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CONSOLIDATED STATUTES

OF

NORTH CAROLINA

PREPARED UNDER PUBLIC LAWS 1917, CHAPTER 252, AND PUBLIC LAWS 1919, CHAPTER 238

BY

L. P. McGEHEE

UNDER DIRECTION OF REVISION COMMISSION

HARRY W. STUBBS, CHAIRMAN; LINDSAY C. WARREN, HARRY P. GRIER, STAHLÉ LINN, CARTER DALTON

ANNOTATED

ON THE BASIS OF PELL'S REVISION OF 1908

BY

A. C. McINTOSH



IN TWO VOLUMES

VOLUME ONE

RALEIGH

COMMERCIAL PRINTING COMPANY, STATE PRINTERS

1920

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Prepared under Public Laws 1914, Chapter 325, and Public Laws 1919, Chapter 238

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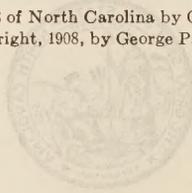
by

J. BRYAN GRIMES, Secretary of State of the State of North Carolina,
in trust, for the benefit of said State

BY

A. C. McINTOSH

Revisal of 1908 of North Carolina by George P. Pell
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IN TWO VOLUMES

VOLUME ONE

PRINTED BY THE
COMMERCIAL PRINTING COMPANY, STATE PRINTERS
1920

PREFACE

The history of previous revisions of the statutes of North Carolina is given in the preface to the Revisal of 1905 and earlier compilations, and it seems unnecessary to insert this matter here.

The Consolidated Statutes has been prepared under the direction of a committee of the General Assembly of 1917 appointed under chapter 252 of the Public Laws of 1917. On the part of the Senate, Messrs. Stahle Linn of Rowan and Lindsay C. Warren of Beaufort were selected; and on the part of the House, Messrs. Harry W. Stubbs of Martin, Harry P. Grier of Iredell, and Carter Dalton of Guilford. A short time after their appointment the Commission met and organized and elected Harry W. Stubbs, Esq., as chairman, and appointed Hon. T. H. Calvert of Raleigh as Revision Commissioner charged with the actual compiling, collating, and revising all of the public statutes of the State. Mr. Calvert, after collecting the material for the work, was appointed by Governor Bickett as Superior Court Judge, and thereupon tendered his resignation as Revision Commissioner. Mr. L. P. McGehee, Dean of the School of Law of the University of North Carolina, was selected as his successor.

The Commission desires to give full and entire credit for this work to Mr. McGehee. It realizes what a stupendous labor it has been, and he is rightly entitled to whatever approbation this work may bring. The Commission felt it was peculiarly fortunate in securing his services, and the splendid results that have been obtained have fully justified the wisdom of his selection.

The Commission desires to make acknowledgments to Prof. A. C. McIntosh, of the School of Law of the University of North Carolina, who has rendered invaluable aid in the preparation of this work. Several chapters were prepared by Messrs. Dalton and Warren of the Commission. The index was prepared by Mr. W. H. Grimes, who has also devoted unremitting care to getting the work through the press. Other members of the Bar who have collaborated in the work are Messrs. T. E. Didlake, M. B. Fowler, and Moses Shapiro.

The work of the Commission was accepted and enacted into law by the General Assembly of 1919 by an act entitled "An Act for Revising and Consolidating the Public and General Statutes of the State of North Carolina," approved March 10, 1919, and embodying the Compiled Statutes as prepared by the Commission, with amendments. See File No. 1030, House Bill 1321, Senate Bill 136.

PREFACE

Under chapter 238, Public Laws 1919, a copy of which is added to this preface, the General Assembly made provision for the completion and publication of the work by the insertion therein of the Public Statutes of 1919. It is the Consolidated Statutes of 1919 as completed in accordance with this chapter which is herewith submitted to the public. Under the same act it was provided that the work should be accepted by a Legislative Committee, and this committee, composed of Senator Dorman Thompson of Iredell, Representative O. M. Mull of Cleveland, and Representative D. B. Teague of Lee, met with the Commission in Raleigh in November, 1919, and ordered that the work be accepted and printed.

In conformity with the last mentioned statute, the Consolidated Statutes are published in two editions, the Magistrates' Edition omitting the second volume of the completed work and containing the statutes without annotation, and the Annotated Edition containing all the statutes annotated to date and a full index.

The Commission secured the copyright of the annotations prepared by Judge Pell for Pell's Revisal. These annotations have been brought up to date under the direction of Professor McIntosh.

HARRY W. STUBBS.

LINDSAY C. WARREN.

HARRY P. GRIER.

STAHLÉ LINN.

CARTER DALTON.

JANUARY 14, 1920.

AN ACT TO PROVIDE FOR THE COMPLETION, PUBLICATION, AND DISTRIBUTION OF THE CONSOLIDATED STATUTES OF NORTH CAROLINA AND TO FIX A DATE WHEN THEY ARE IN FORCE.

The General Assembly of North Carolina do enact:

SECTION 1. That the members of the Legislative Revision Commission, which commission and its members are hereinafter called simply the commission and the commissioners, appointed under chapter two hundred and fifty-two of the Public Laws of one thousand nine hundred and seventeen, namely, Harry W. Stubbs, chairman; Lindsay C. Warren, Stahle Linn, Carter Dalton, and H. P. Grier, shall be continued in office until the duties prescribed in this act are duly performed, and they shall be vested with the powers conferred by the said act so far as the same shall be necessary or convenient for the performance of such duties, and until the completion of such duties they shall receive the compensation and expenses as provided in the said act except as hereinafter stated.

SEC. 2. That the commissioners shall complete and perfect the Consolidated Statutes, as enacted by the present General Assembly, by causing to be inserted therein all such general public statutes as may be enacted at the present session of the General Assembly and all amendments, in their proper places in sections under the appropriate chapters and subdivisions of chapters; and they are hereby authorized to change the number of sections, transfer sections, chapters and subdivisions of chapters, and make such other corrections which do not change the law, as may be deemed expedient. The commission shall number the sections consecutively as in the Revisal.

SEC. 3. That the commissioners shall, as soon as possible after the adjournment of the present General Assembly, cause to be prepared and published for distribution to the justices of the peace of the State of North Carolina an edition of that part of the Consolidated Statutes contained in the first volume of the legislative edition of said Consolidated Statutes, said justices of the peace to pay therefor the sum of two dollars and fifty cents per volume. Said commissioners shall further cause to be prepared and published an edition of the Consolidated Statutes, said edition to contain the text of the Consolidated Statutes as finally completed and approved under this act, with a full index, together with the Constitution of the United States and the Constitution of North Carolina, with indexes to the same, and shall include also the statutes of the United States providing for the authentication of records, naturalization of aliens, and the removal of causes from the State courts to the Federal courts. This edition shall contain also annotations of the decisions of the Supreme Court of North Carolina under the respective sections which they interpret and explain. In annotating said Consolidated Statutes the commission shall have the power, if in their opinion it is in the interest of economy of money and time to do so, to purchase any annotations of any existing North Carolina statute law books.

AN ACT CONCERNING THE CONSOLIDATED STATUTES

SEC. 4. There shall be printed of said annotated edition six thousand copies, the copyright of which edition shall be secured to the state by the commissioners. The copies when printed shall be deposited with the Secretary of State to be distributed and sold as hereinafter provided.

SEC. 5. That the expenses of the Legislative Revision Commission herein provided for, including the compiling, collating, revising, and annotating the public statutes of North Carolina, the purchase of annotations, and of the supervising, printing, publishing, binding, and delivering the said compiled and collated statutes, such clerical assistance as may be necessary, and all assistance as may be deemed necessary in the performance of the duties provided for in this act, shall be paid by the State Treasurer out of the general fund on the warrant of the Auditor, founded on vouchers approved by the chairman of the said commission.

SEC. 6. That there shall be appointed at this session of the General Assembly a committee composed of three members, of whom two shall be members of the House of Representatives, to be appointed by the Speaker of the House of Representatives, and one shall be a member of the Senate, to be appointed by the President of the Senate. This committee shall be authorized to inspect and examine the Consolidated Statutes when the commission shall report to them that the work of the commission has been completely performed, and they shall approve the same, if found to be in accordance with this act. The committee, in conjunction with the members of the commission, shall make the necessary contracts for the publication of the Consolidated Statutes. The members of the committee shall each receive one hundred and fifty dollars and expenses in full compensation for all their services, to be paid by the State Treasurer, upon warrants drawn by the Auditor, based upon vouchers approved by the chairman of the committee.

SEC. 7. That when the commission has finished its work and has notified the committee as aforesaid of the completion of the same, and when the work has been approved by the committee, the members of the commission shall each receive the sum of three hundred and fifty dollars in addition to compensation and expenses already received, and this shall be in full compensation for all work done by them in the compilation and revision thereof, and shall be paid by the State Treasurer upon the warrant of the Auditor, based upon vouchers approved by the chairman of the commission.

SEC. 8. That all provisions, chapters, subdivisions of chapters, and sections contained in the Consolidated Statutes shall be in force from and after the first day of August, one thousand nine hundred and nineteen.

SEC. 9. That the Secretary of State shall immediately, upon the receipt by him of the Consolidated Statutes duly published and bound, distribute one set each to those to whom the Public Laws are now distributed, and to each member of this General Assembly: *Provided, however*, that sets shall not be distributed to sheriffs and registers of deeds, and shall only be sent to the state and court librarians outside the State of North Carolina that request same. The Secretary of State is authorized to sell copies of the Consolidated Statutes at twenty dollars a set, and to sell to book dealers at a discount to be fixed by him.

SEC. 10. That this act take effect from and after its ratification.

Ratified this 10th day of March, A. D. 1919.

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STATE OF NORTH CAROLINA

IN THE YEAR OF OUR LORD ONE THOUSAND NINE
HUNDRED AND NINETEEN

AN ACT

FOR REVISING AND CONSOLIDATING THE PUBLIC AND GENERAL
STATUTES OF THE STATE OF NORTH CAROLINA

The General Assembly of North Carolina do enact the following named chapters, subchapters and sections, to be known as the CONSOLIDATED STATUTES, that is to say :

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2. Exclusive in clerk who first gains.

ART. 2. NECESSITY FOR LETTERS AND THEIR FORM.

3. Letters must issue; immediate rights of family.
4. Executor de son tort.
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- 179. Chapter applies to administrations since 1869.
- 180. Cases pending at adoption of constitution of 1868.
- 181. Administrations prior to 1869.

ART. 1. PROBATE JURISDICTION

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

Clerk has jurisdiction of former probate judge: *Edwards v. Cobb*, 95-4. To take proof of wills: *London v. R. R.*, 88-584; *Millsaps v. McLean*, 60-80; *Wallis v. Wallis*, 60-79. To appoint administrators c. t. a.: *In re Meyers*, 113-545; *Suttle v. Turner*, 53-404. Jurisdiction of clerk presumed, when: *Vance v. R. R.*, 138-460. Jurisdiction exhausted, when: *In re Bowman's Estate*, 121-373. Appointment cannot be attacked collaterally: *Fann v. R. R.*, 155-136; *Batchelor v. Overton*, 158-395; unless it appears that the clerk has no jurisdiction: *Reynolds v. Cotton Mills*, 177-412.

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

See *Grant v. Reese*, 94-720; *Johnson v. Corpening*, 39-216; *Collins v. Turner*, 4-541; *Hannon v. Power Co.*, 173-520. Domicile explained: *Reynolds v. Cotton Mills*, 177-412.

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

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

Page v. Ins. Co., 131-115; *Morefield v. Harris*, 126-626; *Shields v. Life Ins. Co.*, 119-380; *Hyman v. Gaskins*, 27-267; *Smith v. Munroe*, 23-345.

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

Hartness v. Pharr, 133-566; Morefield v. Harris, 126-628; Grant v. Reese, 94-720. Right of action for wrongful death is sufficient assets: Fann v. R. R., 155-136; Vance v. R. R., 138-460. Rev., s. 16; Code, s. 1374; C. C. P., s. 433; R. C., c. 46, s. 1; 1868-9, c. 113, s. 115.

2. **Exclusive in clerk who first gains.** The clerk who first gains and exercises jurisdiction under this chapter thereby acquires sole and exclusive jurisdiction over the decedent's estate.

Rev., s. 17; Code, s. 1375; C. C. P., 434.

Williams v. Neville, 108-563. Where clerk is appointed executor and will proven in another county, see Gregory v. Ellis, 82-225.

ART. 2. NECESSITY FOR LETTERS AND THEIR FORM

3. **Letters must issue; immediate rights of family.** No person shall enter upon the administration of any decedent's estate until he has obtained letters therefor, under the penalty of one hundred dollars, one-half to the use of the informer and the other half to the state; but nothing herein contained shall prevent the family of the deceased from using so much of the crop, stock and provisions on hand as may be necessary, until the widow's year's support is assigned therefrom, as prescribed by law.

Rev., s. 1; Code, s. 1522; 1868-9, c. 113, s. 93.

"Administration" means management of estate: Currie v. Currie, 90-556. Complaint in action for penalty: Ibid. Effect of widow withholding too much: Israel v. King, 69-373. Penalty statutes construed: Alexander v. R. R., 144-93.

4. **Executor de son tort.** Every person who receives goods or debts of any person dying intestate, or any release of a debt due the intestate, upon a fraudulent intent, or without such valuable consideration as amounts to the value or thereabout, is chargeable as executor of his own wrong, so far as such debts and goods, coming to his hands, or whereof he is released, will satisfy.

Rev., s. 2; Code, s. 1494; 1868-9, c. 113, s. 67; 43 Eliz., c. 8.

EXECUTOR DE SON TORT. One who without authority does acts properly duties of administrator: Barnard v. Gregory, 14-223. Administrator who holds property under deed void as to creditors: Norfleet v. Riddick, 14-221; Burton v. Farinholt, 86-267. Intermeddler, though afterwards letters issued to him: Norfleet v. Riddick, 14-221. Fraudulent intermeddler after administrator appointed: McMorine v. Storey, 20-83. Fraudulent donee of personalty: Sturdivant v. Davis, 31-365.

NOT EXECUTOR D. S. T. Intermeddler, while administrator exists, except fraudulent: Francis v. Welch, 33-215; McMorine v. Storey, 20-83; Norfleet v. Riddick, 14-221. Donee of intestate's property which was exempt from execution: Winchester v. Gaddy, 72-115. Intermeddler under colorable title: Turner v. Child, 12-25; Outlaw v. Farmer, 71-31; Bailey v. Miller, 27-444. Bailee turning money over to foreign executor, when: Nesbit v. Stewart, 19-24.

5. **Form of letters.** All letters must be issued in the name of the state, and tested in the name of the clerk of the superior court, signed by him, and sealed with his seal of office, and shall have attached thereto copies of the section of this chapter requiring an inventory to be filed within three months, and of the section requiring annual accounts to be filed.

Rev., s. 36; Code, ss. 1399, 2172; C. C. P., ss. 471, 478; 1871-2, c. 46.

ART. 3. RIGHT TO ADMINISTER

6. Order in which persons entitled. Letters of administration, in case of intestacy, shall be granted to the persons entitled thereto and applying for the same, in the following order:

Executor dying, administrator appointed according to this section: *Little v. Berry*, 94-433. Public administrator postponed to all named in this section, even though applying after six months: *In re Bailey's Will*, 141-193.

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

Widow must be 21: *Wallis v. Wallis*, 60-78. Infant widow may appoint: *Ibid.* Husband's rights: *In re Meyers*, 113-545; *Hoppiss v. Eskridge*, 37-54. See section 7.

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

Clerk may appoint person recommended by next of kin: *In re Saville*, 156-172. Appointee of next of kin not qualifying, clerk appoints: *Williams v. Neville*, 108-559. Nonresident next of kin may appoint: *Smith v. Munroe*, 23-345. Appointment by nonresident only durante absentia: *Ritchie v. McAuslin*, 2-220. Several applicants of equal degree, clerk selects: *Garrison v. Cox*, 95-353. Brothers applying, which selected: *Moore v. Moore*, 12-352. Right to distributive share entitles one under this subsection: *Smith v. Munroe*, 23-345. Right not absolute and exclusive: *Stoker v. Kendall*, 44-242. See *Atkins v. McCormick*, 49-274.

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

Assignee of claim against decedent not entitled: *Pearce v. Castrix*, 53-71. Creditor postponed to all of next of kin, provided next of kin apply in time: *Carthy v. Webb*, 4-20, 6-268.

4. To any other person legally competent.

Those entitled not applying in six months, and public administrator not applying, who entitled: *Garrison v. Cox*, 95-353. Nonresident dying, leaving insurance policy with resident, such resident entitled: *Page v. Life Ins. Co.*, 131-115; *Shields v. Life Ins. Co.*, 119-380.

Rev., s. 3; Code, s. 1376; C. C. P., s. 456; R. C., c. 46, ss. 2, 3; 1868-9, c. 113, s. 115.

7. Husband to administer to wife; right in surplus. If any married woman dies wholly or partially intestate, the surviving husband shall be entitled to administer on her personal estate, and shall hold the same, subject to the claims of her creditors and others having rightful demands against her, to his own use, except as hereinafter provided. If the husband dies after his wife, but before administering, his executor or administrator or assignee shall receive the personal property of the said wife, as a part of the estate of the husband, subject as aforesaid, and except as provided by law.

Rev., s. 4; Code, s. 1479; 1871-2, c. 193, s. 32.

Husband dying without administering, creditor cannot be appointed administrator of wife: *Wooten v. Wooten*, 123-219. When wife leaves will appointing executor, who qualifies, husband cannot administer: *Hood v. Telegraph Co.*, 162-92. Wife dying testate, appointing no executor, husband administers: *In re Meyers*, 113-545. Husband can appoint: *Ibid.* Wife's property, after debts paid, goes to husband: *Bank v. Gilmer*, 116-701; *Whitaker v. Hamilton*, 126-468; *Colson v. Martin*, 62-125; *Coleman v. Hallowell*, 54-204. A legacy vested in wife at her death goes to husband: *In re Shuford's Will*, 164-133. Interest of wife as distributee in amount to be recovered for wrongful death of father goes to husband: *Neill v. Wilson*, 146-242.

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

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

Infant feme covert cannot administer but may appoint: *Wallis v. Wallis*, 60-78. Such appointment durante minoritate: *Ibid*.

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

Nonresident may qualify as executor: *Batchelor v. Overton*, 158-395; but he cannot administer: *Hall v. R. R.*, 146-345; nor can he appoint: *Boynton v. Heartt*, 158-488. But see under former statute, nonresident being appointed, qualifying and giving bond not disqualified: *Moore v. Eure*, 101-16. Nonresident next of kin may appoint durante absentia: *Smith v. Munroe*, 23-345; *Ritchie v. McAuslin*, 2-220.

3. Has been convicted of a felony.

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

“Incompetent” defined in *Stephenson v. Stephenson*, 49-472.

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

6. Has renounced his right to qualify.

Rev., s. 5; Code, ss. 1377, 1378, 2162; C. C. P., s. 457.

9. **Effect of disqualification of person entitled.** Where an executor named in the will, or any person having a prior right to administer, is under the disqualification of nonage, or is temporarily absent from the state, such person is entitled to six months, after coming of age or after his return to the state, in which to make application for letters testamentary, or letters of administration.

Rev., s. 6; Code, ss. 1379, 2165; C. C. P., ss. 452, 460; R. C., c. 46, s. 12.

Infant feme covert coming of age entitled: *Wallis v. Wallis*, 60-78. Nonresident next of kin returning to state entitled: *Smith v. Munroe*, 23-345; *Ritchie v. McAuslin*, 2-220. Persons deemed to have renounced may yet be entitled as against public administrator: *In re Bailey Will*, 141-193.

10. **Divorce a vinculo or felonious slaying is forfeiture.** When a marriage is dissolved a vinculo, the parties respectively, or when either party is convicted of the felonious slaying of the other, or of being accessory before the fact of such felonious slaying, the party so convicted shall thereby lose all his or her right to administer on the estate of the other, and to a distributive share in the personal property of the other, and every right and estate in the personal estate of the other.

Rev., s. 7; Code, s. 1480; 1889, c. 499; 1871-2, c. 193, s. 42.

NOTE. For forfeiture generally by divorce a vinculo, see *Married Women*.

Doctrine in *Owens v. Owens*, 100-240, changed by this section.

11. **Elopement and adultery of wife is forfeiture.** If any married woman elopes with an adulterer, and shall not be living with her husband at his death, she shall thereby lose all right to a distributive share in the personal property of her husband, and all right to administer on his estate.

Rev., s. 8; Code, s. 1481; 1871-2, c. 193, s. 44.

NOTE. For forfeiture generally for elopement, see *Married Women*.

Bigamy of wife a forfeiture to rights in property of first husband: *Gathings v. Williams*, 27-487; *Irby v. Wilson*, 21-568; *Brinegar v. Chaffin*, 14-111. See *Owens v. Owens*, 100-240, under section 10.

12. **Husband's conduct forfeiting rights in wife's estate.** If any husband shall separate himself from his wife, and be living in adultery at her death, or if she

has obtained a divorce a mensa et thoro, and shall not be living with her husband at her death, or if the husband has abandoned his wife, or has maliciously turned her out of doors, and shall not be living with her at her death, he shall thereby lose all his right and estate of whatever character in and to her personal property, and all right to administer on her estate.

Rev., s. 9; Code, s. 1482; 1871-2, c. 193, s. 45.

“Abandoned” defined: *State v. Hopkins*, 130-647; *Setzer v. Setzer*, 128-170; *High v. Bailey*, 107-70. As to marriages contracted prior to statute, see *Taylor v. Taylor*, 93-418, 112-134.

13. Executor may renounce. Any person appointed an executor may renounce the office by a writing signed by him, and on the same being acknowledged or proved to the satisfaction of the clerk of the superior court, it shall be filed.

Rev., s. 10; Code, s. 2163; C. C. P., s. 450.

Can renounce if he has not undertaken office or intermeddled: *Sawyer v. Dozier*, 27-97. Cannot renounce after probate without leave of court: *Mitchell v. Adams*, 23-298. Cannot if he has meddled with estate: *Ibid.*; also *Sawyer v. Dozier*, 27-97. Renouncing, administrator c. t. a. succeeds to powers: *Saunders v. Saunders*, 108-327. Renunciation must appear of record: *Springs v. Irwin*, 28-27. May retract renunciation: *Ryder v. Oates*, 173-569; *Davis v. Insoe*, 84-396; *Wood v. Sparks*, 18-389. Cannot renounce after entering on exercise of trust: *McIntyre v. Proctor*, 145-288; *Washington v. Blunt*, 43-253; *Sawyer v. Dozier*, 27-97. Executors have the right to decline the office, but after accepting and qualifying cannot resign: *McIntyre v. Proctor*, 145-288.

14. Renunciation of prior right required. When any person applies for administration, and any other person has prior right thereto, a written renunciation of the person or persons having such prior right must be produced and filed with the clerk.

Rev., s. 11; Code, s. 1378; C. C. P., s. 459.

Next of kin must renounce before clerk can appoint another within six months of decedent's death: *Williams v. Neville*, 108-559. Mere expressed intent to renounce will not do: *Ibid.*; see *Hill v. Alspaugh*, 72-404.

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

Rev., s. 12; Code, s. 1380; C. C. P., s. 460 (a); 1868-9, c. 203.

Deemed to have renounced, when: *Withrow v. DePriest*, 119-541; *Williams v. Neville*, 108-559; *Hill v. Alspaugh*, 72-404; *Hughes v. Pipkin*, 61-4; *Stoker v. Kendall*, 44-242. Renunciation not per se: In re *Bailey Will*, 141-194. Appointee of person entitled, not qualifying, so deemed: *Williams v. Neville*, 108-559. Renunciation of some entitled to administer does not take away the right of others: In re *Jones*, 177-337. Appointment after six months not revoked at instance of one having prior right applying after six months: *Withrow v. DePriest*, 119-541; In re *Bailey Will*, 141-195.

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

Rev., s. 13; Code, s. 2164; C. C. P., s. 451.

Discussed generally in *Ward v. Sparks*, 18-389.

ART. 4. PUBLIC ADMINISTRATOR

17. Appointment and term. There may be a public administrator in every county, appointed by the clerk of the superior court for the term of eight years.

Rev., s. 18; Code, s. 1389; 1868-9, c. 113.

Term is for eight years in every case: *Boynton v. Heartt*, 158-488. Not considered an office under statute against holding two offices: *State v. Smith*, 145-476. Quo warranto does not lie to remove administrator or to inquire into appointment: *Ibid*.

18. Oath. The public administrator shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties of his trust; and the oath so taken and subscribed must be filed in the office of the clerk of the superior court.

Rev., s. 19; Code, s. 1393; 1868-9, c. 113, ss. 2, 5.

Must give bond and obey all orders of court: *In re Brinson*, 73-278. Must renew bond, when: *In re Trotter*, 115-193; see sections 43-44.

19. Bond. The public administrator shall enter into bond, with three or more sureties, approved by the clerk, in the penal sum of four thousand dollars, payable to the state of North Carolina, conditioned faithfully to perform the duties of his office, and obey all lawful orders of the clerk or other court touching the administration of the several estates that may come into his hands, and such bond shall be renewed every two years. Whenever the aggregate value of the real and personal property belonging to the several estates in the hands of the public administrator exceeds the one-half of his bond, the clerk shall require him to enlarge his bond in amount so as to cover, at all times, at least the double of such aggregate.

Rev., s. 320; Code, ss. 1390, 1391, 1392; 1868-9, c. 113, ss. 2, 3, 4; 1915, c. 216.

For actions on administration bond, see section 40. General requirements as to bond: *In re Brinson*, 73-279. Notice should be given before removal for failure to renew bond: *Trotter v. Mitchell*, 115-190; and if proper bond is then offered, it should be received: *In re Trotter*, 115-193.

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

Office of public administrator a property right: *Trotter v. Mitchell*, 115-190.

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

Not entitled, even after six months, when: *In re Bailey Will*, 141-193; *Withrow v. DePriest*, 119-544; *Hill v. Alspaugh*, 72-402.

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

3. When any person entitled to administration shall request, in writing, the clerk to issue the letters to the public administrator.

Rev., s. 20; Code, s. 1394; 1868-9, c. 113, s. 6.

21. Powers generally and on expiration of term. The public administrator shall have, in respect to the several estates in his hands, all the rights and powers, and be subject to all the duties and liabilities of other administrators. On the expiration of the term of office of a public administrator, or his resignation, he may continue to manage the several estates committed to him prior thereto until he has fully administered the same, if he then enters into a bond as required by law for administrators.

Rev., s. 21; Code, s. 1395; 1868-9, c. 113, s. 7; 1876-7, c. 239.

Subject to orders of clerk: *In re Brinson*, 73-278.

ART. 5. ADMINISTRATOR WITH WILL ANNEXED

22. When letters c. t. a. issue. If there is no executor appointed in the will, or if, at any time, by reason of death, incompetency adjudged by the clerk of the superior court, renunciation, actual or decreed, or removal by order of the court, or on any other account there is no executor qualified to act, the clerk of the superior court may issue letters of administration with the will annexed, to some suitable person or persons, in the order prescribed in this chapter.

Rev., s. 14; Code, s. 2166; C. C. P., s. 453.

Cases generally in point: *In re Meyers*, 113-545; *Williams v. Neville*, 108-559; *Little v. Berry*, 94-433; *Suttle v. Turner*, 53-403. **Duties of administrator c. t. a. as trustee:** *Clark v. Peebles*, 120-31; *Smathers v. Moody*, 112-791; *Saunders v. Saunders*, 108-327; *Creech v. Grainger*, 106-213; *Gay v. Grant*, 101-206; *Couneill v. Averett*, 95-131; *Vaughan v. Farmer*, 90-612; *Hester v. Hester*, 37-330; *Jones v. Jones*, 17-387. **Letters of administration are void unless executor has renounced:** *Springs v. Irwin*, 28-27; *Mitchell v. Adams*, 23-298. **Renunciation of some entitled to administer does not interfere with the right of others:** *In re Jones*, 177-337.

23. Qualifications and bond. Administrators with the will annexed shall have the same qualifications and give the same bond as other administrators; but the executor of an executor shall not be entitled to qualify as executor of the first testator.

Rev., s. 15; Code, s. 2167; C. C. P., s. 454; 1905, c. 286.

ART. 6. COLLECTORS

24. Appointment of collectors. When, for any reason, a delay is necessarily produced in the admission of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will

annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent.

Rev., s. 22; Code, s. 1383; C. C. P., s. 463; R. C., c. 46, s. 9; 1868-9, c. 113, s. 115.

When collector appointed: *In re Palmer's Will*, 117-133; *Syme v. Broughton*, 86-156. As to next of kin's right to collect pending appointment, see *Whit v. Ray*, 26-14.

25. Qualifications and bond. Every collector shall have the qualifications and give the bond prescribed by law for an administrator.

Rev., s. 23; Code, s. 1384; C. C. P., s. 464.

For bond, see section 33.

26. Powers of collectors. Every collector has authority to collect the personal property, preserve and secure the same, and collect the debts and credits of the decedent, and for these purposes he may commence and maintain or defend suits, and he may sell, under the direction and order of the clerk, any personal property for the preservation and benefit of the estate. He may be sued for debts due by the decedent, and he may pay funeral expenses and other debts.

Rev., s. 24; Code, s. 1385; C. C. P., s. 465; R. C., c. 46, s. 6; 1868-9, c. 113, s. 115.

Has no control of lands: *Lee v. Lee*, 74-70.

27. When collector's powers cease; duty to account. When letters testamentary, letters of administration or letters of administration with the will annexed are granted, the powers of such collector shall cease, but any suit brought by the collector may be continued by his successor, the executor or the administrator, in his own name. Such collector must, on demand, deliver to the executor or administrator all the property, rights and credits of the decedent under his control, and render an account, on oath, to the clerk of all his proceedings. Such delivery and account may be enforced by citation, order or attachment.

Rev., s. 25; Code, s. 1386; C. C. P., s. 466; R. C., c. 46, s. 7; 1868-9, c. 113, s. 115.

Not entitled to counsel fees when he resists claim of rightful executor to funds: *Johnson v. Marcom*, 121-83.

ART. 7. APPOINTMENT AND REVOCATION

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

1. The death of the decedent and his intestacy.

Letters upon estate of one living are void: *State ex rel. v. White*, 29-116; *Springer v. Shavender*, 118-33. Letters issued pending contest over will void: *Slade v. Washburn*, 25-557.

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

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

Rev., s. 26; Code, s. 1381; C. C. P., s. 461.

Proper record of appointment may be made *nunc pro tunc*: *Dallas v. R. R.*, 165-269.

29. Right to contest application for letters; proceedings. Any person interested in the estate may, on complaint filed and notice to the applicant, contest the right of such applicant to letters of administration, and on any issue of fact joined, or matter of law arising on the pleadings, the cause may be transferred to the superior court for trial, or an appeal be taken, as in other special proceedings.

Rev., s. 27; Code, s. 1382; C. C. P., s. 462.

What are issues of fact hereunder: *In re Tapp's Estate*, 114-248. Letters already issued cannot be collaterally attacked: *Fann v. R. R.*, 155-136; *Batchelor v. Overton*, 158-395; *Reynolds v. Cotton Mills*, 177-412; *Plemmons v. R. R.*, 140-286; *Lyle v. Siler*, 103-261; *Granbery v. Mhoon*, 12-456. Letters may be revoked at same term granted: *Moore v. Moore*, 12-352. Clerk cannot appoint, pending appeal: *Williams v. Neville*, 108-559.

30. Letters of administration revoked on proof of will. If, after the letters of administration are issued, a will is subsequently proved and letters testamentary are issued thereon; or if, after letters testamentary are issued, a revocation of the will or a subsequent testamentary paper revoking the appointment of executors is proved and letters are issued thereon, the clerk of the superior court must thereupon revoke the letters first issued, by an order in writing to be served on the person to whom such first letters were issued; and, until service thereof, the acts of such person, done in good faith, are valid.

Rev., s. 37; Code, s. 2170; C. C. P., s. 469.

Case supporting section: *Shober v. Wheeler*, 144-403. Jurisdiction of clerk generally as compared with probate judge: *Edwards v. Cobb*, 95-4. Practice under this section discussed: *Ibid.*; *Daniel v. Bellamy*, 91-78. See *Slade v. Washburn*, 25-557; *Ralston v. Telfair*, 22-414. Cited in *In re Palmer's Will*, 117-139.

31. Letters revoked for disqualification or default. If, after any letters have been issued, it appears to the clerk, or if complaint is made to him on affidavit, that any person to whom they were issued is legally incompetent to have such letters, or that such person has been guilty of default or misconduct in the due execution of his office, or that the issue of such letters was obtained by false representations made by such person, the clerk shall issue an order requiring such person to show cause why the letters should not be revoked. On the return of such order, duly executed, if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease.

Rev., s. 38; Code, s. 2171; C. C. P., s. 470.

JURISDICTION. *In re Battle*, 158-388; *McLaurin v. McLaurin*, 106-331; *Tulburt v. Hollar*, 102-406; *Edwards v. Cobb*, 95-4; *Battle v. Duncan*, 90-550; *Merrill v. Sandlin*, 86-54; *Barnes v. Brown*, 79-401; *Taylor v. Riddle*, 71-1. This power exists for the good of the estate, and not exercised for convenience of parties, as to allow executor to resign: *McIntyre v. Proctor*, 145-288. Must be exercised with caution: *Smith v. Collier*, 20-60; *County Court v. Bissell*, 47-388. Superior court's powers on appeal in removal cases discussed in *Pearce v. Lovinier*, 71-248.

PROCESS AND PLEADINGS. Without order to show cause, removal void: *In re Palmer's Will*, 117-133; *Trotter v. Mitchell*, 115-190. Complaint and answer: *Patterson v. Wadsworth*, 94-538; *Neighbors v. Hamlin*, 78-42. Practice explained: *In re Battle*, 158-388.

"DEFAULT OR MISCONDUCT." Generally construed in *McFayden v. Council*, 81-195. Motion to remove for fraud not entertained in application to set aside sale of land for assets: *McLaurin v. McLaurin*, 106-331. Failure to account: *Barnes v. Brown*, 79-401; *Armstrong v. Stowe*, 77-360. Poverty of executor no ground: *In re Knowles*, 148-461; *McFayden v. Council*,

81-195; *Wilkins v. Harris*, 60-592. Failure to defend action when his interest adverse to estate: *Simpson v. Jones*, 82-323. Disagreement between executors no reason per se to remove: *Fairbairn v. Fisher*, 57-390.

Claiming an interest in the property is not sufficient cause for removal: *Morgan v. Morgan*, 156-169. For failure to give or renew bond, see section 43.

32. On revocation, successor appointed and estate secured. In all cases of the revocation of letters, the clerk must immediately appoint some other person to succeed in the administration of the estate; and pending any suit or proceeding between parties respecting such revocation, the clerk is authorized to make such interlocutory order as, without injury to the rights and remedies of creditors, may tend to the better securing of the estate.

Rev., s. 35; Code, s. 1521; 1868-9, c. 113, s. 92.

Clerk must immediately appoint successor, and may order settlement: *In re Brinson*, 73-278; *Taylor v. Biddle*, 71-1.

ART. 8. BONDS

33. Bond; approval; condition; penalty. Every executor from whom a bond is required by law, and every administrator and collector, before letters are issued, must give a bond payable to the state, with two or more sufficient sureties, to be justified before and approved by the clerk, conditioned that such executor, administrator or collector shall faithfully execute the trust reposed in him and obey all lawful orders of the clerk or other court touching the administration of the estate committed to him. The penalty of such bond must be at least double the value of all the personal property of the deceased; such value to be ascertained by the clerk by examination on oath of the applicant or of some other competent person. If the personal property of any decedent is insufficient to pay his debts and the charges of administration, and it becomes necessary for his executor or administrator to apply for the sale of real estate for assets, and the bond previously given is not double the value of both the real and personal estate of the deceased, such executor (if bond is required of him by law) or administrator shall, before or at the time of filing his petition for such sale, give another bond payable and conditioned as the one above prescribed and with like security, in double the value of the real estate for the sale of which application is made.

Rev., s. 319; Code, s. 1388; 1870-1, c. 93; C. C. P., s. 468.

See Administration, sections 39, 40. For action on bond of administrator, see section 40.

Bonds cumulative: *Pickens v. Miller*, 85-543; *Jones v. Hays*, 38-502; *Fidelity Co. v. Fleming*, 132-332, and cases cited. Clerk to determine value of estate: *Williams v. Neville*, 108-565. Bond only guarantees good faith, ordinary care, and reasonable diligence: *Smith v. Patton*, 131-399; *Moore v. Eure*, 101-11; *Atkinson v. Whitehead*, 66-296. All moneys received by administrator under color of the administration are protected by bond: *Lafferty v. Young*, 125-296; *Shuffler v. Turner*, 111-297; *Jennings v. Copeland*, 90-579. Giving bond is not an essential condition of the order appointing administrator: *Howerton v. Sexton*, 104-86; *Harrison v. Cox*, 95-357; *Hughes v. Hodges*, 94-56; *Spencer v. Cahoon*, 18-27; 15-225; *Hoskins v. Miller*, 13-360. Failure to require nonresident executor to give bond does not disqualify: *Batchelor v. Overton*, 158-395.

34. When executor to give bond. Executors shall give bond as prescribed by law in the following cases:

For actions on bond, see section 40. Bond only guarantees good faith: *Moore v. Eure*, 101-11; *Atkinson v. Whitehead*, 66-296. Clerk has power to compel: *Barnes v. Brown*, 79-401; see section 43. Bond required when executor uses estate: *McFayden v. Council*, 81-195; *Gray v. Gaither*, 74-237. Not required because of insolvency alone, when insolvency known to testator: *Neighbors v. Hamlin*, 78-42.

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

Foreign executor must comply with statute: *Bank v. Pancake*, 172-513; *Glasecock v. Gray*, 148-346; but failure to give bond may be only an irregularity: *Batchelor v. Overton*, 158-395.

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

Executrix of husband marrying again: *Godwin v. Watford*, 107-168.

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

Rev., s. 28; Code, s. 1515; R. C., c. 46, ss. 12, 13.

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

1909, c. 825.

36. No bond in certain cases of executor with power to convey. Where a citizen or subject of a foreign country, by will sufficient according to the laws of this state, and duly probated and recorded in the proper county, devises to his executor, with power to sell and convey, real property situated in this state in trust for a person named in the will, the power being vested in the executor as such trustee, the executor may execute the power without giving bond in this state.

1909, c. 901.

37. No bond where will waives bond and coexecutor a resident. A nonresident executor appointed under a will which dispenses with the executor's bond shall not be required to give bond, if a resident of the state is appointed and qualifies as coexecutor, unless the clerk of the court of the county where the will is first probated shall, upon the petition of the creditors or beneficiaries of the estate,

deem the bond of the nonresident executor necessary for the protection of the creditors or beneficiaries. This section applies to nonresident executors who qualified before its enactment as well as to those qualifying afterwards.

1911, c. 176.

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

1911, c. 90.

Conveyances validated by this section: *Vaught v. Williams*, 177-77; *Glascoek v. Gray*, 148-346.

39. Oath and bond required before letters issue. Before letters testamentary, letters of administration with the will annexed, letters of administration or letters of collection are issued to any person, he must give the bond required by law and must take and subscribe an oath or affirmation before the clerk that he will faithfully and honestly discharge the duties of his trust, which oath must be filed in the office of the clerk.

Rev., s. 29; Code, ss. 1387, 1388, 2169; C. C. P., ss. 467, 468; 1870-1, c. 93.

Letters not void because bond not justified: *Garrison v. Cox*, 95-353—or because bond lacks securities, *Jones v. Gordon*, 55-352. Oath taken and bond given: *Armstrong v. Stowe*, 77-362. Amount of bond, see *Williams v. Neville*, 108-565.

40. Right of action on bond. Every person injured by the breach of any bond given by an executor, administrator or collector may put the same in suit and recover such damages as he may have sustained.

Rev., s. 30; Code, s. 1516; 1868-9, c. 113, s. 87.

Bonds of administrators only guarantee good faith: *Smith v. Patton*, 131-397; *Moore v. Eure*, 101-11.

WHO PARTIES PLAINTIFF. Must be "State ex rel.": *Norman v. Walker*, 101-24; *Carmichael v. Moore*, 88-29. Administrator d. b. n. as relator: *Neagle v. Hall*, 115-415; *Brown v. McKee*, 108-387; *Clement v. Cozart*, 107-695; *Tulburt v. Hollar*, 102-406; *Wilson v. Pearson*, 102-290; *Grant v. Rogers*, 94-755; *Merrill v. Merrill*, 92-657; *Neal v. Becknell*, 85-299; *Lansdell v. Winstead*, 76-366; *Goodman v. Goodman*, 72-508; *Carlton v. Byers*, 70-691; *Latham v. Bell*, 69-135; *Badger v. Jones*, 66-305; *Latta v. Russ*, 53-111; *Ferrabee v. Baxter*, 34-64; *State v. Britton*, 33-110; *State v. Johnston*, 30-31; *State v. Moore*, 33-160. Party aggrieved as relator: *Lafferty v. Young*, 125-296; *Alexander v. Wolfe*, 88-398; *Allison v. Robinson*, 78-227; *State v. McKay*, 28-397.

NO NECESSITY OF JUDGMENT AGAINST ADMINISTRATOR TO CHARGE BONDSMEN. *Bratton v. Davidson*, 79-423; *Strickland v. Murphy*, 52-242; *Chairman, etc., v. Moore's Admr.*, 6-22; *Williams v. Hicks*, 5-437.

CERTAIN ACTS HELD TO BE COVERED BY THE BOND. Administrator d. b. n.'s liability measured by administrator's, when: *Roper v. Burton*, 107-526. His collecting from administrator's estate: *Grant v. Reese*, 94-720. Administrator collecting debt from himself: *Gay v. Grant*, 101-206.

PROPERTY COVERED BY BOND. *Lafferty v. Young*, 125-296; *Shuffler v. Turner*, 111-297; *Reaves v. Davis*, 99-425; *Grant v. Reese*, 94-720; *Morton v. Ashbee*, 46-312; *Governor v. Williams*, 25-152.

BREACH OF BOND; WHAT IS AND WHAT IS NOT. Good faith as a test: *Smith v. Patton*, 131-397; *Moore v. Eure*, 101-11. See *Settle v. Settle*, 141-553; *Caviness v. Fidelity Co.*, 140-58; *Gill v. Cooper*, 111-311; *Gay v. Grant*, 101-206; *Lee v. Beaman*, 101-294; *Roper v. Burton*, 107-526; *Summers v. Reynolds*, 95-404; *Grant v. Edwards*, 92-442; *Worthy v. Brower*, 93-344; *Syme v. Badger*, 92-706; *Grant v. Bell*, 90-558; *Hawkins v. Carpenter*, 88-403; *McLean v. McLean*, 88-394; *Ruffin v. Harrison*, 81-212; *Bratton v. Davidson*, 79-423; *Williams v. Williams*, 73-413; *Green v. Green*, 69-25; *Hagans v. Huffsteller*, 65-443; *Finger v. Finger*, 64-183; *Ramsay v. Hanner*, 64-668; *Womble v. George*, 64-759; *Nelson v. Hall*, 58-32; *Holderness v. Palmer*, 57-107; *Cain v. Hawkins*, 50-192; *Fanshaw v. Fanshaw*, 44-166; *Beall v. Darden*, 39-76; *Williams v. Britton*, 33-110; *Green v. Collins*, 28-139; *McLean v. Peoples*, 20-133; *Harrison v. Ward*, 14-417; *Washington v. Hunt*, 12-475; *Smith v. Fagan*, 13-292. See, also, section 173.

SURETIES. Released: *Atkinson v. Farmer*, 6-291; *Tulburt v. Hollar*, 102-406. Not released: *Clancy v. Carrington*, 14-529. Though released, property mortgaged to them to secure them can be taken: *Hooker v. Yellowley*, 128-297. Bonds being cumulative, sureties on all bonds held: *Pickens v. Miller*, 83-543. When surety responsible for debt due estate by administrator: *Moseley v. Johnson*, 144-257.

VENUE. Administrator must be sued as such in the county in which he took out letters, if he or any of his sureties live there: *Foy v. Morehead*, 69-512. See section 465.

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

Rev., s. 33; Code, s. 1519; 1868-9, c. 113, s. 90.

New bond to save former sureties taken: *Governor v. Gowan*, 25-342. See *Barnes v. Brown*, 79-406.

42. On revocation of letters, bond liable to successors. When the letters of an executor, administrator or collector are revoked, his bond may be prosecuted by the person or persons succeeding to the administration of the estate, and a recovery may be had thereon to the full extent of any damage, not exceeding the penalty of the bond, sustained by the estate of the decedent by the acts or omissions of such executor, administrator or collector, and to the full value of any property received and not duly administered. Moneys so recovered shall be assets in the hands of the person recovering them.

Rev., s. 31; Code, s. 1517; 1868-9, c. 113, s. 88.

For actions by administrator d. b. n. as relator, see under section 40, "Who parties plaintiff." Actions for waste brought by administrator d. b. n., see under section 173. Assets must be recovered from prior administrator before any land sold: *Carlton v. Byers*, 70-691; *Latham v. Bell*, 69-135. See generally: *Brittain v. Dickson*, 104-547; *Grant v. Reese*, 94-720; *University v. Hughes*, 90-537; *Ham v. Kornegay*, 85-119; *Duke v. Ferebee*, 52-10; *Hackney v. Steadman*, 46-207.

43. When new bond or new sureties required. If complaint be made on affidavit to the clerk of the superior court that the surety on any bond of an executor, administrator or collector is insufficient, or that one or more of such sureties is or is about to become a nonresident of this state, or that the bond is inadequate in amount, the clerk must issue an order requiring the principal in the bond to show cause why he should not give a new bond, or further surety, as the case may be. On the return of the order duly executed, if the objections in the complaint are found valid, the clerk shall make an order requiring the party to give further surety or a new bond in a larger amount within a reasonable time.

Rev., s. 32; Code, s. 1518; 1868-9, c. 113, s. 89.

Cannot give in lieu of bond mortgage on intestate's property, even though an heir: In re Sellars, 118-573. Clerk passes upon necessity for renewal: *Ibid.* Executor converting funds may be compelled to give bond: In re Knowles, 148-461; *McFayden v. Council*, 81-195; see, also, *Neighbors v. Hamlin*, 78-42; *Hunt v. Sneed*, 64-180; *Barnes v. Brown*, 79-401. Public administrator offering to renew after notice, clerk must accept: In re Trotter, 115-193.

44. On failure to give new bond, letters revoked. If any person required to give a new bond, or further security, or security to indemnify, under the two preceding sections, fails to do so within the time specified in any such order, the clerk must forthwith revoke the letters issued to such person, whose right and authority, respecting the estate, shall thereupon cease.

Rev., s. 34; Code, s. 1520; 1868-9, c. 113, s. 91.

Revocation void unless notice issued to show cause: *Trotter v. Mitchell*, 115-190; In re *Palmer's Will*, 117-133. Generally discussed: *Edwards v. Cobb*, 95-4. See *Barnes v. Brown*, 79-406; *Neighbors v. Hamlin*, 78-42; *Hunt v. Sneed*, 64-180; *McIntyre v. Proctor*, 145-288.

ART. 9. NOTICE TO CREDITORS

45. Advertisement for claims. Every executor, administrator and collector, within twenty days after the granting of letters, shall notify all persons having claims against the decedent to exhibit the same to such executor, administrator or collector, at or before a day to be named in such notice; which day must be twelve months from the day of the first publication of such notice. The notice shall be published once a week for six weeks in a newspaper, if any there be published in the county. If there is no newspaper published in the county, then the notice shall be posted at the courthouse and four other public places in the county. The cost of publishing in a paper shall in no case exceed two dollars and fifty cents.

Rev., s. 39; Code, ss. 1421, 1422; 1868-9, c. 113, s. 29; 1881, c. 278, s. 2.

Claims presented within one year and admitted, statute of limitations suspended: *Turner v. Shuffler*, 108-642. Legal effect on claims not presented within one year: *Mallard v. Patterson*, 108-255; *Morris v. Syme*, 88-453; *Rogers v. Grant*, 88-440. Certain advertisements sufficient under old statute: *McLin v. McNamara*, 22-84; *Blount v. Porterfield's admrs.*, 3-161; see, also, *Gilliam v. Willey*, 54-128; *Lee v. Patrick*, 31-125. Cited in *Morrisey v. Hill*, 142-355; *Love v. Ingram*, 104-602; *Valentine v. Britton*, 127-59. See section 412.

46. Proof of advertisement. A copy of the advertisement directed to be posted or published in pursuance of the preceding section, with an affidavit, taken before some person authorized to administer oaths, of the proprietor, editor or foreman of the newspaper wherein the same appeared, to the effect that such notice was published for six weeks in said newspaper, or an affidavit stating that such notices

were posted, shall be filed in the office of the clerk by the executor, administrator or collector. The copy so verified or affidavit shall be deemed a record of the court, and a copy thereof, duly certified by the clerk, shall be received as conclusive evidence of the fact of publication in all the courts of this state.

