THE GENERAL STATUTES OF NORTH CAROLINA

1970 INTERIM SUPPLEMENT

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

UNDER THE DIRECTION OF
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Volume 1B

With the exception of §§ 7-44, 7-45, 7-68 (b), 7A-43.1 to 7A-43.3 and 7A-160 to 7A-165, which apply State-wide until January 1, 1971, the material enclosed in this Supplement applies only to the following judicial districts: Seventeenth, Nineteenth, Twenty-second, Twenty-third and Twenty-eighth, which Districts encompass the following counties:

Alexander
Alleghany
Ashe
Buncombe
Cabarrus
Caswell
Davidson
Davie
Iredell
Montgomery
Randolph
Rockingham
Rowan
Stokes
Surry
Wilkes
Yadkin

Place in Pocket of 1969 Replacement Volume 1B

THE MICHIE COMPANY, LAW PUBLISHERS
CHARLOTTESVILLE, VA.
1969

Preface

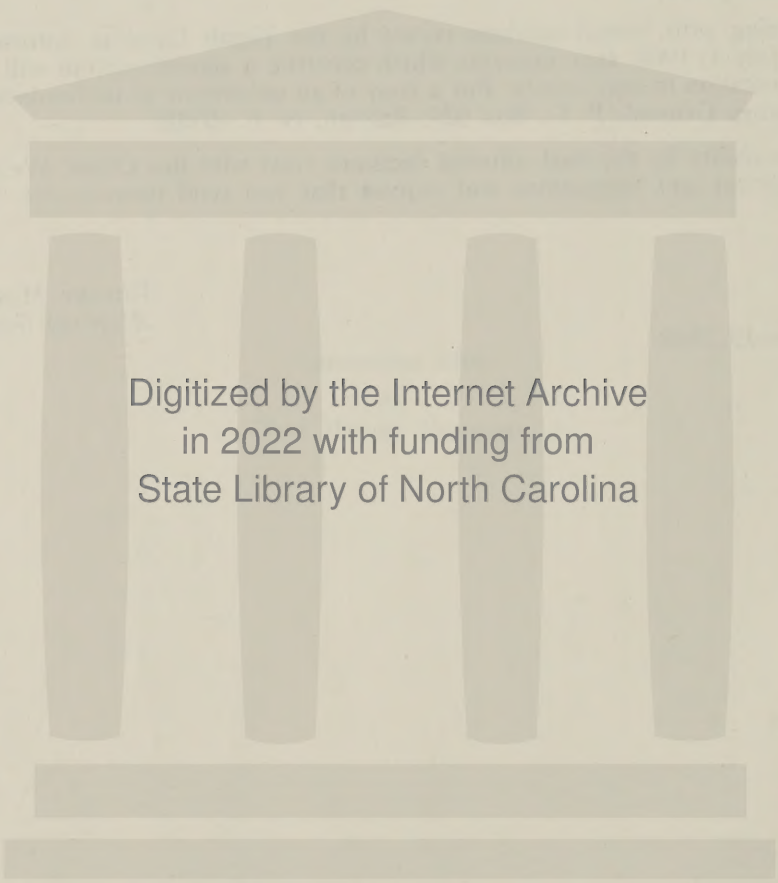
Since all but seventeen counties are currently governed by the provisions of Chapter 7A and the District Court system and since the other seventeen counties will go under the new system on the first Monday in December, 1970, statutes applicable only to the old court system or expressly for a limited time, such as G. S. 7-44 and 7-45, were moved from the Permanent Volume to an Interim Supplement. The reference "See Supplement" will direct the reader to the text of the section or, after the 1971 Supplement is issued, to a citation of the section's repeal or expiration.

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.



The General Statutes of North Carolina
1970 Interim Supplement

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Article 1.

The Office.

§ **2-3. Clerk's bond.**—At the first meeting of the board of commissioners of each county after the election or appointment of any clerk of a superior court it is the duty of the clerk to deliver to such commissioners a bond with sufficient sureties, to be approved by them, in a penalty of not less than ten thousand dollars, and not more than twenty-five thousand dollars, payable to the State of North Carolina, and with a condition to be void if he shall account for and pay over, according to law, all moneys and effects which have come or may come into his hands, by virtue or color of his office, or under an order or decree of a judge, even though such order or decree be void for want of jurisdiction or other irregularities, and shall diligently preserve and take care of all books, records, papers

and property which have come or may come into his possession, by virtue or color of his office, and shall in all things faithfully perform the duties of his office as they are or thereafter shall be prescribed by law: Provided that in counties having a population in excess of fifty thousand inhabitants, the penalty of the clerk's bond shall be not less than ten thousand dollars, and not more than fifty thousand dollars. This section is inapplicable in any county in which a district court has been established. (C. C. P., s. 137; Code, s. 72; 1889, c. 7; 1891, c. 385; 1895, cc. 270, 271; 1899, c. 54, s. 52; 1901, c. 32; 1903, c. 747; Rev., s. 295; C. S., s. 927; 1931, c. 170; 1943, c. 713; 1967, c. 691, s. 38.)

Local Modification. — Camden, Hyde, Tyrrell: 1939, c. 30; Carteret, Currituck, Pamlico: C.S., s. 929; Chowan: 1939, c. 299; Jones: 1925, c. 10; Mecklenburg: 1925, c. 184.

Cross References.—As to liability and action on bond, see §§ 2-4, 109-34, 109-36. As to interest, see § 24-5. As to cemeteries, see § 65-11. As to surety by mortgage, see § 109-28.

Editor's Note. — The 1931 amendment increased the maximum penalty of the bond from fifteen thousand to twenty-five thousand dollars, and the 1943 amendment added the proviso.

The 1967 amendment added the present last sentence in the section.

Purpose.—In Thomas v. Connelly, 104 N.C. 342, 10 S.E. 520 (1889), it was said, "The purpose of this provision is very broad and comprehensive. It requires every clerk of the superior courts to give bond, with sufficient sureties, to secure the faithful discharge of his official duties, and especially, among other things, to secure the accounting for and paying over according to law of all moneys and effects that may be or come into his hands by virtue or color of his office."

"Color of His Office".—"Color of his office" has been construed to embrace all cases where the officer receives the money in his official capacity, when he is not authorized or required to receive the same. Greenlee v. Sudderth, 65 N.C. 470 (1871); Brown v. Cable, 76 N.C. 391 (1877); Ex parte Cassidy, 95 N.C. 225 (1886); Thomas v. Connelly, 104 N.C. 342, 10 S.E. 520 (1889); Sharpe v. Connelly, 105 N.C. 87, 11 S.E. 177 (1890); Presson v. Boone, 108 N.C. 78, 12 S.E. 897 (1891). See McNeill v. Morrison, 63 N.C. 508 (1869); Cox v. Blair, 76 N.C. 78 (1877).

Scope of Bond. — This section requires only one bond to be given by the clerk, and the condition is extensive enough to cover every possible default in office. Hunter v. Routlege, 51 N.C. 216 (1858).

An official bond given by a clerk, upon his entry into office, covers his whole official term, whether a new bond be given afterwards or not. Hunter v. Routlege, 51 N.C. 216 (1858).

The clerk's bond embraces receiverships and incidental liabilities growing out of them. Syme v. Bunting, 91 N.C. 48 (1884); Presson v. Boone, 108 N.C. 78, 12 S.E. 897 (1891); Waters v. Melson, 112 N.C. 89, 16 S.E. 918 (1893).

The bond also covers funds which have come into the hands of the clerk under a statute enacted subsequent to the execution of the bond. City of Wilmington v. Nutt, 78 N.C. 177 (1878); City of Wilmington v. Nutt, 80 N.C. 265 (1879); Presson v. Boone, 108 N.C. 78, 12 S.E. 897 (1891). See Cameron v. Campbell, 10 N.C. 285 (1824); State ex rel. Boger v. Bradshaw, 32 N.C. 229 (1849).

Cumulative Security.—The clerk's bond is cumulative security for the performance of official duties. Darden v. Blount, 126 N.C. 247, 35 S.E. 479 (1900).

Liability on Bond.—The surety bond of a clerk of the superior court is fixed as to amount in the sum of five thousand dollars [in Pamlico County], and to that extent a surety is responsible for the defalcation of his principal, including 6 percent interest from the time of notice given it, except from judgment thereon, when a different principle applies and the surety is liable for 6 percent interest on the judgment until it is paid. Presson v. Boone, 108 N.C. 78, 12 S.E. 897 (1891); State ex rel. Lee v. Martin, 188 N.C. 119, 123 S.E. 631 (1924).

A clerk and his sureties are liable on his bond as an insurer for money that comes into his hands, and not merely for the exercise of good faith in regard to such money. Smith v. Patton, 131 N.C. 396, 42 S.E. 849 (1902). See generally, Havens v. Lathene, 75 N.C. 505 (1876); Morgan v. Smith, 95 N.C. 396 (1886); Board of Educ. v. Bateman, 102 N.C. 52, 8 S.E. 882, 11 Am. St. R. 708 (1889).

Where a defaulting clerk succeeds himself, and has given the required bond for each term, with the same surety, and continues his defalcation, the surety is liable only to the amount of the bond given for each term. State ex rel. Lee v. Martin, 188 N.C. 119, 123 S.E. 631 (1924).

And the burden is on the sureties of the bond in force when the money was re-

ceived by the clerk to show that he paid it over to himself as his own successor. Morgan v. Smith, 95 N.C. 396 (1886).

The clerk is liable on his bond for failure to pay over funds paid to him by commissioners in partition. Smith v. Patton, 131 N.C. 396, 42 S.E. 849 (1902).

Where a clerk of the superior court has forged the signatures of Confederate pensioners to warrants issued by the State Auditor and sent to him for payment to the persons entitled, and has witnessed such signatures, cashed the warrants, and converted the funds to his own use, such sums are received by him by virtue of and under color of his office, and come within the terms of his bonds given under the provisions of this section, and the surety thereon is liable within the penalty of the bonds for the amount so embezzled. State v. Gant, 201 N.C. 211, 159 S.E. 427 (1931).

Same—Negligence. — A clerk who is negligent in issuing an execution was held to be liable in damages for whatever sum the plaintiff might show he had sustained by such nonfeasance. McIntyre v. Merritt, 55 N.C. 558 (1856).

Clerk Is Guarantor of Funds Received by Virtue of Office.—Clerks of the superior court are insurers and guarantors of funds coming into their hands by virtue or color of their offices. State ex rel. Thacker v. Fidelity Deposit Co., 216 N.C. 135, 4 S.E.2d 324 (1939).

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).

Action on Bond. — No action can be maintained on the bond given by a clerk conditioned for the faithful performance of his duty, except where there has been such damages sustained as would give the party a right to maintain an action on the case or the neglect of his official duty. Jones v. Biggs, 46 N.C. 364 (1854).

In an action on an official bond, on failure of a defendant to answer, a judgment entered against him on default cannot be final, since the action is not for the breach of an express or implied contract to pay a definite sum of money fixed by the terms of the bond or ascertainable therefrom, but must be "by default and inquiry." Battle v. Baird, 118 N.C. 854, 24 S.E. 668 (1896). See Morgan v. Bunting, 86 N.C. 67 (1882).

A demand is necessary before bringing an action upon the bond of a clerk for moneys, payable to private individuals, received under color of his office, and the statute of limitations will not begin to run in his favor until after such demand is made. But it is otherwise if he has converted the money, or if it is public money. Furman v. Timberlake, 93 N.C. 66 (1885).

Same—Proper Parties. — Under this section, claimants of a fund arising from a partition sale are the proper parties to sue on the bond of the clerk for failure of the clerk to pay funds paid him by the commissioners in partition. Smith v. Patton, 131 N.C. 396, 42 S.E. 849 (1902).

Where a clerk wrongfully prefers one judgment creditor over another in issuing executions, the wronged party has a remedy upon the official bond of the clerk for the actual loss sustained by his misconduct. Bank of Newbern v. Jones, 17 N.C. 284 (1832).

Same—Evidence.—In an action against a clerk and one of the sureties on his official bond, the record of a judgment against the clerk and others of his sureties, in a previous action against them for the same demand, and on the same bond, but in which action the surety in the present action was not a party, is competent evidence to fix the amount due by the clerk. Morgan v. Smith, 95 N.C. 396 (1886).

Effect Where Penalty of Bond Exceeds Amount Prescribed.—Although this section is directory and prescribes the penalty on the bond of a clerk of the superior court, both the clerk and his surety are presumed to know the provisions of the statute, and where the clerk has voluntarily executed a bond in a greater sum, and the surety has accepted premiums based on a bond in this amount, the surety is estopped to deny the validity of the bond, and the plaintiff may recover of the surety, upon a proper showing, to the full amount of the penalty of the bond. State v. Gant, 201 N.C. 211, 159 S.E. 427 (1931).

Clerical Error.—An error in reciting the term of office in the bond, which is clearly clerical and inadvertent, does not invalidate the bond, but will be treated as surplusage. Battle v. Baird, 118 N.C. 854, 24 S.E. 668 (1896). See Sprinkle v. Martin, 69 N.C. 175 (1873).

§ **2-4. Clerk's bond; approval, acknowledgments and custody.**—The approval of said bond by the board of commissioners, or a majority of them, shall be recorded by their clerk. The said bond shall be acknowledged by the parties thereto, or proved by a subscribing witness, before the clerk of said board of commissioners, or their presiding officer, registered in the register's office in a separate

book to be kept by him for the registration of official bonds; and the original, with the approval thereof endorsed, deposited with the register for safekeeping. The like remedies shall be had upon said bond as are or may be given by law on official bonds. This section is inapplicable in any county in which a district court has been established. (C. C. P., s. 138; Code, s. 73; Rev., s. 296; C. S., s. 928; 1967, c. 691, s. 38.)

Cross Reference.—As to bond, approval and custody, see §§ 109-11, 109-12. See annotations to §§ 109-34, 109-36.

Editor's Note.—The 1967 amendment, effective July 1, 1967, added the present last sentence in the section.

Evidence. — The clerk's bond may be proved, as at common law, without being subjected to the strict rules of evidence, and if there is a subscribing witness it may be proved by other witnesses, as if there was no subscribing witness. Battle v. Baird, 118 N.C. 854, 24 S.E. 668 (1896).

A duly certified copy of the record of the registered bond is competent evidence of its provisions. Battle v. Baird, 118 N.C. 854, 24 S.E. 668 (1896).

Presumptions. — The clerk of the superior court being required to give a bond for the discharge of the duties of his office, etc., it will be presumed, in the trial of an action on such bond, that he did so; and any such bond found in the keeping of the proper custodian will be presumed to have been properly given and accepted as such. Battle v. Baird, 118 N.C. 854, 24 S.E. 668 (1896).

ARTICLE 2.

Assistant Clerks.

§ 2-10. Appointment; oath; powers and jurisdiction; responsibility of clerks.—Each clerk of the superior court, by and with the written consent and approval of the superior court judge resident in his district, may appoint one or more assistant clerks of the superior court, who before entering upon their duties shall take and subscribe the oath prescribed for clerks: Provided, that in counties having a population of less than fifty thousand (50,000), not more than two such assistant clerks may hold office at the same time; that in counties having a population of fifty thousand (50,000) to eighty thousand (80,000), not more than four such assistant clerks may hold office at the same time; that in counties having a population of more than eighty thousand (80,000), not more than ten such assistant clerks may hold office at the same time. Upon compliance with the provisions of this article such assistant clerk or clerks shall be as fully authorized and empowered to perform all the duties and functions of the office of clerk of the superior court as the clerk himself, and all the acts, orders, and judgments of such assistant clerk shall be entitled to the same faith and credit as those of such clerk. Such assistant clerks shall be subject in all respects to all laws which apply to the clerks. The several clerks of the superior court shall be held responsible for the acts of their assistant clerks, and the official bonds of such clerks as now provided by law shall be written to and shall cover the acts of their assistant clerks. (1921, c. 32, s. 1; C. S., s. 934(a); 1951, c. 159, ss. 1, 2; 1959, c. 1297; 1965, c. 264.)

Local Modification.—New Hanover: 1943, c. 514; 1951, c. 93; Orange: 1963, c. 249.

Editor's Note. — The 1951 amendment rewrote the proviso to the first sentence, and inserted the words "or clerks" in the second sentence. Section 3 of the amendatory act, which repealed all laws in conflict with the act, excepted "any local statutes pertaining to the appointment or number of assistant clerks of the superior court."

The 1959 amendment rewrote the first sentence.

Session Laws 1953, c. 404, provided that from and after March 20, 1953, the provisions of this section shall apply to Wake County.

The 1965 amendment increased the maximum number of assistant clerks in counties having a population of more than 80,000 from six to ten.

An assistant clerk of the superior court has plenary authority to probate an instrument in common form. In re Will of Marks, 259 N.C. 326, 130 S.E.2d 673 (1963).

Funds of minors paid into the hands of

the assistant clerk of the superior court, appointed guardian, were not paid into court, and the surety on the guardianship bond may not successfully contend that the clerk's bond was liable therefor. State ex rel. Phipps v. Royal Indem. Co., 203 N.C. 420, 166 S.E. 327 (1932).

While the clerk of the superior court is a constitutional officer, the duties of clerks are prescribed by statute, and the legislature may prescribe that such duties may be performed by assistant clerks as in this and the following sections, and an attack upon the appointment of a guardian by an assistant clerk on the ground that the statute delegating the powers of clerks to assistant clerks is unconstitutional is untenable. In re Barker, 210 N.C. 617, 188 S.E. 205 (1936).

Cited in State v. Cooper, 275 N.C. 283, 167 S.E.2d 266 (1969).

§ 2-11. Certificate of appointment; confirmation; revocation of appointment; compensation.—Any clerk of the superior court desiring to appoint such an assistant clerk shall present a formal written certificate of such appointment to the superior court judge residing in his district, and such judge, if he concurs in and approves such appointment, shall in writing enter his consent and approval upon such certificate and confirm such appointment. Said certificate of appointment, and approval of the judge, together with the oath subscribed by the appointee, shall thereupon be entered in full upon the minute docket of the court, and shall be recorded and cross-indexed in the office of the register of deeds for such county. The appointment of any such assistant clerk may be revoked at any time by the clerk who appointed him or by the superior court judge resident in the district, by the entry of the word "revoked" and the date thereof, with the signature of such clerk or judge, upon the margin of the records of such appointment in the offices of the clerk of the superior court and the register of deeds; and all such appointments shall expire by limitation when the clerk making same ceases to hold office. Nothing in this article shall increase the fees or compensation now allowed by law to the clerks or deputy clerks of the superior court of the several counties of the State. (1921, c. 32, s. 2; C. S., s. 934(b).)

§ 2-12. Clerks not relieved from duties; deputies.—This article shall not in anywise excuse or relieve the clerk of the superior court from giving to the performance of his duties the same time, care, and attention as is now required of such clerks by law, nor shall it change or amend the present laws with reference to deputy clerks of the superior court: Provided, that one person may be appointed both as assistant clerk and as deputy. (1921, c. 32, s. 3; C. S., s. 934(c).)

Article 3.

Deputies.

§ 2-13. Appointment; powers.—Clerks of the superior court may appoint deputies, who shall take and subscribe the oaths prescribed for clerks, and who shall be as fully authorized and empowered as the clerk to certify the existence and correctness of any records in such clerks' offices and to do and perform any other ministerial acts which the clerks may be authorized and empowered to do, in their own names and without reciting the names of their principals. The powers herein specified shall be in addition to such powers and authorities as are now or hereafter may be given deputy clerks by law. (1777, c. 115, s. 86, P. R.; R. C., c. 19, s. 15; Code, s. 75; Rev., s. 898; C. S., s. 935; 1963, c. 1187.)

Editor's Note. — The 1963 amendment substituted "oaths" for "oath" near the beginning of the section and added all the provisions as to powers.

Purpose.—In Miller v. Miller, 89 N.C. 402 (1883), it was said: "The purpose of creating the office of 'deputy clerk' was to help the dispatch of public business, and to provide for the same when the clerk might be necessarily absent from his office, or unable for any cause to give personal attention to his official duties."

Section Provides Only Method of Appointment. — Deputy clerks can be appointed only in the manner prescribed by this section. Shepherd v. Lane, 13 N.C. 148 (1828). And are required to take the same oaths before entering upon their

duties which are required of their principals. Jackson v. Buchanan, 89 N.C. 75 (1883).

The certificate of probate of a deed by a deputy clerk, expressly authorized by statute to acknowledgment, etc., the deed having been duly registered, was prima facie evidence of his appointment and qualification. Piland v. Taylor, 113 N.C. 1, 18 S.E. 70 (1893).

Scope of Authority. — Deputy clerks may do all the acts which the clerk may do, except such as are judicial in their character, or such as a statute may require specially to be done by the clerk himself. Miller v. Miller, 89 N.C. 402 (1883); Piland v. Taylor, 113 N.C. 1, 18 S.E. 70 (1893).

Deputies are expressly authorized to take acknowledgment and proof of deeds, and in exercising such functions a deputy acts by force of the statute alone, and not as the agent of or by a delegation of authority from the clerk. Piland v. Taylor, 113 N.C. 1, 18 S.E. 70 (1893).

The probate of a deed of trust or mortgage by one acting as deputy clerk, but who had not been duly appointed, nor qualified by taking the prescribed oath, is invalid. Suddereth v. Smyth, 35 N.C. 452 (1852).

Deputy Must Act in Clerk's Name. — This section and §§ 2-14 and 2-15 fix the status of a deputy as the agent or servant of the clerk of the superior court, rather than as an independent officer of the court. The decisions give emphasis to the idea that the legal power and authority incident to the office of clerk is vested in the principal clerk as the responsible officer of the law, to be exercised by him, either in person or, within the orbit of ministerial powers, by deputy. Therefore, since a deputy's authority is derivative, the general rule is that he is required to do all things in his principal's name except where statute expressly provides otherwise. Beck v. Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953).

Women as Deputies. — It would seem that women are not disqualified under the Constitution nor any statute from holding the office of deputy clerk. See State ex rel. Spruill v. Bateman, 162 N.C. 588, 77 S.E. 768 (1913); Bank of Union v. Redwine, 171 N.C. 559, 88 S.E. 878 (1916); Preston v. Roberts, 183 N.C. 62, 110 S.E. 586 (1922).

§ 2-14. Record of appointment and discharge; copies.—Each clerk of a superior court shall make a record of the appointment of each deputy he may appoint, on the special proceedings docket of his court, giving the name of such appointee and the date of such appointment, and make a cross-index of the same, and shall furnish to the register of deeds of his county a transcript of such record; and such register of deeds shall record the same in the records of deeds in his office and make a cross-index thereof on the general index in his office. When any such deputy clerk is removed from his office the clerk of the superior court by whom he was appointed shall write on the margin of the record of such appointment in his office, and on the margin of the record of such appointment in the office of the register of deeds, the word "Revoked" and the date of such revocation and sign his name thereto. A duly certified copy of such appointment and of such revocation, under the hand and official seal of the register of deeds, shall be deemed prima facie evidence of the regularity of such appointment and revocation, and shall be admitted as evidence in all the courts. (1899, c. 235, s. 3; Rev., s. 899; C. S., s. 936.)

§ 2-15. Responsibility of clerk for deputy's acts.—The several clerks of the superior court shall be held responsible for the acts of their deputies. Deputies shall be subject in all respects to all laws which apply to the clerks. (1899, c. 235, s. 2; Rev., s. 900; C. S., s. 937.)

Liability for Acts. — Both deputy and clerk are liable for an unlawful act committed by the deputy under color of the office. Coltraine v. McCain, 14 N.C. 308 (1832). See Bank of Union v. Redwine, 171 N.C. 559, 88 S.E. 878 (1916).

Deputy's Bond.—This section does not require any bond of a deputy clerk; but, as the clerk is liable for the defaults and misfeasance of his deputies, common prudence dictates that he require bonds of them for his own protection. Such a bond, not being required by law, is not an official bond in the strict sense of that term. When given, however, it is valid as a common-law bond, the clerk individually, and not the public, being the obligee in interest thereunder. The fact that it runs in the name of the clerk as clerk is immaterial. Fidelity & Cas. Co. v. Hoyle, 64 F.2d 413 (4th Cir. 1933).

Article 4.

Powers and Duties.

§ 2-16. Powers enumerated.

(12) To compel the return to his office by each justice of the peace, on the expiration of the term of office of such justice, or, if the justice be dead, by his personal representative, of all records, papers, dockets and books held by such justice by virtue or color of his office, and to deliver the same to the successor in office of such justice.

(C. C. P., ss. 417, 418, 442; Code, ss. 103, 108; 1901, c. 614, s. 2; Rev., s. 901; 1919, c. 140; C. S., s. 938; 1949, c. 57, s. 1; 1951, c. 28, s. 1; 1961, c. 341, s. 2.)

§ 2-26. Fees of clerk of superior court.—The fees of the clerk of the superior court shall be the following, and no other, namely:

Advertising and selling under mortgage in lieu of bond, two dollars for sales of real estate and one dollar for sales of personal property.

Affidavit, including jurat and certificate, twenty-five cents.

Appeal from justice of the peace, fifty cents.

Appeal from the clerk to the judge, fifty cents.

Appeal to the Supreme Court, including certificate and seal, two dollars.

Appointing and qualifying justices of the peace, to be paid by the justice, twenty-five cents.

Apprenticing infant, including indenture, one dollar.

Attachment, order in, fifty cents.

Auditing account of receiver, executor, administrator, guardian or other trustee, required to render accounts, if not over three hundred dollars, fifty cents; if over three hundred dollars and not exceeding one thousand dollars, eighty cents; if over one thousand dollars, one dollar.

Auditing final settlement of receiver, executor, administrator, guardian or other trustee, required to render accounts, one half of one percent of the amount on which commissions are allowed to such trustee, for all sums not exceeding one thousand dollars, and for all sums over one thousand dollars; one tenth of one percent on such excess; but such fees shall not exceed fifteen dollars, unless there be a contest, when the clerk shall have one percent on the said excess over one thousand dollars; but in no instance shall his fees exceed twenty-five dollars.

Auditing and recording the final account of commissioners appointed to sell real estate, one half of the fees allowed for auditing and recording final accounts of executors.

Bill of costs, preparing same, twenty-five cents.

Bond or undertaking, including justification, sixty cents.

Canceling notice of lis pendens, twenty-five cents.

Capias, each defendant, one dollar.

Capias, when the defendant is not arrested thereunder, shall be such sum as the commissioners of his county may allow.

Caveat to a will, entering and docketing same for trial, one dollar.

Certificate, except where it is a charge against the county, twenty-five cents; and where it is a charge against the county, the fee shall be such sum not exceeding twenty-five cents as the board of commissioners shall allow.

Commission, issuing, seventy-five cents.

Continuance, thirty cents.

Docketing ex parte proceedings, fifty cents.

Docketing indictment, twenty-five cents.

Docketing liens, twenty-five cents.

Docketing judgment, twenty-five cents.

Docketing summons, twenty-five cents.

Execution and return thereon, including docketing, fifty cents; and certifying return to clerk of any county where judgment is docketed, twenty-five cents.

Filing all papers, ten cents for each case.

Guardian, appointment of, including taking bond and justification, one dollar.

Impaneling jury, ten cents.

Indexing judgment on cross-index book, ten cents for the judgment, regardless of number of parties.

Indexing notice of lis pendens, twenty-five cents.

Indexing liens on lien book, ten cents.

Indictment, each defendant in the bill, sixty cents.

Injunction, order for, including taking bond or undertaking and justification, one dollar.

Judgment, final, in termtime, civil action, one dollar.

Judgment, final against each defendant, in criminal actions, one dollar.

Judgment, final, before the clerk, fifty cents.

Judgment by confession, without notice, all services, three dollars.

Judgment in favor of widow for year's support, fifty cents.

Judgment nisi, entering against a defaulting witness or juror, on bail bond or recognizance, twenty-five cents.

Juror ticket, including jurat, ten cents.

Justification of sureties on any bond or undertaking, except as otherwise provided, fifty cents.

Letters of administration, including bond and justification of sureties, one dollar.

Motions, entry and record of, twenty-five cents.

Notices, twenty-five cents, and for each name over one in same paper, ten cents additional.

Notifying solicitors of removal of guardian, one dollar.

Order enlarging time for pleading, and all interlocutory orders, in special proceedings and civil actions, twenty-five cents.

Order of arrest, one dollar.

Order for appearance of apprentice, on complaint of master, one dollar; for appearance of master on complaint of apprentice, one dollar.

Order for the registration of a deed or other writing, which has been proved or acknowledged in another county, or before a judge, justice, notary or other officer, except a chattel mortgage, twenty-five cents.

Postage, actual amount necessarily expended.

Presentment, each person presented, ten cents.

Probate of a deed or other writing, proved by a witness, including the certificate, twenty-five cents.

Probate of a deed or other writing, acknowledged by the signers or makers, including all except married women, who acknowledged at the same time, with the certificate thereof, twenty-five cents.

Probate of a deed, or other writing, executed by a married woman, for her acknowledgment and private examination, with the certificate thereof, twenty-five cents.

Probate of limited partnership, fifty cents.

Probate of will in common form and letters testamentary, one dollar.

Qualifying justice of the peace, to be paid by the justice, twenty-five cents.

Qualifying members of the board of commissioners, to be paid by the commissioners, twenty-five cents.

Recognizance, each party where no bond is taken, twenty-five cents.

Recording and copying papers, per copy sheet, ten cents.

Recording appointment of process agent for nonresident, fifty cents.

Recording names, qualification, and expiration of term of office of justices of the peace, five cents for each name.

Registering trained nurses, including certificate of registration, fifty-cents.

Recording names of jurors as required by law, five cents for each name.

Resignation of guardian, relinquishment of right to administer, or to qualify as executor, receiving, filing and noting same, twenty-five cents.

Seal of office, when necessary, twenty-five cents.

Subpoena, each name, fifteen cents.

Summons, in civil actions or special proceedings, including all the names therein, one dollar, and for every copy thereof, twenty-five cents.

Transcript of judgment, twenty-five cents.

Transcript of any matter of record or papers on file, per copy sheet, ten cents.

Trial of any cause, or stating an account, as referee, pursuant to order of the judge, such allowance as the judge may make.

Witness ticket, including jurat, ten cents.

Five percent commission shall be allowed the clerk on all fines, penalties, amercements and taxes paid the clerk by virtue of his office; and three percent on all sums of money not exceeding five hundred dollars placed in his hands by virtue of his office, except on judgments, decrees, executions, and deposits under article three of chapter forty-five; and upon the excess over five hundred dollars of such sums, one percent.

Provided, that in such counties of the State where the clerk of superior court is now or may hereafter be paid a salary in lieu of fees, that such clerk of superior court shall not charge and collect a fee for juror ticket, including jurat, or witness ticket, including jurat, as herein prescribed.

Provided, that when any services of the clerk of the superior court shall be for any court or person of any county other than his own county, the clerk of the superior court fees shall be as hereinafter set out:

Transcripts of judgments, including the certificate of filing and docketing . . . $1.50 first page, 75¢ for each additional page thereafter.

Issuing certified copies of or recording certified copy of any other matter of record or papers on file in the office of the clerk of the superior court . . . $1.50 first page, 75¢ for each additional page thereafter.

Issuing execution including docketing returns thereon and issuing certificates of satisfaction . . . $1.50 first page, 75¢ for each additional page thereafter.

Execution against specific property or against the person, including docketing of returns thereon and issuing certificates of satisfaction . . . $2.00. (Code, ss. 229, 1789, 3109, 3739; 1885, c. 199; 1893, c. 52, s. 4; 1897, c. 68; 1899, c. 17, s. 2; c. 247, s. 3; cc. 261, 578; 1901, c. 121; c. 614, s. 3; 1903, c. 359, s. 6; 1905, c. 360, s. 3; Rev., s. 2773; 1917, c. 198, s. 6; 1919, c. 329; C. S., s. 3903; 1927, c. 247; 1929, cc. 45, 214; 1933, c. 91; 1945, c. 635; 1955, c. 879; 1959, c. 1163, s. 4; 1967, c. 823, s. 1.)

Local Modification. — Carteret: 1943, c. 697; Franklin: 1927, c. 137; Harnett: 1933, c. 75; Johnston: 1943, c. 653; Northampton: 1931, c. 11; Richmond: 1947, c. 235, s. 8; Transylvania: 1951, c. 1212, s. 1; Wake: 1945, c. 733; Wilson: 1935, c. 241; Burke: 1959, c. 386; Catawba: 1963, c. 886; Craven: 1957, c. 124; Forsyth: 1961, c. 401; Gates: 1957, c. 327; Guilford: 1953, c. 1016; McDowell: 1953, c. 728; Macon: 1963, c. 465; Mitchell: 1959, c. 1270; Richmond: 1955, c. 1324; Surry: 1953, c. 851.

Cross References.—See Editor's note to § 53-5. As to compensation and liability of clerk in settling an estate, see § 28-171. As to costs of appeal generally, see § 6-33. As to costs of transcript on appeal taxed in Supreme Court, see § 6-34. As to costs of appeal from justices of the peace, see § 6-35. As to new provision relating to fees for docketing judgments and for auditing accounts, not applicable in certain counties, see §§ 2-32 through 2-35.

Editor's Note. — The 1927 amendment, which added the proviso at the end of this section, provided that it should not apply to Chatham County; however, by Public Laws 1929, c. 214, the 1927 act was amended to make it applicable to Chatham County. Public Laws 1933, c. 91, repealed the provision of Public Laws 1929, c. 45, which provided for fees in Halifax County.

The 1945 amendment substituted "chapter forty-five" for "chapter fifty-four" in the next to the last paragraph.

The 1955 amendment, which added the proviso at the end of this section, defined a page as being "a regular legal size sheet of paper not greater than four-

teen inches in length." The 1959 amendment inserted the sentence reading "Indexing notice of lis pendens, twenty-five cents."

The 1967 amendment, effective Jan. 1, 1968, deleted provisions as to fees for recording certificates of incorporation of corporations and recording corporation or amendment to corporate certificates.

Appeal from Justices of the Peace. — When a defendant is bound over to the superior court by a justice of the peace, the clerk of the superior court is not entitled to the fee of 50 cents allowed for appeal from justice of the peace. Guilford v. Board of Comm'rs, 120 N.C. 23, 27 S.E. 94 (1897).

Fee taxable for appeal and docketing in Supreme Court. See State ex rel. Blount v. Simmons, 120 N.C. 19, 26 S.E. 649 (1897).

Appeal from Taxation of Costs.—An appeal lies to the Supreme Court from the erroneous taxation of items in bill of costs in the superior court. State ex rel. Blount v. Simmons, 120 N.C. 19, 26 S.E. 649 (1897).

The fees for continuances of cases allowed to the clerk of the superior court must be for such continuance as is made by the judge upon motion, and such as must be recorded in the minutes of the clerk, and not those affected by a crowded docket or the inability for that reason of reaching the cause for trial. Luther v. Southern Ry., 154 N.C. 103, 69 S.E. 762 (1910).

Motion for Judgment. — The fee of twenty-five cents for motion for judgment can only be taxed when the motion is a motion in the cause, in writing, and required to be recorded. State ex rel. Blount v. Simmons, 120 N.C. 19, 26 S.E. 649 (1897).

Filing Papers.—The fee of 10 cents allowed the clerk of the superior court for "filing papers," is for filing all the papers in an action after final judgment, and not for filing each paper in a case. Guilford v. Board of Comm'rs, 120 N.C. 23, 27 S.E. 94 (1897).

Transcript on Appeal When Fees Unpaid.—The clerk of the court below is entitled to receive his fees before being required to send up a transcript on appeal, and therefore a writ of certiorari will be refused where it appears from the affidavit of the clerk that the transcript was not sent up because the appellant failed, after repeated demands, to pay the fees, and in his reply to the answer setting forth the clerk's affidavit the petitioner did not tender the fees. Saunders v. Thompson, 114 N.C. 282, 19 S.E. 225 (1894).

Same—When Incomplete. — Where the clerk of the superior court fails to send up as a part of the transcript the drawing and swearing in of the grand jury who found the indictment, he will not be allowed his costs for making and sending up the transcript of the record. State v. Cameron, 122 N.C. 1074, 29 S.E. 418 (1898).

Settlement of Estate.—Where the clerk of the court was appointed a commissioner of the court to sell certain lands and invest the proceeds, etc., and it appearing that he had rendered services of value, with no indication of conversion, misapplication, or commingling of funds, it was held that he was entitled to his commissions in the settlement of the estate. Hannah v. Hyatt, 170 N.C. 634, 87 S.E. 517 (1916).

Section 6-36 a Proviso.—The true construction of this section regulating the fees of clerks, is had by reading as a proviso at the end thereof § 6-36. Coward v. Commissioners, 137 N.C. 299, 49 S.E. 207 (1904).

Recording in the Minute Docket. — The clerk of the superior court is not entitled to a specific fee for recording the proceedings of a cause in the minute docket of the court. Guilford v. Board of Comm'rs, 120 N.C. 23, 27 S.E. 94 (1897).

Clerk's Allowance for Stating Account Disallowed.—Where the plaintiff recovered judgment in the court below and it was ordered that an allowance be made to the clerk for stating an account, one half to be paid by the plaintiffs and the other half by the defendants, it was held to be error. Wall v. Covington, 76 N.C. 150 (1877).

Nolle Prosequi.—The clerk of the court is not entitled to any fee for entering a judgment of nolle prosequi in a criminal action. State v. Johnson, 101 N.C. 711, 8 S.E. 360 (1888).

When Judgment Is against State or County.—Costs are not allowed for docketing, filing and indexing a judgment against the State or county, since no lien can be acquired by such docketing. State ex rel. Blount v. Simmons, 120 N.C. 19, 26 S.E. 649 (1897).

The State and county are liable for costs only in the cases expressly provided by statute. Guilford v. Board of Comm'rs, 120 N.C. 23, 27 S.E. 94 (1897).

A county cannot be taxed, under § 6-36 with any part of the fees of the clerk or other officers in criminal actions if the grand jury returns "not a true bill." Guilford v. Board of Comm'rs, 120 N.C. 23, 27 S.E. 94 (1897).

Cited in Watson v. Lee County, 224 N.C. 508, 31 S.E.2d 535 (1944).

§ 2-27. Local modifications as to clerk's fees.—For the probate of a short-form lien bond, or lien bond and chattel mortgage combined, the clerk shall receive ten cents in the following counties: Alamance, Alleghany, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Carteret, Caswell, Catawba, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Davie, Duplin, Durham, Edgecombe, Gaston, Gates, Granville, Green, Harnett, Iredell, Johnston, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Onslow, Pamlico, Pender, Perquimans, Person, Pitt, Polk, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Union, Vance, Warren, Washington, Watauga, Wayne, Wilson. (Rev., s. 2773; 1907, c. 717; 1909, c. 502; P. L. 1917, c. 182; C. S., s. 3904; 1933, c. 84; 1947, c. 235, s. 11; 1961, c. 401.)

In Anson, this fee is twenty cents. (P. L. 1913, c. 49; C. S., s. 3904.)

In Bertie County the clerk of the superior court shall collect the sum of fifteen cents for each crop lien or lien bond probated by him for registration in Bertie County, including all services connected therewith. (P. L. 1915, c. 163; C. S., s. 3904.)

In Jackson County, in addition to the fees now allowed by law, the clerk shall receive the sum of five dollars for writing up the minutes of each day's session of the superior court of the county, to be paid by the county. (P. L. 1913, c. 182; C. S., c. 3904.)

In Mitchell County the clerk of the superior court shall receive double the amount of fees and commissions as provided in § 2-26 of this chapter. (1931, c. 53, s. 1.)

In Robeson County the board of county commissioners may make an allowance to the clerk of the superior court for keeping the records of the court and transcribing the minutes, to be paid out of the general county fund. (Rev., s. 2773; C. S. s. 3904.)

From and after February 27, 1923, it shall be unlawful for the clerks of the superior courts of Bertie, Northampton, Vance, Warren and Wayne counties to charge fees for witness and juror tickets issued by them. (C. S., s. 3904; 1923, c. 92.)

Local Modification. — Harnett: 1933, c. 75; Johnston: 1943, c. 653.

Editor's Note. — Public Laws 1933, c. 84, inserted Scotland in the list of counties appearing in the first paragraph, and Session Laws 1947, c. 235, s. 11, struck "Richmond" therefrom.

The 1961 amendment, effective July 1, 1961, deleted Forsyth from the first paragraph and struck out the former fourth paragraph relating to Forsyth County.

§ 2-29. Advance court costs.—The clerk of the superior court is hereby authorized to collect as advance court cost on all suits started in any court the sum of seven dollars and fifty cents (7.50) for one defendant, and one dollar and a half for each additional defendant, which fees shall include any process tax or tax on suits and sheriff fees. (1935, c. 379, s. 2.)

Local Modification. — Catawba: 1939, c. 62; 1949, c. 414; Transylvania: 1951, c. 1212, s. 3.

§ 2-30. Advance costs on appeal from justice of the peace. — The clerk of the superior court is authorized to collect from the appellant in all cases in appeals from justices of the peace court to the superior court four dollars as advance cost to be applied on the court cost including the process tax. (1935, c. 379, s. 1.)

Local Modification.—Transylvania: 1951, c. 1212, s. 4.

Cited in Watson v. Lee County, 224 N.C. 508, 31 S.E.2d 535 (1944).

§ 2-31. Fee for cross-indexing names of parties.—The fee for cross-indexing the name of each party to any action or proceeding required to be cross-

indexed by law shall be ten cents for each name entered upon the cross-index records. (1935, c. 379, s. 3.)

Local Modification.—Transylvania: 1951, c. 1212, s. 5.

§ 2-32. Fee for docketing judgment.—The fee for docketing any judgment shall be ten cents per copy sheet, minimum charge twenty-five cents. (1935, c. 379, s. 4.)

Local Modification.—Transylvania: 1951, c. 1212, s. 6.

§ 2-33. Fee for auditing annual accounts of receivers, executors, etc.—For auditing annual accounts of receivers, executors, guardians, administrators, administrators with will annexed, trustees for incompetents, trustees under wills, surviving partner, where the total receipts and disbursements do not exceed eleven thousand dollars, the fee shall be twenty-five cents for each one hundred dollars on receipts and disbursements or a fraction thereof through one thousand dollars. If the receipts and disbursements exceed one thousand dollars, the fee shall be for the receipts and disbursements above one thousand dollars five cents on each one hundred dollars or a fraction thereof through eleven thousand dollars. When the receipts and disbursements exceed eleven thousand dollars, the fee for the amount of same above eleven thousand dollars shall be one tenth of one percent on the amount of receipts and disbursements in excess of eleven thousand dollars, but in no event shall the fee be less than one dollar nor more than twenty-five dollars. Nothing in this section shall be construed to allow commissions on allotment of dower, on distribution of the shares of heirs, on distribution of shares of distributees of personal property or on distribution of shares of legatees. (1935, c. 379, s. 5; 1945, c. 1036, s. 1.)

Local Modification. — Anson and Lee: 1945, c. 1036, s. 2½; Transylvania: 1951, c. 1212, s. 7.

Editor's Note. — The 1945 amendment added the last sentence of this section.

§ 2-34. Fee for auditing final accounts of receivers, executors, etc. —For auditing final accounts of receivers, executors, administrators, administrators with will annexed, collectors, trustees for incompetents, trustees under wills, guardians or surviving partner, the fee shall be fifty cents for each one hundred dollars or a fraction thereof of the total receipts and disbursements through one thousand dollars, and ten cents per each one hundred dollars or a fraction thereof on everything above one thousand dollars, but in no event shall the fee be less than two dollars: Provided, that when stocks, bonds or any other personal property is delivered to any heir or distributee without converting the same into cash, these fees shall be computed and charged on the same just as though they had been converted into cash; the value of said stocks, bonds, etc., to be fixed as of the date of death, or qualification of the fiduciary. Nothing in this section shall be construed to allow commissions on allotment of dower, on distribution of the shares of heirs, on distribution of shares of distributees of personal property or on distribution of shares of legatees. (1935, c. 379, s. 6; 1945, c. 1036, s. 2.)

Local Modification. — Anson: 1945, c. 1036, s. 2½; Beaufort: 1939, c. 103; Durham: 1945, c. 115; Lee: 1945, c. 1036, s. 2½; Transylvania: 1951, c. 1212, s. 8.

Editor's Note. — The 1945 amendment added the last sentence of this section.

§ 2-35. Fee for auditing final accounts of trustees, etc., selling real estate under foreclosure proceedings. — For auditing final accounts of trustees, mortgagees, commissioners, or other persons, firms, or corporations selling real estate under foreclosure proceeding required to render such final report, the fees shall be twenty-five cents on each one hundred dollars of receipts and disbursements through one thousand dollars and ten cents on each one hundred dollars for everything above one thousand dollars, provided that the minimum fee

shall be one dollar and fifty cents and the maximum fee shall not exceed twenty-five dollars. (1935, c. 379, s. 7.)

Local Modification.—Transylvania: 1951, c. 1212, s. 9.

§ 2-36. Certain counties not subject to §§ 2-29 to 2-35.—Sections 2-29 to 2-35 shall not apply to the counties of: Allegany, Ashe, Avery, Bladen, Buncombe, Burke, Caldwell, Caswell, Catawba, Chowan, Cleveland, Columbus, Cumberland, Davidson, Davie, Duplin, Edgecombe, Franklin, Guilford, Haywood, Iredell, Jackson, Jones, Lenoir, Lincoln, Martin, Mecklenburg, Montgomery, Moore, Nash, New Hanover, Onslow, Orange, Pamlico, Pitt, Richmond, Robeson, Rockingham, Rowan, Stokes, Swain, Tyrrell, Union, Washington, Wayne and Wilson: Provided, that § 2-29 shall apply to Iredell County. Provided, further, that §§ 2-33 and 2-34 shall apply to Bladen and Robeson counties. Provided, also that § 2-29 shall apply to Ashe County. (1935, c. 379, s. 8; c. 494; 1937, cc. 148, 149, 290; 1945, c. 296; 1947, c. 269; 1949, c. 386; 1953, c. 268; 1955, c. 759; 1959, c. 578; 1961, c. 72; 1965, c. 177.)

Editor's Note. — The 1937 amendments struck out Bertie and Yancey from the list of counties in this section, and added the proviso as to Iredell County.

The 1945 amendment struck out "Cabarrus" from the list of counties, the 1947 amendment struck out "Surry" and the 1949 amendment struck out "Franklin."

The 1953 amendment deleted "Vance" from the list of counties.

The 1955 amendment added the proviso as to Bladen County.

The 1959 amendment deleted "Person" from the list of counties.

The 1961 amendment added Robeson to the second proviso.

The 1965 amendment added the proviso as to Ashe County.

§ 2-38. To furnish blank process, bonds and undertakings.—Clerks of courts shall furnish to parties printed copies of the formal parts of all process required to be issued by them with convenient blank spaces for the insertion of written matter; and also the blank forms of such bonds and undertakings as are required to be taken by them. (C. C. P., s. 559; 1868-9, c. 279, s. 558; Code, s. 3761; Rev., s. 911; C.S., s. 948.)

§ 2-42. To keep books or microfilm; enumeration.

17. Record of justices of the peace, which shall contain a complete list of the justices of the peace of the county, by townships, giving the date of election or appointment, qualification, and expiration of term of office of each; and whenever a vacancy occurs it shall be noted therein. These books shall at all times show a complete list of the justices of the peace of the county and who was the predecessor of each justice and the succession in office.

18. Record of books, which shall contain the date of delivery to each justice of the peace of any dockets, records, and books; and the date of the receipt by him to any justice of the peace, or to the personal representative of a deceased justice of the peace, for any dockets, records, and books returned to him.

(Code, ss. 83, 95, 96, 97, 112, 1789; 1887, c. 178, s. 2; 1889, c. 181, s. 4; 1893, c. 52; 1899, c. 1, s. 17; cc. 82, 110; 1901, c. 2, s. 9; c. 89, s. 13; c. 550, s. 3; 1903, c. 51; c. 359, s. 6; 1905, c. 360, s. 2; Rev., s. 915; 1919, c. 78, s. 7; c. 152; c. 197, s. 4; c. 314; C. S., s. 952; 1937, c. 93; 1953, c. 259; c. 973, s. 3; 1959, c. 1073, s. 3; c. 1163, s. 3; 1961, c. 341, ss. 3, 4; c. 960; 1965, c. 489; 1967, c. 691, s. 39; c. 823, s. 2.)

Article 5.

Reports.

§ 2-44. List of justices of the peace to be sent to Secretary of State.—The clerk of the superior court of each county shall, on or before February first of each year, send to the Secretary of State a list of the qualified justices of

the peace in his county as of January first of that year. The list shall include the following information with respect to each such justice of the peace:

(1) The township for which he was elected or appointed.

(2) The date of his election or appointment, and if appointed, by whom so appointed.

(3) The term for which he was elected or appointed.

(4) The date of his qualification. (1881, c. 326; Code, s. 89; 1901, c. 37, s. 2; Rev., s. 916; C. S., s. 954; 1945, c. 161.)

ARTICLE 6.

Money in Hand; Investments.

§ 2-46. Public funds to be reported to county commissioners.—On the first Monday in December of each and every year, or oftener, if required by order of the board of commissioners or any other lawful authority upon ten days' written notice, clerks of the superior courts shall make an annual report of all public funds which may be in their hands. The report shall be made to the board of county commissioners and addressed to the chairman thereof. It shall give an itemized statement of said funds so held, the date and source from which they were received, the person to whom due, how invested and where, in whose name deposited, the date of any certificate of deposit, the rate of interest the same is drawing, and other evidence of investment of said fund; and it shall include a statement of all funds in their hands by virtue or color of their office, and which may belong to persons or corporations. The report shall be subscribed and verified by the oath of the party making it before any person allowed to administer oaths. Provided, further, that in the event the accounts of any clerk of the superior court are audited at least once each year by a certified public accountant, and the report and audit made by such certified public accountant sets forth all of the facts and items required by this section and is approved by the clerk and accepted by the board of county commissioners, such audit shall become and constitute the annual report required by this section. (1891, c. 580; Rev., s. 918; C. S., s. 956; 1931, c. 156; 1951, c. 187.)

Local Modification. — Bertie: Pub. Loc. 1941, c. 39; Carteret: 1941, c. 316; Forsyth: 1941, c. 109; 1945, c. 11; Greene: 1943, c. 146; Halifax: 1949, c. 389; Hertford: 1945, c. 101; Lenoir: 1945, c. 201; Rockingham: 1943, c. 378; Union: 1941, c. 316; Wake: 1943, c. 523; Wayne: 1939, c. 92.

Editor's Note. — The 1931 amendment inserted the words: "upon ten days' written notice" in the first sentence, and the 1951 amendment added the proviso at the end of this section. For construction of "color of his office," see § 2-3 and annotations.

Method of Procedure.—Where a clerk has admitted money to be due in the manner prescribed by this section, he can only be proceeded against on motion for a summary judgment for money that has remained in his hands for three years. Summey v. Johnston, 60 N.C. 98 (1863).

Prima Facie Case of Correctness.—This section raises a prima facie case of the correctness of the annual report of the clerk only when the statute is substantially complied with. Gilmore v. Walker, 195 N.C. 460, 142 S.E. 579 (1928).

§ 2-47. Approval, registration, and publication of report.—The board of commissioners shall refer all itemized statements made by the clerks of the superior courts to a special committee of their board, who shall compare the same with the records of the clerk's office from which the report is made and certify the same to the board as correct, and if approved the board shall cause the same to be registered in the office of the register of deeds, in a book to be furnished to said register by the board of county commissioners, which book shall be styled Record of Official Reports, with a proper index of all reports recorded therein, and each original report shall, if approved by the chairman of the board, be endorsed with the word "Approved," the date of approval and the endorsement signed by the chairman, and when recorded by the register of deeds he shall endorse thereon the

date of registration, the page of the Record of Official Reports upon which the same is registered, sign the same and file it in his office. The register shall also cause a copy of the report to be published one time in some newspaper of general circulation published in the county of the register and also posted at the courthouse door within twenty days after filing the reports; and if no newspaper is published in the county the posting of the report at the courthouse door shall be a sufficient publication. The cost of publishing the report shall be paid by the county. (1874-5, c. 151; 1876-7, c. 276; Code, s. 90; 1891, c. 580, s. 3; 1893, c. 14, s. 3; Rev., s. 919; C. S., s. 957.)

Local Modification. — Forsyth: 1945, c. 11; Wilson: 1943, c. 555.

Cited in Gilmore v. Walker, 195 N.C. 460, 142 S.E. 579 (1928).

§ **2-48. Report compelled by commissioners.**—If any clerk fails to report, or if after a report has been made the board of county commissioners have reason to believe that any report is incorrect, the board shall take legal steps to compel a proper report to be made by suit on the bond of such clerk, or by reporting the fact to the solicitor of the district to which the county of said board may belong for his action. (1874-5, c. 151, s. 3; 1876-7, c. 276; Code, s. 92; 1891, c. 580, s. 2; Rev., s. 920; C. S., s. 958.)

§ **2-49. Payment to persons entitled.**—The said clerks shall, on or before the first day of January in every year after the statements required in the foregoing sections are made, account with and pay to the persons entitled to receive the same all such balances reported as aforesaid to be in their hands. (1823, c. 1186, s. 2, P. R.; 1831, c. 3, ss. 1, 3; R. C., c. 73, s. 2; Code, s. 1865; 1893, c. 14, s. 1; Rev., s. 921; C. S., s. 959.)

Account.—"Account" means a statement in writing of debts and credits, or of receipts and payments, and when payments or settlement is intended, additional words are used. State v. Dunn, 134 N.C. 663, 46 S.E. 949 (1904).

§ **2-50. Unclaimed fees of jurors and witnesses paid to school fund.**—All moneys due jurors and witnesses which remain in the hands of any clerk of the superior court on the first day of January after the publication of a third annual report of the said clerk showing the same shall be turned over to the county treasurer for the use of the school fund of the county, and it is the duty of said clerk to indicate in his report any moneys so held by him for a period embracing the two annual reports. (1891, c. 580, s. 4; 1893, c. 14, s. 3; Rev., s. 922; C. S., s. 960.)