Rev., s. 40; Code, s. 1423; 1868-9, c. 113, s. 31.

Creditor need not show presentment of claim unless administrator avers and proves notice: *Valentine v. Britton*, 127-57; *Love v. Ingram*, 104-600. Proving the notice: *Gilliam v. Willey*, 54-128; *Lee v. Patrick*, 31-135. See under section 412 for effect on pleading statute of limitations.

47. Personal notice to creditor. The executor, administrator or collector may cause the notice to be personally served on any creditor, who shall, thereupon, within six months after personal service thereof, exhibit his claim, or be forever barred from maintaining any action thereon.

Rev., s. 41; Code, s. 1424; 1868-9, c. 113, s. 32; 1885, c. 96.

Morrisey v. Hill, 142-355. See dissenting opinion in *Andres v. Powell*, 97-163.

ART. 10. INVENTORY

48. Inventory within three months. Every executor, administrator and collector, within three months after his qualification, shall return to the clerk, on oath, a just, true and perfect inventory of all the real estate, goods and chattels of the deceased, which have come to his hands, or to the hands of any person for him, which inventory shall be signed by him and be recorded by the clerk. He shall also return to the clerk, on oath, within three months after each sale made by him, a full and itemized account thereof, which shall be signed by him and recorded by the clerk.

Rev., s. 42; Code, s. 1396; R. C., c. 46, s. 16; 1868-9, c. 113, s. 8.

Grant v. Rogers, 94-762. Executor's imperfect account of sale: *Nichols v. Dunn*, 22-287. Inventory prima facie evidence against representative, when: *Grant v. Reese*, 94-720; *Hoover v. Miller*, 51-79; *Graham, admr., v. Davidson*, 22-155; *Yarborough v. Harris*, 14-40; but see *Gay v. Grant*, 101-206. Need not embrace debts owing deceased in another state, when: *Grant v. Reese*, 94-720. Failing to file inventory, not entitled to commissions: *Ibid.*; also *Stonestreet v. Frost*, 123-640. Two coexecutors filing joint inventory, effect: *Graham, admr., v. Davidson*, 22-155. Where one of several wards who are tenants in common dies, duty of administrator to have partition: *Calvert v. Peebles*, 71-274.

49. Compelling the inventory. If the inventory and account of sale specified in the preceding section are not returned as therein prescribed, the clerk must issue an order requiring the executor, administrator or collector to file the same within the time specified in the order, which shall not be less than twenty days, or to show cause why an attachment should not be issued against him. If, after due service of the order, the executor, administrator, or collector does not, on the return day of the order, file such inventory or account of sale, or obtain further time to file the same, the clerk shall have power to vacate the office of administrator, executor or collector.

Rev., s. 43; Code, s. 1397; 1868-9, c. 113, s. 9.

Clerk vacates office for failure to file inventory: *Armstrong v. Stowe*, 77-360; *Barnes v. Brown*, 79-401. Cited in *Atkinson v. Ricks*, 140-420. See generally: *Edwards v. Cobb*, 95-4; also see section 31.

50. New assets inventoried. When further property of any kind, not included in any previous return, comes to the hands or knowledge of any executor, administrator or collector, he must cause the same to be returned, as hereinbefore prescribed, within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as in the case of the first inventory.

Rev., s. 44; Code, s. 1398; 1868-9, c. 113, s. 10.

51. Trustees in wills to file inventories and accounts. Trustees appointed in any will admitted to probate in this state, into whose hands assets come under the provisions of the will, shall file in the office of the clerk of the county where the will is probated inventories of the assets and annual and final accounts thereof, such as are required of executors and administrators. The power of the clerk to enforce the filing and his duties in respect to audit and record shall be the same as in such cases. This section shall not apply to any will in which a different provision is made for filing inventories and accounts.

1907, c. 804.

ART. 11. ASSETS

52. Distinction between legal and equitable assets abolished. The distinction between legal and equitable assets is abolished, and all assets shall be applied in the discharge of debts in the manner prescribed by this chapter.

Rev., s. 45; Code, s. 1406; 1868-9, c. 113, s. 14.

WHAT ARE ASSETS. Rents from devised land, when: *Shell v. West*, 130-171; *Wilcoxon v. Donnelly*, 90-245; *Young v. Young*, 115-105. Proceeds from land devised to be sold: *Mills v. Harris*, 104-626; *McBee ex parte*, 63-332; but see *Newby v. Skinner*, 21-488. Proceeds from partnership settlement: *Allison v. Davidson*, 21-46. Personal property exemption: *Johnson v. Cross*, 66-167. Distinction between personalty and realty as to rights of creditors: *Baker v. Webb*, 2-43. All chattels of which administrator might have possessed himself: *Gray v. Swain*, 9-15. Rents accrued before death: *Wilcoxon v. Donnelly*, 90-245; *Fleming v. Chunn*, 57-422.

WHAT ARE NOT ASSETS. State pension warrant: *In re Smith*, 130-638. Land unsold: *Wilson v. Bynum*, 92-717; *Hawkins v. Carpenter*, 88-403; *Vaughan v. DeLoatch*, 65-378; *Fike v. Green*, 64-665. Proceeds of land sold for partition: *Allison v. Robinson*, 78-222; *Latta v. Russ*, 53-113. Partnership assets before business liquidated: *Mendenhall v. Benbow*, 84-646. Rents accrued after death: *Baptist University v. Borden*, 132-476; *Young v. Young*, 115-105; *Wilcoxon v. Donnelly*, 90-245; *Rogers v. McKenzie*, 65-218; *Fleming v. Chunn*, 57-422. Insurance policy payable to third person: *Simmons v. Biggs*, 99-236; *Conigland v. Smith*, 79-303. Recovery for wrongful death assets only for distribution: *Hood v. Telegraph Co.*, 162-92.

53. Trust estate in personalty. If any trustee, or any person interested in any trust estate, dies leaving any equitable interest in personal estate which shall come to his executor, administrator or collector, the same estate shall be deemed personal assets.

Rev., s. 46; Code, s. 1403; 1868-9, c. 113, s. 11.

54. Crops ungathered at death. The crops of every deceased person, remaining ungathered at his death, shall, in all cases, belong to the executor, administrator or collector, as part of the personal assets, and shall not pass to the widow with the land assigned as dower; nor to the devisee by virtue of any devise of the land, unless such intent be manifest and specified in the will.

Rev., s. 47; Code, s. 1407; 1868-9, c. 113, s. 15.

Cases having a bearing on section: *Parker v. Brown*, 136-280; *State v. Crook*, 132-1053; *Thomas v. Lines*, 83-191; *Flynt v. Conrad*, 61-190. Using part of crop to pay for the gathering does not subject administrator to penalty: *McDaniel v. Johns*, 53-414.

55. Real estate sold to pay debts is personal assets. All proceeds arising from the sale of real property, for the payment of debts, as hereinafter provided, shall be deemed personal assets in the hands of the executor, administrator or collector, and applied as though the same were the proceeds of personal estate.

Rev., s. 48; Code, s. 1404; 1868-9, c. 113, s. 12.

Lafferty v. Young, 125-300; Wilson v. Bynum, 92-717; Vaughan v. DeLoatch, 65-378.

56. Surplus of realty sold for debts is real assets. All proceeds from the sale of real estate, as hereinafter provided, which may not be necessary to pay debts and charges of administration, shall, notwithstanding, be considered real assets, and as such shall be paid by the executor, administrator or collector to such persons as would have been entitled to the land had it not been sold.

Rev., s. 49; Code, s. 1405; 1868-9, c. 113, s. 13.

Administrator dying, his personal representative may be sued by heir for such proceeds: Alexander v. Wolfe, 88-398. See generally: Denton v. Tyson, 118-542; Thomas v. Connelly, 104-342; Latta v. Russ, 53-111. But see Neagle v. Hall, 115-415.

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

Rev., s. 50.

See Fraudulent conveyances, sections 1005-1013.

58. Debt due from executor not discharged by appointment. The appointing of any person executor shall not be a discharge of any debt or demand due from such person to the testator.

Rev., s. 51; Code, s. 1431; 1868-9, c. 113, s. 40.

Construed: Moore v. Miller, 62-359.

59. Joint liability of heirs, etc., for debts. All persons succeeding to the real or personal property of a decedent, by inheritance, devise, bequest or distribution, shall be liable jointly, and not separately, for the debts of such decedent.

Rev., s. 52; Code, s. 1528; 1868-9, c. 113, s. 99.

Only liable after personalty exhausted: Badger v. Daniel, 79-372. Creditor can pursue property in hands of heirs or of others taking after two years, when: Hooker v. Yellowley, 128-297; Badger v. Daniel, 79-372; Hinton v. Whitehurst, 71-66; Winfield v. Burton, 79-388; Syme v. Badger, 96-197; Atkinson v. Farmer, 6-294. Cannot subject property sold after two years, even though purchaser has notice of unpaid debts, when: Brandon v. Phelps, 77-44.

Each heir a surety of the other heirs, when: *Badger v. Daniel*, 79-372. Creditor can sue heir before administrator settles, when: *Syme v. Badger*, 96-197. Statute bars creditor, when, see section 438.

60. Extent of liability of heirs, etc. No person shall be liable, under the preceding section, beyond the value of the property so acquired by him, or for any part of a debt that might by action or other due proceeding have been collected from the executor, administrator or collector of the decedent, and it is incumbent on the creditor to show the matters herein required to render such person liable.

Rev., s. 53; Code, s. 1529; 1868-9, c. 113, s. 100.

Generally discussed in *Badger v. Daniel*, 79-372. Mentioned in *Andres v. Powell*, 97-160.

61. Judgment against heirs, etc., apportioned; costs. In any such action the recovery must be apportioned in proportion to the assets or property received by each defendant, and judgment against each must be entered accordingly. Costs in such actions must be apportioned among the several defendants, in proportion to the amount of the recovery against each of them.

Rev., s. 54; Code, s. 1530; 1868-9, c. 113, s. 101.

62. Persons liable for debts to observe priorities. Every person who is liable for the debts of a decedent must observe the same preferences in the payment thereof as are established in this chapter; nor shall the commencement of an action by a creditor give his debt any preference over others.

Rev., s. 55; Code, s. 1531; 1868-9, c. 113, s. 102.

See sections 102 and 166.

63. Existence of other debts of prior or equal class. The defendants in such action may show that there are unsatisfied debts of a prior class or of the same class with that in suit. If it appears that the value of the property acquired by them does not exceed the debts of a prior class, judgment must be rendered in their favor. If it appears that the value of the property acquired by them exceeds the amount of debts which are entitled to a preference over the debt in suit, the whole amount which the plaintiff shall recover is only such a portion of the excess as is a just proportion to the other debts of the same class with that in suit.

Rev., s. 56; Code, s. 1532; 1868-9, c. 113, s. 103.

See *Heilig v. Foard*, 64-710.

64. Debts paid taken as unpaid as against heirs, etc. If any debts of a prior class to that in which the suit is brought, or of the same class, has been paid by any defendant, the amount of the debts so paid shall be estimated, in ascertaining the amount to be recovered, in the same manner as if such debts were outstanding and unpaid, as prescribed in the preceding section.

Rev., s. 57; Code, s. 1533; 1868-9, c. 113, s. 104.

65. Compelling contribution among heirs, etc. The remedy to compel contribution shall be by petition or action in the superior court or before the judge in term time against the personal representatives, devisees, legatees, and heirs also of the decedent if any part of the real estate be undevisee, within two years after probate of the will, and setting forth the facts which entitle the party to relief; and the costs shall be within the discretion of the court.

Rev., s. 58; Code, s. 1534; 1868-9, c. 113, s. 106.

Merely referred to in *Andres v. Powell*, 97-166; *Wharton v. Wilkerson*, 92-413.

ART. 12. SALES OF PERSONAL PROPERTY

66. Executor or administrator may sell without court order. Every executor and administrator shall have power in his discretion and without any order, except as hereinafter provided, to sell, as soon after his qualification as practicable, all the personal estate of his decedent.

Rev., s. 62; Code, s. 1408; 1868-9, c. 113, s. 16.

Power to sell at common law: Gray v. Armistead, 41-74; Bradshaw v. Simpson, 41-243; Polk v. Robinson, 42-235; Tyrrell v. Morris, 21-559. **See generally:** Wooten v. R. R., 128-124, and cases below. **Sale and pledge of intestate's property for benefit of administrator, effect:** Cox v. Bank, 119-302; Weisel v. Cobb, 118-23; Liles v. Rogers, 113-202; Dickson v. Crawley, 112-632; Hendrick v. Gidney, 114-543; Dancy v. Duncan, 96-117; Latham v. Moore, 59-167; Wilson v. Doster, 42-231.

67. Collector may sell only on order of court. All sales of personal property by collectors shall be made only upon order obtained, by motion, from the clerk of the superior court, who shall specify in his order a descriptive list of the property to be sold.

Rev., s. 61; Code, s. 1409; 1868-9, c. 113, s. 17.

68. Sale to be public; notice. All sales of personal estate by an executor, administrator or collector shall be publicly made, on credit or for cash, after twenty days notification posted at the courthouse and four other public places in the county.

Rev., s. 63; Code, s. 1410, 1411; 1868-9, c. 113, ss. 18, 19.

Publicly made: Davis v. Marcum, 57-189; Pate v. Kennedy, 104-234; Dickson v. Crawley, 112-629; but see McDaniel v. Johns, 53-414. **Statute is directory:** Tyrrell v. Morris, 21-559; Cannon v. Jenkins, 16-422; Wynns v. Alexander, 22-58; Dickson v. Crawley, 112-629. **Administrator cannot purchase:** Gay v. Grant, 101-206; Britton v. Browne, 4-332; Ryden v. Jones, 8-497; Cannon v. Jenkins, 16-423; Villines v. Norfleet, 17-167; Ford v. Blount, 25-519; Tate v. Dalton, 41-562; Froneberger v. Lewis, 70-456, 79-426; Tayloe v. Tayloe, 108-69; Gordon v. Finlay, 10-239—not even through a third party, Summers v. Reynolds, 95-404; Joyner v. Conyers, 59-78; Ford v. Blount, 25-516; but see Ryden v. Jones, 8-497—but if he does purchase, may be ratified by party in interest: Villines v. Norfleet, 17-167; Lyon v. Lyon, 43-201.

69. Clerk may order private sale in certain cases. When personal property consists of cotton, tobacco, peanuts, or other crops, goods, wares and merchandise, state, national or municipal bonds, or the stocks in incorporated companies, the executor or administrator may, upon application to the clerk of the superior court, obtain an order to sell and may sell such personal property at private sale for the best price that can be obtained, and shall report such sale to the clerk for confirmation.

Rev., s. 64; 1893, c. 346; 1919, c. 66.

In action on bond of administrator, the price specified as the price received at the sale of securities is not conclusive: Moseley v. Johnson, 144-257.

70. Clerk must confirm sale on creditor's objection. When any person interested, either as creditor or legatee, on the day of sale objects to the completion of any sale on account of the insufficiency of the amount bid, title to such property shall not pass until the sale is reported to and confirmed by the clerk.

Rev., s. 63; Code, s. 1411; 1868-9, c. 113, s. 19.

Creditor consenting to inadequate price estopped: Cain v. Hawkins, 50-192. **Sale conducted fairly, administrator not chargeable with inadequate prices:** Woody v. Smith, 65-116.

71. Security required; representative's liability for collection. The proceeds of all sales of personal estate and rentings of real property by public auction or privately shall be secured by bond and good personal security; and such proceeds shall be collected as soon as practicable: otherwise the executor, administrator or collector shall be answerable for the same.

Rev., s. 65; Code, s. 1413; 1893, c. 346, s. 2; 1868-9, c. 113, s. 21.

Penalty if administrator does not comply: *Pate v. Kennedy*, 104-234. "Real property" here means leasehold estates belonging to intestate: *Reeves v. McMillan*, 101-479; *Lee v. Lee*, 74-70. Degree of care in taking security: *Torrence v. Davidson*, 92-437; *Davis v. Marcum*, 57-109; *Deberry v. Ivey*, 55-370; *Nelson v. Hall*, 58-32; *Patterson v. Wadsworth*, 89-407. Gross negligence to take only bond of purchaser: *Roseman v. Pless*, 65-374. Sale rescinded when surety insolvent: *Bland v. Hartsoe*, 65-204.

72. Hours of public sale; penalty. All public sales or rentings provided for in this chapter shall be between the hours of ten o'clock a. m. and four o'clock p. m. of the day on which the sale or renting is to be made, except that in towns or cities of more than five thousand inhabitants public sales of goods, wares, and merchandise may be continued until the hour of ten o'clock p. m.; and every executor, administrator or collector who otherwise makes any sale or renting shall forfeit and pay two hundred dollars to any person suing for the same.

Rev., s. 66; Code, s. 1414; 1893, c. 346, s. 3; 1868-9, c. 113, s. 22.

This section does not apply to private sales: *Odell v. House*, 144-647. How penalty statutes construed: *Alexander v. R. R.*, 144-93. Penalty for wrongful sale: *Pate v. Kennedy*, 104-234; but see *McDaniel v. Johns*, 53-414. See cases under section 68.

73. Debts uncollected after year may be sold; list filed. Every executor, administrator and collector, at any time after one year from the grant of letters, is authorized to sell at public auction, in the manner prescribed in this chapter, all bills, bonds, notes, accounts, or other evidences of debt belonging to the decedent, which he has been unable to collect or which may be deemed insolvent. Before offering such evidences of debt at public sale he shall file with the clerk a descriptive list thereof, and obtain an order of sale therefor from the clerk, and shall make return of the proceeds of such sale as in other cases of assets.

Rev., s. 67; Code, s. 1412; 1868-9, c. 113, s. 20.

This statute only directory: *Odell v. House*, 144-647. Sales of solvent credits for less than value, effect: *Weisel v. Cobb*, 118-11; *Grant v. Reese*, 94-720. Private sale valid, if in good faith: *Dickson v. Crawley*, 112-629; *Gray v. Armistead*, 41-74.

ART. 13. SALES OF REAL PROPERTY

74. Sale of realty ordered, if personalty insufficient for debts. When the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, the executor, administrator or collector may, at any time after the grant of letters, apply to the superior court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent.

Rev., s. 68; Code, s. 1436; 1868-9, c. 113, s. 42.

History of statute and practice explained: *Wilson v. Bynum*, 92-717. Duty of personal representative to apply for sale: *Ibid.*; *Tarboro v. Pender*, 153-427; *Yarborough v. Moore*, 151-116. Personalty "insufficient": *Mahoney v. Stewart*, 123-106; *Clement v. Cozart*, 107-695, 705; *Syme v. Badger*, 96-197; *Speer v. James*, 94-417; *Sanderson v. Overman*, 98-235;

Lilly v. Wooley, 94-412; Blount v. Pritchard, 88-445; Shields v. McDowell, 82-137; Knight v. Knight, 59-134. "Debts": Long v. Oxford, 108-280; Brittain v. Dickson, 104-547; Robinson v. McDowell, 133-182; Smith v. Brown, 99-377; Bevers v. Park, 88-456; Syme v. Riddle, 88-463; Williams v. Williams, 17-69; Sanders v. Sanders, 17-262—heirs concluded as to validity of, when: McNair v. Cooper, 174-566; Best v. Best, 161-513; Stainback v. Harris, 115-100; Woodlief v. Bragg, 108-571; Long v. Oxford, 108-280; Lassiter v. Upchurch, 107-411; Proctor v. Proctor, 105-222; Brittain v. Dickson, 104-547; Smith v. Brown, 101-347; Speer v. James, 94-417; but see Tilley v. Bivens, 112-348; Person v. Montgomery, 120-111; Austin v. Austin, 132-262. Administrator "may apply": Clement v. Cozart, 109-181; Mfg. Co. v. Brower, 105-440; Pelletier v. Saunders, 67-261—"at any time," Clement v. Cozart, 109-173; Brittain v. Dickson, 104-551. "Real property": Bruton v. McRae, 125-206; Hinsdale v. Williams, 75-430; Gamble v. Watterson, 83-573; Dickens v. Long, 112-311; see section 77. "Superior Court" defined in cases following, which consider along with section 135 et seq.: Johnson v. Futrell, 86-124; Moore v. Ingram, 91-376; Pelletier v. Saunders, 67-264; Springer v. Shavender, 118-42; Brittain v. Mull, 91-504; Haywood v. Haywood, 79-42; Hyman v. Jarnigan, 65-96; McAdoo v. Benbow, 63-461; Hudson v. Cobb, 97-260; Wilson v. Bynum, 92-717—"of county where land or some part thereof situated," Ellis v. Adderton, 88-472.

CASES BEARING GENERALLY UPON STATUTE. Creditor need not be notified: Thompson v. Cox, 53-311. Creditors may apply for sale: Yarborough v. Moore, 151-116; Hobbs v. Cashwell, 152-183; Baker v. Carter, 127-94; Lee v. McKoy, 118-518; Clement v. Cozart, 112-412, 109-173; Wilson v. Pearson, 102-290; Wilson v. Bynum, 92-717; Fike v. Green, 64-667—but cannot be joined with administrator, he representing all creditors, Strickland v. Strickland, 129-84; Webb v. Atkinson, 122-683; Dickey v. Dickey, 118-956; Rawls v. Carter, 119-596. Creditors may show devastavit of personality: Sanderson v. Overman, 98-235; Bland v. Hartsoe, 65-204; Wiley v. Wiley, 63-182; but see Finger v. Finger, 64-183; see, also, section 110 et seq. Heirs may apply for sale: Settle v. Settle, 141-553—may oppose sale, Person v. Montgomery, 120-111; Rogers v. Clements, 92-81—may pay off debts to prevent sale, James v. Withers, 126-715. Administrator guilty of devastavit, remedy first on bond before selling: Clement v. Cozart, 107-695; Lee v. Beaman, 101-294; Latham v. Bell, 69-135; Carlton v. Byers, 70-691; but see Brittain v. Dickson, 104-547. Real estate the secondary fund liable to payment of debts: Hinton v. Whitehurst, 68-316, 71-66; Badger v. Daniel, 79-384; Tuck v. Walker, 106-288; Lee v. McKoy, 118-525. Statute does not apply when will directs sale: Baptist Female University v. Borden, 132-476; Wiley v. Wiley, 61-131—when personality has been lost by executor: Ibid. No devise to persons not in esse can prevent a sale to pay debts of testator: Carraway v. Lassiter, 139-145. Other cases that merely refer to section: Rhem v. Tull, 35-57; Reade v. Hamlin, 62-131; Evans v. Singletary, 63-205; Wadsworth v. Davis, 63-251; Hardee v. Williams, 65-56; Vaughn v. DeLoatch, 65-378; Stafford v. Harris, 72-198; Allison v. Robinson, 78-222; Williams v. Williams, 85-313; Tillet v. Aydlett, 90-551; Garrison v. Cox, 99-482; Jennings v. Copeland, 90-572; Gilchrist v. Middleton, 108-715; Brittain v. Dickson, 111-531; Coggins v. Flythe, 113-119; Boyd v. Redd, 118-686; Thompson v. Cox, 53-311.

75. When court may order rental. Such executor, administrator or collector, in lieu of asking for an order for the immediate sale of real estate, may ask for an order authorizing him to rent out the same for a term of not exceeding three years, and if it appears to the court that the best interests of the heirs at law and devisees of the deceased will be promoted by granting such order and that it is probable that the rents derived from the real estate during the term will be sufficient to pay off and discharge the debts and the costs of the administration, the superior court may, with the consent of the creditors, make such order upon such terms as may be best for the heirs at law, devisees and creditors of the estate; or if it is made to appear to the court that such executor, administrator or collector is able to borrow sufficient money with which to pay off and discharge all valid and just claims against the estate of the deceased, then the court shall have the power to authorize said executor or administrator to borrow money for the purpose of paying off and discharging such claims and authorizing him to rent

the real estate for a term not exceeding three years and to apply the rents to the repayment of the money thus borrowed, and the said estate shall be and remain liable for the payment of such sums as may be borrowed under such order of the court to the same extent and no further as the estate was liable for the indebtedness of the deceased to pay off and discharge the debt for which the said sums were borrowed. All orders made by the court pursuant to this section shall be approved by the judge residing in or holding the courts of the district in which such county is situated.

1913, c. 49, s. 1.

76. Lands conveyed by heir within two years sold. All conveyances of real property of any decedent made by any devisee or heir at law, within two years from the grant of letters, shall be void as to the creditors, executors, administrators and collectors of such decedent; but such conveyances to bona fide purchasers for value and without notice, if made after two years from the grant of letters, shall be valid even as against creditors.

Rev., s. 70; Code, s. 1442; 1868-9, c. 113, s. 105.

See generally: Arrington v. Arrington, 114-151; Miller v. Shoaf, 110-319; Gilchrist v. Middleton, 108-705; Davis v. Perry, 96-260; Murchison v. Whitted, 87-465; Badger v. Daniel, 79-372; Winfield v. Burton, 79-388; Hinton v. Whitehurst, 71-66; Donnolo v. Patterson, 70-649.

CONVEYANCES HELD VALID. Those made before two years, when: Davis v. Perry, 96-260. Those made after two years, when: Lee v. Giles, 161-541; Francis v. Reeves, 137-269; Bunn v. Todd, 115-138; Brandon v. Phelps, 77-44.

CONVEYANCES HELD INVALID. Those made before two years, when: Camp Mfg. Co. v. Liverman, 128-52; Renan v. Banks, 83-483. Those made after two years, when: Hooker v. Yellowley, 128-297; McArtan v. McLaughlin, 88-391.

CASES MERELY CITING STATUTE. Smith v. Brown, 99-388; Andres v. Powell, 97-166; Syme v. Badger, 96-210; Thompson v. Cox, 53-311; Speed v. Perry, 167-122.

77. Lands conveyed in fraud of creditors sold. The real estate subject to sale under this chapter shall include all the deceased may have conveyed with intent to defraud his creditors, and all rights of entry and rights of action and all other rights and interests in lands, tenements and hereditaments which he may devise, or by law would descend to his heirs: Provided, that lands so fraudulently conveyed shall not be taken from any one who purchased them for a valuable consideration and without a knowledge of the fraud.

Rev., s. 72; Code, s. 1446; 1868-9, c. 113, s. 51.

Land conveyed to third person by direction of decedent not within statute: Clement v. Cozart, 109-173; Rhem v. Tull, 35-57; compare Egerton v. Jones, 107-284. **Land conveyed to wife and children while insolvent:** Webb v. Atkinson, 122-683, 124-447. **Complaint in action to sell land fraudulently conveyed:** Sullivan v. Field, 118-358. **Bearing upon statute:** Speed v. Perry, 167-122; McCaskill v. Graham, 121-190; Clement v. Cozart, 107-700; Tuck v. Walker, 106-285; Harrington v. Hatton, 129-146; Nadal v. Britton, 112-188; Heck v. Williams, 79-437; Mannix v. Ihrie, 76-300; Waugh v. Blevins, 68-167; Paschal v. Harris, 74-335. See, also, under section 1005.

78. Effect of bona fide purchase from fraudulent grantee. When an executor, administrator or collector files his petition to sell lands which have been fraudulently conveyed, and of which there has been a subsequent bona fide sale, whereby he cannot have a decree of sale of the land, the court may give judgment in favor of such executor, administrator or collector for the value of the land, against

all persons who may have fraudulently purchased the same; and if the whole recovery is not necessary to pay the debts and charges, the residue shall be restored to the person of whom the recovery was made.

Rev., s. 73; Code, s. 1447; 1868-9, c. 113, s. 52.

Cited in *Webb v. Atkinson*, 122-688.

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

1. The amount of debts outstanding against the estate.
2. The value of the personal estate, and the application thereof.
3. A description of all the legal and equitable real estate of the decedent, with the estimated value of the respective portions or lots.
4. The names, ages and residences, if known, of the devisees and heirs at law of the decedent.

Rev., s. 77; Code, s. 1437; 1868-9, c. 113, s. 43.

Petition must show that personalty insufficient: *Clement v. Cozart*, 107-695; *Blount v. Pritchard*, 88-445; *Shields v. McDowell*, 82-137—**need not show that bond of former administrator was exhausted**, *Monger v. Kelly*, 115-294—**may state that it will be necessary to sell land fraudulently conveyed**, *Sullivan v. Field*, 118-358—**must show value and disposition of personalty**, *McNeil v. McBryde*, 112-408—**must show amount of debts**, *Austin v. Austin*, 132-265. **Effect of failure to verify petition:** *Stradley v. King*, 84-635. **Other cases that may throw light on section:** *Wilson v. Bynum*, 92-717; *Hinton v. Whitehurst*, 68-316; *Haywood v. Haywood*, 79-42; *Thompson v. Cox*, 53-311.

80. Heirs and devisees necessary parties. No order to sell real estate shall be granted till the heirs or devisees of the decedent have been made parties to the proceeding, by service of summons, either personally or by publication, as required by law.

Rev., s. 74; Code, s. 1438; 1868-9, c. 113, s. 44.

Heirs necessary parties: *Webb v. Atkinson*, 122-683; *Dickens v. Long*, 109-165; *Wadsworth v. Davis*, 63-251; *Thompson v. Cox*, 53-313. **Decree void as to heirs or devisees not served:** *Card v. Finch*, 142-140; *Harrison v. Harrison*, 106-282; *Perry v. Adams*, 93-171; *Stancill v. Gay*, 92-462. **Heirs may plead statute of limitations:** *Matthews v. Peterson*, 150-134.

Infants appear, how: *Settle v. Settle*, 141-553; *Carraway v. Lassiter*, 139-145. **Appointment of guardian ad litem by clerk:** *Ibid.* **Irregularity in making infant parties:** *Glisson v. Glisson*, 153-185; *Carraway v. Lassiter*, 139-145; *Stancill v. Gay*, 92-462; *Hare v. Holloman*, 94-14; *Stradley v. King*, 84-635; *Cates v. Pickett*, 97-21; *Harrison v. Harrison*, 106-282; *Chambers v. Penland*, 78-53. **Infant heir estopped by recitals in record, when:** *Morrison v. Craven*, 120-327; *Sledge v. Elliott*, 116-712. **See generally:** *Harris v. Brown*, 123-419; *Morrisett v. Ferebee*, 120-6.

81. Adverse claimant to be heard. When the land, which is sought to be sold, is claimed by another person under any pretense whatsoever, such claimant shall be admitted to be heard as a party to the proceeding, upon affidavit of his claim, and if the issue be found for the petitioner he shall have his writ of possession and order of sale accordingly.

Rev., s. 76; Code, s. 1441; 1868-9, c. 113, s. 47.

See generally: *Perry v. Peterson*, 98-63; *Gibson v. Pitts*, 69-155. **Adverse claimant being party to action, estopped by confirmation of sale:** *Smith v. Huffman*, 132-600.

82. Upon issues joined, transferred to term. When an issue of law or fact is joined between the parties, the course of the procedure shall be as prescribed in such cases for other special proceedings.

Rev., s. 78; Code, s. 1440; 1868-9, c. 113, s. 46.

Person v. Montgomery, 120-111; Stainback v. Harris, 115-100; Perry v. Peterson, 98-63; Jones v. Hemphill, 77-42; McBryde v. Patterson, 73-479.

83. Order granted, if petition not denied. As soon as all proper parties are made to the proceeding, the clerk of the superior court before whom it is instituted, if the allegations in the petition are not denied or controverted, shall have power to hear the same summarily, and to decree a sale.

Rev., s. 79; Code, s. 1443; 1868-9, c. 113, s. 48.

84. Notice of sale as on execution. Notice of sale under this proceeding shall be the same as for the sale of real estate by sheriffs on execution.

Rev., s. 81; Code, s. 1445; 1868-9, c. 113, s. 50.

85. Court fixes extent and terms; title on confirmation. The court may decree a sale of the whole or any specified parcel of the premises in such a manner, as to size of lots, place of sale, terms of credit, and security for payment of purchase money, as may be most advantageous to the estate, and may also authorize and empower the petitioner or any commissioner appointed by the court to subdivide the land in question, or any part thereof, in such manner as he may deem proper and for the best interest of the estate, and, in making such division, to dedicate to the public such parts thereof as he may find necessary for public streets, alleys, and highways, and to sell such premises, either in bulk or in separate lots, with such streets, alleys, and highways excepted or reserved; but no sale, whether public or private, shall be concluded until reported to and approved and confirmed by the court. Upon the coming in of the report of the sale and the confirmation thereof, title shall be made by such person, and at such time as the court may prescribe, and in all cases where the persons in possession have been made parties to the proceeding, the court may grant an order for possession.

Rev., s. 80; Code, s. 1444; 1868-9, c. 113, s. 49; 1917, c. 127, s. 1.

ORDER. May direct sale of any portion: Tillett v. Aydlett, 90-551, 93-15. Made erroneously: Hyman v. Jarnigan, 65-96.

SALE. Cases holding no fraud in Coffin v. Cook, 106-376. Purchaser not entitled to order for possession, when: Marcom v. Wyatt, 117-129. Administrator cannot purchase: Highsmith v. Whitehurst, 120-123; Howell v. Tyler, 91-207; Roberts v. Roberts, 65-27; Froneberger v. Lewis, 70-456; see under section 68. Title to land offered presumed good: Shields v. Allen, 77-375. Administrator not reporting sale, remedy: Mason v. Osgood, 64-467. Purchaser compelled to complete purchase: Hudson v. Coble, 97-260.

CONFIRMATION OF SALE. Harrell v. Blythe, 140-415; Joyner v. Futrell, 136-301; Smith v. Hoffman, 132-600; Shute v. Austin, 120-440; Marcom v. Wyatt, 117-129; Foushee v. Durham, 84-56; Stradley v. King, 84-635; Shearin v. Hunter, 72-493; Thompson v. Cox, 53-311; Evans v. Singletary, 63-205.

PURCHASER'S TITLE. Made, when: Joyner v. Futrell, 136-301; Foushee v. Durham, 84-56; Mason v. Osgood, 64-467; but see Hyman v. Jarnigan, 65-96; Godley v. Taylor, 14-178. Validity of title discussed: Pinnell v. Burroughs, 168-315; Yarborough v. Moore, 151-116; Carraway v. Lassiter, 139-145; Highsmith v. Whitehurst, 120-123; Piercy v. Watson, 118-976; Sledge v. Elliott, 116-712; Lictie v. Chappell, 111-347; Grimes v. Taft, 98-193; Perry v. Peterson, 98-63; McLean v. Patterson, 84-427.

EFFECT OF DECREE. Fixes liability of land to sale, but not conclusive as to debts: In re Gorham, 177-271; Trust Co. v. Stone, 176-270; Austin v. Austin, 132-265; Latta v. Rush, 53-111.

CASES IN WHICH PROCEEDINGS ATTACKED: Glisson v. Glisson, 153-185; Rackley v. Roberts, 147-201; Settle v. Settle, 141-553; Carraway v. Lassiter, 139-145; Morrow v. Cole, 132-678; Murray v. Southerland, 125-175; McNeill v. Fuller, 121-209; Morrison v. Craven, 120-327; Rawls v. Carter, 119-596; Springer v. Shavender, 118-33; Smith v. Gray, 116-311; Sledge v. Elliott, 116-712; Wilson v. Deweese, 114-653; Adams v. Howard, 110-15; Dickens v. Long, 109-165; Harrison v. Harrison, 106-282; Coffin v. Cook, 106-376; McLaurin v. McLaurin, 106-331; McIver v. Stephens, 101-255; Edwards v. Moore, 99-1; McGlawhorn v. Worthington, 98-199; Perry v. Peterson, 98-63; Ward v. Lowndes, 96-367; Hare v. Holloman, 94-14; Sumner v. Sessoms, 94-371; Fowler v. Poor, 93-466; Simonton v. Brown, 72-46; Lovinier v. Pearce, 70-168; Hyman v. Jarnigan, 65-96; Overton v. Crawford, 52-415.

86. Court may order private sale; terms; sale reopened. If it is made to appear to the court by petition and by satisfactory proof that it will be more for the interest of said estate to sell such real estate by private sale, the court may authorize said petitioner, or any commissioner appointed by the court, to sell the same at private sale, either in whole or in part, for cash in hand, or upon deferred payments, not exceeding two years, with interest from date of sale, the deferred payments to be secured by mortgage or deed of trust upon the property, or by the retention of the title thereto until the purchase money is paid. When any order for private sale has been or may hereafter be made by any superior court of the state, the provisions of section 2591, chapter, Mortgages and Deeds of Trust, not inconsistent with this section shall apply; and the court may also, upon motion of any person interested in the proceeds of such sale, filed in writing within ten days from the date and report of said sale, together with satisfactory proof that said real property has not been sold for its real value, require the sale to be reopened, and thereupon the court may issue an order for the sale of such premises at public sale, as required by section 2591, chapter, Mortgages and Deeds of Trust, and in such order the court may require such premises to be sold in such parcels and on such terms as to the court may seem most advantageous to the estate.

1917, c. 127, s. 2.

87. Undevised realty first sold. When any part of the real estate of the testator descends to his heirs by reason of its not being devised or disposed of by the will, such undevised real estate shall be first chargeable with payment of debts, in exoneration, as far as it will go, of the real estate that is devised, unless from the will it appears otherwise to be the wish of the testator.

Rev., s. 69; Code, s. 1430; 1868-9, c. 113, s. 39.

The will should be disturbed as little as practicable: Tillet v. Aydlett, 90-553. Land undevised sold first: Camp Mfg. Co. v. Liverman, 123-7. Section cited in Speed v. Perry, 167-122.

88. Specifically devised realty; contribution. If, upon the hearing of any petition for the sale of real estate to pay debts, under this chapter, the court decrees a sale of any part that may have been specifically devised, the devisee shall be entitled to contribution from other devisees, according to the principles of equity in respect to contribution among legatees. And the children and issue provided for in this chapter shall be regarded as specific devisees in such contribution.

Rev., s. 86; Code, s. 1535; 1868-9, c. 113, s. 107.

Miller v. Shoaf, 110-319; Lilly v. Wooley, 94-412; Badger v. Daniel, 79-372. Land not specifically devised will exonerate a specific bequest of personalty: Jones v. Huntley, 156-410.

89. Under power in will, sales public or private. Sales of real property made pursuant to authority given by will, unless the will otherwise directs, may be public or private, and on such terms as, in the opinion of the executor, are most advantageous to those interested therein.

Rev., s. 84; Code, s. 1503; 1868-9, c. 113, s. 75.

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

Rev., s. 82; Code, s. 1493; 1889, c. 461.

Cited in *Duckworth v. Jordan*, 138-526; *Saunders v. Saunders*, 108-331; *Creech v. Grainger*, 106-220; *Hester v. Hester*, 37-330. Land converted into personalty: *Mills v. Harris*, 104-626— and administrator with will annexed can make valid title, *Orrender v. Call*, 101-399. Surviving executor executes powers: *Simpson v. Simpson*, 93-373. Power to sell does not include power to option: *Trogden v. Williams*, 144-192. Where two or more executors appointed to sell, all of them must execute the power: *Trogden v. Williams*, 144-192; *Wasson v. King*, 19-262; *Debow v. Hodge*, 4-36. Foreign executors cannot convey land here unless they qualify in this state: *Scott v. Lumber Co.*, 144-44. A waiver by one executor does not bind the other: *Trogden v. Williams*, 144-192. See section 2578.

91. Death of vendor under contract, representative to convey. When any deceased person has bona fide sold any lands, and has given a bond or other written contract to the purchaser to convey the same, and the bond or other written contract has been duly proved and registered in the county where the lands are situated, if within the state, or, if not in the state, shall be proved before the clerk of the superior court and registered in the county where the obligee lives or obligor died, his executor, administrator or collector may execute a deed to the purchaser conveying such estate as shall be specified in the bond or other written contract; and such deed shall convey the title as fully as if it had been executed by the deceased obligor: Provided, that no deed shall be made but upon payment of the price, if that be the condition of the bond or other written contract.

Rev., s. 83; Code, s. 1492; 1868-9, c. 113, s. 65; 1874-5, c. 251.

Contracts within the statute: *Hodges v. Hodges*, 22-72. Personal representative conveys: *Overman v. Jackson*, 104-4. Equitable defenses against bond set up against deed: *McCraw v. Gwin*, 42-55. Conveyance before contract registered and money paid inoperative: *Taylor v. Hargrove*, 101-145. Heirs cannot enjoin personal representative from conveying: *White v. Hooper*, 59-152. Title conveyed with covenant of quiet enjoyment, effect: *Osborne v. McMillan*, 50-109. Purchaser must show consideration paid before getting deed: *Lindsay v. Coble*, 37-602. Does not apply to option accepted after death of owner of land; the title is then in heir or devisee: *Mizell v. Lumber Co.*, 174-68. Cases merely citing section: *Taylor v. Gooch*, 110-390; *Grubb v. Lookabill*, 100-270; *Twitty v. Lovelace*, 97-54. See, also, *Earle v. McDowell*, 12-16.

92. Title in representative for estate, he or successor to convey. When land is conveyed to a personal representative for the benefit of the estate he represents, he may sell and convey same upon such terms as he may deem just and for the advantage of said estate; which sale shall be public, after due advertisement, as for judicial sales, unless the conveyance is made to the party entitled to the proceeds. If such land is not conveyed by such personal representative during his life or term of office, his successor may sell and convey such land as if the title had been made to him: Provided, if the predecessor has contracted in writing to sell said lands, but fails to convey same, his successor in office may do so upon payment of the purchase price.

Rev., s. 71; 1905, c. 342.

ART. 14. PROOF AND PAYMENT OF DEBTS OF DECEDENT

93. Order of payment of debts. The debts of the decedent must be paid in the following order:

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

Where valid lien upon property sold, administrator must use first moneys to discharge lien: *Pate v. Oliver*, 104-458; see, also, *Chemical Co. v. Edwards*, 136-78; *Moore v. Dunn*, 92-63; *Creasy v. Pearce*, 69-67.

Second class. Funeral expenses.

Funeral expenses of no one but intestate included: *Baker v. Dawson*, 131-227—paid any one who of necessity has to advance costs of burial, *Ray v. Honeycutt*, 119-510; see, also, *Parker v. Lewis*, 13-22; *Ward v. Jones*, 44-127; *Barbee v. Green*, 92-471.

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

Taxes to be paid as other debts, and not by ordinary process by sheriff: *Sherrod v. Dawson*, 154-525; see, also, *James v. Withers*, 126-715.

Fourth class. Dues to the United States and to the state of North Carolina.

Fifth class. Judgments of any court of competent jurisdiction within this state, docketed and in force, to the extent to which they are a lien on the property of the deceased at his death.

Priority is determined at the death of the debtor: *Tarboro v. Pender*, 153-427. Debt for purchase money of land is not preferred: *Moore v. Ingram*, 91-376. Cases as to debts of fifth class: *Mauney v. Holmes*, 87-428; *Galloway v. Bradfield*, 86-163; *Murchison v. Williams*, 71-135; *Jenkins v. Carter*, 70-500; *Dancy v. Pope*, 68-147.

Sixth class. Wages due to any domestic servant or mechanical or agricultural laborer employed by the deceased, which claim for wages shall not extend to a period of more than one year next preceding the death; or if such servant or laborer was employed for the year current at the decease, then from the time of such employment; for medical services within the twelve months preceding the decease.

As to debt to child for services performed for parent: *Winkler v. Killian*, 141-575; and cases therein cited.

Seventh class. All other debts and demands.

Foreign and domestic creditors are on same footing as to assets: *Findley v. Gidney*, 75-395. No debt of the estate can be created after the death of intestate: *Lindsay v. Darden*, 124-307.

Cases merely citing statute: *Atkinson v. Ricks*, 140-421; *Cobb v. Rhea*, 137-298; *Cowles v. Hall*, 113-361; *State and Guilford v. Georgia Co.*, 112-42; *Lee v. Eure*, 82-428. Rev., s. 87; Code, s. 1416; 1868-9, c. 113, s. 24.

94. No preference within class. No executor, administrator or collector shall give to any debt any preference whatever, either by paying it out of its class or by paying thereon more than a pro rata proportion in its class.

Rev., s. 88; Code, ss. 1417, 1418; 1868-9, c. 113, ss. 25, 26.

Coggins v. Flythe, 113-114; *Worthy v. Brower*, 93-344; *Moore v. Byers*, 65-240; *Moye v. Albritton*, 42-62. See sections 95 and 173.

95. When payment out of class held valid. Where any executor or administrator has paid any debt of his testator or intestate before all the debts of higher dignity have been paid and satisfied, and the estate of such testator or intestate was at the time of such payment solvent, but has since been rendered insolvent by the emancipation of the slaves, or the insolvency of the debtors of the estate, or other cause, without any fault or want of diligence on the part of the executor or administrator, or when any creditor has refused to accept payment of his debt in Confederate currency, and such currency was afterwards used by the executor or administrator in payment of debts of the estate, or it became of no value by the termination of the war, in all such cases payments thus made shall be deemed and held valid in law, and shall be allowed to such executor or administrator in all suits by creditors of the estate seeking to charge such executor or administrator with assets of the estate or with devastavit thereof, without regard to the dignity of the debt thus paid, or on which such suit may be brought.

Rev., s. 96; Code, s. 1496; 1869-70, c. 150.

Cited in *Coggins v. Flythe*, 113-114. See, also, *Coltraine v. Spurgin*, 31-52; *Roundtree v. Sawyer*, 15-44, and cases cited under sections 94 and 173.

96. Debts due representative not preferred. No property or assets of the decedent shall be retained by the executor, administrator or collector in satisfaction of his own debt, in preference to others of the same class; but such debt must be established upon the same proof and paid in like manner and order as required by law in case of other debts.

Rev., s. 89; Code, s. 1420; 1868-9, c. 113, s. 28.

97. Debts not due rebated. Debts not due may be paid on a rebate of interest thereon for the time unexpired.

Rev., s. 90; Code, s. 1419; 1868-9, c. 113, s. 27.

98. Affidavit of debt may be required. Upon any claim being presented against the estate, the executor, administrator or collector may require the affidavit of the claimant or other satisfactory evidence that such claim is justly due, that no payments have been made thereon, and that there are no offsets against the same, to the knowledge of the claimant; or if any payments have been made, or any offsets exist, their nature and amount must be stated in such affidavit.

Rev., s. 91; Code, s. 1425; 1868-9, c. 113, s. 33.

Hinton v. Pritchard, 126-8.

99. Disputed debt may be referred. If the executor, administrator or collector doubts the justness of any claim so presented, he may enter into an agreement,

in writing, with the claimant, to refer the matter in controversy, whether the same be of a legal or equitable nature, to one or more disinterested persons, not exceeding three, whose proceedings shall be the same in all respects as if such reference had been ordered in an action. Such agreement to refer, and the award thereupon, shall be filed in the clerk's office where the letters were granted, and shall be a lawful voucher for the personal representative. The same may be impeached in any proceeding against the personal representative for fraud therein: Provided, that the right to refer claims under this section shall extend to claims in favor of the estate as well as those against it.

Rev., s. 92; Code, s. 1426; 1868-9, c. 113, s. 34; 1872-3, c. 141.

Cited in *McLeod v. Graham*, 132-473; *Dunn v. Beaman*, 126-766; *Lassiter v. Upchurch*, 107-411; *Morris v. Morris*, 94-613; *Fleming v. Fleming*, 85-127.

100. Disputed debt not referred, barred in six months. If a claim is presented to and rejected by the executor, administrator or collector, and not referred as provided in the preceding section, the claimant must, within six months after due notice in writing of such rejection, or after some part of the debt becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon.

Rev., s. 93; Code, s. 1427; 1868-9, c. 113, s. 35; 1913, c. 3, s. 1.

Cases merely citing section: *Morrisey v. Hill*, 142-355; *Whitaker v. Whitaker*, 138-208; *Andres v. Powell*, 97-167; *Fleming v. Fleming*, 85-129.

101. If claim not presented in twelve months, representative discharged as to assets paid. In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the executor, administrator or collector shall not be chargeable for any assets that he may have paid in satisfaction of any debts, legacies or distributive shares before such action was commenced; nor shall any costs be recovered in such action against the executor, administrator or collector.

Rev., s. 94; Code, s. 1428; 1868-9, c. 113, s. 37.

Morrisey v. Hill, 142-355; *Mallard v. Patterson*, 108-255. See, also, cases under section 412.

102. No lien by suit against representative. No lien shall be created by the commencement of a suit against an executor, administrator or collector.

Rev., s. 95; Code, s. 1432; 1868-9, c. 113, s. 41.

Effect of taking a judgment: *Grant v. Bell*, 91-495; *Holmes v. Foster*, 78-35; *Vaughn v. Stephenson*, 69-212; *Dunn v. Barnes*, 73-273. See, also, sections 62 and 166.

103. When costs against representative allowed. No costs shall be recovered in any action against an executor, administrator or collector, unless it appears that payment was unreasonably delayed or neglected, or that the defendant refused to refer the matter in controversy, in which cases the court may award such costs against the defendant personally, or against the estate, as may be just.

Rev., s. 97; Code, s. 1429; 1868-9, c. 113, s. 38.

NOTE. See Costs; see, also, s. 121.