Local Modification.—Chatham: 1949, c. 906; Randolph: 1949, c. 519; Wayne: 1941, c. 70.

Cross Reference.—See § 115-183.

§ **2-51. Use by public until claimed.**—The money aforesaid, while held by the clerks, shall be paid, on application, to the person entitled thereto; and after it ceases to be so held, it may be used as other revenue, subject, however, to the claim of the rightful owner. (1828, c. 41, s. 1; R. C., c. 73, s. 6; Code, s. 1869; Rev., s. 923; C. S., s. 961.)

Cross Reference.—See § 115-184.

§ **2-58. Inspection and audit by county auditors or accountants; reports of audits.**—It shall be the duty of the county auditor or county accountant of any county to inspect and audit the records and accounts of the clerk of the superior court of the county for the purpose of ascertaining that such clerk is complying with the requirements of §§ 2-54 to 2-60 and that such clerk is properly safeguarding and accounting for all funds of every nature and character which have come into his hands by virtue of his office; such audits to be made and a report thereof made by the county auditor or county accountant to the board of county commissioners of the county and to the Local Government Commission or such other governmental agency as shall succeed to the rights and duties of the Local Government Commission. (1931, c. 281, ss. 6, 60.)

Chapter 6.

Costs.

Article 1.

Generally.

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Article 9.

Criminal Costs before Justices, Mayors, County or Recorders' Courts.

6-64. Liability for criminal costs before justice, mayor, county or recorder's court.
6-65. Imprisonment of defendant for nonpayment of fine and costs.

ARTICLE 1.

Generally.

§ **6-9. Justice required to itemize costs.**—In all trials before justices of the peace any party, plaintiff or defendant, may demand of the justice of the peace before whom the trial is held an itemized statement of the costs of the action. Upon such demand it shall be the duty of the justice to furnish the statement demanded. No person shall be compelled to pay any cost in any trial before a justice of the peace until an itemized statement of the costs has been made out and given to the party charged. It shall be the duty of the justice to insert in the entry of the judgment in every criminal action tried or otherwise disposed of by him a detailed statement of the different items of cost, and to whom due. (Code, s. 734; 1887, c. 297; Rev., ss. 1257, 2789; C. S., s. 1233.)

Cross Reference.—As to fees and costs in appeal from justices of the peace, see § 7-181.

§ **6-10. Justice of the peace refusing to furnish bill of costs.**—If any justice of the peace before whom any trial is held shall refuse to furnish an itemized bill of costs, when demanded by the plaintiff or defendant, he shall be guilty of a misdemeanor, and upon conviction shall be punished at the discretion of the court. (Code, s. 734; 1887, c. 297; Rev., s. 3588; C. S., s. 1234.)

Article 3.

Civil Actions and Proceedings.

§ **6-18. When costs allowed as of course to plaintiff.**—Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

(3) In actions of which a court of a justice of the peace has no jurisdiction, unless otherwise provided by law.

(R. C., c. 31, s. 78; 1874-5, c. 119; Code, s. 525; Rev., s. 1264; C. S., s. 1241.)

Construed with §§ 6-19 and 6-20.—The meaning of this subdivision of the section when considered in connection with § 6-20, is not clear, nor has it ever been fully and satisfactorily interpreted; but in many well considered decisions of the court it has been held to be the correct construction of these sections that, in actions which under the old system were peculiarly cognizable in courts of equity and unless coming in the class of actions specified in §§ 6-18 and 6-19, in which the plaintiff and defendant who succeed in the controversies were to recover costs as of course, that the costs could be awarded in the discretion of the court under the provisions of § 6-20. Yates v. Yates, 170 N.C. 533, 87 S.E. 317 (1915).

Application. — A justice has no cognizance of an action brought for the purpose of subjecting land to the payment of intestate's debts, Williams v. Hughes, 139 N.C. 17, 51 S.E. 790 (1905), consequently, such an action is controlled by this subdivision of the section; and a stakeholder who demurs to the complaint, has guardians ad litem appointed, etc., is liable for the costs. Van Dyke v. Aetna Life Ins. Co., 174 N.C. 78, 93 S.E. 444 (1917).

Article 4.

Costs on Appeal.

§ **6-35. Costs on appeal from justices of the peace.**—1. After an appeal from the judgment of a justice of the peace is filed with a clerk of a superior court, the costs in all subsequent stages shall be as herein provided for actions originally brought to the superior court.

(2) If, on appeal from a justice of the peace, judgment is entered for the plaintiff, and he shall not recover on his appeal a greater sum than was recovered before the justice, besides interest accrued since the rendition of the judgment, he shall not recover the costs of the appeal, but shall be liable at the discretion of the court to pay the same. (1794, c. 414, s. 17, P. R.; R. C., c. 31, s. 106; Code, ss. 542, 566; Rev., ss. 1281, 1282; C. S., s. 1258.)

Cross References.—As to advance costs on appeal, see § 2-30. See also, § 1-299.

Applied in Kincaid v. Graham, 92 N.C. 154 (1885).

Article 5.

Liability of Counties in Criminal Actions.

§ **6-36. County to pay costs in certain cases; if approved, audited and adjudged.**—In a criminal action, if there is no prosecutor designated by the court as liable for the costs under the provisions of General Statutes § 6-49, and the defendant is acquitted or convicted and unable to pay the costs, or a nolle prosequi is entered, or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one half their lawful fees; except in capital cases and in prosecutions for forgery, perjury, or conspiracy, when they shall receive full fees. No county shall pay any such costs unless the same are approved, audited and adjudged against the county as provided in this chapter. (R. S., c. 28, s. 12; R. C., c. 28, s. 8; 1874-5, c. 247; Code, ss. 733, 739; Rev., s. 1283; C. S., s. 1259; 1947, c. 781.)

Local Modification. — Hertford: 1933, c. 68; Johnston: 1939, c. 183; Swain: 1935, c. 210.

Editor's Note.—The 1947 amendment rewrote the first part of the first sentence.

In General.—This section and §§ 6-59, 6-

60, and 6-63, collated and construed together, place it in the discretion of the presiding judge, for reasons satisfactory to him, to refuse to direct the fees of witnesses for the State or for an acquitted defendant, in whole or in part, to be paid by the county, and from his decision no appeal can be taken. State v. Ray, 122 N.C. 1095, 29 S.E. 948 (1898); State v. Hicks, 124 N.C. 829, 32 S.E. 957 (1899).

Construed with Local Law. —Where a public-local law permits the costs of a municipal court to be recovered from a county upon conviction of a criminal offense in certain instances, this provision will be construed in pari materia with this section, and the intent and meaning of the local law will be to permit a recovery of one half the costs only. City of Greensboro v. County of Guilford, 191 N.C. 584, 132 S.E. 558 (1926).

Nolle Prosequi Entered.—Where a nolle prosequi is entered on an indictment for homicide as to murder in the first degree, the witnesses for the State subsequently attending the trial are entitled to only half fees. Coward v. Commissioners, 137 N.C. 299, 49 S.E. 207 (1904).

The clerk of the court is not entitled to any fee for entering a judgment of nolle prosequi in a criminal action. State v. Johnson, 101 N.C. 711, 8 S.E. 360 (1888).

Where on appeal to the superior court from a judgment of a justice of the peace, in a matter in which he had final jurisdiction, a nol. pros. was entered by the solicitor, it was error to tax the county with the costs accrued in the superior court. State v. Shuffler, 119 N.C. 867, 26 S.E. 94 (1896).

Defendant Unable to Pay Costs. — To tax a county with the costs in a criminal action where the defendant is convicted, the trial judge must find that the defendant is unable to pay the costs. Coward v. Commissioners, 137 N.C. 299, 49 S.E. 207 (1904).

Subpoena of Witnesses.—For the attendance of a witness to be taxed as a part of the costs against the losing party to a civil action, or against the county in a criminal action, it is necessary that he should have been legally subpoenaed or lawfully recognized to attend. State v. Means, 175 N.C. 820, 95 S.E. 912 (1918).

Where Grand Jury Returns "Not a True Bill." — A county cannot be taxed, under this section, with any part of the fees of the clerk or other officers in criminal actions if the grand jury returns "not a true bill." Guilford v. Board of Comm'rs, 120 N.C. 23, 27 S.E. 94 (1897).

Appeal without Bond. — There being no statute authorizing it, the officers of the court are not entitled to collect from a county the costs accruing in the court on appeal in a criminal case when the defendant was allowed to appeal without bond and without an order allowing him to appeal in forma pauperis and is insolvent. Clerk's Office v. Commissioners of Carteret County, 121 N.C. 29, 27 S.E. 1003 (1897).

Service on Public Roads. — Under this section the county is liable for the payment of full fees where the defendant is convicted and serves out a sentence on the public roads. State v. Saunders, 146 N.C. 597, 59 S.E. 695 (1907).

Applied in State v. Horne, 119 N.C. 853, 26 S.E. 36 (1896).

Quoted in City of Henderson v. County of Vance, 260 N.C. 529, 133 S.E.2d 201 (1963).

§ 6-37. **Local modification as to counties paying costs.**—In the following counties the county shall pay one half the fees specified when "not a true bill" is found: Alexander, Alleghany, Ashe, Avery, Bertie, Brunswick, Burke, Caldwell, Caswell, Catawba, Chatham, Clay, Craven, Davie, Duplin, Gaston, Granville, Greene, Guilford, Haywood, Henderson, Iredell, Jackson, Johnston, Jones, Lenoir, Lincoln, Macon, Madison, McDowell, Mecklenburg, Mitchell, Montgomery, Northampton, Onslow, Orange, Pamlico, Pender, Person, Pitt, Polk, Richmond, Robeson, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Wake, Watauga, Wilkes, Yadkin, Yancey. Provided, that Haywood County shall only be liable for one-half fee to clerks, constables and sheriffs serving process. (Code, ss. 733, 739; Rev., s. 1283; 1907, cc. 94, 162, 208, 606, 627, 695; 1909, cc. 50, 107; Pub. Loc. 1911, cc. 76, 167; Pub. Loc. 1915, c. 22; C. S., s. 1260; 1931, cc. 135, 187; 1933, c. 366.)

In Bladen County, where in a criminal proceeding before the grand jury a "true bill" is not found, the county shall pay one-half fees to clerks, sheriffs, officers, or constables who served any process in such proceeding. (1909, c. 183; C. S., s. 1260.)

In Brunswick and Catawba counties the county shall not be liable for any part of the costs of justices of the peace, when "not a true bill" is found. (1905, c. 598; Rev., s. 1283; 1909, c. 107; C. S., s. 1260.)

In Montgomery County, in criminal cases, where the defendant is convicted in superior court, justices of the peace are entitled to full fees, if any are legally taxed in the bill of costs. (1909, c. 223; C. S., s. 1260.)

In New Hanover County, in a criminal action, if the defendant is convicted and serves out his sentence on the public roads of the county, the county shall pay one half of the fees as provided in the first sentence of General Statutes § 6-36. (1905, c. 511; Rev., s. 1283; C. S., s. 1260; 1947, c. 781.)

In Northampton and Sampson counties where in criminal proceedings before the recorder's court, the grand jury, or superior court the defendant is found not guilty or a true bill is not found by the grand jury, or the defendant is found guilty and is sentenced by the court to serve on the roads or a term in jail, then the said county shall pay full fees to the sheriff, officer, or constable who served any process in such proceeding. (1937, c. 43; 1947, c. 427.)

Editor's Note. — The 1931 amendment added Avery and Guilford to the list of counties in the first paragraph, and the 1933 amendment added Haywood to the list.

The 1937 amendment added the last paragraph.

The 1947 amendments rewrote the next to last paragraph and made the last paragraph applicable to Sampson County.

§ 6-38. Liability of county when defendant acquitted in appellate division.—If, on appeal to the appellate division in criminal actions, the defendant is successful, the county from which the appeal was taken shall pay one half the costs of the appeal and shall also pay all such sums as have been properly expended by the defendant for the transcript of the record and printing done under the rules of the court. Provided, where the cause has been removed, said costs shall be paid by the county in which the offense was committed instead of the county from which the appeal is taken. (Rev., s. 1284; C. S., s. 1261; 1947, c. 781; 1969, c. 44, s. 21.)

Editor's Note. — The 1947 amendment added the proviso.

The 1969 amendment substituted "appellate division" for "Supreme Court" near the beginning of the section.

§ 6-39. County where offense committed liable for costs.—In all cases where the county is liable to pay costs, that county wherein the offense is alleged to have been committed shall be adjudged to pay them. (1889, c. 354; Rev., s. 1285; C. S., s. 1262.)

§ 6-40. Liability of counties, where trial removed from one county to another.—The costs taxed in any case removed from another county for trial shall include the fees and expenses allowed for summoning the special venire, if one is ordered in the case, and the per diem and mileage of jurors who are impaneled to try the case, together with all other costs and expenses of the trial of the case, the amount of which, if not provided for by law, to be fixed by the presiding judge, so as to fully relieve the county in which the trial is had of all costs and expenses thereof. All fines, forfeitures, penalties and amercements imposed or levied in the case shall belong to the county from which the case was removed and be paid to the treasurer of said county. When a prisoner is sent from one county to another to be held for trial, or for any other cause or purpose, the county from which he is sent shall pay his prison expenses, unless the same is collected from him, on or before the first Monday in each month, and upon a failure to do so, it shall be the duty of the county to which he is sent to pay the same to the sheriff or jailer entitled to receive it at the same rate and under the same regulations as its own prison expenses are paid; and the county liable shall repay the same within thirty days after demand, and upon failing to do so the county to which the money is due shall be entitled to recover in the superior court, or, if the amount be within its jurisdiction, the court of justices of the peace of its own county, the amount due, with ten percent additional, together with eight percent interest on the sum due; and said courts of said county shall have full jurisdiction to hear, try and determine all actions and proceedings that

may be brought for the purpose of enforcing the collection of the same. When the county to which such prisoner has been sent has paid the prison expenses and has made demand therefor upon the county liable as above provided and such demand be not complied with within ten days, the sheriff or jailer shall at once return such prisoner to the county from which such prisoner was sent, and deliver him to the sheriff or jailer thereof. (1889, c. 354; 1901, c. 718; Rev., s. 1285; C. S., s. 1263.)

Cross Reference. — As to requirement that prisoner pay charges and fees, see § 153-181.

§ 6-41. Statement of costs against county to be filed with commissioners.—In all criminal actions where the county is liable in whole or in part for costs, it is the duty of the clerks of the courts to make out a statement of such costs from the record or docket, within thirty days after the hearing, trial, determination, or other disposition thereof, and file the same with the board of commissioners of the county. (1873-4, c. 116, s. 3; Code, s. 736; Rev., s. 1286; C. S., s. 1264.)

§ 6-42. Expenses in conveying prisoner to another county; provision for payment.—When a sheriff or other officer arrests a person under a capias or other legal process, which requires him to have the person arrested before a court or judge of another county, and such sheriff or other officer is obliged to incur expense in the safe delivery of such person by reason of his failing to give bond for his appearance, or if the sheriff or other officer of the county to which the prisoner is to be carried incurs any expense in going for and conveying said prisoner to his county, then in either case the sheriff or other officer shall file with the court or judge issuing the capias or other legal process and with the register of deeds an itemized and sworn account of such expenses, which shall be presented by the register to the board of commissioners at their next regular meeting, to be audited by them. Such sworn statement shall be received by the said board as prima facie correct. Upon such auditing the board of commissioners shall cause to be issued to such sheriff or other officer an order on the county treasurer for the amount so audited and allowed by them, and shall notify the court or judge of their action, to the end that the amount so allowed shall be taxed in the costs to the use of the county. (1885, c. 262; 1901, c. 64; Rev., s. 1287; C. S., s. 1265.)

§ 6-43. Cost of investigating lynchings. — In all cases of investigation and trial of the crime of lynching, the entire cost incurred in the prosecution, unless paid by the person or persons convicted, shall be paid by the county wherein the crime shall have been committed. (1893, c. 461, s. 6; Rev., s. 1288; C. S., s. 1266.)

Editor's Note.—This section was originally a part of ch. 461 of the Laws of 1893; other sections of this act pertaining to lynchings will be found as §§ 14-221, 14-222, 15-98, 15-99 and 15-128. It was held in State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906), that the Act of 1893 had lost none of its efficacy by splitting the same into sections and by placing these sections under the appropriate chapter headings of the Code.

§ 6-44. Costs due credited on taxes due by payee.—Whenever a bill of costs in a criminal action is presented to any board of county commissioners in any county of the State for payment, as provided in this chapter and article, and the said bill is ordered to be paid by the said county commissioners, it shall be the duty of the clerk of said board, before issuing any orders for payment of the sum set out in said bill, to ascertain whether any person to whom any amount is due on said bill of costs, is indebted to the county for taxes, and if said person to whom said order is payable is so indebted, the order shall state in its face, "Payable only on taxes due ..... County," and upon presentation of

such order to the sheriff or tax collector, said sheriff or tax collector shall give said taxpayer credit for the sum designated in said order, and the said sheriff or tax collector shall be entitled to receive credit for said sum so paid in his settlement for taxes.

It shall be unlawful for any board of county commissioners to pay to any person who is indebted to the county for taxes any money payable out of the revenues of the county on account of costs in a criminal case, which is payable by the county, except as provided in paragraph one above. (1933, c. 245.)

Local Modification.—Alamance: 1935, c. 319, ss. 1, 2; Craven: 1933, c. 426; Granville: 1933, c. 426; Wilson: 1933, c. 501.

Article 8.

Fees of Witnesses.

§ 6-52. Fees and mileage of witnesses.—The fees of witnesses, whether attending at a term of court or before the clerk, or a referee, or commissioner, or arbitrator, shall be such amount per day as the board of commissioners of the respective counties may fix, to be not less than one dollar per day and not more than three dollars per day, except in the counties of Alexander, Alleghany, Anson, Ashe, Brunswick, Burke, Clay, Cleveland, Dare, Franklin, Graham, Greene, Harnett, Haywood, Henderson, Johnston, Mitchell, Nash, Polk, Stanly, Swain and Union, in which counties the fees shall be one dollar per day. They shall also receive mileage, to be fixed by the county commissioners of their respective counties, at a rate not to exceed five cents per mile for every mile necessarily traveled from their respective homes in going to and returning from the place of examination by the ordinary route, and ferriage and toll paid in going and returning. If attending out of their counties, they shall receive one dollar per day and five cents per mile going and returning by the ordinary route, and toll and ferriage expenses: Provided, that witnesses before courts of justices of the peace shall receive fifty cents per day in civil cases, and in criminal actions of which justices of the peace have final jurisdiction, witnesses attending the courts of the justices of the peace, under subpoena, shall receive fifty cents per day, and in hearings before coroners witnesses shall receive fifty cents per day and no mileage; but the party cast shall not pay for more than two witnesses subpoenaed to prove any one material fact, but no prosecutor or complainant shall pay any costs except as provided by General Statutes, §§ 6-49 and 6-50: Provided further, that experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may in its discretion order. Witnesses attending before the Utilities Commission shall receive two dollars per day and five cents per mile traveled by the nearest practicable route: Provided further, that any sheriff, deputy sheriff, chief of police, police, patrolman, State highway patrolman, and/or any other law enforcement officer who receives a salary or compensation for his services from any source or sources other than the collection of fees, shall prove no attendance, and shall receive no fee as a witness for attending at any superior or inferior criminal court sitting within the territorial boundaries in which such officer has authority to make an arrest: Provided, further, that in all criminal cases tried in the State where the crime charged is of the grade of a felony, all witnesses who have been held in jail incommunicado pending the trial of such case shall be paid witness fees for each such day which such witness is so held in jail, in addition to the witness fees provided by law in criminal actions. (Code, ss. 2860, 3756; 1891, c. 147; 1905, cc. 279, 522; Rev., s. 2803; P. L. 1911, c. 402; C. S., s. 3893; Ex. Sess. 1920, c. 61, ss. 2, 3; 1921, c. 62, s. 2; 1933, c. 40; 1941, c. 171; 1947, cc. 270, 781; 1949, c. 520; 1961, c. 676.)

Local Modification.—Alamance: 1935, c. 264; Beaufort: 1931, c. 54; Cleveland, Henderson, McDowell, Polk, Rutherford: 1933, c. 495; Craven: 1935, c. 209; Duplin: 1935, c. 247; Forsyth: 1935, c. 333; Franklin: C.S. 3893; 1935, c. 93; Guilford: 1935,

cc. 93, 185; Iredell: 1937, c. 240; Montgomery: 1951, c. 61; New Hanover: 1935, c. 237; Richmond, Rowan, Wayne: 1935, c. 93; Brunswick: 1953, c. 1309; Transylvania: 1961, c. 676; Transylvania and Union: 1953, c. 1317; Wayne: 1959, cc. 443, 920.

Cross References.—See § 1-553. As to liability of prosecutor for costs in certain cases, see § 6-49. As to appearance of witnesses before the Utilities Commission, see § 62-61. As to attendance of witnesses in courts of justices of the peace, see §§ 7-144, 7-145.

Editor's Note. — The 1941 amendment added the last proviso to this section.

The first 1947 amendment struck out "Surry" from the list of counties in the first sentence, and the second 1947 amendment made changes in the first proviso.

The 1949 amendment struck out "Randolph" from the list of counties.

The 1961 amendment deleted "Transylvania" from the list of excepted counties.

In General.—The manner of summoning witnesses, and their compensation is entirely regulated by statute. Stern & Co. v. Herren, 101 N.C. 516, 8 S.E. 221 (1888).

Proof of Attendance.—Witnesses should swear to their attendance at each term, and the ticket should state the number of days' attendance at each term. Thompson v. Hodges, 10 N.C. 318 (1824).

Same—State's Witnesses upon Acquittal. — Costs and charges of State's witnesses upon acquittal of a defendant were ordered to be paid by the county; and in an action against the commissioners to recover the amount of tickets issued to such witnesses: It was held, (1) that ch. 105, § 33, Bat. Rev. makes the tickets presumptive evidence of the facts set forth therein—attendance, miles traveled, etc.; (2) this evidence, together with the order of the court, imposes a duty upon defendants to provide for their payment. Deaver v. Commissioners of Buncombe, 80 N.C. 116 (1879). Section 6-53 now provides that "the certificate of the clerk shall be sufficient evidence of the debt." —Editor's Note.

A witness in a criminal action has no claim upon the county until the liability of the county for the costs is passed upon by the court. Young v. Commissioners of Buncombe, 76 N.C. 316 (1877).

Liability of County for Defendant's Witnesses. — The liability of the county for defendant's witnesses is restricted to the same cases in which the county is responsible for half fees to officers, except that the county is not liable to defendant's witnesses where he is convicted and unable to pay. An appeal in the matter of costs lies in cases of this kind. State v. Horne, 119 N.C. 853, 26 S.E. 36 (1896); Guilford v. Board of Comm'rs, 120 N.C. 23, 27 S.E. 94 (1897). See § 6-59 and notes thereto.

Witnesses for the losing party receive no pay unless said party be solvent. State v. Wheeler, 141 N.C. 773, 53 S.E. 358 (1906).

But this does not abridge the right of all the witnesses to recover compensation against the party summoning them. State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889).

A witness can always prove his attendance against the party who subpoenas him. Sitton v. Lumber Co., 135 N.C. 540, 47 S.E. 609 (1904).

Where Grand Jury Witnesses Entitled to Compensation.—Witnesses are entitled to compensation where a bill is prepared and sent to the grand jury with the names of those summoned indorsed thereon as sworn and sent. Lewis v. Board of Comm'rs 74 N.C. 194 (1876).

Witnesses to Testify Generally before Grand Jury.—There is no provision of law for the payment of witnesses summoned to appear and testify generally before the grand jury "in certain matters then and there to be inquired of." Lewis v. Board of Comm'rs, 74 N.C. 194 (1876).

When Court Rules Witness Incompetent.—Where a witness was ruled by the court to be incompetent, and such ruling was not appealed from, or reversed, it was held that his fees could not be taxed against the adverse party, whether the ruling out of the witness was erroneous or not. Keith v. Goodwin, 51 N.C. 398 (1859).

May Not Withdraw Witness Ticket and Sue Thereon.—A witness is not at liberty after final judgment to withdraw his "witness ticket" and sue upon it. His fees for attendance should be taxed and collected with the other costs against the party adjudged to pay the same, if he be solvent; and if not, then the prevailing party who summoned and required his testimony is responsible therefor. Belden v. Snead, 84 N.C. 243 (1881).

Court's Power to Fix Fees for Expert Witnesses.—The court has now the statutory authority to fix the fees of expert witnesses, and its action is res judicata as to the amount, leaving open the question of the legality of the taxing of the fee on a motion to retax. Chadwick v. Life Ins. Co., 158 N.C. 380, 74 S.E. 115 (1912).

The amount to be paid an expert witness testifying at a hearing before a commissioner of the industrial commission in proceedings before him under the Workmen's Compensation Act is a question to be determined in the discretion of the

court and the witness may not require that it be fixed in advance before testifying as to a material matter involved in the inquiry. In re Hayes, 200 N.C. 133, 156 S.E. 791 (1931).

The court has discretionary authority under this section, to allow expert witnesses compensation and mileage, and plaintiff's remedy upon being so taxed is to move to retax the costs rather than to except under § 6-54. Connor v. Hayworth, 206 N.C. 721, 175 S.E. 140 (1934).

§ 6-56. Fees of witnesses before grand jury. — No witness shall receive pay for attendance in a criminal case before a grand jury, unless such witness has been summoned by direction in writing of the foreman of the grand jury, or of the solicitor prosecuting, addressed to the clerk of the court, commanding him to summon such witness, stating the name of the parties against whom his testimony may be needed, or unless he has been bound or recognized by some justice of the peace to appear before the grand jury. (1879, c. 264; Code, s. 743; Rev., s. 1302; C. S., s. 1278.)

Local Modification. — Martin, Moore, Wayne: C.S. 1279.

Cross Reference.—As to witnesses before grand jury, see §§ 15-138, 15-139.

Permission to Summon. — Grand jurors have no right to summon witnesses to appear before them except by the permission of their foreman or of the solicitor as prescribed by this section. State v. Wilcox, 104 N.C. 847, 10 S.E. 453 (1889).

Endorsement of Names.—Witnesses are entitled to compensation where a bill is prepared and sent to the grand jury with the names of those summoned endorsed thereon as sworn and sent. Lewis v. Board of Comm'rs, 74 N.C. 194 (1876).

§ 6-59. County to pay defendant's witnesses in certain cases. — When the defendant is acquitted, a nolle prosequi entered, or judgment against him arrested, and it is made to appear to the court, by certificate of counsel or otherwise, that said defendant had witnesses, duly subpoenaed, bound or recognized, in attendance, and that they were necessary for his defense, it is the duty of the court, unless the prosecutor is adjudged to pay the costs, to make and file an order in the cause directing that said witnesses be paid by the county in such manner and to such extent as is authorized by law for the payment of State's witnesses in like cases. (1879, c. 264; 1881, c. 312; Code, s. 747; Rev., s. 1290; C. S., s. 1283.)

Cross Reference.—See §§ 6-36 and 6-64.

In General.—This section shows the legislative intent to restrict payment by the county of the defendant's witnesses to the cases specified, and their number and amount of compensation. State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889), discussing authority to tax defendant's witnesses against the county when the "bill is quashed."

The liability of the county for the defendant's witnesses is restricted to the same cases in which the county is responsible for half fees to officers, except that the county is not liable to the defendant's witnesses where he is convicted and unable to pay. An appeal in the matter of costs lies in cases of this kind. State v. Horne, 119 N.C. 853, 26 S.E. 36 (1896); Guilford v. Board of Comm'rs, 120 N.C. 23, 27 S.E. 94 (1897).

§ 6-61. On appeal from justice only two witnesses bound over.— When the defendant appeals from the judgment of the justice of the peace, in any criminal action, it is the duty of such justice of the peace to select and bind over on behalf of the State not more than two witnesses, and neither the county nor the defendant shall be liable for the fees of more than two witnesses on such appeal, unless additional witnesses are summoned by order of the appellate court as provided in the preceding section. (1879, c. 264; Code, s. 745; Rev., s. 1304; C. S., s. 1285.)

When Nol. Pros. Entered.—Where on appeal to the superior court from a judgment of a justice of the peace, in a matter in which he had final jurisdiction, a nol. pros. was entered by the solicitor, it was error to tax the county with the costs accrued in the superior court. State v. Shuffler, 119 N.C. 867, 26 S.E. 94 (1896).

ARTICLE 9.

Criminal Costs before Justices, Mayors, County or Recorders' Courts.

§ 6-64. Liability for criminal costs before justice, mayor, county or recorder's court.—In no action or proceeding in which a justice of the peace has final jurisdiction, commenced or tried in a court of a justice of the peace, mayor or in a county or recorder's court, shall the county be liable to pay any costs. Any defendant or prosecuting witness shall have the right of appeal to the superior court. (1868-9, c. 178; 1879, c. 92, s. 3; 1881, c. 176; Code, s. 895; Rev., s. 1307; C. S., s. 1288; 1931, c. 252; 1947, c. 781.)

Local Modification. — Jackson: 1933, c. 225; Martin: 1935, c. 20; Swain: 1935, c. 84.

Cross References. — As to liability of prosecutor for costs, see § 6-49. As to liability of county for costs, see § 6-36. As to appeals, see §§ 15-177, 15-180.

Editor's Note.—The 1931 amendment rewrote this section, which formerly applied only to proceedings before a justice. The 1947 amendment also rewrote this section.

For general discussion of costs in criminal actions before a justice of the peace, see Merrimon v. Henderson County Comm'rs, 106 N.C. 369, 11 S.E. 267 (1890); State v. Carlton, 107 N.C. 956, 12 S.E. 44 (1890).

Where the justice of the peace has testified on the trial to recover damages for a false arrest that he considered the criminal action "frivolous and malicious," and had taxed the defendant (prosecutor) with cost, the erroneous admission of this evidence is cured by the defendant's admission that he had paid the cost thus taxed him. Harris v. Singletary, 193 N.C. 583, 137 S.E. 724 (1927).

Taxation of Prosecutor in Justice's Court. —See annotations under § 6-49.

Cited in 5 N.C.L. Rev. 359, in a note on "Interest in Costs."

§ 6-65. Imprisonment of defendant for nonpayment of fine and costs.—If a justice of the peace, mayor or judge of a county or recorder's court sentences a party found by him to be guilty to pay a fine and costs in a criminal action or proceeding within the jurisdiction of a justice of the peace, and the same are not immediately paid, the justice of the peace, mayor or judge of a county or recorder's court shall commit the guilty person to the county jail until the same are paid, or he is otherwise discharged according to law (1868-9, c. 178, subchap. 4, s. 15; Code, s. 904; Rev., s. 1308; C. S., s. 1289; 1947, c. 781.)

Cross Reference.—See also § 6-64 and note.

Editor's Note. — The 1947 amendment rewrote this section.

Chapter 7.

Courts.

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Article 7.

Organization.

§ **7-44. Solicitors; compensation.**—Effective July 1, 1969, solicitors shall receive as full compensation for their services fourteen thousand five hundred dollars ($14,500.00) per year, except that solicitors who qualified July 1, 1967, or who qualify July 1, 1969, as full-time solicitors under G.S. 7-46 (b) shall receive sixteen thousand five hundred dollars ($16,500.00) per year. The salaries set forth in this section shall be in lieu of fees or other compensation, except the expenses allowed in G.S. 7-45. (1879, c. 240, s. 12; Code, s. 3736; Rev., s. 2767; C. S., s. 3890; 1923, c. 157, s. 1; 1933, c. 78, s. 1; 1935, c. 278; 1943, c. 134, s. 4; 1949, c. 189, s. 1; 1953, c. 1079, s. 1; 1957, c. 1389, s. 1; 1961, c. 984; 1963, c. 839, s. 3; 1965, c. 1009, s. 1; 1967, c. 1049, s. 2; 1969, c. 1186, s. 7; c. 1190, s. 37.)

Cross Reference.—As to amount of solicitors' fees, see § 6-12.

Editor's Note.—The 1935 amendment increased the salary from $3,900 to $4,500.

The 1949 amendment rewrote this section and increased the solicitor's salary from $4,500.00 to $6,500.00. No explanation of changes made by the 1943 amendment is now practical.

In Moore v. Roberts, 87 N.C. 11 (1882), it was held that the solicitor of the criminal court of a county has no claim upon the State for such compensation as is allowed the district solicitors under this section, where the act establishing said court puts the burden of sustaining the same upon the county.

The 1953 amendment increased the salary from $6,500.00 to $7,150.00.

The 1957 amendment increased the salary from $7,150.00 to $7,936.00.

The 1961 amendment, effective July 1, 1961, increased the salary from $7,936.00 to $9,000.00.

The 1963 amendment, effective July 1, 1963, increased the salary from $9,000.00 to $11,500.00.

The 1965 amendment, effective July 1, 1965, increased the salary from $11,500.00 to $12,000.00.

The 1967 amendment rewrote this section.

Session Laws 1969, c. 1186, effective July 1, 1969, rewrote the first sentence, in-

creasing the salaries, changing the first two dates, inserting "or who qualify July 1, 1969," and making certain other minor changes. Session Laws 1969, c. 1190, effective July 1, 1969, inserted "or July 1, 1969," in the exception clause in the first sentence. The first sentence of the section is set out above as it appears in c. 1186.

Repeal of Section. — Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§ 7-45. Travel and office expenses of solicitors.—(a) In addition to the salary set forth in G.S. 7-44, each solicitor shall receive the sum of three thousand dollars ($3,000.00) per year, as reimbursement for all of his travel and subsistence expenses while engaged in duties connected with his office. This sum shall be paid in equal monthly installments out of the State treasury upon warrants duly drawn thereon.

(b) Solicitors in the following districts may elect to become full-time State employees on July 1, 1968 or July 1, 1969, provided they discontinue the private practice of law and so certify to the Administrative Officer of the Courts by that date; Districts one through twenty-one. Solicitors who qualify under this subsection are entitled to a State allowance of not to exceed four hundred dollars ($400.00) per month per solicitor, to be used to reimburse the solicitor for actual expenditures for office rent, secretarial service, telephone bills, postage, and similar expenses of his office. Reimbursement shall be in accordance with regulations issued by the Administrative Office of the Courts. (1923, c. 157, s. 2; C. S., s. 3890(a); 1933, c. 78, s. 2; 1937, c. 348; 1949, c. 189, s. 2; 1953, ch. 1079, s. 2; 1957, ch. 1389, s. 2; 1965, c. 1009, s. 2; 1967, c. 1049, s. 3; 1969, c. 1190, s. 38; c. 1263.)

Editor's Note. — This section, first inserted by the act of 1923 and providing $750 for expenses, was repealed in 1933. The present section was codified from the 1937 act, and rewritten by the 1949 amendment which increased the amount allowed for expenses from $500.00 to $1,500.00 as of Jan. 1, 1949.

The 1953 amendment substituted "one thousand five hundred dollars" for "fifteen hundred dollars."

The 1957 amendment increased the amount for expenses from $1,500.00 to $2,000.00.

The 1965 amendment, effective July 1, 1965, increased the amount for expenses from $2,000.00 to $3,000.00.

The 1967 amendment, effective July 1, 1967, rewrote this section.

The first 1969 amendment, effective July 1, 1969, inserted "or July 1, 1969" near the beginning of subsection (b).

The second 1969 amendment substituted "Districts one through twenty-one" for an enumeration of certain districts following the colon in the first sentence of subsection (b).

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

ARTICLE 9.

Judicial and Solicitorial Districts and Terms of Court.

§ 7-68. Number of solicitorial districts.—(a): Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

(b) Solicitorial districts.—In conformity with the Constitution, article IV, section 23, the solicitorial districts shall be constituted and numbered as follows:

The first solicitorial district shall be composed of the following counties: Beaufort, Camden, Chowan, Currituck, Dare, Gates, Hyde, Pasquotank, Perquimans, Tyrrell.

The second solicitorial district shall be composed of the following counties: Edgecombe, Martin, Nash, Washington, Wilson.

The third solicitorial district shall be composed of the following counties: Bertie, Granville, Halifax, Hertford, Northampton, Vance, Warren.

The fourth solicitorial district shall be composed of the following counties: Harnett, Johnston, Lee, Wayne.

The fifth solicitorial district shall be composed of the following counties: Carteret, Craven, Greene, Jones, Pamlico, Pitt.

The sixth solicitorial district shall be composed of the following counties: Duplin, Lenoir, Onslow, Sampson.

The seventh solicitorial district shall be composed of the following counties: Franklin, Wake.

The eighth solicitorial district shall be composed of the following counties: Brunswick, Columbus, New Hanover, Pender.

The ninth solicitorial district shall be composed of the following counties: Cumberland and Hoke.

The ninth-A solicitorial district shall be composed of the following counties: Bladen and Robeson.

The tenth solicitorial district shall be composed of the county of Durham.

The tenth-A solicitorial district shall be composed of the following counties: Alamance, Chatham, Orange, Person.

The eleventh solicitorial district shall be composed of the following counties: Alleghany, Ashe, Forsyth.

The twelfth solicitorial district shall be composed of the following counties: Davidson, Guilford.

The thirteenth solicitorial district shall be composed of the following counties: Anson, Moore, Richmond, Scotland, Stanly, Union.

The fourteenth solicitorial district shall be composed of the county of Gaston.

The fourteenth-A solicitorial district shall be composed of the county of Mecklenburg.

The fifteenth solicitorial district shall be composed of the following counties: Alexander, Cabarrus, Iredell, Montgomery, Randolph, Rowan.

The sixteenth solicitorial district shall be composed of the following counties: Burke, Caldwell, Catawba, Cleveland, Lincoln, Watauga.

The seventeenth solicitorial district shall be composed of the following counties: Avery, Davie, Mitchell, Wilkes, Yadkin.

The eighteenth solicitorial district shall be composed of the following counties: Henderson, McDowell, Polk, Rutherford, Transylvania, Yancey.

The nineteenth solicitorial district shall be composed of the following counties: Buncombe, Madison.

The twentieth solicitorial district shall be composed of the following counties: Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain.

The twenty-first solicitorial district shall be composed of the following counties: Caswell, Rockingham, Stokes, Surry. (1913, cc. 63, 196; C. S., s. 1441; 1937, c. 413, s. 1; 1943, c. 134, s. 2; 1955, c. 129, ss. 2, 6; c. 708; 1959, c. 1168, s. 1; c. 1175, s. 1; 1961, c. 730, ss. 1-4½.)

Editor's Note.—Prior to the 1937 amendment there were twenty districts.

The 1943 amendment added the second paragraph of this section. It also inserted "solicitorial" in the article heading.

The first 1955 amendment, effective July 1, 1955, rewrote this section.

The first 1959 amendment rewrote the paragraph relating to the ninth solicitorial district and inserted the paragraph relating to the ninth-A solicitorial district. The second 1959 amendment rewrote the paragraph relating to the fourteenth solicitorial district and inserted the paragraph relating to the fourteenth-A solicitorial district.

Session Laws 1959, c. 1168, s. 2, and c. 1175, s. 2, provide that the Governor of North Carolina shall appoint solicitors for solicitorial districts 9A and 14A to serve until the general election of 1960. The solicitors of the present ninth and fourteenth solicitorial districts shall continue to serve as the new solicitors of such districts. In the primary and general elections to be held in the year 1960, candidates shall be nominated and elected to the office of solicitor of solicitorial districts 9A and 14A for the term ending on December 31, 1962. Thereafter the solicitor of said districts shall be nominated and elected at the same time as are the solicitors for the other solicitorial districts of North Carolina for the term of four years.

The 1961 amendment, effective July 1, 1961, rewrote the first paragraph under subsection (b) and the paragraph relating to the tenth solicitorial district. It inserted the paragraph covering the tenth-A

solicitorial district and transferred Chatham County thereto from the fourth solicitorial district. It also transferred Granville County from the tenth to the third solicitorial district. Section 6 of the 1961 amendatory act provides that the Governor shall appoint the solicitor for solicitorial district No. 10-A to serve until the general election of 1962.

The 1969 amendment, effective July 1, 1969, repealed former subsection (a), relating to judicial districts.

Repeal of Subsection (b).—Section 6, c. 1049, Session Laws 1967, provides that subsection (b) and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971. For provisions as to solicitors and solicitorial districts effective Jan. 1, 1971, see §§ 7A-60 through 7A-67.

Stated in Baker v. Varser, 239 N.C. 180, 79 S.E.2d 757 (1954).

ARTICLE 11.

Special Regulations.

§ 7-89. Court reporters.—The resident judge of each judicial district is hereby authorized and empowered to appoint an official court reporter for one or more or all of the counties in his district who shall serve at the will of the resident judge, and whose appointment may be terminated by 30 days' written notice thereof.

The appointment of such reporter or reporters shall be filed in the office of the clerk of the superior court of each county in said district in which said reporter is to officiate, and the same, or a certified copy thereof, shall be recorded by said clerk on the minute docket of his court.

Before entering upon the discharge of the duties of said office, said reporter shall take and subscribe an oath in words substantially as follows: "I, ..., do solemnly swear that I will, to the best of my ability, discharge the duties of the office of court reporter in and for the county of ..... in the ..... judicial district, and will faithfully transcribe the testimony offered in said courts as the presiding judge may direct, or as I may be required to do under the law, so help me, God." Said oath shall be filed in the office of each of the clerks of the superior courts of the counties in which said reporter is to officiate, and recorded and indexed on the minute dockets of said courts.

If on account of sickness, or for other cause, said reporter is unable to attend upon any of the regular courts of said districts, and for conflict and special terms, the resident judge may appoint a reporter pro tem for said court or courts, and said appointment shall appear upon the minutes of said term, and said reporter shall take and subscribe the oath referred to above, which oath shall be filed with the clerk. In lieu of appointing a reporter pro tem for each of said courts, the resident judge may, in his discretion, appoint a reporter pro tem for a stated period whose duty it shall be to report any and all courts in the county or counties designated in the appointment, which the regular court reporter is for any cause unable to report.

The board of county commissioners of each county shall fix the compensation which such reporter and such reporter pro tem shall receive while engaged in the performance of his duties in said county.

The duties of the office of court reporter or reporter pro tem in each district shall be prescribed by the resident judge of said district.

The testimony taken and transcribed by said court reporter or said court reporter pro tem, as the case may be, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any of the courts of this State as the deposition of the witness whose testimony is taken and transcribed, in the same manner, and under the same rule governing the introduction of depositions in civil actions.

This section shall not apply to any county for which provision for the appointment of a court reporter is made by law elsewhere; provided however, that in the following named counties the county commissioners shall have the authority to appoint, terminate the appointment and reappoint a court reporter and a re-

porter pro tem, and fix the compensation therefor: Anson, Ashe, Bladen, Buncombe, Caldwell, Carteret, Cleveland, Craven, Davidson, Franklin, Gaston, Greene, Halifax, Haywood, Hertford, Hoke, Jackson, Lenoir, Lincoln, Mitchell, Moore, Nash, Northampton, Orange, Pender, Person, Rockingham, Sampson, Surry, Union, Vance, Warren, Yadkin. (Ex. Sess. 1913, c. 69; C. S., s. 1461; Ex. Sess. 1921, c. 57; 1927, c. 268; Pub. Loc. 1927, c. 49; 1933, c. 75, s. 2; 1955, c. 1317, s. 2; 1961, c. 844; 1967, c. 1121.)

Local Modification.—Rockingham: 1955, c. 1317, s. 2½.

Cross Reference. — As to reporting of trials, see § 7A-95.

Editor's Note. — The 1955 amendment effective July 1, 1955, rewrote this section.

The 1961 amendment deleted "McDowell" and "Polk" from the list of counties in the last paragraph.

The 1967 amendment inserted "Nash" in the list of counties in the last paragraph.

The purpose of this section is to preserve an accurate record of the trial. Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962).

SUBCHAPTER IV. DOMESTIC RELATIONS COURTS.

Article 13.

Domestic Relations Courts.

§ 7-101. Establishment by county or city or both. — The board of county commissioners of any county or the governing body of any incorporated city shall have authority to establish a "domestic relations court", which court may be a joint county and city court, as provided in § 7-102 or a court for the county or city as may be determined by the governing authorities. In counties with two or more cities, any city may join any other city or cities in such county in establishing a domestic relations court, or any number of cities may join the county in which they are situate in establishing a domestic relations court.

The board of county commissioners of any of a group of counties, not exceeding five, with abutting boundaries, or the governing body of any incorporated city within the boundaries of the cooperating counties, shall have authority to establish a joint domestic relations court as provided in § 7-102 or a court for the counties cooperating in the establishment of such court, or city or cities within such counties as may be determined by the governing bodies. Any number of cities may join the counties in which they are situate in establishing a domestic relations court.

As used in this section, "city" means any incorporated city or town with a population of at least five thousand as shown by the latest decennial census. (1929, c. 343, s. 1; 1949, cc. 420, 957; 1951, c. 1111, s. 2; 1955, c. 1018, s. 1.)

Local Modification.—Edgecombe, Nash, Pitt, Wayne: 1929, c. 343, s. 10; Buncombe: 1929, c. 343, s. 10; 1941, c. 208, s. 2; Forsyth: 1929, c. 343, s. 10; 1931, c. 221, s. 2; Franklin, Henderson, Transylvania: 1951, c. 1111, s. 3; Wake: 1929, c. 343, s. 10; Pub. Loc. 1941, c. 339; Forsyth: 1959, c. 1290, s. 1.

Cross References.—As to establishment and jurisdiction of juvenile court, see § 110-21 et seq. As to continued existence and ultimate abolition of courts inferior to the superior courts, and their replacement by district courts, see § 7A-3. As to family court services of district courts, see § 7A-134. As to domestic relations jurisdiction of district courts, see § 7A-244. As to jurisdiction of district courts over juveniles, see § 7A-277.

Editor's Note. — The 1951 amendment rewrote this section eliminating the population requirements. It also rewrote the title to this article.

By virtue of Session Laws 1947, c. 142, and Session Laws 1949, cc. 78, 334 and 707, the counties of New Hanover, Gaston, Durham and Guilford, respectively, have been stricken from the list of counties appearing under Local Modification. The acts made the counties mentioned subject to the provisions of this article, which was also made applicable to the City of High Point by Session Laws 1947, c. 962.

The 1955 amendment inserted the second paragraph.

§ 7-102. Vote on establishment of court; any other city in county with required population may have such court. — In case the board of county commissioners and governing authorities of a particular city decide to establish a joint city and county domestic relations court, they, voting as separate bodies, shall determine whether or not such domestic relations court shall be established. If both bodies shall vote for its establishment, each of them shall record the resolutions in their minutes and upon such consent by both boards, the court shall be established. In counties in which the said joint court is thus established by the board of county commissioners and the governing authorities of the county and city such establishment of the court shall not prevent any other city within the territorial limits of the county and having more than twenty-five thousand inhabitants, establishing its own court under § 7-101.

If two or more counties, not exceeding five, cooperate in the joint establishment of such court, the boards of commissioners of such cooperating counties and the governing authorities of cities and towns therein shall follow the same procedure for the establishment of such court as is provided in the preceding paragraph. (1929, c. 343, s. 2; 1955, c. 1018, s. 2.)

Editor's Note. — The 1955 amendment added the second paragraph.

§ 7-103. Jurisdiction.—Said domestic relations court shall have, and is hereby vested with all the power, authority, and jurisdiction heretofore vested by law in the juvenile courts of North Carolina, and said power, authority, and jurisdiction being as fully vested in the domestic relations court as if herein particularly set forth in detail; and in addition thereto the said domestic relations court shall have exclusive original jurisdiction over the following classes of cases:

(a) All cases where any adult is charged with abandonment, nonsupport, or desertion of any minor child, or where either spouse is charged with abandonment, nonsupport, or desertion of the other.

(b) All cases involving voluntary desertion of any juvenile by its mother.

(c) All cases involving the custody of juveniles, including the authority to make orders concerning tuition and maintenance of said juveniles, except where the case is tried in superior court as a part of any divorce proceeding.

(d) All cases where assault, or assault and battery, on a juvenile is charged against an adult, or where husband or wife is charged with assault, or assault and battery, upon the other.

(e) All cases in which an adult is charged with causing or being responsible for delinquency, dependency, or neglect of a juvenile.

(f) All bastardy cases within said county.

(g) All cases wherein any person is charged with receiving stolen goods from any juvenile, knowing them to be stolen.

(h) All cases involving violation of the North Carolina School Attendance Law as set forth in Public Laws of North Carolina, one thousand nine hundred and nineteen, chapter one hundred, and Public Laws of North Carolina, one thousand nine hundred and twenty-three, chapter one hundred and thirty-six; and in §§ 115-302 to 115-312, inclusive; and such other laws relative to school attendance as may hereafter be enacted.

(i) In an action for divorce where the pleadings show that there are minor children; if the pleadings also show that the custody of said children is controverted; or if any judge of the superior court having jurisdiction to try said action so direct, it shall be the duty of the clerk of the superior court to refer the case for investigation as to the child or children, to the domestic relations court, and the judge of the domestic relations court shall make his recommendations to the judge of the superior court as to the disposition of the child, or children, for the consideration of the judge of the superior court in disposing of the custody of the said child or children.

(j) All cases where an adult is charged with failure to support a parent;

(k) All cases where husband and wife are charged with an affray between

each other. (1929, c. 343, s. 3; 1941, c. 308; 1943, c. 470, s. 1; 1955, c. 756; 1957, c. 366, ss. 1, 2.)

Local Modification.—Gaston: 1959, c. 59.

Cross References.—As to establishment and jurisdiction of juvenile court, see § 110-21 et seq. For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

Editor's Note. — The 1941 amendment struck out former subsection (g), relating to the adoption of juveniles, and relettered the subsequent subsections in alphabetical order. See 19 N.C.L. Rev. 453.

The 1943 amendment substituted "minor child" for "juvenile" in subsection (a). For comment on the amendment, see 21 N.C.L. Rev. 343.

The 1955 amendment rewrote the first part of subsection (i).

The 1957 amendment inserted in subsection (c) the phrase "including the authority to make orders concerning tuition and maintenance of said juveniles." It also added subsections (j) and (k).

Exclusive Original Jurisdiction of Child. —The domestic relations courts have the exclusive original jurisdiction in all cases of a child coming within the purview of the Juvenile Court Act and the Domestic Relations Court Act, which, when once acquired, and the status of the child is fixed, continues during the minority of the child. In re Blalock, 233 N.C. 493, 64 S.E.2d 848, 25 A.L.R.2d 818 (1951).

The General Assembly has created both domestic relations courts and clerks of superior court as separate branches of the superior court. By this section the former is given exclusive original jurisdiction over all cases involving the custody of juveniles, and clerks of superior courts are given jurisdiction of proceedings for the adoption of minor children with right, incidental to temporary approval of application for adoption, to "issue an order giving the care and custody of the child to the petitioner" by chapter 48 and §§ 1-7 and 1-13. In re Blalock, 233 N.C. 493, 64 S.E.2d 848, 25 A.L.R.2d 818 (1951).

Issuance of Process and Hearing Complaints.—There is no statutory provision referring specifically to issuance of process, but the statute indicates that the same persons who would issue process in other courts having jurisdiction of the offenses of which the domestic relations court is given jurisdiction, would be authorized to issue process for the domestic relations court, and hence hear complaints. 15 N.C.I. Rev. 113.

An exclusive remedy to compel a father to provide for the support of his illegitimate child, is provided by this section and chapter 49 of General Statutes, and the statutes do not authorize the child to maintain a civil action to compel its father to provide for its support. Allen v. Hunnicutt, 230 N.C. 49, 52 S.E.2d 18 (1949).

Determining the custody of minor children is never the province of a jury; it is that of the judge of the court in which the proceeding is pending. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

With the enactment of § 17-39.1 the legislature did not give the judge presiding in the district the discretion to issue a writ of habeas corpus and to hear and determine the custody of all infants, without regard to previous decisions relating to their custody. To so hold would make a shambles of the statutes relating to custody, some of which are conflicting and inconsistent. In re Custody of Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967).

Determining Paternity of Child. — The domestic relations court has jurisdiction to determine the paternity of a child in a proceeding under G. S. 49-2 et seq. State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

Cited in In re Morris, 224 N.C. 487, 31 S.E.2d 539 (1944).

§ 7-104. Election of judge and term of office; vacancy appointments; judge to select clerk; juvenile court officers may be declared officers of new court.—It shall be the duty of the board of commissioners of any county and the governing board of any city, in which a joint court of domestic relations is established, as provided in this article, or of the governing authorities of any city or county in which an independent domestic relations court shall be established, as provided in this article, acting jointly, in the first instance, or independently, in the second instance, to elect a judge of the domestic relations court and to fix his salary and provide for the payment of same, his term of office to run from the time of his election to the second Monday in July in each odd-numbered year and until his successor shall have been elected and qualified. The regular term of office shall be for a term of two years and until his successor is elected and qualified. If any vacancy should occur in

said office during the two years' term, for any cause, it shall be filled for the unexpired term in the same manner and by the same bodies as provided for the election of said judge.

When two or more counties cooperate in the establishment of such court, it shall be the duty of the boards of commissioners of such counties and the governing authorities of cities and towns within such counties, acting jointly, to elect a judge of such court and to fix his salary and provide for the payment of same, and his term of office shall be as provided in the preceding paragraph. The boards of commissioners of the said counties and the governing bodies of cities and towns shall determine the proportionate share of the salary of such judge and the other expenses of such court to be paid by the governmental units cooperating. The judge of such court shall select a location for the court headquarters at a county seat where all the court records shall be kept and maintained, and such judge shall schedule hearings at the county seats of the cooperating counties as he shall determine the need to be, and file such schedule with the welfare department of each cooperating county.

It shall be the duty of the judge of the domestic relations court to appoint a clerk and such number of deputy clerks as are needed for said court, the salary of said clerk and deputy clerks to be fixed, provided for, and paid by the board of county commissioners of any of such counties and the governing board of any of such cities, acting jointly, or independently when a joint county and city court is not established.

And the officers of the juvenile court of any of such cities and of any such counties, as now constituted by law may be declared to be officers of the domestic relations court.

The probation officers of domestic relations court and their method of appointment shall be the same as now provided for in § 110-31, for probation officers of the juvenile court. The salaries of said probation officers, and the necessary equipment for the proper maintenance and functioning of said court, shall be a charge upon such county and such city jointly, or upon the county or city, if it is an independent court.

Wherever a domestic relations court is established a substitute judge of said court may be appointed in the same manner as the regular judge of said court. Such substitute judge shall serve during the absence, illness or other temporary disability of the regular judge, and while serving shall have the same power and authority as the regular judge. Such substitute judge shall receive such compensation, on a per diem basis, as shall be determined and provided by the governing body or bodies appointing him. (1929, c. 343, s. 4; 1931, c. 221, s. 1; 1943, c. 470, s. 2; 1955, c. 1018, s. 3; 1967, c. 962, ss. 1, 2.)

Local Modification. — Buncombe: 1947, c. 989; 1957, c. 875; Forsyth: 1931, c. 221, s. 2; Mecklenburg: 1937, c. 268; 1949, c. 949; 1961, c. 851; City of Charlotte: 1949, c. 949; Guilford: 1957, c. 1397.

Editor's Note. — The 1943 amendment added the last paragraph of this section. For comment on the amendment, see 21 N.C.L. Rev. 343.

The 1955 amendment directed that the second paragraph be inserted to follow the first paragraph of this section.

The 1967 amendment inserted "and such number of deputy clerks as are needed" preceding "for said court" in the present third paragraph and inserted "and deputy clerks" preceding "to be fixed" in that paragraph.

§ 7-105. Cooperation of all peace officers.—It shall be the duty of all officers of the counties and of the cities to assist the domestic relations court in any and all ways in the line of their official duty as fully and to the same extent and in the same manner as they heretofore have been authorized and required to do in the case of all other courts. (1929, c. 343, s. 5.)

§ 7-106. Procedure, practice and punishments.—The procedure, practice, and punishments imposed in the domestic relations court as established in this article shall be the same as now provided by law in courts now having original jurisdiction of the various offenses or causes enumerated in this article,

and the judge of the said domestic relations court is hereby granted the power to prescribe such rules and fix such modes of procedure, as, in his discretion, will best effect the purposes for which said court is created.

Such court, when established, shall adopt an official seal, shall keep and preserve adequate dockets and other records of its proceedings, and shall be a court or record. The judge, and clerk and deputy clerks of said court shall have power to administer oaths and to issue warrants and other process in said court. (1929, c. 343, s. 6; 1943, c. 470, s. 3; 1967, c. 962, s. 3.)

Editor's Note. — The 1943 amendment added the second paragraph of this section.

For comment on the 1943 amendment to this and the following section, see 21 N.C.L. Rev. 343.

The 1967 amendment included deputy clerks in the last sentence.

§ 7-107. Right of appeal to superior court; trial de novo.—Wherever in this article criminal jurisdiction is conferred upon the domestic relations court there shall be the same right of appeal from this court as from recorders' courts or other inferior criminal courts to the superior court, and the same rules and regulations of such appeals from inferior courts shall apply to appeals from this court, and in the superior court the trial shall be de novo. This provision shall apply also to the trials in bastardy cases, and cases involving the custody of juveniles. (1929, c. 343, s. 7; 1943, c. 470, s. 4.)

Editor's Note. — The 1943 amendment made this section applicable to cases involving the custody of juveniles.

§ 7-108. Offenses before court to be petty misdemeanors; demand for jury trial; appearance bonds.—All the offenses for the trial of which the domestic relations court is given jurisdiction are hereby declared to be petty misdemeanors punishable as now prescribed by law. On the trial before such domestic relations court, if a jury trial is demanded, the cause shall be therewith transferred for trial to some criminal term of the superior court of the counties in which the domestic relations court is situated. The defendant or defendants shall be held under an adequate bond to secure his or their attendance at the criminal term of the superior court to which the record is transferred. If in the exercise of the jurisdiction hereinbefore conferred upon the domestic relations court, it should appear that a felony has been committed, said court shall have jurisdiction and authority upon proper investigation to bind over the alleged felon in all cases in which probable cause is found, to the superior court of the county, under proper bond and recognizances. (1929, c. 343, s. 8.)

Local Modification.—Forsyth: 1959, c. 1290, s. 2.

§ 7-108.1. Docketing judgments forfeiting bonds.—A transcript of any judgment of a domestic relations court rendering absolute a bond forfeiture may be docketed in the office of the clerk of superior court of the county in which said judgment was rendered, and, when so docketed, said judgments shall have the full force and effect of all judgments docketed in the superior court. (1965, c. 989.)

§ 7-109. Pending cases in juvenile court transferred to new court.—All causes pending in the juvenile court of the county or city at the time of the organization of any domestic relations court within said county or city, shall be transferred to the domestic relations court for final adjudication. (1929, c. 343, s. 9.)

§ 7-110. Cases transferred from superior court.—Upon the establishment of a domestic relations court as authorized in this article, the clerk of the superior court and the clerk of any inferior criminal court of the county shall immediately transfer from the superior court and from any inferior criminal courts of the county to such domestic relations court all actions pending in the superior court of which the domestic relations court has jurisdiction as in this

article conferred, whether such actions are untried or tried and retained for judgment, sentence or further orders, and the domestic relations court shall immediately have jurisdiction of such actions and shall thereafter try, enter further orders or dispose of such actions in the same manner and to the same extent as if said actions had been initiated in said domestic relations court. (1941, c. 208, s. 1; 1949, c. 600.)

Editor's Note. — The 1949 amendment inserted the provisions for transfer of cases from inferior criminal courts to domestic relations courts. For brief comment on amendment, see 27 N.C.L. Rev. 441.

§ 7-111. Discontinuance of court.—After the establishment of any domestic relations court by any county commissioners or by the governing authorities of a particular city, or the establishment of a joint county-city court of domestic relations, such board, governing authorities, or both, may, by resolution or resolutions, discontinue any such court. (1941, c. 208, s. 2½.)

Local Modification.—Guilford: 1959, c. 1071; Wake: 1953, c. 469.

SUBCHAPTER V. JUSTICES OF THE PEACE.

ARTICLE 14.

Election and Qualification.

§ 7-112. Constitution, article seven, abrogated; exceptions.—All the provisions of article VII of the Constitution inconsistent with this chapter, except those contained in §§ 7 and 12 are hereby abrogated, and the provisions of this article substituted in their place; subject, however, to the power of the General Assembly to alter, amend or abrogate the provisions of this article, and to substitute others in their stead, as provided in § 13 of article VII of the Constitution. (1876-7, c. 141, s. 7; Code, s. 818; Rev., s. 1408; C. S., s. 1462.)

Cross References.—As to abolition of office of justice of the peace, see § 7A-176. As to magistrates, see §§ 7A-170 to 7A-175.

§ 7-113. Election and number of justices.—At every general election held for members of the General Assembly there shall be elected in each township three justices of the peace, and for each township in which any city or incorporated town is situated, one justice of the peace for every one thousand inhabitants in such city or town, who shall hold office for a term of two years from and after the first Monday in December next after their election. (1876-7, c. 141; Code, s. 819; 1895, c. 157; 1905, cc. 35, 44, 148; Rev., s. 1409; 1907, c. 225; 1909, cc. 177, 716; C. S., s. 1463.)

Local Modification. — Bertie, Caswell, Chowan, Franklin: C.S. 1464; Gaston: 1931, c. 256; Granville: C.S. 1464; New Hanover (City of Wilmington): C.S. 1464; Vance: C.S. 1466; Wake: 1937, c. 113; Warren: C.S. 1465; Yancey: 1959, c. 228; City of Washington: 1957, c. 898.

Number Elected.—Under the legislation of 1895, since continued, each township is entitled to elect three justices of the peace on one ballot, and no more, unless the township shall contain a city or incorporated town with as much as 1,000 inhabitants, in that case one additional justice for every 1,000 inhabitants. A ticket containing more names than the elector has a right to vote for, is to be void, and not counted. Mitchell v. Alley, 126 N.C. 84, 35 S.E. 231 (1900).

Cited in McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961).

§ 7-114. Oath of office; vacancies filled.—Every person elected or appointed a justice of the peace, before his term of office begins or within thirty days thereafter, shall take and subscribe the prescribed oaths of office before the clerk of the superior court, who shall file the same. All elections of justices of the peace by the General Assembly or by the people shall be void unless the persons so elected shall qualify as herein directed. All original vacancies in the

offices of justice of the peace occurring before qualification as provided in this section shall be filled for the term by the Governor. All other vacancies shall be filled by the clerk of the superior court. (Code, s. 821; 1901, c. 37; Rev., s. 1411; C. S., s. 1467.)

Cross Reference.—As to forms of oaths, see §§ 11-6, 11-7, 11-11; N.C. Const., Art. VI, § 7.

Section Constitutional.—This section is not unconstitutional. Gilmer v. Holton, 98 N.C. 26, 3 S.E. 812 (1887).

Duty of Clerk.—It is the duty of the clerk to administer the oath to the justices elected or appointed. Gilmer v. Holton, 98 N.C. 26, 3 S.E. 812 (1887).

Appointed by Clerk.—The authority of the clerks of the superior courts to appoint justices of the peace is confined to vacancies caused by the death, resignation or other causes during the term. Gilmer v. Holton, 98 N.C. 26, 3 S.E. 812 (1887); Etheridge v. Leary, 227 N.C. 636, 43 S.E.2d 847 (1947).

Misbehavior in Office. — If one elected to an office takes possession of the same and engages in the exercise of its duties and misbehaves by taking unlawful and extortionate fees, he will be liable for such misbehavior, and may be indicted therefor, notwithstanding the fact he had failed to take the oath of office. State v. Cansler, 75 N.C. 442 (1876).

Cited in McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961).

§ **7-114.1. Bond required.**—(a) Amount and Conditions; Premiums.—Every justice of the peace shall, before exercising any of the functions of his office, furnish a bond, either corporate or personal, with good and sufficient surety, approved by the clerk of the superior court, in the amount of one thousand dollars ($1,000.00) payable to the State of North Carolina and conditioned upon the faithful performance of his duties and upon a correct and proper accounting for all funds coming into his hands by virtue or color of his office. Premiums on such bonds shall be paid by the justice of the peace concerned.

(b) Penalty for Violation.—Any person exercising any of the official functions of a justice of the peace without having first complied with the provisions of this section shall be subject to a penalty of one hundred dollars ($100.00) for every such violation, such penalty to be recoverable in a civil action by any taxpayer of the county in which such violation occurs.

(c) Counties Exempted.—This section shall not apply to Alleghany, Ashe, Bertie, Bladen, Cabarrus, Caldwell, Caswell, Chatham, Clay, Columbus, Dare, Davie, Duplin, Franklin, Granville, Guilford, Harnett, Haywood, Hertford, Hoke, Hyde, Jackson, Johnston, Lee, Lincoln, McDowell, Mitchell, Montgomery, Northampton, Onslow, Pamlico, Pender, Perquimans, Person, Randolph, Robeson, Rowan, Scotland, Transylvania, Tyrrell, Vance, Yadkin and Yancey counties.

(d) Police Officers Serving as Justices.—Police officers who also serve as justices of the peace are exempt from the provisions of this section so long as they exercise their powers and authorities as justices of the peace solely for the purpose of signing warrants and accepting bonds returnable to any court. (1957, c. 1380.)

The issuance of a warrant by a justice of the peace who had not given bond upon appointment to the office in compliance with this section, is the act of a justice of the peace de facto, and the warrant is not subject to collateral attack. State v. Porter, 272 N.C. 463, 158 S.E.2d 626 (1968).

§ **7-115. Appointment and removal by resident judge.**—In addition to other methods provided by law for appointment or election of a justice of the peace, the resident judge of the superior court of the district in which a county is situated may, from time to time at his discretion, appoint one or more fit persons as justice of the peace in said county who shall hold office for two years from and after the date of appointment: Provided, that the appointing judge shall find to his satisfaction that there is then existing a need for such additional justice or justices of the peace. The appointing judge shall issue to each justice of the peace so appointed a certification in writing of such appointment, a copy of which shall be filed with the clerk of the court, before whom shall be taken

and subscribed the oath of office, and the clerk shall note on his minutes the qualification of the justice of the peace. For such qualification the clerk shall collect a fee of seven dollars and fifty cents ($7.50) which shall be remitted to the Department of Revenue at the time required for remitting the taxes collected pursuant to G.S. 105-93 for the use of the General Fund.

Any justice of the peace so appointed may, after due notice and hearing, be removed from office by the resident judge of the superior court of the district in which the county is situated, for misfeasance, malfeasance, nonfeasance or other good cause.

Any person holding himself out to the public as a justice of the peace, or any person attempting to act in such capacity after his appointment shall have been revoked, shall be guilty of a misdemeanor and upon conviction be punishable in the discretion of the court, as provided for in other misdemeanors. (1917, c. 40; C. S., s. 1468; 1927, c. 116; 1955, c. 910, s. 2.)

Editor's Note. — The 1955 amendment, effective July 1, 1955, rewrote this section which formerly authorized the Governor to appoint justices of the peace.

Section Cumulative.—This section does not purport to repeal and abrogate the other general methods of electing and appointing justices of the peace. It specifically provides that it is in addition to all other methods of appointment. McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961).

The failure of a justice of the peace to collect fees for the service of civil process upon the issuance of the process at the instance of certain business firms, and his action in waiting until the end of the month to collect such fees, is insufficient to support a finding of malfeasance or bad faith on the part of such justice of the peace which would justify his removal from office, any monetary loss from such practice being recoverable by action against such justice of the peace personally and on his official bond. Swain v. Creasman, 255 N.C. 546, 122 S.E.2d 358 (1961).

This section and §§ 128-16 through 128-20 are not in pari materia. State ex rel. Swain v. Creasman, 260 N.C. 163, 132 S.E.2d 304 (1963).

This section, relating to the removal of a justice of the peace by the resident judge appointing him, is restricted in its scope and provides a procedure different from that specified in §§ 128-16 through 128-20. State ex rel. Swain v. Creasman, 260 N.C. 163, 132 S.E.2d 304 (1963).

Where a petition for removal from office of a justice of the peace was heard by the resident judge who appointed him, and the judgment recites that the petition was heard under the provisions of this section and the judge heard the proceeding in chambers after notice to the justice of the peace, instead of fixing the hearing at the next term after the petition was filed, it was held that the proceeding was under this section and not under §§ 128-16 through 128-20. State ex rel. Swain v. Creasman, 260 N.C. 163, 132 S.E.2d 304 (1963).

Justice of the peace is not entitled to recover costs and attorney's fees upon final judgment in his favor in a proceeding under this section to remove him from office, since this section, unlike § 128-20, makes no provision for such recovery. State ex rel. Swain v. Creasman, 260 N.C. 163, 132 S.E.2d 304 (1963).

The provisions of § 128-20, relating to the recovery of costs and attorney's fees, are not applicable to a proceeding under this section. State ex rel. Swain v. Creasman, 260 N.C. 163, 132 S.E.2d 304 (1963).

Stated in State v. Hockaday, 265 N.C. 688, 144 S.E.2d 867 (1965).

§ **7-116. Forfeiture of office.**—When any justice of the peace removes out of his township and does not return therein for the space of six months, he thereby forfeits and loses his office; and any such justice presuming to act thereafter, contrary to this section, unless reelected or reappointed, shall be guilty of a misdemeanor. (Code, s. 822; Rev., ss. 1412, 3589; C. S., s. 1469.)

§ **7-117. Resignation.**—Justices of the peace wishing to resign must deliver their letters of resignation to the clerk of the superior court, who shall file the same. (Code, s. 823; Rev., s. 1413; C. S., s. 1470.)

§ **7-118. Removal and disqualification for crime.**—Upon the conviction of any justice of the peace of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified

from holding or enjoying any office of honor, trust or profit under this State. (Code, s. 826; Rev., s. 1414; C. S., s. 1471.)

Criminal Liability. — The functions of a justice of the peace are ministerial, in preserving the peace, hearing charges against offenders and issuing warrants thereon, examining the parties and bailing or committing them for trial, and in the exercise of such functions, if he act corruptly, oppressively or from any other bad motive, he is liable to indictment. State v. Sneed, 84 N.C. 817 (1881).

§ 7-119. Justice may hold other office.—Any justice of the peace may accept a civil office or appointment of trust or profit, under the authority of the United States, the duties of which confine him to the county where he is resident. (Const., art. 14, s. 7; Code, s. 825; Rev., s. 1415; C. S., s. 1472.)

Cross Reference.—See § 128-1; N.C. Const., Art. XIV, § 7, and note thereto.

Justice of Peace May Also Be Recorder of City Court.—Under N.C. Const., Art. 14, § 7, excepting a justice of the peace from the inhibition against one holding two offices of trust or profit, one may be both a justice of the peace and the recorder of a city recorder's court. State v. Lord, 145 N.C. 479, 59 S.E. 656 (1907).

§ 7-120. Validation of official acts of certain justices of the peace.—Each and all of the official acts of justices of the peace appointed by chapter three hundred twenty-one. Public Laws of one thousand nine hundred thirty-one, performed after the expiration of their terms on April first, one thousand nine hundred thirty-seven, and before March twenty-first, one thousand nine hundred thirty-nine, including all judgments rendered, probates taken, marriages performed, and any and all other acts whatsoever, are hereby in all respects validated, ratified and confirmed. (1939, c. 268.)

Article 15.

Jurisdiction.

§ 7-121. Jurisdiction in actions on contract.—Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract, except—

(1) Wherein the sum demanded, exclusive of interest, exceeds two hundred dollars.

(2) Wherein the title to real estate is in controversy. (Const., art. 4, s. 27; Code, s. 834; Rev., s. 1419; C. S., s. 1473.)

I. Actions Ex Contractu.
II. Title to Land in Controversy.

Cross References.

See § 7-124 and notes. As to petition of insolvent debtor before justice of peace for discharge from imprisonment, see §§ 23-25 through 23-27.

I. ACTIONS EX CONTRACTU.

In General. — Every action to recover a sum of money due by contract, not in excess of two hundred dollars, etc., is required by this section to be originally brought in the court of a justice of the peace, unless contrary to some other legislative enactment. Singer Sewing Mach. Co. v. Burger, 181 N.C. 241, 107 S.E. 14 (1921).

Distribution of Jurisdiction Question of Procedure.—The interpretation of the Constitution and statutes as to the distribution of jurisdiction among the superior and inferior courts, and courts of the justices of the peace, involves no rule of property, but only of procedure. Singer Sewing Mach. Co. v. Burger, 181 N.C. 241, 107 S.E. 14 (1921).

The jurisdiction of a justice of the peace is limited and special—not general—and he can only exercise the power conferred upon him by the N.C. Const., Art. IV, § 27, and statutes. He has no equitable powers. Hopkins v. Barnhardt, 223 N.C. 617, 27 S.E.2d 644 (1943).

Jurisdiction of Superior Court.—The superior court has no original jurisdiction of a legal cause of action, founded on contract, when in no event can the plaintiff recover as much as $200, proper jurisdiction being in the court of a justice of the peace. Howard v. Mutual Reserve Fund Life Ins. Ass'n, 125 N.C. 49, 34 S.E. 199 (1899); Sloan v. Carolina Cent. R.R., 126 N.C. 487, 36 S.E. 21 (1900).

Allegations of a complaint are construed liberally in the pleader's favor with a view to substantial justice between the parties, and where the question of jurisdiction between the superior court and that of a justice of the peace arises, depending upon

the amount involved, and whether the action is ex contractu or ex delicto, the courts are disposed to construe the complaint in favor of the jurisdiction chosen. Mitchem v. Pasour, 173 N.C. 487, 92 S.E. 322 (1917); Coble v. Reap, 269 N.C. 229, 152 S.E.2d 219 (1967).

A justice of the peace has exclusive original jurisdiction of causes of action arising ex contractu when the sum demanded is not in excess of $200, and the superior court has no original jurisdiction of such actions. Jenkins v. Winecoff, 267 N.C. 639, 148 S.E.2d 577 (1966).

Judgment a Contract. — A judgment is a contract within the meaning of this section. Moore v. Nowell, 94 N.C. 268 (1886).

Whether Action in Tort or on Contract. — To determine whether an action is brought in tort or on contract the complaint alone will be considered, and where the complaint alleges the wrongful demand of one hundred dollars by the defendant of the plaintiff's wife, as money due to the defendant under a mistake in the payment of a check, and alleges that the money was paid the defendant by plaintiff's wife upon insistent demand, the complaint alleges an action in tort within the original jurisdiction of the superior court under N.C. Const., Art. IV, § 27, and §§ 7-121 and 7-122, and not an action on contract within the jurisdiction of a justice of the peace under this section. Roebuck v. Short, 196 N.C. 61, 144 S.E. 515 (1928).

Where plaintiff's allegations were to the effect that he purchased specified items of personalty from defendant and made a partial payment under agreement that he would pay the balance when he picked up the articles, and that defendant thereafter sold the personalty to a third party, to plaintiff's actual damage in the amount of $70, the complaint was sufficient to allege a cause of action in tort for conversion, and defendant's demurrer to the jurisdiction on the ground that the action was ex contractu and within the exclusive original jurisdiction of a justice of the peace, should have been overruled. Coble v. Reap, 269 N.C. 229, 152 S.E.2d 219 (1967).

Counterclaims in excess of the jurisdictional amount of a justice's court may not be recovered in that court, and are allowed to be pleaded only for the purposes of setoff and recoupment as a bar to the plaintiff's demand. Singer Sewing Mach. Co. v. Burger, 181 N.C. 241, 107 S.E. 14 (1921).

In an action before a justice of the peace for a sum due by note and within his jurisdiction, it was held, that a counterclaim consisting of an alleged indebtedness arising out of unadjusted partnership dealings between the parties, could not be allowed; the jurisdiction to settle such matters being in a court of equity. Love v. Rhyne, 86 N.C. 576 (1882).

Misjoinder of Causes. — Where two causes are set out and jurisdiction can be attached on only one, the justice of the peace may try that one, rejecting the other. Railroad v. Hardware Co., 135 N.C. 73, 47 S.E. 234 (1904).

Breach of Warranty.—The complaint alleged in substance that plaintiff purchased a mare from defendant, that the defendant warranted the mare to be sound, that in fact the mare had defective eyesight, which was known to defendant, that plaintiff relied upon the representation that the mare was sound, and that plaintiff was damaged in the sum of $125.00 and, as a second cause of action, alleged that as a result of the said wrongful act of defendant, plaintiff had been obliged to feed a worthless mare to his damage in the sum of $100.00. The complaint fails to state a cause of action for fraud in that it fails to allege scienter, but states a cause of action for breach of warranty in the sum of $125.00, which is within the exclusive original jurisdiction of a justice of the peace, the sum claimed for feeding the mare not being within the rule for the determination of the jurisdictional amount, and therefore defendant's demurrer to the action instituted in the superior court was properly sustained. Hill v. Snider, 217 N.C. 437, 8 S.E.2d 202 (1940).

Action for Penalty Plus Attorney's Fees. —Neither the Constitution nor any statutes enacted pursuant thereto, give jurisdiction to justices of the peace in an action for a penalty plus reasonable attorney's fees to be fixed and awarded by the court. Hopkins v. Barnhardt, 223 N.C. 617, 27 S.E.2d 644 (1943).

Waiver of Tort.—Where property is tortiously taken and sold, the owner may waive the tort and maintain an action to recover the proceeds. Brittain v. Payne, 118 N.C. 989, 24 S.E. 711 (1896). See also note to § 7-63. See note of Winslow v. Weitt, 66 N.C. 432 (1872), under § 7-63, analysis line "In General," II, B, 1, a.

Same—Construction. — When the plaintiff can bring his action either in tort or upon contract, the courts, in favor of jurisdiction, will sustain the election of the plaintiff. White v. Eley, 145 N.C. 36, 58 S.E. 437 (1907).

To sustain jurisdiction over the subject matter of an action, the court will liberally construe the pleadings in the pleader's favor, and where the question is whether a

justice of the peace had jurisdiction in contract, and the movant contends the case was ex delicto, and that it was beyond the jurisdiction of the justice of the peace, the court will sustain its jurisdiction if it reasonably appears from the pleadings that it was tried as ex contractu in the justice's court. Higgs-Taft Furniture Co. v. Clark, 191 N.C. 369, 131 S.E. 731 (1926).

Indivisible Cause. — An indivisible cause of action cannot be split in order that separate suits may be brought for the various parts before a justice of the peace. Norvell v. Mecke, 127 N.C. 401, 37 S.E. 452 (1900).

Where a single contract is made for furnishing certain specified articles, at prices fixed for each, the plaintiff cannot be allowed to "split up" the account and recover upon each item. Jarrett v. Self, 90 N.C. 478 (1884).

Where the items of an account are incurred under different contracts an action may be brought on each item before a justice of the peace, the separate items being less than $200. Copland v. Wireless Tel. Co., 136 N.C. 11, 48 S.E. 501 (1904).

A creditor whose account consists of several items, either for goods sold or labor done at different times, each of which is for less than $200, although the aggregate of the account exceeds $200, may sue before a justice for any number of such items not exceeding $200. Boyle v. Robbins, 71 N.C. 130 (1874).

Want of Jurisdiction.—The court will ex mero motu take notice of the want of jurisdiction. Hannah v. Richmond & D.R.R., 87 N.C. 351 (1882).

Objection on Appeal.—When the pleadings before a justice of the peace, in an action on contract, did not show a want of jurisdiction and no objection was made thereto, such objection cannot be made on appeal to the superior court. Cromer Bros. v. Marsha, 122 N.C. 563, 29 S.E. 836 (1898).

Amount Demanded Controlling. — The justice of the peace has jurisdiction of an action upon contract where the summons used as a complaint demands, in good faith, a recovery of $200 or less, though a greater sum could have been demanded. Knight v. Taylor, 131 N.C. 84, 42 S.E. 537 (1902); King Bros. Shoe Store Co. v. Wiseman, 174 N.C. 716, 94 S.E. 452 (1917). The aggregate sum demanded in good faith is the test of the jurisdiction of the court, though this aggregate is made up of several causes of action. Martin v. Goode, 111 N.C. 288, 16 S.E. 232 (1892). For treatment of the amount as fixing jurisdiction and the good faith, etc., required, see notes under § 7-63, analysis line, "Essentials," II, B.

In an action on contract it is the sum demanded in the summons or complaint that fixes the jurisdiction. Cromer Bros. v. Marsha, 122 N.C. 563, 29 S.E. 836 (1898).

Principal and Interest. — The Constitution and this section limit the jurisdiction of justices of the peace in actions upon contract, to where the sum demanded does not exceed two hundred dollars, exclusive of interest; and a justice of the peace has no jurisdiction in an action to recover the balance of the principal due upon a note and interest on the original amount of the note when the original amount thereof exceeded the sum named. Riddle v. Bridgewater Milling Co., 150 N.C. 689, 64 S.E. 782 (1909).

Equitable Causes.—A justice of the peace has no jurisdiction to administer or enforce an equitable cause of action. Wilson v. Life Ins. Co., 155 N.C. 173, 71 S.E. 79 (1911).

A court of a justice of the peace cannot affirmatively administer an equity, and may only pass thereon as a matter of defense. Singer Sewing Mach. Co. v. Burger, 181 N.C. 241, 107 S.E. 14 (1921).

Same — Appeal. — When the plaintiff seeks only equitable relief in a court of a justice of the peace, no jurisdiction can be acquired over the subject matter by the superior court on appeal, the proceedings being void ab initio. Wilson v. Life Ins. Co., 155 N.C. 173, 71 S.E. 79 (1911).

Applied in G.S Miles Co. v. Powell, 205 N.C. 30, 169 S.E. 828 (1933).

II. TITLE TO LAND IN CONTROVERSY.

Cross Reference. — See § 7-124 and sections following and notes thereto.

Jurisdiction.—Justices of the peace can take no jurisdiction over a cause in which title to land is in controversy. Brown v. Southerland, 142 N.C. 225, 55 S.E. 108 (1906). They are prohibited by the Constitution as well as impliedly by this section. Forsythe v. Bullock, 74 N.C. 135 (1876).

Where, under a will devising all of testator's land to his wife, remainder to his nephew (the plaintiff) in fee, except fifty acres in some suitable place and on certain conditions to defendant, and defendant had settled on fifty acres, claiming title thereto as being in a suitable place and conditions having been performed, an action by plaintiff for possession involves the title to land and is not within the jurisdiction of a justice of the peace. Wright v. Harris, 116 N.C. 460, 21 S.E. 693 (1895).

Mere allegation of the defendant that title is in controversy will not oust justice's jurisdiction. — The matter must appear from the evidence or admission of the parties. Jerome v. Setzer, 175 N.C. 391, 95 S.E. 616 (1918).

Title Must Be between Parties to Action.—The question of title, which arrests further proceedings before the justice must be one between the original parties to the action; and jurisdiction once acquired cannot be divested by the intervention of a stranger to the suit, asserting a paramount title in himself. Davis v. Davis, 83 N.C. 71 (1880).

Action Dismissed Judgment for Costs.—If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs. Edwards v. Cowper, 99 N.C. 421, 6 S.E. 792 (1888); Pasterfield v. Sawyer, 132 N.C. 258, 43 S.E. 799 (1903).

Notes Given for Purchase Price of Land.—A justice of the peace has jurisdiction of an action to recover a balance due on a note given for the purchase money of land. McPeters v. English, 141 N.C. 491, 54 S.E. 417 (1906).

Notes on Contract to Convey Land.—A justice of the peace has jurisdiction of an action on a note given for a contract to convey land, the only defense being payment. Patterson v. Freeman, 132 N.C. 357, 43 S.E. 904 (1903).

Recovery of Portion of Crop as Rent.—In an action to recover one third of the crops due as rent under an alleged contract of lease, which the jury found to exist, a justice of the peace had jurisdiction, as the title to land was not involved. Durant v. Taylor, 89 N.C. 351 (1883).

Action between Mortgagor and Mortgagee.—In an action to recover land the jurisdiction of the justice is excluded where the relation is that of mortgagor and mortgagee or vendor and vendee. Hughes v. Mason, 84 N.C. 473 (1881).

Foreclosure of Mortgage. — Because of the equity growing out of the relation of mortgagor and mortgagee when the former seeks to have the mortgaged premises foreclosed for the nonpayment of the debt, the superior court has jurisdiction, when the amount secured is for a less sum than two hundred dollars. Singer Sewing Mach. Co. v. Burger, 181 N.C. 241, 107 S.E. 14 (1921).

Landlord and Tenant Act. — A court of a justice of the peace has no jurisdiction under the landlord and tenant act to try title to land. And where it appears that title is involved or that there are equities involved as to the land a justice of the peace has no jurisdiction. Parker v. Allen, 84 N.C. 466 (1881).

That the vendee, in a contract for the sale of land, remained silent, when the contract was mutilated under the direction of the vendor, is not sufficient evidence of a change of the relations from vendor and vendee to landlord and tenant, to give a justice of the peace jurisdiction of an action to summarily eject the defendant vendee. Boone v. Drake, 109 N.C. 79, 13 S.E. 724 (1891).

In an action by a purchaser of land with warranty to recover a sum of money paid by him to free the land from a lien, the deed will be introduced to prove the covenants, the title to realty will be involved, and a justice would not have jurisdiction. Hann v. Fletcher, 189 N.C. 729, 128 S.E. 328 (1925).

Rule of Estoppel Gives Justice Jurisdiction.—The rule which estops a tenant to precludes all controversy as to the title deny his landlord's title in summary proceedings by the landlord, and thus gives a justice of the peace jurisdiction. Credle v. Gibbs, 65 N.C. 192 (1871); Davis v. Davis, 83 N.C. 71 (1880).

In a proceeding before a justice of the peace under the Landlord and Tenant Act, a defendant who does not deny having entered as the tenant of the plaintiff is estopped from setting up a superior title existing at the date of the lease or subsequently acquired from a third person. Heyer v. Beatty, 76 N.C. 28 (1877).

Penalty.—The title to land is not in controversy in a proceeding to recover a penalty prescribed by a town charter for obstructing a street. Henderson v. Davis, 106 N.C. 88, 11 S.E. 573 (1890).

§ 7-122. Jurisdiction in actions not on contract. — Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed fifty dollars: Provided, however, that justices of the peace shall have concurrent jurisdiction in claim and delivery proceedings wherein the value of the property in controversy does not exceed two hundred dollars ($200.00) and provided, further, that the plaintiff or petitioner in such action has a vendor-vendee relationship with the defendant with respect to the property in question. (Const., art. 4, s. 27; Code, s. 887; Rev., s. 1420; C. S., s. 1474; 1963, c. 383.)

Cross References.—See § 7-121 and note thereto. As to complaint alleging cause of action in tort for conversion, see note to § 7-121.

Editor's Note. — The 1963 amendment added the two provisos.

Generally.—In actions ex contractu justices of the peace have jurisdiction, when the sum demanded does not exceed two hundred dollars, but in actions ex delicto, their jurisdiction is limited to cases wherein the value of the property does not exceed fifty dollars. Noville v. Dew, 94 N.C. 43 (1886).

Justices of the peace have concurrent jurisdiction with the superior courts of actions for torts where the value of the property in controversy does not exceed fifty dollars. Harvey v. Hambright, 98 N.C. 446, 4 S.E. 187 (1887).

It is said in Duckworth v. Mull, 143 N.C. 461, 55 S.E. 850 (1906), "We think that the decisions of this court, already made, lead necessarily to the conclusion that the clause of this section comprehends, and was intended to comprehend, all actions ex delicto; that the term, 'property in controversy,' here used as determinative of jurisdiction, by correct interpretation, means the value of the injury complained of and involved in the litigation; and where a plaintiff, in good faith, states or limits his demand in actions of this character at fifty dollars or less, the justice, as provided by the statute, has jurisdiction concurrent with the superior court to hear and determine the matter."

Jurisdiction Essential.—A judgment rendered by a justice of the peace in an action in which he has no jurisdiction is void. Noville v. Dew, 94 N.C. 43 (1886).

Damages.—A justice of the peace has jurisdiction of an action for damages not exceeding fifty dollars, and for injury to personal property, though such property be of greater value than fifty dollars. Malloy v. City of Fayetteville, 122 N.C. 480, 29 S.E. 880 (1898).

Remittance of Excess Will Not Give Jurisdiction.—Where, in an action of claim and delivery, it appears that the value of the property exceeds fifty dollars, it at least ousts the jurisdiction of the justice, and the plaintiff cannot confer jurisdiction by a remitter. Noville v. Dew, 94 N.C. 43 (1886).

Jurisdictional Amount for Counterclaims.—For note on problem arising from counterclaim exceeding jurisdictional limit of court, see 32 N.C.L. Rev. 231 (1954).

Priority of Proceedings as Determining Jurisdiction.—Where two or more courts have equal and concurrent jurisdiction of a case, that court in which suit is first brought acquires jurisdiction of it, which excludes the jurisdiction of the other courts. Childs v. Martin, 69 N.C. 126 (1873).

Irregular Proceedings.—Where jurisdiction is concurrent, and a case is carried by appeal to the superior court, and the appellant files an answer under leave of the court and goes to trial without objection, the court will have cognizance of the matter by virtue of its original jurisdiction of the subject matter of the action, and by the consent the parties thus manifested, however irregular the proceedings may have been in the justice's court. Boing v. Raleigh & G.R.R., 87 N.C. 360 (1882).

Waiver on Appeal. — Plaintiff brought suit in the court of a justice of the peace claiming a debt of fifty dollars, and also possession of a horse and wagon, under a certain mortgage. On appeal from the justice's judgment to the superior court plaintiff offered to remit his claim for the personal property and declare only for the debt. It was held, that he had a right to take such a course in his discretion, and that his honor erred in denying him that privilege. Jones v. Palmer, 83 N.C. 303 (1880).

Affidavit of Justice Not Conclusive. — Where the record of the justice of the peace has been lost, and only the judgment showing a recovery of the jurisdictional amount ex contractu appears in the trial on appeal, upon defendants' motion to dismiss for want of jurisdiction, an affidavit of the justice to the effect that the action was in tort is not conclusive. Higgs-Taft Furniture Co. v. Clark, 191 N.C. 369, 131 S.E. 731 (1926).

Applied in Coble v. Reap, 269 N.C. 229, 152 S.E.2d 219 (1967).

§ 7-123. Action dismissed for want of jurisdiction; remitter. — Where it appears, in any action brought before a justice, that the principal sum demanded exceeds two hundred dollars, the justice shall dismiss the action and render a judgment against the plaintiff for the costs, unless the plaintiff shall remit the excess of principal, above two hundred dollars, with the interest on said excess, and shall, at the time of filing his complaint, direct the justice to make this entry: "The plaintiff, in this action, forgives and remits to the defendant so much of the principal of this claim as is in excess of two hundred dollars, together

with the interest on said excess." (1868-9, c. 159, s. 3; 1876-7, c. 63; Code, s. 835; Rev., s. 1421; C. S., s. 1475.)

Excess Remitted. — Where the amount recovered exceeds $200, the justice has jurisdiction if the plaintiff remits the excess. Cromer Bros. v. Marsha, 122 N.C. 563, 29 S.E. 836 (1898); Brock v. Scott, 159 N.C. 513, 75 S.E. 724 (1912).

It is only when the principal sum demanded exceeds $200, that the plaintiff is required to remit the excess above that amount in order to give the justice jurisdiction. Brantley v. Finch, 97 N.C. 91, 1 S.E. 535 (1887).

Effect of Remittitur Where Jurisdiction Entirely Derivative. — Where a counterclaim, filed to an action brought before a justice, amounted to more than $200.00, the want of jurisdiction as provided by this section could not be cured by entering a remittitur for the excess in the superior court, as the jurisdiction of the superior court in appeals from justices of the peace is entirely derivative, and if the justice had no jurisdiction in the action, as it was before him, the superior court can derive none by amendment. Perry v. Pulley, 206 N.C. 701, 175 S.E. 89 (1934).

Failure to Use Statutory Formula.—Objection to a failure to use the formula provided in this section should be made in the justice's court. Cromer Bros. v. Marsha, 122 N.C. 563, 29 S.E. 836 (1898).

Waiver.—The plaintiff having remitted the amount of damages arising on contract in excess of $200, so as to confer jurisdiction on the court of a justice of the peace, and having taken a voluntary nonsuit in the superior court on defendants' appeal, is deemed to have waived the excess so remitted in his action on the same contract brought in the superior court, and his recovery is limited to the amount sued for in the justice's court. Brock v. Scott, 159 N.C. 513, 75 S.E. 724 (1912).

Remittance of Counterclaim on Appeal. — The jurisdiction of the superior court in appeals from justices of the peace is entirely derivative, and if the justice had no jurisdiction in the action, as it was before him, the superior court can derive none by amendment. So, where a counterclaim, filed to an action brought before a justice, amounted to more than $200, the want of jurisdiction could not be cured by entering a remittitur for the excess in the superior court. Ijames v. McClamroch, 92 N.C. 362 (1885).

Justice Has Jurisdiction to Recover Salary Which Failed to Equal Amount Stipulated in the "President's Re-Employment Agreement".—A justice of the peace has jurisdiction of an action on contract to recover the amount by which the salary paid plaintiff failed to equal the amount stipulated in the "President's Re-Employment Agreement," voluntarily signed by defendant employer, when the amount demanded does not exceed two hundred dollars. James v. Sartin Dry Cleaning Co., 208 N.C. 412, 181 S.E. 341 (1935).

§ 7-124. Title to real estate in controversy as a defense.—In every action brought in a court of a justice of the peace, where the title to real estate comes in controversy, the defendant may, either with or without other matter of defense, set forth, in his answer, any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. (Code, s. 836; Rev., s. 1422; C. S., s. 1476.)

Cross Reference.—See § 7-121 and note.

Answer in Writing Necessary.—The title to real estate cannot be drawn into controversy by the defendant on a trial in a justice's court except by delivering to the justice an answer in writing that such title will come in question. Evans v. Williamson, 79 N.C. 87 (1878); Harwell v. Rohrabacher, 243 N.C. 255, 90 S.E.2d 499 (1955).

The evidence at the trial must tend to show that the title is in issue. Pasterfield v. Sawyer, 132 N.C. 258, 43 S.E. (1903). And the trial will proceed until it is apparent that this is true. McDonald v. Ingram, 124 N.C. 272, 32 S.E. 677 (1899).

Mere Allegation of Defendant that Title Is in Controversy.—See note of Jerome v. Setzer, 175 N.C. 391, 95 S.E. 616 (1918), under § 7-121, analysis line II.

Judgment in Action in Which Defenses Should Have Been Set Up as Bar to Subsequent Action Thereon.—A possessory action in ejectment in the court of a justice of the peace terminates in that court upon an issue of title to lands or of equitable rights therein being raided by the defendant, and in the superior court the defendant is required to set up his equities, if any he have, and where he fails to do so an independent action by him thereon is barred by the prior judgment, it being as-

sumed that the court rendering the judgment had jurisdiction of the parties and the subject matter of the action. Ogburn v. Booker, 197 N.C. 687, 150 S.E. 330 (1929).

§ 7-125. Title to real estate in controversy, action dismissed.—If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs. (Code, s. 837; Rev., s. 1423; C. S., s. 1477.)

Cross Reference.—See §§ 7-121, 7-124 and notes.

"Real Estate" Defined.—The words "real estate" in this section mean freehold estate. Foster v. Penry, 77 N.C. 160 (1877).

Allegation in Writing Not Required.—It is not necessary that an allegation in writing that the title to real estate is in controversy be made. Edwards v. Cowper, 99 N.C. 421, 6 S.E. 792 (1888). But the trial will proceed until it is apparent from the evidence that the question of title is involved. McDonald v. Ingram, 124 N.C. 272, 32 S.E. 677 (1899).

Duty of Justice to Dismiss Action. — When it appears on the trial that the title to real estate is in controversy, it is the duty of the justice to dismiss the action. Hudson v. Hodge, 139 N.C. 308, 51 S.E. 955 (1905).

Stated in Nesbit v. Turrentine, 83 N.C. 536 (1880); Wright v. Harris, 116 N.C. 460, 21 S.E. 693 (1895).

§ 7-126. Another action in superior court.—When an action, before a justice, is dismissed upon answer, and proof by the defendant, that the title to real estate is in controversy in the case, the plaintiff may prosecute an action for the same cause in the superior court, and the defendant shall not be admitted in that court to deny the jurisdiction by an answer contradicting his answer in the justice's court. (Code, s. 838; Rev., s. 1424; C. S., s. 1478.)

Purpose of Section.—The last clause of this section was passed to prevent the hardship, which would necessarily arise if a defendant could have an action dismissed by a magistrate on his plea that title to real estate is in question, and then, when suit is brought by the same plaintiff for the same cause of action in the superior court, he should be allowed to plead that title to the land did not come in controversy, and have the cause dismissed there. To prevent such absurdity this statute was passed, so that if, on defendants' motion, it is adjudged in the magistrate's court that title to real estate will come in controversy, such finding shall be conclusive between same parties in the new action. Peck v. Culberson, 104 N.C. 425, 10 S.E. 511 (1889).

Dismissal upon Answer Essential.—Recourse may not be had to the provisions of this section where it does not appear that the action before the justice was dismissed upon answer and proof by defendant that the title to real estate was in controversy. Brown v. Southerland, 142 N.C. 225, 55 S.E. 108 (1906). See note of Evans v. Williamson, 79 N.C. 87 (1878), under § 7-124.

Where, however, there is a failure to file the written answer with the justice, the defendant is not estopped from filing such answer in the superior court and denying jurisdiction. Evans v. Williamson, 79 N.C. 87 (1878).

§ 7-127. Justice may act anywhere in county.—A justice of the peace may issue a summons or other process anywhere in his county, but he shall not be compelled to try a cause out of the township for which he was elected or appointed. (Code, s. 824; Rev., s. 1425; C. S., s. 1479.)

Local Modification. — Caldwell: 1951, c. 608; Harnett: 1959, c. 567; Sampson: 1957, c. 1354.

Issuance of Process When Justice out of Township.—A justice may issue process while he is anywhere in his county, provided he hears the matter in his own township. Dictum in Davis v. Sanderlin, 119 N.C. 84, 25 S.E. 815 (1896).

§ 7-128. Punishment for contempt in certain cases. — If any person shall profanely swear or curse in the hearing of a justice of the peace, holding court, the justice may commit him for contempt, or fine him not exceeding five dollars. (1741, c. 30, P. R.; R. C., c. 115; Code, s. 848; Rev., s. 1426; C. S., s. 1480.)

Cross References.—As to courts and officers empowered to punish for contempt, see § 5-6. As to acts punishable as for contempt, see § 5-8. As to penalty of witness refusing to testify in action against railroad before a justice of peace, see § 7-146.

§ 7-129. Jurisdiction in criminal actions. — Justices of the peace have exclusive original jurisdiction of all assaults, assaults and batteries, and affrays, where no deadly weapon is used and no serious damage is done, and of all criminal matters arising within their counties, where the punishment prescribed by law does not exceed a fine of fifty dollars or imprisonment for thirty days: Provided, that justices of the peace shall have no jurisdiction over assaults with intent to kill, or assaults with intent to commit rape, except as committing magistrates: Provided further, that nothing in this section shall prevent the superior or criminal courts from finally hearing and determining such affrays as shall be committed within one mile of the place where and during the time such court is being held; nor shall this section be construed to prevent said courts from assuming jurisdiction of all offenses whereof exclusive original jurisdiction is given to justices of the peace if some justice of the peace, within twelve months after the commission of the offense, shall not have proceeded to take official cognizance of the same. (Const., art. 4, s. 27; Code, s. 892; 1889, c. 504, s. 2; Rev., s. 1427; C. S., s. 1481; 1955, c. 1345, s. 3.)

Cross References.—As to jurisdiction of justice of peace to require defendant to enter recognizance to keep the peace, see § 15-32. For statute divesting inferior courts in most counties of exclusive original jurisdiction in criminal actions, see § 7-64.

Editor's Note. — The 1955 amendment inserted the word "not" in line five.

Generally. — Until the expiration of six months (now twelve) from the commission of the offense justices of the peace have exclusive jurisdiction of all misdemeanors where the punishment cannot exceed a fifty dollar fine or thirty days imprisonment; after the expiration of that their jurisdiction is concurrent with that of the superior court. State v. Roberts, 98 N.C. 756, 3 S.E. 682 (1887).

Concurrent Jurisdiction. — In criminal actions, as in civil actions, although the justice of the peace has been given "exclusive" original jurisdiction in certain instances, other courts have been granted jurisdiction concurrent with that of the justice of the peace. See, for example, §§ 7-190 and 7-222.

Constitutionality. — This section is constitutional. State v. Johnson, 64 N.C. 581 (1870).

Legislative Power.—It is not competent for the legislature to confer jurisdiction upon magistrates of any offense of which the punishment by law may exceed the limit as fixed by this section (and the Constitution). State v. Fesperman, 108 N.C. 770, 13 S.E. 14 (1891).

Where Punishment Unlimited. — Where the punishment under the particular statutes under which the defendant is being tried is unlimited or is not limited to a fine of $50, or imprisonment for thirty days, it is not a case within the jurisdiction of a justice of the peace. State v. Addington, 121 N.C. 538, 27 S.E. 988 (1897).

Pleading.—In the case falling within the provisions of this section the pleadings must show affirmatively everything necessary to confer the jurisdiction relied upon. State v. Johnson, 64 N.C. 581 (1870).

Same—When Jurisdiction Concurrent.— It is not necessary for a bill of indictment charging assault with a deadly weapon, or with intent to commit rape, to show affirmatively the jurisdiction of the superior court, when that court and a justice's court have concurrent jurisdiction, if the latter court had not "proceeded to take cognizance of the crime within twelve months after its commission" for it is for the defendant to show, as matter of defense, the fact that jurisdiction had been thus taken. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911).

"Deadly Weapon."—A deadly weapon is not one that must kill or that may kill, but it is one which would likely produce death or great bodily harm when used by the defendant in the manner in which it was used. State v. Sinclair, 120 N.C. 603, 27 S.E. 77 (1897).

It is material to show whether or not a deadly weapon was used because it is a determining factor in deciding which court has jurisdiction. State v. Murphy, 101 N.C. 697, 8 S.E. 142 (1888).

Same — Question of Law or Fact. — Whether the weapon used is a deadly weapon is a question of law, where there is no dispute about the facts. State v. Sinclair, 120 N.C. 603, 27 S.E. 77 (1897). But where the deadly character of the weapon is to be determined by the relative

size and condition of the parties and the manner in which it was used, it is proper and necessary, to submit the matter to the jury with proper instructions. State v. Archbell, 139 N.C. 537, 51 S.E. 801 (1905).

"Serious Damage."—The serious injury as used in this section must be such physical injury as gives rise to great bodily pain; mental anguish alone is not serious injury within the meaning of this provision. State v. Nash, 109 N.C. 824, 13 S.E. 874 (1891).

Where it was shown that the defendant assaulted the prosecuting witness with his fist, knocked him down, jumped on him and beat him in a cruel manner, stunning him and badly injuring his eyes, but it did not appear that the injuries were permanent, it was held, that this was "serious damage," and a justice of the peace had no jurisdiction of the offense. State v. Shelly, 98 N.C. 673, 4 S.E. 530 (1887).

Same—Manner of Excepting. — Exception to the jurisdiction of the superior court, or that no serious damage was done, or no deadly weapon was used, and six months (now twelve) had not elapsed, should be made, not by a motion to quash or in arrest of judgment, but by a prayer for instruction to the jury to acquit. State v. Earnest, 98 N.C. 740, 4 S.E. 495 (1887). And it may be also taken advantage of under a plea of not guilty. State v. Berry, 83 N.C. 603 (1880); State v. Reaves, 85 N.C. 553 (1881).

Simple Assault.—In a case of simple assault where no deadly weapon is used and no serious damages inflicted, a justice of the peace has jurisdiction. State v. Johnson, 94 N.C. 863 (1886).

Upon the trial of an indictment for simple assault, the superior court prima facie has jurisdiction, but it is open to the defendant to show that the offense was committed within six months (now twelve) of the finding of the bill. State v. Earnest, 98 N.C. 740, 4 S.E. 495 (1887).

Same—Former Conviction and Acquittal. —A plea of former conviction or acquittal before a justice of the peace for a simple assault is a complete defense on a trial for the same offense in the superior court, unless it should appear in the latter that the defendant making the plea had, in fact, used a deadly weapon or inflicted serious injury, in which case, the justice not having jurisdiction, the proceedings before him would be a nullity. State v. Albertson, 113 N.C. 633, 18 S.E. 321 (1893).

Under this section a magistrate has original jurisdiction of simple assault and on appeal from an acquittal a plea of former jeopardy is good. State v. Myrick, 202 N.C. 688, 163 S.E. 803 (1932).

Applied in State v. Doughtie, 238 N.C. 228, 77 S.E.2d 642 (1953).

Cited in State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930); State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943); State v. Grimes, 226 N.C. 523, 39 S.E.2d 394 (1946); State v. Wilkes, 233 N.C. 645, 66 S.E.2d 129 (1951).

Article 16.

Dockets.

§ 7-130. Justice shall keep docket.—A civil and a criminal docket shall be furnished each justice, at the expense of the county, by the board of county commissioners, in which shall be entered a minute of every proceeding had in any action before such justice. (Code, s. 831; Rev., s. 1416; C. S., s. 1482.)

Not a Court of Record. — A justice's court is not a court of record. Williams v. Bowling, 111 N.C. 295, 16 S.E. 176 (1892); Van Smith Bldg. Material Co. v. Pender, 173 N.C. 55, 91 S.E. 524 (1917).

This has been the ruling in a great number of cases but in Harris v. Singletary, 193 N.C. 583, 137 S.E. 724 (1927), it is intimated that under the requirements of this section, a justice's court is partly one of record.

While the court of a justice of the peace is not a court of record, nevertheless, its judgments are conclusive until reversed, modified or vacated in some proceeding instituted for that purpose; and such court has the same jurisdiction to hear applications to vacate judgments rendered by it as superior courts possess over judgments rendered by them. Whitehurst v. Merchants & Farmers Transp. Co., 109 N.C. 342, 13 S.E. 937 (1891).

While the courts of justices of the peace are not, strictly speaking, courts of record, they possess and may exercise many of the powers of such tribunals. Bailey v. Hester, 101 N.C. 538, 8 S.E. 164 (1888).

§ 7-131. Entries to be made.—The justice shall enter all his proceedings in a cause tried before him in his docket. No part of such proceedings must be

entered on the summons, on the pleadings, or on any other paper in the cause. (Code, s. 840, Rule 13; Rev., s. 1470, Rule 14; C. S., s. 1483.)

Time of Docketing. — A judgment of a justice of the peace, not docketed within a year from the date of its rendition, is dormant and its lost validity can not be restored by docketing the same in the superior court, but only by a new action upon it. Cowen v. Withrow, 114 N.C. 558, 19 S.E. 645 (1894).

§ **7-132. Dockets filed with clerk.**—Each justice of the peace as often as he has filled his docket, shall file the same with the clerk of the superior court for his county. (Code, s. 827; Rev., s. 1417; C. S., s. 1484.)

§ **7-133. Dockets, papers, and books delivered to successor.**—When a vacancy exists, from any cause, in the office of a justice of the peace, whose docket is not filled, or when such justice goes out of office by expiration of his term, such former justice, if living, and his personal representative, if dead, shall deliver such docket, all law and other books furnished him as a justice of the peace, and all official papers, to the clerk of the superior court for his successor, who is authorized to hear and determine any unfinished action on said docket, in the same manner as if such action had been originally brought before such successor. (Code, s. 828; 1885, c. 372; Rev., s. 1418; C.S., s. 1485.)

ARTICLE 17.

Fees.