See *Whitaker v. Whitaker*, 138-205; *Morris v. Morris*, 94-613; *Fleming v. Fleming*, 85-127; *May v. Darden*, 83-237. Cited merely in *Valentine v. Britton*, 127-59; *Woodlief v. Bragg*, 108-572; *Long v. Oxford*, 108-281.

104. Obligations binding heirs collected as other debts. Bonds and other obligations in which the ancestor has bound his heirs shall not be put in suit against the heirs or devisees of the deceased, but shall be paid as other debts of the same class in the manner provided in this chapter.

Rev., s. 98; Code, s. 1404; 1868-9, c. 113, s. 12.

See *Pate v. Oliver*, 104-458; *Earle v. McDowell*, 12-16.

ART. 15. ACCOUNTS AND ACCOUNTING

105. Annual accounts. Every executor, administrator and collector shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file, in the office of the clerk of the superior court, an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and, having carefully revised and audited such account, if he approve the same, he must endorse his approval thereon, which shall be deemed prima facie evidence of correctness.

Rev., s. 99; Code, s. 1399; C. C. P., s. 478; 1871-2, c. 46.

“Account” defined in *State v. Dunn*, 134-668. Account prima facie correct: *Marler v. Golden*, 172-823; *Bean v. Bean*, 135-92; *Coggins v. Flythe*, 113-102; *Allen v. Royster*, 107-282; *Grant v. Hughes*, 94-231. Rents and profits of certain land are assets: *Lafferty v. Young*, 125-296. Case in which annual and final account distinguished: *Burgwyn v. Daniel*, 115-115. Referred to in *Stonestreet v. Frost*, 123-292; *Turner v. Turner*, 104-572; *Grant v. Rogers*, 94-762; *Gregory v. Ellis*, 82-228; *McFayden v. Council*, 81-195; *Heilig v. Foard*, 64-710.

106. Clerk may compel account. If any executor, administrator or collector omits to account, as directed in the preceding section, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such executor, administrator or collector to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such executor, administrator or collector fail to appear or refuse to exhibit such account, the clerk may issue an attachment against him for a contempt and commit him till he exhibit such account, and may likewise remove him from office.

Rev., s. 100; Code, s. 1400; C. C. P., s. 479.

“Account” defined in *State v. Dunn*, 134-668. See *Atkinson v. Ricks*, 140-420; *Bean v. Bean*, 135-92. Cited merely in *Edwards v. Cobb*, 95-8; *Battle v. Duncan*, 90-548.

107. Vouchers presumptive evidence. Vouchers are presumptive evidence of disbursement, without other proof, unless impeached. If lost, the accounting party must, if required, make oath to that fact, setting forth the manner of loss, and state the contents and purport of the voucher. And this section shall apply to guardians, collectors, trustees and to all other persons acting in a fiduciary character.

Rev., s. 101; Code, s. 1401; C. C. P., s. 480.

What voucher must show: *McLean v. Breese*, 109-564; *Costen v. McDowell*, 107-546—effect of failure to impeach at proper time, *Drake v. Drake*, 82-443.

108. Gravestones authorized. It is lawful for executors and administrators to provide suitable gravestones to mark the graves of their testators or intestates, and to pay for the cost of erecting the same, and the cost thereof shall be paid as funeral expenses and credited as such in final accounts. The cost thereof shall be in the sound discretion of the executor or administrator, having due regard to the value of the estate and to the interests of creditors and needs of the widow and distributees of the estate. Where the executor or administrator desires to spend more than one hundred dollars for such purpose he shall file his petition before the clerk of the court, and such order as will be made by the court shall specify the amount to be expended for such purpose, and same shall be approved by the resident judge of the district.

Rev., s. 102; 1905, c. 444.

109. Final accounts. An executor or administrator may be required to file his final account for settlement in the office of the clerk of the superior court by a citation directed to him, at any time after two years from his qualification, at the instance of any person interested in the estate; but such account may be filed voluntarily at any time; and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk.

Rev., s. 103; Code, s. 1402; C. C. P., s. 481.

“Account” defined in *State v. Dunn*, 134-668. “Final account” defined in *Vaughan v. Hines*, 87-445; *Burgwyn v. Daniel*, 115-115; *Collins v. Smith*, 109-468. *Prima facie* correct: *Marler v. Golden*, 172-823; *Rich v. Morisey*, 149-47; *Jones v. Sugg*, 136-144; *Allen v. Royster*, 107-278; *Turner v. Turner*, 104-566. See generally: *Woody v. Brooks*, 102-334. Section merely cited in *Atkinson v. Ricks*, 140-420; *Bean v. Bean*, 135-93; *Edwards v. Lemmond*, 136-330; *Self v. Shugart*, 135-189; *Stonestreet v. Frost*, 123-292; *Brawley v. Brawley*, 109-525; *Woody v. Brooks*, 102-341; *Reaves v. Davis*, 99-429; *Andres v. Powell*, 97-165. In a petition for final settlement, administrator can correct his annual accounts by showing them erroneous: *Medlin v. Simpson*, 144-397. Other cases of interest: *Hodges v. Council*, 86-184; *Heilig v. Foard*, 64-714; *Rowland v. Thompson*, 65-110.

110. Creditor's special proceeding for accounting. Any creditor of a deceased person may, within the times prescribed by law, prosecute a special proceeding or a civil action before the judge in his own name and in behalf of himself and all other creditors of the deceased without naming them, against the personal representative of the deceased, to compel him to an account of his administration, and to pay the creditors what may be payable to them respectively.

Rev., s. 104; Code, s. 1448; 1871-2, c. 213; 1876-7, c. 241, s. 6.

Any creditor can become plaintiff: *Long v. Bank*, 85-354. *Summons and complaint*: *Isler v. Murphy*, 76-52. *Effect of suit brought by one creditor for all*: *Dobson v. Simonton*, 93-268. *Difference between action under this section and creditor's bill in equity*: *Patterson v. Miller*, 72-516. *Jurisdiction*: *Clement v. Cozart*, 107-695; *Hester v. Lawrence*, 102-319; *Warden v. McKinnon*, 94-378; *Pegram v. Armstrong*, 82-326; *Bratton v. Davidson*, 79-423; *Haywood v. Haywood*, 79-42; *Herring v. Outlaw*, 70-334; *Jerkins v. Carter*, 70-500. *Creditors cannot become defendants in action by administrators for settlement*: *Carlton v. Byers*, 93-302. *Where plea in bar set up, it must be tried before accounting ordered*: *Oldham v. Rieger*, 145-254; see cases under section 573. *Actions and proceedings brought under this section wherein section not construed*: *Atkinson v. Ricks*, 140-420; *Jones v. Sugg*, 136-143; *Dunn v. Beaman*, 126-764, 766; *Clement v. Cozart*, 107-695; *Love v. Ingram*, 104-600; *Perkins v. Berry*, 103-131; *Hester v. Lawrence*, 102-319; *Brooks v. Brooks*, 97-136; *Warden v. McKinnon*, 94-378; *Speer v. James*, 94-417; *Grant v. Hughes*, 94-231; *Dobson v. Simonton*, 93-268; *Moore v. Edwards*, 92-43; *Moore v. Ingram*, 91-376; *Daniel v. Laughlin*, 87-433; *Mauney v. Mauney*, 87-428; *Long v. Bank*, 85-354; *Bacon v. Berry*, 85-124; *Graham v. Tate*, 77-120; *Isler v.*

Murphy, 76-52; Wordsworth v. Davis, 75-159; Patterson v. Miller, 72-516; Ballard v. Kilpatrick, 71-281; Overman v. Grier, 70-693. Cases where mere reference is made to section: Valentine v. Britton, 127-59; Dickey v. Dickey, 118-956; Cowles v. Hall, 113-361; Clement v. Cozart, 109-181; Wilson v. Pearson, 102-314; Andres v. Powell, 97-165; Carlton v. Byers, 93-302. See cases under section 135.

111. Rules which govern creditor's proceeding. The special proceeding shall be governed by the rules of practice prescribed for special proceedings, except so far as the same are modified by this chapter.

Rev., s. 105; Code, s. 1449; 1871-2, c. 213, s. 2.

Isler v. Murphy, 76-53; Warden v. McKinnon, 94-388.

112. When and where summons returnable. The summons in said special proceeding shall be returnable before the clerk of the superior court of the county in which letters testamentary or of administration were granted, and on a day not less than forty nor more than one hundred days from the issuing thereof, and not less than twenty days after the service thereof.

Rev., s. 106; Code, s. 1450; 1871-2, c. 213, s. 3.

Brooks v. Brooks, 97-141; Isler v. Murphy, 76-52.

113. Clerk to advertise for creditors. On issuing the summons, the clerk shall advertise for all creditors of the deceased to appear before him on or before the return day and file the evidences of their claims.

Rev., s. 107; Code, s. 1451; 1871-2, c. 213, s. 4.

Hester v. Lawrence, 102-319; Warden v. McKinnon, 94-388.

114. Publication of advertisement. The advertisement shall be published at least once a week for not less than four weeks in some newspaper which may be thought by the clerk the most likely to inform all the creditors, and shall also be posted at the courthouse door for not less than thirty days. If, however, the estate does not exceed three thousand dollars in value, and the creditors are supposed by the clerk all to reside within the county or to be known, publication in a newspaper may be omitted, and in lieu thereof the advertisement shall be posted at four public places in the county, besides the courthouse door. Proof of personal service on a creditor or that a copy of the advertisement was sent to him by mail at his usual address shall be as to him equivalent to publication.

Rev., s. 108; Code, s. 1452; 1903, c. 134; 1871-2, c. 213, s. 5.

Hester v. Lawrence, 102-319; Warden v. McKinnon, 94-388.

115. Creditors to file claims and appoint agent. The creditors of the deceased on or before the required day shall file with the clerk the evidences of their demands, and every creditor on filing such claim shall endorse thereon or otherwise name some person or place within the town in which the court is held, upon whom or where notices in the cause may be served or left; otherwise he shall be deemed to have notice of all motions, orders and proceedings in the cause filed or made in the clerk's office.

Rev., s. 109; Code, s. 1453; 1871-2, c. 213, s. 6.

Creditor filing claim has standing in court: Warden v. McKinnon, 94-378; Moore v. Edwards, 92-43.

116. Proof of claims. If the evidence of the demand is other than a judgment, or some writing signed by the deceased, it shall be accompanied by the oath of

the creditor, or, if he be nonresident or infirm or absent, or in any other proper case, of some witness of the transaction, or of some agent of the creditor, that to the best of his knowledge and belief the claim is just, and that all due credits have been given.

Rev., s. 110; Code, s. 1454; 1871-2, c. 213, s. 7.

Warden v. McKinnon, 94-388; Isler v. Murphy, 76-52; Long v. Bank, 85-354.

117. Representative to file claims; notice to creditors. On the day of his appearance the personal representative shall on oath give to the clerk a list of all claims against the deceased of which he has received notice or has any knowledge, with the names and residences of the claimants to the best of his knowledge and belief; and if any person so named has failed to file evidence of his claim, the clerk shall immediately cause a notice requiring him to do so to be served on him, which may be done by posting the same, directed to him at his usual address.

Rev., s. 111; Code, s. 1455; 1871-2, c. 213, s. 8.

Fleming v. Fleming, 85-130.

118. Clerk to exhibit to representative claims filed. On the day fixed for the appearance of the personal representative, the clerk shall exhibit to him a list of all the claims filed in his office, with the evidences thereof.

Rev., s. 112; Code, s. 1456; 1871-2, c. 213, s. 9.

Fleming v. Fleming, 85-130.

119. If representative denies claim, creditor notified. Within five days thereafter the defendant shall state in writing on said list, or on a separate paper, which of said claims he disputes in whole or in part. The clerk shall then notify the creditor, as above provided, that his claim is disputed, and the creditor shall thereupon file in the office of the clerk a complaint founded on his said claim, and the pleadings shall be as in other cases.

Rev., s. 113; Code, s. 1457; 1871-2, c. 213, s. 10.

Practice in case of administrator denying claim: Warden v. McKinnon, 94-378; Graham v. Tate, 77-124; Moore v. Edwards, 92-43. Creditor can dispute claim of other creditor, when: Oates v. Lilly, 84-643; Wordsworth v. Davis, 75-159; Overman v. Grier, 70-693. Referred to in Atkinson v. Ricks, 140-420; Fleming v. Fleming, 85-130; Isler v. Murphy, 76-54.

120. Issues joined; cause sent to superior court. If the issues joined be of law, the clerk shall send the papers to the judge of the superior court for trial, as is provided for by the chapter on Civil Procedure in like cases. If the issues shall be of fact, the clerk shall send so much of the record as may be necessary to the next term of the superior court for trial.

Rev., s. 114; Code, s. 1458; 1871-2, c. 213, s. 11.

Atkinson v. Ricks, 140-420; Warden v. McKinnon, 94-388; Graham v. Tate, 77-124. No accounting ordered until pleas in bar tried: Oldham v. Rieger, 145-254; see, also, cases cited under section 573.

121. When representative personally liable for costs. If any personal representative denies the liability of his deceased upon any claim evidenced as is provided in this chapter, and the issue is finally decided against him, the costs of the trial shall be paid by him personally, and not allowed out of the estate, unless it appears that he had reasonable cause to contest the claim and did so bona fide.

Rev., s. 115; Code, s. 1459; 1871-2, c. 213, s. 12.

NOTE. See s. 103.

Referred to in Valentine v. Britton, 127-59.

122. Court may permit representative to appear after return day. If the personal representative fails to appear on the return day, the clerk or judge of the superior court may permit him afterward to appear and plead on such terms as may be just.

Rev., s. 116; Code, s. 1460; 1871-2, c. 213, s. 13.

123. Clerk to state account. Immediately after the return day the clerk or judge shall proceed to hear such evidence as shall be brought before him, and to state an account of the dealings of the personal representative with the estate of his deceased according to the course of his court.

Rev., s. 117; Code, s. 1461; 1871-2, c. 213, s. 14.

Atkinson v. Ricks, 140-420.

124. Exception to report; final report and judgment. After the clerk has stated the account and prepared his report, he shall notify all the parties to examine and except to the same. Any party may then except to the same in whole or in part. The clerk shall then pass on the exceptions and prepare and sign his final report and judgment, of which the parties shall have notice.

Rev., s. 118; Code, s. 1462; 1871-2, c. 213, s. 15.

Cited in Atkinson v. Ricks, 140-420; Hester v. Lawrence, 102-324.

125. Appeal from judgment; security for costs. Any party may appeal from a final judgment of the clerk to the judge of the superior court in term time, on giving an undertaking with surety, or making a deposit, to pay all costs which shall be recovered against him. If any creditor appeals and gives such security, his appeal shall be deemed an appeal by all who are damaged by the judgment, and no other creditor shall be required to give any undertaking.

Rev., s. 119; Code, s. 1464; 1871-2, c. 213, s. 17.

126. Papers on appeal filed and cause docketed. On an appeal the clerk shall file his report and judgment and all the papers in his office as clerk of the superior court, and enter the case on his trial docket for the next term.

Rev., s. 120; Code, s. 1465; 1871-2, c. 213, s. 18.

127. Prior creditors not affected by appeal may docket judgments. If the exceptions and questions, from the decision on which the appeal is taken, affect only the creditors in one or more classes, the creditors in the prior classes by the leave of the clerk, or of the judge of the superior court, may docket their judgments and issue execution thereon.

Rev., s. 121; Code, s. 1466; 1871-2, c. 213, s. 19.

128. Judgment where assets sufficient to pay a class. If upon taking the account it is admitted, or is found, without appeal, that the defendant has assets sufficient, after the deduction of all proper costs and charges, to pay all the claims which have been presented of any one or more of the classes, the clerk shall give judgment in favor of the creditors whose debts of such classes have been admitted, or adjudged by any competent court; and if any claim in any preferred class is in litigation, the amount of such claim, with the probable cost of the litigation, shall be left in the hands of the personal representative, and not carried to the credit of any subsequent class until the litigation is ended.

Rev., s. 122; Code, s. 1467; 1871-2, c. 213, s. 20.

Cited in Atkinson v. Ricks, 140-420; Hester v. Lawrence, 102-325.

129. Judgment where assets insufficient to pay a class. If the assets are insufficient to pay in full all the claims of any class, the amounts thereof having been found or admitted as aforesaid, the clerk may adjudge payment of a certain part of such claims, proportionate to the assets applicable to debts of that class.

Rev., s. 123; Code, s. 146S; 1871-2, c. 213, s. 21.

Cited in *Atkinson v. Ricks*, 140-420; *Hester v. Lawrence*, 102-324.

130. Contents of judgment; execution. All judgments given by a judge or clerk of the superior court against a personal representative for any claim against his deceased shall declare—

1. The certain amount of the creditor's demand.

2. The amount of assets which the personal representative has applicable to such demand. Execution may issue only for this last sum with interest and costs.

Rev., s. 124; Code, s. 1469; 1871-2, c. 213, s. 22.

Warden v. McKinnon, 94-391. Cited in *Hester v. Lawrence*, 102-324, 325.

131. When judgment to fix with assets. No judgment of any court against a personal representative shall fix him with assets, except a judgment of the judge or clerk, rendered as aforesaid, or the judgment of some appellate court rendered upon an appeal from such judgment. All other judgments shall be held merely to ascertain the debt, unless the personal representative by pleading expressly admits assets.

Rev., s. 125; Code, s. 1470; 1871-2, c. 213, s. 23.

Grant v. Bell, 91-495; *Brooks v. Headen*, 88-449; *Holmes v. Foster*, 78-35; *Dunn v. Barnes*, 73-273. Effect of executor paying the judgment: *Perkins v. Berry*, 103-131. Cited in *Atkinson v. Ricks*, 140-420; *Hester v. Lawrence*, 102-325.

132. Form and effect of execution. All executions issued upon the order or judgment of the judge or clerk or of any appellate court against any personal representative, rendered as aforesaid, shall run against the goods and chattels of the deceased, and if none, then against the goods and chattels, lands and tenements of the representative. And all such judgments docketed in any county shall be a lien on the property for which execution is adjudged as fully as if it were against him personally.

Rev., s. 126; Code, s. 1471; 1871-2, c. 213, s. 24.

Cited in *Atkinson v. Ricks*, 140-420; *Hester v. Lawrence*, 102-325.

133. Report is evidence of assets only at date. The account and report and adjudication by the judge, clerk or any appellate court shall not be evidence as to the assets except on the day to which such adjudication relates.

Rev., s. 127; Code, s. 1472; 1871-2, c. 213, s. 25.

134. Creditor giving security may show subsequent assets. Any creditor may afterwards, on filing an affidavit by himself or his agent that he believes that assets have come to the hands of the personal representative since that day, and on giving an undertaking, with surety, or making a deposit for the costs of the personal representative, sue out a summons against him alleging subsequent

assets, and the proceedings thereon shall be as hereinbefore prescribed, so far as the same may be necessary.

Rev., s. 128; Code, s. 1473; 1871-2, c. 213, s. 26.

Cited in *Atkinson v. Ricks*, 140-420.

135. Suits for accounting at term. In addition to the remedy by special proceeding, actions against executors, administrators, collectors and guardians may be brought originally to the superior court at term time; and in all such cases it is competent for the court in which said actions are pending to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require.

Rev., s. 129; Code, ss. 215, 1511; 1876-7, c. 241, s. 6.

Jurisdiction: *Shober v. Wheeler*, 144-403; *Fisher v. Trust Co.*, 138-90; *Jones v. Sugg*, 136-143; *Pegram v. Armstrong*, 82-326; *Devereux v. Devereux*, 81-12; *Bratton v. Davidson*, 79-423; *Haywood v. Haywood*, 79-42. **No accounting ordered until pleas in bar tried:** *Oldham v. Rieger*, 145-254; also see cases under section 573. **Other actions brought under this section:** *Mann v. Baker*, 142-235; *Brooks v. Holton*, 136-306; *Royster v. Wright*, 118-152; *Collins v. Smith*, 109-468; *Godwin v. Watford*, 107-168; *Perkins v. Berry*, 103-131; *Dobson v. Simonton*, 93-268; *Daniels v. Fowler*, 123-35; *Woody v. Brooks*, 102-334; *Rountree v. Britt and Vinson*, 94-104. See *Smith v. Brown*, 101-347. **Referred to in** *Atkinson v. Ricks*, 140-420; *Andres v. Powell*, 97-166; *Cassidy ex parte*, 95-225; *Tillett v. Aydlett*, 93-22; *Ballinger v. Cureton*, 104-477; *Atkinson v. Ricks*, 140-420. **Consider cases cited under section 110.**

136. Proceedings against land, if personal assets fail. If it appears at any time during, or upon, or after the taking of the account of a personal representative that his personal assets are insufficient to pay the debts of the deceased in full, and that he died seized of real property, it is the duty of the judge or clerk, at the instance of any party, to issue a summons in the name of the personal representative or of the creditors generally, to the heirs, devisees and others in possession of the lands of the deceased, to appear and show cause why said lands should not be sold for assets. Upon the return of the summons the proceeding shall be as is directed in other like cases.

Rev., ss. 130, 131; Code, ss. 1474, 1475; 1871-2, c. 213, ss. 27, 28.

See *Lee v. McKoy*, 118-518; *Clement v. Cozart*, 109-173. **Referred to in** *Godwin v. Watford*, 107-168; *Brooks v. Brooks*, 97-140, 141; *Warden v. McKinnon*, 94-378; *Dickey v. Dickey*, 118-958; *Atkinson v. Ricks*, 140-420. **Heirs and devisees must be parties before judgment rendered:** *Perkins v. Berry*, 103-131; *Wilson v. Pearson*, 102-314. **Power of judge in ordering sale limited:** *Moore v. Ingram*, 91-376. See *Pegram v. Armstrong*, 82-326.

ART. 16. DISTRIBUTION

137. Order of distribution. The surplus of the estate, in case of intestacy, shall be distributed in the following manner, except as hereinafter provided:

Statute analyzed: *Wells v. Wells*, 158-330. **Distributed according to law of domicile at death:** *Jones v. Layne*, 144-600; *Cade v. Davis*, 96-139; *Medley v. Dunlap*, 90-527; *Jones v. Geroek*, 59-190. **Widow dissenting from will, how share ascertained:** *Arrington v. Dortch*, 77-367; *Worth v. McNeil*, 57-272; *Credle v. Credle*, 44-225; *Hunter v. Husted*, 45-97. **Widow's share goes to her personal representative:** *Tart v. Tart*, 154-502. **Infants in ventre sa mere:** *Grant v. Bustin*, 21-77; *Hill v. Moore*, 5-233. **Where will leaves proceeds of sale of land to heirs, grandchildren take per stirpes:** *Lee v. Baird*, 132-755, and cases cited. **Land to be sold and proceeds distributed becomes personalty, and "heirs" would mean next of kin:** *Everett v. Griffin*, 174-106.

1. If there are not more than two children, one-third part to the widow of the intestate, and all the residue by equal portions to and among the children of the intestate and such persons as legally represent such children as may then be dead.

Case where "child's share" in will interpreted: *Eller v. Lillard*, 107-486—"child's part" in will interpreted, *McKrow v. Painter*, 89-440. "Child's part" in statute interpreted: *Headen v. Headen*, 42-162.

2. If there are more than two children, then the widow shall share equally with all the children and be entitled to a child's part.

3. If there is no child nor legal representative of a deceased child, then one-half the estate shall be allotted to the widow, and the residue be distributed equally to every of the next of kin of the intestate, who are in equal degree, and to those who legally represent them.

Baptist University v. Borden, 132-501. Who are "next of kin": *Peterson v. Webb*, 39-56. Representation among collateral kindred: *Moore v. Rankin*, 172-599. Estate divided between widow and mother: *Wells v. Wells*, 156-246; s. c., 158-330.

4. If there is no widow, the estate shall be distributed, by equal portions, among all the children, and such persons as legally represent such children as may be dead.

As to grandchildren: *Ellis v. Harrison*, 140-444; *Skinner v. Wynne*, 55-41.

5. If there is neither widow nor children, nor any legal representative of the children, the estate shall be distributed equally to every of the next of kin of the intestate, who are in equal degree, and those who legally represent them.

Next of kin: *Peterson v. Webb*, 39-56; *Gillespie v. Foy*, 40-280; representation and per capita, *Nelson v. Blue*, 63-659; *Johnston v. Chesson*, 59-147.

6. If, in the lifetime of its father and mother, a child dies intestate, without leaving husband, wife or child, or the issue of a child, its estate shall be equally divided between the father and mother. If one of the parents is dead at the time of the death of the child, the surviving parent shall be entitled to the whole of the estate. The terms "father" and "mother" shall not apply to a step-parent, but shall apply to a parent by adoption.

Father and mother: *Wells v. Wells*, 158-330; s. c., 156-246; *Davis v. R. R.*, 136-115.

7. If there is no child nor legal representative of a deceased child nor any of the next of kin of the intestate, then the widow, if there is one, shall be entitled to all the personal estate of such intestate.

Next of kin: *Peterson v. Webb*, 39-56.

8. If a married woman die intestate leaving one child and a husband, the estate shall be equally distributed between the child and husband; if she leave more than one child and a husband, the estate shall be distributed in equal portions and the husband shall receive a child's part.

Rev., s. 132; Code, s. 1478; R. C., c. 64, s. 1; R. S., c. 64, s. 1; 1893, c. 82; 1868-9, c. 113, s. 53; 1913, c. 166; 1915, c. 37.

NOTE. For distribution of recovery for wrongful death, see s. 160.

138. **Advancements to be accounted for.** Children who shall have any estate by the settlement of the intestate, or shall be advanced by him in his lifetime, shall account with each other for the same in the distribution of the estate in the

manner as provided by the second rule in the chapter entitled Descents, and shall also account for the same to the widow of the intestate in ascertaining her child's part of the estate.

Rev., s. 133; Code, s. 1483; 1868-9, c. 113, s. 54.

ADVANCEMENTS. Defined and explained: *Thompson v. Smith*, 160-256; *Tart v. Tart*, 154-502; *Griffin ex parte*, 142-116; *Meadows v. Meadows*, 33-148.

ADVANCEMENTS ACCOUNTED FOR. Grandchildren taking in their own right need not account for advancements to parents: *Skinner v. Wynne*, 55-41; *Lee v. Baird*, 132-755; *Headen v. Headen*, 42-159; *Daves v. Haywood*, 54-253. Child's part under a certain will discussed in *Eller v. Lillard*, 107-486; *McKrow v. Painter*, 89-440; *Headen v. Headen*, 42-162. Advancement by mother as well as father must be put in hotchpot: *Daves v. Haywood*, 54-253. A delivery necessary to constitute advancement of personalty: *Meadows v. Meadows*, 33-148. Children must account to widow, when: *Eller v. Lillard*, 107-486; *Arrington v. Dortch*, 77-367; *Worth v. McNeill*, 57-272; *Credle v. Credle*, 44-225; *Headen v. Headen*, 42-162. Will bequeathing personalty to children, less advancements, one child dying, how construed: *Seroggs v. Stevenson*, 100-354. Gifts are presumed to be advancements: *Griffin ex parte*, 142-116; *Harper v. Harper*, 92-300; *Bradsher v. Cannady*, 76-445—but intention of parent governs, *Kiger v. Terry*, 119-458; *Harper v. Harper*, 92-300; *Barbee v. Barbee*, 109-299; *Melvin v. Bullard*, 82-33; *Bradsher v. Cannady*, 76-445—presumed not to be advancement when father owes child, *Haglar v. McCombs*, 66-345. Where in will bequest states it is not an advancement: *James v. James*, 76-331. Agreements between children as to advancements: *Bason v. Harden*, 72-281—between child and father, *Webb v. Lyon*, 40-67. Parol evidence competent to rebut presumption as to an advancement arising upon the face of a deed and to show parent's real intention: *Griffin ex parte*, 142-116.

GIFTS HELD TO BE ADVANCEMENTS. Slaves, even though afterwards emancipated: *Banks v. Shannonhouse*, 61-284. Furniture to start child out in life: *Hollister v. Attmore*, 58-373; *Shiver v. Brock*, 55-137. Personalty to son-in-law: *Bridgers v. Hutchins*, 33-68. Services of a slave loaned by father to son: *Hanner v. Winburn*, 42-142. Slave that dies before intestate does: *Walton v. Walton*, 42-138. Slave to son-in-law an advancement to daughter: *Hicks v. Forrest*, 41-528. An estate per autre vie: *Dixon v. Coward*, 57-354. Land to daughter and son-in-law: *Jones v. Spaight*, 6-89.

GIFTS HELD NOT TO BE ADVANCEMENTS. Land to son-in-law: *Banks v. Shannonhouse*, 61-284. Land to child, where land in father's possession, but really devise from aunt: *Hollister v. Attmore*, 58-373. Money to supply child with necessities: *Meadows v. Meadows*, 33-148; see, also, *Walker v. Brooks*, 99-207.

In dividing residue in a will, no advancements regarded: *Donnell v. Mateer*, 40-7; *Richmond v. Vanhook*, 38-581; *Hurdle v. Elliott*, 23-174; *Jerkins v. Mitchell*, 57-207; *Johnston v. Johnston*, 39-9; *Brown v. Brown*, 37-309; *Croom v. Herring*, 11-393—unless will says distribution of residue must be as if testator died intestate, *Raiford v. Raiford*, 41-490. From what date advancement reckoned: *Shiver v. Brock*, 55-137. Interest calculated on advancements, when and how: *Daves v. Haywood*, 54-253; *Taylor v. Bond*, 45-5; *Seroggs v. Stevenson*, 100-360. Advancements valued at time the estate passes, and not subject to interest or rents: *Tart v. Tart*, 154-502.

139. Children advanced to render inventory; effect of refusal. Where any parent dies intestate, who had in his or her lifetime given to, or put in the actual possession of, any of his or her children any personal property of what nature or kind soever, such child shall cause to be given to the administrator or collector of the estate an inventory, on oath, setting forth therein the particulars by him or her received of the intestate in his or her lifetime. In case any child who had, in the lifetime of the intestate, received a part of said estate, refuses to give such inventory, he shall be considered to have had and received his full share of the deceased's estate, and shall not be entitled to receive any further part or share.

Rev., ss. 134, 135; Code, ss. 1484, 1485; 1868-9, c. 113, ss. 55, 56.

Kiger v. Terry, 119-458; *Seroggs v. Stevenson*, 100-354; *Bradsher v. Cannady*, 76-446.

140. Illegitimates next of kin to mother and to each other. Every illegitimate child of the mother dying intestate, or the issue of such illegitimate child deceased, shall be considered among her next of kin, and as such shall be entitled to a share of her personal estate as prescribed in this chapter. Illegitimate children, born of the same mother, shall be considered legitimate as between themselves and their representatives, and their personal estate shall be distributed in the same manner as if they had been born in lawful wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall be distributed among his mother and all such persons as would be his next of kin if all such children had been born in lawful wedlock.

Rev., ss. 136, 137; Code, ss. 1486, 1487; 1868-9, c. 113, ss. 57, 58.

Kenney v. R. R., 167-14; *Coor v. Starling*, 54-243; *Kimbrough v. Davis*, 16-71.

141. Allotment to after-born child in real estate. The share of an after-born child in real estate shall be allotted to him out of any lands not devised, if there is enough for that purpose; and if there is none undevised, or not enough, then the whole share, or the deficiency, as the case may be, shall be made up of the lands devised; and so much thereof shall be taken from the several devisees according to their respective values, as near as may be convenient, as will make the proper share of such child.

Rev., s. 138; Code, s. 1536; 1868-9, c. 113, s. 108.

For all the beneficial purposes of heirship a child in ventre sa mere is considered absolutely born: *Deal v. Sexton*, 144-158. Presumption as to legitimacy, *Johnson v. Chapman*, 45-213. Inheritance of after-born children: *Watkins v. Flora*, 30-374; *Graves v. Barrett*, 126-267; *King v. Davis*, 91-142; *Deal v. Sexton*, 144-157.

142. Allotment to after-born child in personal property. The share of an after-born child in the personal estate shall be paid and delivered to him out of any such estate not bequeathed, if there is enough for that purpose; and if there is none undisposed of, or not enough, then the whole share or the deficiency, as the case may be, shall be made up from the estate bequeathed; and so much shall be taken from the several legacies, according to their respective values, as will make the proper share of such child.

Rev., s. 139; Code, s. 1537; 1868-9, c. 113, s. 109.

Johnson v. Chapman, 45-213, 54-130. Right to share in personalty: *Grant v. Bustin*, 21-77; *Hill v. Moore*, 5-233.

143. Allotment of personalty from proceeds of realty. If, after satisfaction of the child's share of real estate out of undevised lands, there is a surplus of such lands, and there is no personal estate undisposed of, or not enough to make up his share of such estate, then the surplus of undevised land, or as much as may be necessary, shall be sold and the proceeds applied to making up his share of personal estate. And if, after satisfaction of the child's share of personal estate out of property undisposed of by the will, there is a surplus of such property, then the surplus thereof shall be applied, as far as it will go, in exoneration of land, both devised and descended; and the same shall be set apart and secured as real estate to such child, if an infant, non compos, or feme covert.

Rev., s. 140; Code, s. 1538; 1868-9, c. 113, s. 110.

144. Effect of allotment of realty; contribution to equalize burden. Upon the allotment to such child of any real estate in the manner aforesaid, he shall thence-

forth be seized thereof in fee simple; and the court shall give judgment severally, in favor of such of the devisees and legatees of whose lands and legacies more has been taken away than in proportion to the respective values of said lands and legacies, against such of said devisees and legatees of whose lands and legacies a just proportion has not been taken away, for such sums as will make the contribution on the part of each and every of them equitable, and in the ratio of the values of the several devises and legacies.

Rev., s. 141; Code, s. 1539; 1868-9, c. 113, s. 111.

145. After-born child on allotment deemed devisee or legatee. An after-born child after such decrees shall be considered and deemed in law a legatee and devisee as to his portion, shall be styled as such in all legal proceedings, and shall be liable to all the obligations and duties by law imposed on such: Provided, that all judgments or decrees bona fide obtained against the devisees and legatees previously to the preferring of any petition, and which were binding upon or ought to operate upon the lands and chattels devised or bequeathed, shall be carried into execution and effect notwithstanding, and the petitioner shall take his portion completely subject thereto: Provided further, that any suit instituted against the devisees and legatees previously to such petition shall not be abated or abatable thereby nor by the decree thereon, but shall go on as instituted, and the judgment and decree, unless obtained by collusion, be carried into execution; but on the filing of the petition, during the pendency of such suit, the petitioner, by guardian, if an infant, may become a defendant in the suit.

Rev., s. 142; Code, s. 1540; 1868-9, c. 113, s. 112.

146. Before settlement executor may have claimants' shares in estate ascertained. In case no petition is filed within two years, as herein prescribed, the executor or administrator with the will annexed, before he shall pay or deliver the legacies in the will given, or before paying to the next of kin of the testator any residue undisposed of by the will, shall call upon the legatees, devisees, heirs and next of kin, and the said after-born child, by petition in the superior court, to litigate their respective claims, and shall pray the court to ascertain the share to which said child shall be entitled, and to apportion the shares and sums to which the legatees, devisees, heirs or next of kin shall severally contribute toward the share to be allotted to said child, and the court shall adjudge and decree accordingly.

Rev., s. 143; Code, s. 1541; 1868-9, c. 113, s. 113.

Johnson v. Chapman, 45-213; 54-130.

147. Legacy or distributive share recoverable after two years. Legacies and distributive shares may be recovered from an executor, administrator or collector by petition preferred in the superior court, at any time after the lapse of two years from his qualification, unless the executor, administrator or collector shall sooner file his final account for settlement. The suit shall be commenced and the proceedings therein conducted as prescribed in other cases of special proceedings.

Rev., s. 144; Code, s. 1510; 1868-9, c. 113, s. 83.

Jurisdiction: Williams v. Williams, 71-427; Hendrick v. Mayfield, 74-626; Bidwell v. King, 71-287. **Parties to proceeding:** York v. McCall, 160-277; Carlton v. Byers, 93-302; Hagler v. McCombs, 66-345; Mitchell v. Mitchell, 132-350; see, also, section 155. Section referred to in

Self v. Shugart, 135-196; Woody v. Brooks, 102-341; Andres v. Powell, 97-165; Cassidy ex parte, 95-225. As to interest on legacies and shares: Hart v. Williams, 77-426; Grant v. Edwards, 92-442; Peyton v. Smith, 22-325; Finch v. Ragland, 17-137; Evans v. Smith, 84-146; Pickens v. Miller, 83-543; Smith v. Smith, 101-461; Roper v. Burton, 107-526; Coggins v. Flythe, 113-102. As to costs in such actions: Smith v. Smith, 101-461. See generally: Jones v. Wooten, 137-421; Allen v. Royster, 107-278; Redfearn v. Austin, 88-413; Turnage v. Turnage, 42-127; Hobbs v. Craige, 23-332; Nance v. Powell, 39-297; Ellison v. Andrews, 34-188; Badger v. Daniel, 79-372.

148. Payment to clerk after one year discharges representative pro tanto. It is competent for any executor, administrator or collector, at any time after twelve months from the date of letters testamentary or of administration, to pay into the office of clerk of the superior court of the county where such letters were granted, any moneys belonging to the legatees or distributees of the estate of his testator or intestate, and such payment shall have the effect to discharge such executor, administrator or collector and his sureties on his official bond to the extent of the amount so paid.

Rev., s. 145; Code, s. 1543; 1881, c. 305, s. 1.

Administrator should file report and pay in the money to prevent interest: Overman v. Lanier, 159-437; s. c., 157-544. Section not mandatory: Moore v. Eure, 101-11. Clerk responsible officially for money: Cassidy ex parte, 95-225; Moore v. Eure, 101-11; Brown v. Coble, 76-391; Greenlee v. Sudderth, 65-470; Broughton v. Haywood, 61-380. Referred to in Presson v. Boone, 108-78; Thomas v. Connelly, 104-345; Woody v. Brooks, 102-341.

149. On payment clerk to sign receipt. It is the duty of the clerk, in the cases provided for in the preceding section, to receive such money from any executor, administrator or collector, and to execute a receipt for the same under the seal of his office.

Rev., s. 146; Code, s. 1544; 1881, c. 305, s. 3.

Cassidy ex parte, 95-225. Referred to in Presson v. Boone, 108-78.

ART. 17. SETTLEMENT

150. Representative must settle after two years. No executor, administrator, or collector, after two years from his qualification, shall hold or retain in his hands more of the deceased's estate than amounts to his necessary charges and disbursements and such debts as he shall legally pay; but all such estate so remaining shall, immediately after the expiration of two years, be divided and be delivered and paid to the person to whom the same may be due by law or the will of the deceased; and the clerk of the superior court in each county shall require settlement of the balance in hand due distributees as shown by the final account of any administrator, executor, or guardian, and shall audit same.

Rev., s. 147; Code, s. 1488; 1868-9, c. 113, s. 59; 1919, c. 69.

Time of settlement: Caviness v. Fidelity Co., 140-58; Turner v. Turner, 104-566; Brittain v. Dickson, 104-547; Grant v. Edwards, 92-446; Turnage v. Turnage, 42-127; Hobbs v. Craige, 23-332; Whitted v. Webb, 22-442. Cases indirectly touching upon section: Allen v. Royster, 107-278; Edwards v. Lemmond, 136-329; Gilchrist v. Middleton, 108-715; Woody v. Brooks, 102-341; Clements v. Rogers, 91-66; McKinder v. Littlejohn, 23-66; State v. McAleer, 27-632.

151. Representative may retain claim undue or in litigation. If, on a final accounting before the judge or clerk, it appears that any claim exists against the estate which is not due, or on which suit is pending, the judge or clerk shall allow a sum sufficient to satisfy such claim, or the proportion to which it may be

entitled, to be retained in the hands of the executor, administrator or collector, for the purpose of being applied to the payment when due or when recovered, with the expense of contesting the same. The order allowing such sum to be retained must specify the amount and nature of the claim.

Rev., s. 148; Code, s. 1489; 1868-9, c. 113, s. 60.

Character of claim that "exists": *Miller v. Shoaf*, 110-319. Referred to in *Woody v. Brooks*, 102-341; *Jackson v. Shields*, 87-437; *Andres v. Powell*, 97-165.

152. After final account representative may petition for settlement. An executor, administrator or collector, who has filed his final account for settlement, may, at any time thereafter, file his petition against the parties interested in the due administration of the estate, in the superior court of the county in which he qualified, or before the judge in term time, setting forth the facts, and praying for an account and settlement of the estate committed to his charge. The petition shall be proceeded on in the manner prescribed by law, and, at the final hearing thereof, the judge or clerk may make such order or decree in the premises as shall seem to be just and right.

Rev., s. 150; Code, s. 1525; 1868-9, c. 113, s. 96.

Moore v. Rankin, 172-599; *Medlin v. Simpson*, 144-397; *Kirkman v. Phipps*, 86-428; *Carlton v. Byers*, 93-302. Referred to merely in *Self v. Shugart*, 135-196; *Gay v. Grant*, 101-218; *Bumpass v. Chambers*, 77-357.

153. Payment into court of fund due absent defendant or infant. When any balance of money or other estate which is due an absent defendant or infant without guardian is found in the hands of an executor, administrator or collector who has preferred his petition for settlement, the court or judge may direct such money or other estate to be paid into court, to be invested upon interest, or otherwise managed under the direction of the judge, for the use of such absent person or infant.

Rev., s. 151; Code, s. 1526; 1868-9, c. 113, s. 97; 1893, c. 317.

154. Procedure where person entitled unheard of for seven years. When the party entitled to the money has not been heard of for seven years or more, the fund shall be distributed among the next of kin of the absent deceased person as prescribed by statute, in the following manner: An administrator shall be appointed and made a party to a special proceeding in which a verified petition shall be filed setting forth the facts, with names of the parties entitled, and such other evidence as may be required by the clerk in whose office said fund was deposited, and the proceedings conducted as other special proceedings; and the order disposing of the fund shall be approved and confirmed by the judge, either at term or at chambers.

Rev., s. 151; Code, s. 1526; 1868-9, c. 113, s. 97; 1893, c. 317.

155. Parties to proceeding for settlement. In all actions and proceedings by administrators or executors for a final settlement of their estates and trusts, whether at the instance of distributees, legatees or creditors or of themselves, if the personal representative dies or is removed pending such actions or proceedings, the administrator de bonis non or administrator with the will annexed, as the case may be, shall be made party as provided in other cases, or in such way as the court may order, and the action or proceeding shall be conducted to its end, and such judgment shall be rendered on the confirmation of the report,

or upon the terms of settlement, if any shall be agreed upon by the parties, as will fully protect and discharge all parties to the record.

Rev., s. 154; 1893, c. 206.

Administrator d. b. n. must be party, when: Neagle v. Hall, 115-415; Jarratt v. Lynch, 106-422; Brittain v. Dickson, 104-547; Brawley v. Brawley, 109-526; Gilliam v. Watkins, 104-180; Grant v. Reese, 94-720; Merrill v. Merrill, 92-657; Hardy v. Miles, 91-131; University v. Hughes, 90-537. See Carlton v. Byers, 93-302.

156. When legacies may be paid in two years. It is in the power of the judge or court, on petition or action, within two years from the qualification of an executor, administrator or collector, to adjudge the payment in full or partially, of legacies and distributive shares, on such terms as the court deems proper, when there is no necessity for retaining the fund.

Rev., s. 155; Code, s. 1512.

Clements v. Rogers, 91-63; Turnage v. Turnage, 42-127; Godwin v. Watford, 107-168; Hobbs v. Craige, 23-332. **Complaint in actions hereunder:** Allen v. Royster, 107-278. **Refunding bonds required of legatees or distributees:** State v. McAleer, 27-632; McKinder v. Littlejohn, 23-66.

157. Commissions allowed representatives. Executors, administrators and collectors shall be entitled to a commission not exceeding five per cent upon the amount of receipts and expenditures which shall appear to be fairly made in the course of administration, and such allowance may be retained out of the assets against creditors and all other persons claiming an interest in the estate. In determining the allowance the trouble and time expended in the management of the business shall be considered; but in sales of land for payment of debts commissions shall not be allowed on any larger amount of the proceeds than the sum actually applied in payment of debts. Such commissions are authorized and directed to be allowed by the clerk of the superior court when the final account of the representative entitled is filed for settlement, or by any judge of the superior court or commissioner appointed by the said court to take and state an account of the assets of any decedent in the hands of his representative upon a plea of fully administered. Nothing in this section shall prevent any executor, administrator or collector from retaining a reasonable sum for necessary charges and disbursements in the management of the estate.

Rev., s. 149; Code, s. 1524; 1868-9, c. 113, s. 95; 1869-70, c. 189.

AS TO ALLOWANCES. Of counsel fees: Overman v. Lanier, 157-544; Lindsay v. Darden, 124-307; Kelly v. Odum, 139-278; Johnson v. Marcom, 121-83; Burke v. Turner, 85-500; McKay v. Royall, 52-426; Love v. Love, 40-204; Fairbairn v. Fisher, 53-385; Young v. Kennedy, 95-265; Stonestreet v. Frost, 123-640; Allen v. Royster, 107-278—**of expenses attending sales, etc.,** Whitted v. Webb, 22-442; Morris v. Morris, 54-326; Poindexter v. Gibson, 54-44—**of expenses in carrying out provisions in will,** Lambertson v. Vann, 134-108; Edwards v. Love, 94-365—**of taxes paid on lands descending to heirs,** Young v. Kennedy, 95-265—**of expenses of prosecuting suit begun by intestate,** Clapp v. Coble, 21-177—**for personal services over actual expenses,** Wilson v. Lineberger, 88-416.

AS TO COMMISSIONS. Cannot be retained until allowed: Hodges v. Armstrong, 14-253. Clerk personally interested in commissions has no jurisdiction to allow: Barlow v. Norfleet, 72-535. Pleading commissions as counterclaim in action against personal representative: *Ibid.* Commissions will not be reduced by supreme court unless amount is excessive: Green v. Barbee, 84-69. Amount of commissions allowed on final settlement: Overman v. Lanier, 157-544; Bank v. Bank, 126-531; Hahn v. Mosely, 119-76; Scroggs v. Stevenson, 100-358; Grant v. Edwards, 92-442; Parker v. Grant, 91-338; Drake v. Drake, 82-443; Graves v. Graves, 58-280; Washington v. Emery, 57-32; Whitted v. Webb, 22-442; Bond v. Turner's Exrs., 4-690, 6-331;

Potter v. Stone, 9-30. Whether allowed or not where will is subsequently defeated or probate recalled: Ralston v. Telfair, 22-414—where administrator fails to show that receipts and disbursements have been fairly made, Grant v. Reese, 94-720—where executor is tenant for life of testator's estate, Blount v. Hawkins, 57-162—where executor keeps no accounts, Finch v. Ragland, 17-137—where executor assumes control of funds of minor children willed to them by his testator, Haglar v. McCombs, 66-345; but see Perry v. Maxwell, 17-488—where good faith is exercised by administrator, though loss results, Perkins v. Caldwell, 79-441—where set-off allowed in reducing a debt due estate, Spruill v. Cannon, 22-400; Walton v. Avery, 22-405—where there are coexecutors, Grant v. Pride, 16-269—where decedent's lands sold, Seroggs v. Stevenson, 100-354—where administrator failed to account for funds he should have accounted for, Allen v. Royster, 107-278—where administrator collects his own debt to estate, Arnold v. Byars, 17-1—where administrator failed to file inventory and mixes estate with his own, Stonestreet v. Frost, 123-640; Grant v. Reese, 94-720; Burke v. Turner, 85-500—where specific things are delivered to next of kin, Seroggs v. Stevenson, 100-354; Shepard v. Parker, 35-103; Walton v. Avery, 22-405—where money used by administrator, but he at all times makes regular returns to clerk, Carr v. Askew, 94-194—where disbursements are made to legatees and distributees, Potter v. Stone, 9-30; Arnold v. Byars, 17-1; Clarke v. Cotton, 17-51; Peyton v. Smith, 22-325—where permanent improvements made by executor on land of testator, Lambertson v. Vann, 134-108—where estate goes through several administrations, Seroggs v. Stevenson, 100-354; Hodge v. Hawkins, 21-564—where slaves are received in payment of debt owing testator and delivered over specifically to next of kin, Sellars v. Ashford, 37-104. Provision in will for commissions and additional compensation: Ellington v. Durfey, 156-253.

158. Liability and compensation of clerk. Every clerk of the superior court who may be intrusted with money or other estate in such case shall be liable on his official bond for the faithful discharge of the duties enjoined upon him by the judge in relation to said estate, and he may receive such compensation for his services as the judge may allow.

Rev., s. 152; Code, s. 1527; 1868-9, c. 113, s. 98.

Presson v. Boone, 108-78; Smith v. Patton, 131-396; see under sections 148-927.

ART. 18. ACTIONS BY AND AGAINST REPRESENTATIVE

159. Action survives to and against representative. Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate.

Rev., s. 156; Code, s. 1490; 1868-9, c. 113, s. 63.