§ **7-134. Fees of justices of the peace.**—Justices of the peace shall receive the following fees, and none other: For attachment with one defendant, twenty-five cents, and if more than one defendant, ten cents for each additional defendant; transcript of judgment, ten cents; summons, twenty cents; if more than one defendant in the same case, for each additional defendant, ten cents; subpoena for each witness, ten cents; trial when issues are joined, seventy-five cents, and if no issues are joined, then a fee of forty cents for trial and judgment; taking an affidavit, bond or undertaking, or for an order of publication, or an order to seize property, twenty-five cents; for jury trial and entering verdict, seventy-five cents; execution, twenty-five cents; renewal of execution, ten cents; return to an appeal, thirty cents; order of arrest in civil actions, twenty-five cents; warrant of arrest in criminal and bastardy cases, including affidavit or complaint, fifty cents; warrant of commitment, twenty-five cents; taking depositions on order or commission, per one hundred words, ten cents; garnishment for taxes, and making necessary return and certificate of same, twenty-five cents; for hearing petition for widow's year's allowance, issuing notice to commissioners and allotting the same, one dollar; for filing and docketing laborers' liens, fifty cents; probate of a deed or other writing proved by a witness, including the certificate, twenty-five cents; probate of a deed or other writing executed by a married woman, proper acknowledgment and private examination, with the certificate thereof, twenty-five cents; probate of a deed or other writing acknowledged by the signers or makers, including all except married women who acknowledge at the same time, with the certificate thereof, twenty-five cents; probating chattel mortgage, including the certificate, ten cents; for issuing all papers and copies thereof in an action for claim and delivery, and the trial of the same, if issues are joined, when there is one defendant, one dollar and fifty cents, and if more than one defendant in action, fifty cents for each additional defendant, and ten cents for each subpoena issued in said cause, and twenty-five cents for taking the replevy bond, when one is given: Provided, that when the trial of such a cause shall have been removed from before the justice of the peace issuing the said papers, the justices of the peace sitting in trial of such cause shall receive fifty cents of the above costs for such trial and judgment.

Justices of the peace in the counties of Alamance, Alexander, Anson, Bertie, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Chatham, Cherokee, Chowan,

Clay, Columbus, Davidson, Duplin, Edgecombe, Forsyth, Franklin, Gates, Granville, Greene, Halifax, Haywood, Henderson, Hertford, Jackson, Johnston, Jones, Lee, Lenoir, Macon, Madison, Mitchell, Montgomery, Nash, Northampton, Onslow, Orange, Pender, Perquimans, Person, Polk, Richmond, Robeson, Rockingham, Rowan, Stanly, Stokes, Swain, Transylvania, Tyrrell, Vance, Wake, Washington, Watauga, Wayne, Wilkes and Yadkin shall receive the following fees, and none other: For attachment with one defendant, thirty-five cents, and if more than one defendant, fifteen cents for each additional defendant; transcript of judgment, fifteen cents; summons, thirty cents; if more than one defendant in the same case, for each additional defendant, fifteen cents; subpoena for each witness, fifteen cents; trial when issues are joined, one dollar; and if no issues are joined, then a fee of fifty cents for trial and judgment; taking an affidavit, bond, or undertaking, or for an order of publication, or an order to seize property, thirty-five cents; for jury trial and entering verdict, one dollar; execution, thirty-five cents; renewal of execution, fifteen cents; return to an appeal, forty cents; order of arrest in civil actions, thirty cents; warrant of arrest in criminal and bastardy cases, including affidavit or complaint, seventy-five cents; warrant of commitment, fifty cents; taking depositions on order of commission, per one hundred words, fifteen cents; garnishment for taxes and making necessary return and certificate of same, thirty-five cents. (1870-1, c. 130, s. 9; 1883, c. 368; Code, ss. 2135, 3748; 1885, c. 86; 1903, c. 225; Rev., s. 2788; 1907, c. 967; 1917, c. 260; C. S., s. 3923; 1921, c. 113; Ex. Sess., 1921, cc. 38, 64, 67; 1923, cc. 28, 114, 238; 1929, cc. 13, 59; 1931, cc. 51, 303; 1945, c. 150; 1947, c. 337; 1953, c. 1173; 1955, c. 522, s. 3; 1957, c. 776; c. 933, s. 2; c. 1054; 1959, c. 691, s. 1; 1963, c. 1073, s. 1.)

Local Modification. — Catawba: 1949, c. 348; Davidson: 1949, c. 643; Franklin: 1945, c. 167; 1949, c. 258; Granville: 1945, c. 1066; Haywood: 1947, c. 687; Henderson: 1941, c. 324; Jackson: 1949, c. 252; Jones: 1943, c. 313, § 2; Lincoln: 1947, c. 138; Orange: 1935, c. 358; Polk: 1949, c. 729; Randolph: 1947, c. 337; Robeson: 1949, c. 619; Transylvania: 1947, c. 1003; Wake: 1937, c. 136; 1941, c. 165; 1951, c. 866; Warren: 1937, c. 187; Watauga: 1947, c. 983; Alleghany: 1959, c. 1116; Avery: 1957, c. 922; Beaufort: 1957, c. 641; Caldwell: 1959, c. 691, s. 2; Chowan: 915, c. 972; Currituck: 1957, c. 1116; Harnett: 1963, c. 1073, s. 2; Hyde: 1953, c. 872; 1957, c. 933, s. 1; McDowell: 1957, c. 776; 1959, c. 694; Washington: 1955, c. 522, s. 1; 1961, c. 774.

Editor's Note. — The 1929 amendment added Caldwell and Onslow to the list of counties in the second paragraph; the 1931 amendment added Cumberland and Madison; and the 1945 amendment added Yadkin. The 1947 amendment struck out Randolph from the list.

The 1953 and 1955 amendments made the second paragraph applicable to Washington County. The 1957 amendments deleted "Cumberland," "Hyde" and "McDowell" from the list of counties in the second paragraph. The 1959 amendment deleted "Caldwell" from the list of counties.

The 1963 amendment deleted "Harnett" from the list of counties.

The fee of the recorder of a city who is ex officio justice of the peace for the trial of an offense should, in proper instances, be taxed against the defendant as a part of the costs, upon the trial in the superior court, upon appeal. State v. Lord, 145 N.C. 479, 59 S.E. 656 (1907).

Article 17A.

Warrants and Receipts.

§ 7-134.1. Clerk of superior court to furnish printed forms; requirements for warrants and receipts.—The clerk of superior court of every county in the State shall have printed, at the expense of the county, warrants, warrants-issued register pages, and receipt books for the use of justices of the peace as hereinafter provided. The warrants shall be prenumbered consecutively in duplicate and bound together in sets of twenty-five (25) or more. The receipt books shall contain receipts in triplicate, and the receipts shall be prenumbered consecutively and bound together in sets of twenty-five (25) or more. The clerk shall distribute to each justice of the peace in his county one or more sets of pre-

numbered warrants, one or more receipt books containing prenumbered receipts, and a sufficient supply of warrants-issued register pages. The clerk shall from time to time issue other prenumbered warrants and receipts and other warrants-issued register pages as demand is made for them. (1957, c. 1109, s. 1.)

Local Modification. — Union: 1959, c. 1195.

§ 7-134.2. Use of forms by justices; contents of warrants-issued register; reports to clerk of superior court; records open to inspection. —Each justice of the peace shall in all criminal cases use the said prenumbered warrants. The warrants shall be issued consecutively and upon issuance the warrant shall be entered on the warrants-issued register. Warrants which are voided or returned to the justice of the peace unserved shall be retained by the justice of the peace.

The warrants-issued register shall contain columns for each of the following:

(1) The warrant number,
(2) The date of issuance,
(3) The offense for which issued,
(4) The defendant's name,
(5) The defendant's address,
(6) The officer or office to which the warrant was issued,
(7) The docket number,
(8) The receipt number or numbers issued.

When a criminal case is docketed, the docket number shall be entered on the warrants-issued register opposite the appropriate warrant number. Each justice of the peace shall issue a receipt to every person paying a fine, fee, cost, or other item in a criminal case. The receipts shall be issued consecutively, and each receipt shall be made out in triplicate with the original going to the person paying the fine, fee, cost, or other item, one copy being retained by the justice of the peace, and one copy being retained in the receipt book for filing with the clerk of superior court. When the receipt is issued, the number thereof shall be entered on the warrants-issued register opposite the appropriate warrant number. When a justice of the peace fills his docket and files the same with the clerk of the superior court as provided in G. S. 7-132, he shall at the same time turn over all such receipt books as are filled and shall file with the clerk of the superior court a report indicating what warrants he has issued that are not in his possession and to whom such warrants were delivered. The failure of the justice of the peace to have such warrants in his possession shall not be deemed to constitute a violation of the criminal provisions of this article. All warrants, warrants-issued register pages, receipts and other records and reports filed with the clerk shall be public records and open to inspection by any person. (1957, c. 1109, s. 2.)

§ 7-134.3. Auditing of justices' records. — Each board of county commissioners shall cause the record of each justice of the peace to be audited annually and at such other time as the board may direct. The audit shall cover all criminal records, including the warrants, warrants-issued register, and receipts herein provided for, whether in the possession of the justice of the peace or in the possession of the clerk of the superior court, and the audit may cover such other records as the board of county commissioners may direct. The cost of any such audit shall be borne by the county and may be performed either by the county accountant or by a certified public accountant, as the board may in its discretion determine. (1957, c. 1109, s. 3.)

Local Modification.—Swain: 1959, c. 236.

§ 7-134.4. Enforcement officers to submit list of warrants for auditing; lists to be made available to accountant. — Every law enforcement officer serving criminal process shall submit to the clerk of the superior court for auditing purposes a list of warrants in his possession as of June 30 of each

year, or at such other time as the board of county commissioners may direct. The clerk in turn shall make such lists available to the accountant selected by the board of county commissioners to perform audits of justices of the peace. (1957, c. 1109, s. 4.)

§ **7-134.5. Penalty.**—Any person violating any of the provisions of this article shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of the court. (1957, c. 1109, s. 5.)

§ **7-134.6. Counties to which article applies.**—The provisions of this article shall apply to the following counties only: Anson, Ashe, Avery, Cabarrus, Cherokee, Chowan, Columbus, Craven, Cumberland, Davidson, Guilford, Harnett, Haywood, Hertford, Hoke, Johnston, Macon, McDowell, Montgomery, Nash, Onslow, Richmond, Rowan, Rutherford, Swain, Union, Wayne and Wilkes. (1957, c. 1109, s. 5-1; 1959, cc. 184, 237, 300, 335, 345, 762, 958; 1961, cc. 389, 499, 578, 736.)

Editor's Note. — The 1959 amendments inserted Anson, Columbus, Craven, Harnett, Hertford and Wayne in the list of counties, and deleted therefrom Burke and Pitt.

The first 1961 amendment inserted Avery in the list of counties, and the second 1961 amendment inserted Macon in the list. The third 1961 amendment deleted Polk from the list of counties. The fourth 1961 amendment added Wilkes to the list of counties.

Article 18.

Process.

§ **7-135. Action begun by summons.**—Civil actions in these courts shall be commenced by the issuing of a summons. (1868-9, c. 159, s. 9; Code, s. 830; Rev., s. 1444; C. S., s. 1486.)

Cross Reference. — As to summons and process generally, see § 1-88 et seq.

Service by Publication. — In attachment and publication on a nonresident defendant before a justice of the peace, where defendant's property within the jurisdiction of the court has been levied on, a summons is not required. Mills v. Hansel, 168 N.C. 651, 85 S.E. 17 (1915). As to service by publication generally, see § 1-98 and the notes thereto.

§ **7-136. Issuance and contents of summons.**—The summons shall be issued by the justice and signed by him. It shall run in the name of the State, and be directed to any constable or other lawful officer, commanding him to summon the defendant to appear and answer the complaint of the plaintiff at a place, within the county, to be therein specified, and at a time to be therein named, not exceeding thirty days from the date of the summons. It shall also state the sum demanded by the plaintiff or the value of the property sued for, where specific property is claimed. (1874-5, c. 234; Code, s. 832; Rev., s. 1445; C. S., s. 1487.)

To Whom Directed. — The summons in a civil action before a justice of the peace must be directed to "any constable or other lawful officer." McKee v. Angel, 90 N.C. 60 (1884).

Special Officer. — A special officer may be deputized to serve the summons issued by a justice of the peace, where the sheriff and coroner are interested. Baker v. Brem, 127 N.C. 322, 37 S.E. 454 (1900).

Signing.—Where a justice of the peace, because of bad eyesight, requests his secretary to sign his name to the summons, which she does in his presence and under his supervision, the summons is valid, and when the summons is issued in an action in arrest and bail and defendant therein is later arrested upon return of execution against his property unsatisfied, the manner of the issuance of the summons will not support an action for false imprisonment. Johnson v. Chambers, 219 N.C. 769, 14 S.E.2d 789 (1941).

Amount Must Be Stated.—In an action before a justice of the peace, if on contract, the summons should state the amount demanded, if for a tort, it should state the amount of damages claimed, and if for the recovery of specific property, the value of the property, and such state-

ment in the summons gives the justice prima facie jurisdiction. Noville v. Dew, 94 N.C. 43 (1886). A defect in this particular will not be cured by the insertion of the necessary averment in the pleadings or other process. Leathers v. Morris, 101 N.C. 184, 7 S.E. 783 (1888).

Same — Omission by Inadvertence. — Where it is made to appear that the court would have jurisdiction if the summons had contained the proper allegation, but it was omitted by mistake or inadvertence, it may, pending the action, permit the necessary amendment. Leathers v. Morris, 101 N.C. 184, 7 S.E. 783 (1888).

Same — Conclusiveness as Fixing Jurisdiction.—Where the amount claimed in the summons issued by a justice was $200, and no other complaint was filed, and the amount offered in evidence amounted to $242, but the plaintiff stated that he remitted the excess over $200, it was held that the justice had jurisdiction. Cromer v. Marsha, 122 N.C. 563, 29 S.E. 836 (1898).

Failure to Serve Summons. — Where a justice issued a summons and warrant of attachment, and publication of the warrant was made, but the summons was not served, a judgment rendered thereon is void for insufficiency of service of summons. Ditmore v. Goins, 128 N.C. 325, 39 S.E. 61 (1901).

After Thirty Days. — When personal service of summons in attachment cannot be made for the absence from the court's jurisdiction of a nonresident defendant having property therein, publication of summons is sufficient if made after the expiration of thirty days subsequent to service of attachment—in this case, one day thereafter — computed from the time of granting the attachment. Mills v. Hansel, 168 N.C. 651, 85 S.E. 17 (1915).

Presumption as to True Date.—A summons is presumed to bear the true date of its issue, but it is competent to show that it was not in fact then issued. Currie v. Hawkins, 118 N.C. 593, 24 S.E. 476 (1896).

§ 7-137. Service and return of summons. — The officer to whom the summons is delivered shall execute the same within five days after its receipt by him or immediately, if required to do so by the plaintiff. Before proceeding to execute it, he is entitled to require of the plaintiff his fees for the service. When executed he shall immediately return the summons, with the date and manner of the service, to the justice who issued the same. (Code, s. 833; Rev., s. 1446; C. S., s. 1488.)

Cross References.—See §§ 7-136, 7-137 and notes. As to summons and process generally, see § 1-88 et seq., and notes.

In General.—The same requirements as to a proper service of summons in a civil action issuing from the court of a justice of the peace, must be observed by the process officer as from the superior court, § 7-149, Rule 16, and where a copy thereof is not served at the time of its reading to the defendant, the service is invalid, and the action will be dismissed on special appearance and motion, when the defendant has preserved this right by a like motion in the court of the justice of the peace. Pass v. Elias, 192 N.C. 497, 135 S.E. 291 (1926).

To Whom Returnable.—A summons issued by one justice of the peace cannot be made returnable before another (except in cases of bastardy). Williams v. Bowling, 111 N.C. 295, 16 S.E. 176 (1892).

§ 7-138. Process issued to another county.—No process shall be issued by any justice of the peace to any county other than his own, unless one or more bona fide defendants shall reside in, and also one or more bona fide defendants shall reside outside of, his county; in which case, only, he may issue process to any county in which any such nonresident defendant resides. (1876-7, c. 287; Code, s. 871; Rev., s. 1447; C. S., s. 1489.)

In General.—This section being a restricted legislative grant of power when exercised, must be strictly pursued. Durham Fertilizer Co. v. Marshburn, 122 N.C. 411, 29 S.E. 411 (1898). See Fisher v. Bullard, 109 N.C. 574, 13 S.E. 799 (1891).

The language of the statute would seem to make the question of jurisdiction, or the right to serve process on a defendant outside the county of the justice, to depend somewhat upon the good faith of the plaintiff in joining the defendants as parties. In certain cases, perhaps, it may be so plain that the plaintiff has no real or bona fide claim against the defendant, who is a resident of the county in which the suit is pending, that the question of misjoinder may be presented as one of law. Marler v. Wadesboro Clothing Co., 150 N.C. 519, 64 S.E. 366 (1909).

Amendment as to Resident Defendant. —Where the summons was issued against

a resident of a county and a nonresident of the county, and on the trial the summons was amended on striking out the name of the resident defendant, it was held, that the justice should dismiss the action. Wooten v. Maultsby, 69 N.C. 462 (1873).

To Whom Addressed.—When a justice of the peace issues process for nonresident defendants, it must be issued (addressed) to the officer of the county where it is to be served. Durham Fertilizer Co. v. Marshburn, 122 N.C. 411, 29 S.E. 411(1898).

Foreign Corporations. — The provisions of this section do not apply to foreign corporations. Allen-Fleming Co. v. Southern Ry., 145 N.C. 37, 58 S.E. 793 (1907).

The Municipal Court of Greensboro has no jurisdiction under Chapter 126, Private Laws of 1931, to determine a cause upon a contract, involving less than $200.00, when the sole defendant is not a resident of Guilford County and summons is served in Lee County as this section and § 7-139 are applicable. G.S. Miles Co. v. Powell, 205 N.C. 30, 169 S.E. 828 (1933).

Cited in Waters v. McBee, 244 N.C. 540, 94 S.E.2d 640 (1956).

§ **7-139. Civil process in inferior courts.**—The process of any recorder's court, county court, or other court inferior to the superior courts of the State, when such court is exercising the jurisdiction of a justice of the peace in civil matters, shall run only as does the process of the court of a justice of the peace for the county in which such court is located. (1915, c. 19; C. S., s. 1490.)

Cross Reference.—As to uniform practice in inferior courts where summons issued to run outside county, see §§ 1-92, 1-93.

§ **7-140. Endorsement of process to another county.**—In all civil actions in courts of justices of the peace where one or more of the defendants may reside in a county other than that of the plaintiff, it shall be lawful for any justice of the peace within the county where such defendant or defendants may reside, upon proof of the handwriting of the justice of the peace who issued the process, to endorse his name on the same, or a duplicate thereof, and such process so endorsed shall be executed in like manner as if it had been originally issued by the justice endorsing it. (Code, s. 872; Rev., s. 1449; C. S., s. 1491.)

To Whom Addressed. — See note of Durham Fertilizer Co. v. Marshburn, 122 N.C. 411, 29 S.E. 411 (1898), under § 7-138.

§ **7-141. Certificate of clerk on process for another county.** — In all cases referred to in § 7-140 it shall be lawful for the clerk of the superior court of the county in which the action is brought to certify, under the seal of his court, on the process or a duplicate thereof, that the justice of the peace who issued the same is an acting justice of the peace in his county. And in all such cases it shall be the duty of any sheriff or constable to whom it may be directed to make an entry of the date of its reception, and to execute the same as provided for the service of civil process in courts of justices of the peace, and return it by mail to the justice of the peace from whose court it issued. (1870-1, c. 60, s. 2; Code, s. 873; Rev., s. 1450; C. S., s. 1492.)

Cross Reference.—See §§ 7-188, 7-190, and notes.

§ **7-142. Judgment against defendant in another county.**—No justice of the peace shall enter a judgment under §§ 7-140 and 7-141 against any defendant who may be a nonresident of his county, unless it shall appear that the process was duly served upon him at least ten days before the return day of the same. (1876-7, c. 57; Code, s. 874; Rev., s. 1451; C. S., s. 1493.)

Section Not Jurisdictional.—The provision of this section, that a justice of the peace shall not enter a judgment against a nonresident defendant unless it shall appear that process was duly served at least ten days before the return day, is not jurisdictional; and where, upon special appearance of defendant for the purpose of dismissing the action, he was given more than ten days thereafter to answer or defend, which he refused to do, the justice's judgment will not be disturbed. Bank of Union v. Carlile, 174 N.C. 624, 94 S.E. 297 (1917).

Application. — This section applies only where a justice's summons has been is-

sued against a defendant residing in another county. Williams v. Iron Belt Bldg. & Loan Ass'n, 131 N.C. 267, 42 S.E. 607 (1902).

§ 7-143. Service on foreign corporation. — Whenever any action of which a justice of the peace has jurisdiction shall be brought against a foreign corporation, which corporation is required to maintain a process agent in the State, the summons may be issued to the sheriff of the county in which such process agent resides, and when certified under the seal of his office by the clerk of the superior court of the county in which the justice issuing such summons resides to be under the hand of such justice, the sheriff of the county to which such summons shall be issued shall serve the same as in other cases and make due return thereof. No justice of the peace shall enter a judgment in such cases against any such foreign corporation unless it shall appear that the process was duly served upon such process agent at least twenty days before the return day of the same. The summons may be made returnable at a time to be therein named, not exceeding forty days from the date of such summons: Provided, this section shall not apply to actions commenced in a county where the defendant has an officer or agent upon whom process may be served: Provided, that when any foreign corporation has no process agent in this State, but has an agent who collects money for it, said agent shall be deemed a process agent within the terms of this section, and that this proviso shall apply to existing claims as well as those arising hereafter. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides in this State, or when it cannot be made personally within the State upon the president, treasurer, or secretary thereof. (Rev., s. 1448; 1907, c. 473; C. S., 1494; Ex. Sess. 1920, c. 28.)

Cross References. — As to agents on whom service can be had, see § 1-97. See also §§ 55-38, 58-153 and notes.

Editor's Note. —The last provision of this section is new with the 1920 amendment.

Service on Agent Valid. — Under the provision of this section, a summons issued to a foreign corporation in another county where it has a process agent, properly certified under seal of the clerk of the superior court, served on such corporation or the agent more than twenty days before the return day, is valid. Allen-Fleming Co. v. Southern Ry., 145 N.C. 37, 58 S.E. 793 (1907).

§ 7-144. Attendance of witnesses.—The justice, on application of either party, shall, by a subpoena or by an order in writing, on the process, direct the constable or other officer to summon witnesses to appear and give testimony at the time and place appointed for the trial. Each witness failing to appear shall forfeit and pay eight dollars to the party at whose instance he was summoned, and shall be further liable to such party for all damage sustained by nonattendance. The fine herein imposed may be recovered, on motion, before the justice who tried the action, unless the witness on a notice of five days, by affidavit or other proof, show sufficient excuse for his failure to attend. (Code, s. 847; Rev., s. 1452; C. S., s. 1495.)

Cross Reference.—As to power to punish for contempt, see §§ 5-6, 5-8.

In General.—The power to punish for contempt is inherent in all courts and is essential to their existence. State v. Aiken, 113 N.C. 651, 18 S.E. 690 (1893).

Duty to Attend Court.—The duty of attending court in obedience to a subpoena is incident to citizenship. State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889).

No Bond Authorized.—A justice of the peace is not authorized to put a witness under bond to appear at a subsequent trial before the justice. Lovick v. Atlantic Coast Line R.R., 129 N.C. 427, 40 S.E. 191 (1901).

§ 7-145. Subpoena issued to another county.—Justices of the peace, in all civil cases, may issue subpoenas to counties other than their own; such subpoenas shall be authenticated in the same manner as provided by law for the authentication of process. When so authenticated the sheriff, constable or other officer to whom the same is directed shall execute and return the same as pro-

vided for the return of process: Provided, that where witnesses attend in counties other than their own under such subpoena they shall receive the same per diem and mileage as witnesses who attend the superior courts: Provided further, that before issuing such subpoenas the party wanting such witness shall deposit with the justice before whom the cause is pending one day's per diem and the mileage of the witness to and returning from place of trial, which amount shall be paid to the witness on his attendance and taxed against the party cast in the trial. (1893, c. 436; Rev., s. 1453; C. S., s. 1496.)

§ 7-146. Subpoena duces tecum in case against railroad.—When any action is brought against a railroad company before a justice of the peace, the justice before whom such action is made returnable shall have power to issue a subpoena to any county within the limits of the State, commanding the president or any officer, director, agent, or anyone in the employment of such company, to appear before him at the time and place of trial and to produce such books, cards and other papers as the justice shall deem proper, and to give evidence in said cause; and each witness summoned as aforesaid failing or refusing to appear and testify and produce the books and papers aforesaid in obedience to such writ shall be deemed guilty of a contempt of court and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (1885, c. 221, s. 2; Rev., s. 1454; C. S., s. 1497.)

Article 19.

Pleading and Practice.

§ 7-147. Removal of case.—In all proceedings and trials, both criminal and civil, before justices of the peace, the justice before whom the writ or summons is returnable shall, upon written request made by either party to the action before evidence is introduced, move the same to some other justice residing in the same township, or to the justice of some neighboring township if there be no other justice in said township; but no cause shall be more than once removed. (1880, c. 15; 1883, c. 66; Code, s. 907; Rev., s. 1455; 1917, c. 48; C. S., s. 1498.)

Local Modification.—Mecklenburg: 1933, c. 278.

Cross Reference.—For statutes authorizing removal to inferior court other than that of another justice of the peace, see §§ 7-224, 7-437.

Duty of Justice.—It is the duty of a justice of the peace, upon affidavit and motion (now a written request) for a removal being filed, to remove the case to another justice residing in the same township, State v. Ivie, 118 N.C. 1227, 24 S.E. 539 (1896); and if there be no other justice in the same township he can remove the case to the justice of a neighboring township.

Same—Removal to Improper Justice.—If the case is removed to a justice of a neighboring township when there is another justice in the same township in which the action is commenced, the justice to whom the case is thus removed has no jurisdiction, and his judgment is void. State v. Warren, 100 N.C. 489, 490, 5 S.E. 662 (1888); State v. Ivie, 118 N.C. 1227, 24 S.E. 539 (1896).

Not Applicable to Mayor's Court. — The provisions of this section apply only to courts of justices of the peace and in a prosecution for violation of a town ordinance before a mayor, the defendant is not entitled to a removal. State v. Joyner, 127 N.C. 541, 37 S.E. 201 (1900).

§ 7-148. Removal in case of death or incapacity. — If any justice of the peace dies or becomes incapacitated by removal, resignation or other cause, having any action, civil or criminal, pending before him, which has not been finally determined, such action shall not abate or be discontinued, but the plaintiff in such civil action, or anyone on behalf of the State in such criminal action, may remove such action for further and final determination before any other justice of the peace of the same township in which the original action was pending, or before any justice of the peace of the same county when there is no other in the township, by filing the papers in said action with the justice to whom the

same is removed and by giving ten days' notice to the defendant of such removal; and if the plaintiff in any civil action shall fail to give such notice of removal within ten days from the happening of the death, removal, or resignation, or incapacity of such justice, then the defendant in such action may remove the same by giving like notice to the plaintiff; and if no notice is given by either party to such action within twenty days, then such action shall stand discontinued without prejudice. The justice of the peace before whom such action may be removed shall proceed to try and determine the same, but he shall demand no fees or costs which have theretofore been properly advanced by any party to such action. After such removal either party shall be entitled to all the rights given in § 7-147. (1905, c. 121; Rev., s. 1456; C. S., s. 1499.)

Cross Reference.—For statutes authorizing removal to inferior court other than that of another justice of the peace, see §§ 7-224, 7-437.

§ 7-149. Rules of practice:

Rule 1, Pleadings. The pleadings in these courts are—

(1) The complaint of the plaintiff.

(2) The answer of the defendant. (Code, s. 840; Rev., s. 1457; C. S., s. 1500.)

Rule 2, Complaint. The complaint must state, in a plain and direct manner, the facts constituting the cause of action. (Code, s. 840, Rule 3; Rev., s. 1459; C. S., s. 1500.)

Generally.—When the parties come to trial in a justices' court, the justice should require the plaintiff to state in a plain and direct manner the facts constituting the cause of action. Smith v. Newberry, 140 N.C. 385, 53 S.E. 234 (1906).

Where two causes of action were set forth in a warrant before a justice of the peace (treated as a complaint), the judge properly submitted the issue upon the cause of action which was sustained by the evidence. Smith v. Newberry, 140 N.C. 385, 53 S.E. 234 (1906).

Rule 3, Answer. The answer may contain a denial of the complaint, or of any part thereof, and also a statement, in a plain and direct manner, of any facts constituting a defense or counterclaim. (Code, s. 840, Rule 4; Rev., s. 1460; C. S., s. 1500.)

The pendency of another action for the same cause, may be set up in the answer, with other defenses, and any issue arising thereon may be submitted at the same time as the others growing out of the pleadings, with instructions to the jury that, if found for the defendant, the others need not be considered. Montague v. Brown, 104 N.C. 161, 10 S.E. 186 (1889).

Same—Waiver. — Unless this defense is set up in the answer or in some way insisted on, before the trial on the merits, it will be considered as waived. Blackwell v. Dibbrell Bros. & Co., 103 N.C. 270, 9 S.E. 192 (1889).

Jurisdictional Amount for Counterclaims.—For note on problem arising from counterclaim exceeding jurisdictional limit of court, see 32 N.C.L. Rev. 231 (1954).

Rule 4, Demurrer. Either party may demur to a pleading of his adversary, or to any part thereof, when it is not sufficiently explicit to enable him to understand it, or contains no cause of action or defense, although it be taken as true. (Code, s. 840, Rule 11; Rev., s. 1461; C. S., s. 1500.)

Rule 5, Order on demurrer. If the justice deem the objection well founded, he shall order the pleading to be amended on such terms as he may think just; and if the party refuse to amend, the defective pleading shall be disregarded. (Code, s. 840, Rule 12; Rev., s. 1462; C. S., s. 1500.)

Rule 6, Pleadings, oral or written. The pleadings may be either oral or written; if oral, the substance must be entered by the justice on his docket; if written, they must be filed by the justice, and a reference to them be made on his docket. (Code, s. 840, Rule 2; Rev., s. 1458; C. S., s. 1500.)

In General. — While we liberally construe pleadings filed in the court of a justice of the peace, they must substantially conform to the statutory requirements,

i.e., there shall be a complaint and answer; if oral, the justice may enter the substance on his docket, and, if written, the pleadings may be filed and reference made to them on the docket; the answer may state the facts constituting a defense or counterclaim. Baxter v. Irvine, 158 N.C. 277, 73 S.E. 882 (1912).

Written Pleadings. — Where the parties to an action before a justice of the peace have elected to file written pleadings, the pleadings are subject to the rule that material allegations in the complaint not denied by the answer stand admitted. Parker v. Horton, 176 N.C. 143, 96 S.E. 904 (1918).

Oral Pleadings.—In actions before justices of the peace the pleadings may be oral, but if so, the substance of them must be entered on the docket, and contain, in a plain and distinct manner, the ground of the action; and if the facts relied on as a defense be new matter, notice of that, also, must be given on the docket, in a plain and direct manner. Montague v. Brown, 104 N.C. 161, 10 S.E. 186 (1889).

Applied in Home Bldg. & Loan Ass'n v. Moore, 207 N.C. 515, 177 S.E. 633 (1935).

Rule 7, No particular form for pleadings. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is meant. (Code, s. 840, Rule 5; Rev., s. 1463; C. S., s. 1500.)

Technical Accuracy Not Required. — The pleadings in a justice's court need not be in any particular form or drawn with technical accuracy, but are sufficient if they "enable a person of common understanding to know what is meant," and they may not "be quashed or set aside for want of form, if the essential matters are set forth therein," and ample powers are given the court to amend either in substance or form, at any time before or after judgment in furtherance of justice. Aman v. Dover & S.R.R., 179 N.C. 310, 102 S.E. 392 (1920).

Informality of Irregularity. — Pleadings and proceedings in the trial of a cause should be liberally construed so as to prevent a failure of justice because of mere informality or irregularity, especially when the case is tried before a justice of the peace, where this section expressly provides that the pleadings are not required to be in any particular form and are sufficient when they "enable a person of common understanding to know what is meant." Wilson v. Batchelor, 182 N.C. 92, 108 S.E. 355 (1921).

Rule 8, No judgment by default. Where a defendant does not appear and answer, the plaintiff must still prove his case before he can recover. (Code, s. 840, Rule 6; Rev., s. 1464; C. S., s. 1500.)

Rule 9, Action on account or note. In an action or defense, founded on an account, or an instrument for the payment of money only, it is sufficient for a party to deliver the account or instrument to the justice and state that there is due him thereon from the adverse party a specified sum, which he claims to recover or set off. (Code, s. 840, Rule 7; Rev., s. 1465; C. S., s. 1500.)

Note for Purchase of Land.—Where an action to recover interest due upon a note, according to its terms, is cognizable in the court of a justice of the peace, his jurisdiction is not ousted by reason of the note having been executed for the purchase of land. Parker v. Horton, 176 N.C. 143, 96 S.E. 904 (1918).

Rule 10, Account or demand exhibited. The justice may at the joining of issue require either party, at the request of the other, at that or some other specified time to exhibit his account or demand, or state the nature thereof as far as may be in his power; and in case of his default, the justice shall preclude him from giving evidence of such parts thereof as have not been so exhibited or stated. (Code, s. 840, Rule 10; Rev., s. 1469; C. S., s. 1500.)

Rule 11, Variance. A variance between the evidence on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled to his prejudice thereby. (Code s. 840, Rule 8; Rev., s. 1466; C. S., s. 1500.)

Rule 12, No process quashed for want of form. No process or other proceeding begun before a justice of the peace, whether in a civil or a criminal action, shall be quashed or set aside for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time either before or after judgment. (1794, c. 414, P. R.; R. C., c. 3; c. 62, s. 22; Code, s. 908; Rev., s. 1467; C. S., s. 1500.)

Editor's Note.—For note as to power of superior court to amend warrant, see 36 N.C.L. Rev. 80 (1957).

Docket Incomplete. — In bastardy proceedings the justice of the peace before whom the trial is had should take the denial of the defendant under oath, before trying the case, so as to make up the issue, and should regularly note it on his docket and in his return; and if the docket is incomplete in this respect the superior court judge on appeal should allow the denial to be entered nunc pro tunc. State v. Currie, 161 N.C. 275, 76 S.E. 694 (1912).

In State v. Mills, 181 N.C. 530, 106 S.E. 677 (1921), the court said: "A clear analysis of this section (which was § 1-577 of the Code) is made by Justice Ashe in State v. Vaughan, 91 N.C. 532 (1884), showing that the exercise of the power is discretionary, and that the power itself, by gradual amendment of the statute, is very broad and finally was extended to matters of substance, whereas formerly it related only to matters of form and was confined to civil actions."

Applicable to Final Judgments Only. — Our statutes requiring a motion for a rehearing before a justice of the peace within ten days, etc., this section, Rule 12, and § 7-179, allowing fifteen days for appeal from the justice's judgment, etc., apply to final judgments regularly entered, and not to judgments irregularly taken upon defective service, or void for lack of service of summons on the defendant, or other proper process to bring him before the court. Graves v. Reidsville Lodge, 182 N.C. 330, 109 S.E. 29 (1921).

Power of superior court to allow amendments to warrants is very comprehensive. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Amendment of Warrants.—The superior court, under Rule 12 of this section, may allow, within the discretion of the court, an amendment to a warrant both as to form and substance before or after verdict, provided the amended warrant does not change the nature of the offense intended to be charged in the original warrant. State v. Brown, 225 N.C. 22, 33 S.E.2d 121 (1945); State v. Thompson, 233 N.C. 345, 64 S.E.2d 157 (1951); State v. McHone, 243 N.C. 231, 90 S.E.2d 536 (1955); State v. Moore, 247 N.C. 368, 101 S.E.2d 26 (1957); State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

A warrant may be defective in form and substance and yet contain sufficient information to inform defendant of the accusation made against him. Such a warrant may be amended. State v. Brown, 225 N.C. 22, 33 S.E.2d 121 (1945); State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

It is contemplated in the law, that magistrates, not learned in the law, may sometimes issue papers defective in form, and even in substance, but the method of correction is provided by this section. Alexander v. Lindsey, 230 N.C. 663, 55 S.E.2d 470 (1949).

On appeal to the superior court from a county court upon conviction for assault, the superior court has power to allow an amendment of the warrant by the addition of the words "inflicting serious injury" provided the charge as amended is within the jurisdiction of the county court since the amendment does not change the offense with which the defendant was charged. State v. Carpenter, 231 N.C. 229, 56 S.E.2d 713 (1949).

The amendment of a warrant is a procedural matter. State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965).

As a general proposition the superior court, on an appeal from a recorder's court or other inferior court upon a conviction of a misdemeanor, has power to allow an amendment to the warrant, provided the charge as amended does not change the offense wih which defendant was originally charged. State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965).

Notwithstanding these broad powers with respect to amendments, a warrant as well as the amendments thereto must relate to the charge and the facts supporting it as they existed at the time it was formally laid in the court. Therefore, a conviction upon an amended warrant, unsupported by the facts as they existed at the time the warrant was issued, will not be upheld. Neither will a conviction for

the willful failure to support an illegitimate child be upheld on such warrant, where the State, in order to sustain the conviction, must rely altogether on evidence of willful failure to support the child subsequent to the time the charge was laid in court. State v. Thompson, 233 N.C. 345, 64 S.E.2d 157 (1951).

A warrant cannot be amended so as to charge a different offense. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

North Carolina courts have authority to amend warrants defective in form, and even in substance, provided the amendment does not change the nature of the offense charged in the original warrant. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Fatal Defect Cannot Be Cured by Amendment.—Where a warrant or indictment is fatally defective in failing to charge an essential element of the offense, the defect cannot be cured by amendment. State v. Williams, 1 N.C. App. 312, 161 S.E.2d 198 (1968).

Amendments Liberally Allowed.—While amendments to process and pleading, under our procedure, in both civil and criminal causes, are liberally allowed by this and § 1-163, this does not imply that the court has power to change the nature of the offense intended to be charged so as to charge a different offense in substance from that at first intended. State v. Clegg, 214 N.C. 675, 200 S.E. 371 (1939).

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

Rule 13, Pleadings amended. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when by such amendment substantial justice will be promoted. If the amendment be made after the joining of the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party, in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require as a condition of an amendment the payment of costs to the adverse party. (Code, s. 840, Rule 9; Rev., s. 1468; C. S., s. 1500.)

Power Not Reviewable.—The discretionary power to amend a complaint conferred upon a justice of the peace is not reviewable on appeal. State v. Taylor, 118 N.C. 1262, 24 S.E. 526 (1896).

Nature of Amendment Allowable.—The superior court has the power to amend a justice warrant in a criminal action, in form or substance, but the amendment must not change the nature of the offense intended to be charged. State v. Vaughan, 91 N.C. 532 (1884); State v. Taylor, 118 N.C. 1262, 24 S.E. 526 (1896).

Amendment of Indictment. — An indictment before a justice of the peace may be amended by the trial judge upon the trial in the superior court on appeal. State v. Holt, 195 N.C. 240, 141 S.E. 585 (1928).

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

Words Omitted.—Where a warrant was defective due to the omission of certain words, it was held to be within the discretion of the court to permit an amendment inserting the necessary words. Laney v. Mackey, 144 N.C. 630, 57 S.E. 386 (1907).

Allegation of Value Omitted. — Where, in an action of claim and delivery of personal property, the allegation as to the value was omitted in the summons, the justice of the peace properly allowed a motion to amend by filling in the blank left for such allegation. Cox v. Grisham, 113 N.C. 279, 18 S.E. 212 (1893).

Equitable Proceedings.—On the trial of an appeal from a justice of the peace, of an action that sought to recover for a breach of contract, and also to enforce an equity, the trial judge properly allowed an amendment discarding the equitable proceeding. Starke v. Cotton, 115 N.C. 81, 20 S.E. 184 (1894).

Rule 14, Tender of judgment. The defendant may, on the return of process and before answering, make an offer in writing to allow judgment to be taken against him for an amount, to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceeding be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof in writing, the justice shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the

plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer. (Code, s. 840, Rule 16; Rev., s. 1471; C. S., s. 1500.)

In General. — The tender, made under the provision of this section must be a proposition (made before any defense is set up) to pay a specified sum in discharge of the plaintiff's claim, and not a sum in excess of a counterclaim. Rand v. Harris, 83 N.C. 486 (1880).

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 plaintiffs, pending the litigation, amounts to a satisfaction of their claim, and subjects the plaintiffs to all subsequently accruing costs." Cline v. Rudisill, 126 N.C. 523, 36 S.E. 36 (1900).

Rule 15, Continuance. Any justice before whom an action is brought may, on sufficient excuse therefor shown on the affidavit of either party or any person for him, continue such action from time to time for trial; but such continuance shall not exceed thirty days. (Code, s. 840. Rule 17; Rev., s. 1472; C. S., s. 1500.)

Termination of Proceeding. — When a justice of the peace continues a criminal action for malicious prosecution upon a request of the prosecuting witness, and more than thirty days has passed without a trial, in which the prosecutor has remained inactive, the criminal proceeding is terminated under Rule 15 of this section. Winkler v. Lenoir & Blowing Rock Lines, 195 N.C. 673, 143 S.E. 213 (1928).

Rule 16, Chapter on civil procedure applicable. The chapter on civil procedure, respecting forms of actions, parties to actions, the times of commencing actions, and the service of process, shall apply to justices' courts. (Code, s. 840, Rule 15; Rev., s. 1473; C. S., s. 1500.)

Cross Reference.—See § 7-135 and note.

Appointment of Next Friend. — There being no statutory special method indicated by which a next friend may be appointed to represent an infant in an action properly brought in a justice's court, the appointment should be made by the justice of the peace, using the same care and circumspection in investigating the fitness of the person to be appointed as is required, by the clerk, in actions properly brought in the superior court. Houser v. W.R. Bonsal & Co., 149 N.C. 51, 62 S.E. 776 (1908).

Rule 17, Attachment proceedings. Attachment proceedings before justices of the peace are governed by the provisions of §§ 1-440.47 through 1-440.56. (Code, s. 853; Rev., s. 1474; C. S., s. 1500; 1947, c. 693, s. 2.)

Cross Reference. — As to attachments generally, see § 1-440.1 et seq.

Editor's Note. — The 1947 amendment rewrote Rule 17.

Purpose.—The issuance of a warrant of attachment by a justice of the peace having jurisdiction of the action is only for the purpose of acquiring jurisdiction over a defendant who is a nonresident of the State, and is only incidental to the relief sought in the original action, and the warrant in garnishment may run beyond the limits of the county wherein the action was brought. Mohn v. Cressey, 193 N.C. 568, 137 S.E. 718 (1927).

Remedy for Wrongful Issue. — An attachment wrongfully issued from the justice's court against a citizen of the State, transiently absent, is remedied by recordari. Merrill v. McHone, 126 N.C. 528, 36 S.E. 35 (1900).

Rule 18, Claim and delivery and arrest and bail. The chapter on civil procedure is applicable, except as herein otherwise provided, to proceedings in justices' courts concerning claim and delivery of personal property and arrest and bail, substituting the words, "justice of the peace" for "judge," "clerk" or "clerk of the court," and inserting the words "or constable" after "sheriff," whenever they occur. (1876-7, c. 251; Code, ss. 849, 889; Rev., s. 1475; C. S., s. 1500.)

Cross References.—As to arrest and bail, see § 1-409 et seq. As to claim and delivery, see § 1-472 et seq.

Rule 19, Actions for damages and for conversion. All actions in a court of a justice of the peace for the recovery of damages to real estate, or for the con-

version of personal property, or any injury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil actions in a justice's court. (1876-7, c. 251; Code, s. 888; Rev., s. 1476; C. S., s. 1500.)

Damages Limited to Fifty Dollars. — A justice of the peace under this section has jurisdiction of an action for damages, not exceeding fifty dollars, for injury to personal property, though such property be of greater value than fifty dollars. Malloy v. City of Fayetteville, 122 N.C. 480, 29 S.E. 880 (1898).

An action for damages for converting a crop of greater value than fifty dollars is not founded on an implied contract, and hence is not within the cognizance of a justice's court. Womble v. Leach, 83 N.C. 84 (1880).

Rule 20, Action on former judgment. On the trial of an action founded on a former judgment, the judgment itself shall be evidence of the debt, subject to such payments as have been made. (Code, s. 844; Rev., s. 1477; C. S., s. 1500.)

Rule 21, Rehearing of case. When a judgment has been rendered by a justice, in the absence of either party, and when such absence was caused by the sickness, excusable mistake or neglect of the party, such absent party, his agent or attorney, may, within ten days after the date of such judgment, apply for relief to the justice who awarded the same, by affidavit, setting forth the facts, which affidavit must be filed by the justice; whereupon the justice, if he deem the affidavit sufficient, shall open the case for reconsideration; and to this end, he shall issue a summons, directed to a constable, or other lawful officer, to cause the adverse party, together with the witnesses on both sides, to appear before him at a place and at a time, not exceeding twenty days, to be specified in the summons, when the complaint shall be reheard, and the same proceedings had as if the case had never been acted on. If execution has been issued on the judgment, the justice shall direct an order to the officer having such execution in his hands, commanding him to forbear all further proceedings thereon, and to return the same to the justice forthwith. (Code, s. 845; Rev., s. 1478; C. S., s. 1500.)

In General.—A new trial cannot be allowed in a justice's court, but the party dissatisfied with the judgment has his remedy only by appeal. But where the judgment is rendered in the absence of either party and such absence is occasioned by sickness or excusable neglect, relief may be had by filing an affidavit before the justice, setting forth the grounds therefor, within ten days after judgment. Gambill v. Gambill, 89 N.C. 201 (1883).

This and the other sections regulating procedure before justices of the peace, which makes the general provisions of the chapter applicable, do not confer on a nonresident defendant the right to a rehearing, or, which is the same thing, a new trial, in the justice's court after judgment, upon failure of personal service and a good defense shown; and the remedy is appeal, so that the action may be heard de novo in the superior court, where he will be permitted to interpose his defense. Thompson v. Lynchburg Notion Co., 160 N.C. 519, 76 S.E. 470 (1912).

Inexcusable Neglect. — Where the local agent of an incorporated company appeared on the return day of a summons, before a justice of the peace, and procured a continuance for ten days, within which time it had an opportunity to employ counsel to represent it, but it neglected to do so until the day of the trial, when, because of delay in the mail, the counsel was not able to appear until after the trial, it was held to be inexcusable neglect. Finlayson v. American Accident Co., 109 N.C. 196, 13 S.E. 739 (1891).

Justices of the peace have power to rehear cases decided by them, when mistake, surprise or excusable neglect is shown, and the application is made in ten days after the date of the judgment. After the lapse of that time, they cannot rehear their judgments for such cause. Navassa Guano Co. v. Bridgers, 93 N.C. 439 (1885).

Statute of Limitations. — Where a judgment was rendered by a justice of the peace and upon a rehearing granted by him a similar judgment was rendered, the statute of limitations began to run from the date of the latter, the first judgment having been vacated. Salmon v. McLean, 116 N.C. 209, 21 S.E. 178 (1895).

ARTICLE 20.

Jury Trial.

§ 7-150. Parties entitled to a jury trial.—When an issue of fact shall be joined before a justice, on demand of either party thereto, he shall cause a jury of six men to be summoned, who shall try the same. (Const., art. 4, s. 27; C. S., s. 1501.)

Cross Reference.—As to jury trial in justice of peace court in criminal actions, see §§ 15-156 through 15-158.

This section and N. C. Const., art. IV, § 27, Determinative of Number of Jury in Criminal Prosecution in Municipal Recorder's Court.—See note to § 7-204.

§ 7-151. Jury trial waived.—A trial by jury must be demanded at the time of joining the issue of fact, and if neither party demand at such time a jury, they shall be deemed to have waived a trial by jury. (Code, s. 857; Rev., s. 1431; C. S., s. 1502.)

The "Due Process" Clause. — The requirements of the United States Constitution that no person shall be deprived of his property without due process of law does not imply that all trials in the State courts affecting property must be by jury, but it is met if the trial be had according to the settled course of judicial proceedings. Caldwell v. Wilson, 121 N.C. 425, 28 S.E. 554 (1897).

Rights Preserved on Appeal. — When a legislative act creates a court of original jurisdiction for the trial of petty misdemeanors and prescribes an appeal to the superior court, the constitutional right of trial by jury is preserved. State v. Shine, 149 N.C. 480, 62 S.E. 1080 (1908).

Waiver.—If the defendant, after having been duly summoned, fails to appear and answer before a justice of the peace he thereby waives and loses the right to demand a trial by jury. Durham v. Wilson 104 N.C. 595, 10 S.E. 683 (1889).

§ 7-152. Number constituting the jury.—Six jurors shall constitute a jury in a justice's court, but, by consent of both parties, a less number may constitute it. (Code, s. 866; Rev., s. 1440; C. S., s. 1503.)

§ 7-153. Jury list furnished.—The clerk of the board of commissioners shall furnish, on demand, to each justice of the peace in the county, a list of the jurors for the township for which such justice is elected or appointed. (Code, s. 854; Rev., s. 1428; C. S., s. 1504.)

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ 7-154. Names kept in jury box.—Each justice shall keep a jury box, having two divisions marked respectively number one and number two, and having two locks, the key to be kept by the justice. He shall cause the names on his jury list to be written on small scrolls of paper of equal size, and to be placed in the jury box, in division marked number one, until drawn out for the trial of an issue as required by law. (Code, ss. 855, 856; Rev., ss. 1429, 1430; C. S., s. 1505.)

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

Cross Reference.—See § 9-2 and note.

§ 7-155. Fees deposited for jury trial.—Before a party is entitled to a jury he shall deposit with the justice the sum of three dollars for jury fees, and the justice shall pay to all persons who attend, pursuant to the summons, as well to those who do not actually serve as to those who do serve, twenty-five cents each, to be included in the judgment as part of the costs, in case the party demanding the jury recover judgment, but not otherwise. The justice shall refund to the party the fees of all jurors who do not attend. (Code, s. 869; Rev., s. 1432; C. S., s. 1506.)

§ 7-156. Jury drawn and trial postponed.—When a trial by jury is demanded, the justice shall immediately, in the presence of the parties, proceed to

draw the names of twelve jurors from division marked number one of the jury box; and the trial of the cause shall thereupon be postponed to a time and place to be fixed by the justice. (Code, s. 858; Rev., s. 1433; C. S., s. 1507.)

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

Constitutional Provisions. — The method by which jurors are to be selected and summoned is not provided for in the Constitution, and there is no limitation therein upon the power of the General Assembly to regulate it. State v. Brittain, 143 N.C. 668, 57 S.E. 352 (1907).

§ **7-157. Summoning the jury.**—A list of the jurors so drawn shall be immediately delivered by the justice to any constable, or other lawful officer, with an order indorsed thereon, directing him to summon the persons named in the list to appear as jurors at the time and place fixed for the trial; and it is the duty of the officer to proceed forthwith to summon such jurors, or so many of them as can be found, according to the order; and he shall make return thereof at the time and place appointed, stating in his return the names of the jurors summoned by him. For performing the aforementioned duties, he shall receive the fee allowed by law for summoning jurors. The preceding sentence shall not apply to the counties of Beaufort, Brunswick, Cabarrus, Edgecombe, Forsyth, Gaston, Gates, Guilford, Halifax, Martin, McDowell, Orange, Pasquotank, Rowan, Transylvania, and Wake. (Code, s. 859; Rev., s. 1434; C. S., s. 1508; 1935, c. 309.)

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ **7-158. Selection of jury.**—At the time and place appointed, and on return of the order, if the trial be not further adjourned, and if adjourned, then at the time and place to which the trial shall be adjourned, the justice shall proceed, in the presence of the parties, to draw from the jurors summoned the names of six persons to constitute the jury for the trial of the issue. (Code, s. 860; Rev., s. 1435; C. S., s. 1509.)

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ **7-159. Challenges.**—Each party shall be entitled to challenge, peremptorily, two of the persons drawn as jurors. (Code, s. 861; Rev., s. 1436; C. S., s. 1510.)

§ **7-160. Names returned to the jury box.**—The scrolls containing the names of jurors not summoned, if any, and of those summoned but not drawn, and of those drawn but challenged and set aside, must be returned by the justice to his jury box, in division marked number one: Provided, that the scrolls containing the names of such as are not legally liable or legally qualified to serve as jurors shall be destroyed. (Code, s. 862; Rev., s. 1437; C. S., s. 1511.)

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ **7-161. Names of jurors serving.**—The scrolls containing the names of the jurors who serve on the trial of an issue must be placed in the jury box in division marked number two, until all the scrolls in division marked number one have been drawn out. As often as that may happen, the whole number of scrolls shall be returned to division marked number one, to be drawn out as in the first instance. (Code, s. 868; Rev., s. 1441; C. S., s. 1512.)

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ **7-162. Tales jurors summoned.**—If a competent and indifferent jury is not obtained from the twelve jurors drawn, as before specified, the justice may direct others to be summoned from the bystanders, sufficient to complete the jury. (Code, s. 863; Rev., s. 1438; C. S., s. 1513.)

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ **7-163. No juror to serve out of township.**—No person is compelled to serve as a juror in a justice's court out of his own township, except as a talesman. (Code, s. 867; Rev., s. 1439; C. S., s. 1514.)

Local Modification.—Mecklenburg: 1959, c. 341, s. 2.

§ **7-164. Additional deposit for jury fees on adjournment.**—No adjournment shall be granted after the return of the jury, unless the party asking the same shall, in addition to the other conditions imposed on him by law or by the justice, deposit with the justice, to be immediately paid to the jurors attending, the sum of twenty-five cents each, such amount to be in no case included in the judgment as part of the costs. On such adjournment, the jurors shall attend at the time and place appointed, without further summons or notice; and the fees for the jury, deposited with the justice in the beginning, shall remain in his hands until the jury are impaneled on the trial, and shall be then immediately paid to the jurors or to the party entitled thereto. (Code, s. 870; Rev., s. 1442; C. S., s. 1515.)