Actions for damages to land: Mast v. Sapp, 140-533; Rippey v. Miller, 33-247; Howcott v. Warren, 29-20. Rights of action for breach of contract or other duty: Mayo v. Dawson, 160-76; Miller v. Leach, 95-229; Allen v. Baker, 86-92; Shuler v. Millsaps, 71-297. Injury to or conversion of property: Butner v. Keehln, 51-60; Sledge v. Reid, 73-440; Shields v. Lawrence, 72-43. Cited merely in Harper v. Comrs., 123-119; Hannah v. R. R., 87-351; Wallace v. McPherson, 139-298.

160. Death by wrongful act; recovery not assets; dying declarations. When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding

the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy.

In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like manner and under the same rules as dying declarations of the deceased in criminal actions for homicide are now received in evidence.

Rev. s. 59; Code, ss. 1498, 1500; 1868-9, c. 113, ss. 70, 72, 115; R. C., c. 46, ss. 8, 9; 1919, c. 29.

ACTION FOR DEATH BY WRONGFUL ACT. A new cause of action, since there was none at common law: *Causey v. R. R.*, 166-5; *Hood v. Telegraph Co.*, 162-92; *Bolick v. R. R.*, 138-370; *Hartness v. Pharr*, 133-569; *Killian v. R. R.*, 128-261; *Harper v. Comrs.*, 123-119; *Bradley v. R. R.*, 122-973; *Howell v. Comrs.*, 121-363. **Effect of action for injury afterward resulting in death:** *Edwards v. Chemical Co.*, 170-551; *Whitehurst v. R. R.*, 160-1; *Bolick v. R. R.*, 138-370. **Action in this state for death in another state:** *Harrill v. R. R.*, 132-655; see, also, *Lassiter v. R. R.*, 136-89. **Action must be brought within one year from the death:** *Causey v. R. R.*, 166-5; *Meekins v. R. R.*, 131-1; *Williams v. Building and Loan Assn.*, 131-269; *Best v. Kinston*, 106-205; *Taylor v. Cranberry Iron Co.*, 94-525; this is not a statute of limitations, but a material fact to be proved: *Bennett v. R. R.*, 159-345; *Gulledge v. R. R.*, 147-234; s. c., 148-567. **A controversy or delay in administration is no excuse:** *Reynolds v. Cotton Mills*, 177-412; *Hall v. R. R.*, 149-108; *Gulledge v. R. R.*, 147-234; s. c., 148-567.

PARTIES TO SUE. Action must be by personal representative: *Hood v. Telegraph Co.*, 162-70; *Hood v. Telegraph Co.*, 162-92; *Bennett v. R. R.*, 159-345. **A cause of action is sufficient ground for the appointment of an administrator:** *Hall v. R. R.*, 146-345; *Vance v. R. R.*, 138-460. **Widow cannot sue as widow:** *Howell v. Comrs.*, 121-362. **Father cannot sue as father:** *Hope v. Peterson*, 172-869; *Killian v. R. R.*, 128-261; **nor husband as husband:** *Hood v. Telegraph Co.*, 162-92; *Hunter v. R. R.*, 152-682. **Foreign administrator cannot sue:** *Hall v. R. R.*, 146-345; s. c., 149-108. **Administrator may sue for death of infant:** *Davis v. R. R.*, 136-115; *Russell v. Steamboat Co.*, 126-961. **Administrator may sue in forma pauperis, when:** *Christian v. R. R.*, 136-321; *Allison v. R. R.*, 129-344; *Hamlin v. Neighbors*, 75-66. **Action in state court against receiver appointed by federal court:** *Lassiter v. R. R.*, 163-19. **The death gives a cause of action which becomes property:** *Neill v. Wilson*, 146-242. **The complaint must allege the essential facts:** *Black v. R. R.*, 115-667; *Emry v. Nav. Co.*, 111-94; *Conley v. R. R.*, 109-692; *Warner v. R. R.*, 94-250. **Cause of action for personal injuries abates upon death of plaintiff, though injuries subsequently result in death:** *Bolick v. R. R.*, 138-370; *overruling Peebles v. R. R.*, 63-238, and *Collier v. Arrington*, 61-356.

DISTRIBUTION OF RECOVERY. The amount is not assets of the estate except for distribution: *Hood v. Telegraph Co.*, 162-92. **Not subject to widow's year's support:** *Broadnax v. Broadnax*, 160-432. **The statute of distributions of state:** *Neill v. Wilson*, 146-242; *Vance v. R. R.*, 138-460; *Davis v. R. R.*, 136-115; *Hartness v. Pharr*, 133-566; *Baker v. R. R.*, 91-308. **University gets it, if no next of kin:** *Warner v. R. R.*, 94-250. **The recovery is not liable to the debts of decedent:** *Neill v. Wilson*, 146-242. **Husband's right to his wife's share as distributee had she lived:** *Ibid.* **The right is determined as of the time of intestate's death:** *Ibid.* **Distribution of recovery under Federal Employers' Liability Act:** *Hudson v. R. R.*, 176-488; *Horton v. R. R.*, 175-472; *overruling In re Stone*, 173-208.

161. Damages recoverable for death by wrongful act. The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death.

Rev., s. 60; Code, s. 1499; 1868-9, c. 113, s. 71; R. C., c. 1, s. 10.

Manner of estimating damages: *Gurley v. Power Co.*, 172-690; *Lynch v. Mfg. Co.*, 167-98; *Ward v. R. R.*, 161-180; *Roberson v. Lumber Co.*, 154-328; *Poe v. R. R.*, 141-525; *Carter v. R. R.*, 139-499; *Byrd v. Express Co.*, 139-273; *Pickett v. R. R.*, 117-616; *Kesler v. Smith*,

66-154; *Burton v. W. & W. R. R.*, 82-504; *Coley v. Statesville*, 121-301; *Meekins v. R. R.*, 134-217; *Mendenhall v. R. R.*, 123-275; *Bradley v. R. R.*, 122-972; *Gray v. Little*, 127-304; *Russell v. Steamboat Co.*, 126-961; *Burns v. R. R.*, 125-304; *Watson v. R. R.*, 133-188; *Benton v. R. R.*, 122-1007; *McLamb v. R. R.*, 122-862; *Warner v. R. R.*, 94-259; *Collier v. Arrington*, 61-356. **Mental anguish not considered:** *Byrd v. Express Co.*, 139-273. **Estimating damages under Federal Employers' Liability Act:** *Horton v. R. R.*, 175-472; **overruling** *In re Stone*, 173-208.

162. Actions which do not survive. The following rights of action do not survive:

1. Causes of action for libel and for slander, except slander of title.
2. Causes of action for false imprisonment and assault and battery.

Cases before act of 1915, c. 38: *Watts v. Vanderbilt*, 167-567; *Bolick v. R. R.*, 138-370; *Morton v. Telegraph Co.*, 130-299; *Strauss v. City of Wilmington*, 129-100; *Killian v. R. R.*, 128-261; *Harper v. Comrs.*, 123-118; *Scarlett v. Norwood*, 115-286; *Hannah v. R. R.*, 87-351.

3. Causes where the relief sought could not be enjoyed, or granting it would be nugatory, after death.

No vindictive damages recovered against estate of decedent for trespass by him during lifetime: *Rippey v. Miller*, 33-247; *Butner v. Keehn*, 51-60. **Action against register of deeds for penalty:** *Wallace v. McPherson*, 139-297. **Consider:** *Peebles v. R. R.*, 63-238, and *Collier v. Arrington*, 61-356; **both overruled in some particular by** *Bolick v. R. R.*, 138-370. See *Shields v. Lawrence*, 72-43; *Mast v. Sapp*, 140-537.

Rev., s. 157; Code, s. 1491; 1868-9, c. 113, s. 64; 1915, c. 38.

163. Right of action survives to successor. Executors and administrators shall have actions in like manner as the first testator or intestate might have had against any person, his executors and administrators, in all cases, except where such actions, being commenced, are not allowed by statute to be revived on the death of any party.

Rev., s. 158; Code, s. 1497; 1868-9, c. 113, s. 69; 1905, c. 286.

See cases under sections 159 and 162. Section cited in *Mast v. Sapp*, 140-537.

164. To sue or defend in representative capacity. All actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity.

Rev., s. 160; Code, s. 1507; 1868-9, c. 113, s. 79.

Mitchell v. Mitchell, 132-350; *Byrd v. Byrd*, 117-525; *Rogers v. Gooch*, 87-442; *Ballinger v. Cureton*, 104-474.

165. Service on or appearance by one binds all. In actions against several executors, administrators or collectors they are all to be considered as one person, representing the decedent; and if the summons is served on one or more, but not all, the plaintiff may proceed against those served, and if he recovers, judgment may be entered against all.

Rev., s. 161; Code, s. 1508; 1868-9, c. 113, s. 81.

166. When creditors may sue on claim; execution in such action. An action may be brought by a creditor against an executor, administrator or collector on a demand at any time after it is due, but no execution shall issue against the executor, administrator or collector on a judgment therein against him without

leave of the court, upon notice of twenty days and upon proof that the defendant has refused to pay such judgment its ratable part, and such judgment shall be a lien on the property of the defendant only from the time of such leave granted.

Rev., s. 162; Code, s. 1509; 1868-9, c. 113, s. 82.

Cited in *Hester v. Lawrence*, 102-325; *Andres v. Powell*, 97-165. See generally: *Rountree v. Britt*, 94-110; *Hoover v. Berryhill*, 84-134; *Vaughan v. Stephenson*, 69-212; *Heilig v. Foard*, 64-710. See, also, under section 102.

167. Service by publication on executor without bond. Whenever process may issue against an executor who has not given bond, and the same cannot be served upon him by reason of his absence or concealment, service of such process may be made by publication in the manner prescribed in other civil actions.

Rev., s. 163; Code, s. 1523; 1868-9, c. 113, s. 94.

168. Execution by successor in office. Any executor, administrator or collector may have execution issued on any judgment recovered by any person who preceded him in the administration of the estate, or by the decedent, in the same cases and the same manner as the original plaintiff might have done.

Rev., s. 164; Code, s. 1513; 1868-9, c. 113, s. 84.

169. Action to continue, though letters revoked. In case the letters of an executor, administrator or collector are revoked, pending an action to which he is a party, the adverse party may, notwithstanding, continue the action against him in order to charge him personally. If such party does not elect so to do, within six months after notice of such revocation, the action may be continued against the successor of the executor, administrator or collector in the administration of the estate, in the same manner as in case of death.

Rev., s. 165; Code, s. 1514; 1868-9, c. 113, s. 85.

Cited in *Turlburt v. Hollar*, 102-409.

ART. 19. REPRESENTATIVE'S POWERS, DUTIES AND LIABILITIES

170. Representative may maintain appropriate suits and proceedings. Executors, administrators or collectors may maintain any appropriate action or proceeding to recover assets, and to recover possession of the real property of which executors are authorized to take possession by will; and to recover for any injury done to such assets or real property at any time subsequent to the death of the decedent.

Rev., s. 159; Code, s. 1501; 1868-9, c. 113, s. 73.

Mayo v. Dawson, 160-76; *Hendrick v. Gidney*, 114-543; *Smathers v. Moody*, 112-795; *Coleman v. Howell*, 131-129. An administrator in another state cannot maintain an action in this state; administration must be taken out here: *Person v. Leary*, 126-506; *Morefield v. Harris*, 126-626; *Hall v. R. R.*, 146-345.

171. Representative may purchase for estate to prevent loss. At any auction sale of real property belonging to the estate, the executor, administrator or collector may bid in the property and take a conveyance to himself as executor, administrator or collector for the benefit of the estate when, in his opinion, this is necessary to prevent a loss to the estate.

Rev., s. 85; Code, s. 1505; 1868-9, c. 113, s. 77.

Ramsay v. Hanner, 64-668.

172. Representatives hold in joint tenancy. Every estate vested in executors, administrators or collectors, as such, shall be held by them in joint tenancy.

Rev., s. 166; Code, s. 1502; 1868-9, c. 113, s. 74.

Cameron v. Hicks, 141-21.

173. Representatives liable for devastavit. The executors and administrators of persons who, as rightful executors or as executors in their own wrong, or as administrators, shall waste or convert to their own use any estate or assets of any person deceased, shall be chargeable in the same manner as their testator or intestate might have been.

Rev., s. 167; Code, s. 1495; 1868-9, c. 113, s. 68.

“Conversion” defined: *University v. Bank*, 96-280. “Waste,” what does and does not constitute: *Caviness v. Fidelity Co.*, 140-62; *Moore v. Eure*, 101-11; *Lee v. Beaman*, 101-294; *University v. Bank*, 96-280; *Worthy v. Brower*, 93-344; *Grant v. Edwards*, 92-442; *Syme v. Badger*, 92-706; *Grant v. Bell*, 90-558; *Lansdell v. Winstead*, 76-368; *Green v. Green*, 69-25; *Nelson v. Hall*, 58-32; *Cain v. Hawkins*, 50-192; *Fanshaw v. Fanshaw*, 44-166; *Green v. Collins*, 28-139; *Smith v. Fagan*, 13-298. See, also, under section 40.

174. Nonresident executor or guardian to appoint process agent. A nonresident qualifying in the state as an executor or guardian shall at the time of his qualification appoint in writing a resident agent in the county of his qualification, on whom may be served citations, notices, and all processes required by law to be served on such executor or guardian. The executor or guardian shall file the appointment with the clerk in the county of his qualification, and the clerk shall record it in the record book immediately after the record of qualification, and shall properly index it in the record book. All citations, notices, and processes served on such process agent shall be as effective as if served on the executor or guardian, but the return date shall not be sooner than ten days from the date of the issuance of the citation, notice, or process. No letters shall be granted to an executor nor shall a guardian be permitted to qualify, unless the process agent is named simultaneously with the application for letters or for qualification.

1917, c. 198, ss. 1, 2, 3.

175. Executor or guardian removing from state; to appoint process agent. When a resident executor or guardian removes from the state, he shall, before removing or within thirty days thereafter, appoint a process agent in the manner as provided in the case of a nonresident, and upon failure to make the appointment within thirty days, the clerk shall remove him and appoint an administrator with the will annexed, or a new guardian, as the case may be.

1917, c. 198, s. 4.

176. Nonresident's failure to obey process ground for removal. The clerk may remove any nonresident executor or guardian who fails or refuses to obey any citation, notice or process served on the process agent appointed as provided in the preceding two sections, and appoint a resident.

1917, c. 198, s. 5.

ART. 20. CONSTRUCTION AND APPLICATION OF CHAPTER

177. Where no time specified, reasonable time allowed; extension. If no length of notice, or no time for the doing of an act, is stated in this chapter, the time shall be reasonable, and in any case it may be enlarged by the clerk from time to time, or by the judge of the superior court, on application to him or on appeal to him from the clerk.

Rev., s. 169; Code, s. 1463; 1871-2, c. 213, s. 16.

178. Powers under will not affected. Nothing in this chapter shall be construed to affect the discretionary powers, trusts and authorities of an executor or other trustee acting under a will, provided creditors be not delayed thereby nor the order changed in which by law they are entitled to be paid.

Rev., s. 170; Code, s. 1415; 1868-9, c. 113, s. 23; R. C., c. 46, ss. 12, 13.

Cited in *Pate v. Oliver*, 104-469.

179. Chapter applies to administrations since 1869. This chapter shall apply only to cases where the grant of letters of collection or of probate or of administration shall have issued on or after the first day of July, one thousand eight hundred and sixty-nine, except in case of administrations de bonis non upon estates where the former letters of administration or letters testamentary were granted prior to the first of July, one thousand eight hundred and sixty-nine, in all which cases estates shall be administered, closed up and settled according to the law as it existed just prior to the first of July, one thousand eight hundred and sixty-nine.

Rev., s. 173; Code, s. 1476; 1871-2, c. 213, s. 29; 1872-3, c. 179.

Administrators d. b. n. administer, how: *Brittain v. Dickson*, 104-547. Cited in *Brown v. McKee*, 108-392; *Wilson v. Pearson*, 102-310; *Smith v. Brown*, 99-386; *Gaither v. Sain*, 91-307. **Administrators d. b. n. of estates appointed since July 1, 1869, where administration began prior to July 1, 1869, close up estates according to law prior to July 1, 1869:** *Brittain v. Dickson*, 104-550, and cases there cited; *Brandon v. Phelps*, 77-44.

180. Cases pending at adoption of constitution of 1868. All cases for the sale of real estate for assets heretofore in the county courts, in which final orders for collection and application or distribution of purchase money and making titles were not made before the adoption of the present constitution, may, at the instance of any person interested, be transferred, as other cases, to the superior court of the county where such proceeding was pending, and such court shall have full authority to make all necessary orders to complete the same.

Rev., s. 171; Code, s. 1542; 1871-2, c. 161.

181. Administrations prior to 1869. This chapter shall apply to the estates of such deceased persons only whereof original administration has been granted subsequent to the first day of July, one thousand eight hundred and sixty-nine, and all estates whereon administration was granted prior to the said first day of July, one thousand eight hundred and sixty-nine, shall be dealt with, administered and settled according to the law as it existed just prior to said date, and it is hereby declared that such is the true intent and meaning of this chapter: Provided, that nothing herein shall be construed to prevent the application of this chapter so far as it relates only to the courts having jurisdiction of any

action or proceeding for the settlement of an administration or to the practice and procedure therein. If any person shall have bona fide administered any estate or any part of the estate of any deceased person whereof original administration was granted prior to the first day of July, under the said act of one thousand eight hundred and sixty-eight and one thousand eight hundred and sixty-nine, he shall not be deemed guilty of a devastavit.

Rev., ss. 168, 172; Code, ss. 1433, 1434; 1869-70, c. 58, ss. 1, 2.

Cited merely in *Brittain v. Dickson*, 104-550; *Wilson v. Pearson*, 102-310; *Glover v. Flowers*, 101-141; *Smith v. Brown*, 99-386; *Gaither v. Sain*, 91-307; *Little v. Duncan*, 89-418. Debts of estate administered since July 1, 1869, must be paid pro rata in their class: *Moore v. Byers*, 65-240. The powers of probate court both as to jurisdiction and procedure extend to estates administered both prior and subsequent to July 1, 1869: *Taylor v. Biddle*, 71-1. Administrator d. b. n. appointed after July 1, 1869, where original administration began prior thereto, must comply with law existing prior to such date: *Brandon v. Phelps*, 77-44; *Brittain v. Dickson*, 104-550. Where petition to sell land for assets prior and subsequent to July 1, 1869. See sections 74 and 135 et seq.

CHAPTER 2

ADOPTION OF MINORS

- 182. Petition for adoption; contents.
- 183. Parties to proceeding.
- 184. Order and letters of adoption.
- 185. Effect of order; child's right of succession.
- 186. Change of child's name.
- 187. Bond to secure orphan's property.
- 188. Record of order; revocation.
- 189. Abandonment by parent; custody forfeited.
- 190. Restoration of parent's rights.
- 191. Procuring possession of child unlawfully.

182. Petition for adoption; contents. Any person desiring to adopt any minor child may file a petition in the superior court of the county wherein such child resides, setting forth the name and age of such child and the name of its parents, whether the parents or either of them are living, and if there is no living parent, the name of the guardian, if any, and if there is no guardian, the name of the person having charge of the child or with whom such child resides, the amount and nature of the child's estate, if any, and especially if the adoption is for the minority or for the life of the child.

Rev., s. 174; Code, s. 1; 1872-3, c. 155.

183. Parties to proceeding. The parent or guardian, or the person having charge of such child, or with whom it may reside, must be a party of record in this proceeding.

Rev., s. 175; Code, s. 6; 1872-3, c. 155, s. 6.

184. Order and letters of adoption. Upon the filing of such petition, and with the consent of the parent or parents, if living, or of the guardian, if any, or of the person with whom such child resides, or who may have charge of such child, the court may, if the petitioner is a proper and suitable person, sanction and allow such adoption by an order granting letters of adoption.

Rev., s. 176; Code, s. 2.

185. Effect of order; child's right of succession. Such order, when made, shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child during the minority or for the life of such child, according to the prayer of the petition, with all the duties, powers and rights belonging to the relationship of parent and child, and in case the adoption be for the life of the child, and the petitioner die intestate, such order shall have the further effect to enable such child to inherit the real estate and entitle it to the personal estate of the petitioner in the same manner and to the same extent such child would have been entitled to if such child had been the actual child of the person adopting it. The child shall not inherit and be entitled to the personal estate, if the petitioner specially sets forth in his petition such to be his desire and intention.

Rev., s. 177; Code, s. 3; 1872-3, c. 155, s. 3; 1885, c. 390.

Child inherits, how: *King v. Davis*, 91-142. Question of whether parental relation relates back to birth of child: *Ibid.* As between natural and adopted parent, the former inherits from child: *Edwards v. Yearby*, 168-663.

186. Change of child's name. For proper cause shown in the petition the court may decree that the name of the child shall be changed to that of the petitioner.

Rev., s. 177; 1885, c. 390.

187. Bond to secure orphan's property. If the child is an orphan and without guardian, and possesses any estate, the court shall require from the petitioner such bond as is required by law to be given by guardians.

Rev., s. 178; Code, s. 4.

188. Record of order; revocation. The order granting letters of adoption shall be recorded in the office of the clerk of the superior court of the county in which it is made, and may be revoked at any time by the court for good cause shown.

Rev., s. 179; Code, s. 5; 1872-3, c. 155, s. 5.

189. Abandonment by parent; custody forfeited. In all cases where the parent or parents of any child has willfully abandoned the care, custody, nurture and maintenance of the child to kindred, relatives or other persons, such parent or parents shall be deemed to have forfeited all rights and privileges with respect to the care, custody and services of such child.

Rev., s. 180; 1885, c. 120, s. 1; 1909, c. 917.

When no abandonment proven, court must still find facts entitling one to child's restoration: *Newsome v. Bunch*, 142-19; 144-15. Section cited in *Howell v. Solomon*, 167-588.

190. Restoration of parent's rights. The rights and privileges of such parent may be restored by the voluntary surrender of such child by the person in whose care and custody such child may be, or by order of any judge of the superior court in the district in which such child may be, when it appears to the satisfaction of such judge that the interest and welfare of such child will not be materially prejudiced by such restoration. The person having the care and custody of any such child shall have at least ten days notice of the time and place of the hearing of the application for such order of restoration, and shall be permitted to resist the same.

Rev., s. 181; 1885, c. 120, ss. 2, 3.

For contests over custody of children, see section 2241. For effect of divorce on children, see section 1664. For right of parent to determine custody of children by deed or will, see section 2151. For small allowance paid to indigent children by clerk, in certain cases, see section 962. Facts to be passed upon in determining if child shall be restored: *Newsome v. Bunch*, 142-19, 144-15. Where father of good character had left child with grandparents, but subsequently desired it, held entitled: *In re Fain*, 172-790; *Newsome v. Bunch*, 144-15; *Latham v. Ellis*, 116-30. Father entitled to custody, except when parted with it by deed or is unfitted to care for child: *Ibid.*; *Howell v. Solomon*, 167-588. Right to custody of illegitimate child: *In re Mary Jones*, 153-312.

191. Procuring possession of child unlawfully. Any parent whose rights and privileges have been forfeited as provided by the second preceding section, who shall procure the possession and custody of such child, with respect to whom his rights and privileges are forfeited, otherwise than as by law provided, shall be guilty of a crime and shall be punished as for abduction.

Rev., s. 3373; 1885, c. 120, s. 4.

CHAPTER 3

ALIENS

- 192. Rights as to real property.
- 193. Contracts validated.

192. Rights as to real property. It is lawful for aliens to take both by purchase and descent, or other operation of law, any lands, tenements or hereditaments, and to hold and convey the same as fully as citizens of this state can or may do, any law or usage to the contrary notwithstanding.

Rev., s. 182; Code, s. 7; 1870-1, c. 255.

As to alien holding land which he acquires by grant, see section 738. Who is an alien; and right of alien enemy to sue: *Krachanake v. Mfg. Co.*, 175-435.

193. Contracts validated. All contracts to purchase or sell real estate by or with aliens, heretofore made, shall be deemed and taken as valid to all intents and purposes.

Rev., s. 183; Code, s. 8; 1870-1, c. 255, s. 2.

CHAPTER 4

ATTORNEYS AT LAW

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- 194. Examination ; scope ; issuance of license.
- 195. Dates and method of holding examinations.
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ART. 1. LICENSES AND QUALIFICATIONS OF ATTORNEYS

194. Examination ; scope ; issuance of license. No person shall practice law without first obtaining license so to do from the supreme court. All examinations shall be in writing, and based upon such course of study, and conducted under such rules, as the court may prescribe. All applicants who satisfy the court of their competent knowledge of the law and upright character shall receive license to practice in all the courts of this state.

Rev., s. 207 ; Code, s. 17 ; R. C., c. 9, s. 1 ; 1818, c. 963, s. 3 ; 1907, c. 70.

Nonresident cannot practice habitually: *Manning v. R. R.*, 122-824. Question as to whether an unnaturalized foreigner can be licensed reviewed at length in *Ex parte Thompson*, 10-355. "Practice" defined: *State v. Bryan*, 98-644. **Legislature can establish the qualification to be required of one to become a practicing attorney:** *In re Applicants for License*, 143-1— for the power to so establish qualifications is not inherent in the supreme court, though the court has power to say whether such qualifications are met: *Ibid.*

195. Dates and method of holding examinations. The examinations for license to practice law may be held in the city of Raleigh on Monday, one week prior to the spring and fall terms of the supreme court, by the chief justice and two associate justices to be designated by the court, and upon their certification

license shall be issued, signed by all the members of the court. The chief justice and each associate justice holding said examinations shall receive the sum of one hundred dollars and actual expenses for each examination, to be paid out of the fees of applicants for license, and not otherwise.

1917, c. 87.

196. Conditions precedent to examination. Before being allowed to stand an examination each applicant must comply with the following conditions:

1. He must be at the time twenty-one years of age, or will arrive at that age before the time for the next examination.

2. He must file with the clerk of the court a certificate of good moral character signed by two attorneys who practice in that court. An applicant from another state may have such certificate signed by any state officer of the state from which he comes.

This certificate, prior to the amendment in chapter 70 of the Laws of 1907, all that was required as to character: *In re Applicants for License*, 143-1. Affidavits as to character privileged: *Baggett v. Grady*, 154-342.

3. He must deposit with the clerk twenty-one dollars and fifty cents. Of this sum one dollar and fifty cents shall be retained by the clerk. If the applicant obtains license the remaining twenty dollars shall be paid by the clerk to the librarian for use of the supreme court library. If the applicant fails on examination the twenty dollars shall be repaid him.

Rev., s. 208; Code, s. 18; R. C., c. 9, s. 2; 1777, c. 115, s. 8.

197. Oaths taken in open court. Attorneys before they shall be admitted to practice law shall, in open court before a justice of the supreme or judge of the superior court, take the oath prescribed for attorneys, and also the oaths of allegiance to the state, and to support the constitution of the United States, prescribed for all public officers, and the same shall be entered on the records of the court; and, upon such qualification had, and oath taken, may act as attorneys during their good behavior.

Rev., s. 209; Code, s. 19; R. C., c. 9, s. 3; 1777, c. 115, s. 8.

Relation of attorneys to the court interestingly discussed in *Robins, ex parte*, 63-309. See *Ex parte Thompson*, 10-355.

198. Persons disqualified. No clerk of the superior or supreme court, nor deputy or assistant clerk of said courts, nor sheriff, nor any justice of the peace, nor county commissioner shall practice law. Persons violating this provision shall be guilty of a misdemeanor and fined not less than two hundred dollars. This section shall not apply to Confederate soldiers.

Rev., ss. 210, 3641; Code, ss. 27, 28, 110; 1870-1, c. 90; 1883, c. 406; 1871-2, c. 120; 1880, c. 43; C. C. P., s. 424; 1919, c. 205.

NOTE. Practicing attorney not eligible to office of sheriff, see *Sheriff*, s. 2936.

Practicing law is habitually or customarily holding one's self out to the public as a lawyer or the demanding of compensation for services as such: *State v. Bryan*, 98-644. Evidence as to violation of statute: *Ibid*.

199. Officers of inferior courts disqualified in certain cases. No judge or prosecuting attorney of any recorder's, municipal, or county court shall appear in any other court on behalf of the defendant in a criminal action, where such criminal action has been tried in the court of such officer. Any person violating

the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars. This section shall not apply to Iredell County.

1917, c. 213.

ART. 2. RELATION TO CLIENT

200. Authority filed or produced if requested. Every attorney who claims to enter an appearance for any person shall, upon being required so to do, produce and file in the clerk's office of the court in which he claims to enter an appearance, a power or authority to that effect signed by the persons or some one of them for whom he is about to enter an appearance, or by some person duly authorized in that behalf, otherwise he shall not be allowed so to do: Provided, that when any attorney claims to enter an appearance by virtue of a letter to him directed (whether such letter purport a general or particular employment), and it is necessary for him to retain the letter in his own possession, he shall, on the production of said letter setting forth such employment, be allowed to enter his appearance, and the clerk shall make a note to that effect upon the docket.

Rev., s. 213; Code, s. 29; R. C., c. 31, s. 57 (16).

ATTORNEY'S AUTHORITY TO APPEAR. As to whether appearance special or general, see section 401. An appearance by attorney without authority is regular upon its face and binds clients in some cases: *England v. Garner*, 90-197; *Allen v. Allen*, 44-60; *Williams v. Johnson*, 112-424; see *Harrill v. Rwy.*, 144-542. Attorney once appearing, continues until judgment satisfied, unless relieved by court: *Ladd v. Teague*, 126-544; *Branch v. Walker*, 92-87; *Newbern v. Jones*, 63-606; *Walton v. Sugg*, 61-98. Client not allowed to dispute attorneyship two or three years after judgment, after acquiescing in and getting benefit of services: *Ladd v. Teague*, 126-544. Letter conferring authority upon attorney, requirements of: *Day v. Adams*, 63-254; *Arrington v. Arrington*, 102-491. Whether a person is attorney for another is a question of fact: *Alspaugh v. Jones*, 64-29. Authority is presumed to continue until revoked, or until the case is ended: *Newkirk v. Stevens*, 152-498; *Bank v. Peregoy*, 147-293. Parties about to acquire rights under judgment need not inquire as to authority of attorney in case: *Williams v. Johnson*, 112-424. Where attorney of record opposes motion of his client's attorney under seal, see *Newbern v. Jones*, 63-606. Motion by defendant's attorney claiming authority to strike out name of a plaintiff, plaintiff's attorney objecting, clash as to authority, see *Petteway v. Hinsdale*, 64-450. Case where one attorney employs another, see *Rogers v. McKenzie*, 81-164. Demand for power of attorney must be made before attorney has been recognized in order to be in apt time: *Reece v. Reece*, 66-377. Effect on the judgment where a lawyer was marked as attorney, when no authority, reviewed in *Koonce v. Butler*, 84-221. Power of attorney given by married woman to dismiss action concerning her land need not be registered: *Hollingsworth v. Harman*, 83-153. Power of attorney may be revoked by parol: *Brookshire v. Brookshire*, 30-74.

EFFECT OF ATTORNEY'S ACTION IN THE CASE. Client bound by acts and agreements of counsel in management of his case: *Chemical Co. v. Bass*, 175-426; *Gardiner v. May*, 172-192; *Beck v. Bellamy*, 93-129; *Greenlee v. McDowell*, 39-481. Attorney is agent of client and an act exceeding authority is binding when ratified: *Christian v. Yarboro*, 124-72. The fact that attorney misunderstood his authority and signed an agreed statement of facts without any authority is no ground to set aside judgment: *Harrill v. R. R.*, 144-542. Client bound where associate attorney receipts the judgment: *Rogers v. McKenzie*, 81-164. Solvent attorney appearing without authority, judgment not set aside: *University v. Lassiter*, 83-38. Attorney, without authority, cannot compromise case: *Chavis v. Brown*, 174-122; *Bank v. McEwen*, 160-414; *Moye v. Cogdell*, 69-93; *Lewis v. Blue*, 110-420; but see *Locheimer v. Weil*, 113-181. Attorney cannot collect debt except in money without authority: *Moye v. Cogdell*, 69-93; *Bank v. Grimm*, 109-93. Where attorney transferred for value a bond which his client had endorsed in blank and delivered to him for collection, transferee protected: *Bradford v. Williams*, 91-7. See *Sherrill v. Clothing Co.*, 114-436; *Hines v. Butler*, 38-307; *Earp v.*

Richardson, 81-5. **Attorney consenting to judgment:** *Chemical Co. v. Bass*, 175-426; *Gardiner v. May*, 172-192; *Hoell v. White*, 169-640; *Hairston v. Garwood*, 123-345.

Where minors were represented in partition proceedings by attorney without authority: *England v. Garner*, 90-201. **Attorney cannot accept service of summons:** *Warlick v. Reynolds*, 151-606; *Starr v. Hall*, 87-381. **In lunatic's suit by next friend, question whether power of attorney given to defendant by plaintiff to dismiss suit is valid:** *Smith v. Smith*, 106-498. **Appearance by attorney though unauthorized gives jurisdiction:** *Hackett v. McMillan*, 112-513; *Williams v. Johnson*, 112-424. **Associate counsel of city attorney may continue in case after resignation of city attorney:** *Wilmington v. Stolter*, 122-395. **Attorney cannot extend the time on a note and release surety:** *Hall v. Presnell*, 157-290.

Attorney cannot have debtor arrested without special authority: *Moore v. Cohen*, 128-345; *West v. Grocery Co.*, 138-166. **Attorney's fee fixed by the court in case of next friend and guardian ad litem:** *In re Stone*, 176-336; *Outland v. Outland*, 118-141. **The attorney of appellant is his agent for perfecting appeal:** *Truelove v. Norris*, 152-755; *Hewitt v. Beck*, 152-757. **Attorney cannot appear on both sides of adversary proceeding:** *Marcom v. Wyatt*, 117-129; *Arrington v. Arrington*, 116-170; *Cotton Mills v. Cotton Mills*, 116-647; *Gooch v. Peebles*, 105-411.

201. Failure to file complaint, attorney liable for costs. When a plaintiff is compelled to pay the costs of his suit in consequence of a failure on the part of his attorney to file his complaint in proper time, he may sue such attorney for all the costs by him so paid, and the receipt of the clerk may be given in evidence in support of such claim.

Rev., s. 214; Code, s. 22; R. C., c. 9, s. 5; 1786, c. 253, s. 6.

Attorney cannot sever from client without notice: *Gooch v. Peebles*, 105-411. **Courts can order attorneys to pay costs where guilty of gross negligence:** *Robins*, ex parte, 63-309.

202. Fraudulent practice, attorney liable in double damages. If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages.

Rev., s. 215; Code, s. 23; R. C., c. 9, s. 6; 1743, c. 37.

Attorney cannot appear on both sides: *Marcom v. Wyatt*, 117-129; *Cotton Mills v. Cotton Mills*, 116-647; *Arrington v. Arrington*, 116-170; *Gooch v. Peebles*, 105-432. **Fraud presumed where attorney gains advantage of client in trading with him:** *Egerton v. Logan*, 81-172. **Case where lawyer collected client's money, got drunk and couldn't tell what went with it, but did not use it:** *Kane v. Haywood*, 66-1.

ART. 3. ARGUMENTS

203. Court's control of argument. In all trials in the superior courts there shall be allowed two addresses to the jury for the state or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The judges of the superior court are also authorized to limit the time of argument on the trial of all actions, civil and criminal, except in capital felonies, but in no instance shall the time be limited to less than one hour on each side in misdemeanors, or to less than three hours on each side in other causes. Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury.

Rev., s. 216; 1903, c. 433.

Power of judge to limit argument: *State v. Jones*, 117-768. **Right to open and close argument, see** *Brown v. R. R.*, 140-154; *In re Peterson*, 136-13; *Banking Co. v. Walker*, 121-115;

Austin v. Secrest, 91-214; Cheek v. Watson, 90-302; Brooks v. Brooks, 90-142; Love v. Dickerson, 85-5; McRae v. Lawrence, 75-289; Churchill v. Lee, 77-341; Hudson v. Wetherington, 79-3; Syme v. Broughton, 85-367; State v. David, 49-354; Stronach v. Bledsoe, 85-473; Superior Court Rules 3, 4 and 6, 174-847.

WHAT MAY BE USED IN ARGUMENT. Use of other cases: Cashwell v. Bottling Works, 174-324; Howard v. Telegraph Co., 170-495; Harrington v. Wadesboro, 153-437; Horah v. Knox, 87-483; State v. Smallwood, 78-560; State v. Whit, 50-224. **Pleadings cannot be commented on unless introduced in evidence:** Smith v. Smith, 106-498. **Cases in which question arises as to whether certain matters should be allowed to be argued:** Holt v. Mfg. Co., 177-170; Davis v. Hill, 75-224; In re Burns' Will, 121-336; Fowler v. Ins. Co., 74-89; Smith v. Nimocks, 94-243; Smith v. Smith, 106-498; Gwaltney v. Timber Co., 115-579—as to whether comments allowed upon certain persons not testifying, State v. Harrison, 145-408; Devries v. Phillips, 63-53; Gragg v. Wagner, 77-246; Goodman v. Sapp, 102-477; Peebles v. Horton, 64-374; State v. Williams, 65-505; State v. Bryan, 89-531; State v. Suggs, 89-527; Guy v. Manuel, 89-83; State v. Rogers, 94-860; Chambers v. Greenwood, 68-274; Wilson v. White, 80-280; Greenlee v. Greenlee, 93-278; Kerchner v. McRae, 80-219; Tobacco Co. v. McElwee, 96-71; Bank v. Bridgers, 114-383; State v. Costner, 127-566. **Counsel's abuse of privilege:** State v. Rogers, 168-112; State v. Banner, 149-519; State v. Harrison, 145-408; Moseley v. Johnston, 144-257; State v. Braswell, 82-693; State v. Williams, 65-505; Jenkins v. Ore Co., 65-563; Greenlee v. Greenlee, 93-278; Goodman v. Sapp, 102-477; Holly v. Holly, 94-96; Horah v. Knox, 87-486; State v. Noland, 85-576; State v. Smith, 75-306; State v. Underwood, 77-502; Cannon v. Morris, 81-139; Denning v. Gainey, 95-528; Houser v. Beam, 111-501; Cawfield v. R. R., 111-597; Byrd v. Hudson, 113-203; Pearson v. Crawford, 116-756; State v. Tuten, 131-701; Hopkins v. Hopkins, 132-25; State v. Tyson, 133-692; Perry v. R. R., 128-471. **Judge must stop counsel whenever he abuses privilege:** State v. Williams, 65-505. **The refusal to interfere with comment of counsel is in judge's discretion and not reviewable, unless discretion abused:** State v. Carawan, 142-575; Smith v. R. R., 142-21; State v. Exum, 138-599; discussed in other cases hereunder. **Judge's discretion must not be exercised to deprive litigant of counsel's argument:** Puett v. R. R., 141-332; Irvin v. R. R., 164-5. **When objection is made judge should note language at the time with the exception, to avoid any question thereafter:** Moseley v. Johnson, 144-257.

ART. 4. DISBARMENT

204. Only for causes set out. No duly licensed attorney at law shall be disbarred or deprived of his license and right to practice law, either permanently or temporarily, unless for a cause set forth in this chapter and unless he be disbarred according to the provisions thereof.

Rev., s. 211; Code, s. 26; 1870-1, c. 216, s. 4.

Statute constitutional: Ex parte Schenek, 65-353. **Fine and imprisonment is not the appropriate remedy against an attorney in cases stated in statute, but disbarment:** Kane v. Haywood, 66-1. **Question of disbarment fully reviewed:** Ibid.; see, also, reference to the subject in In re Applicants for License, 143-1.

205. Conviction or confession of crime. No attorney at law shall be disbarred for crime unless after conviction or confession in open court of a felony or of a criminal offense showing him to be unfit to be trusted in the duties of his profession. After conviction of felony he must be disbarred by the court.

Rev., s. 211; Code, s. 26; 1870-1, c. 216, s. 4; 1907, c. 941, s. 1.

Does not apply to conviction in another state: In re Ebbs, 150-44. **Conviction of selling liquor:** State v. Johnson, 171-799; McLean v. Johnson, 174-345.

206. Failure to account for property or money collected. When final judgment is rendered against an attorney at law for property received or money collected by him as an attorney and retained by him without any bona fide claim thereto or to any part thereof, he must be disbarred by the court. The clerk of

the court shall retain such cause on the trial docket until the next term of such court beginning not less than ninety days after the rendition of such final judgment. If such judgment is not then satisfied, the judge presiding shall make an order, which shall be entered on the records of the court, for such attorney to show cause, at a time and place to be named in such order, and upon the return thereof may make an order debaring such attorney at law from practicing law in any of the courts, and he shall thereby be debarred from so practicing. When any such judgment is rendered in the court of a justice of the peace, and it is thereupon sought to debar an attorney at law under this section, the cause shall be docketed on the civil issue docket of the superior court, and written notice served on such attorney ninety days before action by the court.

Rev., s. 212; Code, ss. 24, 25; 1881, c. 129; 1907, c. 941, s. 1.

See famous case under former statute where attorney collected money for client, got drunk, but swore he never used it: *Kane v. Haywood*, 66-1. Demand before suit brought must be made on attorney for money collected, unless attorney was unauthorized: *Bryant v. Peebles*, 92-176. Attorney collecting money for heirs cannot defend on ground that it belongs to administrator: *Means v. Hogan*, 37-525.

207. Fraud or soliciting business; discretion of court. An attorney at law may be disbarred or suspended at the discretion of the court upon its being found by a jury that he has been guilty of any conduct in the practice of his profession involving willful deceit or fraud; or, that he has by himself or another solicited professional business.

1907, c. 941, s. 2.

ART. 5. PROCEEDINGS FOR DISBARMENT

208. Instituted by state bar association. Proceedings for the disbarment or suspension of any attorney under this article shall be instituted and prosecuted only by the committee on grievances of the North Carolina state bar association.

1907, c. 941, s. 3.

Disbarment proceedings are civil in their nature: *In re Ebbs*, 150-44. For a proceeding under the statute, see *McLean v. Johnson*, 174-345.

209. Accusation delivered to solicitor. The accusation as formulated by the committee on grievances of said state bar association shall be signed by the chairman of said committee and attested by the secretary of said association, accompanied by the written affidavit of any person or persons who make charges against such attorney, if any, duly verified and setting forth the facts upon which the same may be based, and shall be delivered by the secretary of said association or by the chairman of said committee to the solicitor of the judicial district in which such attorney resides.

1907, c. 941, s. 4.

210. Solicitor to draw accusation and move; citation, service and return. Upon the receipt from the chairman of the committee on grievances of the bar association of the accusation signed, attested and verified as above provided, the solicitor shall draw up such accusation, citing the accused to appear before the superior court of the county in which he resides, or in some adjoining county thereto, on a day named therein, and moving the court for the disbarment or suspension of such attorney, and have the same served by the sheriff of said county by deliver-

ing a copy thereof to the accused, and the original thereof, with the return of the sheriff, shall be delivered to the judge holding the courts of the district.

1907, c. 941, s. 4.

211. Order on accused to show cause. The judge of the superior court must, if of opinion that the accusation would, if true, warrant the disbarment or suspension of the accused attorney, make an order requiring the accused to appear and answer the same at a specified day during the next term of the court in which the proceeding is instituted, or at any other time when the court can hear and determine the same, a copy of which, together with a copy of the accusation, must be duly served upon the accused. If such order is made as much as ten days before any term of the court, the accusation must be made returnable and be heard during such term, unless continued for good cause by the court upon such terms as it may impose; and if such proceeding is begun less than ten days before a term of the court, it shall stand for hearing at the succeeding term unless the court shall order otherwise.

1907, c. 941, s. 5.

212. Answer of accused. The accused attorney may answer such accusation either by objecting in writing to its sufficiency or by denying the truth of the facts alleged, or setting forth the facts of his defense, which said answer as to facts by denial or otherwise must be in writing, signed by the accused and duly verified by him; and thereupon the accusation, objections and answer are hereby made a part of the records of the court as in other civil actions therein pending.

1907, c. 941, s. 6.

213. Trial and judgment; surrender of license. If the accused pleads guilty or fails or refuses to answer the accusations, the court must proceed to judgment of disbarment or suspension; and if he answers the accusation, the court must at such time as it may appoint proceed to try the same; the jury or judge finding the facts must make a special finding of the facts upon issues of fact submitted to them, and the court must, upon such facts found, thereupon render judgment of acquittal or of disbarment or of suspension, as such facts may warrant. The accused attorney may at any time stop or prevent the prosecution of the proceeding by a surrender of his license as an attorney at law, and record of such surrender shall be made in the supreme court of the state.

1907, c. 941, s. 7.

214. Proceedings in state's name by solicitor; costs. The proceedings must be conducted in the name of the state, and in all cases the solicitor of the district shall appear and prosecute the accusation and be responsible for the faithful discharge of the duties required of him under this article, and he may be assisted by other counsel. The court may, upon the motion of the solicitor, and upon good cause shown at the time, require the North Carolina state bar association to give security for the costs of such proceedings, to be approved by the court within ten days after notice thereof, and the hearing of the cause shall be postponed for that time unless security be given.

1907, c. 941, s. 8.

215. Appeal from judgment. Either party may appeal to the supreme court of North Carolina from an adverse judgment rendered by said superior court in the manner now prescribed by law for appeals in civil actions.

1907, c. 941, s. 9.

CHAPTER 5

BANKS

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ART. 1. CREATION

216. How incorporated. Three or more persons may be incorporated for the purpose of establishing and operating commercial banks of deposit and discount, or savings banks of loan and deposit, or banks with both classes of business, or banks with a trust, fiduciary and surety business, by setting forth in a certificate of incorporation—

1. The name of the corporation; no name can be assumed already in use by another corporation organized under the laws of this state or of congress, or so similar as to lead to uncertainty or confusion.

2. The location of its principal office in the state. No branch office or business may be established and maintained without the approval first obtained of the corporation commission.

Absence of express power to establish branch bank: *Banking Co. v. Tate*, 122-313. State only can complain: *Ibid.* Where authority given by legislature to establish branches, relation of home bank to branch is as parent to child: *Worth v. Bank*, 122-397.

3. The nature of its business, whether that of commercial bank, or savings bank, or both, or of a bank with a trust, fiduciary and surety business.

4. The amount of the authorized capital stock, the number of shares into which it is divided, and the par value of each share, which must be either twenty-five, fifty, or one hundred dollars; the amount of capital stock with which it will commence business, which must be at least \$5,000 in cities and towns of 1,500 population or less, \$10,000 in cities and towns of 1,500 and not over 5,000 population, and \$25,000 in all other places, the population to be ascertained by the last preceding national census; and if there is more than one class of stock, a description of the different classes with the terms on which they are created.

5. The names and postoffice addresses of the stock subscribers and the number of shares subscribed for by each; the aggregate of the subscriptions must be the amount of the capital with which the corporation will commence business.

6. The period, if any, for the duration of the corporation.

Rev., s. 222; 1901, c. 769; 1903, c. 275, ss. 1, 2; 1907, c. 829, s. 1; 1917, c. 165, s. 1; 1919, c. 59; 1919, c. 174.

217. Requirements as to certificate of incorporation. The certificate of incorporation shall be signed by a majority of the original stock subscribers, and must be proved or acknowledged before an officer duly authorized under the laws of this state to take the proof or acknowledgment of deeds. The certificate, when so proved, shall then be filed in the office of the secretary of state, who shall, if it is in accordance with law, cause it to be recorded in his office in a book to be kept for that purpose and known as the Corporation Book. Upon the payment of the organization tax and fees, the secretary of state shall certify under his official seal two copies of the certificate of incorporation and probates, one of which shall be forthwith recorded in the office of the clerk of the superior court of the county where the principal office of said corporation in this state is, or is to be, located, in a book to be known as the Record of Incorporations, and the other shall be filed in the office of the corporation commission. The said persons shall thereupon become a body politic and corporate under the name stated in the certificate. The certificate of incorporation, or a copy thereof duly filed by the secretary of state or by the clerk of the superior court of the county in which

it is recorded, or by the clerk of the corporation commission, under their respective seals, is evidence in all courts and places, and in all judicial proceedings is prima facie evidence, of the complete incorporation and organization of the corporation purporting thereby to have been established.

Rev., s. 223; 1901, c. 2, s. 9; 1903, c. 275, s. 3; 1903, c. 343.

218. Payment of capital stock. No bank shall be authorized to commence business with less than a paid-in capital stock of \$5,000 and until at least fifty per cent of the capital has been paid in in cash. The remainder of the capital stock shall be paid in monthly installments of at least ten per cent in cash of the whole of the capital, payable at the end of each succeeding month from the time it is authorized by the corporation commission to commence business, and the payment of each installment shall be certified to the corporation commission, under oath, by the cashier or president of the bank.

Rev., s. 224; 1903, c. 275, s. 10; 1909, c. 911, s. 1.

219. When and how authorized to begin business. Before a corporation may begin the banking, or banking and trust, fiduciary or surety business there must be filed with the corporation commission a statement under oath, by the cashier or president, containing the names of all of the directors and officers, with the date of the election or appointment, term of office, residence and postoffice address of each, the amount of capital stock of which each is the owner in good faith, and the amount of money paid in on account of the capital stock. Nothing shall be received in payment of capital stock but money. If from this statement, or upon examination, if an examination appears necessary, it appears to the corporation commission that the corporation is lawfully entitled to commence the business of banking, the commission shall, within thirty days after the filing of the certificate required by law, give to the corporation a certificate signed by the chairman and attested by the secretary of the commission, that such corporation has complied with all the provisions required to be complied with before commencing the business of banking and is authorized to commence such business. The corporation commission may withhold from any such corporation its certificate authorizing the commencement of business whenever it has reason to believe that the stockholders have formed the same for any other purpose than the legitimate objects contemplated by this chapter.