§ **7-165. Jury sworn and impaneled; verdict; judgment.**—The jury shall be sworn and impaneled by the justice, who shall record their verdict in his docket and enter a judgment in the case according to such verdict. (Code, s. 864; Rev., s. 1443; C. S., s. 1516.)

ARTICLE 21.

Judgment and Execution.

§ **7-166. Justice's judgment docketed; lien and execution; transcript.**—A justice of the peace on the demand of a party in whose favor he has rendered a judgment, shall give a transcript thereof which may be filed and docketed in the office of the superior court clerk of the county where the judgment was rendered. And in such case he shall also deliver to the party against whom such judgment was rendered, or his attorney a transcript of any stay of execution issued, or which may thereafter be issued by him on such judgment, which may be in like manner filed and docketed in the office of the clerk of such court. The time of the receipt of the transcript by the clerk shall be noted thereon and entered on the docket, and from that time the judgment shall be a judgment of the superior court in all respects for the purpose of lien and execution. The execution thereon shall be issued by the clerk of the superior court to the sheriff of the county and shall have the same effect, and be executed in the same manner as other executions of the superior court, but in case a stay of execution upon such judgment shall be granted as provided by law, execution shall not be issued thereon by the clerk of the superior court until the expiration of such stay. A certified transcript of such judgment may be filed and docketed in the superior court clerk's office of any other county, and with like effect, in every respect as in the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing such transcript. A justice of the peace may issue a transcript of a judgment under the provisions of this section which was rendered by said justice of the peace during his prior term of office, provided said judgment was rendered within one year of the issuance of said transcript. If, within one year after rendering a judgment, any justice of the peace dies, vacates his office, fails to re-qualify or becomes insane or otherwise becomes incapable of performing the duties of his office, without issuing a transcript of a judgment rendered by him during his term any other justice of the peace in the same county may issue a transcript of said judgment from the docket or a judgment found among the papers of the justice of the peace who rendered said judgment upon request of a party in whose favor said judgment was rendered and the payment of the necessary fees. (Code, s. 839; Rev., s. 1479; C. S., s. 1517; 1953, c. 846.)

Cross Reference.—As to removing judgment of justice of peace to another county for execution, see § 7-169.

Editor's Note. — The 1953 amendment added the last two sentences.

Generally. — A judgment in a justice's court does not create a lien upon the property of the defendant. To have this effect a transcript of the judgment must be filed and docketed in the office of the superior court clerk of the county wherein the judgment is rendered. Ledbetter v. Osborne, 66 N.C. 379 (1872).

When a transcript of a judgment of a justice of the peace is filed and docketed in accordance with this section, this section expressly provides that such judgment shall be a judgment of the superior court in all respects for the purposes of lien and execution. Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

Judgment Conclusive. — 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).

Amendments of the judgment before the magistrate, or of the transcript, can be made only before the tribunal which gave it; no court has original power to amend the records of another court. McAden v. Banister, 63 N.C. 479 (1869).

Presumed Regular.—Though the signature of the justice of the peace is not attached to the judgment, it is presumed from the term of the certificate of authentication that it was entered up regularly and in proper form. Surratt v. Crawford, 87 N.C. 372 (1882).

Priorities.—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).

Same—Fractional Parts of a Day.—The law takes notice of the fractional part of a day when there is a conflict between creditors arising as to the application of money received on justice's judgment filed and docketed on the same day. Bates v. Hinsdale, 65 N.C. 423 (1871).

Where Docketed.—A judgment given by a magistrate in one county cannot be docketed in another, unless previously docketed in the former county; and what is allowed to be docketed in the latter county is the transcript of judgment as docketed in the former. McAden v. Banister, 63 N.C. 479 (1869).

Docketing in Different Counties.—See § 7-169.

Same—Its Nature in Superior Court.—If the judgment has been docketed in the superior court and subsequently vacated by the justice of the peace, the defendant may, upon motion, have the judgment therein set aside; such docketing, however, only operates as a judgment of the superior court for the purposes of lien. Whitehurst v. Merchants & Farmers' Transp. Co., 109 N.C. 342, 13 S.E. 937 (1891).

A judgment of a justice of the peace, duly docketed in the superior court, becomes a judgment of the superior court, and may be enforced by execution at any time within ten years from the date of such docketing. McIlhenny v. Wilmington Sav. & Trust Co., 108 N.C. 311, 12 S.E. 100 (1891); Essex Inv. Co. v. Pickelsimer, 210 N.C. 541, 187 S.E. 813 (1936). See also § 1-234 and note thereto.

The judgment as actually docketed is the only authority for the execution named; the form of the docketed judgment depends upon that of the transcript actually sent. McAden v. Banister, 63 N.C. 479 (1869).

Quoted in Rehm v. Rehm, 2 N.C. App. 298, 163 S.E.2d 54 (1968).

Cited in Clements v. Booth, 244 N.C. 474, 94 S.E.2d 365 (1956).

§ 7-167. Effect of judgment on appeal.—In cases of appeal to the superior court from a justice's judgment docketed in such court, when judgment is rendered in the superior court on such appeal, the lien acquired by the docketing of such justice's judgment shall merge into the judgment of the superior court, and continue as a lien from the date of the docketing of such justice's judgment, and be superior to any other judgment docketed subsequent to the date of the justice's judgment, except prior attachment liens and judgment on the same. The clerk of the superior court shall carry forward and tax into the judgment of the superior court all costs incurred in the justice's court, in-

cluding transcript and docketing, as well as all costs incurred in the superior court, and shall issue execution only on the judgment rendered in the superior court, and not upon the justice's judgment. When the judgment of the superior court is satisfied, it shall be a satisfaction of the justice's judgment, and the clerk shall note such satisfaction on the record of the justice's judgment. (1903, c. 179; Rev., s. 1479; C. S., s. 1518.)

Effect of Appeal. — An appeal from a judgment of the justice of the peace does not deprive the plaintiff of the right to have the judgment docketed, nor does it take away the lien of the judgment. Dunham v. Anders, 128 N.C. 207, 38 S.E. 832 (1901).

§ 7-168. Entries made by clerks when judgment is rendered.—Whenever a transcript of a judgment taken before a justice of the peace is docketed on the judgment docket of the superior court and the same is afterwards reversed, modified, or affirmed in the superior court on appeal by a final judgment, the clerk of said court shall within ten days thereafter enter on the judgment docket where the said transcript was first docketed, the word "reversed," "modified," or "affirmed," as the case may be, and further refer to the book and page where can be found the judgment reversing, modifying, or affirming the former judgment. Any clerk failing to perform such duties as are required of him in this section shall pay to any person all such damages as he may have sustained by such failure. (Rev., s. 1479; 1907, c. 880; C. S., s. 1519.)

§ 7-169. Justice's judgment removed to another county.—Any person who may desire to have a justice's judgment in his favor removed to another county to be enforced against the goods and chattels of the defendant must obtain from the justice who rendered the judgment a transcript thereof, under his hand; and must further procure a certificate from the clerk of the superior court of the county where the judgment was rendered, under the seal of his court, that the justice who gave the judgment was, at the rendition thereof, a justice of the county. On such transcript of the judgment, thus certified, any justice in any other county may award execution for the sum therein expressed. (Code, s. 846; Rev., s. 1480; C. S., s. 1520.)

Cross Reference.—As to execution issuing on judgment rendered in a justice of the peace court when docketed in the office of the clerk of the superior court, see § 7-166.

Docketing in Different Counties. — The fact that a judgment docketed in one county is afterwards docketed in another, does not deprive it of the lien it had on the defendant's land in the first county. Perry v. Morris, 65 N.C. 221 (1871).

Docketing in the county where the judgment was rendered is necessary before the same can be docketed in another county. McAden v. Banister, 63 N.C. 479 (1869).

Same—The Transcript Docketed. — The transcript is what is allowed, by this section, to be docketed in the county other than that where the judgment was rendered. McAden v. Banister, 63 N.C. 479 (1869).

§ 7-170. Issue and return of execution.—Execution may be issued on a judgment, rendered in a justice's court, at any time within one year after the rendition thereof, and shall be returnable sixty days from the date of the same. (Code, s. 840, Rule 14; Rev., s. 1481; C. S., s. 1521.)

Failure to Docket. — The lost vitality of a judgment not docketed within one year from its rendition cannot be restored by placing it on the docket of the superior court. Woodard v. Paxton, 101 N.C. 26, 7 S.E. 469 (1888); Cowen v. Withrow, 114 N.C. 558, 19 S.E. 645 (1894). Nor will such docketing in the superior court arrest the running of the statute of limitation. Daniel v. Laughlin, 87 N.C. 433 (1882).

Same — Rights of Purchaser. — A purchaser under an execution on a judgment of a justice of the peace docketed after the lapse of one year acquires no title although he be a stranger to the judgment and without notice. Cowen v. Withrow, 114 N.C. 558, 19 S.E. 645 (1894).

Execution may be issued by the justice of the peace unless the cause has been removed to the superior court, and he may likewise recall the execution where it is improvidently issued. Bailey v. Hester, 101 N.C. 538, 8 S.E. 164 (1888).

Under prescribed circumstances, execu-

tion may be issued by a justice of the peace on a judgment rendered in his court. Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

Application of Proceeds. — A justice of the peace has no jurisdiction to direct the application by a sheriff, of the proceeds of an execution issued by another justice of the peace upon the ground that the latter was null and void. Cary v. Allegood, 121 N.C. 54, 28 S.E. 61 (1897).

§ 7-171. Levy and lien of execution.—Executions issued by a justice, which must be directed to any constable or other lawful officer of the county, shall be a lien on the goods and chattels of the defendant named therein, from the levy thereof only, but shall not be levied on or enforced in any manner against real estate; but when a justice's judgment shall be made a judgment of the superior court, as is elsewhere provided, the execution shall be capable of being levied and collected out of any property of the defendant in execution, and it shall be a lien on the real estate of said defendant from the time when it becomes a judgment of the superior court. (1868-9, c. 159, s. 5; Code, s. 841; Rev., s. 1482; C. S., s. 1522.)

To Whom Directed.—Execution from a justice's court must be directed to "any constable or other lawful officer of the county," and if it comes into the hands of the sheriff, he must obey it. But a constable cannot serve process addressed to the sheriff, nor can a sheriff serve process addressed to a constable. McGloughan v. Mitchell, 126 N.C. 681, 36 S.E. 164 (1900).

Same — Appraisers. — A constable to whom an execution from the court of a justice of the peace has been delivered may summon appraisers and administer to them the prescribed oaths. McAuley v. Morris, 101 N.C. 369, 7 S.E. 883 (1888).

Personal Property.—It is not necessary, under this section, that the judgment be docketed in the superior court, to entitle the judgment creditor to an execution against personal property. McAuley v. Morris, 101 N.C. 369, 7 S.E. 883 (1888).

Real Property.—A judgment of a justice of the peace, when duly docketed in the office of the superior court clerk, becomes a judgment of that court to all intents and purposes, and is a lien upon all of the real estate of the defendant in the county. Dysart v. Brandreth, 118 N.C. 968, 23 S.E. 966 (1896).

§ 7-172. Stay of execution.—In all actions founded on contract, whereon judgments are rendered in justices' courts, stay of execution, if prayed for at the trial by the defendant or his attorney, shall be granted by the justices in the following manner: for any such sum not exceeding twenty-five dollars, one month; for any sum above twenty-five dollars and not exceeding fifty dollars, three months; for any sum above fifty dollars and not exceeding one hundred dollars, four months; for any sum above one hundred dollars, six months. But no stay of execution shall be allowed in any action wherein judgment is rendered on a former judgment taken before a justice of the peace. (1868-9, c. 272; Code, s. 842; Rev., s. 1483; C. S., s. 1523.)

§ 7-173. Security on stay of execution.—The party praying for a stay of execution shall, within ten days after the trial, give sufficient security, approved by the justice, for payment of the judgment, with interest thereon till paid, and cost; and the acknowledgment of the surety, entered by the justice in his docket and signed by the surety, shall be sufficient to bind such surety. If the judgment be not discharged at the time to which execution has been stayed, the justice who awarded the judgment shall issue execution against the principal, or surety, or both. (Code, s. 843; Rev., s. 1484; C. S., s. 1524.)

Generally. — An undertaking that the appellant shall pay all costs that may be awarded against him on an appeal from a justice's court, and that if the judgment or any part thereof be affirmed, or the appeal dismissed, the appellant shall pay the amount directed to be paid by the judgment, is in compliance with the statute, and does not restrict the obligation to pay the judgment (if affirmed) as rendered in the justice's court, but the signers are bound to pay such as may be rendered in the superior court against the appellant. It is not necessary, to bind the appellant party to a suit, that he should sign the undertaking. Walker v. Williams, 88 N.C. 7 (1883).

Judgment Remains Unimpaired. — Al-

though the execution on the judgment may be stayed on giving it undertaking as herein provided for, the force and effect of the judgment remains unchanged. Dunham v. Anders, 128 N.C. 207, 38 S.E. 832 (1901).

§ **7-174. Stay of execution on appeal.**—In all cases of appeal from justices' courts, if the appellant desires a stay of execution of the judgment, he may, at any time, apply to the clerk of the appellate court for leave to give the undertaking as provided in a subsequent section; and the clerk, upon the undertaking being given, shall make an order that all proceedings on the judgment be stayed. Instead of before the clerk of the appellate court, the appellant may give the undertaking before the justice who tried the cause, who shall indorse his approval thereon. (1869-70, c. 187; Code, ss. 882, 883; Rev., ss. 1485, 1486; C. S., s. 1525.)

Mortgage as Substitute for Undertaking.—There is no statutory provision that allows a mortgage of real or personal property to be given in lieu of the undertaking on appeal from a justice's judgment, required by this section. Yet, if the defendant give and the plaintiff accept such mortgage, it is valid and can be enforced. The stay of the execution is a valuable and sufficient consideration to support the mortgage. Comron v. Standland, 103 N.C. 207, 9 S.E. 317 (1889).

Judgment Remains Unimpaired. — See note of Dunham v. Anders, 128 N.C. 207, 38 S.E. 832 (1901), § 7-173.

Action on Bond. — In an action on a bond given to stay execution on an appeal from a justice's judgment, it is not necessary to allege that the plaintiff has sustained damage on account of the appeal. McMinn v. Patton, 92 N.C. 371 (1885).

§ **7-175. Nature of undertaking.**—The undertaking shall be in writing, executed by one or more sufficient sureties, to be approved by the justice or clerk making the order, to the effect that if judgment be rendered against the appellant, the sureties will pay the amount together with all costs awarded against the appellant, and when judgment shall be rendered against the appellant, the appellate court shall give judgment against the said sureties. And in the event that said defendant shall prior to entry of the final judgment be adjudicated a bankrupt, then and in that event, the surety or sureties on said bond shall remain bound as if they were codebtors with the defendant and the plaintiff may continue the prosecution of the action against said sureties, as if they were codefendants in the cause. (1879, c. 68; Code, s. 884; Rev., s. 1487; C. S., s. 1526; 1933, c. 251, s. 1.)

Editor's Note. — The 1933 amendment added the second sentence.

Substantial Compliance Sufficient. — A literal compliance with the provisions of this section is unnecessary—a substantial compliance is sufficient. McMinn v. Patton, 92 N.C. 371 (1885).

Surety's Liability Attaches When Final Judgment Rendered against Principal. — The liability of a surety on a bond given in accordance with this section to stay execution of a judgment of the justice of the peace pending appeal, as provided by § 7-174, attaches when or if final judgment is rendered against the principal, and where the principal has been relieved of liability by a discharge in bankruptcy pending the appeal, plaintiff's claim being filed in the schedule in bankruptcy, no final judgment is rendered against the principal, and the surety may not be held liable on the stay bond. Note: this decision was given on the basis that chapter 251, Public Laws of 1933, amending this section, is prospective in effect and does not apply to bonds executed prior to its effect. Sutton v. Davis, 205 N.C. 464, 171 S.E. 738 (1933).

Mortgage as Substitute for Undertaking.—See note of Comron v. Standland, 103 N.C. 207, 9 S.E. 317 (1889), § 7-174.

Effect of Bankruptcy. — Where a judgment was rendered against the defendant before a justice of the peace, and an undertaking filed as provided for by this section, and pending the appeal he obtained a discharge in bankruptcy, it was held, that the sureties were not liable. Laffoon v. Kerner, 138 N.C. 281, 50 S.E. 654 (1905). This case was decided prior to the 1933 amendment. For a discussion of the case and the change effected by the amendment, see 11 N.C.L. Rev. 221.

§ **7-176. Execution stayed upon order given.**—A delivery of a certified copy of the order, hereinbefore mentioned, to the justice of the peace shall stay

the issuing of an execution on the judgment; if it has been issued, the service of a certified copy of such order on the officer holding the execution shall stay further proceedings thereon. A certified copy of such order shall also be served on the respondent, or on his agent or attorney, within ten days after the making thereof. (Code, s. 885; Rev., s. 1488; C. S., s. 1527.)

Article 22.

Appeal.

§ 7-177. No new trial; either party may appeal.—A new trial is not allowed in a justice's court in any case whatever; but either party dissatisfied with the judgment in such court may appeal therefrom to the superior court, as hereinafter prescribed. (Code, s. 865; Rev., s. 1489; C. S., s. 1528.)

Cross References.—As to appeal from court of justice of peace being first heard in recorder's court, see § 7-243; in special county court, see § 7-427. As to rehearing when judgment rendered against party absent because of sickness, excusable mistake or neglect, see Rule 21 of § 7-149.

New Trial Not Allowed. — When both parties to an action are present at the trial in a justice court, and the case is heard and judgment rendered, on new trial cannot be allowed. The party dissatisfied must appeal to the superior court. Froneburger v. Lee, 66 N.C. 333 (1872).

Strict compliance with the requirements for perfecting the appeal given by this section is required. Green v. Hobgood, 74 N.C. 234 (1876).

Time for Taking.—See note of Hahn v. Guilford, 87 N.C. 172 (1882), § 7-179.

Rehearing.—See note of Salmon v. McLean, 116 N.C. 209, 21 S.E. 178 (1895), § 7-149, Rule 21.

Bastardy Proceeding.—A bastardy proceeding, being a civil action, is subject to appeal by either party. State v. Liles, 134 N.C. 735, 47 S.E. 750 (1904).

Cited in State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934).

§ 7-178. Appeal does not stay execution.—No appeal shall prevent the issuing of an execution on a judgment, or work a stay thereof, except as provided for by giving an undertaking and obtaining an order to stay execution. (1876-7, c. 251, s. 6; Code, s. 875; Rev., s. 1490; C. S., s. 1529.)

An appeal from a justice of the peace does not vacate the judgment nor does it suspend its operation. Dunham v. Anders, 128 N.C. 207, 38 S.E. 832 (1901).

Applied in Massenburg v. Fogg, 256 N.C. 703, 124 S.E.2d 868 (1962).

§ 7-179. Manner of taking appeal.—The appellant shall, within ten days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served and the defendant did not appear and answer, he shall have fifteen days, after personal notice of the rendition of the judgment, to serve the notice of appeal herein provided for. (1876-7, c. 251, s. 7; Code, s. 876; Rev., s. 1491; C. S., s. 1530.)

This section applies to causes of which the court has acquired jurisdiction, and does not affect a case which enables one to obtain relief from a judgment entered against him when the court for lack of service was without jurisdiction to make any orders in any way affecting the rights of person or property. Graves v. Reidsville Lodge, 182 N.C. 330, 109 S.E. 29 (1921).

The principle both as to the right and procedure for a defendant against whom service of summons has not been made, or the same waived, to have the judgment set aside applies to the courts of justice of the peace as well as to those of more extensive jurisdiction. Graves v. Reidsville Lodge, 182 N.C. 330, 109 S.E. 29 (1921).

Duty of Justice.—A justice of the peace who takes a case under advisement and later renders judgment must notify the parties thereof to afford them opportunity to appeal in accordance with the provisions of the statute. Blacker v. Bullard, 196 N.C. 696, 146 S.E. 807 (1929).

Time.—An appeal must be taken to the next term of the appellate court. Hahn v. Guilford, 87 N.C. 172 (1882).

In accordance with practice and proce-

dure in courts of justices of peace, an appeal to the superior court means to the next term of the court to which an appeal in orderly and regular course would go. Starr Elec. Co. v. Lipe Motor Lines, 229 N.C. 86, 47 S.E.2d 848 (1948).

From the decision of a justice of the peace in a bastardy proceeding either the woman or the defendant may appeal to the superior court, but the appeal must be taken to the next term. The superior court has no right to dispense with this requirement. Helsabeck v. Grubbs, 171 N.C. 377, 88 S.E. 473 (1916). The "next term" means any term, civil or criminal, which begins after the expiration of the ten days allowed for serving the notice of appeal. State v. Fleming, 204 N.C. 40, 167 S.E. 483 (1933).

The carbon copy of a letter from the secretary of the Industrial Commission to the attorney for the defendant is not notice of appeal as herein contemplated and cannot be construed as a compliance with this section and § 7-180. Higdon v. Nantahala Power & Light Co., 207 N.C. 39, 175 S.E. 710 (1934).

Service of Notice.—Where judgment is given on process not personally served, but served by publication, and the defendant does not appear at the trial, the defendant is entitled to take fifteen days' notice of his judgment in which to send notice of his appeal. Thompson v. Lynchburg Notion Co., 160 N.C. 519, 76 S.E. 470 (1912).

Same—Discretion.—Although, where an appeal from a justice of the peace is regularly docketed in due time in the superior court, and proper notice of the appeal has not been given, a judge may, in his discretion, permit notice of appeal to be given, yet he has no discretion to revive an appeal lost by delay and to permit the same to be docketed at a subsequent term to the one to which it would have been returned. Davenport v. Grisson, 113 N.C. 38, 18 S.E. 78 (1893).

Same—Time of Service.—In an appeal from a justice of the peace to the superior court, notice must be served by an officer (unless service is accepted or the appeal is taken at the trial), and within ten days both upon the justice who tried the case and upon the appellee, and upon failure to give such notice, unless the judge, in his discretion, permits the notice to be given at the trial, the appeal should be dismissed. State v. Johnson, 109 N.C. 852, 13 S.E. 843 (1891).

Same—Excusable Neglect. — Where the judgment is rendered in the absence of either party and such absence is occasioned by sickness or excusable neglect, relief may be had by filing an affidavit before the justice, setting forth the grounds therefor, within ten days after judgment. Gambill v. Gambill, 89 N.C. 201 (1883). See Dunn v. Patrich, 156 N.C. 248, 72 S.E. 220 (1911).

Actual Service. — Where the defendant is actually served with summons he is bound to take notice of the rendition of judgment. Spaugh v. Boner, 85 N.C. 208 (1881).

Service by Officer. — The notice of an appeal from a justice of the peace, when the notice is not given on the trial, must be served by an officer. Clark v. Deloatch Mills Mfg. Co., 110 N.C. 111, 14 S.E. 518 (1892).

Appeals under Workmen's Compensation Act shall, insofar as is reasonable and consonant with the language of the act and legislative intent, conform to this section. Summerell v. Chilean Nitrate Sales Corp., 218 N.C. 451, 11 S.E.2d 304 (1940).

§ 7-180. No written notice of appeal in open court.—Where any party prays an appeal from a judgment rendered in a justice's court, and the adverse party is present in person or by attorney at the time of the prayer, the appellant shall not be compelled to give any written notice of appeal either to the justice or to the adverse party. (1869-70, c. 187; 1876-7, c. 251, s. 8; Code, s. 877; Rev., s. 1492; C. S., s. 1531.)

Party Present. — Where the party is present when the appeal is prayed for, no written notice is required. State v. Crouse, 86 N.C. 617 (1882).

If notice of appeal be given in open court, the adverse party being present in person or by attorney at the time appeal is prayed, no written notice is required. Starr Elec. Co. v. Lipe Motor Lines, 229 N.C. 86, 47 S.E.2d 848 (1948).

Applicability of Estoppel. — Where the defendant upon judgment being rendered against him in a justice's court appealed in open court, and afterwards told the justice not to send up the papers, who thereupon delayed in so doing, and thereafter the defendant changed his mind and filed with the clerk of the superior court a bond sufficient to cover the plaintiff's claim and costs: Held, that it was not error in the court below to refuse to dismiss the appeal. Suttle v. Green, 78 N.C. 76 (1878).

§ 7-181. Justice's return on appeal.—The justice shall, within ten days after the service of the notice of appeal on him, make a return to the appellate court and file with the clerk thereof the papers, proceedings and judgment in the case, with the notice of appeal served on him. He may be compelled to make such return by attachment. But no justice shall be bound to make such return until the fees, prescribed by law for his service, be paid him. The fee so paid shall be included in the costs, in case the judgment appealed from is reversed. (Code, s. 878; Rev., s. 1493; C. S., s. 1532.)

Payment of Fees Necessary. — Officers of the court are not compelled to perform their duties until fees prescribed by law are paid or tendered them, but they must be demanded by them before laches can be imputed to litigants. West v. Reynolds, 94 N.C. 333 (1886).

Motion to Dismiss Appeal Where Record Not Filed in Superior Court.—Where appeal from a judgment of a justice of the peace is not filed in the superior court within ten days as required by this section, but is filed during the term at which the appeal would have stood regularly for trial had the record been timely filed, appellee's motion at the next succeeding term to dismiss the appeal presents, in like manner as a petition for recordari under Superior Court Rule 14, the question of fact whether the failure of the justice of the peace to comply with this section was caused by defendant's default, and when there is no evidence or finding in regard thereto, judgment denying the motion is not supported by the record, and the cause must be remanded. Freeman v. Bennett, 249 N.C. 180, 105 S.E.2d 809 (1958).

Statement of Evidence Not Sent Up.—The requirement of this section that the justice file with the clerk, "the papers, proceedings and judgment in the case," does not include a statement of the evidence, unless there was an exception by one of the parties. London v. Headen, 76 N.C. 72 (1877).

Liability of Justice.—The sending up an appeal to the superior court by the justice of the peace upon the payment of the cost is a judicial act, and no action for damages will lie against him for failing to send up the papers in apt time. Simonds v. Carson, 182 N.C. 82, 108 S.E. 353 (1921).

Power of Justice Ends upon Transmission of Appeal. — After a justice of the peace has transmitted an appeal from his judgment and all the papers to the superior court, he has no power to grant a motion to set aside his judgment for want of jurisdiction. Forbes v. McGuire, 116 N.C. 449, 21 S.E. 178 (1895).

Remedy Where Justice Fails in His Duty.—Upon failure of a justice of the peace to make a return to notice of appeal, appellant, if in no default should move at the next ensuing term of the superior court for a writ of recordari to compel the justice of the peace to make the return and to file the papers, etc., as required by this section. Starr Elec. Co. v. Lipe Motor Lines, 229 N.C. 86, 47 S.E.2d 848 (1948).

A motion in the superior court for a recordari or an attachment under this section is the remedy given an appellant for the failure of the justice to send up an appeal, and it is no legal excuse for the appellant to show that he had paid to the justice his fees and those of the clerk, and that the justice had failed to docket it as required by the statutes. The appellant would thus make the justice his agent and for his neglect he would be responsible. MacKenzie v. Davidson County Dev. Co., 151 N.C. 276, 65 S.E. 1003 (1909).

Failure to Sign Return.—The failure of a justice of the peace to sign the return of notice of appeal does not vitiate the proceedings in the superior court, where the appellant had given notice of appeal and paid the justice's fee, and the appellee made no motion for any purpose, but made a general appearance in the superior court at the trial in person and by attorney. Hawks v. Hall, 139 N.C. 176, 51 S.E. 857 (1905).

Appeal from Order of Superior Court Granting Writ of Recordari. — For a review and discussion of the decisions relative to the right of an immediate appeal to the Supreme Court from an order of the superior court granting a motion for a writ of recordari to a justice's court where the justice has failed to comply with this section, see Freeman v. Bennett, 249 N.C. 180, 105 S.E.2d 809 (1958).

§ 7-182. Defective return amended.—If the return be defective, the judge or clerk of the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with the order by attachment. (Code, s. 879; Rev., s. 1494; C. S., s. 1533.)

Stated in Hawks v. Hall, 139 N.C. 176, 51 S.E. 857 (1905).

§ 7-183. Restitution ordered upon reversal of judgment.—If the judgment appealed from, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing of the appeal, on a previous notice of six days. If the order be obtained before the judgment of reversal is entered, the amount may be included in the judgment. (Code, s. 886; Rev., s. 1495; C. S., s. 1534.)

Involuntary Payments. — This section only applies where there has been an involuntary payment of or on the judgment. Cowell v. Gregory, 130 N.C. 80, 40 S.E. 849 (1902).

ARTICLE 23.

Forms.

§ 7-184. Forms to be used in justice's court. — The following forms, or substantially similar ones, shall be sufficient in all cases of proceedings in civil actions, provided for in this article:

[No. 1]

Summons

North Carolina, ... County, ... Township.

A.....B..... } Before .....
against
C.....D..... } Justice of the Peace.

State of North Carolina, to any constable or other lawful officer of ..... County—Greeting:

We command you to summon C. D. to appear before G. W. H., Esq., one of the justices of the peace for the county of ....., on the ..... day of ....., 19...., at his office (or elsewhere, as the justice may appoint the place of trial), in ..... Township, to answer A.B. in a civil action for the recovery of ..... dollars; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this ..... day of ....., 19.....

G. W. H. .....
Justice of the Peace.

[No. 2]

Summons on Allowing Application to Rehear
(Title, etc., as in No. 1)

Whereas, A. B., plaintiff above named (or C. D., defendant above named), has applied by affidavit, which is filed, for a rehearing in the above-entitled action, wherein judgment was rendered against the said plaintiff (or defendant), in his absence, at the trial thereof, before the undersigned on the ..... day of ....., 19....; and such application having been allowed, and the cause opened for reconsideration;

Now, therefore, we command you to summon the said plaintiff (or defendant) to appear before G. W. H., Esq., one of the justices of the peace for the county of ....., on the ..... day of ....., 19...., at ....., in said county, when and where the complaint will be reheard and the same proceedings be had as if the case had not been acted on; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this ..... day of ....., 19.....

G. W. H. .....
Justice of the Peace.

[No. 3]-[No. 16]

Repealed by Session Laws 1947, c. 693, s. 3.

[No. 17]

Affidavit for Arrest on Debt Fraudulently Contracted
(Title as in No. 1)

A. B., plaintiff above named, being duly sworn, deposes and says:

(1) That the defendant C. D. is indebted to the plaintiff in the sum of ..... dollars on an inland bill of exchange, drawn on the ..... day of ....., 19.... by defendant on the First National Bank of Charlotte, North Carolina, payable at sight to the order of plaintiff.

(2) That on the ..... day of ....., 19...., the defendant applied to the plaintiff to purchase a bill of goods amounting to ..... dollars, which the plaintiff offered to sell to the defendant for cash; that the defendant, contriving to defraud the plaintiff, represented that he had money on deposit at said National Bank for more than the amount of the proposed purchase, and offered to give plaintiff a sight draft on said bank; that the plaintiff, relying upon the representations of the said defendant, and solely induced thereby, sold and delivered a bill of goods amounting to ..... dollars to the defendant, who thereupon drew the sight order on said bank above referred to; that on the .....day of ....., 19...., the plaintiff presented said draft at said bank for acceptance, when the same was not accepted for want of any funds in said bank to the credit of the defendant; that notice of nonacceptance was given to the defendant, who has wholly refused to pay the draft or any part thereof; that the representations made as aforesaid by the defendant were, and each and every of them was, as deponent is informed and believes, untrue; and that the defendant, as deponent is informed and believes, did not have, nor expect to have, any funds on deposit at said bank at the making of the representations above mentioned, but said defendant was then and is now wholly insolvent.

A. B.....

Sworn to and subscribed before me, this ..... day of ....., 19.....
G. W. H.....
Justice of the Peace.

[No. 18]

Undertaking on Arrest
(Title as in No. 1)

Whereas, the plaintiff above named is about to apply (or has applied) for an order to arrest the defendant, C. D.;

Now, therefore, we, J. J., of ..... County, and P. P., of ..... County, undertake, in the sum of ..... dollars (the sum must be at least one hundred dollars), that if the said defendant recover judgment in this action the plaintiff will pay all costs that may be awarded to the said defendant and all damages which he may sustain by reason of his arrest in this action.

J. J.....
P. P.....

Signed in my presence, this ..... day of ....., 19.....
G. W. H.....
Justice of the Peace.

[No. 19]

Order of Arrest

(Title as in No. 1)

North Carolina, ... County, ... Township.

To any constable or other lawful officer of said county:

For the causes stated in the annexed affidavit, you are required forthwith to arrest C. D., the defendant named above, and hold him to bail in the sum of ..... dollars (the sum should be the amount of the plaintiff's claim), and to return this order before the undersigned at his office in said county, on the ..... day of ....., 19.....; of which return you will give notice to plaintiff or his attorney.

Dated this ..... day ....., 19.....

G. W. H.....
Justice of the Peace.

[No. 20]

Undertaking of Bail on Arrest

(Title as in No. 1)

Whereas, the above named defendant, C. D., has been arrested in this action:

Now, therefore, we, B. B., of ..... County, and D. D., of ..... County, undertake, in the sum of ..... dollars (the sum should be the same as mentioned in the order of arrest), that if the defendant is discharged from arrest he shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce judgment therein.

B. B.....
D. D.....

Signed in my presence, this ..... day of ....., 19.....

G. W. H.....
Justice of the Peace.

[No. 21]

Notice of Exception to Bail

(Title as in No. 1)

To O. P. M., constable (or sheriff) of the county of .....:

Take notice, that the plaintiff does not accept the bail offered by the defendant in this action (and if the undertaking is defective in form or otherwise, add also), and further he accepts to the form and sufficiency of the undertaking.

Yours, etc.,
A. B....., Plaintiff.
(or M. W. N....., Attorney for Plaintiff.)

Dated this ..... day of ....., 19.....

[No. 22]

Notice of Justification of Bail

(Title as in No. 1)

To A. B., Plaintiff (or M. W. N., attorney for plaintiff):

Take notice, that the bail in this action will justify before G. W. H., Esq., a justice of the peace for said county, at the office of said justice, in said county, on the ..... day of ....., 19.....

Dated this ..... day of ....., 19.....

C. D. .....
(or, M. W. N. ....., Attorney for C. D.), Defendant.

[No. 23]

Notice of Other Bail

(Title as in No. 1)

Take notice that R. S., of ..... County (physician), and Y. Y., of ..... County (farmer), are proposed as bail, in addition to (or in place of) B. B. and D. D., the bail already put in; and that they will justify (conclude as in last form). Date, etc.

[No. 24]

Justification of Bail

(Title as in No. 1)

On this ..... day of ....., 19...., before G. W. H., Esq., a justice of the peace for said county, personally appeared B. B. and D. D. (or R. S. and Y. Y., as the case may be), the bail given by the defendant C. D. in this action, for the purpose of justifying pursuant to notice; and the said B. B., being duly sworn, says:

(1) That he is a resident and householder (or freeholder) in this State;

(2) That he is worth the sum of ..... dollars (the amount specified in the order of arrest), exclusive of property exempt from execution.

And the said D. D., being duly sworn, says:

(As with the other bail.)

(And so on with each bail offered.)

(Signatures of bail.)

Examination taken and sworn to before me, this ..... day of ....., 19.....

G. W. H. .....
Justice of the Peace.

[No. 25]

Allowance of Bail

(Title as in No. 1)

The bail of the defendant, C. D., within mentioned, having appeared before me and justified, I do find the said bail sufficient, and allow the same.

Dated this ..... day of ....., 19.....

G. W. H. .....
Justice of the Peace.

[No. 26]

Subpoena to Testify

State of North Carolina, ... County.

To S. T. ....., greeting: (the justice may insert any number of necessary names.)

You (and each of you) are commanded to appear personally before G. W. H., Esq., a justice of the peace for said county, at his office in said county, on the ..... day of ....., 19...., to give evidence in a certain civil action now pending before said justice, and then and there to be tried, between A. B., plaintiff, and C. D., defendant, on the part of the defendant (or plaintiff).* Herein fail not, under the penalty prescribed by law. Witness our said justice, this ..... day of ....., 19.....

G. W. H. .....
Justice of the Peace.

[No. 27]

N. B.—The justice may, instead of a formal subpoena, indorse on the summons or other process an order for witnesses, substantially as follows:

The officer to whom the within process is directed will summon the following persons as witnesses for the plaintiff: .....; and the following as wit-

nesses for the defendant: .....; and will notify all such witnesses to appear and testify at the time and place within named for the return of this process.

Dated this ..... day of ....., 19.....

G. W. H. .....
Justice of the Peace.

[No. 28]

Subpoena Duces Tecum

If any witness has a paper or document which a party desires as evidence at the trial, the justice will pursue the form No. 26 as far down as the asterisk(*) and then add the following clause:

And you, S. T., are also commanded to bring with you and there produce as evidence a certain bond (describe particularly) which is now in your possession or under your control, together with all papers, documents, writing or instruments in your custody, or under your control. (Conclude as in form No. 26.)

[No. 29]

Form of Oath of Witness

You swear that the evidence you will give as to the matters in difference between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth. So help you, God.

[No. 30]

Proceedings against Defaulting Witness

When a witness, under subpoena, fails to attend, the justice will note the fact in his docket by some such entry as the following:

R. P., a witness summoned on behalf of the plaintiff, called and failed.

If the party who suffers by default of the witness wishes to move for the penalty against him, he will serve substantially the following notice on the witness:

(Title as in No. 1)

To R. P.:

Take notice, that on the ..... day of ....., 19...., the plaintiff in the above action will move G. W. H., Esq., the justice before whom the trial of said action was had, on the ..... day of ....., 19...., for judgment against you for the sum of ..... dollars, forfeited by reason of your failure to appear and give evidence on said trial as you were summoned to do.

Dated this ..... day of ....., 19.....

A. B. ....., Plaintiff.

The justice will enter the proceedings on the foregoing notice on his docket as follows:

A. ..... B. ..... against C. ..... D.	Justice's Court. Motion for penalty against R. P., defaulting witness.

..... day of ....., 19...., A. B., above named, appears, and according to a notice filed and duly served on R. P., moved for the penalty of ..... dollars forfeited by the said R. P. by reason of his failure to attend and give evidence on the trial of a cause, wherein A. B. was plaintiff and C. D. was defendant, tried before me at my office on the ..... day of ....., 19.., as appears by entry duly made on my docket; when and where the said R. P., a witness summoned on the part of the plaintiff in that action, was called and did fail.

R. P. appears and assigns for excuse "high water," and offers his own affidavit, which is filed. He also offers as a witness in his behalf S. S., who being duly sworn, testifies that (state what S. S. says about the condition of the water at the time.) R. P., having no other evidence, closed the case on his part. Whereupon

A. B., offered M. Y. as a witness, who, being sworn, testifies (state what witness says).

Neither party having any other evidence, and after hearing all the proofs and allegations submitted for and against the motion, it is adjudged, on motion of A. B., that A. B. do recover of R. P. the sum of ..... dollars, penalty forfeited by reason of the premises, and the further sum of ..... dollars, costs of this motion.

[No. 31]

Form of a Venire

The justice will make a list of the persons drawn by him as jurors, and indorse thereon substantially as follows:

To O. P. M., constable of ..... County:

You are hereby directed to summon the persons named within to appear as jurors before me at my office in your county, on the ..... day of ....., 19...., for trial of a civil action now pending between A. B., plaintiff, and C. D., defendant, then and there to be tried. And have you then and there the names of the jurors you shall summon, with this precept.

Dated this ..... day of ....., 19.....

G. W. H. .....
Justice of the Peace.

[No. 32]

Form of Juror's Oath

You swear well and truly to try the matter in difference between A. B., plaintiff, and C. D., defendant, and a verdict to give thereon according to the evidence in the cause. So help you, God.

[No. 33]

Form of Oath to Constable of the Jury

You swear that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial together in some private and convenient place, without any meat or drink, except such as may be ordered by the court; that you will not suffer any communication, orally or otherwise, to be made to them, and that you will not communicate with them yourself, orally or otherwise, unless by order of the court. So help you, God.

[No. 34]

Summons against Defaulting Juror to Show Cause

State of North Carolina, to any constable or other lawful officer of .....
County—Greeting:

We command you to summon R. S. to appear before G. W. H., Esq., a justice of the peace for your county, at his office in said county, on the ..... day of ....., 19...., to show cause why he, the said R. S., should not be fined according to law for his nonattendance as a juror before our said justice at his office in said county on the ..... day of ....., 19...., in a certain cause then and there pending, in which A. B., was plaintiff and C. D. was defendant; and have you then and there this precept, with the date and manner of your service thereof.

Witness, our said justice, this ..... day of ....., 19...

G. W. H. .....
Justice of the Peace.

[No. 35]

Demurrer to Complaint

(Title as in No. 1)

The defendant demurs to the complaint in this action, for that the said com-

plaint does not state facts sufficient to constitute a cause of action (or, for that the said complaint is not sufficiently explicit to enable this defendant to understand it).

(Signature of defendant or defendants' attorney.)

[No. 36]

Demurrer to Answer

(Title as in No. 1)

The plaintiff demurs to the answer of the defendant, for that the facts stated in the answer are not legally sufficient to constitute a defense to this action (or, for that the said answer is not sufficiently explicit to make this plaintiff understand it).

(Signature of plaintiff or plaintiff's attorney.)

[No. 37]

Judgment upon Demurrer

NOTE.—If the justice thinks the objection raised by the demurrer to the pleadings is well-founded, he will make this entry on his docket:

"Demurrer to the complaint (or to the answer) filed, heard and sustained; and whereupon it is ordered that the said pleading be amended without cost (or upon payment of costs, as the case may be)."

This order to amend the defective pleading is a matter of course, and is the only judgment which the justice can render upon demurrer. He cannot give a final judgment in the cause at this stage, for the party may choose to amend his pleadings and try the case of the facts. If, however, the party refuse to amend the defective pleading, the justice will disregard the same, and proceed to render final judgment, as follows:

"The plaintiff (or defendant) having refused to amend his complaint (or his answer) demurred to, it is adjudged that the defendant go without day and recover of the plaintiff the sum of ..... dollars, costs of this action (or that the plaintiff recover of the defendant the sum of ..... dollars, damages, and the further sum of ..... dollars, costs of this action)."

If the justice deem the objection, raised by the demurrer, not well-founded, he will enter in his docket as follows: "Demurrer to the complaint (or to the answer) filed, heard and overruled," and he will then proceed to the evidence in the cause.

[No. 38]

Entry in Docket

Note.—The following is offered as a general precedent of the manner in which the justice will make the entries in his docket:

(Title as in No. 1)

....., 19..... Summons issued; returnable on the ..... instant at my office.

....., 19..... Summons returned, served on defendant by O. P. M., constable, on the ..... instant, both parties appear, the plaintiff in person, the defendant by R. H. R., Esq., attorney.

The plaintiff complains on a promissory note executed by the defendant to him, dated ....., 19...., payable one day after date, for $....., and also for goods sold and delivered to the defendant, and claims damages for $.....

The defendant answers and denies each and every allegation in the complaint, and claims a setoff of $..... for wood sold and delivered to the plaintiff, and also of $..... for work and labor performed for the plaintiff.

On joining issue of fact as above, the action is, by consent of parties, adjourned to the ..... instant, at my office.

A venire is also issued at the plaintiff's (or defendant's) demand, returnable at the time and place last mentioned.

....., 19..... The parties appear and proceed to the trial of the cause. The following jurors are returned as summoned upon the venire by O. P. M., constable. (Insert the names of all jurors summoned.) The following jurors, who are returned as summoned, do not appear. (Insert their names.) The following jurors appear according to the summons. (Insert their names.) The following jurors are sworn to try the action. (Insert their names.)

H. P. and J. M., witnesses for the plaintiff, and W. F., a witness, for the defendant, are sworn and testify; J. S., a witness on the part of the defendant, is offered, but objected to by the plaintiff on the ground (state the ground), and rejected.

Having heard the evidence (and the arguments of a council, if any), the cause is submitted to the jury, who retire, under charge of O. P. M., a constable duly sworn for that purpose, and afterwards return in open court and publicly deliver their verdict, by which they find in favor of the plaintiff for $..... damages; whereupon, I adjudged that the plaintiff do recover of the defendant—

Damages, ... $.....
Costs, ...

....., 19... Execution issued for above judgment to O. P. M., constable.

....., 19..... Notice of appeal served on me by defendant; my fee paid and returned to the appeal made by me.

N. B.—If the action is tried by the justice without a jury, all that relates to the venire and the verdict in the above form must be left out, and the judgment will be entered as follows:

After hearing the proofs and allegations of the respective parties, I do adjudge that the plaintiff recover, etc. (as above).

[No. 39]

Form of Notice of Appeal to the Superior Court, Where a New Trial of the Whole Matter Is to Be Had

(Title as in No. 1)

To G. W. H., Esq., a justice of the peace for said county.

Take notice, that the defendant in the above action appeals to the Superior Court from the judgment rendered therein by you on the ..... day of ....., 19...., in favor of the plaintiff for the sum of sixty-five dollars damages and the further sum of three dollars and seventy-five cents costs, and that this appeal is founded upon the ground that the said judgment is contrary to law and evidence.

Dated this ..... day of ....., 19.....

W. W. .....
Attorney for Appellant.

[No. 40]

Return to Notice of Appeal.

A. ..... B. .....
against
C. ..... D. .....
} County of .....

To the Superior Court of ..... County:

An appeal having been taken in this action by the defendant, I, G. W. H., the justice before whom the same was tried, in pursuance of the notice of appeal hereto annexed, do hereby certify and return that the following proceedings were had by and before me in said action:

On the first of February, one thousand eight hundred and sixty-nine, at the

request of the plaintiff, I issued a summons in his favor and against the defendant, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office; and at the same time and place the parties personally appeared.

The plaintiff complained for goods sold and delivered to defendant to the amount of $75. The defendant denied the right of the plaintiff to recover that amount for the goods, on the ground that he had paid, at or shortly after the purchase of said goods, ... dollars thereon; and he also claimed to have a setoff against the plaintiff to the amount of $85 for board and lodging furnished to plaintiff and work and labor done for him; and he claimed to be entitled to judgment against the plaintiff for $.....

Both parties introduced evidence upon the claims so made by them, and after hearing their proofs and allegations, I rendered judgment in favor of the plaintiff and against the defendant, on the tenth of February, eighteen hundred and sixty-nine, for $65 damages, and for the further sum of $3.75, costs of the action.

I also certify that on the eleventh of February, eighteen hundred and sixty-nine, the defendant served the annexed notice of appeal on me, and at the same time paid me my fee of $1 for making my return.

All of which I send, together with process, pleadings, and other papers in the cause. Dated this ..... day of ....., 19.....

G. W. H. .....
Justice of the Peace.

N. B.—If the cause was tried by a jury, state the fact and set forth the verdict, with the judgment thereon. It is not necessary to set out in the return a copy of any process, pleading, affidavit or other paper. It is sufficient to refer to such a paper as filed and as herewith sent.

[No. 41]

Where the Sum Demanded Exceeds Two Hundred Dollars

It appearing that the sum demanded by the plaintiff in this action exceeds two hundred dollars, it is ordered that the action be dismissed, and judgment is rendered against A. B., plaintiff, for the sum of ..... dollars, costs.

(Date and sign.)

[No. 42]

Where the Title to Real Estate Is in Question

N. B.—The defendant, if he wishes to make answer to title, must file a written answer to the complaint, setting forth the facts.

Answer of Title

(Title as in No. 1)

The defendant answers to the complaint:

(1) That no allegation thereof is true.

(2) That the plaintiff ought not to have or maintain his action against the defendant, because the premises mentioned and described in the complaint, at the time when the rent and renter, for which said action is brought, is alleged to be due, was and is now the land and freehold of one J. D., and not that of the plaintiff; nor was the plaintiff then, nor is he now, entitled to the possession thereof; and the defendant further answers that the title to said premises was, at the time aforesaid, and is now, in said J. D., and will come in question on the trial of this action.

Dated this ..... day of ....., 19.....

C. D. ....., Defendant.

It appearing from the answer and proof of the defendant that the title to real estate is in controversy in this action, it is ordered that the action be dismissed, and judgment is rendered against the plaintiff for ..... dollars, costs.

[No. 43]

Tender of Judgment

(Title as in No. 1)

To C. D. .....:

Take notice, that the defendant hereby offers to allow judgment to be taken against him by the plaintiff in the above action for the sum of fifty dollars, with costs.

Dated this ..... day of ....., 19...

C. D. ....., Defendant.

[No. 44]

Acceptance of Tender of Judgment

(Title as in No. 1)

To A. B. .....:

Take notice, that the plaintiff hereby accepts the offer to allow the plaintiff to take judgment in the above action for the sum of fifty dollars, with costs, and the justice will enter up judgment accordingly.

Dated this ..... day of ..... 19...

A. B. ....., Plaintiff.

[No. 45]

Form of Judgment on Tender

(Title as in No. 1)

N. B.—The justice will state all the proceedings in the action from the issuing of the summons down to the appearance of the parties and the complaint of the plaintiff, and then proceed as follows:

Whereupon, the said defendant before answering said complaint, made and served an offer, in writing, to allow the plaintiff to take judgment against him for the sum of fifty dollars with costs; * and the said plaintiff thereupon accepted such offer, and gave notice thereof to the defendant in writing; said offer and acceptance thereof being filed;

Now, therefore, judgment is accordingly rendered in favor of the plaintiff and against the defendant for the sum of fifty dollars damages, and the further sum of one dollar, costs.

If notice of acceptance is not given, the entry will be as follows:

(Follow the foregoing form down to the asterisk (*) and then add):

And the said plaintiff having refused to accept such offer, the defendant answered the complaint by denying, etc. (state the defense of the defendant down to the judgment, which, in case the plaintiff fails to recover more than the sum mentioned in the offer, will be entered thus):

After hearing the proof and allegations of the respective parties, I adjudge that the plaintiff do recover the sum of fifty dollars damages, and the further sum of one dollar, costs.

I further adjudge that the defendant do recover of the plaintiff the sum of two dollars and seventy-five cents, costs accruing in the action subsequent to the offer of the defendant referred to.

[No. 46]

General Form—Execution

(Title as in No. 1)

State of North Carolina, to any constable or other lawful officer of ..... County—Greeting:

Whereas, judgment has been rendered by G. W. H., Esq., a justice of the peace for said county, against C. D., in favor of A. B., for the sum of ..... dollars damages, and the further sum of ..... dollars costs, on the ..... day of ....., 19..;

You are therefore commanded forthwith to levy of the goods and chattels of the said C. D. (excepting such goods and chattels as are by law exempt from execution) the amount of such judgment, with interest from the date thereof until the money is recovered.

And make due return, according to law, in sixty days from the date hereof.

Dated this ..... day of ....., 19.....

G. W. H. .....
Justice of the Peace.

[No. 47]

Repealed by Session Laws 1947, c. 693, s. 3.

[No. 48]

Record of Conviction of a Contempt

The justice will make an entry in his docket stating the particular circumstances of the contempt, of which the following is offered as an example:

Whereas, on the ..... day of ....., 19...., while engaged in the trial of an action (or other judicial act, as the case may be) in which A. B. was plaintiff and C. D. was defendant, at my office in ..... County, M. B. did willfully and contemptuously interrupt me, and did then and there conduct himself so disorderly and insolently towards me, and by making a loud noise did disturb the proceedings on said trial (or other judicial act) and impair the respect due to the authority of the law; and on being ordered by me to cease making such noise and disturbance, the said M. B. refused so to do, but on the contrary did publicly declare and with loud voice (state whatever offensive words were used); and whereas, when immediately called upon by me to answer for the said contempt said M. B. did not make any defense thereto, nor excuse himself therefrom; the said M. B. is therefore convicted of the contempt aforesaid, and is adjudged to pay a fine of five dollars and be imprisoned in the county jail for the term of two days, and until he pays such fine or is duly discharged from imprisonment according to law.

G. W. H. .....
Justice of the Peace.

[No. 49]

Warrant of Commitment for a Contempt

(Title as in No. 1)

State of North Carolina, to the keeper of the common jail of ..... County—Greeting:

Whereas, etc. (recite the record of conviction so as to show the entire matter of contempt, together with the judgment therefor, and then proceed as follows):

Therefore, you are hereby commanded to receive the said M. B. into your custody in the said jail, and him there safely keep during the said term of two days, and until he pays the said fine or is duly discharged according to law.

Herein fail not.

Dated this ..... day of ....., 19.....

G. W. H. .....
Justice of the Peace.

(Code, s. 909; Rev., s. 1496; C. S., s. 1535.)

SUBCHAPTER VI. RECORDERS' COURTS.

ARTICLE 24.

Municipal Recorders' Courts.

§ 7-185. In what cities and towns established; court of record.—In each city and town in the State, which has acquired a population of one

thousand or over by the last federal census, a recorder's court for such municipality may be established, which shall be a court of record and shall be maintained pursuant to the provisions of this subchapter. (1919, c. 277, ss. 1, 2; C.S., s. 1536; 1925, c. 32, s. 1.)

Local Modification.—Richmond: 1941, c. 60, s. 1.

Cross References.—As to abolishing municipal recorder's court, see § 7-212. See also, note to § 7-278. As to continued existence and ultimate abolition of courts inferior to the superior court, and their replacement by district courts, see § 7A-3.

Editor's Note.—Session Laws 1953, c. 998, made the provisions of this article applicable to municipalities in Johnston County.

Constitutionality. — Where the question of the constitutionality of this section establishing recorders' courts by a general act is the subject of the action, and pending the appeal the legislature has withdrawn the effect or operation of the statute from a certain county (Caldwell) wherein the establishment of the court was the subject of injunctive relief, the cause of action abates and the appeal will be dismissed at the cost of each party, and the order restraining the establishment of the particular court will continue to be effective. Coffey v. Rader, 182 N.C. 689, 110 S.E. 106 (1921).