Rev., ss. 225, 226, 227; 1903, c. 275, ss. 5, 6, 7, 10; 1907, c. 829, ss. 2, 3, 4.

Failure to commence business in two years can be taken advantage of only by state: *Boyd v. Redd*, 120-335.

ART. 2. POWERS AND RESTRICTIONS

220. Powers. In addition to the powers conferred by law upon private corporations, a banking corporation and banking and trust company doing a fiduciary and surety business has power—

1. To exercise by its board of directors or duly authorized officers or agents, subject to law, all powers necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt, receiving deposits, buying and selling exchange, coin and bullion, and by loaning money on personal security or real or personal property. At the time of making loans or discounts it may take in advance such interest as is agreed upon, not exceeding the legal rate.

2. To purchase, hold and convey such real estate as is—

(1) Necessary for the convenient transaction of its business, including with its banking offices other apartments to rent as a source of income, which investment shall not exceed fifty per cent of its paid-in capital stock and permanent surplus. This provision shall not apply to any such investment made before the ninth day of March, one thousand nine hundred and three.

(2) Mortgaged to it in good faith by way of security for loans made or money due to it.

(3) Conveyed to it in satisfaction of debts previously contracted in the course of its dealing.

(4) Acquired by it under execution sale or judgment of any court in its favor.

All powers and privileges heretofore granted to any person, firm or corporation doing a banking business in connection with a fiduciary and surety business, or the right to deal to any extent in real estate inconsistent with this chapter, are hereby repealed.

Rev., s. 228; 1903, c. 275, ss. 8, 9; 1907, c. 829, ss. 5, 12; 1919, c. 55.

221. State banks and trust companies may become members of Federal Reserve system. The words, "Federal Reserve Act," as herein used shall be held to mean and to include the act of Congress of the United States, approved December twenty-third, nineteen hundred and thirteen, as heretofore and hereafter amended. The words, "Federal Reserve Board," shall be held to mean the Federal Reserve Board created and described in the Federal Reserve Act. The words, "Federal Reserve Bank," shall be held to mean the Federal reserve banks created and organized under authority of the Federal Reserve Act. The words, "Member bank," shall be held to mean any national bank, State bank or bank and trust company which has become or which becomes a member of one of the Federal Reserve banks created by the Federal Reserve Act.

2. Any bank or trust company incorporated under the laws of this state shall have the power to subscribe to the capital stock and become a member of a Federal Reserve bank.

3. Any bank or trust company incorporated under the laws of this state which is or which becomes a member of a Federal Reserve bank is by this act vested with all powers conferred upon member banks of the Federal Reserve banks by the terms of the Federal Reserve Act as fully and completely as if such powers were specifically enumerated and described herein, and all such powers shall be exercised subject to all restrictions and limitations imposed by the Federal Reserve Act or by regulations of the Federal Reserve Board made pursuant thereto. The right, however, is expressly reserved to revoke or to amend the powers herein conferred.

4. A compliance on the part of any such bank or trust company with the reserve requirements of the Federal Reserve Act shall be held to be a full compliance with those provisions of the laws of this state which require banks or trust companies to maintain cash balances in their vaults or with other banks, and no such bank or trust company shall be required to carry or maintain reserve other than such as is required under the terms of the Federal Reserve Act.

5. Any such bank or trust company shall continue to be subject to the supervision and examinations required by the laws of this state, except that the Federal Reserve Board shall have the right, if it deems necessary, to make exam-

inations; and the authorities of this state having supervision over such bank or trust company may disclose to the Federal Reserve Board, or to examiners duly appointed by it, all information in reference to the affairs of any bank or trust company which has become, or desires to become, a member of a Federal Reserve bank.

1919, c. 252, ss. 1, 2, 3, 4, 5.

222. Acceptances. Banking corporations and banking and trust companies doing a fiduciary business shall have power to accept drafts or bills of exchange drawn upon them, and to indorse drafts or bills of exchange drawn upon another, having not more than six months sight to run, exclusive of days of grace, which grow out of transactions involving the importation or exportation of goods, or which grow out of transactions involving the domestic shipment of goods. No such banking corporation or banking and trust company doing a fiduciary business shall accept or indorse, whether in a foreign or domestic transaction, for any one person, company, firm, or corporation to an amount equal at any time in the aggregate to more than ten per centum of its paid-up and unimpaired capital stock and surplus, unless the banking corporation or banking and trust company doing a fiduciary business is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance; and no such banking corporation or banking and trust company doing a fiduciary business shall accept or indorse such bills or drafts to an amount equal at any one time in the aggregate to more than one-half of its paid-up and unimpaired capital stock and surplus. The corporation commission, however, under such general regulations as it may prescribe, which shall apply to all banking corporations or banking and trust companies doing a fiduciary business alike regardless of the amount of capital stock and surplus, may authorize any banking corporation or banking and trust company doing a fiduciary business to accept or indorse such bills or drafts to an amount not exceeding at any time in the aggregate one hundred per centum of its paid-up and unimpaired capital stock and surplus: Provided, that the aggregate of acceptances growing out of domestic transactions shall in no event exceed fifty per centum of such capital stock and surplus.

1919, c. 76.

Taking "acceptances" by bank before the enactment of this section not ultra vires: *Sherill v. Trust Co.*, 176-591.

223. Restriction as to investment in real estate. A bank and trust company doing a general banking and trust, fiduciary and surety business, and dealing in real estate, shall not invest more than twenty-five per cent of the capital stock and permanent surplus in real estate, except that acquired to protect its loans, debts contracted in the course of its dealings or by sale under execution or judgment of any court in its favor.

1907, c. 829, s. 6.

224. When bank may purchase its stock. No bank may be the holder as pledgee or as purchaser of any portion of its capital stock, unless such purchase is necessary to prevent loss upon a debt previously contracted in good faith.

Rev., s. 229; 1903, c. 275, s. 1.

Discussion of question of lien granted by former statute to bank on stock of stockholder indebted to bank: *Boyd v. Redd*, 120-335. Stock pledged under charter allowing a bank to accept pledge of its own stock must be released by payment of the debt before it can share in the assets of a bank winding up business: *Bank v. Riggins*, 124-534.

225. Banks may invest in federal farm bonds. Any savings bank, banking institution, trust company, or insurance company, organized under the laws of this state, or any person acting as executor, administrator, guardian, or trustee, may invest in federal farm bonds issued by any federal land bank or joint-stock land bank, organized pursuant to "The Farm Loan Act" of Congress, approved July seventeenth, one thousand nine hundred and sixteen.

1919, c. 83.

226. Reserve fund. Every bank or banking and trust company doing business and engaging in banking, trust, fiduciary, or surety business, and dealing in real estate, shall at all times have on hand as reserve in available funds an amount equal to at least fifteen per cent of the aggregate amount of its demand deposits and five per cent of time deposits. But no reserve shall be required on deposits secured by United States bonds or North Carolina state bonds.

Demand deposits, within the meaning of this act, shall comprise all deposits payable within thirty days, and time deposits shall comprise all deposits payable after thirty days, all savings accounts and certificates of deposit which are subject to not less than thirty days notice before payment, and all postal savings deposits.

The available funds consist of cash on hand and balances due from other solvent banks. Cash includes lawful money of the United States, and exchange of any clearing house association. A bank shall not make any new loans or discounts, otherwise than by discounting or purchasing bills of exchange payable at sight, and shall not make any dividends of its profits when the available funds are below the reserve herein required.

Any bank that is now or may hereafter become a member of a federal reserve bank shall maintain the same reserves with respect to deposits as shall be required of other members of such federal reserve bank.

Rev., s. 232; 1903, c. 275, s. 29; 1919, c. 58.

227. Restriction on loans. The total liabilities to any bank or banking institution or banking or trust company doing a fiduciary and surety business and dealing in real estate, of any person, corporation or firm, for money borrowed, including in the liabilities of a firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of paid-in capital stock and surplus of such institution. But the discount of bills of exchange drawn in good faith against actually existing values and the discount of commercial or business paper actually owned by the person negotiating it shall not be considered as money borrowed. This section does not apply to banks with a paid-up capital of one hundred thousand dollars or less.

Rev., s. 233; 1897, c. 298, s. 3; 1897, c. 432; 1907, c. 829, s. 8; 1919, c. 47.

228. Deposits of minors. When a deposit is made by or in the name of a person who is a minor of the age of fifteen years and upwards, in any state or national bank in this state, it shall be held for the exclusive right and benefit of the minor, free from the control of all persons; and it shall be paid, together with any interest thereon, to the person in whose name the deposit was made, and the receipt or check of such minor to the said state or national bank is a valid and sufficient discharge for such deposit or any part thereof.

1907, c. 750, s. 1.

For deposits by married women, see section 2508.

229. Deposits in trust for minors. When a deposit not in excess of fifty dollars is made in any bank, banking institution or trust company doing business in this state in trust for a person who is a minor of the age of fifteen years and upward, and no other or further notice of the existence and terms of a legal and valid trust have been given to the bank, in the event of the death of the trustee, all or any part of the deposit, together with the dividends or interest thereon, may be paid to the person for whom it was made.

1909, c. 459, s. 1.

230. Deposits in two names. When a deposit has been or is hereafter made in any bank, trust company, banking and trust company, or any other institution transacting business in this state, in the names of two persons, payable to either, or payable to either or the survivor, all or any part of the deposit, or any interest or dividend thereon, may be paid to either of said persons, whether the other is living or not; and the receipt or acquittance of the person so paid is a valid and sufficient discharge to the bank for payment so made.

1917, c. 243, s. 1.

See Carr v. Bank, 126-186.

231. Liability for forged or raised check. No bank, banking institution or trust company doing business in this state is liable to a depositor for the payment by it of a forged or raised check or order to pay money, unless within six months after the return to the depositor of the voucher of such payment he notifies the bank of the forgery or raising.

1909, c. 105, s. 1.

Bank assumes liability for erroneous payment of check: Bank v. Thompson, 174-349. Drawee bank presumed to know signature of drawer: Bank v. Trust Co., 168-605; Yarborough v. Trust Co., 142-377.

232. Liability for nonpayment of check. No bank shall be liable to a depositor because of the nonpayment, through mistake or error and without malice, of a check which should have been paid had the mistake or error of nonpayment not occurred, except for the actual damage by reason of such nonpayment that the depositor shall prove, and in such event the liability shall not exceed the amount of damage so proven.

1919, c. 306.

Bank is liable to drawer and not to holder before acceptance: Trust Co. v. Bank, 166-112; Bank v. Bank, 118-783; Hawes v. Blackwell, 107-196; Perry v. Bank, 131-117.

233. Collections forwarded to payer bank. Any banking corporation or banking and trust company, doing a fiduciary business, hereinafter called the bank, doing business in this state, receiving for collection or deposit any check, note, or other negotiable instrument drawn upon or payable at any other bank, located in another city or town whether within or without this state, may forward such instrument for collection directly to the bank on which it is drawn or at which it is made payable, and such method of forwarding direct to the payer shall be deemed due diligence; and the failure of such payer bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor: Provided, such forwarding bank shall have used due diligence in other respects in connection with the collection of such

instrument. The provisions of this section shall not apply where there is more than one bank in a town.

1919, c. 169.

This section changes the law as given in *Bank v. Trust Co.*, 172-344; s. c., 177-254; *Bank v. Floyd*, 142-187.

234. Transactions on legal holidays and Saturdays. Nothing in any law of this state shall in any manner whatsoever affect the validity of, or render void or voidable, the payment, certification, or acceptance of a check or other negotiable instrument or any other transaction by a bank in this state because done or performed on any legal holiday or on any Saturday between twelve o'clock noon and midnight, provided such payment, certification, acceptance, or other transaction would be valid if done or performed on any business day other than a legal holiday or before twelve o'clock noon on any such Saturday. Nothing herein shall be construed to compel any bank in this state, which by law or custom is entitled to close on legal holidays or at twelve o'clock noon on any Saturday, to keep open for the transaction of business or to perform any of the acts or transactions aforesaid on any legal holiday, or any Saturday after twelve o'clock noon, except at its own option.

1919, c. 253.

235. Reorganization. When a bank, under the laws of this state or of the United States, is authorized to dissolve and has taken the necessary steps to effect dissolution, it is lawful for a majority of the directors of the bank, upon the authority in writing of the owners of two-thirds of its capital stock, with the approval of the corporation commission, to execute a certificate of incorporation as provided in this chapter, which certificate, in addition to other requirements of law, shall further set forth the authority derived from the stockholders of the dissolved bank. Upon filing the certificate as hereinbefore provided for the organization of banks, the same becomes a bank under the laws of this state, and all assets of the dissolved national bank by operation of law become the property of the state bank, subject to all liabilities of the national bank not liquidated under the laws of the United States before the reorganization.

Rev., s. 230; 1903, c. 275, s. 17.

236. Chapter on corporations applicable. All of the provisions of law relating to private corporations, and particularly those enumerated in the chapter entitled *Corporations*, not inconsistent with this chapter, or with the business of banking, are applicable to banks.

Rev., s. 234; 1903, c. 275, s. 4.

ART. 3. STOCKHOLDERS AND INSOLVENCY

237. Individual liability. The stockholders of every bank organized under any general law or special act of North Carolina are individually responsible, equally and ratably, for all contracts, debts and engagements of such corporation, to the extent of the par value of their stock, in addition to the amount invested in such shares. The term "stockholder," when used in this chapter, applies not only to the persons who appear by the books of the corporation as stockholders, but also to every legal or equitable owner of stock, although the

same is on such books in the name of another person; but does not apply to persons who hold the stock as collateral security for the payment of a debt, or as executors, administrators, guardians, or trustees, but the estate and funds in their hands is liable in like manner and extent as the testator, intestate, ward, or cestui que trust would be if living and competent to act and hold the stock in his own name.

Rev., ss. 235, 237; 1897, c. 298; 1903, c. 275, s. 13.

Procedure in enforcing the double liability of stockholders of an insolvent bank, see *Smathers v. Bank*, 135-410. Statute of limitations begins to run in favor of stockholders, when bank suspends specie payment: *Long v. Bank*, 90-405. No exemption from liability in the case of married women: *Smathers v. Bank*, 155-283. The liability is for benefit of creditors and is not part of assets of the corporation: *Hill v. Smathers*, 173-642.

238. Exemptions in special charters repealed. Any exemption from individual liability imposed upon stockholders by the preceding section contained in the charter of any bank incorporated prior to the first day of January, nineteen hundred and three, is repealed.

Rev., s. 236; 1903, c. 275, s. 17.

239. Assessment of stock when assets insufficient. When a banking corporation chartered by the state becomes insolvent, and it appears to the court with jurisdiction of the cause that the bank's assets are insufficient to discharge its obligations, and that it will be necessary to assess the shares of stock issued by such bank as provided by law, an accounting may be had in the original action and the shareholders made parties defendant thereto. When upon the facts found it is adjudged that such deficiency exists and the amount thereof is determined, the court shall assess the stock of the corporation equally and ratably, and not in excess of the limitation provided by statute, and adjudge the holders indebted to the receiver of the corporation in proportion to the amount of stock therein credited to them upon the books of the bank within thirty days next preceding its suspension. The certificates of stock are thereafter evidence as against all stockholders of an indebtedness due the receiver equivalent to the assessment thereon, and the judgment shall establish the amount of the deficiency, the necessity of the assessment, the names of the shareholders, and their several liabilities as such.

1911, c. 25, s. 1.

240. Receiver to sue and collect from stockholders. The receiver of the insolvent bank is empowered to demand, sue for, and collect by lawful process all indebtedness due from its stockholders, whether they reside within or without the state, and wherever they or their legal representatives may be served with process, or wherever any property belonging to them, or their estate, may be subject to attachment, garnishment, or other lawful process. All indebtedness due from such stockholders, their representatives or estates, is payable to the receiver as corporate assets, and the title thereto vests in and must be applied by him for the equal benefit of all persons entitled to share in the distribution of the fund and disbursed ratably under the orders of the court. The receiver may, within ten years after an assessment on the stock, institute civil actions against the stockholders to reduce their liability thereon to final judgment, and in any such action the creditors of the bank may be proper, but are not necessary parties plaintiff.

1911, c. 25, ss. 2, 3, 6.

241. Liability as affected by stock assignment. A person who has in good faith and without any intent to evade his liability as a stockholder, transferred his stock on the books of the corporation to a person of full age, previous to a default in the payment of any debt or liability of the corporation, is not subject to any personal liability on account of the nonpayment of such debt or liability, but the assignee is liable to the amount of the stock, in the same manner as if he had been the owner at the time the corporation contracted the debt or liability. But no transfer of stock in an insolvent state bank made within thirty days of its suspension releases or discharges the assignor thereof, but is prima facie evidence that the assignment was made with knowledge of the insolvency of the bank and with an intent to avoid liability thereon.

Rev., s. 238; 1903, c. 275, s. 14; 1911, c. 25, s. 5.

242. Assignment by bank evidence of insolvency. When any state bank makes a voluntary assignment of its assets to trustees, such fact is prima facie evidence of insolvency, and sufficient to authorize the appointment of a receiver.

1911, c. 25, s. 4.

243. Stock sold if subscription unpaid. When a stockholder or his assignee fails to pay any installment on the stock, when the same is required by law to be paid, the directors of the bank may sell the stock of the delinquent stockholder at public sale, having first given him twenty days notice, personally or by mail at his last known address. If no party can be found who will pay for the stock the amount due thereon to the bank, with any additional indebtedness of such stockholder to the bank, the amount previously paid shall be forfeited to the bank and the stock sold as the directors order within six months of the time of the forfeiture, and if not sold, it shall be canceled and deducted from the capital of the bank.

Rev., s. 239; 1903, c. 275, s. 11.

ART. 4. CORPORATION COMMISSION

244. Banking institutions and receivers under supervision of. Every bank, corporation, partnership, or individual transacting a banking, banking and trust, fiduciary and surety, or banking and real estate business, within and under the laws of this state, is subject to the provisions of this chapter, and under the supervision of the corporation commission, which has power to make such rules, consistent with law, for the government of such institutions, as in its judgment seem wise and expedient. When a receiver has been appointed for a failing bank or banking institution or corporation doing a banking business, he is under the control of the corporation commission and shall obey its orders in so far as they do not conflict with the orders or decrees of the court made in the case.

Rev., ss. 240, 241; 1903, c. 275, ss. 19, 20; 1907, c. 829, ss. 9, 13.

245. Quarterly reports and publication. Every bank and corporation, partnership, or individual transacting a banking or banking and trust, fiduciary and surety business, or banking and real estate business shall make to the corporation commission not less than four reports each year, according to the form prescribed by the commission. These reports shall be verified in the case of incorporated banking companies by the oath or affirmation of the president, vice president or

cashier, and two of the board of directors, and in other cases by the oath or affirmation of the partners, or individual owner. The bank, corporation or individual making such report shall publish it in a newspaper in the county in which the bank, corporation or individual is located.

Rev., s. 242; 1903, c. 275, s. 21; 1907, c. 829, s. 10.

False and misleading statements held, prior to this statute, to give person induced thereby to deposit money a right of action against directors: *Tate, Treasurer, v. Bates*, 118-287. Directors presumed to know condition of bank: *Ibid*; *Solomon v. Bates*, 118-311. If false and fraudulent statements are made by officers, they are liable to one induced thereby to deal with such bank: *Townsend v. Williams*, 117-330; *Solomon v. Bates*, 118-311; *Houston v. Thornton*, 122-365.

246. Quarterly reports from banks of trust and surety or guarantee business. Every individual, partnership or corporation doing a banking and trust and fiduciary and surety or guarantee business shall make to the corporation commission not less than four reports each year, showing the entire amount of trust and surety and fiduciary and guarantee business as a part of the liabilities of said banking institution, which report shall be published as are the reports of other banking institutions. If any individual, partnership or corporation shows by the reports, or by the examination of the bank examiner, that such liabilities are equal to the amount of the capital stock, the corporation commission has the authority and is empowered to make such rules and regulations and reductions of said liabilities as it deems necessary for the protection of the creditors and depositors of the institution.

1907, c. 829, s. 11.

247. Annual and special reports. Every bank shall at all times keep a correct record of the names of its stockholders, and once in each year, or whenever called upon, must file in the office of the corporation commission a correct list of its stockholders, with the number of shares held by each. The commission has power to call for special reports from any bank, corporation, firm or individual transacting a banking business, whenever necessary, in order to obtain a full and complete knowledge of such bank.

Rev., ss. 243, 244; 1903, c. 275, ss. 16, 22.

248. Penalty and action for failure to report. Every bank, corporation, partnership, or individual that fails to make any report, or any published statement required by the provisions of this chapter is subject to a penalty of two hundred dollars. This penalty shall be recovered by the state in a civil action in any court of competent jurisdiction, and it is the duty of the attorney general to prosecute all such actions.

Rev., s. 245; 1903, c. 275, s. 26.

ART. 5. BANK EXAMINERS

249. Appointment and compensation. The corporation commission shall appoint from time to time a bank examiner and such number of assistant bank examiners as are necessary to make a thorough examination of the affairs of every bank, corporation, or individual doing a banking business, as often as is deemed necessary and proper and at least once in every year, and it is the duty of these examiners to verify the report made by the directors, members, or individ-

ual conducting any banking institution, as required by section 245 in this chapter. The corporation commission may also appoint such clerks and stenographers as are necessary to effectually carry out the provisions of the banking laws of the state, and may at any time remove any person appointed by it under this section. The commission shall fix the compensation to be paid to the bank examiner, assistant bank examiners, clerks and stenographers employed in the banking department, and certify the same to the state auditor; but their total compensation and expenses shall not exceed in any one year the total fees collected under section 252 in this chapter for the examination of banks and the expenses of examiners.

1917, c. 165, ss. 4, 5; Ex. Sess. 1913, c. 36, s. 1.

250. Powers and reports of examination. The bank examiner and assistant bank examiners have power to make a thorough examination into all the books, papers and affairs of the bank or corporation, partnership or individual transacting a banking business, and, in so doing, to administer oaths and affirmations and to examine on oath or affirmation any individual banker and the officers, agents, partners and clerks of such bank, corporation, partnership or individual touching the matters they are authorized and directed to inquire into, and to examine, and to summon, and by attachment compel the attendance of, any person or persons in this state to testify under oath before them in relation to the affairs of such corporation, partnership, or individual. They shall make a full and detailed report in writing to the corporation commission of each examination within ten days after it has been made.

Rev., ss. 247, 248; 1903, c. 275, s. 24.

251. Penalty for unauthorized disclosure. Except as provided in this chapter, or as required by an order or decree of a court of competent jurisdiction, it shall be unlawful for any bank examiner or assistant bank examiner to disclose any information acquired by him in the performance of his duties as prescribed by law. An examiner or assistant examiner violating the provisions of this section shall be guilty of a misdemeanor, punishable by a fine of not exceeding five hundred dollars or imprisonment of not exceeding twelve months, or both, in the discretion of the court; and upon conviction shall forfeit his office or appointment as examiner.

1919, c. 300.

252. Annual examinations; fees and expenses. One examination each year is designated as the annual examination, and for this the bank, corporation, or individual examined shall pay into the office of the corporation commission the following fees: banks, banking institutions, and individuals with total resources of \$100,000 or less, \$15; over \$100,000 and not over \$200,000, \$20; over \$200,000 and not over \$300,000, \$25; over \$300,000 and not over \$500,000, \$30; over \$500,000 and not over \$750,000, \$35; over \$750,000 and not over \$1,000,000, \$40; \$1,000,000 and over, \$40, plus \$2 for each \$100,000 and fraction thereof, up to \$5,000,000, then \$1 additional for each \$100,000 or fraction thereof. The expenses incurred and services, other than examinations performed specially for any bank, shall be paid by such bank or banking institution. No bank may be compelled to pay for more than one examination in each year unless it appears that the condition of the bank, banking institution, or banker is precarious, or in any

way unsatisfactory, then it is the duty of the commission to order a special examination, which must be paid for by such bank at the same rates as the annual examinations.

The corporation commission shall not later than the tenth of each month turn into the state treasury any balance it may have on hand from fees collected the previous month for bank examinations or expenses of the examiners, after payment of the expenses incurred by the examiners.

Rev., s. 249; 1903, c. 275, s. 25; 1917, c. 165, ss. 2, 3.

253. May take possession of bank; receiver appointed. A bank examiner who has filed the bond required by the commission, when ordered by the commission, has authority to take possession of any bank doing business under the laws of this state and retain possession thereof for a time sufficient to make a thorough examination into its affairs and financial condition; and in case it is found by the examiner that the bank is insolvent or is conducting its business in an unsafe and unauthorized manner, or is jeopardizing the interests of its depositors, then he, when authorized by the corporation commission, has authority to take and retain possession of all the property of every description belonging to such bank, corporation, partnership, or individual, until the corporation commission can receive and act on the report made by the examiner of such bank, and have a receiver appointed, for the purpose of winding up and settling the affairs of such bank, banking institution or banker, according to law; and the corporation commission is hereby empowered, in its own name, to institute and maintain civil actions for the appointment of receivers in such cases, and for such other relief as is necessary or proper to protect the creditors of the bank. The commissioners may grant such bank, corporation or individual sixty days in which to correct any errors or irregularities, and make good any deficiencies or losses shown in any reports or otherwise.

Rev., s. 250; 1903, c. 275, s. 30.

Receiver is proper party to enforce the double liability of stockholders of an insolvent bank: *Smathers v. Bank*, 135-410. Receiver appointed at instance of creditors not the proper party to be sued for deposit: *Crutchfield v. Hunter*, 138-54. Ordinarily motion for receiver must be made before resident judge or judge holding courts of district: *Worth, Treasurer, v. Bank*, 121-343. Where two receivers appointed by two courts, question of priority settled on basis of fractions of a day: *Ibid.* Under former statute giving state treasurer power to apply for receiver, creditor still had right to do so: *Ibid.* For complaint by receiver against cashier for accounting, see *Dunn v. Johnson*, 115-249. Upon bank's closing doors, all claims against and in favor of it mature *eo instanti*: *Davis v. Mfg. Co.*, 114-321. Where resident creditor of insolvent bank brings suit in another state, hindering the collection of bank's assets, receiver can enjoin him even if there was an adequate remedy at law: *Davis v. Lumber Co.*, 132-233.

254. May make arrests; procedure. When it appears to a bank examiner, by examination or otherwise, that any officer, agent, employee, director, stockholder or owner of a bank or banking institution is guilty of a violation of the criminal laws of the state relating to banks and banking institutions, it is his duty to hold and detain such person until a warrant can be procured for his arrest; and for such purpose the examiner has all the powers of a peace officer of such county, and may arrest without warrant for past offenses. Upon report of his action to the corporation commission, it may direct the release of the person held, or, if in its judgment he should be prosecuted, the commission shall cause the solicitor

of the judicial district in which the detention is had to be promptly notified, and the action against such person shall be continued a reasonable time to enable the solicitor to be present at the trial.

Rev., s. 251.

NOTE. For malfeasance by bank examiners, see Crimes and Punishments, s. 4401.

ART. 6. INDUSTRIAL BANKS

255. Industrial bank defined. The term "industrial bank" as used in this article shall mean any corporation formed under the provisions thereof, and any corporation heretofore organized under the general corporation law of this state which shall hereafter reorganize as an industrial bank pursuant to the provisions of this article.

1919, c. 225, s. 1.

256. Manner of organization. Corporations may be organized under this article in the same manner as provided for corporations authorized under the chapter on Corporations.

1919, c. 225, s. 2.

257. Capital stock. The capital stock of an industrial bank shall not be less than twenty-five thousand dollars.

1919, c. 225, s. 3.

258. Corporate title. Every corporation incorporated or reorganized pursuant to the provisions of this article shall be known as an industrial bank, and may use the word "bank" as part of its corporate title.

1919, c. 225, s. 4.

259. Powers. In addition to the general powers conferred upon corporations formed under the chapter on Corporations, every industrial bank shall have the following powers:

1. To loan money on real or personal security and reserve lawful interest in advance upon such loans, and to discount or purchase notes, bills of exchange, acceptances or other choses in action.

2. To sell or offer for sale its secured or unsecured evidences or certificates of indebtedness, or investment, and to receive from investors therein or purchasers thereof payments therefor in installments or otherwise, with or without an allowance of interest upon such payments, whether such evidence or certificates of indebtedness, or of investment be hypothecated for a loan or not, and to enter into contracts in the nature of a pledge or otherwise with such investors or purchasers with regard to said evidences or certificates of indebtedness, or of investment, and no such transaction shall, in any way, be construed to affect the rate of interest on such loans.

3. To charge for a loan made pursuant to this section one dollar for each fifty dollars or a fraction thereof loaned, up to and including loans of two hundred and fifty dollars, and, for loans in excess of two hundred and fifty dollars, one dollar for each two hundred and fifty dollars excess or fraction thereof, to cover expenses, including any examination or investigation of the character and circumstances of the borrower, comaker, or surety. An additional fee of five dollars

may be charged on such loans where same are secured by mortgage on real estate. No charge shall be collected unless a loan shall have been made.

4. To establish branch offices or places of business within the county in which its principal office is located, but not elsewhere.

1919, c. 225, s. 5.

260. Restrictions on powers. No industrial bank shall—

1. Make any loan under the provisions of this article for a longer period than one year from the date thereof.

2. Deposit any of its funds in any banking corporation unless such corporation has been designated as such depository by a vote of a majority of the directors, or of the executive committee, exclusive of any director who is an officer, director, or trustee of the depository so designated, present at any meeting duly called at which a quorum is in attendance.

1919, c. 225, s. 7.

261. Limit of loans. The total liabilities to any industrial bank of any person, corporation, company, or firm, for money borrowed, including in the liabilities of the company or firm the liabilities of the several members thereof, shall at no time exceed ten per cent of the actually paid-up capital and surplus of such industrial bank, but the discount of bona fide bills of exchange or acceptances drawn against actually existing values, and the discount of commercial or business paper actually owned by the person or persons, corporation, company, or firm negotiating the same, shall not be considered money so borrowed.

1919, c. 225, s. 6.

262. Directors. At least three-fourths of the number of directors of any industrial bank shall be residents of the state of North Carolina.

1919, c. 225, s. 8.

263. Supervision and examination. Every industrial bank formed under the provisions of this article shall be subject to supervision by the corporation commission and subject to examination in the same manner as is provided in the case of state banks so far as the same may be applicable and not inconsistent with the provisions of this article.

1919, c. 225, s. 9.

264. Previously organized corporations may qualify. Any corporation heretofore organized under the general corporation law of this state, and authorized by its charter or articles of incorporation to engage in the business described in this article, shall, upon filing notice with the secretary of state and the corporation commission on or before January first, one thousand nine hundred and twenty, be recognized as an industrial bank within the provisions of this article and shall be subject to this article to the same extent as if actually incorporated hereunder.

1919, c. 225, s. 10.

CHAPTER 6

BASTARDY

- 265. Justices have jurisdiction; when warrant issued.
- 266. Complaint as to bastard by county commissioner.
- 267. Woman declaring father; issue of paternity; appeal.
- 268. Judgment on appeal to superior court against putative father.
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- 278. Effects of legitimation.
- 279. Legitimation by subsequent marriage.

265. Justices have jurisdiction; when warrant issued. Justices of the peace of the several counties have exclusive original jurisdiction to issue, try and determine all proceedings in cases of bastardy in their respective counties. A warrant in bastardy shall be issued only upon the voluntary affidavit and complaint of the mother of the bastard; or, upon the affidavit of one of the county commissioners, setting forth the fact that the bastard is likely to become a county charge.

Rev., s. 252; Code, s. 31.

Bastardy proceeding is a civil action, in the nature of police regulation: *State v. Currie*, 161-275; *State v. McDonald*, 152-802; *State v. Addington*, 143-687; *Burton v. Belvin*, 142-151; *State v. Liles*, 134-735; *State v. Edwards*, 110-511; *State v. Peeples*, 108-768; *State v. Bryan*, 83-611; *State v. Higgins*, 72-226; *State v. Pate*, 44-244; *State v. Carson*, 19-370; *State v. Wilkie*, 85-513; *State v. Crouse*, 86-617; *State v. Hickerson*, 72-421; *State v. McIntosh*, 64-607; *State v. Waldrop*, 63-507; *Ward v. Bell*, 52-79; *State v. Thompson*, 48-367; *Adams v. Pate*, 47-15; *State v. Brown*, 46-130. The following cases, now overruled, hold that bastardy is a criminal action or a proceeding in the nature of a criminal action: *State v. Perry*, 122-1043; *State v. Ballard*, 122-1024; *State v. Nelson*, 119-797; *State v. Ostwalt*, 118-1208; *State v. Wynne*, 116-981; *State v. Cagle*, 114-835; *Myers v. Stafford*, 114-234; *State v. White*, 125-674; *State v. Bruce*, 122-1040. Jurisdiction of magistrate stated in the following cases, some of which do not hold since the decision that the proceeding is civil: *State v. Mize*, 117-780; *State v. Wynne*, 116-981; *State v. White*, 125-674; *State v. Ostwalt*, 118-1208; *State v. Parish*, 83-613; *State v. Roberts*, 32-350; *State v. Jenkins*, 34-121; *State v. Elam*, 61-460; *State v. McQuaig*, 63-550; *State v. Hales*, 65-244. Former proceeding dismissed for want of jurisdiction no bar to second proceeding: *State v. Giles*, 103-391. Justice's jurisdiction to issue warrant depends upon domicile of mother: *State v. Hales*, 65-244. Proceedings cannot be instituted against personal representative of putative father to subject his estate to maintenance: *Clements v. Durham*, 52-100. The intention of proceedings in bastardy is to secure to the mother her probable expenses or to reimburse her actual outlay, even though the child die at birth: *State v. Addington*, 143-683—and if the child live, to indemnify the county against loss: *State v. Brown*, 46-130; *Ward v. Bell*, 52-79; *State v. Edwards*, 110-511; *State v. Beatty*, 66-648.

266. Complaint as to bastard by county commissioner. When complaint is made on affidavit by a county commissioner to a justice of the peace of the county in which the woman resides, that any single woman within his county is big with child, or delivered of a child, the justice may cause her to be brought before him,

or any other justice of the county, to be examined upon oath respecting the father. If she refuses to declare the father, she shall pay a fine of five dollars and give a bond payable to the state with sufficient surety to keep such child from being chargeable to the county; otherwise, she shall be committed to prison until she shall declare the same, or pay the fine aforesaid and give such bond.

Rev., s. 253; Code, s. 32.

Where woman refuses to disclose father, pays the fine and gives the bond, she cannot afterwards pursue the father on ground of collusion between justice and father, she being in *pari delicto*: *State v. Price*, 81-516; *State v. Brown*, 46-129. Question as to which county must maintain child settled: in *State v. Elam*, 61-460; *Merritt v. McQuaig*, 63-550; *State v. Jenkins*, 34-121; *State v. Roberts*, 32-350. Proceeding may be brought while child *en ventre sa mere*: *State v. Addington*, 143-687; *State v. Wynne*, 116-982; *State v. Crouse*, 86-617.

267. Woman declaring father; issue of paternity; appeal. If any woman, upon oath, accuses any man of being the father of her bastard child, the justice before whom such oath is made shall cause him to be brought before some justice of the peace of such county to answer the charge. If he denies, upon oath, that he is the father of such child, the justice shall proceed to try the issue of paternity, and if it is found that he is the father of the child, or if he does not deny upon oath that he is the father of the child, then he shall stand charged with the maintenance thereof, as the court may order, and shall give bond, with sufficient surety, payable to the state, to perform said order, and to indemnify the county where such child is born from charges for his maintenance and may be committed to prison until he finds surety for the same, and shall be liable for the costs of the issue or proceeding. From this judgment and finding the affiant, the woman or the defendant may appeal to the next term of the superior court of the county, where the trial is to be had *de novo*.

Rev., s. 254; Code, s. 32.

Procedure when charge is made: *State v. Currie*, 161-275; *State v. Edwards*, 110-512. The offense is committed when child is begotten: *State v. Wynne*, 116-981; *State v. Nelson*, 119-797. Defendant cannot be placed twice in jeopardy: *State v. Ostwalt*, 118-1208. A judgment committing defendant "until he finds surety" is valid: *State v. Wynne*, 116-981. The provision that the affiant or the woman may appeal is unconstitutional: *State v. Ostwalt*, 118-1208; *State v. Bruce*, 122-1040; *State v. Ballard*, 122-1024; overruled by *State v. Liles*, 134-742. Effect of father's compromising with woman, see *State v. Beasley*, 75-211; *State v. Harshaw*, 20-506. Summons may be issued by one justice and returnable before another: *Williams v. Bowling*, 111-295. Mother should not be joined as party plaintiff with the state, *State v. Collins*, 85-511. The correct issues in bastardy proceeding set forth: *State v. Liles*, 134-735; *State v. Warren*, 124-807; *State v. Rose*, 75-239; *Warlick v. White*, 76-175; *State v. Herman*, 35-502. Proof that putative father was impotent at time child was begotten is sufficient bar: *State v. Broadway*, 69-411.

Defendant should deny under oath, but it need not be in writing: *State v. Currie*, 161-275. Not necessary for proceeding to show affirmatively that mother is a single woman: *State v. Allison*, 61-346; *State v. Pettaway*, 10-623; *State v. Wilson*, 32-131; *State v. Peoples*, 108-768; *State v. McDowell*, 101-736; *State v. Higgins*, 72-227; *Wilkie v. West*, 5-319. Child born in wedlock is presumed to be legitimate, but this presumption may be rebutted: *State v. McDowell*, 101-734; *State v. Pettaway*, 10-623; *State v. Allison*, 61-346; *State v. Herman*, 35-502; *State v. Wilson*, 32-131. Where married woman was visibly pregnant at her marriage, presumption is the child was the child of her husband: *State v. Herman*, 35-502. When trial by justice, he must give notice to defendant of the charge against him, give him opportunity of making defense, and the evidence must be according to law: *State v. Barrow*, 7-121. When mother of child is a married woman legitimacy of child is an issue of fact dependable on proof of impotence or nonaccess of husband: *State v. Liles*, 134-735; *State v. McDowell*, 101-

736. Legitimacy of child being in issue, evidence of bad character of mother as to chastity during husband's lifetime is incompetent. *Warlick v. White*, 76-175. As to legitimacy of child, mother a competent witness: *Warlick v. White*, 76-175.

Purpose of law both to indemnify county and maintain child: *State v. Currie*, 161-276; *State v. Beatty*, 66-648; *State v. Addington*, 143-683; *State v. Edwards*, 110-511; *Ward v. Bell*, 52-79; *State v. Brown*, 46-130. As to maintenance, no difference between past and future as far as court concerned: *State v. Beatty*, 66-648. Resemblance of child and accused, competent evidence: *State v. Horton*, 100-443; *State v. Britt*, 78-439; *Warlick v. White*, 76-175; *State v. Woodruff*, 67-89; *State v. Bowles*, 52-579. Evidence not sufficient to rebut presumption raised by woman's oath and examination: *State v. Bennett*, 75-305; *State v. Parish*, 83-613; see *State v. Britt*, 78-439. Child can be exhibited to jury: *Warlick v. White*, 76-175; *State v. Woodruff*, 67-89; *State v. Horton*, 100-443. Defendant may show woman unworthy of credit: *State v. Floyd*, 35-382; *State v. Pate*, 44-244. Wife competent to prove intercourse with one not her husband: *State v. Pettaway*, 10-623. Husband impotent or nonaccess proven, child declared a bastard: *State v. Pettaway*, 10-623; *State v. Rose*, 75-239. When the child dies upon being born, the mother is still entitled to her expenses incident thereto, including, among other things, her medicine and medical attention, and the burial expenses of the child: *State v. Addington*, 143-683.

268. Judgment on appeal to superior court against putative father. If the jury at term finds that the person accused is the father of the child, then the judge shall make the order for the maintenance and for costs of proceeding, and shall take bond from the defendant and his sureties for the maintenance of the child and to indemnify the county and pay the costs; and, in default thereof, may imprison the defendant.

Rev., s. 255; Code, s. 32.

Child dying before case tried, what order made: *State v. Beatty*, 66-648; *State v. Addington*, 143-683.

269. Woman's examination presumptive evidence. Upon the trial of the issue of paternity, whether before the justice or at term, the examination of the woman taken and returned shall be presumptive evidence against the person accused, subject to be rebutted by other evidence which may be introduced by the defendant.

Rev., s. 255; Code, s. 32.

Examination of woman presumptive evidence: *State v. Currie*, 161-275; *State v. McDonald*, 152-802; *State v. Rogers*, 119-793, 79-609; *State v. Mitchell*, 119-784; *State v. Cagle*, 114-835. Accused failing to demand privilege of cross-examining mother when her written examination taken, waives his right to object to her evidence: *State v. Rogers*, 119-793; *State v. Mitchell*, 119-784. When woman charges accused on her examination, burden is on him to disprove: *State v. Mitchell*, 119-784. Woman's examination not signed is competent: *State v. Thompson*, 26-484. Woman's examination not appearing to be on oath is invalid: *State v. Ledbetter*, 26-245.

270. Upon appeal parties and witnesses recognized. When an appeal is taken the justice shall recognize the person accused of being the father of the child with sufficient surety for his appearance at the next term of the superior court for the county, and to abide by and perform the order of the court. The justice shall also recognize the woman and other witnesses to appear at the superior court, and shall return to the court the original papers in the proceeding and a transcript of his proceedings as required in other cases of appeal. If the putative father fails to appear, unless for good cause shown, the judge shall direct the issue of paternity to be tried. If the issue is found against the person accused,

he shall order a *caipias* or attachment to be issued for the father, and may also enter up judgment against the father and his surety on his recognizance.

Rev., s. 257; Code, s. 33.

On appeal the case is placed on civil issue docket: *State v. Currie*, 161-275. Case stands for trial, when: *State v. Edwards*, 110-511; *State v. Cagle*, 114-835; but see *State v. Liles*, 134-742. The court may make proper amendments, including the affidavit of the woman: *State v. Currie*, 161-275; *State v. Giles*, 103-391. Degree of proof required: *State v. Rogers*, 79-609; *State v. Williams*, 109-846; *State v. Liles*, 134-742; *State v. McDonald*, 152-802; overruling *State v. Rogers*, 119-795. For effect of evidence of illicit intercourse with others, see *State v. Warren*, 124-807; *State v. Giles*, 103-391; *State v. Britt*, 78-439; *State v. Bennett*, 75-305; *State v. Parish*, 83-613; *State v. Perkins*, 117-698; *State v. Patterson*, 74-157. Justice failing to recognize defendant, *caipias* issued: *State v. Green*, 71-172; *State v. Palin*, 63-471.

271. Putative father out of county. If the putative father escapes or is in any other county than that of the justice issuing the warrant, it shall be issued, indorsed, executed and returned as provided for warrants in criminal actions.

Rev., s. 256; Code, s. 32.

272. Continuance till birth of child. When the judge or justice, as the case may be, trying the issue of paternity, deems it proper, he may continue the case until the woman is delivered of the child. When a continuance is granted, the court shall recognize the person accused of being the father of the child with surety for his appearance either at the next term of the court or at a time to be fixed by the justice granting the continuance, which shall be after the delivery of the woman.

Rev., s. 258; Code, s. 34.

State v. Addington, 143-688.

273. Allowance and bond. When the issue of paternity is found against the putative father, or when he admits the paternity, the judge or justice shall make an allowance to the woman not exceeding the sum of fifty dollars, to be paid in such installments as the judge or justice shall see fit, and he shall give bond to indemnify the county as prescribed by law; and in default of such payment he shall be committed to prison.

Rev., s. 259; Code, s. 35.

The word "fine" herein is used in the sense of a punishment for a criminal offense, and cannot be imposed when issue of paternity found against defendant: *State v. Addington*, 143-683; *State v. Liles*, 134-737. Provision of statute that allowance be made in addition to fine, is constitutional: *State v. Wynne*, 116-981; *State v. Morgan*, 141-727; but see *State v. Addington*, 143-683. Mother granted an allowance is such a creditor of father of child as would enable her to prevent his discharge: *State v. Parsons*, 115-730. Woman can release her interest in the bond where she was the relator and suit was brought in name of state, to whom bond was payable: *State v. Ellis*, 34-264. Suits on bond: *Shew v. Stewart*, 18-412.

274. Action barred in three years after birth. All examinations upon oath to charge any man with being the father of a bastard child shall be taken within three years next after the birth of the child, and not after.

Rev., s. 260; Code, s. 36.

Time in which proceeding must be brought controlled entirely by this section: *State v. Perry*, 122-1043; *State v. Hedgepeth*, 122-1039. See *State v. Ledbetter*, 26-242; *State v. Robeson*, 24-46.

275. Execution for maintenance. When the judge or justice charges the father of a bastard child with its maintenance and the father neglects to pay the same, then the judge or justice, upon application of the party aggrieved, notice being served on the defendant at least ten days before the return day stated in the notice, or such notice being returned by the sheriff or constable that the defendant is not to be found, may order an execution against the property of the father for such sum as the court shall adjudge sufficient for the maintenance of the bastard child.

Rev., s. 261; Code, s. 37.

Father cannot claim his exemption of \$500 as against allowance to mother: *State v. Parsons*, 115-730. Summary remedy here provided is only cumulative: *Shew v. Stewart*, 18-412. In suit by mother to eject father from land purchased under execution by her, she must show this section complied with: *McPherson v. McCoy*, 13-391.

276. Putative father when committed or apprenticed. In all cases arising under this chapter, when the putative father is charged with costs or the payment of money for the support of a bastard child, and he is, by law, subject to be committed to prison in default of paying the same, it is competent for the court to sentence him to the house of correction for such time not exceeding twelve months, as the court may deem proper. The putative father, at his discretion, instead of being committed to prison or to the house of correction, may bind himself as an apprentice to any person whom he may select, for such time and at such price as the court may direct. The binding shall be by indenture in open court, and the price obtained shall be paid to the county treasurer. On the indenture being signed by the judge of the court and by the master receiving such apprentice, the person thus bound shall be treated and regarded as an apprentice in all matters except education.

Rev., s. 262; Code, s. 38.

Defendant may not be put to work on roads: *State v. Addington*, 143-683; *State v. Morgan*, 141-726; overruling *Myers v. Stafford*, 114-234. Imprisonment for failure to obey order to maintain, or to give bond, valid: *State v. Addington*, 143-688; *State v. Morgan*, 141-726; *State v. Nelson*, 119-797; *State v. Edwards*, 110-512; *State v. Palin*, 63-471. Discharged from imprisonment upon complying with section 1632, see *State v. Parsons*, 115-730; *State v. White*, 125-674. Who can object, and how, to defendant's discharge as an insolvent, discussed in *State v. Parsons*, 115-730.

277. Legitimation of bastards. The putative father of any illegitimate child may apply by petition in writing to the superior court of the county in which he resides, praying that such child may be declared legitimate; and if it appears that the petitioner is reputed the father of the child, the court may thereupon declare and pronounce the child legitimated; and the clerk shall record the decree.

Rev., s. 263; Code, s. 39.

Judgment of court upon subject of legitimation is conclusive: *Craige v. Neely*, 51-170. Marriage of father and mother in a state where children are legitimated thereby, effect on child's relation in other states: *Fowler v. Fowler*, 131-169.

278. Effects of legitimation. The effect of such legitimation shall extend no further than to impose upon the father all the obligations which fathers owe to their lawful children, and to enable the child to inherit from the father only his real estate, and also to entitle such child to the personal estate of his father, in the same manner as if he had been born in lawful wedlock. In case of death

and intestacy, the real and personal estate of such child shall be transmitted and distributed according to the statute of descents and distribution among those who would be his heirs and next of kin in case he had been born in lawful wedlock.

Rev., s. 264; Code, s. 40.

King v. Davis, 91-146. Effect of legislative private act passed at instance of father legitimizing children and defining their rights, see Perry v. Newsome, 36-28; Drake v. Drake, 15-110.

279. Legitimation by subsequent marriage. When the mother of any bastard child and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall in all respects after such intermarriage be deemed and held to be legitimate and entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock.

1917, c. 219, s. 1.

For law prior to enactment of this section, see Fowler v. Fowler, 131-169.

CHAPTER 7
BILLS OF LADING

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ART. 1. GENERAL PROVISIONS

280. General definitions. In this chapter, unless the context of subject-matter otherwise requires—

“Action” includes counterclaim, set-off, and suit in equity.

“Bill” means bill of lading governed by this chapter.

“Consignee” means the person named in the bill as the person to whom delivery of the goods is to be made.

“Consignor” means the person named in the bill as the person from whom the goods have been received for shipment.

“Goods” means merchandise or chattels in course of transportation or which have been or are about to be transported.

“Holder” of a bill means a person who has both actual possession of such bill and a right of property therein.