Validity of Act Making Article Applicable to Municipalities in Johnston County. —The 1953 act making the provisions of this article applicable to municipalities in Johnston County, etc., was not a local, private or special act violative of N.C. Const., Art. II, § 29, but was tantamount to a reenactment of the general law relating to establishment of recorders' courts, making it applicable to Johnston County. State v. Ballenger, 247 N.C. 216, 100 S.E.2d 351 (1957).

Cited in Stephens v. Dowell, 208 N.C. 555, 181 S.E. 629 (1935); State v. Boykin, 211 N.C. 407, 191 S.E. 18 (1937); State v. Morgan, 246 N.C. 596, 99 S.E.2d 764 (1957); State v. Johnson, 251 N.C. 339, 111 S.E.2d 297 (1959).

§ 7-186. Recorder's election and qualification; term of office and salary.—The court shall be presided over by a recorder, who may be a licensed attorney at law, and who shall be of good moral character and, at the time of his appointment or election, a qualified elector of the municipality. The first recorder, upon the establishment of such court, shall be elected by the governing body of the municipality, either at the time of the establishment of the court or within thirty days thereafter, and he shall hold office until the next municipal election and until his successor is duly elected and qualified. If a vacancy occur in the office at any time, the same shall be filled by the election of a successor for the unexpired term by the governing body of the municipality, at the regular or special meeting called for that purpose. After the first elected recorder each succeeding recorder shall be nominated and elected in the municipality in the same manner and at the same time as is now provided by law for the elective officers of the municipality, and in the general election for such officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office, as is now provided by law for a justice of the peace, and shall file the same with the clerk of the board of the city or town. The salary of the recorder shall be determined and fixed in advance by the governing body of the city or town, and shall not be increased or decreased during the term of his office, and shall be paid out of the funds of the municipality: Provided, that the governing body of such city or town is hereby authorized to provide a schedule of fees to be charged by said recorder. (1919, c. 277, s. 2; C.S., s. 1537; 1925, c. 32, s. 2; 1943, c. 543.)

Local Modification. — City of Belmont: 1949, c. 871, s. 1; 1957, c. 385, s. 1; 1965, c. 35; city of Burlington: city of New Bern: 1949, c. 649; city of Randleman: 1947, c. 930, s. 1; town of Asheboro: 1947, c. 930, s. 1; town of Dallas: 1951, c. 963, s. 1; Johnston: 1957, c. 619, s. 2; town of Graham: 1959, c. 960; town of Kernersville: 1955, c. 282, s. 1; town of Liberty: 1965, c. 478, amending 1959, c. 731; town of Mount Holly: 1959, c. 223; town of Siler City: 1953, c. 607, s. 2; town of Southern Pines: 1959, c. 74, s. 1; town of Wendell: 1955, c. 1007.

Cross References.—As to forms of oath required of justice of peace, see § 11-11. As to oaths required of public officials generally, see §§ 11-6, 11-7, N.C. Const.,

Art. VI, § 7. As to penalty for failure to take oaths, see § 128-5.

Editor's Note. — The 1925 amendment added two provisos to this section. The 1943 amendment struck out the second proviso making the recorder eligible to hold the office of mayor.

Mandamus to Compel Appointment. — When it appears on appeal to the Supreme Court from admitted facts that a board of aldermen of an incorporated town are acting in violation of a command of the statute that they elect a recorder in the manner specified therein, a mandamus will issue, in view of the public interests involved. State ex rel. Battle v. City of Rocky Mount, 156 N.C. 329, 72 S.E. 354 (1911).

Constitutional Provisions.—It is held in State v. Bateman, 162 N.C. 588, 77 S.E. 768 (1913), that a former requirement that the recorder must be "a licensed attorney at law" is unconstitutional, on the ground that it does not lie within the power of the legislature to add to the constitutional disqualifications to hold office.

§ **7-187. Time and place of holding court.**—The court shall be opened for the trial of criminal cases at least one day of each week, to be fixed by the governing body of the municipality, and shall continue its session from day to day until all business is legally disposed of. The court shall be held in the city or town hall, or other place provided therefor, and other sessions of the court may be called by the recorder, as necessity may require. (1919, c. 277, s. 3; C. S., s. 1538.)

§ **7-188. No subsequent change of judgment.**—When a case has been finally disposed of and judgment pronounced therein, it shall not thereafter be reopened or the judgment or sentence rendered therein be modified, changed or stricken out by the recorder after the adjournment of the regular weekly term or after the adjournment of any special term called by the recorder. (1919, c. 277, s. 3; C.S., s. 1539.)

§ **7-189. Procedure in the court.**—The recorder shall preside over the court and try and determine all criminal actions coming before him, the jurisdiction of which is conferred by this article, and the proceedings of the court shall be the same as are now prescribed for courts of justices of the peace and for the superior court so far as the same may reasonably apply. (1919, c. 277, s. 9; C. S., s. 1540.)

§ **7-190. Criminal jurisdiction.**—The court shall have the following jurisdiction within the following named territory:

(1) Original, exclusive, and concurrent jurisdiction, as the case may be, of all offenses committed within the corporate limits of the municipality which are now or may hereafter be given to justices of the peace under the Constitution and general laws of the State, including all offenses of which the mayor or other municipal court now has jurisdiction.

(2) Original and concurrent jurisdiction with justices of the peace of all offenses committed outside the corporate limits of the municipality and within a radius of five miles thereof, which is now or may hereafter be given to justices of the peace under the Constitution and general laws of the State.

(3) Exclusive, original jurisdiction of all other criminal offenses committed within the corporate limits of such municipality and outside, but within a radius of five miles thereof, which are below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors.

(4) Concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime committed within the territory above mentioned, of which the recorder's court is not herein given final jurisdiction.

(5) All jurisdiction given by the general laws of the State to justices of the

peace, or to the superior court, to punish for contempt, to issue writs ad testificandum, and other process to require the attendance of witnesses and to enforce the orders and judgments of the court. (1919, c. 277, s. 4; C. S., s. 1541; 1925, c. 32, s. 3.)

Local Modification. — City of Belmont: 1949, c. 871, s. 2, 1951, c. 964, s. 1; 1957, c. 385, s. 2; City of Burlington: 1951, c. 1949, c. 871, s. 2; 1951, c. 964, s. 1; 1957, Johnston: 1957, c. 619, s. 1.

Cross Reference.—For statutory definition of felony, see § 14-1.

Editor's Note. — The 1925 amendment changed the radius in subsections 2 and 3 from two to five miles.

Conflicting Jurisdiction of Magistrate and City Courts. — The legislature may constitutionally grant a city court exclusive jurisdiction of offenses occurring within the city limits and embraced within the jurisdiction of a justice of the peace. State v. Baskerville, 141 N.C. 811, 53 S.E. 742 (1906); but such exclusive jurisdiction cannot extend beyond the city limits. State v. Doster, 157 N.C. 634, 73 S.E. 111 (1911).

Jurisdiction Given Over Crimes below Grade of Felony.—In order that recorders' courts might be permitted to take cognizance of crime and try criminals without indictment, all crimes below the degree of felony have been declared to be "petty misdemeanors" by subdivision (3) of this section. State v. Boykin, 211 N.C. 407, 191 S.E. 18 (1937).

By virtue of this section a municipality is vested with power and authority to create a recorder's court with jurisdiction to try cases which involve criminal acts below the grade of felony, committed within a radius of five miles outside its corporate limits. State v. Ballenger, 247 N.C. 216, 100 S.E.2d 351 (1957).

Such Offenses Designated Petty Misdemeanors.—The legislature has declared in this section that criminal offenses below the grade of felony committed within the corporate limits of the municipality or within five miles thereof are petty misdemeanors, and for such offenses N. C. Const., art. 1, § 13, authorizes the legislature to provide means of trial other than by (common-law) jury. Roebuck v. City of New Bern, 249 N.C. 41, 105 S.E.2d 194 (1958).

Concurrent Jurisdiction of County Recorder's Court. — County recorder's court and a municipal recorder's court in the county were held to possess concurrent jurisdiction of general misdemeanors committed within the territorial limits of municipal recorder's court. State v. Sloan, 238 N.C. 547, 78 S.E.2d 312 (1953).

Applied in State v. Dove, 261 N.C. 366, 134 S.E.2d 683 (1964).

Cited in State v. Johnson, 251 N.C. 339, 111 S.E.2d 297 (1959).

§ 7-191. Jurisdiction to recover penalties.—The recorder's court shall also have jurisdiction to try all actions for the recovery of penalties imposed by law, or by any ordinance of the municipality in which the court is located, for any offense committed within the corporate limits of the municipality or outside thereof within five miles of the corporate limits, and all such penalties shall be recovered in the name of the municipality. (1919, c. 277, s. 10; C.S., s. 1542; 1925, c. 32, s. 4.)

Local Modification. — City of Belmont: 1949, c. 871, s. 3; 1957, c. 385, s. 3; City of Burlington: 1951, c. 452; Town of Dallas: 1951, c. 963, s. 2.

Editor's Note. — The 1925 amendment extended the radius from two to five miles of the corporate limits.

§ 7-192. Disposition of cases when jurisdiction not final. — In all cases heard by the recorder against any person for any offense whereof the court has not final jurisdiction and in which probable cause of guilt is found, such person shall be bound in a bond or recognizance with sufficient surety to appear at the next succeeding term of the superior court of the county for the trial of criminal cases, and in default of such bond or recognizance he shall be committed to the common jail of the county to await trial; but in all capital cases such person shall be committed to the common jail of the county without bail. (1919, c. 5; C. S., s. 1543.)

§ 7-193. Disposition of cases when jurisdiction final. — All persons pleading guilty or convicted in the court of any offense of which the court has final jurisdiction shall be fined or imprisoned, according to law, and any person

entering a plea of guilty, or who may be convicted of any such offense, shall also pay the costs of the prosecution. (1919, c. 277, s. 7; C.S., s. 1544.)

§ 7-194. Sentences to be imposed.—When any person is convicted, or pleads guilty, of any offense of which the court has final jurisdiction, the recorder may sentence him to the common jail of the county in which the court is held, to be assigned to work under the State Highway and Public Works Commission; or when such person is a woman or an infant of immature years, the recorder may sentence him or her to the city or county workhouse or State reformatory, or other penal institution provided by law for such purposes. (1919, c. 277, s. 8; C. S., s. 1545; 1945, s. 635.)

Cross References. — As to sentencing prisoners for work under the supervision of the State Highway and Public Works Commission, see §§ 148-30 and 148-32. See also § 7-244.

Editor's Note. — The 1945 amendment struck out the words "and assign him to work on the public roads of the county as provided by law" ending at the semi-colon and inserted in lieu thereof the words "to be assigned to work under the State Highway and Public Works Commission." It also struck out the former provision relating to sentence to work upon the roads of another county.

§ 7-195. Appeal to superior court.—Any person convicted of any offense of which the recorder has final jurisdiction may appeal to the superior court of the county from any judgment or sentence of the recorder, in the same manner as is now provided for appeals from courts of justices of the peace. Upon such appeal the defendant shall be required to give bond or recognizance with sufficient surety for his appearance at the next term of the superior court; and in default thereof the recorder shall commit him to the county jail of the county until he shall give bond or be otherwise discharged by law. (1919, c. 277, ss. 5, 9; C. S., s. 1546.)

Local Modification.—Pitt: 1937, c. 134; City of Belmont: 1949, c. 871, s. 4; Town of Dallas: 1951, c. 963, s. 3; Town of Southern Pines: 1959, c. 74, s. 2.

Quoted in State v. Johnson, 251 N.C. 339, 111 S.E.2d 297 (1959).

§ 7-196. Costs paid to the municipality.—All costs incurred in issuing warrants and serving the same in cases where the recorder has not final jurisdiction, and for the service of process arising in such cases when the process is served by the officer of the municipality, except as hereinafter provided, shall be paid to the municipality; and officers serving process issued from said court shall be allowed the same fees as are now allowed sheriffs in like cases, the same, when collected, to be paid over as herein provided. Where such officer is not an officer of a municipality such costs shall be dealt with as is now provided by law. (1919, c. 277, s. 6; C. S., s. 1547.)

Local Modification. — Johnston: 1957, c. 619, s. 3.

§ 7-197. Seal of court.—The recorder's court shall have a seal with the impression, "The Recorder's Court of the City of .....," which seal shall be used in the attestation of writs, warrants, or other process, acts, judgments, or decrees of the court, in the same manner and to the same effect as the seal of other courts in the State; but no process issuing from the court, to be executed within the county in which court is held, shall require attestation by seal. (1919, c. 277, s. 11; C. S., s. 1548.)

Local Modification. — City of Belmont: 1949, c. 871, s. 5; Town of Dallas: 1951, c. 963, s. 4; Town of Siler City: 1953, c. 607, s. 3.

§ 7-198. Issuance and service of process.—The recorder may issue process to the chief of police of the municipality in which the court is held, or to the sheriff, constable, or other lawful officer of the county in which the municipality is located, or to any other county in the State; and such process, when

attested by the seal of the court, shall run anywhere in the State, and shall be executed by all public officers authorized to execute process, and be returned by them according to law.

The summons, warrant of arrest, and every other writ, process, or precept issuing from a recorder's court or other court inferior to the superior court, except justices of the peace, may be signed by the recorder, vice recorder, or presiding justice of the court, or by the clerk of the court or deputy clerk, where the court has a clerk or deputy. (1919, c. 157; 1919, c. 277, s. 12; C. S., s. 1549.)

Local Modification. — City of Belmont: 1949, c. 871, s. 6; Town of Dallas: 1951, c. 963, s. 5.

Proper Proceeding.—Under the proceedings established in "recorders' courts," the complaint and warrant — which, if necessary, must be construed together — have been established as the proper proceeding, just as has come down from the common law as to crimes the punishment of which is within the jurisdiction of a justice of the peace. State v. Boykin, 211 N.C. 407, 191 S.E. 18 (1937).

This section does not confer upon police sergeants the power to issue warrants. State v. Blackwell, 246 N.C. 642, 99 S.E.2d 867 (1957).

Search Warrant for Illegal Liquor. — Under this section in conjunction with § 18-13, the deputy clerk of a municipal court had authority to issue a search warrant for illegal liquor. State v. Mock, 259 N.C. 501, 130 S.E.2d 863 (1963).

§ 7-199. Vice recorder; election and duties.—The governing body of the municipality shall, at the same time and in the same manner as is provided in this article for the election of the first recorder, elect a vice recorder, who shall have the jurisdiction and authority conferred upon the recorder when the recorder shall be prevented from attending to his duties on account of sickness or other temporary disability or by reason of his temporary absence. The vice recorder shall receive the compensation allowed to the recorder for such services for the time that he may render such service, the compensation of the vice recorder to be deducted from the salary of the recorder, and the vice recorder shall be thereafter elected by the governing body of the municipality for the same term as the recorder is elected, and any vacancy occurring in the office of vice recorder shall be filled in the same manner as is provided for the filling of vacancies in the office of recorder. (1919, c. 277, s. 13; C. S., s. 1550.)

Local Modification. — City of Belmont: 1949, c. 871, s. 7; Town of Dallas: 1951, c. 963, s. 6.

§ 7-200. Clerk of court; election and duties; removal; fees.—The clerk of the recorder's court shall be elected by the governing body of the city or town at the same time and for the same term as the vice recorder, and all vacancies in the office of the clerk of the court shall be filled in the manner provided for filling vacancies in the office of vice recorder. Before entering upon the duties of his office, the clerk shall enter into a bond, with sufficient surety, in a sum to be fixed by the governing body of the municipality, not to exceed five thousand dollars, payable to the State, conditioned upon the true and faithful performance of his duties as such clerk and for the faithful accounting for and paying over of all money which may come into his hands by virtue of his office. The bond shall be approved by the governing body and shall be filed with the clerk of the superior court of the county. The clerk shall make monthly settlements with the county and city treasurers for all money which has come into his hands belonging to either. The clerk of the governing body of the municipality shall ex officio discharge the duties of the clerk of the court, unless the governing body shall elect some other person to discharge the duties. The governing body of the municipality shall have the right to remove the clerk of the court, either for incapacity or for neglect of the duties of his office; and in case of a vacancy for any cause the office shall be filled in the manner hereinbefore

provided. Provided, that the governing body of the municipality is hereby authorized to provide a schedule of fees to be charged by the clerk of said court. (1919, c. 277, ss. 15, 18; C. S., s. 1551; 1925, c. 32, s. 5.)

Local Modification. — City of Belmont: 1949, c. 871, s. 8, amended by 1951, c. 964, s. 2; town of Dallas: 1951, c. 963, s. 7; city of Wilson: 1955, c. 529; town of Southern Pines: 1959, c. 74, s. 3.

Editor's Note. — The 1925 amendment added the proviso at the end of this section.

Cited in Stephens v. Dowell, 208 N.C. 555, 181 S.E. 629 (1935).

§ **7-200.1. Deputy or assistant clerks of court.** — The governing body of the municipality may, at any time it deems necessary and in the same manner as is provided in this article for the election of the clerk of court, elect a deputy or assistant clerk of court, who before entering upon his duties shall enter into a bond, in the same manner and amount as is now required for the clerk of court. Upon compliance with the provisions of this article, such assistant or deputy clerk shall be as fully authorized and empowered to perform all the duties and functions of the office of clerk of municipal recorder's court as the clerk himself and shall be fully empowered to issue all process of the court, administer oaths, receive moneys and do all other things necessary to the operation of his office. The compensation of such office shall be fixed by the governing body of the municipality, shall consist of a salary only, which salary shall not be subject to be diminished during such deputy's or assistant's term of office. Provided, the clerk of the municipal recorder's court shall be held responsible for the official acts of such deputy or assistant clerk. Provided, further, that the election of a deputy or assistant clerk under this article shall be in the discretion of the governing body of the municipality subject to their finding that a deputy or assistant clerk is necessary to the operation of the court. (1959, c. 858.)

§ **7-201. Clerk to keep records.**—It shall be the duty of the clerk of the court to keep an accurate and true record of all costs, fines, penalties, forfeitures, and punishments by the court imposed, and the record shall show the name and residence of the offender, the nature of the offense, the date of the hearing of the trial, and the punishment imposed, which record shall at all times be open to inspection by any of the city authorities, or other person having business relating to the court. The clerk shall keep a permanent docket for recording all the processes issued by the court, which shall conform to the dockets kept by the clerk of the superior court. He shall also keep in proper files, to be provided by the city, a record of all cases which shall be disposed of in the court and the disposition made thereof. (1919, c. 277, s. 17; C. S., s. 1552.)

Local Modification. — City of Belmont: 1949, c. 871, s. 9; Town of Dallas: 1951, c. 963, s. 8.

Clerk's certificate is accepted as true in the absence of positive proof to the contrary. State v. Dawkins, 262 N.C. 298, 136 S.E.2d 632 (1964).

Failure of judge to sign the minutes of the court or the judgment in criminal cases, except capital, does not affect the validity of the judgment. State v. Dawkins, 262 N.C. 298, 136 S.E.2d 632 (1964).

§ **7-202. Clerk to issue process.**—The clerk of the court shall have all the power and authority now conferred upon justices of the peace to issue warrants for the arrest of all persons charged with the commission of offenses within the territory fixed in this article which warrants, however, shall be made returnable before the recorder of said court at the next sitting thereof, and shall be issued only upon affidavit made as now required by law to support warrants issued by justices of the peace. The clerk shall also have all power and authority of justices of the peace or clerk of the superior court to issue subpœnas or other process, to run anywhere within the State; and when such subpœnas or other process shall run beyond the county in which the court is located the same shall be attested by the seal of the court, and shall also be signed by the recorder. (1919, c. 277, s. 18; C. S., s. 1553.)

§ 7-203. Prosecuting attorney; duties and salary.—There shall be a prosecuting attorney in the court, who shall appear for the prosecution in all cases therein and, when specially requested by the governing body of the municipality and the recorder, shall assist in the prosecution of all cases which may be bound over or appealed from the court to the superior court; for his services he shall be paid such amount per annum as may be fixed by the governing body, at the same time and in the same manner as is provided for fixing the salary of the recorder. The prosecuting attorney may, or may not, perform the duties of city attorney, in the discretion of the governing body of the municipality: Provided, that the governing body of any such municipality is hereby authorized to provide a schedule of fees to be charged by said prosecuting attorney. (1919, c. 277, s. 16; C. S., s. 1554; 1925, c. 32, s. 6.)

Local Modification. — Lenoir: 1949, c. 1237; City of Belmont: 1949, c. 871, s. 11; City of Fayetteville: 1951, c. 213; Town of Dallas: 1951, c. 963, s. 9; Town of Kernersville: 1955, c. 282, s. 2; town of Siler City: 1953, c. 607, s. 4; town of Southern Pines: 1959, c. 74, s. 4.

Editor's Note. — The 1925 amendment added the proviso at the end of this section.

§ 7-204. Jury trial, as in justice's court.—In all trials in the court, upon demand for a jury by the defendant or the prosecuting attorney representing the State, the recorder shall try the same as is now provided in actions before justices of the peace wherein a jury is demanded, and the same procedure as is now provided by law for jury trials before justices of the peace shall apply: Provided, however, that the compensation allowed jurors in all cases wherein the superior court has heretofore had final jurisdiction shall be the same as is allowed jurors in the superior court of the county in which the recorder's court is established. (1919, c. 277, s. 24; C. S., s. 1555.)

Local Modification.—Burke: 1931, c. 335; Craven: 1929, c. 115, s. 1; Currituck: 1951, c. 972, ss. 2, 3; Halifax: 1945, c. 628, s. 2; Hoke: Pub. Loc. 1937, c. 408; Martin: 1951, c. 183; Pitt: 1937, c. 134; Washington: 1951, c. 589; town of Asheboro: 1947, c. 930, s. 2; city of Belmont: 1949, c. 871, s. 12; town of Cherryville: 1951, c. 660; town of Dallas: 1951, c. 963, s. 10; city of Randleman: 1947, c. 930, s. 2; Chowan: 1957, c. 701; Wake: 1963, c. 343; Bessemer City: 1959, c. 224; city of Wilson: 1955, c. 573; town of Garner: 1955, c. 459; town of Liberty: 1965, c. 477; town of Mooresville: 1969, c. 38; town of Siler City: 1953, c. 607, s. 5; town of Southern Pines: 1959, c. 74, s. 5.

The number of which the jury shall consist under this section is determined by a reference to N.C. Const., Art. IV, § 27, and § 7-150, with as much certainty as if actually set out in this section. Roebuck v. City of New Bern, 249 N.C. 41, 105 S.E.2d 194 (1958).

Provisions of §§ 7-250 and 7-252 Inapplicable.—See note to § 7-250.

Quoted in State v. Johnson, 251 N.C. 339, 111 S.E.2d 297 (1959).

§ 7-205. Continuances, recognizances, and transcripts. — The recorder's court shall have the same authority to grant continuances, take bonds and recognizances, and render judgments on forfeited bonds and recognizances, as is now vested by law in the superior courts, and the procedure regulating the issuing and service of notices against defendants and their sureties upon bonds and recognizances, and all other proceedings in taking and enforcing judgments in such cases, shall be the same as in the superior court in like cases. Transcripts of any judgments rendered may be docketed in the superior court of the county in which such court is held, in the same manner and with the same effect as judgments of other courts docketed as provided by law. (1919, c. 277, s. 21; C. S., s. 1556.)

§ 7-206. Officers' fees; fines and penalties paid.—In each case disposed of by the recorder where the defendant is convicted or pleads guilty, there shall, in addition to other lawful costs, be allowed the following fees, to be taxed as a part of the costs against the defendant, viz.: For recorder, one dollar in each case involving the breach of a municipal ordinance and any crime or

offense of which a justice of the peace has final jurisdiction, and a fee of two dollars in all other cases; for the prosecuting attorney, one dollar in all cases of violation of municipal ordinances and of any crime or offense of which a justice of the peace has final jurisdiction, and in all other cases a fee as now provided by law for solicitors prosecuting in the superior court; and for the clerk of such court the same fees as are now allowed to clerks of the superior court in similar cases; but in all cases of the breach of municipal ordinances and cases of which a justice of the peace has final jurisdiction and in which the defendant pleads guilty, the fee herein allowed a prosecuting attorney may be remitted by the recorder in his discretion. All costs recovered and collected in the court, except as herein otherwise provided, shall belong to the municipality and be paid into the treasury thereof. All fines and penalties collected shall be paid by the clerk of the court to the county treasurer as provided by law, and all fees allowed by law for an arrest or serving other process in a criminal action, when the same shall have been made by the chief of police or other officer who shall be on a salary, shall be paid over to the treasurer of the municipality for the use of the same, and to reimburse it for the expense of maintaining and supporting the court.

Where a municipal recorder's court is established or may be established in a municipality wherein the territorial jurisdiction of said municipal recorder's court is composed of portions of two or more counties the fines and forfeitures collected by or paid into said municipal recorder's court shall be paid to the county treasurer for distribution according to law of the county in which the crime was committed which resulted in the indictment and conviction and because of which said fines or penalties were collected and paid; except that the provisions of this sentence shall not apply to the following counties: Alamance, Cabarrus, Catawba, Edgecombe, Guilford and Nash. (1919, c. 277, s. 14; C. S., s. 1557; 1955, c. 707.)

Local Modification.—Cabarrus: 1937, c. 279; Harnett: 1933, c. 75, s. 1(g); City of Belmont: 1949, c. 871, s. 13; Town of Dallas: 1951, c. 963, s. 11.

Cross Reference.—For sections authorizing the governing bodies of municipalities to fix certain fees, see §§ 7-186, 7-200, 7-203.

Editor's Note. — The 1955 amendment added the last paragraph in this section.

§ 7-207. County to pay for offenders' work on roads.—Whenever, under any judgment of the court, any defendant is sentenced to work upon the public works of the county, or to pay a fine and the costs of the prosecution, or costs only, and the defendant shall in fact work out the sentence or fine and costs, or either, upon such public works, then the county shall be liable for and shall pay to the treasurer of the municipality one half the amount of the costs taxed in the cause: Provided, the sentence imposed shall be of sufficient length to reimburse the county for one half of such costs. (1919, c. 277, s. 19; C. S., s. 1558; 1945, c. 635.)

Local Modification. — City of Belmont: 1949, c. 871, s. 14; Town of Dallas: 1951, c. 963, s. 12.

Editor's Note. — The 1945 amendment substituted the words "public works of" for the words "public roads or other public work in" and made other alterations in phraseology in conformity to such change.

§ 7-208. Prosecutor may be taxed with costs. — The recorder shall have full power, in any case in which he shall adjudge that the prosecution was not required by the public interests, to tax the prosecutor with the costs of such action; and in the event the recorder shall adjudge that prosecution is frivolous or malicious, he may imprison the prosecutor for the nonpayment of such costs, as provided by law for similar cases in other courts. When the costs are paid, they shall belong to the city. (1919, c. 277, s. 20; C. S., s. 1559.)

§ 7-209. Justice of the peace to bind defendants to recorder's court; procedure thereon.—In case any justice of the peace residing within the territory above mentioned shall bind any person over for any offense committed within said territory, of which the justice has committing, but not final,

jurisdiction, but of which the recorder's court has final jurisdiction, then such justice of the peace, instead of binding the defendant over to the superior court of the county, shall bind him to appear at the recorder's court on the day succeeding the trial before the justice, at ten o'clock A.M. The justice of the peace shall at once turn over the case to the clerk of said court, and the clerk shall, upon receipt of the same, enter the case upon the docket of the court, and the recorder shall try such person either upon the original warrant under which he was bound over or upon a new warrant to be issued by him for such offense. In all cases the recorder shall have the right to amend any warrant issued by him or by the clerk of the court, or sent up by any justice of the peace as hereinbefore provided, in the same manner and to the same extent as justices of the peace are now authorized by law to make amendments to warrants in justices' courts. (1919, c. 277, s. 22; C. S., s. 1560.)

§ 7-210. Transfer of certain cases to recorder's court.—All cases which shall be pending in any recorder's, police, mayor's, or other municipal court in the counties where the courts provided for in this article shall be established shall, after the election and qualification of the recorder and other officers authorized and required by this article, be transferred to the recorders' courts of the respective municipalities, to be tried in the manner and in accordance with the procedure provided; but no case pending in the superior court of any county at the time this article takes effect shall be transferred to the recorder's court, except by order of the presiding judge thereof. No cause shall be removed from the recorder's court as is now provided for the removal of cases from one justice of the peace to another. (1919, c. 277, s. 23; C. S., s. 1561.)

§ 7-211. Jurisdiction of justice of the peace after three months delay.—If any criminal offense committed within the jurisdiction of any recorder's court, of which said court is given original, exclusive and final jurisdiction, is not prosecuted to a final termination within three months after the commission of the offense, any justice of the peace within the territory shall acquire jurisdiction to issue his warrant, apprehend the offender, and dispose of such warrant as is now provided by law. (1919, c. 277, s. 23; C. S., s. 1562.)

Local Modification. — City of Belmont: 1949, c. 871, s. 15; Town of Dallas: 1951, c. 963, s. 13.

§ 7-212. How municipal recorders' courts may be abolished.—The governing body of any municipality shall have the same power, to be exercised in the same manner, subject to the same limitations, to abolish municipal recorders' courts as is given the board of commissioners of any county to discontinue a county recorder's court, under the provisions of § 7-239. (1919, c. 277, s. 35; C. S., s. 1582.)

§ 7-213. Extension of jurisdiction. — In any city or town within the State of North Carolina, having a population of five thousand inhabitants or more, where there is now maintained a recorder's court under and by virtue of the law, or in which a recorder's court may be hereafter established and maintained, it shall be lawful for the governing body of any such city or town, and the board of county commissioners of the county in which such city or town shall be located, to extend the jurisdiction of the recorder's court in such city or town to the township in which such city or town is located, in the manner described in the following sections. (1921, c. 216, s. 1; C. S., s. 1562(a).)

§ 7-214. Meeting of town and county authorities; election.—Whenever the governing body of any city or town, as described in § 7-213, and the board of county commissioners of the county in which the same shall be located, shall desire to extend the jurisdiction of the recorder's court in such city or town

to include the whole township, as set forth in § 7-213, the mayor of such city or town and the chairman of such board of county commissioners shall call a joint meeting of the two boards, to be held at any place within such township as they may agree upon, and if a majority of each of such boards, at such meeting, shall by a joint resolution vote in favor of the extension of the jurisdiction of the recorder's court as herein described, then at such joint meeting the governing body of the town or city, and the board of county commissioners of the county, shall pass a joint resolution calling an election, submitting to the voters of the entire township the question of the extension of said municipal court, and that election shall be conducted by the county commissioners in the same manner as is prescribed for the conduct of elections for the establishment of municipal recorders' courts by the governing bodies of cities and towns, insofar as said procedure is applicable; the result of the election shall be recorded in the minutes of the county commissioners and certified to and recorded in the minutes of the governing body of the town or city; the form of the ballot shall be as prescribed in § 163-155, subsec. (e), and if by such election such resolution is adopted it shall have the effect of conferring upon the recorder's court in such city or town the same powers, authority, and jurisdiction as to offenses or crimes committed within the township in which such city or town is located as such court would have had if the same had been committed in such city or town: Provided, however, that the extension of the jurisdiction of such recorder's court as herein described shall not have the effect of in any way extending or affecting in any manner whatsoever any ordinance or other law pertaining exclusively to such city or town. (1921, c. 216, s. 2; C. S., s. 1562(b).)

§ **7-215. Police powers.**—Whenever the jurisdiction of any recorder's court shall have been extended as described in §§ 7-213 to 7-216, such action shall thereupon confer upon the police officers of such city or town the same powers and authority in making arrests for crimes and offenses committed anywhere within the township in which such city or town shall be located, as is now or may hereafter be conferred upon sheriffs or their deputies within their respective counties. (1921, c. 216, s. 3; C. S., s. 1562(c).)

§ **7-216. Resolution for extension filed with each board as records.** —Whenever the governing board of any city or town and the county commissioners of the county shall have adopted the resolution extending the jurisdiction of the recorder's court as described in §§ 7-213 to 7-216, a copy of such resolution duly signed by the mayor and clerk of such city or town, and the chairman and clerk of such board of county commissioners, shall be duly filed with each board, and shall be kept and maintained as a part of their official records. (1921, c. 216, s. 4; C. S., s. 1562(d).)

§ **7-217. Jurisdiction not to extend to other municipalities.** — No court hereafter established by the governing body of any city or town shall have jurisdiction over the territory within the corporate limits of any other incorporated city or town, or outside the county in which the city or town establishing such court is located. (1925, c. 280.)

Local Modification. — Craven, Edgecombe, Nash, Robeson: 1925, c. 280.

Article 25.

County Recorders' Courts.

§ **7-218. Established by county commissioners.** — In any county in which a municipal recorder's court may not be established under the provisions of this subchapter, or in which such court has in fact not been established in the county seat, the board of commissioners may, in their discretion, establish a recorder's court for the entire county, which shall be a court of record and

shall be held at the county seat, or other place within the county provided by the board of commissioners. (1919, c. 277, s. 25; C. S., s. 1563; 1921, c. 110, s. 1; 1943, c. 543.)

Local Modification.—Caldwell: Pub. Loc. 1931, c. 138; Halifax: 1945, c. 627; Henderson; 1927, c. 103; 1937, c. 97; 1939, c. 238; Orange: 1947, c. 214, s. 1; Richmond: 1941, c. 60; Swain: Pub. Loc. 1939, c. 499.

Cross Reference. — As to continued existence and ultimate abolition of courts inferior to the superior court, and their replacement by district courts, see § 7A-3.

Editor's Note. — The 1943 amendment added at the end of this section the following words "or other place within the county provided by the board of commissioners."

The county recorder's court in Pamlico County is a duly constituted court under this section. State v. Mercer, 249 N.C. 371, 106 S.E.2d 866 (1959).

Stated in State v. Norris, 206 N.C. 191, 173 S.E. 14 (1934).

Cited in State v. Morgan, 246 N.C. 596, 99 S.E.2d 764 (1957); State v. Clayton, 251 N.C. 261, 111 S.E.2d 299 (1959); State v. Lowe, 254 N.C. 631, 119 S.E.2d 449 (1961); State v. Cook, 273 N.C. 377, 160 S.E.2d 49 (1968).

§ 7-219. Recorder's election, qualification, and term of office.—The court shall be presided over by a recorder, who shall have the same qualifications as provided for recorders of municipalities. The first recorder shall be elected by the board of commissioners of the county, either at the time of the establishment of the court or within thirty days thereafter, and shall hold the office until the next regular election wherein county officers are elected, and until his successor shall be duly elected and qualified; and should a vacancy occur in said office at any time, the same shall be filled by the election of a successor with the qualifications herein provided, for the unexpired term, by the board of county commissioners at a regular or special meeting called for that purpose. The successor of the first recorder herein provided for and each succeeding recorder shall be nominated and elected in the county in the same manner and at the same time as is now provided by law for the nomination and election of the elective officers of the county and in the general election for such elective officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office as is now provided by law for justices of the peace, and shall file the same with the clerk of the superior court of the county, who shall duly record the same in a book kept for that purpose. The recorder's salary shall be fixed in advance by the board of commissioners, and paid out of the county funds upon vouchers, and shall not be increased or decreased during his term. (1919, c. 277, s. 25; C. S., s. 1564.)

Local Modification. — Henderson: 1939, c. 238; Mecklenburg: 1937, c. 253; Orange: 1947, c. 214, s. 2; Perquimans: 1943, c. 742; 1951, c. 42; Scotland: 1925, c. 171; Washington: 1949, c. 1102; Caldwell: 1965, c. 1481; Hertford: 1957, c. 660; Randolph: 1953, c. 444.

Cross References.—As to forms of oaths required of justice of the peace, see §§ 11-6, 11-7, 11-11; N.C. Const., Art. VI, § 7. As to penalty for failure to take oaths, see § 128-5.

§ 7-220. Time and place for holding court.—The court shall be open for the trial of all criminal causes of which it has jurisdiction at least one day of each week, to be fixed by the board of county commissioners, and shall continue its session from day to day until all business is transacted by trial, continuance, or otherwise. The session of the court shall be held in the county courthouse or other place within the county provided by the board of commissioners for that purpose. Special sessions of the court may be called by the recorder as the necessities may require. (1919, c. 277, s. 26; C. S., s. 1565.)

The Recorder's Court of Pamlico County has jurisdiction to try a defendant on a charge of operating a motor vehicle on a public highway while his license was revoked, and when the judge of that court testified that he held a session of court on a certain day, such court was a court of competent jurisdiction to try the defendant for such offense on that day. State v. Mercer, 249 N.C. 371, 106 S.E.2d 866 (1959).

§ **7-221. No subsequent change of judgment.** — When any case has been finally disposed of by the recorder and judgment pronounced therein, the case shall not thereafter be reopened or the judgment or sentence rendered therein changed, modified or stricken out by the recorder after the adjournment of the regular weekly term of court or after the adjournment of any special term of court by the recorder. (1919, c. 277, s. 26; C. S., s. 1566.)

§ **7-222. Criminal jurisdiction.**—The court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and, in addition to the jurisdiction conferred by this section, shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors: Provided, however, that where a special court or recorder's court shall legally exist within such county by virtue of a special act of the legislature passed before the amendments to the Constitution in reference thereto, then the county recorder's court, as established in this article, shall not have jurisdiction of criminal cases within the territory of such existing recorder's court, so as to interfere with or conflict with the existing recorder's court, but shall have concurrent jurisdiction where the jurisdiction of the two courts covers the same causes or the same subject matter. This article and the establishment of any court thereunder shall not be construed to repeal, modify or in anywise affect any existing special court or recorder's court by virtue of such former special acts herein referred to. (1919, c. 277, s. 27; C. S., s. 1567.)

Local Modification. — Franklin: 1943, c. 350; Orange: 1947, c. 214, s. 4.

Concurrent Jurisdiction of Municipal Recorder's Court. — County recorder's court and a municipal recorder's court in the county were held to possess concurrent jurisdiction of general misdemeanors committed within the territorial limits of municipal recorder's court. State v. Sloan, 238 N.C. 547, 78 S.E.2d 312 (1953).

Jurisdiction of Municipal-County Courts. —Municipal-county courts created pursuant to § 7-240 have exclusive jurisdiction of all misdemeanors except minor misdemeanors, with respect to which they have concurrent jurisdiction with justices of the peace under this section. State v. Davis, 253 N.C. 224, 116 S.E.2d 381 (1960).

Applied in State v. Morgan, 246 N.C. 596, 99 S.E.2d 764 (1957).

Cited in State v. Norman, 237 N.C. 205, 74 S.E.2d 602 (1953); State v. Lowe, 254 N.C. 631, 119 S.E.2d 449 (1961).

§ **7-223. Jurisdiction and powers as in municipal court.** — The recorders of county courts provided for in this article shall be vested with all the jurisdiction and authority conferred upon recorders of municipal courts, in like manner and to the same extent as if such jurisdiction and authority had been specifically in this section set forth, insofar as such jurisdiction and authority are applicable to such courts, and the provisions of this subchapter relative to municipal recorders' courts shall in all things apply to the county recorders' courts where same are not inconsistent and insofar as same are practically applicable: Provided, this section shall not take away the jurisdiction of a mayor to try breaches of ordinances when such city has no other municipal court. (1919, c. 277, s. 34; C. S., s. 1568.)

Local Modification.—Bertie: 1943, c. 772; Nash: c. 768.

Cited in State v. Clayton, 251 N.C. 261, 111 S.E.2d 299 (1959).

§ **7-224. Removal of cases from justices' courts.** — When, upon written request made before entering on the trial of any cause before any justice of the peace, it shall appear proper for the cause to be removed for trial to some other justice, as is now provided by law, the cause may be removed for trial to the recorder's court of the county. (1919, c. 277, s. 28; C. S., s. 1569; 1921, c. 110, s. 3.)

Local Modification.—Cleveland, Lenoir: 1933, c. 277; 1939, c. 63; Mecklenburg: 1933, c. 277; 1937, c. 386.

Editor's Note.—Prior to the 1921 amendment this section read "upon affidavit, etc.," instead of "upon written request, etc.," as it now stands.

§ 7-225. Defendants bound by justice to recorder's court.—In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the recorder's court as provided in this article, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance or surety to appear at the next succeeding session of the recorder's court of the county, for trial; and in default of such surety such person shall be committed to the common jail of the county to await a trial: Provided, that in the event any justice of the peace or other committing magistrate shall bind over to the superior court any person accused of a crime within the jurisdiction of the county recorder's court, the clerk of the superior court shall, upon his own motion, transfer all papers in the case to the recorder's court, and the case shall then stand for trial at the next succeeding term of said recorder's court as if the defendant had been bound over to the recorder's court in the first instance: and Provided further, that in the event any justice of the peace or other committing magistrate shall bind over to the recorder's court any person charged with an offense beyond the jurisdiction of said court, the said recorder shall cause the accused person to enter into a new bond with sufficient surety for his appearance at the next succeeding term of the superior court of the county, and shall transmit all papers in the case to the said superior court, but this shall be done without additional cost to the accused person. (1919, c. 277, s. 29; C. S., s. 1570; 1921, c. 110, s. 4.)

Local Modification. — Vance, Warren: Pub. Loc. 1927, c. 438.

§ 7-226. Notice to accused of transfer; trial; obligation of bond.—Whenever the clerk of the superior court shall transfer the papers in any case from the superior court to a county recorder's court, he shall at the same time issue a notice to the accused person and his surety, informing them that the cause has been so transferred and requiring the accused person to appear at the next succeeding term of said recorder's court for trial, and, upon the service of said notice upon the accused person and his surety, at least five days before the beginning of the next succeeding term of the recorder's court, the case shall stand for trial at said term and the bond given by the accused person for his appearance at the next term of the superior court shall in all respects be valid and binding to compel the appearance of the accused person at the said next succeeding term of said recorder's court, and in case said notice is not served on the accused person and his surety at least five days before the beginning of the next succeeding term of the recorder's court, then the case shall not be tried without the consent of the accused person until the following term of the recorder's court. (1921, c. 110, s. 5; C. S., s. 1570(a).)

§ 7-227. Trials upon warrants; by whom warrants issued.—All trials of criminal causes in said court shall be upon warrant issued by the clerk of the superior court or deputy clerk provided for in this article, or by the recorder or by any justice of the peace of the county. In either event such warrant shall be issued upon affidavit duly made and subscribed, setting forth the complaint against the defendant: Provided, the recorder shall have authority to amend the warrant and to allow amendment of the affidavit at any time before judgment. (1919, c. 277, s. 30; C. S., s. 1571; 1921, c. 110, s. 6.)

Cited in State v. Turner, 220 N.C. 437, 17 S.E.2d 501 (1941).

§ 7-228. Jury trial as in municipal court.—In all trials in county recorders' courts, upon demand for a jury by the defendant or the prosecuting attorney representing the State, a jury shall be had in the same manner and under the same provisions as are set forth in this subchapter in reference to

municipal courts, so far as the same may be practically applicable to a county court. (1919, c. 277, s. 40; C. S., s. 1572.)

Local Modification.—Burke: 1931, c. 335; Cabarrus: 1939, c. 347; Caldwell: 1951, c. 369; Craven: 1929, c. 115; Halifax: 1945, c. 628, s. 2; Henderson: 1933, c. 316; Hoke: Pub. Loc. 1937, c. 408; Martin: 1945, c. 113; Orange: 1947, c. 214, s. 3; Pasquotank: 1941, c. 213; Pender: 1945, c. 60; Perquimans: 1929, c. 25; Tyrrell: 1943, c. 177; Chowan: 1957, c. 701; Randolph: 1959, c. 1077, repealing Session Laws 1951, c. 414, and providing for election as to jury trials.

Effect of Demand for Jury Trial in Craven County Recorder's Court.—Where the defendant demanded a jury trial in the Craven County recorder's court, the jurisdiction of the recorder's court was ousted and the Superior Court of Craven County was vested with exclusive original jurisdiction of the charges laid in the warrants, and the jurisdiction of the superior court was not derivative but original, and it was necessary for defendant to be tried on bills of indictment and not upon the original warrants. State v. Peede, 256 N.C. 460, 124 S.E.2d 134 (1962).

Cited in State v. Norman, 237 N.C. 205, 74 S.E.2d 602 (1953).

§ 7-229. Sentence imposed; fines and costs paid. — Whenever any person is convicted or pleads guilty of any offense of which the court has final jurisdiction, the recorder may sentence him to the common jail of the county in which court is held, and he may assign him to work under the State Highway and Public Works Commission. Provided, that in case the person so convicted or pleading guilty shall be a woman or an infant of immature years, then the recorder may assign him or her to the county workhouse, reformatory, or other penal institution located in the county; or if there be none, any similar institution that may be located outside of the county to which judges of the superior court are authorized to sentence such person under the general laws of the State. All fines imposed by the court shall be collected by the clerk of such court or the deputy clerk thereof in the same manner as the clerk of the superior court collects fines imposed by the superior court; and, where a defendant is convicted and fails to pay the costs of such conviction, the county shall pay such costs as is allowed by law in similar cases before the superior court. (1919, c. 277, s. 32; C. S., s. 1573; 1925, c. 308; 1945, c. 635.)

Cross Reference.—As to sentencing prisoners for work under the supervision of the State Highway and Public Works Commission, see §§ 148-30 and 148-32.

Editor's Note.—The 1945 amendment rewrote the first sentence.

§ 7-230. Appeals to superior court.—Any person convicted of any offense of which the county recorder has final jurisdiction may appeal to the superior court from any judgment or sentence of the court in the same manner as is now provided for appeals from the courts of justices of the peace; and any person tried before the recorder for any offense of which the court has not final jurisdiction shall, upon the recorder's finding probable cause of guilt, be bound over to the superior court in the same manner as is provided by law in similar cases before justices of the peace. (1919, c. 277, s. 33; C. S., s. 1574.)

Derivative Jurisdiction. — When the superior court sits upon an appeal from a judgment of a justice of the peace in a criminal action, or a judgment of a recorder's court under this section, it is sometimes said to be acting under the derivative jurisdiction of the court from which appeal is taken; the trial is had upon the warrant issued by the court which had jurisdiction and which is required to be transmitted to the court with the return to the appeal. State v. Boykin, 211 N.C. 407, 191 S.E. 18 (1937).

Where the case is beyond the jurisdiction of the inferior court, it does not reach the superior court under this section by appeal, but by the process of "binding over," and in such case only is an indictment necessary. State v. Boykin, 211 N.C. 407, 191 S.E. 18 (1937).

§ 7-231. Clerk of superior court ex officio clerk of county recorder's court.—The clerk of the superior court of any county in which a county recorder's court shall be established shall be ex officio clerk of such court. He

shall keep separate criminal dockets in his office for such court in the same manner as he keeps criminal dockets in the superior court; he shall otherwise possess all the powers and functions conferred upon, and discharge all the duties required of, clerks of the superior court under the general law; and he shall be liable upon his official bond as clerk of the superior court for all of his official acts and conduct in reference thereto. Whenever the clerk of the superior court acts ex officio as clerk of the recorder's court or general county court, any assistant clerk or deputy clerk of the superior court in his office shall have power and authority to take affidavits, issue warrants and other process, administer oaths to witnesses and to perform any other duty in connection with said court under the direction of the clerk of the superior court, and for the acts of said assistant or deputy clerk, the clerk of the superior court shall be liable on his official bond to the same extent that he would have been liable if he had done the act himself. The preceding sentence shall not apply to recorder's courts in Brunswick, Camden, Forsyth, Gates, Halifax, Martin, Moore, Perquimans and Vance counties. (1919, c. 277, s. 36; C. S., s. 1576; 1935, c. 346; 1947, c. 214, s. 5; 1957, c. 305.)

Local Modification.—Columbus: 1925, c. 232; Mecklenburg: 1949, c. 955.

Editor's Note. — The 1935 amendment added the last two sentences, and the 1947 amendment struck out "Orange" from the list of counties in the last sentence. The 1957 amendment deleted "Bladen" from the list of counties in the last sentence.

Cited in State v. Boykin, 211 N.C. 407, 191 S.E. 18 (1937).

§ 7-232. Deputy clerk may be appointed.—Instead of having the clerk of the superior court to act ex officio as clerk of the recorder's court or general county court, the board of commissioners of any county wherein a county recorder's court or general county court may be established may, at the time of the establishment of said court or at the time of fixing the county budget for any succeeding year, call upon the clerk of the superior court to appoint a special deputy to act as clerk of the recorder's court or general county court, and the clerk of the superior court shall within sixty days thereafter appoint a special deputy to act as clerk of the recorder's court or general county court, unless the time for good cause shall be extended by the board of county commissioners. Said special deputy clerk shall assist the clerk of the superior court with the duties of his office and shall have all the power and authority in reference to the county recorder's court or general county court conferred upon the clerk of the superior court by the preceding section, and he shall do all things in reference to said recorder's court or general county court under the direction of the clerk of the superior court of the county as fully as the clerk of the superior court would otherwise be authorized to do. The board of commissioners may require and fix the official bond of said special deputy clerk for the faithful performance of his duties and fix his salary, which shall be fixed before he enters upon his duties and shall not be lowered during his term of office. His term of office shall be for the same time as the term of the recorder of said court, unless he shall be sooner removed by the clerk of the superior court for cause, and shall cease at any time that the court itself shall cease to exist. This section shall not apply to Bladen, Brunswick, Camden, Forsyth, Gates, Guilford, Halifax, Lee, Martin, Moore, Prequimans and Vance counties. (1919, c. 277, s. 36; C. S., s. 1576; 1935, c. 346; 1947, c. 214, s. 5.)

Local Modification.—Mecklenburg: 1949, c. 955.

Editor's Note. — The 1935 amendment rewrote this section, and the 1947 amendment struck out "Orange" from the list of counties in the last sentence.

§ 7-233. Compensation of clerk when no deputy apopinted.—When no deputy clerk is appointed or elected by the board of commissioners, they are authorized to pay annually to the clerk of superior court an amount fixed by the board, which shall be in addition to any salary or fees theretofore allowed by law to the clerk of superior court, and which shall be in compensation for the services rendered by him as clerk of the county recorder's court. Such compensation shall

be paid to the clerk of superior court so long as he shall perform the duties of clerk ex officio of the county recorder's court. (1919, c. 277, s. 36; C. S., s. 1577.)

§ 7-234. **Deputy clerk to take oath of office.**—If any deputy clerk shall be appointed as provided in this article he shall take the oath required of deputy clerks under the general law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of him under this article, both of which oaths shall be recorded in the office of the clerk of the superior court, and such deputy clerk is further authorized to perform all duties of deputy clerk under the general law in addition to the duties set forth in this article. (1919, c. 277, s. 37; C. S., s. 1578.)

Cross Reference.—As to oaths required, see §§ 2-13, 11-6, 11-7, 11-11; N.C. Const., Art. VI, § 7.

§ 7-235. **Prosecuting attorney may be elected.**—The board of commissioners of any county availing itself of the provisions of this article may elect, at the same time, in the same manner, and for the same term as herein provided for the election of a deputy clerk, a prosecuting attorney for said court, and fix his compensation in such amount as they may deem suitable for the services to be rendered: Provided, that the board may require the county attorney to discharge the duties of prosecuting attorney in said court, and fix his compensation accordingly. (1919, c. 277, s. 38; C. S., s. 1579.)

Local Modification. — Franklin: 1955, c. 4; Montgomery: 1929, c. 112; Perquimans: 1951, c. 41; Washington: 1941, c. 164.

§ 7-236. **Fees for issuing and serving process.** — All justices of the peace, constables and sheriffs issuing or serving warrants or other process returnable to the recorder's court shall have the same fees as are now prescribed by law, which fees shall be collected and paid out in the same manner and by the same officers as collect and distribute such fees in the superior court. (1919, c. 277, s. 31; C. S., s. 1580.)

§ 7-237. **Costs and fees taxed as in municipal court.**—Except as provided in § 7-238, there shall be taxed in the county recorder's court the same costs and fees for the benefit of the officers thereof as provided for municipal recorder's court. Such costs and fees shall be collected by the clerk and paid over monthly to the treasurer of the county as county funds to be dealt with by the commissioners. (1919, c. 277, s. 39; C. S., s. 1581.)

Cross Reference.—See § 7-206.

§ 7-238. **Fees taxed when county officer on salary; recorder's court fund.**—In cases in which the recorder or judge and the solicitor of the county recorder's court shall be paid salaries, in lieu of fees for such recorder or judge or solicitor, the clerk of the recorder's court shall tax against the defendant who is convicted, or who confesses his guilt, or upon whom judgment is suspended in said court in cases originally within the jurisdiction of the justice of the peace a tax fee of three dollars in each case, and in all other cases within the jurisdiction of the said recorder's court a tax fee of six dollars, and these several sums when collected shall be paid over by said clerk to the treasurer or financial agent of the county, to be kept by him as a separate and distinct fund to be known as the recorder's court fund. This fund shall be used only in paying the salary of the recorder and prosecuting attorney of said court, and the other expenses of the court. (1921, c. 110, s. 13; C. S., s. 1598(a).)

Local Modification.—Cherokee: 1955, c. 105.

§ 7-239. **Courts may be discontinued after two years.**—The board of commissioners of any county which has established a county recorder's court under

the provisions of this article are authorized, after two years trial of the court, to discontinue the same at any time thereafter if in their judgment the public interest shall require it. If any such court shall be so discontinued, the action or resolution must be taken or adopted at least six months prior to the next general election, and shall not go into effect until the term of office of the recorder shall expire. (1919, c. 277, s. 35; C. S., s. 1582.)

Article 27.

Provisions Applicable to All Recorders' Courts.

§ 7-243. Appeals from justices of the peace.—In all cases where there is an appeal from a justice of the peace, such appeal shall be first heard in the recorder's court, in the manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the recorder's court. (1919, c. 277, s. 54½; C. S., s. 1597.)

Object.—One of the objects of this and related sections was to relieve the congested dockets of the superior court. State v. Baldwin, 205 N.C. 174, 170 S.E. 645 (1933).