“Order” means an order by indorsement on the bill.

“Person” includes a corporation or partnership, or two or more persons having a joint or common interest.

“To purchase” includes to take as mortgagee and to take as pledgee.

1919, c. 65, s. 42.

281. Provisions of this chapter do not apply to existing bills. The provisions of this chapter do not apply to bills made and delivered prior to the taking effect thereof.

1919, c. 65, s. 43.

CASES BEFORE THE ADOPTION OF THIS CHAPTER. A bill of lading, as a contract, defines the terms of transportation: *Hamilton v. R. R.*, 96-398; *Mfg. Co. v. R. R.*, 121-514; *Mule Co. v. R. R.*, 160-215; *Culbreth v. R. R.*, 169-723; but a bill of lading is not necessary to bind the carrier: *Berry v. R. R.*, 122-1002; *Smith v. R. R.*, 163-143; *McConnell v. R. R.*, 163-504; *Davis v. R. R.*, 172-209; *Bryan v. R. R.*, 174-177; *McRary v. R. R.*, 174-563; *Mann v. Transportation Co.*, 176-104.

282. Provisions and sections of this chapter are independent and severable. The provisions and each part thereof, and the sections and each part thereof of this chapter are independent and severable, and the declaring of any provision or part thereof, or provisions or parts thereof, or section or part thereof, or sections or parts thereof, unconstitutional shall not impair or render unconstitutional any other provision or part thereof, or section or part thereof.

1919, c. 65, s. 44.

ART. 2. ISSUE OF BILLS OF LADING

283. Bills governed by this chapter. Bills of lading issued by any common carrier for the transportation of goods from one point in North Carolina to another shall be governed by this chapter.

1919, c. 65, s. 1.

284. Definition of straight bill. A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.

1919, c. 65, s. 2.

285. Definition of order bill. A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order

bill. Any provision in such a bill or in any notice, contract, rule, regulation, or tariff that it is nonnegotiable shall be null and void, and shall not affect its negotiability within the meaning of this chapter unless upon its face and in writing agreed to by the shipper.

1919, c. 65, s. 3.

286. Order bills must not be issued in sets. Order bills issued in North Carolina for transportation of goods from one point to another in North Carolina shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to any one who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts.

1919, c. 65, s. 4.

287. Duplicate order bills must be so marked. When more than one order bill is issued in North Carolina for the same goods to be transported to any place in North Carolina, the word "duplicate" or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to any one who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill.

1919, c. 65, s. 5.

288. Straight bill shall be marked "nonnegotiable." A straight bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgments of an informal character.

1919, c. 65, s. 6.

289. Insertion of name of person to be notified. The insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

1919, c. 65, s. 7.

Instances of bills "order, notify": *Mfg. Co. v. R. R.*, 149-261; *Bank v. R. R.*, 153-347; *Killingsworth v. R. R.*, 171-47.

ART. 3. OBLIGATIONS AND RIGHTS OF CARRIERS UPON BILLS OF LADING

290. Obligation of carrier to deliver. A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

1. An offer in good faith to satisfy the carrier's lawful lien upon the goods;
2. Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods if the bill is an order bill; and
3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.

1919, c. 65, s. 8.

291. Justification of carrier in delivery. A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

1. A person lawfully entitled to the possession of the goods; or
2. The consignee named in a straight bill for the goods; or
3. A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.

1919, c. 65, s. 9.

See *Jeans v. R. R.*, 164-224; *Killingsworth v. R. R.*, 171-47.

292. Carrier's liability for misdelivery. Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions 1 and 2 of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

1. Had been requested by or on behalf of a person having a right of property or possession in the goods not to make such delivery; or
2. Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request for information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

1919, c. 65, s. 10.

293. Order bills must be canceled when goods delivered. Except as provided in section 308, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to any one who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto.

1919, c. 65, s. 11.

294. Order bills must be canceled or marked when part of goods delivered. Except as provided in section 308, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill had been issued and fails, either—

1. To take up and cancel the bill, or
2. To place plainly upon it a statement that a portion of the goods has been delivered, with a description, which may be in general terms, either of the goods or packages that have been so delivered or of the goods or packages which still

remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to any one who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

1919, c. 65, s. 12.

295. Altered bills. Any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, whether in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

1919, c. 65, s. 13.

296. Lost or destroyed bills. Where an order bill has been lost, stolen, or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction, and upon the giving of a bond, with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill remaining outstanding. The court may also, in its discretion, order the payment of the carrier's reasonable costs and counsel fees: Provided, a voluntary indemnifying bond without an order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been, or shall be, negotiated for value without notice of the proceedings or of the delivery of the goods.

1919, c. 65, s. 14.

297. Effect of duplicate bills. A bill, upon the face of which the word "duplicate," or some other word or words indicating that the document is not an original bill, is placed plainly, shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.

1919, c. 65, s. 15.

298. Carrier can not set up title in himself. No title to the goods or right to their possession asserted by a carrier for his own benefit shall excuse him from liability for refusing to deliver the goods according to the terms of the bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.

1919, c. 65, s. 16.

299. Interpleader of adverse claimants. If more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate.

1919, c. 65, s. 17.

See section 460.

300. **Carrier has reasonable time to determine validity of claims.** If some one other than the consignee or the person in possession of the bill has claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

1919, c. 65, s. 18.

301. **Adverse title is no defense except as above provided.** Except as provided in the preceding sections of this article, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand.

1919, c. 65, s. 19.

302. **Carriers not to insert "shipper's load and count" when goods are loaded by carrier.** When goods are loaded by a carrier, such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity, if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation or tariff, "shipper's weight, load and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or, in case of bulk freight and freight not concealed by packages, the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

1919, c. 65, s. 20.

303. **Liability for nonreceipt or misdescription of goods loaded by shipper.** When package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also, by inserting in the bill of lading the words "shipper's weight, load, and count," or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and, if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading. Where the shipper of bulk freight, however, installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight

within a reasonable time after such written request, and the carrier shall not in such case insert in the bill of lading the words "shipper's weight," or other words of like purport; and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

1919, c. 65, s. 21.

Instance of "shipper's load and count": *Peele v. R. R.*, 149-390.

304. Liability for nonreceipt or misdescription of goods. If a bill of lading has been issued by a carrier, or on his behalf by an agent or employee, the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among several states and with foreign nations, the carrier shall be liable to—

1. The owner of goods covered by a straight bill, subject to existing right of stoppage in transit; or

2. The holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

1919, c. 65, s. 22.

This changes the rule laid down in *Williams, Black & Co. v. R. R.*, 93-42; *Peele v. R. R.*, 149-390; *Bank v. R. R.*, 175-415.

305. Attachment or levy upon goods for which an order bill has been issued. If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.

1919, c. 65, s. 23.

306. Creditor's remedy to reach order bills. A creditor whose debtor is the owner of an order bill shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

1919, c. 65, s. 24.

307. Lien for charges under order bill. If an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill and all other charges incurred in transportation and delivery, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.

1919, c. 65, s. 25.

308. Effect of sale. After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be an order bill.
1919, c. 65, s. 26.

ART. 4. NEGOTIATION AND TRANSFER OF BILLS

309. Negotiation of order bills by delivery. An order bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank.
1919, c. 65, s. 27.

310. Negotiation of order bills by indorsement. An order bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.
1919, c. 65, s. 28.

311. Transfer of bills. A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill cannot be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right.
1919, c. 65, s. 29.

312. Who may negotiate a bill. An order bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.
1919, c. 65, s. 30.

313. Rights of person to whom a bill has been negotiated. A person to whom an order bill has been duly negotiated acquires thereby—

1. Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

2. The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

1919, c. 65, s. 31.

314. Rights of person to whom a bill has been transferred. A person to whom a bill has been transferred, but not negotiated, acquires thereby as against the

transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a straight bill, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods.

1919, c. 65, s. 32; 1919, c. 290.

315. Transfer of negotiable bill without indorsement. Where an order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

1919, c. 65, s. 33.

316. Warranties on sale of bill. A person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

1. That the bill is genuine;
2. That he has a legal right to transfer it;
3. That he has knowledge of no fact which would impair the validity or worth of the bill;
4. That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby.

1919, c. 65, s. 34.

317. Indorser not a guarantor. The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorser of the bill to fulfill their respective obligations.

1919, c. 65, s. 35.

318. No warranty implied from accepting payment of a debt. A mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt, or from any other person, shall not be

deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described.

1919, c. 65, s. 36.

See *Mason v. Cotton Co.*, 148-492; *overruling Finch v. Gregg*, 126-176.

319. When negotiation not impaired by fraud, accident, mistake, duress or conversion. The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion.

1919, c. 65, s. 37.

320. Subsequent negotiation. Where a person, having sold, mortgaged or pledged goods which are in a carrier's possession and for which an order bill has been issued, or, having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

1919, c. 65, s. 38.

321. Negotiation defeats vendor's lien. Where an order bill has been issued for goods no seller's lien or right of stoppage in transit shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transit. Nor shall the carrier be obliged to deliver or be justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

1919, c. 65, s. 39.

322. When rights and remedies under mortgages and liens are not limited. Except as provided in the preceding section, nothing in this chapter shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this chapter, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien, and obtained possession of them.

1919, c. 65, s. 40.

ART. 5. CRIMINAL OFFENSES

323. Issuing false bills or violating chapter made felony. Any person who knowingly, or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment in this state, or with intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed

bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing, or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates or fails to comply with, or aids in any violation of, or failure to comply with any provision of this chapter, shall be guilty of a felony and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or both.

1919, c. 65, s. 41; 1919, c. 290.

CHAPTER 8

BONDS

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ART. 1. OFFICIAL BONDS

324. Irregularities not to invalidate. When any instrument is taken by or received under the sanction of the board of county commissioners, or by any person or persons acting under or in virtue of any public authority, purporting to be a bond executed to the state for the performance of any duty belonging to any office or appointment, such instrument, notwithstanding any irregularity or invalidity in the conferring of the office or making of the appointment, or any variance in the penalty or condition of the instrument from the provision prescribed by law, shall be valid and may be put in suit in the name of the state for

the benefit of the person injured by a breach of the condition thereof, in the same manner as if the office had been duly conferred or the appointment duly made, and as if the penalty and condition of the instrument had conformed to the provisions of law: Provided, that no action shall be sustained thereon because of a breach of any condition thereof or any part of the condition thereof which is contrary to law.

Rev., s. 279; Code, s. 1891; R. C., c. 78, s. 9; 1842, c. 61; 1869-70, c. 169, s. 16.

Purpose of section stated: *Comrs. v. Magnin*, 86-286. Official bond not in accordance with statute good as a voluntary bond: *Governor v. Witherspoon*, 10-42. Guardian bond, sureties claiming it was not complete, see *Rollins v. Ebbs*, 138-140; overruling *Rollins v. Ebbs*, 137-355. Where guardian was appointed by court of which he was acting justice: *Barnes v. Lewis*, 73-138. Treasurer's bond, awkward statement of condition as to school tax in, see *Comrs. v. Magnin*, 86-286. Constable's bond, where a delivery was denied: *Greensboro v. Scott*, 84-188—where condition did not state the term, *Shipman v. McMinn*, 60-122—where blank for constable's name not filled out, *Grier v. Hill*, 51-572. Sheriff's bond, where kind of taxes misstated, see *Comrs. v. Sutton*, 120-298—where taxes for building fences were made payable to one other than county treasurer, *Speight v. Staton*, 104-44. Failure to register constable's bond does not invalidate: *Warren v. Boyd*, 120-57. Section referred to in *Prairie v. Jenkins*, 75-545; *Barnes v. Lewis*, 73-138; *Hoell v. Cobb*, 49-259; *State v. Jones*, 29-359; *State v. McMinns*, 29-344; *State v. Pool*, 27-105.

325. Penalty for officer acting without bond. Every person or officer of whom an official bond is required, who presumes to discharge any duty of his office before executing such bond in the manner prescribed by law, is liable to a forfeiture of five hundred dollars to the use of the state for each attempt so to exercise his office.

Rev., s. 278; Code, s. 1882; R. C., c. 78, s. 8.

What amounts to discharging duty as officer, discussed in *Hoell v. Cobb*, 49-259; *Mabry v. Turrentine*, 30-201; *Burke v. Elliott*, 26-355; *Gilliam v. Reddick*, 26-368; *State v. McEntyre*, 25-171.

326. Condition and term of official bonds. Every clerk, treasurer, sheriff, coroner, register of deeds, surveyor, and every other officer of the several counties who is required by law to give a bond for the faithful performance of the duties of his office, shall give a bond for the term of the office to which such officers are chosen, respectively.

Rev., s. 308; Code, s. 1874; 1869-70, c. 169; 1876-7, c. 275, s. 5; 1895, c. 207, s. 4; 1899, c. 54, s. 54.

Sheriff must give all three bonds before being inducted into office: *Dixon v. Comrs.*, 80-118; *Worley v. Smith*, 81-304; *Bray v. Barnard*, 109-44.

327. Annual examination of bonds; keeping good; increase. The bonds shall be carefully examined on the first Monday in December of every year, and if it appears that the security has been impaired, or for any cause become insufficient to cover the amount of money or property or to secure the faithful performance of the duties of the office, then the bond shall be renewed or strengthened, the insufficient security increased within the limits herein prescribed, and the impaired security shall be made good; but no renewal, or strengthening, or additional security shall increase the penalty of said bond beyond the limits herein prescribed for the term of office.

Rev., s. 308; Code, s. 1874; 1869-70, c. 169; 1876-7, c. 275, s. 5; 1895, c. 207, s. 4; 1899, c. 54, s. 54.

Commissioners cannot release sureties on sheriff's bond: *Fid. Co. v. Fleming*, 132-332.

328. Effect of failure to renew bond. Upon the failure of any such officer to make such renewal of his bond, it is the duty of the board of commissioners, by an order to be entered of record, to declare his office vacant, and to proceed forthwith to appoint a successor, if the power of filling the vacancy in the particular case is vested in the board of commissioners; but if otherwise, the said board shall immediately inform the proper person having the power of appointment of the fact of such vacancy.

Rev., s. 309; Code, s. 1875; 1869-70, c. 169, s. 2.

Cases of failure to give first bond: *Cole v. Patterson*, 97-360; *Kilburn v. Latham*, 81-312; *Worley v. Smith*, 81-304; *Dixon v. Comrs.*, 80-118. **Upon failure to give or renew bond, office declared vacant:** *Bray v. Barnard*, 109-44; *Kilburn v. Latham*, 81-312; *Worley v. Smith*, 81-304; *People v. Green*, 75-329—but sheriff cannot be deprived of his office without a day in court, *Vann v. Pipkin*, 77-408.

329. Justification of sureties. Every surety on an official bond required by law to be taken or renewed and approved by the board of commissioners shall take and subscribe an oath before the chairman of the board or some person authorized by law to administer an oath, that he is worth a certain sum (which shall be not less than one thousand dollars) over and above all his debts and liabilities and his homestead and personal property exemptions, and the sum thus sworn to shall in no case be less in the aggregate than the penalty of the bond. But nothing herein shall be construed to abridge the power of the said board of commissioners to require the personal presence of any such surety before the board when the bond is offered, or at such subsequent time as the board may fix, for examination as to his financial condition or other qualifications as surety.

Rev., s. 310; Code, s. 1876; 1869-70, c. 169, s. 3; 1879, c. 207; 1889, c. 7; 1891, c. 385; 1901, c. 32.

Sureties are liable equally and not in proportion to amount of their justification: *Comrs. v. Dorsett*, 151-307. Cited in *Cole v. Patterson*, 97-365. **Failure of sheriff to respond to summons to justify, effect:** *People v. Green*, 75-329.

330. Action against officer to compel justification; office vacated; successor appointed. When oath is made before any judge of the superior court by five respectable citizens of any county within his district that after diligent inquiry made they verily believe that the bond of any officer of such county, which has been accepted by the board of commissioners, is insufficient either in the amount of the penalty or in the ability of the sureties, it is the duty of such judge to cause a notice to be served upon such officer requiring him to appear at some stated time and place and justify his bond by evidence other than that of himself or his sureties. If this evidence so produced fails to satisfy the judge that the bond is sufficient, both in amount and the ability of the sureties, he shall give time to the officer, not exceeding twenty days, to give another bond, the judge fixing the amount of the new bond, when there is a deficiency in that particular. And upon failure to give a good bond to the satisfaction of the judge within the twenty days, he shall declare the office vacant, and if the appointment be with himself, he shall immediately proceed to fill the vacancy; and if not, he shall notify the persons having the appointing power that they may proceed as aforesaid.

Rev., s. 316; Code, s. 1885; 1874-5, c. 120.

Proceeding as to clerk: *Mitchell v. West*, 74-485; **as to sheriff,** *Mitchell v. Hubbs*, 74-484; **as to treasurer,** *Mitchell v. Kilburn*, 74-483.

331. Successor to give bond; official bonds to be liabilities. The person so appointed shall give bond before the judge, and the bond so given shall in all respects be subject to the requirements of the law in relation to official bonds; and all official bonds shall be considered debts and liabilities.

Rev., s. 317; Code, s. 1886; 1874-5, c. 120, s. 2.

See section 354 for actions on official bonds.

332. Judge to file statement of proceedings with commissioners. When a vacancy is declared by the judge, he shall file a written statement of all his proceedings with the clerk of the board of commissioners, to be recorded by him.

Rev., s. 318; Code, s. 1887; 1874-5, c. 120, s. 3.

333. Approval, acknowledgment and custody of bonds. The approval of all official bonds taken or renewed by the board of commissioners shall be recorded by their clerk. Every such bond shall be acknowledged by the parties thereto or proved by a subscribing witness, before the chairman of the board of commissioners, or before the clerk of the superior court, registered in the register's office in a separate book to be kept for the registration of official bonds, and the original bond, with the approval of the commissioners endorsed thereon and certified by their chairman, shall be deposited with the clerk of the superior court, except the bond of said clerk, which shall be deposited with the register of deeds, for safe keeping.

Rev., s. 311; Code, s. 1877; 1869-70, c. 169, s. 4; 1879, c. 207, s. 2.

334. Votes of commissioners on approval recorded; penalty. It is the duty of the clerk of the board of commissioners to record in the proceedings of the board the names of those commissioners who are present at the time of the approval of any official bond, and who vote for such approval. Every clerk neglecting to make such record, besides other punishment, shall forfeit his office. Any commissioner may cause his written dissent to be entered on the records of the board.

Rev., s. 312; Code, ss. 1878, 1881; 1869-70, c. 169, ss. 5, 8; R. C., c. 78, s. 7; 1790, c. 327; 1809, c. 777.

335. When commissioner liable as surety. Every commissioner who approves an official bond, which he knows to be, or which by reasonable diligence he could have discovered to have been, insufficient in the penal sum, or in the security thereof, shall be liable as if he were a surety thereto, and may be sued accordingly by any person having a cause of action on said bond.

Rev., s. 313; Code, s. 1879; 1869-70, c. 169, s. 6.

Cited in *Cole v. Patterson*, 97-365.

336. Record of board conclusive as to facts stated. In all actions under the preceding section a copy of the proceedings of the board of commissioners in the particular case, certified by their clerk under his hand and the seal of the county, is conclusive evidence of the facts in such record alleged and set forth.

Rev., s. 314; Code, s. 1881; 1869-70, c. 169, s. 8.

337. Person required to approve bond not to be surety. No member of the board of commissioners, or any other person authorized to take official bonds, shall sign as surety on any official bond upon the sufficiency of which the board of which he is a member may have to pass.

Rev., s. 315; Code, s. 1887; 1874-5, c. 120, s. 3.

ART. 2. BONDS IN SURETY COMPANY

338. State officers may be bonded in surety company. All persons who are required to give bond to the state of North Carolina to be received by the governor or by any department of the state government, in lieu of personal security, may give as security for said bond and for the performance of the duties named in the said bond any indemnity or guaranty company authorized to do business in the state of North Carolina, subject to such regulations as the governor or department may prescribe, and with power in them to demand additional security at any time. Any person presenting any indemnity or guaranty company as surety shall accompany his bond with a statement of the insurance commissioner as to the condition of such company as required by law.

Rev., s. 272; 1901, c. 754.

NOTE. For certificate of solvency and insolvency of surety companies, see Insurance, s. 6379.

For construction of surety bonds, see *Blades v. Dewey*, 136-176; *Bank of Tarboro v. Fid. Co.*, 128-366. What is reasonable notice to a surety company of default: *Bank of Tarboro v. Fid. Dep. Co.*, 128-366. In action on bond, where burden of proof rests: *Bank v. Fidelity Co.*, 126-320.

339. Surety company sufficient surety on bonds and undertakings. A bond or undertaking by the laws of North Carolina required or permitted to be given by a public official, fiduciary, or a party to an action or proceeding, conditioned for the doing or not doing of an act specified therein, shall be sufficient when it is executed or guaranteed by a corporation authorized in this state to act as guardian or trustee, or to guarantee the fidelity of persons holding places of public or private trust, or to guarantee the performance of contracts, other than insurance policies, or to give or guarantee bonds and undertakings in actions or proceedings.

The bond or undertaking of a corporation having such power shall be sufficient, although the law or regulation in accordance with which it is given requires two or more sureties, or requires the sureties to be residents or freeholders. But the clerk of the superior court may exercise his discretion as to accepting such a corporation's surety on the bonds of fiduciaries or parties to actions or proceedings.

Rev., s. 273; 1895, c. 270; 1899, c. 54, s. 45; 1901, c. 706.

340. Clerk to notify county commissioners of condition of company. Each clerk of the superior court shall furnish the chairman of the board of county commissioners of his county with notice of each surety company licensed in this state, and of each surety company whose license has been revoked, in which any officer of the county has been bonded.

Rev., ss. 295, 4803.

341. Release of company from liability. A company executing such bond, obligation or undertaking, may be released from its liability or security on the same terms as are or may be by law prescribed for the release of individuals upon any such bonds, obligations or undertakings.

Rev., s. 274; 1899, c. 54, s. 48.

Surety company can only be released by getting off of bond: *Bank of Tarboro v. Fid. and Dep. Co.*, 128-366. County commissioners cannot release surety on sheriff's bond: *Fidelity Co. v. Fleming*, 132-332.

342. Company not to plead ultra vires. Any company which executes any bond, obligation or undertaking under the provisions of this article is estopped, in any proceeding to enforce the liability which it assumes to incur, to deny its corporate power to execute such instrument or assume such liability.

Rev., s. 275; 1899, c. 54, s. 49; 1901, c. 706, s. 1, subsec. 5.

343. Failure to pay judgment is forfeiture. If a surety company against which a judgment is recovered fails to discharge the same within sixty days from the time such final judgment is rendered, it shall forfeit its right to do business in this state, and the insurance commissioner shall cancel its license.

Rev., s. 275; 1901, c. 706, s. 1, subsec. 5.

344. On presentation of proper bond officer to be inducted. Upon presentation to the person authorized by law to take, accept and file official bonds, of any bond duly executed in the penal sum required by law by the officer chosen to any such office, as principal, and by any surety company, as security thereto, whose insurance or guaranty is accepted as security upon the bonds of United States bonded officials (such insurance company having complied with the insurance laws of the state of North Carolina), or by any other good and sufficient security thereto, such bond shall be received and accepted as sufficient, and the principal thereon shall be inducted into office.

Rev., s. 276; 1899, c. 54, s. 53; 1901, c. 706, s. 1, subsec. 5.

345. Expense of fiduciary bond charged to fund. A receiver, assignee, trustee, committee, guardian, executor or administrator, or other fiduciary required by law to give a bond as such, may include as part of his lawful expenses such sums paid to such companies for such suretyship not exceeding one-half of one per cent per annum on the account of such bonds as the clerk, judge or court may allow.

Rev., s. 277; 1901, c. 706, s. 1, subsec. 5.

NOTE. For requisites for surety companies to be accepted as bondsmen, see Insurance, Art. 11.

ART. 3. MORTGAGE IN LIEU OF BOND

346. Mortgage in lieu of bond required to be given. An administrator, executor, guardian, collector or receiver, or an officer required to give an official bond, or the agent or surety of such person or officer, may execute a mortgage on real estate, of the value of the bond required to be given by him to the state of North Carolina, conditioned to the same effect as the bond should be, were the same given, with a power of sale, which power of sale may be executed by the clerk of the superior court, with whom said mortgage shall be deposited, upon a breach of any of the conditions of said mortgage, after advertisement for thirty days.

Rev., s. 265; Code, s. 118; 1874-5, c. 103, s. 2.

Administrator cannot give mortgage on lands of intestate of whom he is heir: *In re Sellars*, 118-573.

347. Mortgage in lieu of security for appearance, costs, or fine. Any person required to give a bond or undertaking, or required to enter into a recognizance for his appearance at any court, in any criminal proceeding, or for the security of any costs or fine in any criminal action, may also execute a mortgage on real or personal property of the value of such bond or recognizance, payable to the

state of North Carolina, conditioned as such bond or recognizance would be required, with power of sale, which power shall be executed by the clerk or justice of the peace in whose court said mortgage is executed, upon a breach of any of the conditions of said mortgage.

Where such mortgage upon real property is executed before a justice of the peace the power of sale shall be enforced by the clerk of the court of the county in which the criminal proceeding is had.

No such mortgage on real property executed for the security for costs or fine shall allow a longer time for payment of said costs or fine than six months from the execution thereof, and no mortgage on personal property a longer time than three months, except in cases of appeal, when the time allowed shall be counted from the date of the final decision in the cause.

All legitimate expenses of sale, which shall only be made after due advertisement according to law, shall be paid out of the proceeds of the sale of the mortgaged property, as shall also the following fees, to wit: For each sale of real property mortgaged under this section the clerk shall receive two dollars, and for each sale of personal property mortgaged under this section the clerk or justice of the peace who enforces the power of sale shall receive one dollar.

Rev., s. 266; Code, s. 120; 1874-5, c. 103, s. 3; 1891, c. 425, ss. 1, 2, 3.

The clerk may exercise power of sale or obtain order of court: *Clark v. Fairly*, 175-342. Mortgage given may be foreclosed by motion, upon notice, in original action: *Ryan v. Martin*, 103-282. This section has no application in justices' courts: *Comron v. Standland*, 103-207. Kind of mortgage necessary to comply with statute: *Eshon v. Comrs.*, 95-75. Referred to in *State v. Jenkins*, 121-642.

348. Cancellation of mortgage in such proceedings. Any mortgage given by any person in lieu of bond or undertaking or recognizance for his appearance at any court in any criminal proceeding, or for the security of any cost or fine in a criminal action, which has been registered, when the party made his appearance at the court to which he was bound and did not depart the court without leave, or paid the cost or fine required, may be canceled or discharged by the clerk of the court of the county where such action was pending by entry of "satisfaction" upon the margin of the record where such mortgage is recorded, in the presence of the register of deeds or his deputy, who shall subscribe his name as a witness thereto, and such release shall have the effect to discharge and release all the right, title and interest of the state of North Carolina in and to the property described in such mortgage.

Rev., s. 267; 1905, c. 106.

349. Clerk of court may give surety by mortgage deposited with register. In all cases where the clerk of the superior court may be required to give surety, he may deposit a mortgage with the register of deeds, payable to the state, and conditioned, as the bond would have been required, with power of sale. The power of sale shall be executed by the register of deeds, upon a breach of any of the conditions of said mortgage; and the register of deeds shall in all cases immediately register the same, at the expense of the said clerk.

Rev., s. 268; Code, s. 122; 1874-5, c. 103, s. 6.

350. Mortgage in lieu of bond to prosecute or defend in civil case. It is lawful for any person desiring to commence any civil action or special proceeding, or to

defend the same, his agent or surety, to execute a mortgage on real estate of the value of the bond or undertaking required to be given, at the beginning of said action, or at any stage thereof, to the party to whom the bond or undertaking would be required to be made, conditioned to the same effect as such bond or undertaking, with power of sale, which power of sale may be executed upon a breach of any of the conditions of the said mortgage after advertisement for thirty days.

Rev., s. 269; Code, s. 117; 1874-5, c. 103, s. 1.

This section does not require, but simply allows, defendant to execute mortgage: *Wilson v. Fowler*, 104-471—and has no application in justice's court, *Comron v. Standland*, 103-207. Whether can be given in lieu of appeal undertaking discussed in *Eshon v. Comrs.*, 95-75.

351. Affidavit of value of property required. In all cases where a mortgage is executed, as hereinbefore permitted, it is the duty of the clerk of the court in which it is executed, or of the justice, to require an affidavit of the value of the property mortgaged to be made by at least one witness not interested in the matter, action or proceeding in which the mortgage is given.

Rev., s. 270; Code, s. 121; 1874-5, c. 103, s. 4.

352. When additional security required. If, from any cause, the property mortgaged in lieu of a bond becomes of less value than the amount of the bond in lieu of which the mortgage is given, and it so appears upon affidavit of any person having any interest in the matter as a security for which the mortgage was given, it is the duty of the mortgagor to give additional security by a deposit of money, or the execution of a mortgage on more property, or justify as required in cases where bond or undertaking is given.

Rev., s. 271; Code, s. 119; 1874-5, c. 103, s. 5.

ART. 4. ACTIONS ON BONDS

353. Bonds in actions payable to court officer to be sued on in name of state. Bonds and other obligations taken in the course of any proceeding at law, under the direction of the court, and payable to any clerk, commissioner, or officer of the court, for the benefit of the suitors in the cause, or others having an interest in such obligation, may be put in suit in the name of the state.

Rev., s. 280; Code, s. 51; R. C., c. 13, s. 11.

Merely referred to in *Lackey v. Pearson*, 101-655; *Cotten*, ex parte, 62-82.

354. On official bonds injured party sues in name of state; successive suits. Every person injured by the neglect, misconduct, or misbehavior in office of any clerk of the superior court, register, entry-taker, surveyor, sheriff, coroner, constable, county treasurer, or other officer may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the state, without any assignment thereof; and no such bond shall become void upon the first recovery, or if judgment is given for the defendant, but may be put in suit and prosecuted from time to time until the whole penalty is recovered; and every such officer

and the sureties on his official bond shall be liable to the person injured for all acts done by said officer by virtue or under color of his office.

Rev., s. 281; Code, s. 1883; R. C., c. 78, s. 1; 1793, c. 384, s. 1; 1833, c. 17; 1825, c. 9; 1869-70, c. 169, s. 10.

THIS SECTION GENERALLY CONSTRUED. It enlarges scope of official bonds: *Kivett v. Young*, 106-567. Construction of words 'by virtue or under color of his office': *Daniel v. Grizzard*, 117-105; *Smith v. Patton*, 131-397; *Thomas v. Connelly*, 104-342; *Cassidy, ex parte*, 95-225; *Greenlee v. Sudderth*, 65-470; *Broughton v. Haywood*, 61-380.

BONDS CUMULATIVE. Bonds of officers given from time to time during term are cumulative: *Fidelity Co. v. Fleming*, 132-332; *Dixon v. Comrs.*, 80-118; *Pickens v. Miller*, 83-543; *Moore v. Boudinot*, 64-190; *Bell v. Jasper*, 37-597; *Poole v. Cox*, 31-69.

LIABILITY ON OFFICIAL BONDS. Even though he may not be liable on bond he may be personally liable: *Holt v. McLean*, 75-346. Where after giving bond, new duties are added to office by statute, effect on liability: *Daniel v. Grizzard*, 117-110; *County Bd. Education v. Bateman*, 102-52; *Prairie v. Worth*, 78-169; *State v. Bradshaw*, 32-229. The bond of a public officer is liable for money that comes into his hands as an insurer and not merely for exercise of good faith: *Smith v. Patton*, 131-396; *Presson v. Boone*, 108-78; *Bd. Education v. Bateman*, 102-52; *Morgan v. Smith*, 95-396; *Havens v. Lathene*, 75-505; *Bd. Comrs. v. Clarke*, 73-257, and cases therein cited.

RELATOR IN ACTIONS ON BOND. On sheriff's bond, for school taxes: *Comrs. v. Sutton*, 120-298; *Comrs. v. Magnin*, 86-286—for county taxes, *Comrs. v. Clarke*, 73-255—for illegal levy and sale; *Cook v. Smith*, 119-350—for costs collected by sheriff and not paid to clerk, *Jackson v. Maultsby*, 78-174. On treasurer's bond, for school money: *Comrs. v. Magnin*, 86-286—for money due the county, *Wescott v. Thees*, 89-55. On register's bond for wrongly issuing marriage license: *Furr v. Johnson*, 140-157; *Joyner v. Roberts*, 112-111; and cases cited under section 2503. Clerk's bond, for proceeds of partition sale: *Smith v. Patton*, 131-396—for records, money, etc., not turned over to successor, *Peebles v. Boone*, 116-57. Constable's bond, for negligence in not collecting debt: *Chiple v. Albea*, 53-204; *State v. Corpening*, 32-58; *Governor v. Deaver*, 25-56; *State v. Lightfoot*, 24-306. Surety cannot bring action as relator against cosureties for default of principal: *Sanders v. Bean*, 44-318. Relator is real party in interest, and miscalling his name will not impair his right: *Warrenton v. Arrington*, 101-109. No abatement of action when relator dies: *Davenport v. McKee*, 98-500.

ACTION ON OFFICIAL BONDS GENERALLY. Bonds made payable to state must be sued on in name of state: *Carmichael v. Moore*, 88-29; *Williams v. McNair*, 98-336; *Norman v. Walker*, 101-24. Plaintiff can sue all or one obligor in bond: *Guess v. Barbee*, 28-279. Misjoinder of parties plaintiff not fatal: *Warrenton v. Arrington*, 101-109. How bonds put in evidence: *Short v. Currie*, 53-42. Justice's jurisdiction as to actions on bonds discussed in *Fell v. Porter*, 69-140; *Bryan v. Rousseau*, 71-194. Obligor in bond payable to beneficiary cannot defend on ground that it was not made payable to state: *Warrenton v. Arrington*, 101-109—nor on ground that their names were not inserted in instrument, *Howell v. Parsons*, 89-230. In action against sureties on several bonds, how judgment entered: *Davenport v. McKee*, 98-500. Sureties are equally liable on the judgment and not in proportion to amount justified to: *Comrs. v. Dorsett*, 151-307. Actions brought until penalty exhausted: *State v. McAlpin*, 28-347. What evidence against principal admissible against sureties, see section 358. Is demand necessary before action brought: *Furman v. Timberlake*, 93-66; *Little v. Richardson*, 51-305; *Kivett v. Massey*, 63-240; *Potter v. Sturges*, 12-79; *White v. Miller*, 20-50; *Wills v. Sugg*, 25-96; *State v. McIntosh*, 31-307. Statute of limitations bars action in six years: *Comrs. v. McRae*, 89-95; see, also, section 439. Cases referring to but not construing section: *Daniel v. Grizzard*, 117-108; *Peebles v. Boone*, 116-57; *Fell v. Porter*, 69-140.

For actions on bond of sheriff, see section 3930—of clerk, see section 928—of county treasurer, see section 1388—of register of deeds, see section 3545—of constable, see section 973.

355. Complaint must show party in interest; election to sue officer individually. Any person who brings suit in manner aforesaid shall state in his complaint

on whose relation and in whose behalf the suit is brought, and he shall be entitled to receive to his own use the money recovered; but nothing herein contained shall prevent such person from bringing at his election an action against the officer to recover special damages for his injury.

Rev., s. 282; Code, s. 1884; R. C., c. 78, s. 2; 1793, c. 384, ss. 2, 3; 1869-70, c. 169, s. 11.

Pleadings should set forth parties interested: *Kerlee v. Corpening*, 97-330. Following cases casually touch upon subject matter: *Peebles v. Boone*, 116-57; *Joyner v. Roberts*, 112-111; *Fagan v. Williamson*, 53-433.

356. Summary remedy on official bond. When a sheriff, coroner, constable, clerk, county or town treasurer, or other officer, collects or receives any money by virtue or under color of his office, and on demand fails to pay the same to the person entitled to require the payment thereof, the person thereby aggrieved may move for judgment in the superior court against such officer and his sureties for any sum demanded; and the court shall try the same and render judgment at the term when the motion shall be made, but ten days notice in writing of the motion must have been previously given.

Rev., s. 283; Code, s. 1889; R. C., c. 78, s. 5; 1819, c. 1002; 1869-70, c. 169, s. 14; 1876-7, c. 41, s. 2.

This section only gives summary remedy to person who is himself entitled to funds: *O'Leary v. Harrison*, 51-338. Justice's jurisdiction under this section: *Fell v. Porter*, 69-140; *Bryan v. Rousseau*, 71-194. Referred to in *Lackey v. Pearson*, 101-654; *Smith v. Moore*, 79-86; *Guess v. Barbee*, 28-279. For annotations as to clerk's bond, see section 928—county treasurer's, see section 1388—sheriff's, section 3930—register of deeds', section 3545—constable's, section 973.

357. Officer unlawfully detaining money liable for damages. When money received as aforesaid is unlawfully detained by any of said officers, and the same is sued for in any mode whatever, the plaintiff is entitled to recover, besides the sum detained, damages at the rate of twelve per centum per annum from the time of detention until payment.

Rev., s. 284; Code, s. 1890; R. C., c. 78, s. 9; 1819, c. 1002, s. 2; 1868-9, c. 169.

There must be some default on part of officer: *Hannah v. Hyatt*, 170-634. Cases referring casually to section: *Presson v. Boone*, 108-87; *Gregory v. Morisey*, 79-559; *State v. Allen*, 27-36.

358. Evidence against principal admissible against sureties. In actions brought upon the official bonds of clerks of courts, sheriffs, coroners, constables, or other public officers, and also upon the bonds of executors, administrators, collectors or guardians, when it may be necessary for the plaintiff to prove any default of the principal obligors, any receipt or acknowledgment of such obligors, or any other matter or thing which by law would be admissible and competent for or toward proving the same as against him, shall in like manner be admissible and competent as presumptive evidence only against all or any of his sureties who may be defendants with or without him in said actions.

Rev., s. 285; Code, s. 1345; R. C., c. 44, s. 10; 1844, c. 33; 1881, c. 8.

Judgment against principal fixes prima facie amount of liability of surety: *Ins. Co. v. Bonding Co.*, 162-384; *McNeill v. Currie*, 117-346; *Brown v. Pike*, 74-531; *Moore v. Alexander*, 96-36; *Morgan v. Smith*, 95-396. Admissions by sheriff evidence as against sureties, when: *State v. Woodside*, 30-104. Record of sheriff's settlements as evidence against sureties on bond: *Davenport v. McKee*, 98-500. This section held not to apply in action on in-

demnity bond of sheriff for tort: *Martin v. Buffalo*, 128-305. Annual account of guardian presumptive evidence against sureties on bond: *Loftin v. Cobb*, 126-58; *Armistead v. Harra-mond*, 11-339. Cited in *Lewis v. Fort*, 75-253; *Speer v. James*, 94-424.

359. Officer liable for negligence in collecting debt. When a claim is placed in the hands of any sheriff, coroner or constable for collection, and he does not use due diligence in collecting the same, he shall be liable for the full amount of the claim notwithstanding the debtor may have been at all times and is then able to pay the amount thereof.

Rev., s. 286; Code, s. 1888; R. C., c. 78, s. 3; 1844, c. 64; 1869-70, c. 169, s. 12.

NOTE. For particular classes of bonds allowed as investments to fiduciaries, see *Trustees*, s. 4018.

See sections 3930 and 973 and annotations thereunder. This section only applies to such claims as are within magistrate's jurisdiction: *Brunhild v. Potter*, 107-416; *McLaurin v. Buchanan*, 60-91; *Ellis v. Long*, 30-515; *State v. Long*, 29-379. Sixteen days delay in collecting held to be negligence, when: *Nixon v. Bagby*, 52-4. Cases against sheriff: *Brunhild v. Potter*, 107-416; *McLaurin v. Buchanan*, 60-91; *State v. Allen*, 27-36—against constable: *State v. Galbraith*, 65-409; *Lipscomb v. Cheek*, 61-332; *Nixon v. Bagby*, 52-4; *Dunton v. Doxey*, 52-222; *State v. Wall*, 31-20; *Chiple v. Albea*, 53-204; *Morgan v. Horne*, 44-25; *State v. Stephens*, 25-92; *Wills v. Sugg*, 25-96. Claim remaining in constable's hands during two successive terms of office, which bond sued on, see *State v. Wall*, 31-20. Officer is agent of creditor: *State v. Wall*, 31-20; *Williams v. Williamson*, 28-281. Constable taking claims for collection that are in magistrate's jurisdiction, presumption is that he takes them as constable: *Dunton v. Doxey*, 52-222. Degree of diligence required of constable under this section: *Morgan v. Horne*, 44-25; *Hearn v. Parker*, 52-150.

ART. 5. BOND-ISSUING DISTRICTS INCORPORATED

360. Various districts issuing bonds incorporated. The inhabitants of every road district, special road district, school district, graded school district, or other district, in the name of which, or on behalf of which, bonds or other evidences of indebtedness are authorized by law to be issued, shall, for all purposes relating to the issuance or payment of such bonds or other evidences of indebtedness, constitute a body politic and corporate under the name given by law to such district; and all such bonds or other evidences of indebtedness hereafter issued shall be obligations of such corporation. The board or body authorized by law to issue such bonds or other evidences of indebtedness may adopt a seal for such corporation, and shall, except as otherwise provided by law, have and exercise all the powers and perform all the duties of such corporation relating to the issuance or payment of such bonds or other evidences of indebtedness. This article shall not apply to any notes or bonds heretofore issued.

1919, c. 308.

CHAPTER 9

BOUNDARIES

- 361. Special proceedings to establish.
- 362. Occupation sufficient ownership.
- 363. Procedure.
- 364. Surveys in disputed boundaries.

361. Special proceeding to establish. The owner of land, any of whose boundary lines are in dispute, may establish any of such lines by special proceedings in the superior court of the county in which the land or any part thereof is situated.

Rev., s. 325; 1893, c. 22.

Nature of proceeding explained: Rhodes v. Ange, 173-25; Green v. Williams, 144-63; Woody v. Fountain, 143-67; Stanaland v. Rabon, 140-202; Williams v. Hughes, 124-3; Parker v. Taylor, 133-103; Basnight v. Meekins, 121-23; must be strictly followed in all material respects: Forney v. Williamson, 98-329. **When processioning is a matter of right:** Green v. Williams, 144-60. **Where title has been settled in one action the losing party cannot reopen the question by a proceeding to have the land processioned:** Holley v. Holley, 96-229. **For additional remedy when records are burned, see section 366.**

362. Occupation sufficient ownership. The occupation of land constitutes sufficient ownership for the purposes of this chapter.

Rev., s. 326; 1893, c. 22; 1903, c. 21.

Possession is sufficient to maintain proceeding: Basnight v. Meekins, 121-23; Williams v. Hughes, 124-3; Parker v. Taylor, 133-103; Smith v. Johnson, 137-43; Stanaland v. Rabon, 140-202; Woody v. Fountain, 143-67. **Title not in question unless raised by the pleadings:** Williams v. Hughes, 124-3; Vandyke v. Farris, 126-744; Midgett v. Midgett, 129-21; Woody v. Fountain, 143-67.

363. Procedure. 1. *Petition; summons; hearing.* The owner shall file his petition under oath stating therein facts sufficient to constitute the location of such line as claimed by him and making defendants all adjoining owners whose interest may be affected by the location of said line. The clerk shall thereupon issue summons to the defendants as in other cases of special proceedings. If the defendants fail to answer, judgment shall be given establishing the line according to petition. If the answer deny the location set out in the petition, the clerk shall issue an order to the county surveyor or, if cause shown, to any competent surveyor to survey said line or lines according to the contention of both parties, and make report of the same with a map at a time to be fixed by the clerk, not more than thirty days from date of order; to which time the cause shall be continued. The cause shall then be heard by the clerk upon the location of said line or lines and judgment given determining the location thereof.

PROCEDURE. Court decides what are the boundaries and the jury finds where they are: Echerd v. Johnson, 126-409. **Burden of proof is upon plaintiff to locate line:** Tillotson v. Fulp; 172-499; Garris v. Harrington, 167-86; Green v. Williams, 144-60; Woody v. Fountain, 143-66; Hill v. Dalton, 140-9, 136-339; Echerd v. Johnson, 126-409. **An affidavit filed by defendant denying plaintiff's allegations treated as an answer:** Scott v. Kellum, 117-664. **Injunction not granted in this proceeding, no substantive relief being afforded by it:** Wilson v. Alleghany Co., 124-7—but this may not be so under section 758. **Upon issue of title or**

other material fact the case is transferred to civil issue docket for trial at term: *Brown v. Hutchinson*, 155-205; *Woody v. Fountain*, 143-66; *Davis v. Wall*, 142-452; *Stanaland v. Rabon*, 140-202; *Smith v. Johnson*, 137-43; *Parker v. Taylor*, 133-104—the proceeding being converted into an action to quiet title, *Woody v. Fountain*, 143-71—or into an action of ejectment, *Davis v. Wall*, 142-452; *Parker v. Taylor*, 133-104; but a question of title arising incidentally does not prevent a settlement of the boundary in dispute: *Green v. Williams*, 144-60. Order of survey made: *Cole v. Seawell*, 152-349. Report of processioners: *Roberts v. Dickey*, 110-67; *Euliss v. McAdams*, 101-391—under prior law, *Hoyle v. Wilson*, 29-466; *Matthews v. Matthews*, 26-155; *Carpenter v. Whitworth*, 25-204; *Cansler v. Hoke*, 14-268; *Wilson v. Shufford*, 7-504. Setting aside report of processioners: *Martin v. Flippin*, 101-452. The survey, how made: *Norwood v. Crawford*, 114-513; *Porter v. Durham*, 90-55. Jury must locate line from evidence: *Nall v. McMath*, 177-183. Judgment as an estoppel when question of boundary is raised, and when question of title: *Hilliard v. Abernathy*, 171-644; *Whitaker v. Garren*, 167-658; *Davis v. Wall*, 142-450; *Parker v. Taylor*, 133-103; *Williams v. Hughes*, 124-3; *Midgett v. Midgett*, 129-21. This proceeding no bar to action of ejectment: *Vandyke v. Farris*, 126-744. Cases construing prior laws: *Forney v. Williamson*, 98-329; *Holley v. Holley*, 96-229; *Oakley v. Anderson*, 93-109; *Porter v. Durham*, 90-57; *Hoyle v. Wilson*, 29-466; *Matthews v. Matthews*, 26-155; *Carpenter v. Whitworth*, 25-204; *Cansler v. Hoke*, 14-268; *Willson v. Shufford*, 7-504.

EVIDENCE. General rules explained for ascertaining boundaries: *Power Co. v. Savage*, 170-625. In a general and a particular description the latter will control: *Potter v. Bonner*, 174-20. Lines of another tract, natural objects, course and distance, as controlling: *Gray v. Coleman*, 171-344; *Byrd v. Spruce Co.*, 170-429; *Lumber Co. v. Bernhardt*, 162-460; *Lumber Co. v. Hulton*, 152-537; s. c., 159-445; *Mitchell v. Wellborn*, 149-347; *Tate v. Johnson*, 148-267; *Hill v. Dalton*, 140-9; s. c., 136-339; *Echerd v. Johnson*, 126-409; *Redmond v. Stepp*, 100-212. Senior grant and junior grant: *Hill v. Dalton*, 140-9; s. c., 136-339; *Euliss v. McAdams*, 108-507; *Sasser v. Herring*, 14-340. Reversing calls of deed: *Jarvis v. Swain*, 173-9; *Gunter v. Mfg. Co.*, 166-161. Agreement and conduct of parties may indicate line, but cannot change it: *Taylor v. Meadows*, 175-373; *Wiggins v. Rogers*, 175-67. Lines surveyed and marked at time of conveyance: *Potter v. Bonner*, 174-20; *Milliken v. Sessoms*, 173-723; *Nelson v. Lineker*, 172-279; *Lumber Co. v. Lumber Co.*, 169-80; *Allison v. Kenion*, 163-582; *Clarke v. Aldridge*, 162-326; *Mitchell v. Wellborn*, 149-347; *Fincannon v. Sudderth*, 144-587; *Elliott v. Jefferson*, 133-207. Parol evidence to remove latent ambiguities as to boundaries: *Lewis v. Roper Lumber Co.*, 113-57; *Wynne v. Alexander*, 29-237; *Bullard v. Barksdale*, 33-461; *Hurley v. Morgan*, 18-425; *Reed v. Schenck*, 13-415; *Loften v. Heath*, 3-347; *Bustin v. Christie*, 3-99; *Archibald v. Davis*, 50-322; *Waters v. Simmons*, 52-54; *Slade v. Green*, 9-218. Declarations of deceased persons to locate boundaries: *Bank v. Whilden*, 175-52, 159-280; *Lumber Co. v. Hinton*, 171-27; *Byrd v. Spruce Co.*, 170-429; *Sullivan v. Blount*, 165-7; *Lamb v. Copeland*, 158-136; *Lumber Co. v. Branch*, 150-240; *Hill v. Dalton*, 140-9; *Yow v. Hamilton*, 136-357; *Shaffer v. Gaynor*, 117-15; *Bethea v. Byrd*, 95-311; *Smith v. Headrick*, 93-210; *Mason v. McCormick*, 85-226; *Huffman v. Walker*, 83-411; *Caldwell v. Neely*, 81-114; *Hedrick v. Gabble*, 63-48; *Toole v. Peterson*, 31-180; *Dancy v. Sugg*, 19-515; *Hartzog v. Hubbard*, 19-241; *Sasser v. Herring*, 14-340; *Gervin v. Meredith*, 4-439; *Harris v. Powell*, 3-349. To establish lost corners: *Caraway v. Chaney*, 51-361; *Addington v. Jones*, 52-582; *Topping v. Sadler*, 50-357; *Safret v. Hartman*, 50-185; *McNeill v. Massey*, 10-91; *Cherry v. Slade*, 7-82; *Den v. Green*, 9-218. General reputation as evidence: *Byrd v. Spruce Co.*, 170-429; *Echerd v. Johnson*, 126-409; *Mendenhall v. Cassells*, 20-43.