Under the general provisions of this section, an appeal from a conviction of simple assault in a justice's court must first be taken to the recorder's court and not the superior court in the counties affected by the act. State v. Baldwin, 205 N.C. 174, 170 S.E. 645 (1933).

§ 7-244. Offenders may be sentenced to city chain gang.—In case any municipality possessing a population of two thousand or over, as provided for herein, in which a recorder's court shall be established pursuant to the provisions of this subchapter, shall now or hereafter establish and maintain a city chain gang, or workhouse or other penal institutions for the imprisonment and working of city prisoners, any recorder may sentence any person convicted of any offense committed within said municipality and punishable by imprisonment, to be imprisoned and worked on such city chain gang, or in such workhouse or other penal institutions, for such time as the recorder may in his discretion determine in accordance with the law. (1919, c. 277, s. 44; C. S., s. 1586.)

Local Modification.—Richmond: 1941, c. 60.

Cross Reference.—See § 7-194 and note.

§ 7-245. Recorders' courts substituted for other special courts.—Wherever there has been established in any county, city, or town a recorder's court or other special court, which, under the provisions of this subchapter, might have been established hereunder, whether it shall possess exactly the same jurisdiction and functions or not, the board of commissioners of the county or the governing body of such city or town, or the governing body of such city or town and the board of commissioners of the county acting jointly, may abolish such existing court and adopt any one of the courts herein provided for by appropriate resolution of such boards. (1919, c. 277, s. 45; C. S., s. 1587.)

Article 28.

Civil Jurisdiction of Recorders' Courts.

§ 7-246. Civil jurisdiction may be conferred.—The board of county commissioners of any county in which there is a city or town with a population of not less than ten thousand inhabitants, in which city or town there has been established a municipal recorder's court, under the provisions of this subchapter, or in which there is a municipal recorder's court established by law, may confer upon such recorder's court jurisdiction to try and determine civil actions, as hereinafter provided, wherein the party plaintiff or defendant is a resident of such

county, or is doing business in the county. Such jurisdiction may be conferred by resolution by the board of county commissioners of any county, entered upon their minutes, and the board of county commissioners of the county may likewise confer civil jurisdiction on the county recorder's court to try and determine civil actions as hereinafter provided wherein one or more of the parties, plaintiff or defendant, is a resident of said county or is doing business therein. (1919, c. 277, s. 47; C. S., s. 1589; 1921, c. 110, s. 7; 1933, c. 166.)

Local Modification. — Carteret: 1933, c. 379; Richmond: 1941, c. 60; Surry: Pub. Loc. 1927, c. 133, s. 1.

Editor's Note.—Prior to the 1933 amendment this section applied in cities or towns of not less than 10,000 "nor more than 25,000" inhabitants. The quoted clause was omitted by the amendment.

Constitutionality.—A similar statute authorizing the board of commissioners of a county having a recorder's court to allot stated civil jurisdiction to said court by the adoption of a resolution to that effect was held to be unconstitutional as an unlawful delegation of legislative powers. Durham Provision Co. v. Daves, 190 N.C. 7, 128 S.E. 593 (1925).

§ 7-247. Extent of jurisdiction; cross action or counterclaim in excess of jurisdiction.—The jurisdiction of such municipal and county recorders' courts in civil actions shall be as follows:

(1) Jurisdiction concurrent with that of the justices of the peace within the county;

(2) Jurisdiction concurrent with the superior court in all actions founded on contract, wherein the amount involved exclusive of interest and costs does not exceed one thousand dollars;

(3) Jurisdiction concurrent with the superior court in actions not founded upon contract wherein the amount involved exclusive of interest and cost does not exceed the sum of five hundred dollars.

When any action either on contract or in tort has been or hereafter is instituted in any court inferior to the superior court having jurisdiction of civil actions, and a cross action or counterclaim is filed for an amount in excess of the jurisdiction of the court in which the action was instituted, both the original action and the cross action or counterclaim may, upon motion of either plaintiff or defendant, in the discretion of the court, be transferred for trial, on all issues presented, to the superior court of the county where the action originated; provided, however, that if the court in which the action is pending fails to transfer such action to the superior court upon motion of either plaintiff or defendant, the defendant may elect to take voluntary nonsuit as to the cross action or counterclaim, and in such event, the determination of the issues on the plaintiff's action in the inferior court, shall not constitute res judicata as to defendant's counterclaim or cross action in a subsequent action, instituted in the superior court of any county by the defendant, nor shall the pendency of such action in the inferior court be ground for abatement of a subsequent action instituted by the defendant in the superior court of any county; provided further, however, that the defendant may elect to prosecute his cross action or counterclaim in the inferior court in which the action was commenced but, in that event, the recovery shall be limited to the jurisdiction of such court, and the determination of the issues raised by the pleadings, shall constitute res judicata in any subsequent action. (1919, c. 277, s. 48; C. S., s. 1590; 1921, c. 110, s. 8; 1963, c. 487.)

Local Modification. — Carteret: 1933, c. 379; Mecklenburg: 1933, c. 174; Franklin: 1953, c. 218, s. 1.

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

§ 7-248. Procedure in civil actions.—The rules of practice, issuing and serving process, and filing pleadings shall conform, as near as may be, to the practice in the superior court: Provided, it shall not be necessary to file written pleadings in any action of which justices of the peace now have jurisdiction. The pro-

cess shall be returnable directly to the court; and no civil process shall be issued by any recorder's court to any county other than that in which the court is located. (1919, c. 277, s. 56; C. S., s. 1591; 1921, c. 110, s. 9.)

Local Modification. — Carteret: 1933, c. 379; Franklin: 1953, c. 218, s. 3.

Cross Reference. — As to uniform practice in inferior courts where summons issued to run outside county, see §§ 1-92, 1-93.

Editor's Note.—Prior to the 1921 amendment it was necessary to file written pleadings in an action of which the justice of the peace had jurisdiction.

§ 7-249. **Trial by jury in civil actions.**—In all civil actions the parties shall be deemed to have waived a trial by jury unless demand for such trial is made before the trial begins. The demand shall be in writing and signed by the party making it, or his attorney, and accompanied by a deposit of five dollars to insure the payment of the jury tax: Provided, such demand shall not be used to the prejudice of the party making it. (1919, c. 277, s. 49; C. S., s. 1592; 1921, c. 110, s. 10.)

Local Modification. — Craven: 1929, c. 115, s. 1; Halifax: 1945, c. 628, s. 2; Hoke: Pub. Loc. 1937, c. 408.

Editor's Note.—The amendment in 1921 changed the amount of the deposit from three to five dollars.

§ 7-250. **Jurors drawn and summoned.**—If a trial by jury is demanded, the recorder shall continue the cause until a day to be set, and the recorder, together with the attorneys for all parties, shall immediately proceed to the office of the register of deeds of the county and cause to be drawn a jury of eighteen, observing as nearly as may be the rule for drawing a jury for the superior court. The recorder shall issue the proper writ to the sheriff of the county, commanding him to summon the jurors so drawn to appear at the court on the day set for the trial of the action. (1919, c. 277, s. 50; C. S., s. 1593.)

Local Modification. — Craven: 1929, c. 115, s. 1; Halifax: 1945, c. 628, s. 2; Hoke: Pub. Loc. 1937, c. 408.

This Section and § 7-252 Inapplicable to Criminal Prosecution Contemplated by § 7-204.—Statutory provisions for a jury of twelve under this section and § 7-252, applicable solely to civil actions in a municipal recorder's court, cannot be invoked by a defendant in a criminal prosecution is such court as the basis for demand under § 7-204, for a jury of twelve, in the face of statutes establishing a jury of six in criminal prosecution in such court. Roebuck v. City of New Bern, 249 N.C. 41, 105 S.E.2d 194 (1958).

§ 7-251. **Talesmen and challenges.**—The recorder shall have the right to call in bystanders according to the practice in the superior court as nearly as the same is applicable, and each party shall have the same causes of challenge as in the superior court. (1919, c. 277, s. 51; C. S., s. 1594.)

Local Modification. — Craven: 1929, c. 115, s. 1; Halifax: 1945, c. 628, s. 2; Hoke: Pub. Loc. 1937, c. 408.

§ 7-252. **Jury as in superior court.**—The jury shall be a jury of twelve and the trial shall be conducted as nearly as possible as in the superior court. (1919, c. 277, s. 52; C. S., s. 1595.)

Local Modification. — Craven: 1929, c. 115, s. 1; Halifax: 1945, c. 628, s. 2; Hoke: Pub. Loc. 1937, c. 408; Surry: Pub. Loc. 1927, c. 133, s. 2.

Section Inapplicable to Criminal Prosecution Contemplated by § 7-204. — See note to § 7-250.

§ 7-253. **Appeals to superior court.**—Appeals may be taken from the recorder's court to the superior court of the county in term time, for errors assigned in matters of law, in the same manner as now provided for appeals from the superior court to the Supreme Court, with the exception that the record may be typewritten instead of printed, and only one copy thereof shall be required. The time for taking and perfecting appeals shall be counted from the end of the

term. Upon such appeal the superior court may either affirm or modify the judgment of the recorder's court, or remand the cause for a new trial. From the judgment of the superior court an appeal may be taken to the Supreme Court: Provided, that appeals from a county recorder's court to the superior court of the said county shall be tried de novo in the superior court. (1919, c. 277, ss. 53, 54; C. S., s. 1596; 1921, c. 110, s. 11.)

Editor's Note. — The 1921 amendment added the proviso at the end of this section.

The reason for a jury of twelve in a civil action before a municipal recorder's court is made apparent by examination of this section, which provides for appeals in civil cases from recorder's court to the superior court in term. Upon such appeal the superior court may either affirm or modify the judgment of the recorder's court, or may remand the cause for a new trial. A jury trial is not available in the superior court in a civil case. Therefore, a jury trial in the constitutional or common-law sense (in a civil case) must be provided in the municipal recorder's court. Roebuck v. City of New Bern, 249 N.C. 41, 105 S.E.2d 194 (1958).

§ 7-254. **Enforcement of judgments.** — Orders to stay execution shall be the same as in appeals from the superior court to the Supreme Court. Judgments of the recorder's court may be enforced by executions issued by the clerk thereof, returnable within twenty days. Transcripts of such judgments may be docketed in the superior court, as now provided for judgments of justices of the peace; and the judgment, when docketed, shall in all respects be a judgment of the superior court as if rendered by such court, and shall be subject to the same statute of limitations and the statutes relating to revival of executions; Provided, that a judgment of the recorder's court shall not be a lien upon real estate until docketed in the superior court. (1919, c. 277, s. 55; C. S., s. 1598; 1921, c. 110, s. 12.)

Editor's Note. — The 1921 amendment added the proviso at the end of this section.

§ 7-255. **Costs in civil actions.**—In all civil actions the clerk shall tax against the losing party the sum of three dollars in cases originally within the jurisdiction of the justice of the peace, and the sum of six dollars in all other cases, and all sums so collected shall be disposed of as provided for tax fees in criminal actions in § 7-238. (1921, c. 110, s. 13; C. S., s. 1598(a).)

Cross Reference.—See §§ 7-206 and 7-237.

ARTICLE 29.

Elections to Establish Recorders' Courts.

§ 7-256. **Election required.**—The courts provided for in this subchapter shall be established upon elections held as set forth in this article, except municipal recorders' courts which are established without a popular vote pursuant to the provisions of article 29A of this chapter, and except the governing body of any municipality having an estimated population of more than twenty thousand (20,000) on the first day of January, 1945, may establish municipal recorders' courts and/or the board of county commissioners of any county may establish county recorders' courts without a vote of the people. (1919, c. 277, s. 58; C. S., s. 1599; 1921, c. 110, s. 14; 1947, c. 840, s. 1; 1947, c. 1021, s. 1.)

Editor's Note. — The 1921 amendment added an exception clause relating to county recorders' courts.

The 1947 amendments rewrote this section. For brief comment on amendments, see 25 N.C.L. Rev. 400.

§ 7-257. **Municipal recorder's court.**—The governing body of any city or town which may, under the terms of this subchapter, establish a court, prior to its establishment shall pass a resolution, if in their judgment such court should be established, reciting such fact and calling an election at a date to be fixed, which shall be not less than thirty days nor more than two years from the passage of the

resolution, at which election there shall be submitted to the qualified voters of the city the question of establishing such court. The form of the ballot shall be as prescribed in § 163-155, subsec. (e). (1919, c. 277, s. 58; C. S., s. 1600; 1939, c. 201.)

Editor's Note. — The 1939 amendment substituted "two years" for "sixty days" formerly appearing in this section.

§ **7-258. Notice of election.**—Notice of such election shall be given, signed by the clerk of the city or town or the mayor thereof, containing in substance the resolution, the date of the election, and a reference to this subchapter, which notice shall be published once a week for four successive weeks prior to said election in some newspaper published in the city or town. (1919, c. 277, s. 59; C. S., s. 1601.)

§ **7-259. New registration may be ordered.**—The governing body of such city or town may in its discretion order a new registration of the voters for any election authorized hereunder. (1919, c. 277, s. 60; C. S., s. 1602.)

§ **7-260. Manner of holding election.** — The election shall be held, reported, and recorded in the city or town, under the laws governing general elections as near as may be applicable to the city or town. The result of the election shall be reported to, canvassed and declared by the governing body of the city or town, and recorded upon the minutes thereof. If the majority of the votes cast is declared in favor of such court, it shall be established, and not otherwise. (1919, c. 277, s. 61; C. S., s. 1603.)

Cross Reference.—As to general election laws, see § 163-148 et seq.

§ **7-261. Another election after two years.**—If the majority of the votes cast at such election is against the court, another election for the same purpose may thereafter be called, but not within less than two years from the first or any succeeding election in reference thereto. (1919, c. 277, s. 62; C. S., s. 1604.)

§ **7-262. Municipal courts with jurisdiction over the entire county.** —The courts provided for in article twenty-six of this subchapter shall be established in the following manner: The governing body of the city and the board of county commissioners of the county, at a joint meeting, shall pass a joint resolution calling an election submitting to the voters of the entire county the question of the establishment of said court. The election shall be conducted by the county commissioners in the same manner as is prescribed for the conduct of elections for the establishment of municipal recorders' courts by the governing bodies of cities and towns, insofar as said procedure is applicable; the result of the election shall be recorded in the minutes of the county commissioners and certified to and recorded in the minutes of the governing body of the city. The form of the ballot shall be as prescribed in § 163-155, subsec. (e). (1919, c. 277, s. 62; C. C., s. 1606.)

§ **7-263. Expense of elections paid.** — The expense of conducting the elections for "municipal courts" and "municipal-county courts" shall be borne by the city or municipality concerned. (1919, c. 277, s. 63; C. S., s. 1607.)

§ **7-264. Certain districts and counties not included.**—This subchapter shall not apply to the following judicial districts; the tenth, except to Alamance, Granville and Orange counties; the eleventh; the seventeenth, the eighteenth, except as to Rutherford and Transylvania counties; the nineteenth; and the twentieth, except as to Cherokee, Haywood, Jackson and Swain counties; nor shall it apply to the counties of Chatham, New Hanover and Robeson. (1919, c. 277, s. 64; C. S., s. 1608; 1921, c. 110, s. 16; Ex. Sess. 1921, cc. 59, 80;

1923, cc. 19, 40; 1925, c. 162; Pub. Loc. 1927, cc. 214, 545; 1929, cc. 17, 111, 114, 130, 340; 1931, cc. 3, 19; 1933, c. 142; 1935, c. 396; 1939, c. 204; 1941, c. 338; 1947, c. 1021, s. 2; 1953, cc. 850, 998.)

Local Modification.—Alexander: 1939, c. 204; Halifax: 1931, c. 3; Hyde: 1935, c. 396; 1941, c. 134.

Editor's Note.—The 1947 amendment inserted the reference to Alamance County.

The first 1953 amendment deleted Columbus from the list of counties at the end of the section. And the second 1953 amendment deleted Johnston from the list.

The 1953 act eliminating Johnston County from the list of excepted counties was not a local, private or special act in violation of N.C. Const., Art. II, § 29. State v. Ballenger, 247 N.C. 216, 100 S.E.2d 351 (1957).

ARTICLE 29A.

Alternate Method of Establishing Municipal Recorders' Courts; Establishment, Organization and Jurisdiction.

§ 7-264.1. Establishment of municipal recorders' courts without election.—(a) Notwithstanding the provisions of article 29 of this chapter, the governing body of any municipality authorized by this subchapter to establish a court may, by adoption of an appropriate resolution, create a municipal recorder's court after giving due notice and holding a public hearing with respect thereto.

(b) Such public notice shall set forth that the governing body is considering the creation of a municipal recorder's court without holding an election thereon and shall name a time and place for a public hearing thereon, at which time all interested persons may appear and be heard.

(c) Such notice shall be published at least once a week for four successive weeks in some newspaper published within the corporate limits of the municipality and shall be posted on the official bulletin board in the city hall of such municipality during the period of publication.

(d) After a public hearing is held pursuant to the provisions of this section, the governing body of the municipality is authorized, in its discretion, to establish a municipal recorder's court without holding an election thereon. (1947, c. 840, s. 2.)

Cited in State v. Johnson, 251 N.C. 339, 111 S.E.2d 297 (1959).

SUBCHAPTER VII. GENERAL COUNTY COURTS.

ARTICLE 30.

Establishment, Organization and Jurisdiction.

§ 7-265. Establishment authorized; official entitlement; jurisdiction.—In each county of this State, there may be established a court of civil and criminal jurisdiction, which shall be a court of record and which shall be maintained pursuant to this subchapter and which court shall be called the general county court and shall have jurisdiction over the entire county in which said court may be established. In any county in the State in which there is situated a city which has or may have in the future a population, according to any enumeration by the United States census bureau, of more than fifteen thousand inhabitants, the commissioners of such county or counties are authorized hereby to establish general county courts as hereinafter provided without first submitting the question of establishing such court to a vote of the people: Provided, that the said enumeration need not be made at a regular decennial census. In the event that the second sentence of this section is acted upon by the commissioners of any county in establishing a general county court, as is herein provided, the said commissioners

may make such provisions for holding such courts in such city. (1923, c. 216, s. 1; C. S., s. 1608(f); 1925, c. 242; 1927, c. 74; 1955, c. 1081.)

Local Modification.—Beaufort: 1959, c. 848, s. 1; Caswell: 1931, c. 17; 1933, c. 405; 1937, c. 54; Cherokee: Pub. Loc. 1927, c. 87; Henderson: 1927, c. 103; Richmond: 1941, c. 60, s. 1; Wilson: 1931, c. 61; 1935, cc. 29, 149, s. 1.

Cross Reference.—As to continued existence and ultimate abolition of courts inferior to the superior court, and their replacement by district courts, see § 7A-3.

Editor's Note. — The 1955 amendment substituted "fifteen thousand" for "twenty thousand" in line seven.

See note to § 7-278.

History. — For history of this section, see Waters v. McBee, 244 N.C. 540, 94 S.E.2d 640 (1956).

In General.—Under this section the legislature may create courts inferior to superior court if provision is made for appeal to the superior court. Jones v. Standard Oil Co., 202 N.C. 328, 162 S.E. 741 (1932).

The establishment of a general county court by the board of commissioners of a county under the provisions of this and related sections, will not be held invalid as being an unlawful exercise of legislative power, the jurisdiction of such courts being prescribed by the legislature and the board of commissioners being clothed merely with the power to find the facts in regard to the necessity and expediency of such court, and their acts in establishing such courts having been ratified by the legislature. State ex rel. Meador v. Thomas, 205 N.C. 142, 170 S.E. 110 (1933).

Enactment of Acts of Commissioners in Creating Courts.—The acts of the county commissioners in the organization of general county courts, heretofore organized, as provided by ch. 216 of the Public Laws of 1923 and ch. 85 of the Public Laws, extra session 1924, and all amendments thereto, were ratified and declared to be the acts of the General Assembly of North Carolina by the Acts 1927, ch. 232, § 1.

The phrase "shall have jurisdiction over the entire county in which said court may be established" does not have reference to the kind or character of action of which the general county court may take jurisdiction nor of the parties who may be subject to its jurisdiction. It merely fixes the territorial limits within which the court may act. The quoted words give such court jurisdiction within the boundaries of its county notwithstanding that other courts may have been created with jurisdiction covering the same matters in other parts of the county, and do not limit such court to causes of action arising within the county. Waters v. McBee, 244 N.C. 540, 94 S.E.2d 640 (1956).

Cited in In re Hickerson, 235 N.C. 716, 71 S.E.2d 129 (1952).

§ 7-266. Creation by board of commissioners without election.—If in the opinion of the board of commissioners of any county, the public interests will be best promoted by so doing, they may establish a general county court under this article, by resolution which shall, in brief, recite the reasons for the establishment thereof, and further recite that, in the opinion of the board of commissioners, it is not necessary that an election be called upon the establishment of such court as herein provided for, and upon the adoption of such resolution the board of commissioners may establish said court without holding such election. (Ex. Sess. 1924, c. 85, s. 2.)

Local Modification.—Beaufort: 1959, c. 848, s. 1; Henderson: 1927, c. 103; Person: 1929, c. 246.

Cited in Efird v. Board of Comm'rs, 219 N.C. 96, 12 S.E.2d 889 (1941); In re Hickerson, 235 N.C. 716, 71 S.E.2d 129 (1952).

§ 7-267. Abolishing the court.—Whenever in the opinion of the board of commissioners of any county in which a court has been established under this article, the conditions prevailing in such county are such as to no longer require the said court, such board of county commissioners may, by proper resolution reciting in brief the reasons therefor, abolish said court: Provided, no such court shall be abolished except at the end of the terms of office of the judge and solicitor, unless such judge and solicitor shall voluntarily tender their resignations, setting forth, in brief, that in their opinion the existence of the said court is no longer necessary, in which event the board of commissioners may forthwith abolish the same. (Ex. Sess. 1924, c. 85, s. 2.)

Cited in Efird v. Board of Comm'rs, 219 N.C. 96, 12 S.E.2d 889 (1941).

§ 7-268. Transfer of criminal cases.—Upon the establishment of the general county court, as in this article authorized, the clerk of the superior court shall immediately transfer from the superior court to such general county court all criminal actions pending in the superior court of which the general county court has jurisdiction, as in this article conferred, and the general county court shall immediately proceed to try and dispose of such criminal actions. (Ex. Sess. 1924, c. 85, s. 2.)

Local Modification. — Beaufort: 1959, c. 848, s. 3.

Section 15-177 Modified.—This and related sections modify § 15-177. See State v. Baldwin, 205 N.C. 174, 170 S.E. 645 (1933).

§ 7-269. Transfer of civil cases.—Transfers may be made in term of any civil action in the superior court to the general county court, and from the general county court to the superior court by the presiding judge of said respective courts, by consent, or upon motion of which due notice has been given, when, in the opinion of the presiding judge of the court from which the transfer is to be made, the ends of justice will be best served and promoted by such transfer. (Ex. Sess. 1924, c. 85, s. 2; 1933, c. 127.)

Editor's Note. — The 1933 amendment changed the 1924 act which authorized the judge of the superior court to transfer civil actions to the general county court for trial. The amendment allows the judge of either the superior court or the general county court to transfer cases to the other court for trial, either by consent or by motion upon notice. 11 N.C.L. Rev. 216.

§ 7-270. Costs.—Costs in both criminal and civil actions shall be taxed and collected as now provided by law. (Ex. Sess. 1924, c. 85, s. 2.)

Local Modification. — Buncombe: 1953, c. 1021; Surry: 1949, c. 896, s. 2.

Cited in In re Hickerson, 235 N.C. 716, 71 S.E.2d 129 (1952).

§ 7-271. Judge; election, term of office, vacancy in office, qualification, salary, office.—The court shall be presided over by the judge, who may be a licensed attorney at law, and at the time of his election he shall be a qualified elector in the county. The first judge of the court upon the establishment of said court shall be elected by the board of county commissioners within thirty days after the establishment of said court, and he shall hold his office until January first, following the next general election of county officers and until his successor is elected and qualified. If a vacancy occurs in the office of judge of said court, the same shall be filled by the election of a successor for the unexpired term by the board of county commissioners. After the first elected judge by the board of county commissioners, each succeeding judge shall be elected by a vote of the qualified electors of the county at the next general election before the expiration of the term of office and when other county officers are elected, and shall hold his office for a term of four years beginning January first following his election, and until his successor is elected and qualified. Before entering upon the duties of his office, the judge shall take and subscribe an oath of office, as is now provided by law for justices of the peace, and he shall file the same with the clerk of the superior court of the county. The salary of said judge shall be fixed by the board of commissioners of the county, and shall not be decreased during the term of office, and it shall be paid monthly out of the funds of the county. The judge shall reside in the county and shall be provided by the county commissioners with an office of the county seat. The terms of said court shall be held in the courthouse, except as otherwise provided in § 7-265, but they shall at no time inconvenience or discommode the superior court of the county while the superior court in term is using the courthouse. If in the opinion of the board of commissioners the best interests of the county will be promoted thereby, the said board may appoint such judge, fixing his term of office, in which event the judge so appointed shall hold

office pursuant to such appointment, and shall not be elected by a vote as herein provided for. (1923, c. 216, s. 2; C. S., s. 1608(g); Ex. Sess. 1924, c. 85, s. 1.)

Local Modification. — Beaufort: 1953, c. 1247, s. 2; 1959, c. 848, s. 3; Buncombe: 1955, c. 425; 1969, c. 630; Henderson: 1957, c. 362, s. 6; Duplin: 1943, c. 264; Scotland: 1925, c. 172; Surry: 1949, c. 896, s. 2.

Cross References.—As to forms of oaths required of justices of peace, see § 11-11. As to oaths required of public officials generally, see §§ 11-6, 11-7; N.C. Const., Art. VI, § 7.

Editor's Note. — The 1924 amendment struck out a provision fixing the salary at not less than $3600, and a provision denying the judge the power to practice law in the courts of the State. It also added the last sentence.

Election of Judge by Commissioners Constitutional.—Under the N.C. Const., Art. IV, § 30, the legislature may provide for the election of officers of inferior courts, and the word "election" does not necessarily import a popular election and the delegation to the county commissioners of the power to elect judges is not an unlawful delegation of legislative powers. State ex rel. Meador v. Thomas, 205 N.C. 142, 170 S.E. 110 (1933).

Cited in In re Hickerson, 235 N.C. 716, 71 S.E.2d 129 (1952).

§ 7-272. Terms of court.—The court shall open for the transaction of business and trial of causes the first Monday of each month and continue until all matters before the court are disposed of. (1923, c. 216, s. 2; C. S., s. 1608(h).)

Local Modification. — Duplin: 1947, c. 899; 1959, c. 650.

§ 7-273. Prosecuting officer; duties, election, salary, etc. — There shall be a prosecuting attorney of the general county court, to be known officially as prosecutor, who shall appear for the State and prosecute in all criminal cases being tried in said court, and for his services he shall be paid such salary as may be fixed by the board of county commissioners. He shall be elected by the board of county commissioners for the first term as herein provided for the election of the judge, and thereafter by the qualified electors of the county in the same manner as is provided herein for the election of the judge; and vacancies in the office of the prosecutor shall be filled by the board of county commissioners as they are herein authorized to fill vacancies in the office of judge. If requested to do so by the judge, the prosecutor shall represent the county in prosecution of criminal appeals from this court in the superior court. The salary of the prosecutor shall be paid monthly out of the county funds. If in the opinion of the board of commissioners the best interests of the county will be promoted thereby, the said board may appoint such solicitor, fixing his term of office, in which event the solicitor so appointed shall hold office pursuant to such appointment, and shall not be elected by vote as herein provided for. (1923, c. 216, s. 3; C. S., s. 1608(i); Ex. Sess. 1924, c. 85, s. 1; 1925, c. 250, s. 1.)

Local Modification. — Buncombe: 1969, c. 630; Duplin: 1943, c. 264; Henderson: 1927, c. 103; 1957, c. 362, s. 7.

Editor's Note. — This section was amended in 1924 by striking out a provision limiting the salary to a minimum of $1,000. The last sentence was also added by the amendment.

The 1925 amendment struck out the word "judge" in the last sentence and substituted the word "solicitor."

§ 7-274. Superior court clerk as clerk ex officio; salary, bond, etc. —The clerk of the superior court of the county shall be ex officio clerk of the general county court, herein provided for, and in addition to the salary and fees paid him as clerk of the superior court, he shall be paid such additional compensation as the county commissioners of the county may fix, to be paid monthly out of the county funds. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him to the same extent as he is bound as clerk of the superior court. The clerk of said court or any deputy thereof, upon application and the making of proper affidavit, as provided by law, shall have power and authority to issue any criminal warrant or warrants in said

court and make the same returnable before the judge thereof, at any time or times designated for the trial of criminal cases. The last sentence shall not apply to the following counties: Alexander, Alleghany, Ashe, Caldwell, Camden, Clay, Dare, Davidson, Duplin, Durham, Edgecombe, Forsyth, Haywood, Hertford, Hoke, Hyde, Jackson, Johnston, Lincoln, Mecklenburg, Nash, New Hanover, Person, Pitt, Robeson, Rockingham, Scotland, Tyrrell, Union, Vance, Wake, Watauga, Wayne, Wilkes, Yadkin and Yancey. (1923, c. 216, s. 4; C. S., s. 1608(j); 1931, c. 233; 1955, c. 8; c. 1080, s. 1; 1957, c. 362, s. 3; c. 811.)

Local Modification.—Buncombe: 1967, c. 517; Surry: 1949, c. 896, s. 2.

Editor's Note. — The 1955 amendments deleted "Halifax" and "Craven" from the list of counties, and the 1957 amendments deleted "Alamance" and "Henderson" therefrom.

Cited in In re Hickerson, 235 N.C. 716, 71 S.E.2d 129 (1952).

§ 7-275. Sheriff; duties; additional allowance. — The sheriff of the county or his deputy appointed shall attend upon the terms of this court in the same manner and with the same power and authority as he does and has in attendance upon the superior courts of the county. The county commissioners of the county are authorized to make said sheriff such additional allowances as they may fix for such services in addition to his salary and fees fixed by law. (1923, c. 216, s. 5; C. S., s. 1608(k).)

§ 7-276. Fees of clerk and sheriff.—In those counties in which the clerk of the superior court and sheriff are paid fees, and not salaries, such clerk and sheriff shall receive the same fees for services rendered in the general county court as they would have received had such services been rendered in the superior court. (Ex. Sess. 1924, c. 85, s. 5½.)

Local Modification. — Scotland: 1925, c. 172.

§ 7-277. Separate records to be kept by clerk; blanks, books and stationery.—The clerk of the said general county court shall keep separate records, criminal and civil, for the use of said court, to be furnished by the county commissioners, and they shall also provide all such necessary blanks, forms, books and stationery as may be needed by said court. And the said clerk shall keep the same in his office of clerk of the superior court. (1923, c. 216, s. 6; C. S., s. 1608(l).)

§ 7-278. Criminal jurisdiction, extent.—The general county court, herein provided for, shall have the following jurisdiction in criminal actions within the county:

(1) Original, exclusive and concurrent jurisdiction, as the case may be, of all offenses within said county which are now or may hereafter be given to justices of the peace under the Constitution and general laws of the State, including all offenses of which mayors of towns or other municipal courts now have jurisdiction.

(2) Original and concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime within the territory of the general county court, and of which said court is not herein given final jurisdiction.

(3) To punish for contempt to the same extent and in the manner allowed by law to the superior courts of this State; to issue writs ad testificandum and other process to compel the attendance of witnesses and to enforce the orders and judgments of the court in the same manner allowed by law to the superior courts of this State.

(4) The general county court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and in addition thereto shall have exclusive original jurisdiction of all other criminal offenses committed in the county

below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors. In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the general county court, as herein provided for, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance, or surety, to appear at the next first Monday of the month next succeeding before the general county court for trial, and in default of surety such person shall be committed to the county jail to await trial.

(5) In counties in which there is a special court or courts for cities and towns, the jurisdiction of the general county court in criminal actions shall be concurrent with the jurisdiction conferred upon such special courts. (1923, c. 216, s. 13; C. S., s. 1608(m); 1924, c. 85, s. 1.)

Local Modification. — Beaufort: 1959, c. 848, s. 3; Buncombe: 1969, c. 630.

Editor's Note.—The fifth paragraph was added by the 1924 amendment.

In General. — This section as enacted was one of many general provisions applicable to the several courts provided by the act. The last clause has reference to the jurisdiction exercised by the statutory courts in all criminal matters arising in the county which are given to justices of the peace. State v. Baldwin, 205 N.C. 174, 170 S.E. 645 (1933).

When the amendment of 1924 is construed in pari materia with both § 7-265 et seq., and § 7-185 et seq., it has a prospective purpose and means that when general county courts exist or are created in counties where special courts for cities and towns shall be, or shall have been created, or are in contemporaneous existence, their jurisdiction shall be as defined in the amendment, that is, concurrent with the jurisdiction conferred upon such special courts. In re Barnes, 212 N.C. 735, 194 S.E. 499 (1938).

Warrant on Appeal. — Upon conviction in a county court of a misdemeanor within the final jurisdiction of such court, upon a warrant sworn out before a justice of the peace, on appeal the superior court has derivative jurisdiction to try defendant upon the same warrant without a bill of indictment found by the grand jury. State v. Shine, 222 N.C. 237, 22 S.E.2d 447 (1492).

Cited in Waters v. McBee, 244 N.C. 540, 94 S.E.2d 640 (1956).

§ 7-279. Civil jurisdiction, extent. — The jurisdiction of the general county court in civil actions shall be as follows:

(1) Jurisdiction concurrent with that of the justices of the peace of the county;

(2) Jurisdiction concurrent with the superior court in all actions founded on contract;

(3) Jurisdiction concurrent with the superior court in all actions not founded upon contract;

(4) Jurisdiction concurrent with the superior court in all actions to try title to lands and to prevent trespass thereon and to restrain waste thereof;

(5) Jurisdiction concurrent with the superior court in all actions pending in said court to issue and grant temporary and permanent restraining orders and injunctions;

(6) Jurisdiction concurrent with the superior court of all actions and proceedings for divorce and alimony, or either;

(7) Jurisdiction concurrent with the superior court in all matters pending in said court for the appointment of receivers, as provided in § 1-501 et seq.;

(8) Jurisdiction concurrent with the superior court to appoint receivers. (1923, c. 216, s. 14; C. S., s. 1608(n); 1935, c. 171; 1937, c. 58.)

Local Modification. — Beaufort: 1953, c. 1247, s. 4; 1959, c. 848, s. 3; Bertie: 1935, c. 179.

Editor's Note. — The 1935 amendment added subdivision (6) to this section, and the 1937 amendment added subdivisions (7) and (8). See 12 N.C.L. Rev. 39.

The jurisdiction of the superior court upon appeal from a general county court is limited to rulings on exceptions duly

noted and brought forward, and the superior court is without authority to make additional findings of fact. Becker v. Becker, 273 N.C. 65, 159 S.E.2d 569 (1968).

Jurisdiction Not Limited to Causes of Action Arising in the County. — Had it been the intention of the legislature to limit the jurisdiction of the general county court to causes of action arising in the county, it would have been simple and appropriate for it to have inserted such a provision in this section. No such limitation appears. To the contrary the General Assembly has made express provisions for change of venue in appropriate cases in § 7-286. Nelms v. Nelms, 250 N.C. 237, 108 S.E.2d 529 (1959).

Where plaintiff institutes an action in the general county court for alimony without divorce and for custody and support of the children, that court acquires original jurisdiction of the parties and the children, and the superior court thereafter has appellate jurisdiction only and is without authority to modify custody or contempt orders entered in the court below. Becker v. Becker, 273 N.C. 65, 159 S.E.2d 569 (1968).

Cited in McLean v. McLean, 233 N.C. 139, 63 S.E.2d 138 (1951); Waters v. McBee, 244 N.C. 540, 94 S.E.2d 640 (1956); In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968).

§ 7-280. Election, requirement of. — The general county court, herein provided for, shall be established upon elections as set forth in this article, except as otherwise provided in §§ 7-265 and 7-266. (1923, c. 216, s. 20; C. S., s. 1608(o).)

Local Modification. — Beaufort: 1959, c. 848, s. 2.

Cross Reference. — As to when court may be established without election, see §§ 7-265 and 7-266.

Cited in State ex rel. Meador v. Thomas, 205 N.C. 142, 170 S.E. 110 (1933).

§ 7-281. Resolution by county commissioners; time for election; ballots.—The board of commissioners of the county shall pass a resolution, if in their judgment such court should be established, reciting such fact and calling an election at a date to be fixed, which shall not be less than thirty days nor more than sixty days from the passage of the resolution, at which election there shall be submitted to the qualified voters of the county the question of establishing such court. The form of the ballot shall be as provided in § 163-155, subsec. (e). (1923, c. 216, s. 21; C. S., s. 1608(p).)

§ 7-282. Notice of election; publication.—Notice of such election shall be given at least thirty days prior to the day of election, signed by the chairman of the board of county commissioners and containing in substance the resolution passed by the board, the date of the election and a reference to the act creating the court, and which notice shall be published once a week for four successive weeks prior to said election in some newspaper published in the county and a copy thereof shall be posted at the courthouse door. (1923, c. 216, s. 22; C. S., s. 1608(q).)

§ 7-283. Law governing elections; election officers; registration.— Any election held under the provisions of this law shall be conducted in the same manner as is now or may hereafter be prescribed by law for holding elections for the members of the General Assembly, except as herein otherwise stated. The board of county commissioners shall appoint the registrars and judges of election and any other election officers necessary for holding said election, and registration and challenge of voters shall be conducted in the same manner as is now or may hereafter be provided for election of the members of the General Assembly, except as herein set forth. The said board of county commissioners may or may not, in their discretion, order a new registration for any election held under this law. In case no new registration is ordered the registration books of each voting precinct shall be kept open for twenty days prior to the election for the purpose of allowing electors to register who have not theretofore registered in the township or voting precinct, of their residence, and who are entitled to register for said

election; and the registration books shall close on Saturday next preceding the election and the registrar shall transcribe the names of all persons who have registered for former elections in their township, or voting precincts, and are otherwise qualified electors at said election upon a new registration book. The registrars are authorized and directed to register any person legally qualified and entitled to vote in their respective townships or voting precincts who apply for such purpose, in the same manner and under the same rules and regulations as now or hereafter may be provided for registering electors for the general election in said county. (1923, c. 216, s. 23; C. S., s. 1608(r).)

Cross Reference.—As to general election laws, see § 163-148 et seq.

§ 7-284. Count and return of votes; canvass of returns; effect; expense.—The vote cast at said election shall be counted at the close of the polls by the election officers and returned to the clerk of the said board of county commissioners of said county by a member of said election officers on the second day next succeeding the day of said election; and the said board of county commissioners, at their next regular meeting, or at a called meeting, shall tabulate and declare the result of the election, all of which shall be recorded in the minutes of said board of county commissioners, and no other recording and declaring of the result of said election shall be necessary. If a majority of the votes cast at said election is declared in favor of such court, it shall be established, and not otherwise. The expenses of said election shall be paid by the county commissioners out of the county fund. (1923, c. 216, s. 24; C. S., s. 1608(s).)

Cited in In re Hickerson, 235 N.C. 716, 71 S.E.2d 129 (1952).

§ 7-285. Application of article.—This article shall not apply to any county in which there has been established a court, inferior to the superior court, by whatever name called by a special act, nor shall this article apply to the following counties: Granville, Iredell, New Hanover, Pasquotank and Wake; nor shall it apply to the counties in the seventeenth and nineteenth judicial districts, except Buncombe County: Provided, the provisions of this article shall apply to Surry County, notwithstanding that there has been established a court inferior to the superior court. (Ex. Sess. 1924, c. 85, s. 2; 1925, c. 9; 1927, c. 103, ss. 1, 2; 1929, c. 159, s. 1; 1931, c. 19; 1937, c. 439; 1949, c. 896; 1953, c. 845; 1953, c. 1241, s. 1; 1957, c. 362, s. 4.)

Local Modification.—Watauga: 1937, c. 439.

Editor's Note. — The 1925 amendment added Randolph to the list of counties in this section, and the 1927 amendment added Henderson to the list. The 1931 amendment struck out the former exemption of the counties in the sixteenth judicial district. The first 1953 amendment deleted Randolph from the list of counties, and the second 1953 amendment added the proviso to this section.

The 1957 amendment deleted "Henderson" from the list of counties. Section 2 of the amendatory act provided that this article is applicable to Henderson County, except as otherwise provided in the act. See Local Modification under G.S. 7-271 and 7-273.

Repealed Only as to Surry County. — Chapter 896 of the 1949 Session Laws is held to repeal this section only insofar as it relates to Surry County. When the act is considered in its entirety, it seems clear that the purpose of the legislature was to take Surry County out of those counties to which the general county court act did not apply, and place it under the provisions of the act, and to make special provisions in respect of the general county court of the county. In re Hickerson, 235 N.C. 716, 71 S.E.2d 129 (1952).

And Wilkes County is still excluded from the general county court act. Therefore, its board of commissioners is without authority to establish a general county court. In re Hickerson, 235 N.C. 716, 71 S.E.2d 129 (1952).

Article 31.

Practice and Procedure.

§ 7-286. Procedure; issuance and return of process.—The rules of procedure, issuing process and filing pleadings shall conform as nearly as may be to the practice in the superior courts. The process shall be returnable directly to the court, and may issue out of the court to any county in the State: Provided, that civil process in cases within the jurisdiction now exercised by justices of the peace shall not run outside of or beyond the county in which such court sits.

Motions for the change of venue or removal of cases from the general county courts to the superior courts of counties other than the one in which the said court sits may be made and acted upon, and the causes for removal shall be the same as prescribed by law for similar motions in the superior courts.

The provisions of the chapters on civil procedure and criminal procedure, and all amendments thereof, shall apply as nearly as may be to the general county courts, and the judges and the clerks of said courts, in all causes pending in said courts, shall have rights, privileges, powers and immunities similar in all respects to those conferred by law on the judges and clerks of the superior courts of the State, and shall be subject to similar duties and liabilities: Provided, that this section shall not extend the jurisdiction of said judges and clerks, nor infringe in any manner upon the jurisdiction of the superior courts, except as provided in articles thirty and thirty-one of this chapter.

All motions and petitions for removal of actions from the general county court to the district court of the United States shall be presented to, be heard and determined by the judge of the general county court, with the right of appeal from any order or ruling of said judge to the superior court. (1923, c. 216, s. 7; C. S., s. 1608(t); 1925, c. 242, s. 2; 1925, c. 250, s. 2; 1933, c. 128, s. 1.)

Local Modification.—Richmond: 1941, c. 60.

Cross Reference.—See note to § 7-279.

Editor's Note.—The first 1925 amendment made several changes in this section and the second 1925 amendment added the proviso at the end of the third paragraph. The 1933 amendment added the last paragraph.

§ 7-287. Trial by jury; waiver; deposit for jury fee.—In all civil actions the parties shall be deemed to have waived a jury trial unless demand shall be made therefor in the pleadings of the parties to the action when same are filed. The demand shall be in writing and signed by the party making it, or by his attorney, and accompanied by a deposit of three dollars to insure the payment of the jury tax: Provided, such demand shall not be used to the prejudice of the party making it. Any defendant in a criminal action may demand a trial by jury, in which event such defendant shall not be required to deposit the sum of three dollars. Such jury shall be drawn as herein otherwise provided for. (1923, c. 216, s. 8; C. S., s. 1608(u); Ex. Sess. 1924, c. 85, s. 1; 1937, c. 56.)

Local Modification.—Duplin: 1937, c. 85; Beaufort: 1953, c. 1247, s. 3; Henderson: 1965, c. 480, s. 1.

Editor's Note.—The last two sentences of this section were added by the 1924 amendment.

Prior to the 1937 amendment demand for jury trial was required to be made "before the trial begins."

Cited in Crafford v. Lafayette Life Ins. Co., 198 N.C. 269, 151 S.E. 249 (1930); Gasperson v. Rice, 240 N.C. 660, 83 S.E.2d 665 (1954).

§ 7-288. Continuance if jury demanded; drawing of jury; list.—If a jury trial is demanded, the judge shall continue the case until a day to be set, and the judge, together with the attorneys for all parties, shall proceed to the office of the register of deeds of the county and cause to be drawn a jury of eighteen men, observing as nearly as may be the rule for drawing a jury for the superior court. The judge shall issue the proper writ to the sheriff of the county commanding him to summon the jurors so drawn to appear at the court on the day set for

the trial of the action. It shall be the duty of the register of deeds to prepare a list of jurors for this the general county court identical with the list prepared for the superior court, and the jury shall be drawn out of the box containing such list. Provided, that the judge of said court may in his discretion, if and when a sufficient number of cases are at issue in which jury trial has been demanded to warrant such action, cause a jury of not less than eighteen, nor more than twenty-four men to be drawn for a certain week of a term, setting such cases for trial during such time, and in such cases the juries shall be drawn in the same manner as now provided for the drawing of juries for the superior court. The proviso shall not apply to the following counties: Alamance, Alexander, Alleghany, Ashe, Caldwell, Camden, Clay, Dare, Davidson, Duplin, Durham, Edgecombe, Forsyth, Halifax, Haywood, Hertford, Hoke, Hyde, Jackson, Johnston, Lincoln, Mecklenburg, Nash, New Hanover, Person, Pitt, Robeson, Rockingham, Scotland, Tyrrell, Union, Vance, Wake, Watauga, Wayne, Wilkes, Yadkin and Yancey. (1923, c. 216, s. 9; C. S., s. 1608(v); 1931, c. 233, s. 2; 1955, c. 1080, s. 2; 1957, c. 362, s. 5.)

Local Modification. — Henderson: 1963, c. 660; 1965, c. 480, s. 2.

Editor's Note. — The 1955 amendment deleted "Craven" from the list of counties in the last sentence and the 1957 amendment deleted "Henderson" therefrom.

§ 7-289. Talesmen; challenges.—The judge shall have the right to call in talesmen to serve as jurors according to the practice of the superior court as nearly as the same is applicable, and to direct the sheriff to summon a sufficient number of talesmen to serve during any one week for the proper dispatch of the business of the court. (1923, c. 216, s. 10; C. S., s. 1608(w).)

§ 7-290. Process; authentication; service; return. — All civil summons in actions begun in the general county court shall be served at least ten days before the return day named therein, and shall be returnable on the first Monday of the month next succeeding the issue thereof, unless the same be issued within less than ten days before the first Monday of the month next succeeding its issuing, in which event it shall be made returnable on the first Monday of the second succeeding month next after the date of the issue thereof; and when the summons shall be issued more than ten days before the first Monday of the month next succeeding its issuing, and shall be executed by the proper officer within less than ten days of the return day named therein, it shall be returned as if executed in proper time, and the case placed on the summons docket and continued to the first Monday of the month next succeeding the return day thereof, at which time it shall be treated in all respects as if that had been the return day named therein. The summons shall run in the name of the State, be signed by the clerk of the court in which the action is brought, and shall be directed to the sheriff or other proper officer of the county. (1923, c. 216, s. 11; C. S., s. 1608(x).)

Local Modification. — Duplin: 1959, c. 649.

§ 7-291. Pleadings; time for filing.—The complaint shall be filed by the return day named in the summons and the answer, demurrer or other pleadings on the part of the defendant shall be filed within twenty (20) days thereafter: Provided, if a copy of the complaint be served on the defendant at the time of the service of the summons, then the defendant shall have only twenty (20) days from the date of such service to file an answer, demurrer or otherwise plead. If the answer contains a counterclaim against the plaintiff or plaintiffs or any of them, such answer shall be served upon the plaintiff or plaintiffs against whom such counterclaim is pleaded or against the attorney or attorneys of record of such plaintiff or plaintiffs; the plaintiff or plaintiffs against whom such counterclaim shall be pleaded shall have twenty (20) days after the service thereof within which to answer or reply to such counterclaim. If a counterclaim is pleaded against any of the plaintiffs and no copy of the answer containing such counter-

claim shall be served as herein provided for, such counterclaim shall be deemed to be denied as fully as if the plaintiff or plaintiffs had filed an answer or reply denying the same. All other replies, if any, shall be filed within twenty (20) days from the filing of the answer. For good cause shown and found by the judge, the judge may extend the time for the filing of any of the pleadings provided for in this article on the part of the plaintiff or on the part of the defendant. (1923, c. 216, s. 12; C. S., s. 1608(y); 1925, c. 250, s. 3.)

Local Modification. — Duplin: 1959, c. 649.

Editor's Note. — This section was amended in 1925 to make it conform to other sections now appearing as §§ 1-125 and 1-140.

§ 7-292. Criminal appeals to superior court; cases bound over to superior court.—Any person convicted of any offense of which the general county court has final jurisdiction may appeal to the superior court of the county from any judgment or sentence of the court in the same manner as is now provided for appeals from justices of the peace; and any person tried before the general county court for any offense of which said court has not final jurisdiction shall, if probable cause be found, be bound over to the superior court in the same manner as is provided by law in similar cases before a justice of the peace. The judge may, upon proper affidavit, issue criminal warrants returnable before him in or out of term. All persons convicted in said court may be sentenced to the roads, or county farms, or jail, as the judge may determine. (1923, c. 216, s. 15; C. S., s. 1608(z).)

§ 7-293. Amendments in pleadings and warrants. — The judge shall have power in his discretion to allow amendments in pleadings and warrants, to the same extent as is allowed in the superior courts of the State. (1923, c. 216, s. 16; C. S., s. 1608(aa).)

§ 7-294. Jury trials, conduct of.—The jury in the general county court shall be a jury of twelve and the trial shall be conducted as nearly as possible as in the superior court. (1923, c. 216, s. 17; C. S., s. 1608 (bb).)

§ 7-295. Appeals to superior court in civil actions; time; record; judgment; appeal to Supreme Court.—Appeals in civil actions may be taken from the general county court to the superior court of the county in term time for errors assigned in matters of law in the same manner as is now provided for appeals from the superior court to the Supreme Court except that appellant shall file in duplicate statement of case on appeal, as settled, containing the exceptions and assignments of error, which, together with the original record, shall be transmitted by the clerk of the general county court to the superior court, as the complete record on appeal in said court; that briefs shall not be required to be filed on said appeal, by either party, unless requested by the judge of the superior court; the record on appeal to the superior court shall be docketed before the next term of the superior court ensuing after the case on appeal shall have been settled by the agreement of the parties or by order of the court, and the case shall stand for argument at the next term of the superior court ensuing after the record on appeal shall have been docketed ten days, unless otherwise ordered by the court. The time for taking and perfecting appeals shall be counted from the end of the term of the general county court at which such trial is had. Upon such appeal the superior court may either affirm or modify the judgment of the general county court, or remand the cause for a new trial. From the judgment of the superior court an appeal may be taken to the Supreme Court as is now provided by law. (1923, c. 216, s. 18; C. S., s. 1608(cc); 1933, c. 109; 1937, c. 84.)

Editor's Note. — Prior to the 1933 amendment the exception at the end of the first sentence of this section merely provided that the record might be typewritten and that only two copies should be required. This was omitted and the present exception and the provision as to briefs inserted in lieu thereof.

The 1937 amendment added that part of the first sentence beginning with the second semicolon.

Section Governs Appeals. — Appeals in

civil actions from the general county courts to the superior court are governed by this section. Paris v. Carolina Portable Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967).

Section makes no provision for filing of case on appeal or docketing of record in superior court until settlement of the case. Paris v. Carolina Portable Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967).

Delay in Filing Case as Settled.—When appellant timely serves his case on appeal and appellee files exceptions thereto with request that the judge settle the case, appellee is not entitled to dismissal for any delay of the judge of the general court in filing the case as settled by him. Paris v. Carolina Portable Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967).

Assignments of Error.—In the absence of assignments of error appearing in the transcript on an appeal to the Supreme Court, the appeal will ordinarily be dismissed on the motion of the appellee. Smith v. Texas Co., 200 N.C. 39, 156 S.E. 160 (1930).

In the exercise of its appellate jurisdiction under this section, the Supreme Court may consider and pass only on the contention of the appellant that there was error in matters of law at the hearing in the superior court. This contention must, however, be presented to this court by assignments of error based on exceptions to specific rulings of the judge of the superior court, on the assignments of error appearing in the case on appeal filed in the superior court. Smith v. Texas Co., 200 N.C. 39, 156 S.E. 160 (1930).

Sending Record Up.—Where an appeal is taken from a county court under this section it is not desirable that the entire record in the superior court be sent up, but only such parts as relate to the questions to be reviewed with only material exceptions, properly stated, grouped and sufficiently compiled to enable the court to understand them without searching through the record. Baker v. Clayton, 202 N.C. 741, 164 S.E. 233 (1932).

See 11 N.C.L. Rev. 217, where it is pointed out that the 1933 amendment changes this section, so that instead of following the practice in appeals from the superior court to the Supreme Court, the appellant may file in duplicate the statement of the case on appeal, and this with the original records in the case shall be transmitted to the clerk of the superior court as the complete record on appeal. Briefs are not required to be filed by either party, unless requested by the judge of the superior court.

Superior Court Sits as Appellate Court.—In hearing civil cases on appeal from the general county court, the superior court sits as an appellate court, subject to review by the Supreme Court. Jenkins v. Castelloe, 208 N.C. 406, 181 S.E. 266 (1935), citing Cecil v. Snow Lumber Co., 197 N.C. 81, 147 S.E. 735 (1929); Pelaez v. Carland, 268 N.C. 192, 150 S.E.2d 201 (1966).

The jurisdiction of the superior court on an appeal from a general county court is an appellate jurisdiction limited to matters of law only which are properly presented by errors assigned, and the superior court may either affirm or modify the judgment of the general county court or remand the cause for a new trial. Robinson v. McAlhaney, 216 N.C. 674, 6 S.E.2d 517 (1940).

Upon the entering of an appeal the trial court is functus officio and has no further jurisdiction except to enter orders affecting the judgment during the term when the judgment is in fieri, to adjudge an appeal abandoned after notice and on a proper showing, and to settle the case on appeal, which the court may do only in the event of timely service of exceptions or countercase to appellant's statement of case on appeal. Pelaez v. Carland, 268 N.C. 192, 150 S.E.2d 201 (1966).