2. *Appeal to term.* Either party may within ten days after such determination by the clerk serve notice of appeal from the ruling of the clerk determining the said location. When notice of appeal is served it shall be the duty of the clerk to transmit the issues raised before him to the next term of the superior court of the county for trial by a jury, when the question shall be heard de novo.

On appeal other parties may come in: *Bates v. Pridgen*, 147-133.

3. *Survey after judgment.* When final judgment is given in the proceeding the court shall issue an order to the surveyor to run and mark the line or lines

as determined in the judgment. The surveyor shall make report including a map of the line as determined, which shall be filed with the judgment roll in the cause and entered with the judgment on the special proceedings docket.

4. *Procedure as in special proceedings.* The procedure under this chapter, the jurisdiction of the court, and the right of appeal shall, in all respects, be the same as in special proceedings except as herein modified.

Rev., s. 326; 1893, c. 22; 1903, c. 21.

364. Surveys in disputed boundaries. When in any suit pending in the superior court the boundaries of lands are drawn in question, the court may, if deemed necessary, order a survey of the lands in dispute, agreeable to the boundaries and lines expressed in each party's titles, and such other surveys as shall be deemed useful; which surveys shall be made by two surveyors appointed by the court, one to be named by each of the parties, or by one surveyor, if the parties agree; and the surveyors shall attend according to the order of the court, and make the surveys, and shall make as many accurate plans thereof as shall be ordered by the court; and for such surveys the court shall make a proper allowance, to be taxed as among the costs of the suit.

Rev., s. 1504; Code, s. 939; R. C., c. 31, s. 119; 1779, c. 157; 1786, c. 252.

The judge must make the allowance for such survey, and not the clerk on a motion to retax: Cannon v. Briggs, 174-740; LaRoque v. Kennedy, 156-361.

CHAPTER 10

BURNT AND LOST RECORDS

- 365. Copy of destroyed record as evidence; may be recorded.
- 366. Originals may be again recorded.
- 367. Establishing boundaries and interest, where original and copy destroyed.
- 368. Copy of lost will may be probated.
- 369. Copy of lost will as evidence; letters to issue.
- 370. Establishing contents of will, where original and copy destroyed.
- 371. Perpetuating destroyed judgments and proceedings.
- 372. Color of title under destroyed instrument.
- 373. Action on destroyed official bond.
- 374. Destroyed witness tickets; duplicates may be filed.
- 375. Replacing lost official conveyances.
- 376. Court records as proof of destroyed instruments set out therein.
- 377. Copies contained in court records may be recorded.
- 378. Rules for petitions under this chapter.
- 379. Records allowed under this chapter to have effect of original records.
- 380. Destroyed court records proved prima facie by recitals in conveyances executed before their destruction.
- 381. Conveyances reciting court records prima facie evidence thereof.
- 382. Court records and conveyances to which chapter extends.
- 383. Local, Moore County; certain records presumed burned.
- 384. Local: Buncombe, Haywood, Madison, and Yancey; destroyed court records therein.

365. Copy of destroyed record as evidence; may be recorded. When the office of any registry is destroyed by fire or other accident, and the records and other papers thereof are burnt or destroyed, the copies of all such proceedings, instruments and papers as are of record or registry, certified by the proper officer, though without the seal of office, shall be received in evidence whenever the original or duly certified exemplifications would be. Such copies, when the court is satisfied of their genuineness, may be ordered to be recorded or registered.

Rev., s. 327; Code, s. 55.

This section does not have effect to exclude parol testimony to prove contents: *Varner v. Johnston*, 112-570; *Hopper v. Justice*, 111-418; *Mobley v. Watts*, 98-284. Certified copy of deed cannot be changed by parol testimony as to what original contained: *Hopper v. Justice*, 111-418. A copy should always be produced, but if no copy, then proof may be by parol: *Cowles v. Hardin*, 91-233; *Dumas v. Powell*, 14-103; *Baker v. Webb*, 2-43.

366. Originals may be again recorded. All original papers, once admitted to record or registry, whereof the record or registry is destroyed, may, on motion, be again recorded or registered, on such proof as the court shall require.

Rev., s. 328; Code, s. 56.

Registry of partition destroyed, and readmitted to record by clerk on satisfactory proof: *Hill v. Lane*, 149-267.

367. Establishing boundaries and interest, where original and copy destroyed. When any conveyance of real estate, or of any right or interest therein, is lost, the registry thereof being also destroyed, any person claiming under the same may cause the boundaries thereof to be established in the manner provided in the chapter entitled Boundaries, or he may proceed in the following manner to establish both the boundaries and the nature of his estate:

He shall file his petition before the clerk of the superior court, setting forth the whole substance of the conveyance as truly and specifically as he can, the location and boundaries of his land, whose land it adjoins, the estate claimed therein, and a prayer to have his own boundaries established and the nature of his estate declared.

All persons claiming any estate in the premises, and those whose lands adjoin, shall be notified of the proceedings. Unless they or some of them, by answer on oath, deny the truth of all or some of the matters alleged, the clerk shall order a surveyor to run and designate the boundaries of the petitioner's land, and return his survey, with a plot thereof, to court. This, when confirmed, shall, with the declaration of the court as to the nature of the estate of the petitioner, be registered and have, as to the persons notified, the effect of a deed for the same, executed by the person possessed of the same next before the petitioner. But in all cases, however, wherein the process of surveying is disputed, and the surveyor is forbidden to proceed by any person interested, the same proceedings shall be had as under the chapter entitled Boundaries.

If any of the persons notified deny by answer the truth of the conveyance, the clerk shall transfer the issues of fact to the superior court at term, to be tried as other issues of fact are required by law to be tried; and on the verdict and the pleadings the judge shall adjudge the rights of the parties, and declare the contents of the deed, if any deed is found by the jury, and allow the registration of such judgment and declaration, which shall have the force and effect of a deed.

Rev., s. 328; Code, s. 56.

This is an enabling statute, giving an additional, but not exclusive, remedy: *Jones v. Ballou*, 139-526; *Cowles v. Hardin*, 91-231. Plaintiff can depend upon rules of common law to set it up: *Hopper v. Justice*, 111-420; *Mobley v. Watts*, 98-284; *Cowles v. Hardin*, 91-231. When proceeding brought hereunder, requirements must be complied with: *Cowles v. Hardin*, 79-577. Before a deed can be made plaintiff must clearly prove that such a deed once existed, its legal operation and its loss: *Plummer v. Baskerville*, 36-252; *Loftin v. Loftin*, 96-94. Purpose of statute stated: *Waters v. Crabtree*, 105-402. The judgment in this proceeding has the effect of the original conveyance: *McNeely v. Laxton*, 149-327.

368. Copy of lost will may be probated. In counties where the original wills on file in the office of the clerk of superior court, and will-books containing copies, are lost or destroyed, if the executor or any other person has preserved a copy of a will (the original being so lost or destroyed) with a certificate appended, signed by a clerk of the court in whose office the will was, or is required to be filed, stating that said copy is a correct one, this copy may be admitted to probate, under the same rules and in the same manner as now prescribed by law for proving wills. The proceedings in such cases shall be the same as though such copy was the original offered for the first time for probate, except that the clerk who signed such certificate shall, on oath, acknowledge his signature, or in case it appears that he has died or left the state, then his signature shall be proved by a competent witness; and the witness or witnesses to the original, who may be examined, shall be required to swear that he or they signed in the presence of the testator and by his direction a paper-writing purporting to be his last will and testament.

Rev., s. 329; Code, s. 57.

Probate of lost will must be made before clerk: *McCormick v. Jernigan*, 110-406. No statute of limitation applies to this proceeding: *Ibid*.

369. Copy of lost will as evidence; letters to issue. In any action or proceeding at law, where it becomes necessary to introduce such will to establish title, or for any other purpose, a copy of the will and of the record of the probate, with a certificate signed by the clerk of the superior court for the county where the will may be recorded, stating that said record and copy are full and correct, shall be admitted as competent evidence; and when a copy of a will is admitted to probate, the clerk shall thereupon issue letters testamentary.

Rev., s. 330; Code, s. 58.

370. Establishing contents of will, where original and copy destroyed. Any person desirous of establishing the contents of a will destroyed as aforesaid, there being no copy thereof, may file his petition in the office of the clerk of the superior court, setting forth the entire contents thereof, according to the best of his knowledge, information and belief. All persons having an interest under the same shall be made parties, and if the truth of such petition is denied, the issues of fact shall be transferred to the superior court at term for trial by a jury, whether the will was recorded, and if so recorded, the contents thereof, and the declarations of the judge shall be recorded as the will of the testator. Any devisee or legatee is a competent witness as to the contents of every part of said will, except such as may concern his own interest in the same.

Rev., s. 331; Code, s. 59.

Evidence to prove contents: *Cox v. Lumber Co.*, 124-78; *Varner v. Johnston*, 112-570; *Mobley v. Watts*, 98-284—to prove existence of will, *Cox v. Lumber Co.*, 124-78. **Statute of limitations:** *Varner v. Johnston*, 112-570.

371. Perpetuating destroyed judgments and proceedings. Every person desirous of perpetuating the contents of destroyed judgments, orders or proceedings of court, or any paper admitted to record or registration, or directed to be filed for safe keeping, other than wills or conveyances of real estate, or some right or interest therein, or any deed or other instrument of writing, required to be recorded or registered, but not having been recorded or registered, it being competent to register or record said deed or other instrument at the time of its loss or destruction, may file his petition in the court having jurisdiction of like matters with the original proceeding, setting forth the substance of the whole record, deed, proceeding, or paper, which he desires to perpetuate. If, on the hearing, the court shall declare the existence of such record, deed, or proceeding, or paper at the time of the burning of the office wherein the same was lodged or kept, or other destruction thereof, and that the same was there destroyed, and shall declare the contents thereof, such declaration shall be recorded or registered, or filed, according to the nature of the paper destroyed.

Rev., s. 332; Code, s. 60.

Restored record cannot be collaterally attacked: *Branch v. Griffin*, 99-173.

372. Color of title under destroyed instrument. Every person who has been in the continual, peaceable and quiet possession of land, tenements, or hereditaments, situated in the county, claiming, using and occupying them as his own, for the space of seven years, under known boundaries, the title thereto being out of the state, is deemed to have been lawfully possessed, under color of title, of such estate therein as has been claimed by him during his possession, although he may exhibit no conveyance therefor: Provided, that such possession com-

menced before the destruction of the registry office, or other destruction as aforesaid, and also that any such person, or any person claiming by, through or under him, makes affidavit and produces such proof as is satisfactory to the court that the possession was rightfully taken; and if taken under a written conveyance, that the registry thereof was destroyed by fire or other means, or was destroyed before registry as aforesaid, and that neither the original nor any copy thereof is in existence: Provided further, that such presumption shall not arise against infants, persons of nonsane memory, and persons residing out of the state, who were such at the time of possession taken, and were not therefore barred, nor were so barred at the time of the burning of the office or other destruction.

Rev., s. 333; Code, s. 61.

Hill v. Overton, 81-393.

373. Action on destroyed official bond. Actions on official or other bonds lodged in any office which are destroyed with the registry thereof may be prosecuted by petition against the principal and sureties thereto, and the proceedings shall be as in the former courts of equity.

Rev., s. 334; Code, s. 62.

This proceeding is equitable in its nature: McCormick v. Jernigan, 110-406.

374. Destroyed witness tickets; duplicates may be filed. The court having jurisdiction of the action may allow other witness tickets to be filed in place of such as may be destroyed, upon the oath of the witness or other satisfactory proof.

Rev., s. 335; Code, s. 63.

375. Replacing lost official conveyances. Where any conveyance executed by any person, sheriff, clerk and master, or commissioner of court has been lost, and registry thereof destroyed as aforesaid, and there is no copy thereof, such persons, whether in or out of office, may execute another of like tenor and date, reciting therein that the same is a duplicate, and such deed shall be evidence of the facts therein recited, in all cases wherein the parties thereto are dead, or are incompetent witnesses to prove the same, to the extent as if it was the original conveyance.

Rev., s. 336; Code, s. 64.

376. Court records as proof of destroyed instruments set out therein. The records of any court in or out of the state, and all transcripts of such records, and the exhibits filed therewith in any case, are admissible to prove the existence and contents of all deeds, wills, conveyances, depositions and other papers, copies whereof are therein set forth or exhibited, in all cases where the records and registry of such as were or ought to have been recorded and registered, or the originals of such as were not proper to be recorded or registered, have been destroyed as aforesaid, although such transcripts or exhibits have been informally certified; and when offered in evidence have the like effect as though the transcript or record was the record of the court whose records are destroyed, and the deeds, wills and conveyances, depositions and other papers therein copied or therewith exhibited were original.

Rev., s. 337; Code, s. 65.

Fain v. Gaddis, 144-765.

377. Copies contained in court records may be recorded. The copies aforesaid of all such deeds, wills, conveyances and other instruments proper to be recorded or registered, as are mentioned in the preceding section, may be recorded or registered on application to the clerk of the superior court and due proof that the original thereof was genuine.

Rev., s. 338; Code, s. 66.

378. Rules for petitions under this chapter. The following rules shall be observed in petitions and motions under this chapter:

1. The facts stated in every petition or motion shall be verified by affidavit of the petitioner that they are true according to the best of his knowledge, information, and belief.

2. The instrument or paper sought to be established by any petition shall be fully set forth in its substance, and its precise language shall be stated when the same is remembered.

3. All persons interested in the prayers of the petition or decree shall be made parties.

4. Petitions to establish a record of any court shall be filed at term in the superior court of the county where the record is sought to be established. Other petitions may be filed in the office of the clerk.

5. The costs shall be paid as the court may decree.

6. Appeals shall be allowed as in all other cases, and where the error alleged shall be a finding by the superior court at term, of a matter of fact, the same may be removed on appeal to the supreme court, and the proper judgments directed to be entered below.

7. It shall be presumed that any order or record of the court of pleas and quarter sessions, which was made and has been lost or destroyed, was made by a legally constituted court, and the requisite number of justices, without naming said justices.

Rev., s. 339; Code, s. 69; 1893, c. 295.

Parties to proceeding: *Cowles v. Hardin*, 79-577. **Verification of petition:** *Cowles v. Hardin*, 79-577. **Cases having some bearing:** *Flemming v. Roberts*, 77-415; *Dail v. Sugg*, 85-104.

379. Records allowed under this chapter to have effect of original records. The records and registries allowed by the court in pursuance of this chapter shall have the same force and effect as original records and registries.

Rev., s. 340; Code, s. 68.

See *Waters v. Crabtree*, 105-402; *McNeely v. Laxton*, 149-327.

380. Destroyed court records proved prima facie by recitals in conveyances executed before their destruction. The recitals, reference to, or mention of any decree, order, judgment or other record of any court of record of any county in which the courthouse, or records of said courts, or both, have been destroyed by fire or otherwise, contained, recited or set forth in any deed of conveyance, paper-writing, or other bona fide written evidence of title, executed prior to the destruction of the courthouse and records of said county, by any executor or administrator with a will annexed, or by any clerk and master, superior court clerk, clerk of the court of pleas and quarter sessions, sheriff, or other officer, or commissioners appointed by either of said courts, and authorized by law to

execute said deed or other paper-writing, are deemed, taken and recognized as true in fact, and are prima facie evidence of the existence, validity and binding force of said decree, order, judgment or other record so referred to or recited in said deed or paper-writing, and are to all intents and purposes binding and valid against all persons mentioned or described in said instrument of writing, deed, etc., as purporting to be parties thereto, and against all persons who were parties to said decree, judgment, order or other record so referred to or recited, and against all persons claiming by, through or under them or either of them.

Rev., s. 341; Code, s. 69.

Section is constitutional: Barefoot v. Musselwhite, 153-208. It must be shown that the record has been destroyed before recitals in the deed are evidence: Ibid. Judgment roll lost, contents proven by minute docket: Everett v. Newton, 118-919. Recitals in deeds evidence of regularity of court proceedings: Hare v. Hollomon, 94-14; Everett v. Newton, 118-919; Pinnell v. Burroughs, 168-315; s. c., 172-182; evidence of facts and authority set out: Irvin v. Clark, 98-437. Recitals of record in a deed executed by virtue of court proceedings prior to 1865 prima facie evidence of existence and validity of record: Isler v. Isler, 88-576. Existence and validity of execution proven by recitals in sheriff's deed: Dail v. Sugg, 85-104. Cases merely citing section: Lumber Co. v. Sanford, 112-655; In re Thomas, 111-416.

381. Conveyances reciting court records prima facie evidence thereof. Such deed of conveyance, or other paper-writing, executed as aforesaid, and registered according to law, may be read in any suit now pending or which may hereafter be instituted in any court of this state, as prima facie evidence of the existence and validity of the decree, judgment, order, or other record upon which the same purports to be founded, without any other or further restoration or reinstatement of said decree, order, judgment, or record than is contained in this chapter.

Rev., s. 342; Code, s. 70.

When record is lost, recitals in a deed that certain proceedings were had are prima facie evidence: Pinnell v. Burroughs, 172-182; see, also, Hare v. Hollemon, 94-20.

382. Court records and conveyances to which chapter extends. This chapter shall extend to records of any court which has been or may be destroyed by fire or otherwise, and to any deed of conveyance, paper-writing, or other bona fide evidence of title executed before the destruction of said records.

Rev., s. 343; Code, s. 71.

383. Local: Moore County; certain records presumed burned. In all cases in Moore County of bonds, indentures, accounts, minutes, judgment rolls and all other records that cannot be found on record or on file in the said clerk's office after diligent search therefor by the clerk of the court, and cannot be otherwise accounted for, the same having been on record or file therein on or before September fifth, one thousand eight hundred and eighty-nine, shall be presumed to have been destroyed by fire. In all cases in which said bonds, indentures, accounts, minutes, judgment rolls and other records or any part thereof have been lost or destroyed and in which it may become necessary to use the same in evidence, it shall be presumed that the same were executed, filed, audited or adjudicated, as the case may be, in due and legal form and were in all respects lawful records and documents.

Rev., s. 344; 1891, c. 55.

384. **Local: Buncombe, Haywood, Madison and Yancey; destroyed court records therein.** Whenever any of the records of any of the courts in this state have been burnt, lost or destroyed, and there is in existence any copy thereof, or of any part of the same, duly certified, whether under the seal of the court or otherwise, by any former clerk of said court, it shall be the duty of the present clerk of said court, or any clerk of said court hereafter in office, upon presentation to him of such copy and the payment of his lawful fees therefor, to record said copy upon the minutes or records of said court; and after the same shall have been so recorded the record then shall be used as and be taken and deemed and shall have all the force and effect of the original record so burnt, lost or destroyed; and such record thereof, or a copy of the same duly certified by the clerk of said court, shall be in all respects competent in the same way and manner as the original record in all the courts of this state. This section shall apply only to the counties of Buncombe, Madison, Yancey and Haywood.

Rev., s. 345; 1905, c. 308.

CHAPTER 11

CITIZENSHIP RESTORED

- 385. Petition filed.
- 386. When and where petition filed.
- 387. Notice given.
- 388. Hearing and evidence.
- 389. Decree.
- 390. Procedure in case of pardon or suspension of judgment.

385. Petition filed. Any person convicted of an infamous crime, whereby the rights of citizenship are forfeited, desiring to be restored to the same, shall file his petition in the superior court, setting forth his conviction and the punishment inflicted, his place or places of residence, his occupation since his conviction, the meritorious causes which, in his opinion, entitle him to be restored to his forfeited rights, and that he has not before been restored to the lost rights of citizenship.

Rev., s. 2675; Code, ss. 2938, 2940; R. C., c. 58, ss. 1, 3; 1840, c. 36, s. 4.

The disqualification for citizenship is not part of the judgment of the court, but a mere consequence thereof: *State v. Jones*, 82-685.

386. When and where petition filed. At any time after the expiration of four years from the date of conviction, the petition may be filed in the superior court of the county in which the applicant is at the time of filing and has been for five years next preceding a bona fide resident, or in the superior court of the county, at term, where the indictment was found upon which the conviction took place; and in case the petitioner may have been convicted of an infamous crime more than once, and indictments for the same may have been found in different counties, the petition shall be filed in the superior court of that county where the last indictment was found.

Rev., s. 2676; Code, ss. 2940, 2941; 1897, c. 110; R. C., c. 58, ss. 3, 4; 1840, c. 36, s. 3.

Upon conviction, imprisonment and pardon, application can be made only after four years from conviction: *In re Petition of Jones*, 160-15.

387. Notice given. Upon filing the petition the clerk of the court shall advertise the substance thereof, at the courthouse door of his county, for the space of three months next before the term when the petitioner proposes that the same shall be heard.

Rev., s. 2677; Code, s. 2938; R. C., c. 58, s. 1; 1840, c. 36.

388. Hearing and evidence. The petition shall be heard by the judge at term, at which hearing the court shall examine all proper testimony which may be offered, either by the petitioner as to the facts set forth in his petition or by any one who may oppose the grant of his prayer. The petitioner shall also prove by five respectable witnesses, who have been acquainted with the petitioner's character for three years next preceding the filing of his petition, that his character for truth and honesty during that time has been good; but no deposition shall be admissible for this purpose unless the petitioner has resided out of this state for three years next preceding the filing of the petition.

Rev., s. 2678; Code, ss. 2938, 2939; 1897, c. 110; 1901, c. 533; R. C., c. 58, ss. 1, 2; 1840, c. 36.

389. Decree. At the hearing the court, on being satisfied of the truth of the facts set forth in the petition, and on its being proved that the character of the applicant for truth and honesty is good, shall decree his restoration to the lost rights of citizenship, and the petitioner shall accordingly be restored thereto.

Rev., s. 2679; Code, s. 2938; R. C., c. 58, s. 1; 1840, c. 36.

390. Procedure in case of pardon or suspension of judgment. Any person convicted of any crime, whereby the rights of citizenship are forfeited, and the judgment of the court pronounced does not include imprisonment anywhere, and pardon has been granted by the governor, or the court suspended judgment on payment of the costs, and the costs have been paid, such person may be restored to such forfeited rights of citizenship upon application, by petition, to the judge presiding at any term of the superior court held for the county in which the conviction was had, one year after such conviction. The petition shall set out the nature of the crime committed, the time of conviction, the judgment of the court, and that pardon has been granted by the governor, and also that said crime was committed without felonious intent, and shall be verified by the oath of the applicant and accompanied by the affidavits of ten reputable citizens of the county, who shall state that they are well acquainted with the applicant and that in their opinion the crime was committed without felonious intent. No notice of the petition in such case shall be necessary, and no advertisement thereof be made, but the same shall be heard by the judge, upon its presentation, during a term of court; and if he is satisfied as to the truth of the matters set out in the petition and affidavits, he shall decree the applicant's restoration to the lost rights of citizenship, and the clerk shall spread the decree upon his minute docket: Provided, that in all cases where the court suspended judgment it shall not be necessary to allege or prove that pardon has been granted by the governor, and in such cases the petition may be made and the forfeited rights of citizenship restored at any time after conviction.

Rev., s. 2680; 1899, cc. 44, 249; 1905, c. 547.

For cases prior to this enactment, see *State v. Houston*, 103-383; *State v. Pearson*, 97-434. This section does not apply to a case of conviction and imprisonment: In re *Petition of Jones*, 160-15. Upon pardon granted, the fine paid may be recovered if it is still under control of the court: *Bynum v. Turner*, 171-86.

CHAPTER 12

CIVIL PROCEDURE

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- 846. When timber may be cut.
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- 852. Before what judge returnable.
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- 873. Leave withdrawn and action dismissed for insufficient bond.
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- 876. Trials expedited.
- 877. Time for bringing action.
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- 879. Possession of office not disturbed pending trial.
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- 881. Service of summons and complaint.
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- 883. Mandamus to aid relator.
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- 885. Relator inducted into office; duty and damages.
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- 889. For and against whom action lies.
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- 902. Compelling attendance of party for examination before trial.
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- 905. Irresponsive answer may be met by party's own testimony.
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- 909. Motions; when and where made.
- 910. Affidavit for or against, compelled.
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- 916. Service upon a party.
- 917. Service by publication.
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- 921. Officer's return evidence of service.

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- 923. Computation in publication.
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SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS

ART. 1. DEFINITIONS

391. Remedies. Remedies in the courts of justice are divided into—

1. Actions.
2. Special proceedings.

Rev., s. 346; Code, s. 125; C. C. P., s. 1.

Cited in *Lyon v. Comrs.*, 120-242.

392. Actions. An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense.

Rev., s. 347; Code, s. 126; C. C. P., s. 2; 1868-9, c. 277, s. 2.

Cases differentiating special proceedings from civil actions: *Tate v. Powe*, 64-644; *Pollard v. Slaughter*, 92-72; *Parton v. Allison*, 109-674.

PROCEEDINGS THAT ARE NOT ACTIONS. Probating wills: *Powell v. Watkins*, 172-244; *Young's Will*, 123-358; *Syme v. Broughton*, 85-367; *Love v. Johnston*, 34-355; *Whitfield v. Hurst*, 31-170; *Sawyer v. Dozier*, 27-97; *St. John's Lodge v. Callender*, 26-335. **Condemnation proceedings:** *Click v. R. R.*, 98-391.

Case merely citing section: *State v. Burton*, 113-659.

393. Special proceedings. Every other remedy is a special proceeding.

Rev., s. 348; Code, s. 127; C. C. P., s. 3.

REMEDIES THAT ARE SPECIAL PROCEEDINGS. Generally stated in *Tate v. Powe*, 64-644. Proceedings for partition: *Ibid.*; also, *Bragg v. Lyon*, 93-151; *Capps v. Capps*, 85-408; also see chapter on Partition—for drainage, *Durden v. Simmons*, 84-555; also see section 5261—for widow's year's allowance, *Tate v. Powe*, 64-644—for creditors against administrator, *Jerkins v. Carter*, 70-500; but see *Haywood v. Haywood*, 79-42; *Patterson v. Miller*, 72-516; see section 110—for sale of decedent's land for assets, *Badger v. Jones*, 66-305; see, also, section 74—for recovery of distributive shares and legacies, *Bell v. King*, 70-330; see, also, section 147—to force administrator to sell land for assets, *Pelletier v. Saunders*, 67-261—to lay off dower, *Gatewood v. Tomlinson*, 113-312; *Felton v. Elliott*, 66-195; *Tate v. Powe*, 64-644; except where an equitable element is involved, *Efland v. Efland*, 96-488; or proceeding is by assignee of widow, *Parton v. Allison*, 109-674—for alimony without divorce, *Reeves v. Reeves*, 82-348; see, also, section 1667—for damages for erection of mill, *Sumner v. Miller*, 64-638—for settlement of decedents' estates, *Herring v. Outlaw*, 70-334; *Hunt v. Sneed*, 64-176; also see sections 110 and 152—to remove administrator or executor, *Edwards v. Cobb*, 95-4; *Murrill v. Sandlin*, 86-54; *Simpson v. Jones*, 82-323; *McFayden v. Council*, 81-195; *Barnes v. Brown*, 79-401; also see sections 30, 31, 32, 42, 44—to correct error in partition of land, *Wahab v. Smith*, 82-229; settlement of boundaries, section 361.

394. Kinds of actions. Actions are of two kinds—

1. Civil.
2. Criminal.

Rev., s. 349; Code, s. 128; C. C. P., s. 4.

395. Criminal action. A criminal action is—

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

Words "criminal action" and "indictment" synonymous: *State v. Simons*, 68-378. Prosecutions for public offenses are criminal actions: *State v. Lupton*, 63-483.

2. An action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime against his person or property.

Proceeding on peace warrant is a criminal action: *State v. Lyon*, 93-576; *State v. Oates*, 88-668. See section 4531 et seq.

Rev., s. 350; Code, s. 129; C. C. P., s. 5; Const., Art. IV, s. 1.

396. Civil action. Every other is a civil action.

Rev., s. 351; Code, s. 130; C. C. P., s. 6.

Any proceeding that under the old mode was commenced by *capias ad respondendum* (including ejection), or by a bill in equity for relief, is a civil action: *Tate v. Powe*, 64-644. In cases where question arose, the following proceedings have been held to be civil actions: *Bastardy*, *State v. Liles*, 134-735—*mandamus*, *Haymore v. Comrs.*, 85-268; *Belmont v. Reilly*, 71-260; *Brown v. Turner*, 70-93—*falsifying accounts of decedent's estate*, *Murphy v. Harrison*, 65-246—*enforcing a judgment nisi against sheriff*, *Jones v. Gupton*, 65-48—*ward's suit on guardian bond for account*: *Rowland v. Thompson*, 65-110—*ejection*, *Woodley v. Gilliam*, 64-649.

397. When court means clerk. In the following sections which confer jurisdiction or power, or impose duties, where the words "superior court," or "court," in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular term of the court, in which cases the judge of the court alone is meant.

Rev., s. 352; Code, s. 132; C. C. P., s. 9.

NOTE. For the jurisdiction of clerk, see s. 403.

Cases in which "superior court" is construed to mean "clerk": *Bank v. Hotel Co.*, 147-594; *Pelletier v. Saunders*, 67-261; see, also, *Tillett v. Aydlett*, 90-551. Cases in which section is referred to but not construed: *Mills v. Lumber Co.*, 139-524; *Adams v. Howard*, 110-19; *Click v. R. R.*, 98-392; *Brittain v. Mull*, 91-502.

ART. 2. GENERAL PROVISIONS

398. Remedies not merged. Where the violation of a right admits both of a civil and a criminal remedy, the right to prosecute the one is not merged in the other.

Rev., s. 353; Code, s. 131; C. C. P., s. 7.

White v. Underwood, 125-25; *White v. Fort*, 10-251.

399. One form of action. The distinction between actions at law and suits in equity and the forms of such actions and suits are abolished, and there is but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which is denominated a civil action.

Rev., s. 354; Code, s. 133; C. C. P., s. 12; Const., Art. IV, s. 1.

"DISTINCTIONS BETWEEN ACTIONS AT LAW AND SUITS IN EQUITY" ABOLISHED. But not distinctions between principles of law and equity: *Hardware Co. v. Lewis*, 173-290; *Rudisill v. Whitener*, 146-404; *Makuen v. Elder*, 170-510; *Morrisey v. Swinson*, 104-555; *Ely v. Early*, 94-1; *Allen v. Taylor*, 96-37; *Lumber Co. v. Wallace*, 93-22; *Katzenstein v. R. R.*, 84-694; *Matthews v. McPherson*, 65-189—nor the jurisdiction of superior court over matters heretofore within equity jurisdiction, *Barcello v. Hapgood*, 118-712. The equity practice, with slight modification, is the outcome: *Staton v. Webb*, 137-39.

"ONE FORM OF ACTION." Both legal and equitable remedies administered in one action: *Floars v. Ins. Co.*, 144-232; *Winders v. Hill*, 142-694; *Bean v. R. R.*, 107-731; *Pendleton v. Dalton*, 92-185; *Stein v. Cozart*, 122-280; *Edwards v. Love*, 94-365; *Vegeahn v. Smith*,

95-254; *Allen v. Taylor*, 96-37; *Efland v. Efland*, 96-488; *Condry v. Cheshire*, 88-375; *Farmer v. Daniel*, 82-152; *Murray v. Blackledge*, 71-492; *McRae v. Battle*, 69-98. Only one form: *Williams v. R. R.*, 144-498; *Fincannon v. Sudderth*, 144-594; *Lumber Co. v. Wallace*, 93-22; *Ely v. Early*, 94-1; *Bean v. R. R.*, 107-731; *Wilson v. Hughes*, 94-182; *Haymore v. Comrs.*, 85-268; *Belmont v. Reilly*, 71-262; *Bitting v. Thaxton*, 72-541; *Garrett v. Trotter*, 65-431; *Froelich v. Southern Express Co.*, 67-4—and that form similar to the equity bill, *Staton v. Webb*, 137-39. There is no particular form of action or statement, but sufficient facts must be alleged to justify the relief: *Reid v. King*, 158-85; *Cheese Co. v. Pipkin*, 155-394; *McFarland v. Cornwell*, 151-428; *Vinson v. Knight*, 137-408; *Bitting v. Thaxton*, 72-541.

“FORMS OF ALL SUCH ACTIONS AND SUITS” ABOLISHED. But this does not dispense with such degree of certainty and regularity as is essential in every system adopted for the administration of justice: *Norton v. McDevit*, 122-755; *Lassiter v. Roper*, 114-17; *Moore v. Hobbs*, 79-535; *Oates v. Gray*, 66-442. Sustaining the words of the statute, *Staton v. Webb*, 137-39; *Hargrove v. Harris*, 116-418.

EFFECT ON PROCEDURE AND PLEADING. See generally the latest cases: *Blackmore v. Winders*, 144-215; *Wilson v. Brown*, 134-407. Essential principles and the rules of common-law pleading still remain except as modified by this section: *Webb v. Hicks*, 116-598; *Lassiter v. Roper*, 114-17; *Hinsdale v. Sinclair*, 83-338; *Oates v. Gray*, 66-442; *Parsley v. Nicholson*, 65-207; *Vass v. Bldg. Assn.*, 91-62; *Rowland v. Windley*, 82-133; *Crump v. Mims*, 64-767—but see the following cases that seem to overrule the preceding, *Staton v. Webb*, 137-39; *Wilson v. Brown*, 134-407; *Pierce v. R. R.*, 124-83; *Sams v. Price*, 119-572; *Holden v. Warren*, 118-326; *Fulps v. Mock*, 108-601; *Stokes v. Taylor*, 104-394; *Moore v. Edmiston*, 70-517. Equities must be set up in the pleadings: *Moore v. Cameron*, 93-51; *Lumber Co. v. Wallace*, 93-22; *Stamps v. Cooley*, 91-316; *Ledbetter v. Quick*, 90-276; *Rawlings v. Hunt*, 90-270; *Adams v. Hayes*, 120-383. New system of pleading looks to the merits: *Halstead v. Mullen*, 93-252. How far the old practice may still be recognized: *Boyleston Ins. Co. v. Davis*, 74-78; *London v. Bear*, 84-266; *Morrissey v. Swinson*, 104-555; *Simms v. Goettle*, 82-271.

Cases citing but not construing section: *Kiff v. Weaver*, 94-278; *Sneed v. Harris*, 109-358.

400. Plaintiff and defendant. In civil actions the party complaining is the plaintiff, and the adverse party the defendant.

Rev., s. 355; Code, s. 134; C. C. P., s. 13.

It is irregular to be plaintiff and defendant in the same action: *Medlin v. Simpson*, 144-397.

401. How party may appear. A party may appear either in person or by attorney in actions or proceedings in which he is interested.

Rev., s. 356; Code, s. 109; C. C. P., s. 423.

General and special appearance distinguished: *State v. White*, 164-408. The test for determining the character of an appearance is the relief asked: *Woodard v. Milling Co.*, 142-100; *Scott v. Life Assn.*, 137-518; *Grant v. Grant*, 159-528; *Wooten v. Cunningham*, 171-123. What amounts to a general appearance, see *Comrs. v. Scales*, 171-523; *Hassell v. Steamboat Co.*, 168-296; *Allen-Fleming Co. v. R. R.*, 145-37; *Woodard v. Milling Co.*, 142-100; *Scott v. Life Assn.*, 137-515. General appearance cures all defects in service of process: *Drainage District v. Comrs.*, 174-738; *Roberts v. Allman*, 106-391; *Lemly v. Ellis*, 143-200; *Wheeler v. Cobb*, 75-21; *Penniman v. Daniel*, 95-341; *Hatcher v. Faison*, 142-364; see, also, sections 475, 490. What amounts to special appearance, see *Woodard v. Milling Co.*, 142-100; *Scott v. Life Assn.*, 137-515. Special appearance can only be made to dismiss an action or move to set aside judgment for lack of jurisdiction: *Scott v. Life Assn.*, 137-515; *Clark v. Mfg. Co.*, 110-111—and cannot be entered to take an appeal, *Ibid.*; also, *Allen-Fleming Co. v. Rwy.*, 145-37; *Houston v. Lumber Co.*, 136-328. When special appearance made to move to dismiss, and motion overruled, defendant should except and go to the merits: *Graham v. O'Bryan*, 120-463; *Farris v. R. R.*, 115-600; *Guilford County v. Georgia Co.*, 109-310. A special appearance, with a motion to dismiss and a temporary continuance of the motion, does not amount to general appearance: *Warlick v. Reynolds*, 151-606. The entry should state the special purpose, but a failure to state it from inadvertence is not a waiver of client's right: *Suiter v. Brittle*, 90-19. As to the doctrine of appearance by representation, see *Card v. Finch*, 142-140; *Springs v. Scott*, 132-548.

402. Feigned issues abolished and substituted. Feigned issues are abolished, and instead thereof, in the cases where the power formerly existed to order a feigned issue, or when a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made by the judge, stating distinctly and plainly the question of fact to be tried; and this order is the only authority necessary for a trial.

Rev., s. 357; Code, s. 135; C. C. P., s. 15.

Feigned issues in ejectment abolished: Harkey v. Houston, 65-137—and in actions for seduction, Hood v. Sudderth, 111-215. Court should dismiss action upon a feigned issue *ex mero motu*: Blake v. Askew, 76-325.

403. Jurisdiction of clerk. The clerk of the superior court has jurisdiction to hear and decide all questions of practice and procedure and all other matters over which jurisdiction is given to the superior court, unless the judge of the court or the court at a regular term is expressly referred to.

Rev., s. 358; Code, s. 251; C. C. P., s. 108.

See section 397. For history of change in practice, see Bynum v. Powe, 97-374. Clerk has no equitable jurisdiction, except when specially conferred by statute: Vance v. Vance, 118-864; Bragg v. Lyon, 93-151. Exercise of judicial powers by clerk is exercise of them by court, acting through clerk: Brittain v. Mull, 91-498. Cases merely citing section: Turner v. Holden, 109-186; Cushing v. Styron, 104-339; Click v. R. R., 98-392; Maxwell v. Blair, 95-317; Loftin v. Rouse, 94-508; Jones v. Desern, 94-35; Johnson v. Judd, 63-498; McAden v. Banister, 63-481; McAdoo v. Benbow, 63-462.

SUBCHAPTER II. LIMITATIONS

ART. 3. LIMITATIONS, GENERAL PROVISIONS

404. When action commenced. An action is commenced as to each defendant when the summons is issued against him.

Rev., s. 359; Code, s. 161; C. C. P., s. 40.

An action is pending from the issuing of the summons and not from the service: Pettigrew v. McCoin, 165-472. The court will take judicial notice of the summons to ascertain when action was commenced: Harrell v. Lumber Co., 172-827. Requisites of a valid summons: Redmond v. Mullenax, 113-505. Rebuttable presumption that summons was issued on the date it bears: Houston v. Thornton, 122-365; Currie v. Hawkins, 118-593. Fatal effect of a break in the chain of alias summonses: Ruffy v. Claywell, 93-306; Etheridge v. Woodley, 83-11; Koonce v. Pelletier, 115-233. A summons is issued within the meaning of this section when it is delivered to the sheriff: Smith v. Lumber Co., 142-26; Webster v. Sharpe, 116-466—when put out from clerk's office under his direction to be sent to officer for service, Houston v. Thornton, 122-365.

Summons is not issued within the meaning of this section when it remains in the office of the clerk filled up and signed but held for a prosecution bond: Webster v. Sharpe, 116-466—when signed and issued but not docketed on summons docket, nor returned served; nor followed by alias, Neal v. Nelson, 117-393. When the service is by attachment of property and publication no summons is required: Mills v. Hansel, 168-651; Currie v. Mining Co., 157-217; Grocery Co. v. Bag Co., 142-174; overruling McClure v. Fellows, 131-509; Best v. Mortgage Co., 128-351. Cases merely citing section: Morris v. House, 125-560; Farthing v. Carrington, 116-331.

405. Run from accrual of cause of action; objection. Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action has accrued, except where in special cases a different limitation is pre-

scribed by statute. The objection that the action was not commenced within the time limited can only be taken by answer.

Rev., s. 360; Code, s. 138; C. C. P., s. 17.

CAUSE OF ACTION ACCRUES. When plaintiff is at liberty to sue, not being under disability: *Eller v. Church*, 121-269. In cases of fraud or mistake, from its discovery or when it should have been discovered: *Tuttle v. Tuttle*, 146-484; *Modlin v. Railroad and Lumber Co.*, 145-218; *Peacock v. Barnes*, 142-215; *Alpha Mills v. Engine Co.*, 116-797—in cases of failure of clerk to index judgment, *Shackleford v. Staton*, 117-73—of subjecting stockholders of bank to liability, *Long v. Bank*, 90-405—of negligence, *Mast v. Sapp*, 140-533—of sureties liable on administrator's bond, *Gill v. Cooper*, 111-311—of surety on indemnity bond, *Graeber v. Sides*, 151-596—of sureties generally, *Leak v. Covington*, 99-559—of breach of covenant of seizin, *Shankle v. Ingram*, 133-254—of breach of covenant of warranty, *Shankle v. Ingram*, 133-254; *Wiggins v. Pender*, 132-628; *Griffin v. Thomas*, 128-310; *Mizzell v. Ruffin*, 118-69—of damages for construction of railroad, *Cardwell v. R. R.*, 171-365; *Bareliff v. R. R.*, 168-268; *Lassiter v. R. R.*, 126-509; *Ridley v. R. R.*, 118-996; *Hocutt v. R. R.*, 124-219—of sale by sheriff of exempt property, *Hobbs v. Barefoot*, 104-224—of failure of consideration, to recover purchase money, *Barden v. Stickney*, 132-416—of trespass on land, *Spruill v. Mfg. Co.*, 130-42—of ejectment, *Ladd v. Byrd*, 113-466—of ouster of cestui que trust, *Webb v. Borden*, 145-188—of action against nonresident, *Green v. Ins. Co.*, 139-309.

In favor of debtor on mutual account: *Stokes v. Taylor*, 104-394—of executor against creditor of testator, *Hinton v. Pritchard*, 126-8; *Lynn v. Lowe*, 88-478; *Miller v. Shoaf*, 110-319; *Love v. Ingram*, 104-600—of mortgagor or trustor, *Scott v. Lumber Co.*, 144-44; *Bernhardt v. Hagamon*, 144-526; *Triplett v. Foster*, 115-335; *Woody v. Jones*, 113-253; *Moore v. Ray*, 108-252—of guardian against ward, *Dunn v. Beaman*, 126-766; *Kennedy v. Cromwell*, 108-2—of judgment debtor where judgment taken on rehearing before magistrate, *Salmon v. McLean*, 116-209—of tenant in common, *Tharpe v. Holecombe*, 126-365—of debtor to one under disability, *Eller v. Church*, 121-269; *Dunn v. Dunn*, 137-533—of trustee of implied trust, *Dunn v. Dunn*, 137-533—of trustee of express trust, *Hilton v. Gordon*, 177-342; *Rouse v. Rouse*, 176-171; *Coxe v. Carson*, 169-132; *Rouse v. Rouse*, 167-208; *Greenleaf v. Land Co.*, 146-505; *Dixon v. Dixon*, 145-46; *Owens v. Williams*, 130-165; *Davis v. Boyden*, 123-283; *Wright v. Cain*, 93-296; *Patterson v. Lilly*, 90-87; *Bd. of Ed. v. Bd. of Ed.*, 107-366—of county as against holders of bond coupons, *Threadgill v. Comrs.*, 116-616—of vendee in bond for title, *Worth v. Wrenn*, 144-656—of sureties on bond of first administrator against administrator d. b. n., *Burgwyn v. Daniel*, 115-115—of grantee of junior grant, *Johnson v. Lumber Co.*, 144-717; *McAden v. Palmer*, 140-258—of an employer of labor, *Robertson v. Pickerell*, 77-302—of a partner, *Loan Assn. v. Ferrell*, 114-301; *Murray v. Penny*, 108-324; *Rencher v. Anderson*, 95-208—of one who is guilty of conversion, *Meekins v. Simpson*, 176-130; *Smith v. Durham*, 127-417; *Ritch v. Oates*, 122-634; *University v. Bank*, 96-280; *Bryant v. Peebles*, 92-176; *Earp v. Richardson*, 81-5; *Blount v. Parker*, 78-128; *Carroway v. Burbank*, 12-306—of obligor in bond, *Ervin v. Brooks*, 111-358—of one claiming against remainderman during life estate, *Pritchard v. Williams*, 175-319; *Shaw v. Ward*, 175-192; *Graves v. Causey*, 170-175; *Norcum v. Savage*, 140-472; *Joyner v. Futrell*, 136-301; *Griffin v. Thomas*, 128-310; *Wooten v. R. R.*, 128-119; *Hunniceutt v. Brooks*, 116-788—of grantee of the legal title from trustee as against cestui que trust, *Cherry v. Power Co.*, 142-404—of person who received money on executory contract where contract not executed, *Tomlinson v. Bennett*, 145-279.

In breach of contract for services rendered intestate: *Helsabeck v. Doub*, 167-205; *Freeman v. Brown*, 151-111; *Miller v. Lash*, 85-54. For breach of contract generally: *Dry Kiln Co. v. Ellington*, 172-481; *Holden v. Royall*, 169-676. Between principal and agent: *Gooch v. Bank*, 176-213. Dissolution of partnership: *Moore v. Westbrook*, 156-482. Causes of action before 1868: *Brown v. Wilson*, 174-668; *Edwards v. Lemmond*, 136-330. Assignee of judgment against assignor for defects: *Mfg. Co. v. Fertilizer Co.*, 150-417.

WHEN STATUTE BEGINS TO RUN NOTHING STOPS IT. *Frederick v. Williams*, 103-189; *Chaney v. Powell*, 103-160; *Mebane v. Patrick*, 46-27; *Barden v. Stickney*, 132-416; *Copeland v. Collins*, 122-619; *Neal v. Nelson*, 117-393; *Grady v. Wilson*, 115-344; *Koonce v. Pelletier*, 115-234; *Hughes v. Boone*, 114-54; *Helm Co. v. Griffin*, 112-356; *Asbury v. Fair*, 111-251.

NECESSITY OF PLEADING THE STATUTE. Statute of presumptions does not have to be pleaded: *Ins. Co. v. Edwards*, 124-116; *Crawford v. McLellan*, 87-169—but statute of limitations must be pleaded: *Roberts v. Baldwin*, 155-276; *Boone v. Peebles*, 126-824; *Ins. Co. v. Edwards*, 124-116; *Bank v. Loughran*, 122-668; *Albertson v. Terry*, 109-8; *Guthrie v. Bacon*, 107-337; *Green v. R. R.*, 73-524—except in possessory actions where title is to be shown: *Ditmore v. Rexford*, 165-620; *Whitaker v. Jenkins*, 138-476; *Ins. Co. v. Edwards*, 124-117; *Freeman v. Sprague*, 82-366; *Asbury v. Fair*, 111-251; *Shelton v. Wilson*, 131-501. Defendant not allowed to plead the statute where delay was caused by his telling plaintiff he would not plead it: *Bareroft v. Roberts*, 91-363; *Daniel v. Comrs.*, 74-494; *Joyner v. Massey*, 97-148; *Hill v. Hilliard*, 103-34; *Cecil v. Henderson*, 121-244; *Brown v. R. R.*, 147-217. Administrator is not compelled to plead statute, but must exercise good faith: *Person v. Montgomery*, 120-111; *McNair v. Cooper*, 174-566; *Twiddy v. Mullen*, 176-16.

LIMITATION BARRING ACTION, HOW PLEADED. Can only be done by answer: *Wilmington v. McDonald*, 133-548; *King v. Powell*, 127-10; *Ins. Co. v. Edwards*, 124-116; *Bacon v. Berry*, 85-124; *Long v. Bank*, 81-41—not by demurrer: *Moody v. Wike*, 170-541; *Oldham v. Rieger*, 145-254; *King v. Powell*, 127-10; *Bacon v. Berry*, 85-124; *Daniel v. Comrs.*, 74-494; but see *Dockery v. Hamlet*, 162-118—nor by motion to dismiss: *Oldham v. Rieger*, 145-254; *Lynn v. Lowe*, 88-483; nor by motion to vacate judgment: *Williams v. Mullis*, 87-159—and must set up the facts, not a conclusion of law: *Bank v. Warehouse Co.*, 172-602; *Duckworth v. Duckworth*, 144-621; *Pipes v. Lumber Co.*, 132-612; *Murray v. Barden*, 132-136; *Heyer v. Rivenbark*, 128-270; *Turner v. Shuffler*, 108-642; *Pope v. Andrews*, 90-401. Other cases where held insufficiently pleaded: *Murray v. Barden*, 132-136; *Humble v. Mebane*, 89-410. The burden is upon the plaintiff when defendant pleads the statute: *Tillery v. Lumber Co.*, 172-296; *Ditmore v. Rexford*, 165-620; *House v. Arnold*, 122-220; *Stubbs v. Motz*, 113-458; *Moore v. Garner*, 101-374. When the statute is a question of law: *Roberts v. Baldwin*, 155-276; *Oldham v. Rieger*, 145-254.