In Granting New Trial Superior Court Must State Rulings on Exceptions. — Where an appeal is taken from the general county court to the superior court for errors assigned in matters of law, as authorized by this section, and a new trial is granted by the superior court, it is essential that the rulings upon exceptions granting the new trial be specifically stated, so that in case of appeal to the Supreme Court, they may be separately assigned as error in accordance with Rule 19(3) of the Rules of Practice in the Supreme Court, and properly considered on appeal. Jenkins v. Castelloe, 208 N.C. 406, 181 S.E. 266 (1935).

Extensions of Time. — In this case the defendants' attorneys, following a series of other extensions, consented to an order extending the time to serve the case on appeal through August 19, 1965, a time of approximately eight months. Plaintiff then obtained an additional order from the judge of the general county court which purported to grant a further extension of time to August 30, 1965. The court, however, was without authority to grant this additional extension. Pelaez v. Carland, 268 N.C. 192, 150 S.E.2d 201 (1966).

After appeal and the fixing of time for service of case on appeal from a general county court to the superior court, the

trial court granted successive extensions of time, one with the consent of appellee, and then granted further extensions of time without appellee's consent. It was held that no case on appeal having been served within the time fixed or within the extension agreed upon by counsel, the superior court could review only the record proper, and, no error appearing on the face thereof, should have dismissed the purported appeal, and objection that the motion to dismiss was broadside is untenable, the matter being a question of jurisdiction. Pelaez v. Carland, 268 N.C. 192, 150 S.E.2d 201 (1966).

Dismissal of Appeal. — Where the record is not docketed in the superior court within the time prescribed, the appeal is properly dismissed. Grogg v. Graybeal, 209 N.C. 575, 184 S.E. 85 (1936).

The superior court has discretionary authority to reinstate an appeal from a general county court upon motion made at the same term the appeal is dismissed for failure of appellant to comply with the statutory requirements governing such appeals. This section provides that such appeals shall be governed by the rules for appeals from the superior court to the Supreme Court, and such procedure is provided by the Rules of Practice in the Supreme Court (Rule 17), and the superior court obtains jurisdiction through the motion to reinstate aptly made, and may pass upon the motion at that or a subsequent term. West v. F. W. Woolworth Co., 214 N.C. 214, 198 S.E. 659 (1938).

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

Cited in Johnson v. Wayne Thompson, Inc., 250 N.C. 665, 110 S.E.2d 306 (1959).

§ 7-296. Enforcement of judgments; stay of execution, etc.; retention of jurisdiction in divorce, alimony, custody and support cases.—Orders to stay execution on judgments entered in the general county court shall be the same as in appeals from the superior court to the Supreme Court. Judgments of the general county court may be enforced by execution issued by the clerk thereof, returnable within twenty days. Transcripts of such judgments may be docketed in the superior court as now provided for judgments of justices of the peace, and the judgment when docketed shall in all respects be a judgment of the superior court in the same manner and to same extent as if rendered by the superior court, and shall be subject to the same statutes of limitations and the statutes relating to the revival of judgments in the superior court and issuing executions thereon. Notwithstanding the foregoing, the general county court shall retain jurisdiction to hear and determine all motions with respect to divorce, divorce a mensa et thoro, alimony without divorce, child custody and support in all cases wherein the said general county court had rendered the initial order or judgment. (1923, c. 216, s. 19; C. S., s. 1608(dd); 1965, c. 1198.)

Editor's Note. — The 1965 amendment added the last sentence.

Alternate Route for Collection of Money Judgment.—By this section, the legislature is providing the holder of a money judgment obtained in a general county court an alternate route for collection. He may have execution issue from the general county court, or he may have his judgment transcripted to superior court as is provided for judgments of justices of the peace. When this is done, it shall be a judgment of the superior court in all respects for the purposes of lien and execution, subject to the same statutes of limitations and the statutes relating to the revival of judgments and executions thereon. Rehm v. Rehm, 2 N.C. App. 298, 163 S.E.2d 54 (1968).

Jurisdiction in Custody and Child Support Matters.—By this section the legislature did not intend to oust the jurisdiction of the general county court in custody and child support matters where the judgment settling custody and support was docketed in the superior court as a matter of custom and convenience. Rehm v. Rehm, 2 N.C. App. 298, 163 S.E.2d 54 (1968).

In suits for alimony without divorce and for the custody of children, the general county court acquires jurisdiction of the children as well as the parents, and that jurisdiction remains in the court wherein the action is brought. Rehm v. Rehm, 2 N.C. App. 298, 163 S.E.2d 54 (1968).

Docketing of Judgment Gives Superior Court Jurisdiction. — When the judgment of a general county court is docketed in the superior court of the county it becomes a judgment of the superior court in like manner as transcripted judgments of justices of the peace under § 7-166, and the general 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).

In an action for subsistence without di-

vorce tried in the general county court, judgment was rendered in favor of plaintiff, which judgment was duly docketed in the office of the clerk of the superior court of the county. Thereafter order was entered in the general county court reducing the amount of the monthly allowance. Upon the abolition of the general county court, the judge thereof, pursuant to previous notice given to the county bar, entered a general order transferring all cases then pending to the superior court of the county. Thereafter defendant failed to further comply with the orders for the payment of subsistence and plaintiff moved in the superior court for an order that defendant show cause why he should not be adjudged in contempt and for an order increasing the amount of subsistence. Defendant entered a special appearance and demurred to the jurisdiction of the superior court. It was held that upon the docketing of the judgment in the superior court, it acquired jurisdiction of the cause, and defendant's demurrer to the jurisdiction was properly overruled under this section. Brooks v. Brooks, 220 N.C. 16, 16 S.E.2d 403 (1941).

Cited in Becker v. Becker, 273 N.C. 65, 159 S.E.2d 569 (1968).

SUBCHAPTER IX. COUNTY CRIMINAL COURTS.

Article 36.

County Criminal Courts.

§ 7-384. Counties authorized to establish county criminal courts.— In each county in this State there may be established a court of criminal jurisdiction, which shall be a court of record, and it shall be maintained pursuant to the provisions of this article, and said court shall be called the county criminal court, and shall have jurisdiction over the entire county in which said court shall be established. (1931, c. 89, s. 1.)

Cross Reference. — As to continued existence and ultimate abolition of courts inferior to the superior court, and their replacement by district courts, see § 7A-3.

Cited in Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

§ 7-385. Established by resolution of county commissioners.—If, in the opinion of the board of commissioners of any county, the public interest will be best promoted by so doing, they may establish a county court under the provisions of this article, by resolution which shall in brief recite the reasons for the establishment thereof, and further recite that in the opinion of the board of commissioners it is not necessary that an election be called for the establishment of said court, as herein provided, and upon the adoption of such resolution the board of commissioners may establish said court without holding such election. (1931, c. 89, s. 2.)

§ 7-386. Court may be abolished by resolution.—Whenever in the opinion of the board of commissioners of any county in which a court has been established under this article, the conditions prevailing in such county are such as to no longer require the said court, such board of commissioners may, by proper resolution, reciting in brief the reasons therefor abolish said court. (1931, c. 89, s. 3.)

§ 7-387. Transfer of cases from docket of superior court. — Upon the establishment of the county court, as in this article authorized, the clerk of the superior court shall immediately transfer from the superior court to such county court all criminal actions pending in the superior court of which the county court has jurisdiction, as in this article conferred, and the county court shall immediately proceed to try and dispose of such criminal actions. (1931, c. 89, s. 4.)

§ 7-388. Appointment of judge; associate judge.—The court shall be presided over by a judge, who may be licensed to practice law, and who, at the time of his election or appointment, shall be a qualified elector in the county. The board of commissioners of the county shall appoint such judge, whose term of

office shall be two (2) years from the date of his appointment, and until his successor shall have been appointed and qualified, or until the court shall be abolished, as herein provided. In the event of a vacancy by death or resignation, appointment shall be for the unexpired term of the previous judge. The salary of said judge shall be fixed by the board of commissioners of the county, and the same shall be paid monthly out of the general county fund. In each county in which the court is established, under the provisions of this article, there shall be appointed by the board of commissioners of said county an associate judge, who shall preside as judge of the county court, and with like authority of the regular judge, in the event of sickness or absence from the county of the regular judge, or in the event that the regular judge should be disqualified by relationship to the parties in interest, or from other cause. The associate judge shall take the same oath of office required by the judge of the county court, and shall be paid such compensation for his services as may be provided by the board of commissioners. The compensation which shall be paid to the associate judge shall be deducted from the salary to be paid to the regular county judge as herein provided. He shall be appointed at the time fixed for the appointment of the judge of the county court, and for the same term as herein provided for a regular judge of the county, with the authority on the part of the board of commissioners to fill the vacancy in the event of death or resignation. (1931, c. 89, s. 5.)

Local Modification.—McDowell: 1957, c. 486, s. 1.

§ 7-389. Appointment of prosecuting attorney. — There shall be a prosecuting attorney of said county court, to be known as the prosecuting attorney, who shall appear for the State and prosecute all criminal cases being tried in said court, and for his services he shall be paid such salary as may be fixed by the board of commissioners, to be paid monthly from the general county fund. The board of commissioners shall appoint such prosecuting attorney, whose term of office shall be two (2) years from the date of his appointment, and until his successor shall have been appointed and qualified, or until the court shall be abolished, as herein provided, except in the event of a vacancy in the office of prosecuting attorney, either by death or resignation, the appointment to fill such vacancy shall be for the unexpired term of the previous prosecuting attorney. (1931, c. 89, s. 6.)

Local Modification. — Gates: 1957, c. 1166; McDowell: 1957, c. 486, s. 2.

§ 7-390. Clerk of court; term of office; fees; bond; sheriff.—In those counties in which the clerk of the superior court and sheriff are paid fees and not salaries, such clerks and sheriffs shall receive the same fees for services rendered in a county court as they would have received had such services been rendered in the superior court.

The clerk of the superior court shall, ex officio, be clerk of the county court, and in all counties in which the clerk of the superior court is paid fees, the clerk of the superior court shall have the right and privilege to resign as clerk of the county court, and in the event of such resignation the board of commissioners shall have the authority to appoint a clerk of the county court, whose term of office shall be two (2) years, and whose term of office shall expire at the time fixed for the termination of the office of the judge of said court, and the appointment of the clerk of the county court shall thereafter be made by the board of commissioners at the same time when the appointment of the judge of said court is made by said board of commissioners. He will receive the same fees for services rendered as clerks of the superior courts. In all counties in which the clerks of the superior court are paid salaries the board of commissioners are authorized, in their discretion, to provide additional compensation to such clerks for their services rendered as clerk of the county court.

In the event that the clerk of the superior court shall resign as clerk of the county court as herein provided, upon the appointment of a clerk to the county

court, he shall be required to enter into a bond in such sum as may be fixed by the board of commissioners for the faithful performance of the duties of his office. (1931, c. 89, s. 7.)

Local Modification. — Burke: 1957, c. 284; Lee: 1941, c. 330.

§ **7-391. Oath of judge; prosecuting attorney.** — The judge of the county court, before entering upon the duties of his office, shall take the prescribed oath required of judges of the superior court, and such oath shall be recorded by the clerk of the superior court of the county. The prosecuting attorney, before entering upon the duties of his office, shall take the prescribed oath required of solicitors of the superior court, and said oath shall be recorded by the clerk of the superior court of the county. (1931, c. 89, s. 8.)

Cross References. — As to forms of oaths, see §§ 11-6, 11-7, 11-11. And see N.C. Const., Art. VI, § 7.

§ **7-392. Court seal.**—The county criminal court shall have a seal with the impression "County Court of ..... County," which shall be used in attestation of all writs, warrants, or other processes, acts, or judgments of said court whenever required, and in the same manner and in the same effect as the seal of other courts of record in the State of North Carolina. (1931, c. 89, s. 9.)

§ **7-393. Jurisdiction; appeal; judgment docket.**—The jurisdiction of the county court shall be as follows:

(a) Said court shall have final exclusive and original jurisdiction of all criminal offenses committed in the county below the grade of a felony, as now defined by law, except as to offenses over which justices of the peace have final jurisdiction, and all such offenses whereof said court is given jurisdiction are hereby declared to be petty misdemeanors.

(b) To punish for contempt to the same extent and in the same manner allowed by law to the superior court of this State; to issue writs ad testificandum and other processes to compel the attendance of witnesses and to enforce the orders and judgments of the court in the same manner allowed by law to the superior courts of this State.

(c) The judge of the county court shall have all the power and jurisdiction and authority now conferred by law upon the superior court to sentence any person who pleads guilty or who is convicted in said court of a misdemeanor for which the punishment prescribed by law is imprisonment, to be imprisoned in the common jail of the county and to be assigned to work on the public roads under the supervision of the State Highway and Public Works Commission and the clerk of said court shall issue commitments therefor in the same manner as now provided by law for the clerks of the superior court.

(d) Any person convicted in said court shall have the right of appeal to the superior court of said county, and upon such appeal the trial in the superior court shall be de novo.

(e) The county court shall have exclusive preliminary jurisdiction over all offenses whereof exclusive jurisdiction is not given to said court, and shall hear and determine all warrants charging such offenses, and in the event that the court finds probable cause, shall bind the defendant over to the superior court, requiring such bond as the court may fix for the appearance of the defendant at the next ensuing term of the superior court of said county for the trial of criminal causes; and all justices of the peace issuing warrants wherein the defendant or defendants are charged with the commission of an offense whereof the superior court has jurisdiction, shall make said warrants returnable before the said county court.

(f) The judge of the county court shall have the same authority as the judge of

the superior court to render judgments upon all appearance bonds, and such other bonds as are authorized by law, when default has been made. All such judgments shall be certified to and docketed upon the civil judgment docket in the superior court of the county in which the court is held, and shall be cross-indexed as other judgments, and shall, from the time of docketing, have the same force and effect as judgments of the superior court. (1931, c. 89, s. 10; 1931, c. 241; 1937, c. 123.)

Local Modification. — Burke: 1935, c. 298; 1939, c. 226; as to subsection (d), 1955, c. 637; Anson: 1959, c. 933, s. 1; Yadkin, as to subsection (a): 1959, c. 411.

Editor's Note. — Public Laws 1937, c. 123, repealed Public Laws 1931, c. 241, relative to civil jurisdiction of recorder's court in Gates County.

Section Modified by Former § 7-64.—The exclusive original jurisdiction given county criminal courts by this section was modified by former § 7-64, except as to those counties excluded from its provisions. State v. Robbins, 253 N.C. 47, 116 S.E.2d 192 (1960).

County court does not have final jurisdiction of felonies. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

But clerk may issue warrants in felony cases. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

And county court may determine whether probable cause exists in felony cases. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

§ 7-394. **Jury trials.**—In all cases coming before the said county court a jury may be demanded by either the State or the defendant, or the court may, upon its own motion, order a jury trial in any case where, in the judgment of the court, the ends of justice would be better met by submitting the case to a jury. The board of commissioners of the county in which said county court is established are hereby required to furnish the clerk of said county court with a list of jurors of said county, and in any case where a jury trial is to be had a jury of twelve (12) shall be drawn from the said list of jurors so furnished by the board of commissioners. The names of the jurors shall be drawn from the box as now provided in cases in the superior court in drawing a special venire: Provided, however, the defendant may waive a jury drawn from the box, in which event the court shall direct the sheriff to summons bystanders or tales jurors to serve as jurors in said cases, and the judge of the county court shall have like authority as is now existing by the judge of the superior court to order the summons of tales jurors to serve in said court where the jurors drawn from the box shall be legally challenged or shall be otherwise disqualified to serve as such jurors. The causes of challenges of jurors in the county court shall be the same as now provided for challenges of jurors in the superior court. The fees of jurors shall be the same as now paid jurors in the superior court, and shall be paid from the general county fund, and a jury tax of fifteen ($15.00) dollars in such cases shall be taxed in the bill of costs. (1931, c. 89, s. 11.)

Local Modification. — Anson: 1949, c. 773; 1959, c. 933, s. 2; Burke: 1951, c. 689; Lee: 1939, c. 213; Onslow: 1941, c. 303; Davie: 1961, c. 797; 1963, c. 407; McDowell: 1959, c. 530; Person: 1955, c. 118; Yadkin: 1957, c. 378, s. 1.

§ 7-395. **Process.**—The clerks of the superior court as ex officio clerks and/or the clerks of county criminal courts or any of their deputies, upon application and the making of proper affidavit, as provided by law, shall have power and authority to issue any criminal warrant or warrants, peace warrants, subpoenas, and/or other processes of law in said court and make the same returnable before the judge thereof, at any time or times designated for the trial of criminal cases, and shall be directed to the sheriff or other lawful officer of the county, and the service thereof shall be lawfully made when made by the sheriff or deputy sheriff of the county, or any constable of said county, or by any rural policeman or municipal officer, and all warrants and subpoenas and other processes issued by the clerk of the superior court as ex officio clerk or the clerk of such court, when attested by the seal of said court, shall run anywhere in the State of North Carolina,

and shall be executed by all officers in the same manner and way as processes now issued by the superior court. (1931, c. 89, s. 12; 1947, c. 130.)

Cross Reference.—See note to § 7-393.

Editor's Note.—The 1947 amendment rewrote this section.

Applied in State v. Brady, 238 N.C. 407, 78 S.E.2d 129 (1953).

§ 7-396. Duties of judge; bond on appeal or on being bound over.—The judge of the county court shall preside over said court and shall direct and determine all actions coming before him, the jurisdiction of which is conferred by this article, and in all cases where the defendant or defendants shall crave an appeal to the superior court, and in cases where the court has preliminary jurisdiction, and probable cause is found, the defendant shall be required to give bond, with sufficient surety, to be fixed by the court, conditioned upon the defendant's appearance at the next ensuing term of the superior court of said county for the trial of criminal causes, and in default thereof the court shall commit the defendant to the common jail of said county until said defendant shall have given bond or shall have been otherwise discharged according to law, except in capital cases, when the court shall find probable cause, he shall bind the defendant over to the superior court without bond. (1931, c. 89, s. 13.)

Cross Reference.—See note to § 7-393.

§ 7-397. When prosecuting attorney's fee taxed in bill of costs.—In all cases where the defendant shall plead guilty, or shall be convicted, there shall be taxed in the bill of costs a fee of eight dollars ($8.00) in lieu of prosecuting attorney's fee, which shall be paid by the defendant, and shall be paid into the general county fund. In the event the defendant is confined to jail or confined to jail and assigned to work on the public roads such fee shall not be taxed as a part of the cost. (1931, c. 89, s. 14.)

§ 7-398. Complete record to be kept by clerk; docket.—It shall be the duty of the clerk of said court to keep an accurate account and true record of all costs, fines, penalties, forfeitures, and punishments of said court imposed under the provisions of this article, and said record shall show the name of each offender, the name of the offense, the date of the hearing of the trial, and the punishment imposed, and the board of commissioners shall provide dockets for recording all of the processes issued by said court, which shall conform to the docket kept by the clerk of the superior court, and shall also provide proper files to properly keep a record of all cases which shall be disposed of in said court, and the disposition that has been made of the same. (1931, c. 89, s. 15.)

§ 7-399. Warrants returnable to court. — All warrants for crimes whereof the county court shall have jurisdiction may be issued by any justice of the peace of said county, or mayor of any incorporated town, as provided by law, and shall be made returnable before the county court at the next ensuing term thereof. (1931, c. 89, s. 16.)

Local Modification. — Yadkin: 1957, c. 378, s. 2.

§ 7-400. Service fees to officers except where they are on salary.—The cost of issuing and serving warrants, subpoenas, and other processes of law by said court shall be payable to the officers issuing or serving them, and shall be payable to the clerk of said court as is now done in cases determined by the superior court, except in those counties where officials are paid salaries and are not allowed fees, in which cases the costs so taxed shall be paid into the office of the clerk of said court, to be paid by him to the county treasurer or depository of said county, in the same manner and way as is now provided for similar fees in the superior court. (1931, c. 89, s. 17.)

Local Modification.—Davie: 1963, c. 742.

§ 7-401. Regular and special terms; place of sessions.—There shall be held a regular term of the county court established under the provisions of this article on the second Tuesday in each month: Provided, however, special terms may be held at any time by order of the judge of said court for the purpose of disposing of cases where pleas of guilty shall be entered and for the trial of cases where the defendants are confined to prison. At all regular terms the court shall continue in session until all cases are tried, continued, or otherwise disposed of according to law: Provided, however, the board of county commissioners in any county in which a county court is established under the provisions of this article by proper resolution duly entered upon the minutes of said board, may, in the exercise of their discretion, fix other days than the days provided in this article on which regular terms of said court may be held: Provided, further, when a regular term of the county court to be held under the terms fixed by this article shall conflict with a term of the superior court in said county, the regular term of the county court shall be held on the first Tuesday following the termination of said term of the superior court, as fixed by law. All sessions of said county court shall be held in the courthouse of the county in which said court is established. (1931, c. 89, s. 18.)

Local Modification. — Yadkin: 1957, c. 378, s. 3.

§ 7-402. Judge and prosecuting attorney may practice law in other courts.—In the event of the appointment of a licensed lawyer as judge or prosecuting attorney of said county court, nothing in this article shall prevent the said judge or the prosecuting attorney appointed under the provisions of this article from practicing law in matters in which he is in no way connected by reason of his said office, or in courts in the State in matters which have not been heard or will not be heard in the county court of which he is an officer. (1931, c. 89, s. 19.)

§ 7-403. Other county court acts not affected.—Nothing in this article shall be construed to repeal, alter, or amend any law heretofore enacted authorizing the establishment of county courts in the several counties of the State, but this article shall be construed to be in addition to and supplemental to such acts, and any court established under the provisions of this article shall be restricted and limited to all the provisions herein contained. (1931, c. 89, s. 20.)

§ 7-404. Certain counties excepted from provisions of article.—This article shall not apply to the counties of Alexander, Alleghany, Ashe, Beaufort, Bertie, Bladen, Brunswick, Buncombe, Camden, Caswell, Catawba, Chowan, Clay, Cleveland, Craven, Cumberland, Currituck, Dare, Davidson, Duplin, Durham, Edgecombe, Franklin, Greene, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Jackson, Johnston, Lincoln, Macon, Madison, Montgomery, New Hanover, Northampton, Orange, Pamlico, Pasquotank, Perquimans, Pitt, Randolph, Richmond, Robeson, Rockingham, Rowan, Sampson, Scotland, Stanly, Surry, Swain, Transylvania, Vance, Wake, Warren, Watauga, Wayne, Wilkes and Yancey. (1931, c. 89, s. 21; 1931, c. 270; 1935, c. 8; 1939, c. 41; 1951, c. 699.)

Editor's Note. — The 1935 amendment deleted Cabarrus from the list of counties, the 1939 amendment deleted Yadkin, and the 1951 amendment struck out Davie.

SUBCHAPTER X. SPECIAL COUNTY COURTS.

ARTICLE 37.

Special County Courts.

§ 7-405. Establishment upon resolution of county commissioners.—In addition to the plans now provided for the establishment of courts inferior to the superior court, there may be established by resolution of all of the members

of the board of county commissioners of any county in the State a court of criminal and civil jurisdiction, which shall be a court of record and shall be called a special county court and shall have criminal and civil jurisdiction as herein provided: Provided, that the board of county commissioners may by proper resolution, establish a special county court having only criminal jurisdiction or only civil jurisdiction or having both criminal and civil jurisdiction as herein provided. (1939, c. 357, s. 1.)

Cross Reference. — As to continued existence and ultimate abolition of courts inferior to the superior court, and their replacement by district courts, see § 7A-3.

Cited in State v. Carpenter, 231 N.C. 229, 56 S.E.2d 713 (1949).

§ **7-406. Qualifications of judge and solicitor.**—The judge of said court shall be an elector in and for said county at the time of appointment and qualification, and shall be a man of good moral character. The solicitor of the county shall be an elector in and for said county, shall be a man of good moral character and a licensed attorney at law. (1939, c. 357, s. 2.)

§ **7-407. Appointment of judge.**—After the establishment of such court by any county, it shall be the duty of the clerk of the board of commissioners of such county to immediately notify the Governor of the State, who shall appoint a judge to preside over such court, and each second year thereafter it shall be the duty of the Governor of the State to appoint the judge of each such county court who shall preside over said court, and the said judge shall hold office for a term of two years, and until his successor is appointed and qualified. Any vacancy occurring in the office of judge shall be filled by the Governor of the State. (1939, c. 357, s. 3.)

§ **7-408. Appointment of prosecuting attorney and clerk.** — The board of commissioners of any county availing itself of the provisions of this article may elect or appoint and for the same term as herein provided for the appointment of the judge of this court, a prosecuting attorney and clerk for said court. (1939, c. 357, s. 4.)

Local Modification. — Richmond: 1941, c. 60, s. 4; 1943, c. 254, s. 4.

§ **7-409. Appointment of acting attorney or judge in absence of regular official.**—Whenever, for any reason, the prosecuting attorney is temporarily absent, the judge shall appoint some other practicing attorney in the county to act as prosecuting attorney, and in case of temporary absence of the judge, either on account of sickness or other cause, the judge of said court shall appoint a judge to hold court during the absence of the regular judge. (1939, c. 357, s. 5.)

§ **7-410. Compensation of judge and solicitor.**—The salary of the judge and solicitor and clerk shall be fixed by the board of commissioners of the county, and shall be paid monthly out of the funds of the county. (1939, c. 357, s. 6.)

Local Modification.—Richmond: 1941, c. 60, s. 5; Richmond: 1953, c. 285.

§ **7-411. Oaths of judge and solicitor.**—Before entering upon the duties of office, the judge and solicitor shall take and subscribe an oath as is now provided by law for the judges and solicitors of the superior court, and file the same with the clerk of the superior court of the county, and the clerk shall record the same. (1939, c. 357, s. 7.)

Cross References. — As to forms of oaths, see §§ 11-6, 11-7, 11-11. And see N.C. Const., Art. VI, § 7.

§ **7-412. Appointment of temporary judge, etc.**—Where the judge is disqualified by reason of interest in any case, he may appoint a temporary judge to hear said case, or said case may be removed to the superior court for trial in the county. (1939, c. 357, s. 8.)

§ **7-413. Duties and liabilities of clerk.**—The clerk of the special county court established under the provisions of this article shall have as nearly as possible the same duties, powers, and responsibilities with reference to the special county court as a clerk of the superior court. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him as clerk of the special county court to the same extent as a clerk of the superior court. (1939, c. 357, s. 9.)

§ **7-414. Oath of office of clerk.**—The clerk of the special county court before entering on the duties of the office, shall take and subscribe, before some officer authorized by law to administer an oath, the oath required under general law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of him under this article and file such oath with the register of deeds for the county. (1939, c. 357, s. 10.)

Cross References. — As to forms of oaths, see §§ 11-6, 11-7, 11-11. And see N.C. Const., Art. VI, § 7.

§ **7-415. Attendance upon court by sheriff or deputies.**—The sheriff of the county, or his deputies, shall attend upon this court in the same manner and with the same power and authority as he does and has in attendance upon the superior court of the county. (1939, c. 357, s. 11.)

§ **7-416. Appointment of court stenographer.**—In the trial of any case in the special county court where a stenographer is deemed necessary, the judge of said court shall appoint a stenographer, and the fees for such work shall be taxed as part of the court cost in said case. (1939, c. 357, s. 12.)

§ **7-417. Right of jury trial in civil actions.**—In the trial of civil actions in said court, any party is entitled to the right of trial by jury as is provided in the trial of causes in the superior court, unless said right of trial by jury shall be waived as hereinafter provided. (1939, c. 357, s. 13.)

§ **7-418. Jury trial where no written pleadings are filed.**—In those cases in which no written pleadings are required, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the issuance of the summons, the plaintiff, or petitioner, in writing, demands a jury trial, or the defendant at any time before the commencement of the trial, in writing, demands a jury trial. (1939, c. 357, s. 14.)

§ **7-419. Jury trial where written pleadings are filed.**—In those cases in which written pleadings are required to be filed, the parties shall be conclusively presumed to have expressly waived their right to trial by jury, unless at the time of the filing of the complaint or petition, the plaintiff, in writing, demands a jury trial, or unless at the time of the filing of the answer, or other pleading raising an issue of fact, the defendant or other party filing such pleading demands, in writing, a jury trial. (1939, c. 357, s. 15.)

§ **7-420. Jury trial where cases appealed or removed.**—In those cases which were or may hereafter be instituted before a justice of the peace and removed or appealed to this court, and in those cases which were or may hereafter be instituted in superior court, and removed to this court, a jury trial shall be conclusively presumed to have been expressly waived unless the party desiring a trial by jury shall make a demand therefor, in writing, at any time before the case is called for trial, in which event the number of the jury shall be as herein elsewhere provided. (1939, c. 357, s. 16.)

§ 7-421. Number of jurors; deposit on demand for jury trial.—The jury of said court shall be a jury of six in all civil cases where a jury is demanded: Provided, that in those cases in which a jury is demanded the party shall at the time of making the demand pay to the clerk of the said court a deposit of six dollars ($6.00) to insure the payment of the jury tax: Provided, further, that where a party making such demand for a jury trial makes affidavit and satisfies the judge or clerk of the said court that he is unable to make the deposit, such party shall not be required to make the same. The deposit for a jury shall be returned to the party making it when the cost is paid by the losing party, against whom the cost is taxed. (1939, c. 357, s. 17.)

§ 7-422. Continuance of trial upon demand for jury; drawing and summoning of jury; compensation of jurors.—When a trial by jury is demanded in civil or criminal cases, the judge shall continue the cause until a day to be set, and the judge, together with the attorneys representing all parties shall immediately proceed to the office of the register of deeds of the county and cause to be drawn a jury of twelve, observing as nearly as may be the rule for drawing a jury for the superior court. The judge shall issue the proper writ to the sheriff of the county, commanding him to summon the jurors so drawn to appear at the court on the day set for the trial of the action. Such jurors shall receive the same compensation as is provided by law for jurors serving in the superior court, and are to be paid out of the treasury of said county on presentation of a ticket duly issued by the clerk of said court. (1939, c. 357, s. 18.)

§ 7-423. Jury trials in criminal actions.—In all criminal actions, upon demand of the defendant or the prosecuting attorney, a jury of six shall be summoned in the same manner as provided for summoning jurors in civil actions. (1939, c. 357, s. 19.)

§ 7-424. Talesmen may serve as jurors.—In all criminal and civil actions, the judge shall have the right to call in talesmen to serve as jurors, according to the practice of the superior court, and to direct the sheriff to call in a sufficient number of talesmen to serve during any one week or part of a week for the proper dispatch of the business of the court. (1939, c. 357, s. 20.)

§ 7-425. Sessions of court.—The special county court shall be open for the trial of all criminal cases of which it has jurisdiction at least one day of each week, and shall also be open at least once each month for the trial of all civil causes of which it has jurisdiction, said days to be fixed by the board of county commissioners, and shall continue its session from day to day until all business is transacted by trial, continuance or otherwise. The session of the court shall be held in the county courthouse or other place within the county provided by the board of county commissioners for that purpose. Special sessions of the court may be called by the judge as the necessities may require. (1939, c. 357, s. 21.)

§ 7-426. Civil jurisdiction of court.—The special county court shall have jurisdiction in civil matters as follows:

(1) Jurisdiction concurrent with that of the justices of the peace of the county.

(2) Jurisdiction concurrent with the superior court in all actions founded on contracts wherein the amount demanded shall not exceed the sum of fifteen hundred dollars ($1500.00), exclusive of interest and cost.

(3) Jurisdiction concurrent with that of the superior court in all actions not founded on contracts wherein the amount demanded shall not exceed the sum of one thousand dollars ($1000.00), exclusive of interest and cost.

(4) Jurisdiction concurrent with the superior court in all attachment and claim and delivery proceedings wherein the value of the property de-

manded does not exceed the sum of one thousand dollars ($1000.00), exclusive of interest and cost. (1939, c. 357, s. 22.)

§ **7-427. Procedure for hearing of appeals from courts of justices of the peace.**—In all cases where there is an appeal from a justice of the peace of a county wherein a special county court has been established under the provisions of this article, such appeal shall be first heard de novo in the special county court. All appeals from justices of the peace in civil cases shall be heard in the same manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the said special county court, and said appeals shall be docketed in the special county court within the same time limit and in the same manner as such appeals are now required to be docketed in the superior court. (1939, c. 357, s. 23.)

§ **7-428. Transfer of cases from superior court.**—By written consent of a plaintiff and defendant filed with the clerk of the superior court, any civil case within the jurisdiction of the special county court, now or hereafter pending, in the superior court, may be transferred to the docket of the special county court, and there tried. If a jury trial is desired, it shall be expressed in the agreement to transfer the case; otherwise the right to trial by jury shall be conclusively presumed to have been expressly waived. (1939, c. 357, s. 24.)

§ **7-249. Separate records, equipment, etc., furnished by commissioners.**—The clerk of the special county court shall keep separate records for use of said court to be furnished by the county commissioners, and they shall also provide necessary blanks, forms, books and such stationery and office equipment as may be needed by the court. The clerk shall keep the same in the office of the clerk of such court. (1939, c. 357, s. 25.)

§ **7-430. Procedure in civil actions.**—In civil cases when the special county court is exercising jurisdiction concurrent with that of the superior court, as now established, the rules of procedure, pleadings, practice, and admission of evidence, and judgment shall conform as nearly as possible to those of the superior court. In civil cases where the special county court is exercising jurisdiction concurrent with that of justices of the peace, actions shall be commenced in the special county court by summons issued and signed by the clerk or deputy, and orders to seize property in claim and delivery proceedings, warrants of attachment and subpoena may be issued by the clerk or deputy and the other rules of processes, pleadings, procedure, practice and procuring evidence and judgments shall conform as nearly as possible to those of the courts of the justices of the peace. (1939, c. 357, s. 26.)

§ **7-431. Orders to stay execution; judgments.**—Orders to stay execution on judgments entered in the special county court shall be the same as in appeals from the superior court to the Supreme Court. Judgments of the county court shall be docketed in the judgment docket of the superior court, as is provided for judgments of the superior court, and the judgments when docketed shall in all respects be judgments of the superior court in the same manner and to the same extent as if rendered by the superior court, and shall be subject to the same statute of limitations and the statutes relating to the revival of judgments in the superior court and issuing executions thereon. (1939, c. 357, s. 27.)

§ **7-432. Seal of court.**—The county court shall have a seal with the impression "..... County Special Court," which shall be used in attestation of all summons, other processes, etc., acts, or judgments of said court whenever required, and in the same manner and to the same effect as the seal of other courts of record in the State of North Carolina. (1939, c. 357, s. 28.)

§ **7-433. Costs and fees.**—There shall be taxed in the special county court the same costs and fees for services of the officers thereof as provided for the court

having concurrent jurisdiction; such costs and fees shall be taxed and collected by the clerk and paid over to the proper officers who are entitled to receive them. (1939, c. 357, s. 29.)

Local Modification.—Richmond: 1941, c. 60, s. 5½.

§ 7-434. Reopening of cases and modification of judgments.—When any case has been finally disposed of by the judge of the court and judgment pronounced therein, the case shall not thereafter be reopened or the judgment or sentence rendered therein changed, modified or stricken out by the judge after the adjournment of the regular weekly term of court or after the adjournment of any special term of court. (1939, c. 357, s. 30.)

§ 7-435. Criminal jurisdiction.—The court shall have concurrent jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and, in addition to the jurisdiction conferred by this section, shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors: Provided, however, that where a special county court or recorder's court shall legally exist within such county by virtue of a special act of the legislature passed before the amendment of the constitution in reference thereto, then the special county court, as herein established, shall not have jurisdiction of criminal cases within the territory of such existing recorder's court, so as to interfere or conflict with the existing recorder's court, but shall have concurrent jurisdiction where the jurisdiction of the two courts covers the same causes or the same subject matter. This article and the establishment of any court thereunder shall not be construed to repeal, modify or in anywise affect any existing special court or recorder's court by virtue of such former special acts herein referred to. (1939, c. 357, s. 31.)

Local Modification. — Richmond: 1943, c. 254, s. 5.

Stated in State v. Carpenter, 231 N.C. 229, 56 S.E.2d 713 (1949).

§ 7-436. Judges vested with jurisdiction of municipal recorders.—The judges of special county courts herein provided for shall be vested with all the jurisdiction and authority conferred upon recorders of municipal courts, in like manner and to the same extent as if such jurisdiction and authority had been specially in this section set forth, insofar as such jurisdiction and authority are applicable to such courts, and the provisions of existing law relative to municipal recorder's courts shall in all things apply to the special county courts where the same are not inconsistent and insofar as same are practically applicable: Provided, that this section shall not take away the jurisdiction of a mayor to try breaches of ordinances when such city has no other municipal court. (1939, c. 357, s. 32.)

§ 7-437. Removal of cases from courts of justices of peace.—When, upon written request made before entering on the trial of any cause before any justice of the peace, it shall appear proper for the cause to be removed for trial to some other justice, as is now provided by law, the cause may be removed for trial to the special county court of the county. (1939, c. 357, s. 33.)

§ 7-438. Criminal cases bound over by justices of the peace.—In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the special county court as provided in this article, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance or surety to appear at the next succeeding session of the special county court of the county, for trial; and in default of such surety such person shall be committed to the common jail of the county to await a trial: Provided, that in the event any justice of the peace or other committing magistrate shall bind over to the superior

court any person accused of a crime within the jurisdiction of the special county court, the clerk of the superior court shall, upon his own motion, transfer all papers in the case to the special county court, and the case shall then stand for trial at the next succeeding term of said special county court, as if the defendant had been bound over to the said court in the first instance: Provided, further, that in the event any justice of the peace or other committing magistrate shall bind over to the special county court any person charged with an offense beyond the jurisdiction of said court, the said judge shall cause the accused person to enter into a new bond with sufficient surety for his appearance at the next succeeding term of the superior court of the county, and shall transmit all papers in the case to the said superior court, but this shall be done without additional cost to the accused person. (1939, c. 357, s. 34.)

§ **7-439. Notice to accused person and surety in cases transferred from superior court.**—Whenever the clerk of the superior court shall transfer the papers in any case from the superior court to a special county court, he shall at the same time issue a notice to the accused person and his surety, informing them that the cause has been so transferred and requiring the accused person to appear at the next succeeding term of said special county court for trial, and, upon the service of said notice upon the accused person and his surety, at least five days before the beginning of the next succeeding term of the special county court, the case shall stand for trial at said term and the bond given by the accused person for his appearance at the next term of the superior court shall in all respects be valid and binding to compel the appearance of the accused person at the said next succeeding term of said special county court, and in case said notice is not served on the accused person and his surety at least five days before the beginning of the next succeeding term of the special county court, then the case shall not be tried without the consent of the accused person until the following term of the special county court. (1939, c. 357, s. 35.)

§ **7-440. Issuance of warrant in criminal causes.**—All trials of criminal causes in said court shall be upon warrant issued by the clerk of said court or deputy clerk herein provided for or by the judge or by any justice of the peace of the county. In either event such warrant shall be issued upon affidavit duly made and subscribed, setting forth the complaint against the defendant: Provided, the judge shall have authority to amend the warrant and to allow amendment of the affidavit at any time before judgment. (1939, c. 357, s. 36.)

§ **7-441. Punishment upon conviction.** — Whenever any person shall be convicted or plead guilty of any offense of which the court has final jurisdiction the judge may sentence him to the common jail of the county in which the court shall be held, and assign him to work on the public roads, under the supervision of the State Highway and Public Works Commission: Provided, that in case the person so convicted or pleading guilty shall be a woman or an infant of immature years, then the judge may assign him or her to the county workhouse, reformatory, or other penal institution located in the county; or if there be none, any similar institution that may be located outside of the county to which judges of the superior court are authorized to sentence such person under the general laws of the State. All fines imposed by the court shall be collected by the clerk of such court or the deputy clerk thereof in the same manner as the clerk of the superior court; and, where a defendant is convicted and fails to pay the costs of such conviction, the county shall pay such costs as are allowed by law in similar cases before the superior court. (1939, c. 357, s. 37.)

§ **7-442. Appeals to superior court.**—Any person convicted of any offense of which the county court has final jurisdiction may appeal to the superior court from any judgment or sentence of the court in the same manner as is now provided for appeals from the courts of justices of the peace; and any person tried

before the judge for any offense of which the court has not final jurisdiction shall, upon the judge's finding probable cause of guilt, be bound over to the superior court in the same manner as is provided by law in similar cases before justices of the peace. (1939, c. 357 s. 38.)

§ **7-443. Fees for issuance and service of warrants.**—All justices of the peace, constables and sheriffs issuing or serving warrants or other process returnable to the special county court shall have the same fees as are now prescribed by law which fees shall be collected and paid out in the same manner and by the same officers as collect and distribute such fees in the superior court. 1939, c. 357, s. 39.)

§ **7-444. Costs and fees as county funds.**—There shall be taxed in the special county court the same costs and fees for the benefit of the officers thereof as provided for municipal recorder's court. Such costs and fees shall be collected by the clerk and paid over monthly to the treasurer of the county as county funds to be dealt with by the commissioners. (1939, c. 357, s. 40.)

§ **7-445. Abolition of court by resolution of commissioners.** — Any court established under this article may be abolished by resolution of a majority of the board of county commissioners for such county by giving written notice of such intention one month prior thereto; and in case of the abolition of the court, cases then pending shall be transferred to the superior court and there tried. (1939, c. 357, s. 41.)

§ **7-446. Counties exempt.**—This article shall not apply to the counties of Alamance, Alexander, Anson, Ashe, Avery, Beaufort, Bertie, Bladen, Brunswick, Burke, Caldwell, Carteret, Catawba, Chatham, Chowan, Clay, Cleveland, Columbus, Craven, Dare, Duplin, Edgecombe, Franklin, Forsyth, Gaston, Gates, Granville, Greene, Halifax, Harnett, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenoir, Lincoln, Madison, Mecklenburg, Mitchell, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Perquimans, Robeson, Rutherford, Sampson, Stanly, Surry, Union, Vance, Wake, Warren, Wayne, Washington and Wilson. (1939, c. 357, s. 42.)

§ **7-447. Construction of article.**—This article shall not be construed to repeal or modify any existing laws by which a county court may be created or to affect or repeal any court now or hereafter created under existing laws, and shall only be construed to be an additional method by which a special county court may be established for criminal, civil, or criminal and civil jurisdictions. (1939, c. 357, s. 43.)

Chapter 7A.

Judicial Department.

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 7.

Organization.

Sec.
7A-43.1. Temporary incapacity of solicitor; acting solicitor.
7A-43.2. Assistant solicitors.
7A-43.3. County may authorize appointment of additional assistant solicitors.

Article 15.

District Prosecutors.

Sec
7A-160. Appointment; term; duties; oath; practice of law forbidden.
7A-161. Compensation; expenses.
7A-162. Suspension; removal; reinstatement.
7A-163. Vacancies in office; temporary incapacity; acting prosecutor.
7A-164. Assistant prosecutors; appointment; compensation; duties; oath; practice of law forbidden.
7A-165. Attorneys appointed to assist in prosecution.

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 7.

Organization.

§ 7A-43.1. Temporary incapacity of solicitor; acting solicitor.—When a superior court solicitor becomes for any reason unable to perform his duties, the Attorney General shall appoint an acting solicitor to serve during the period of disability. An acting solicitor has all the power, authority and duties of the regular solicitor. He shall take the oath of office prescribed for the regular solicitor, and receive fifty-five dollars ($55.00) per diem for each day in which he performs the duties of solicitor. (1965, c. 310, s. 1; 1967, c. 691, s. 2; 1969, c. 1186, s. 1.)

Editor's Note. — The 1967 amendment, effective July 1, 1967, struck out the former last sentence, making the section effective on the first Monday in December, 1966.

The 1969 amendment, effective July 1, 1969, increased the per diem from forty-five dollars to fifty-five dollars.

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§ 7A-43.2. Assistant solicitors.—(a) With the approval of the Administrative Officer of the Courts, the solicitor may appoint one or more full-time assistant solicitors, each to serve at the pleasure of the solicitor. The salary for a full-time assistant solicitor shall be fixed by the Administrative Officer of the Courts, but shall not exceed that of a district court prosecutor.

(b) With the approval of the Administrative Officer of the Courts, a solicitor may appoint for part-time service one or more qualified attorneys to assist in the prosecution of the criminal dockets of his district when:

(1) Criminal cases accumulate on the dockets of the district beyond the capacity of the solicitor and his full-time assistants, if any, to keep the dockets reasonably current; or

(2) The prosecution of criminal cases in a specific location in the district would be better served.

Attorneys appointed under the authority of this subsection shall receive forty-five dollars ($45.00) per diem for each day, not in excess of five days per week,

they serve as assistant prosecutors, and they shall serve for such time as may be authorized by the Administrative Officer of the Courts.

(c) An assistant solicitor appointed under this section is entitled to reimbursement for travel and subsistence expenses when engaged on official business outside his county of residence at the rate applicable to State employees generally. (1965, c. 310, s. 1; 1967, c. 691, s. 3; 1969, c. 1186, s. 2.)

Editor's Note. — The 1967 amendment, effective July 1, 1967, rewrote the section.

The 1969 amendment, effective July 1, 1969, increased the per diem in subsection (b) from thirty-five dollars to forty-five dollars.

Repeal of Section. — Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§ **7A-43.3. County may authorize appointment of additional assistant solicitors.**—Notwithstanding the provisions of G.S. 7A-43.2, the board of commissioners of any county may, in its discretion, authorize the solicitor to appoint a competent attorney to assist him in the prosecution of the criminal docket of the superior court of the county. The assistant solicitor so appointed serves at the pleasure of the solicitor, who assigns his duties. The compensation of the assistant solicitor shall be fixed by the board of commissioners after consultation with the solicitor, and it shall be paid from the general fund of the county. The board may terminate the compensation at any time upon 30 days' notice. (1965, c. 310, s. 1; 1967, c. 691, s. 4.)

Editor's Note. — The 1967 amendment, effective July 1, 1967, substituted "Notwithstanding the provisions of G.S. 7A-43.2" for "In addition to the assistant solicitors otherwise provided for in this article" at the beginning of the section and struck out the former last sentence, making the section effective on the first Monday in December, 1966.

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

Article 15.

District Prosecutors.

§ **7A-160. Appointment; term; duties; oath; practice of law forbidden.**—The senior regular resident superior court judge shall appoint, for a term of four years, a district court prosecutor for his district, except that the term of office of a prosecutor appointed in a district activated in December, 1968, or December, 1970, is terminated December 31, 1970. The prosecutor shall be a resident of the district. The prosecutor's term of office shall commence on the same day as that of the district judges in his district. It shall be the duty of the prosecutor to prosecute on behalf of the State all criminal actions in the district courts of his district, to advise the officers of justice in his district, and to cooperate with the superior court solicitor in criminal actions arising in the district court. The prosecutor shall also represent the State in juvenile cases in which the juvenile is represented by an attorney. The district prosecutor shall take the oath of office prescribed for the superior court solicitor.

The office of district prosecutor is full time, and he shall not practice law during his term of office, nor shall he during such term be the partner or associate of any person engaged in the practice of law. (1965, c. 310, s. 1; 1967, c. 1049, s. 4; 1969, c. 1190, s. 12.)

Editor's Note. — The 1967 amendment added the exception at the end of the first sentence.

The 1969 amendment, effective July 1, 1969, added the fifth sentence of the first paragraph.

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§ 7A-161. Compensation; expenses.—Each district court prosecutor shall receive the annual salary provided in the Budget Appropriations Act, and reimbursement, on the same basis as State employees generally, for his necessary travel and subsistence expenses. (1965, c. 310, s. 1; 1967, c. 691, s. 12.)

Editor's Note. — The 1967 amendment rewrote the section, which formerly consisted of two sentences and specified the amount of compensation.

Repeal of Section. — Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§ 7A-162. Suspension; removal; reinstatement.—A district prosecutor may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to a district court judge. (1965, c. 310, s. 1.)

Cross Reference. — As to suspension, removal and reinstatement of district judge, see § 7A-143.

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§ 7A-163. Vacancies in office; temporary incapacity; acting prosecutor.—A vacancy in the office of district prosecutor shall be filled for the unexpired term in the same manner as the original appointment.

If the prosecutor in a district which has no full-time assistant prosecutor becomes for any reason unable to perform his duties, the senior regular resident superior court judge for that district may appoint an acting prosecutor to serve during the period of disability. An acting prosecutor has all the power, authority and duties of the regular prosecutor. He shall take the oath of office prescribed for the regular prosecutor, and receive from the State fifty dollars ($50.00) per diem for each day in which he performs the duties of prosecutor. (1965, c. 310, s. 1; 1969, c. 1186, s. 4.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, increased the per diem in the last sentence from forty-five dollars to fifty dollars.

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§ 7A-164. Assistant prosecutors; appointment; compensation; duties; oath; practice of law forbidden.—A district prosecutor may appoint full-time assistant prosecutors in the number authorized by the General Assembly. The number of full-time assistant prosecutors for each district shall be determined with due regard to the population, geography and criminal case load of each district. An assistant prosecutor serves at the pleasure of the prosecutor. He shall receive the annual salary provided in the Budget Appropriations Act, and reimbursement, on the same basis as State employees generally, for his necessary travel and subsistence expenses. The duties of an assistant prosecutor are assigned by the district prosecutor, and he takes the same oath of office as the prosecutor.

An assistant prosecutor shall not practice law during his term of office, nor shall he during such term be the partner or associate of any person engaged in the practice of law. (1965, c. 310, s. 1; 1967, c. 691, s. 13.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, rewrote the fourth sentence.

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

§ 7A-165. Attorneys appointed to assist in prosecution.—A district prosecutor, with the approval of the Administrative Officer of the Courts, may designate one or more qualified attorneys to assist in the prosecution of the criminal dockets of the district when:

(1) The criminal cases accumulate on the dockets of the district court be-

yond the capacity of the prosecutor and his assistants to keep the dockets reasonably current; or

(2) A full-time assistant prosecutor becomes for any reason unable to perform his duties; or

(3) The prosecution of criminal cases in a specific location would be better served.

Attorneys designated under the authority of this section shall receive forty-five dollars ($45.00) per diem for each day, not in excess of five days per week, they serve as assistant prosecutors, and they shall serve for such time as may be authorized by the Administrative Officer of the Courts. Assistant prosecutors shall also receive reimbursement for travel and subsistence expenses on the same basis as State employees generally. (1965, c. 310, s. 1; 1967, c. 691, s. 14; 1969, c. 1186, s. 5.)

Editor's Note. — The 1967 amendment, effective July 1, 1967, substituted "not in excess of five days per week, they serve as assistant prosecutors, and they" for "they prosecute in court and" in the first sentence in the last paragraph and added the second sentence in that paragraph.

The 1969 amendment, effective July 1, 1969, increased the per diem in the last paragraph from thirty-five dollars to forty-five dollars.

Repeal of Section.—Section 6, c. 1049, Session Laws 1967, provides that this section and all other laws and clauses of laws in conflict with c. 1049, Session Laws 1967, are repealed effective Jan. 1, 1971.

Chapter 9.

Jurors.

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

Sec.
9-8. Fees of jurors; provisions in effect until district court established.

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

§ 9-8. Fees of jurors; provisions in effect until district court established.—All jurors in the superior court shall receive such compensation as the board of county commissioners shall fix, not less than three dollars ($3.00) and not more than eight dollars ($8.00) per day; provided, that the board of county commissioners may establish different rates of compensation for different classes of superior court jurors within the limitations set out above. A board of county commissioners may fix the compensation of jurors to pass upon the competency of any person, under the provisions of chapter 35, article 2, of the General Statutes, at not less than one dollar ($1.00) per day and not more than six dollars ($6.00) per day.

In addition to the compensation provided for above, all jurors shall receive a travel allowance of five cents (5¢) per mile for travel to the seat of court and return home, the distance to be computed by the usual route of public travel; provided, that this allowance shall be paid once per calendar week for each calendar week in which attendance is required.

This section shall cease to be effective in each county on the date that a district court is established therein, and thereupon G.S. 7A-312 shall govern the compensation of jurors. Until that time all local modifications of the general law as to jury fees shall remain in effect. This section is repealed effective January 1, 1971. (Rev., s. 2798; 1919, c. 85, ss. 1, 2; C. S., s. 3892; Ex. Sess. 1920, c. 61, ss. 1, 3; 1921, c. 62, s. 1; 1947, c. 1015; 1949, c. 915; 1951, c. 98; 1955, c. 1360; 1967, c. 218, s. 1.)

Local Modifications to Former § 9-5. — Bertie: 1949, c. 802; c. 914, s. 2; 1965, c. 319; Bladen: 1961, c. 285; 1967, c. 68; Chatham: 1947, c. 47; Chowan: 1965, c. 460; Cumberland: 1945, c. 316; 1961, c. 495, s. 2; Currituck: 1945, c. 269; 1947, c. 228; Davidson: 1949, c. 521; Duplin: 1949, c. 680; Durham: 1943, c. 323; Gaston: 1947, c. 206; Graham: 1959, c. 1147; Harnett: 1933, c. 75; 1955, c. 460; Hertford: 1947, c. 59; 1965, c. 40; Johnston: 1963, c. 730, repealing 1961, c. 448; 1965, c. 322, repealing 1945, c. 993; Jones: 1949, c. 1002; Macon: 1951, c. 34; 1959, c. 194; Martin: 1943, c. 173; 1961, c. 349; Montgomery: 1951, c. 62; Moore: 1959, c. 997; New Hanover: 1947, c. 619; Onslow: 1961, c. 175, repealing 1947, c. 205; Pender: 1967, c. 714; Randolph: 1949, c. 854; Richmond: 1947, c. 235, s. 1; 1955, c. 421; Rowan: 1945, c. 233; 1959, c. 147; Swain: 1949, c. 234; Tyrrell: 1965, c. 179; c. 179; Vance: 915, c. 149; Washington: 1945, c. 103; 1959, c. 146; 1961, c. 178; Yadkin: 1955, c. 612.

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 1970 Interim Supplement to Volume 1B 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