STATUTE DOES NOT RUN. Against one in possession: *Jefferson v. Lumber Co.*, 165-46; *Porter v. White*, 128-42; *Norton v. McDevitt*, 122-755; *Stith v. McKee*, 87-389—against subscriptions of stock payable as called for, *Cooper v. Security Co.*, 127-219—against municipality holding land in trust, when: *Turner v. Comrs.*, 127-153—against a charge upon land for owelty of partition: *In re Ausborn*, 122-42; *Walker, ex parte*, 107-340; *Dobbins v. Rex*, 106-444; *Sutton v. Edwards*, 40-425. See sections 434, 435. For change of statute, see under section 436.

406. Deemed pleaded by insane party. On the trial of any action or special proceeding to which an insane person is a party, such insane person is deemed to have pleaded specially any defense, and shall on trial have the benefit of any defense, whether pleaded or not, that might have been made for him by his guardian or attorney under the provisions of this chapter. The court, at any time before the action or proceeding is finally disposed of, may order the bringing in, by proper notice, of one or more of the near relatives or friends of the insane person, and may make such other order as it deems necessary for his proper defense.

Rev., s. 361; 1889, c. 89, s. 2.

Insane person deemed to have pleaded the statute of limitations: *Hospital v. Fountain*, 129-90; *In re Hybart*, 119-366.

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

1. Within the age of twenty-one years; or

Self v. Shugart, 135-185; *Lafferty v. Young*, 125-296; *Amis v. Stephens*, 111-174; *Gudger v. R. R.*, 106-481; *Frederick v. Williams*, 103-189; *Chancey v. Powell*, 103-159; *Campbell v. Crater*, 95-162. Infant having guardian nevertheless protected: *Cross v. Craven*, 120-331; see *Norman v. Walker*, 101-24.

2. Insane; or

Outland v. Outland, 118-138; Asbury v. Fair, 111-251; Warlick v. Plonk, 103-81; Ellington v. Ellington, 103-55. **Insanity once shown to exist, the presumption is that it continues, but this is rebuttable:** Beard v. R. R., 143-137.

3. Imprisoned on a criminal charge, or in execution under sentence for a criminal offense;

See Holly v. Assurance Co., 170-4.

May bring his action within the times herein limited, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he must commence his action, or make his entry, within three years next after the removal of the disability, and at no time thereafter.

Rev., s. 362; Code, ss. 148, 163; C. C. P., ss. 27, 142; 1899, c. 78.

For disabilities in an action to recover land sold for taxes, see section 2761. Adverse possession relates only to the true title, and the exemptions in the statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action: Berry v. Lumber Co., 141-386. Full time allowed after disability removed except in case of land, then only three years: Cooley v. Lee, 170-18. This section does not apply to presumptions: In re Dupree's Will, 163-256; Houck v. Adams, 98-519; Summerlin v. Cowles, 101-473.

408. Disability of marriage. In any action in which the defense of adverse possession is relied upon, the time computed as constituting such adverse possession shall not include any possession had against a feme covert during coverture prior to February thirteenth, one thousand eight hundred and ninety-nine.

Rev., s. 363; 1899, c. 78, ss. 2, 3.

Adverse possession prior to February 13, 1899, as to married woman: Berry v. Lumber Co., 141-386; Norcum v. Savage, 140-472; Gaskins v. Allen, 137-426; Earnhardt v. Clement, 137-91; Fowler v. McLaughlin, 131-209; Hill v. Lane, 149-267; Bond v. Beverly, 152-56; Holmes v. Carr, 172-213. The statute runs against claim of wife against husband: Graves v. Howard, 159-594. Coverture as a disability not recognized: Carter v. Reaves, 167-131.

409. Cumulative disabilities. When two or more disabilities coexist at the time the right of action accrues, or when one disability supervenes an existing one, the limitation does not attach until they all are removed.

Rev., s. 364; Code, ss. 149, 170; C. C. P., ss. 28, 49.

Cases directly supporting statute: Miller v. Bumgardner, 109-412; Cross v. Craven, 120-331; Epps v. Flowers, 101-160; Campbell v. Crater, 95-156; Davis v. Perry, 89-422; Lippard v. Troutman, 72-553; Davis v. Cooke, 10-608. Cases merely citing statute: Smith v. Tew, 127-301; Boone v. Peebles, 126-826.

410. Disability must exist when right of action accrues. No person may avail himself of a disability, unless it existed when his right of action accrued.

Rev., s. 365; Code, s. 169; C. C. P., s. 48.

Where right accrued before disability began, it avails nothing: Self v. Shugart, 135-187; Kennedy v. Cromwell, 108-1; Causcy v. Snow, 122-326; Erwin v. Brooks, 111-358. Where right accrued during lifetime of ancestor, it does not stop, even though heir under disability: Chaney v. Powell, 103-159; Frederick v. Williams, 103-189. That disability existed when right of action accrued should be set out in pleading: Gudger v. R. R., 106-481.

411. Defendant out of state; when action begun or judgment enforced. If, when the cause of action accrues or judgment is rendered or docketed against

a person, he is out of the state, action may be commenced, or judgment enforced, within the times herein limited, after the return of the person into this state, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this state, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action, or the enforcement of the judgment.

Rev., s. 366; Code, s. 162; C. C. P., s. 41; 1881, c. 258, ss. 1, 2.

Section analyzed and explained: *Armfield v. Moore*, 97-34. Applies to individuals and corporations: *Green v. Ins. Co.*, 139-309; *Williams v. B. and L. Assn.*, 131-267; *Alpha Mills v. Engine Co.*, 116-797. Statute not suspended when foreign corporation has process agent in the state: *Oliver v. Fidelity Co.*, 176-598; *Anderson v. Fidelity Co.*, 174-417; *Cuthbertson v. Bank*, 170-531; *Volivar v. Cedar Works*, 152-656; *Bennett v. Telegraph Co.*, 152-671. Cases contra: *Volivar v. Cedar Works*, 152-34; *Green v. Ins. Co.*, 139-309; *Williams v. B. and L. Assn.*, 131-267. A nonresident owning property in this state does not affect this section: *Grist v. Williams*, 111-53. Mortgagor and mortgagee nonresident: *Love v. West*, 169-13; *Owens v. Hornthal*, 156-19. Time of absence for more than a year excluded: *Arthur v. Henry*, 157-393. "After return of such person" does not mean a casual passing through state: *Lee v. McKoy*, 118-518; *Armfield v. Moore*, 97-34. Where one of two tenants in common is nonresident, but is in possession by tenant, the section does not apply: *Weaver v. Love*, 146-414. Section does not apply to plaintiff out of state: *Ewbank v. Lyman*, 170-505; *Cox v. Brower*, 114-422. Section does not affect presumptions: *In re Dupree's Will*, 163-256. This section does not apply to causes of action accruing prior to August 24, 1868: *Johnston v. Lumber Co.*, 144-719; *Blue v. Gilchrist*, 84-239. Section referred to in *Navigation Co. v. Williams*, 111-36.

412. Death before limitation expires; action by or against executor. If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person. If the claim upon which the cause of action is based is filed with the personal representative within the time above specified, and admitted by him, it is not necessary to bring an action upon such claim to prevent the bar, but no action shall be brought against the personal representative upon such claim after his final settlement.

Rev., s. 367; Code, s. 164; C. C. P., s. 43; 1881, c. 80.

NOTE. For survival of actions, see Administration, ss. 159-163.

For presenting claims, see sections 45 and 98-101, inclusive. This is an enabling, not a disabling, statute, and extends the time when necessary: *Geitner v. Jones*, 176-542; *Lowder v. Hathecock*, 150-438; *Person v. Montgomery*, 120-111; *Redmond v. Pippen*, 113-93; *Benson v. Bennett*, 112-505. It applies only when the death occurs before the claim is barred: *Parker v. Harden*, 121-57; *Vaughan v. Hines*, 87-450. Extension of one year as affecting the rights of the creditor and the debtor: *Lowder v. Hathecock*, 150-438; *Coppersmith v. Wilson*, 107-31. Cases where debtor died before statute barred creditor from suing: *Harris v. Davenport*, 132-697; *Phifer v. Ford*, 130-208; *Winslow v. Benton*, 130-58; *Hinton v. Pritchard*, 126-8; *Stonestreet v. Frost*, 123-640; *Copeland v. Collins*, 122-619; *Benson v. Bennett*, 112-505; *Turner v. Shuffler*, 108-642; *Woodlief v. Bragg*, 108-571; *Robertson v. Dunn*, 87-191. Cases generally sustaining section: *Winslow v. Benton*, 130-58; *Coppersmith v. Wilson*, 107-31.

The requirement that letter must be issued within ten years took effect August 1, 1905: *Matthews v. Peterson*, 150-132, and 150-134. What "filing" prevents the bar of the statute: *Harris v. Davenport*, 132-697; *Hinton v. Pritchard*, 126-8; *Stonestreet v. Frost*, 123-640; *Justice v. Gallert*, 131-393; *Whitehurst v. Dey*, 90-542; *Woodlief v. Bragg*, 108-571.

Effect of section on judgment taken prior to death of intestate: *Stonestreet v. Frost*, 123-640; *Mauney v. Holmes*, 87-428; *Daniel v. Laughlin*, 87-433; *Brittain v. Dickson*, 104-547; *Benson v. Bennett*, 112-505; *Hughes v. Boone*, 114-54. It does not extend the lien of a judgment: *Matthews v. Peterson*, 150-132. Effect when administrator dies or is removed: *Burgwyn v. Daniel*, 115-115; *Smith v. Brown*, 99-377; *Brawley v. Brawley*, 109-524; *Dunlap v. Hendley*, 92-115; *Fisher v. Ballard*, 164-326.

Cases merely citing section: *Grady v. Wilson*, 115-347; *Gilechrist v. Middleton*, 107-669; *Smith v. Brown*, 101-353; *Syme v. Badger*, 96-210; *Vaughan v. Hines*, 87-450; *Hall v. Gibbs*, 87-4; *Flemming v. Flemming*, 85-130.

413. Time of stay by injunction or prohibition. When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

Rev., s. 368; Code, s. 167; C. C. P., s. 46.

Time of stay by appeal not counted, *Adams v. Guy*, 106-275—by injunction not counted: *Walton v. Pearson*, 85-35.

414. Time during controversy on probate of will or granting letters. In reckoning time when pleaded at a bar to actions, that period shall not be counted which elapses during any controversy on the probate of a will or granting letters of administration, unless there is an administrator appointed during the pendency of the action, and it is provided that an action may be brought against him.

Rev., s. 369; Code, s. 168; C. C. P., s. 47.

This section applies only where there is no administrator or collector during the contest: *Hughes v. Boone*, 114-54. Merely referred to in *Frederick v. Williams*, 103-191. This is intended to protect creditors and not heirs or devisees: *Stalges v. Simmons*, 170-42.

415. New action within one year after nonsuit, etc. If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in forma pauperis.

Rev., s. 370; Code, ss. 142, 166; C. C. P., ss. 21, 45; 1915, c. 211, s. 1.

Section intended to extend the period of limitation, not to abridge it: *Grimes v. Andrews*, 170-515; *Lumber Co. v. Hayes*, 157-333; *Keener v. Goodson*, 89-273. Cases where nonsuit taken or action dismissed and another action brought within a year: *Hines v. Lumber Co.*, 174-294; *Henderson v. Eller*, 147-582; *Timber Co. v. Butler*, 134-50; *Hood v. Tel. Co.*, 135-622; *Evans v. Alridge*, 133-378; *Loeklear v. Bullard*, 133-260; *Harris v. Davenport*, 132-697; *Prevatt v. Harrelson*, 132-250; *Halcombe v. Comrs.*, 89-346; *Wharton v. Comrs.*, 82-11; *Straus v. Beardsley*, 79-59; *Freshwater v. Baker*, 52-255; *Long v. Orrell*, 35-123; *Skillington v. Allison*, 9-347; *Williams v. B. and L. Assn.*, 131-270; *Meekins v. R. R.*, 131-1; *Bank v. Loughran*, 122-671. After action or appeal is dismissed in supreme court: *Smith v. Manufacturing Co.*, 151-260; *Lumber Co. v. Harrison*, 148-333; *Tussey v. Owens*, 147-335. The section applies to a new action for wrongful death after a nonsuit, under section 160: *Trull v. R. R.*, 151-545; but not under the federal statute: *Belch v. R. R.*, 176-22. Where judgment reversed and new action within a year: *Woodcock v. Bostie*, 128-243.

The cause of action and the parties should be the same: *Queleh v. Futch*, 174-395; but where husband and wife sue and are nonsuited, the husband may sue again: *Whetstine v. Wilson*, 104-385; or where one partner sues alone when the action should have been in firm name: *Martin v. Young*, 85-156.

The requirement as to the payment of costs does not apply if the action could not be barred: *Summers v. R. R.*, 173-398; *Bradshaw v. Bank*, 172-632. Cases merely referring to section: *Webb v. Hicks*, 125-203; *Collins v. Smith*, 109-470; *McElhenny v. Savings and Trust Co.*, 108-311; *Mfg. Co. v. Brooks*, 106-112; *Currie v. Clark*, 101-331; *Royster v. Comrs.*, 98-152.

416. New promise must be in writing. No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest.

Rev., s. 371; Code, s. 172; C. C. P., s. 51.

This section does not apply to judgments: *McCaskill v. McKennon*, 121-190; *Hughes v. Boone*, 114-54; *McDonald v. Dickson*, 87-404—nor to promises not to plead statute: *Cecil v. Henderson*, 121-246; *Joyner v. Massey*, 97-153; *Oliver v. Fidelity Co.*, 176-598; *Brown v. R. R.*, 147-217. A new promise, if not in writing, cannot defeat operation of statute of limitations: *Raby v. Stuman*, 127-463; *Helm Co. v. Griffin*, 112-356; *Greenleaf v. R. R.*, 91-33; *Pool v. Bledsoe*, 85-2; *Kull v. Farmer*, 78-340; *Faison v. Bowden*, 74-45; *Flemming v. Flemming*, 85-127.

WHAT AMOUNTS TO "ACKNOWLEDGMENT" OR "PROMISE." Must be express, specific and unconditional: *Phillips v. Giles*, 175-409; *Cooper v. Jones*, 128-40; *Helm Co. v. Griffin*, 112-356; *Taylor v. Miller*, 113-340; *Greenleaf v. R. R.*, 91-33; *Riggs v. Roberts*, 85-152. Must be clear, positive, and distinctly refer to debt: *Hussey v. Kirkman*, 95-63. Must show a clear intention to renew the debt: *Simonton v. Clark*, 65-525. Must extend to entire debt and to pay in money: *Wells v. Hill*, 118-900; but see as to payment in specific articles, *Young v. Alford*, 113-130. Must be certain in its terms or able to be so made: *Shoe Store Co. v. Wiseman*, 174-716; *Long v. Oxford*, 104-408. Must be made to party or agent or attorney: *Hussey v. Kirkman*, 95-63—not to stranger: *Parker v. Shuford*, 76-219; *Faison v. Bowden*, 76-425. "I propose to settle": *Taylor v. Miller*, 113-340. "Renewed" marked on note and signed and dated by maker: *Morris v. Osborne*, 104-609. Offer of compromise at specific sum after suit brought: *Pope v. Andrews*, 90-401. Memorandum between mortgagor and mortgagee: *Royster v. Farrell*, 115-306. Not necessary to be formal writing, but may be by letters, entries, etc.: *Taylor v. Miller*, 113-340; *Morris v. Osborne*, 104-609.

WHAT DOES NOT AMOUNT TO "ACKNOWLEDGMENT" OR "PROMISE." "Can't pay what I owe you, but will pay soon or next winter": *Faison v. Bowden*, 72-406. "You have my due bill and I'm going to pay it as soon as I possibly can": *Cooper v. Jones*, 128-41. "As soon as I can, I'm going to settle all my indebtedness": *Ibid.*

PARTIAL PAYMENT. Must be made as recognition of debt and of obligation to pay balance: *Battle v. Battle*, 116-161—and if not so made it is ineffectual to defeat the bar of the statute, *Supply Company v. Dowd*, 146-191. Where several debts against defendant, and he pays something without specifying on which debt: *French v. Richardson*, 167-41; *Supply Co. v. Dowd*, 146-191; *Young v. Alford*, 118-215; *White v. Beaman*, 96-122; *Raymond v. Newman*, 122-52; *Moss v. Adams*, 39-42. Where one rebutting account credited on another: *Bank v. Harris*, 96-118.

Partial payment does not stop the statute from running, but renews debt: *Copeland v. Collins*, 122-619. When made before debt barred, renews the debt as to principals and sureties: *Houser v. Fayssoux*, 168-1; *Garrett v. Reeves*, 125-529; *Moore v. Goodwin*, 109-218; *Copeland v. Collins*, 122-619; *Wood v. Barber*, 90-76; *Campbell v. Brown*, 86-376; *Green v. Greensboro College*, 83-449; but not as to indorsers: *Barber v. Absher Co.*, 175-602; *Houser v. Fayssoux*, 168-1; *Garrett v. Reeves*, 125-529; *LeDuc v. Butler*, 112-458. When made by principal after debt barred, renews debt as to principal: *Garrett v. Reeves*, 125-529—but not as to partners after partnership dissolved who do not assent to it, *Wood v. Barber*, 90-79—nor as to indorsers, unless approving, *Garrett v. Reeves*, 125-529—nor as to sureties, *Garrett*

v. Reeves, 125-529—but otherwise when surety pays, Long v. Miller, 93-233. See section 417. Payment by a receiver does not suspend the statute: Bank v. Hamrick, 162-216; but payment of money realized from sale of collaterals in hands of third person will suspend statute: Bank v. King, 164-303.

Cases merely referring to section: Christmas v. Haywood, 119-134; Grady v. Wilson, 115-348; Grant v. Burgwyn, 84-560.

417. Admission by partner or comaker. No act, admission or acknowledgment by partner after the dissolution of the copartnership, or by any of the makers of a promissory note or bond after the statute of limitations has barred the same, is evidence to repel the statute, except against the partner or maker of the promissory note or bond doing the act or making the admission or acknowledgment.

Rev., s. 372; Code, s. 171; C. C. P., s. 50.

As to effect of payments by principal, joint obligors or sureties, see section 416. Judgment suffered by one of several obligors does not bind the others: Lane v. Richardson, 79-159; Rogers v. Clements, 98-180. Part payment by payee, who is indorser, will not repel the bar, as this section does not apply: LeDuc v. Butler, 112-458. Cases merely referring to section: Moore v. Goodwin, 109-219; Wood v. Barber, 90-79.

418. Undisclosed partner. The statutes of limitations apply to a civil action brought against an undisclosed partner only from the time the partnership became known to the plaintiff.

Rev., s. 373; 1893, c. 151.

419. Cotenants. If in actions by tenants in common or joint tenants of personal property, to recover the same, or damages for its detention or injury, any of them are barred of their recovery by limitation of time, the rights of the others are affected thereby, but they may recover according to their right and interest, notwithstanding such bar.

Rev., s. 374; Code, s. 173; C. C. P., s. 52.

For effect of statute and change in the law, see Cameron v. Hicks, 141-36.

420. Applicable to actions by state. The limitations prescribed by law apply to civil actions brought in the name of the state, or for its benefit, in the same manner as to actions by or for the benefit of private parties.

Rev., s. 375; Code, s. 159; C. C. P., s. 38.

Insane person pleading statute as against state: Hospital v. Fountain, 129-90. State can plead the statute to prevent recommendatory decision by the supreme court: Cowles v. The State, 115-173. The maxim, "Nullum tempus occurrit regi," does not now apply: Furman v. Timberlake, 93-67; City of Wilmington v. Cronly, 122-387; and the statute runs against the state and those claiming under it, unless otherwise provided: Tillery v. Lumber Co., 172-296; Threadgill v. Wadesboro, 170-641. No statute of limitations runs against the state in an action to recover tax money, unless special provision in revenue act: Wilmington v. Cronly, 122-388.

421. Action on open account. In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action accrues from the time of the latest item proved in the account on either side.

Rev., s. 376; Code, s. 160; C. C. P., s. 39.

A mutual open and current account defined: Hollingsworth v. Allen, 176-629; Stokes v. Taylor, 104-394. One may be by direct agreement or may be inferred from circumstances:

Stancill v. Burgwyn, 124-69. Such inferred agreement may be when one party, with the knowledge of the other, keeps an account of the debits and credits: Stokes v. Taylor, 104-394; Mauney v. Coit, 86-463; Hussey v. Burgwyn, 51-385; Green v. Caldeleugh, 18-321. Where there are mutual accounts statute runs from the last dealing between the parties: Robertson v. Pickerell, 77-303—from last item, Stokes v. Taylor, 104-394.

422. **Not applicable to bank bills.** The limitations prescribed by law do not affect actions to enforce the payment of bills, notes or other evidences of debt, issued or put in circulation as money by banking corporations incorporated under the laws of this state.

Rev., s. 377; Code, s. 174; C. C. P., s. 53; 1874-5, c. 170.

423. **Actions against bank directors or stockholders.** The limitations prescribed by law do not affect actions against directors or stockholders of any banking association incorporated under the laws of this state, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.

Rev., s. 378; Code, s. 175; C. C. P., s. 54.

See *Houston v. Thornton*, 122-375.

424. **Aliens in time of war.** When a person is an alien subject, or a citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action.

Rev., s. 379; Code, s. 165; C. C. P., s. 44.

Right of alien enemy to sue: *Krachanake v. Mfg. Co.*, 175-435.

ART. 4. LIMITATIONS, REAL PROPERTY

425. **Title against state.** The state will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right or title of the state to the same—

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

Thirty years adverse possession takes title out of state even though possession not continuous nor chain of title complete: *Tillery v. Lumber Co.*, 172-296; *May v. Mfg. Co.*, 164-262; *Locklear v. Savage*, 159-236; *Bullard v. Hollingsworth*, 140-634; *Wilson v. Wilson*, 125-525; *Walden v. Ray*, 121-237; *Dills v. Hampton*, 92-565; *Yount v. Miller*, 91-331; *Bryan v. Spivey*, 109-57; *Mallett v. Simpson*, 94-37; *Cowles v. Hall*, 90-330; *Davis v. McArthur*, 78-357; *Reed v. Earnhart*, 32-516; *Candler v. Lunsford*, 20-542; *Fitzrandolph v. Norman*, 4-564; *Pearson v. Simmons*, 98-281; *Davidson v. Arledge*, 97-172; *Osborne v. Anderson*, 89-261; *Melvin v. Waddell*, 75-361. **Privity between successive tenants:** *May v. Mfg. Co.*, 164-262; *Price v. Jackson*, 91-11; *Phipps v. Pierce*, 94-514. **Possession must be actual and not constructive:** *May v. Mfg. Co.*, 164-262; *Locklear v. Savage*, 159-236.

2. When the person in possession thereof, or those under whom he claims, has been in possession under colorable title for twenty-one years, this possession having been ascertained and identified under known and visible lines or boundaries.

Rev., s. 380; Code, s. 139; C. C. P., s. 18; R. C., c. 65, s. 2.

See section 405. For cases on colorable title, possession, adverse possession and known and visible lines and boundaries, and lappage, see under section 428.

GENERAL OBSERVATIONS. General doctrine of subsection 2 substantiated and explained: *Barfield v. Hill*, 163-262; *Gardner v. Lumber Co.*, 144-110; *Walker v. Moses*, 113-527. Constructive possession sufficient: *May v. Mfg. Co.*, 164-262; *Hamilton v. Icard*, 114-532. No constructive possession will ripen a defective will into a good one: *Williams v. Wallace*, 78-354.

Plaintiff must recover on the strength of his own title as against the world, or against defendant by estoppel: *Pope v. Pope*, 176-283; *Campbell v. Everhart*, 139-503; *Alexander v. Gibbon*, 118-796; *Mobley v. Griffin*, 104-115; *Conwell v. Mann*, 100-234; *Pearson v. Simmons*, 98-281. Adverse possession under color need not be entirely continuous: *Lewis v. Overby*, 126-347; *Hamilton v. Icard*, 114-532; *Reed v. Earnhardt*, 32-516; but see *Malloy v. Bruden*, 86-251. When trustee in an active trust is barred, the cestui que trust also barred: *Kirkman v. Holland*, 139-185. Not necessary to plead the statute, but defendant can make simple denial: *Whitaker v. Jenkins*, 138-476; *Ins. Co. v. Edwards*, 124-117; *Freeman v. Sprague*, 82-366; *Asbury v. Fair*, 111-251; *Shelton v. Wilson*, 131-501; see section 405. When both parties claim title from a common source, not necessary to show title out of the state: *Van Gilder v. Bullen*, 159-291; *Sample v. Lumber Co.*, 150-161; *McCoy v. Lumber Co.*, 149-1; *Warren v. Williford*, 148-474. What does and what does not amount to an ouster: *Day v. Howard*, 73-1; *Ward v. Farmer*, 92-93; *Dobbins v. Dobbins*, 141-210. Possession of ancestor and of tenant in dower added to that of heirs: *Jacobs v. Williams*, 173-276; *Atwell v. Shook*, 133-391.

426. Possession presumed out of state. In all actions involving the title to real property title is conclusively deemed to be out of the state unless it is a party to the action, but this section does not apply to the trials of protested entries laid for the purpose of obtaining grants, nor to actions instituted prior to May 1, 1917.

1917, c. 195.

Does not apply to proceedings before May 1, 1917: *Riddle v. Riddle*, 176-485.

427. Such possession valid against claimants under state. All such possession as is described in the preceding section, under such title as is therein described, is hereby ratified and confirmed, and declared to be a good and legal bar against the entry or suit of any person, under the right or claim of the state.

Rev., s. 381; Code, s. 140; C. C. P., s. 19.

Threadgill v. Wadesboro, 170-641; *Prevatt v. Harrelson*, 132-350; *Walker v. Moses*, 113-527.

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

Rev., s. 382; Code, s. 141; C. C. P., s. 20.

For cases as to adverse possession of tenants in common, see under section 430. Cases directly supporting section: *Gudger v. Hensley*, 82-481; *Johnson v. Parker*, 79-475; *Williams v. Wallace*, 78-354; *Moore v. Thompson*, 69-120; *Cox v. Ward*, 107-507; *Hamilton v. Icard*, 114-532; *Walker v. Moses*, 113-527; *Broadwell v. Morgan*, 142-475; *Brown v. Brown*, 106-452; *Simpson v. Simpson*, 107-552; *Mfg. Co. v. Brooks*, 106-107; *Ellington v. Ellington*, 103-54; *Allen v. Salinger*, 103-14; *Campbell v. Crater*, 95-162; *Logan v. Fitzgerald*, 92-645.

Plaintiff must recover on strength of his own title: *Pope v. Pope*, 176-283. Must show both color of title and adverse possession: *White v. Edenton*, 171-21; *Cedar Works v. Lumber Co.*, 168-391; *Henly v. Wilson*, 77-218. Not necessary that entry should be under color, when color obtained later: *Hawkins v. Cedar Works*, 122-87. Adverse possession under color for

seven years before, and three years after, death of married woman, bars the heirs: *Swift v. Dixon*, 131-42. The tacking of possessions together to make up the seven years: *Vanderbilt v. Chapman*, 172-809; *Barrett v. Brewer*, 153-547; *Bond v. Beverly*, 152-57; *Morrison v. Craven*, 120-327; *Atwell v. Shook*, 133-387; *Alexander v. Gibbon*, 118-796; *Scarboro v. Scarboro*, 122-234. Seven years possession and cultivation of land under junior grant makes title as against senior grant: *Asbury v. Fair*, 111-251; but not since enactment of section 7545: *Weaver v. Love*, 146-415. The seven years adverse possession need not be the seven years next preceding action: *Christenbury v. King*, 85-229; *Alexander v. Cedar Works*, 177-137; *Waldo v. Wilson*, 174-626; nor need there be a tortious entry and expulsion: *Ibid.*—but it must be continuous and uninterrupted, *Bland v. Beasley*, 145-168; *Cox v. Ward*, 107-507; *Williams v. Wallace*, 78-356. Not necessary to plead the statute; a general denial will do: *Mfg. Co. v. Brooks*, 106-107, and cases cited under section 405—but where lost deed is relied on defendant must plead it: *Wilson v. Wilson*, 117-351; *Hinton v. Pritchard*, 102-94. Seven years adverse possession of the second story of a house under color of title will give title: *Asheville Div. v. Aston*, 92-578. Adverse possession relates only to the true title, and the exemptions in the statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action: *Berry v. Lumber Co.*, 141-386. Not presumed that father is agent of his child in holding possession: *Barrett v. Brewer*, 143-88. When trustee of active trust barred, cestui que trust also barred: *Kirkman v. Holland*, 139-185. When one joint tenant barred, other joint tenants also barred: *Cameron v. Hicks*, 141-21.

CASES WHERE THIS SECTION REFERRED TO, BUT ESSENTIAL POINTS ANNOTATED ELSEWHERE: *Noreum v. Savage*, 140-472; *Lindsay v. Austin*, 139-463; *Campbell v. Everhart*, 139-504; *Johnston v. Case*, 131-491; *Brown v. Morisey*, 128-138; *Britton v. Ruffin*, 122-113; *McLean v. Smith*, 114-357; *Zimmerman v. Robinson*, 114-39; *Cheatham v. Young*, 113-161; *Miller v. Bumgardner*, 109-412; *Gilchrist v. Middleton*, 108-705; *Lenoir v. Mining Co.*, 106-473; *Staton v. Mullis*, 92-623; *Lewis v. McDowell*, 88-261; *Clayton v. Rose*, 87-106; *Isler v. Dewey*, 84-345; *Hill v. Averton*, 81-393; *Day v. Howard*, 73-1.

CASES WHERE THERE IS LAPPAGE: *Currie v. Gilchrist*, 147-648; *Simmons v. Box Co.*, 153-257; *Mintz v. Russ*, 161-538; *Lumber Co. v. Swain*, 161-566; *Hamilton v. Icard*, 114-532; *McLean v. Smith*, 114-357; *Zimmerman v. Robinson*, 114-39; *Logan v. Fitzgerald*, 92-645; *Brady v. Maness*, 91-135; *Asbury v. Fair*, 111-251; *Scott v. Elkins*, 83-424; *McAlister v. Devane*, 76-57; *McCormick v. Monroe*, 48-332; *Baker v. McDonald*, 47-244; *Brown's Heirs v. Potter's Heirs*, 44-461; *Bryson v. Slagle*, 44-449; *Williams v. Miller*, 29-186; *Williams v. Buchanan*, 23-535; *Williams v. Wallace*, 78-354; *Kitchin v. Wilson*, 80-191; *King v. Wells*, 94-344.

WHAT CONSTITUTES "POSSESSION" HEREUNDER. Exercising such dominion over land and making that use of it to which it is capable of being put in its then state in such repeated manner as to show it is done in the character of owner: *Alexander v. Cedar Works*, 177-137; *Patrick v. Ins. Co.*, 176-660; *Holmes v. Carr*, 172-213; *McCaskill v. Lumber Co.*, 169-24; *Reynolds v. Palmer*, 167-454; *Coxe v. Carpenter*, 157-557; *Berry v. McPherson*, 153-4; *Baum v. Shooting Club*, 96-310; *Hamilton v. Icard*, 114-538; *Patterson v. Mills*, 121-258—but when not capable of use at all, see *McLean v. Smith*, 114-357. Fence built around land unoccupied, for purpose of pasture, is an inference drawn from *Osborne v. Johnston*, 65-22. Using land for pasture every winter: *Wall v. Wall*, 142-387. Actual, open, visible occupation of land: *Malloy v. Bruden*, 86-251. Unequivocal acts of ownership that would have exposed occupant to possessory action at common law: *Bland v. Beasley*, 145-168; *Fuller v. E. City*, 118-25; *Hamilton v. Icard*, 114-532; *Shaffer v. Gaynor*, 117-15; *Everett v. Newton*, 118-919; *Boomer v. Gibbs*, 114-76; *Osborne v. Johnston*, 65-22. Using a spring and building a spring-house over it: *Brittain v. Daniels*, 94-981. Building shed, quarrying rock, erecting lime kiln, and cutting wood for fuel in making lime: *Moore v. Thompson*, 69-120. Constructive possession: *Staton v. Mullis*, 92-623; *Hamilton v. Icard*, 114-532; see cases under other paragraphs under this section. One tenant in common holds possession for all: *Dobbins v. Dobbins*, 141-210; *Johnston v. Case*, 131-491; *Tharpe v. Holcombe*, 126-365; *Carson v. Carson*, 122-645; *Page v. Branch*, 97-97; *Vickers v. Henry*, 110-371; *Gaylord v. Respass*, 92-553; *Neely v. Neely*, 79-478; *Linker v. Benson*, 67-150. Every possession is taken to be under possessor's own title: *Bryan v. Spivey*, 109-57; *Nixon v. Williams*, 95-103; *Hawkins v. Cedar Works*, 122-87. Cases as to possession under former similar statutes: *Blackstock v.*

Cole, 51-560; *Morris v. Hayes*, 47-93; *Lenoir v. South*, 32-237; *Bynum v. Carter*, 26-310; *Berryman v. Kelly*, 35-269; *Bynum v. Thompson*, 25-578; *Flanniken v. Lee*, 23-293; *Tredwell v. Reddick*, 23-56.

WHAT IS NOT SUFFICIENT "POSSESSION." Grantor and plaintiff had raked and hauled straw off of land, and father of plaintiff had farmed on an acre or two: *Prevatt v. Harrelson*, 132-250. Planting part of land in tobacco every year, but no one part for over two years, only enclosing while crop growing: *Hamilton v. Icard*, 114-532. Paying taxes on land and employing agents with respect to it: *Ruffin v. Overby*, 88-369; *Shermer v. Dobbins*, 176-547. Occasional entries not sufficient: *Williams v. Wallace*, 78-354; *Shaffer v. Gaynor*, 117-15; *Hamilton v. Icard*, 114-532; *Asbury v. Fair*, 111-251; *Ruffin v. Overby*, 105-78; *Land Co. v. Floyd*, 167-686.

CONSTRUCTIVE POSSESSION. Possession is presumed to follow the title and extend to the whole boundary in the absence of other actual possession: *Alsworth v. Cedar Works*, 172-17; *Ray v. Anders*, 164-311; *Stewart v. McCormick*, 161-625; *Pheeny v. Hughes*, 158-463; *Simmons v. Box Co.*, 153-257; *Bond v. Beverly*, 152-57; *Haddock v. Leary*, 148-378; *Currie v. Gilchrist*, 147-649; *Basnight v. Smith*, 112-229; see, also, *Mfg. Co. v. Frey*, 112-160; *Melton v. Monday*, 64-295; *McCormick v. Monroe*, 46-13; *Wyman v. Taylor*, 124-430.

WHEN POSSESSION IS "ADVERSE." "Adverse possession" defined and discussed: *Parker v. Banks*, 79-480; *Locklear v. Savage*, 159-236. Possession by tenant under a parol gift: *Wilson v. Wilson*, 125-525; *Dean v. Gupton*, 136-141. Every possession of land by other than the claimant: *Ruffin v. Overby*, 88-369. No presumption that possession is adverse: *Bland v. Beasley*, 145-168; *Monk v. Wilmington*, 137-322; but see *Ruffin v. Overby*, 88-369; *Alexander v. Gibbon*, 118-797. An actual, open, visible occupation of land by another: *Malloy v. Bruden*, 86-251; *Patterson v. Mills*, 121-258.

By whom adverse possession can be taken: *Williams v. Wallace*, 78-354. Unequivocal acts of ownership which would have subjected the occupant to a possessory action at common law: *Christman v. Hilliard*, 167-4; *Fowle v. Whitley*, 166-445; *Fuller v. Elizabeth City*, 118-25; *Hamilton v. Icard*, 114-532; *Shaffer v. Gaynor*, 117-15; *Lewis v. Covington*, 130-543; *Worth v. Simmons*, 121-357; *Everett v. Newton*, 117-919; *Osborne v. Johnston*, 65-22. One tenant in common against another: *Dobbins v. Dobbins*, 141-210; *Woodlief v. Woodlief*, 136-133; *Shannon v. Lamb*, 126-38; *Jolly v. Bryan*, 86-458; *Neely v. Neely*, 79-478; *Covington v. Stewart*, 77-148; *Page v. Branch*, 97-97; *Vickers v. Henry*, 110-371; *Shannon v. Lamb*, 126-38; *McGill v. Buie*, 106-242; *Linker v. Benson*, 67-150; see, also, *Hicks v. Bullock*, 96-164. See section 430. Person entering under a void deed, claiming to own land in fee: *Kirkman v. Holland*, 139-185. As between heir and widow: *Brown v. Morrissey*, 124-292; *Campbell v. Murphy*, 55-357. As against remainderman after death of life tenant: *Bullin v. Hancock*, 138-198; *Wilson v. Brown*, 134-400; *Hauser v. Craft*, 134-319; *Staton v. Mullis*, 92-623. As between mortgagor and mortgagee: *Weathersbee v. Goodwin*, 175-234; *Stancill v. Spain*, 133-76; *Williams v. Kerr*, 113-306; *Edwards v. Tipton*, 85-479; *Parker v. Banks*, 79-481. Building fence along marked line supposed to be dividing line, when in fact 25 yards over on his neighbor: *Mode v. Long*, 64-433. Mineral interest separate from ownership of land: *Hoilman v. Johnson*, 164-268.

Cases as to adverse possession under former similar statutes: *Smith v. Reid*, 51-494; *Lofitin v. Cobb*, 46-406; *Powell v. Felton*, 33-469; *Gilchrist v. McLaughlin*, 29-310; *Montgomery v. Wynns*, 20-667; *Murray v. Shanklin*, 20-431; *Ring v. King*, 20-307.

WHEN POSSESSION NOT "ADVERSE." Possession by tenant and those claiming under him: *Wilson v. Wilson*, 125-525; *Dills v. Hampton*, 92-566; *Alexander v. Gibbon*, 118-796; *McNeill v. Fuller*, 121-209; *Bonds v. Smith*, 106-553; but see *Worth v. Simmons*, 121-357. When defendant claiming under color cannot show continuous possession under his title: *Johnston v. Case*, 131-491. When claimant has good title to tract, part of which he holds adversely, his possession is not adverse as to another part of tract which is not actually occupied and to which he claims title by possession under color of title: *Lewis v. Covington*, 130-541. One holding land under bond for title not adverse to vendor: *Bradsher v. Hightower*, 118-399; *McNeill v. Fuller*, 121-209. Possession not adverse as to remainderman during life estate: *Cooley v. Lee*, 170-18; *Graves v. Causey*, 170-175; *Brown v. Brown*, 168-4;

Cox v. Jernigan, 154-584; Maynard v. Sears, 157-1; Everett v. Newton, 118-919; Melvin v. Waddell, 75-361. Purchasing outstanding title does not admit superior title: Lumber Co. v. Cedar Works, 168-344; s. c., 158-161; Alsworth v. Cedar Works, 172-17.

WHAT IS "COLORABLE TITLE." See section 372. A deed or instrument which purports to pass title, but which fails to do so from want of title in the grantor or some defect in the mode of conveyance: Alsworth v. Cedar Works, 172-17. Judge Gaston's definition: Dobson v. Murphy, 18-586; approved in Ellington v. Ellington, 103-54; Utley v. R. R., 119-720, and Avent v. Arrington, 105-390; Keener v. Goodson, 89-273; but see Austin v. Staten, 126-783; Lindsay v. Beaman, 128-192; distinguished, however, in Janney v. Robbins, 141-400. Judge Hoke's definition in Smith v. Proctor, 139-314. Judge Henderson's definition in Tate v. Southard, 10-119.

Ancient deed, unproven, accompanied by possession: Davis v. Higgins, 91-382. Deed improperly registered: Brown v. Brown, 106-451; Power Co. v. Power Co., 168-219. Unregistered deed is not color of title as against a subsequent deed for valuable consideration and duly registered: Kluttz v. Kluttz, 172-622; King v. McRackan, 168-621; nor when the parties hold from a common source of title; otherwise it is color: Buchanan v. Hedden, 169-222; Moore v. Johnson, 162-266; Gore v. McPherson, 161-638; Janney v. Robbins, 141-400, distinguishing Austin v. Staten, 126-783; Lindsay v. Beaman, 128-192; see, also, Davis v. Higgins, 91-382; Hunter v. Kelly, 92-285; Utley v. R. R., 119-720; Avent v. Arrington, 105-377; Hardin v. Barrett, 51-159; Campbell v. McArthur, 9-33. Record of partition proceedings: Lindsay v. Beaman, 128-192; Smith v. Tew, 127-299; Bynum v. Thompson, 25-578; Lumber Co. v. Cedar Works, 165-83; Alexander v. Cedar Works, 177-137. Deeds made after verdict and judgment fixing parol trust on land: Taylor v. Smith, 121-76. A return upon an execution showing sale of land, with description, purchaser's name and payment of purchase price: Neal v. Nelson, 117-393; Jones v. Putney, 7-562. A judgment in an action for possession: Burns v. Stewart, 162-360. Where several entered land without color and occupied different portions in severalty, then deed was made conveying land in trust for all collectively, but they continued to hold as before: Bryan v. Spivey, 109-57. A deed is colorable title only for land described in it: Davidson v. Arledge, 88-326; Carson v. Carson, 122-645; McRea v. Williams, 52-430—must attach to some particular tract, Barker v. Railway, 125-596—and land must be described in it, Cook v. Pittman, 144-530; King v. Wells, 94-344; Smith v. Fite, 92-319; Dickens v. Barnes, 79-490.

Deed purporting to convey title is color whether grantor owner or not: Britton v. Ruffin, 122-113; Taylor v. Smith, 121-77; Hill v. Wilton, 6-14; Bond v. Beverly, 152-56. Deed by clerk after he goes out of office for land sold while in office: Williams v. Council, 49-206. Sheriff's deed color, when: Worth v. Simmons, 121-357; Mfg. Co. v. Brooks, 106-107; Ferguson v. Wright, 113-537. Tax deeds: Kivett v. Gardner, 169-78; Lumber Co. v. Pearce, 166-588; Greenleaf v. Bartlett, 146-495. Deed by attorney in fact, though power not produced: Smith v. Allen, 112-223. Trustee's deed, though private examination of cestui que trust, a married woman, not taken: Smith v. Allen, 112-223. Deed for land in two counties, proven and recorded in one: Lewis v. Roper, 109-19. Deed by non compos: Ellington v. Ellington, 103-54. Deed signed by husband and wife, but no private examination taken: Perry v. Perry, 99-270; Pearse v. Owens, 3-234; King v. McRaekan, 168-621; Norwood v. Totten, 166-648; but see Cook v. Pittman, 144-530. Deed conveying life estate: Staton v. Mullis, 92-623. Color of title inoperative unless accompanied by possession: Barber v. Railway, 125-596. Mortgage deed: Edwards v. Tipton, 85-479; Stewart v. Lowdermilk, 147-584. A will as color of title: Henley v. Wilson, 81-405; McConnell v. McConnell, 64-342; Trustees v. Blount, 4-455; Evars v. Satterfield, 5-413; Lumber Co. v. Cedar Works, 165-83. A deed obtained by fraud: Seals v. Seals, 165-409. A deed to the former grantor: Chatham v. Lansford, 149-363. Grants from state: Weaver v. Love, 146-415; Kron v. Hinson, 53-347; but see section 7545. Deed of land calling, bounded by a river, is color to the thread of unnavigable stream: Wall v. Wall, 142-387.

WHAT IS NOT "COLORABLE TITLE." An assignment of a homestead is not color of title: Keener v. Goodson, 89-273. Paper-writing without seal, though registered: Johnston v. Case, 131-491. Deed though signed, not color unless delivered: Avent v. Arrington, 105-377. Deed is not color beyond line called for, even though distance call would carry it beyond: Smith v. Headrick, 93-210. Former title of one who mortgaged land which was sold and deeded

to purchaser, but mortgagor retained possession: *Call v. Daney*, 144-494. Original deed to defendant, after his land sold by sheriff and deed made to another: *Wilson v. Brown*, 134-400.

A deed by one tenant in common is not color of title: *Lumber Co. v. Cedar Works*, 168-344, 165-83; *Dobbins v. Dobbins*, 141-210. Deed by tenants in common to husband of wife who was one of the tenants, yet did not sign deed: *Carson v. Carson*, 122-645. Deed by widow is not color of title: *Graves v. Causey*, 170-175. No color of title without some paper-writing attempting to convey title, which must not be so plainly and obviously defective as to mislead: *Williams v. Scott*, 122-545. Deed by devisees of remainder in land where will provided for it to be sold by executor and divided as personalty: *Orrender v. Call*, 101-399. Deed with insufficient description: *Fincannon v. Sudderth*, 144-587; *Dickens v. Barnes*, 79-490; see, also, *Perry v. Scott*, 109-380; *Blow v. Vaughan*, 105-198; *Reed v. Reed*, 93-462; *Harrell v. Butler*, 92-20; *Radford v. Edwards*, 88-347; *Wharton v. Eborn*, 88-344; *Farmer v. Batts*, 83-387; *Capps v. Holt*, 58-153.

“KNOWN AND VISIBLE LINES AND BOUNDARIES.” Existence of visible and definite boundary marks necessary in constructive possession: *Scott v. Elkins*, 83-424. Deed containing no metes and bounds or other description is no evidence of known and visible lines and boundaries: *Priece v. Jackson*, 91-11.

429. **Seizin within twenty years necessary.** No action for the recovery or possession of real property shall be maintained, unless it appears that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within twenty years before the commencement of the action, unless he was under the disabilities prescribed by law.

Rev., s. 383; Code, s. 143; C. C. P., s. 22.

This and section 432 are to be construed together: *Conkey v. Lumber Co.*, 126-499. Where plaintiff has title he is presumed to have been in possession within the twenty years: *Ibid.*; *Bland v. Beasley*, 145-168. Possession must be within the twenty years: *Honeycutt v. Brooks*, 116-788; *Moore v. Curtis*, 169-74. Referred to in *Dean v. Gupton*, 136-142; *Covington v. Stewart*, 77-151; *Mintz v. Russ*, 161-538; *Stewart v. McCormick*, 161-625; *Stewart v. Stephenson*, 172-81.

430. **Twenty years adverse possession.** No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability.

Rev., s. 384; Code, s. 144; C. C. P., s. 23.

For cases on “colorable title,” “possession,” “adverse possession,” and “known and visible lines and boundaries,” see section 428. For cases on pleading the statute, see section 405.

Possession must be for the required time, but need not be unceasing: *Alexander v. Cedar Works*, 177-137; *Cross v. R. R.*, 172-119; *Berry v. McPherson*, 153-4. User or nonuser of easement: *Hunter v. West*, 172-160; *Snowden v. Bell*, 159-497; *LaRoque v. Kennedy*, 156-361; *May v. R. R.*, 151-388. A former owner who has lost title by judgment or deed may acquire new title by adverse possession: *Moore v. Curtis*, 169-74; *Brown v. Brown*, 168-4; *Chatham v. Lansford*, 149-363; *Scarboro v. Scarboro*, 122-234. Adverse possession by corporation: *Cross v. R. R.*, 172-119; *Raleigh v. Durfey*, 163-154. Cases directly supporting this section: *Wilson v. Wilson*, 125-525; *Walden v. Ray*, 121-237; *Batts v. Staton*, 123-45; *Shaffer v. Bledsoe*, 118-279; *Covington v. Stewart*, 77-148; *Melvin v. Waddell*, 75-361.

APPLIED TO TENANTS IN COMMON: *Gill v. Porter*, 176-451; *Lester v. Harward*, 173-83; *McKeel v. Holloman*, 163-152; *Clary v. Hatton*, 152-107; *Boggan v. Somers*, 152-390; *Mott v. Land Co.*, 146-525; *Church v. Bragaw*, 144-126; *Dobbins v. Dobbins*, 141-210; *Bullin*

v. Hancock, 138-198; Tharpe v. Holcombe, 126-365; Rascoe v. Lumber Co., 124-42; Hampton v. Wheeler, 99-222; Breeden v. McLaurin, 98-307; Hicks v. Bullock, 96-164; Ward v. Farmer, 92-93; Covington v. Stewart, 77-148; Carson v. Carson, 122-645; Ferguson v. Wright, 113-537; Page v. Branch, 97-97; Neely v. Neely, 79-478; Shannon v. Lamb, 126-38; Whitaker v. Jenkins, 138-476; Caldwell v. Neely, 81-114; McMillan v. Gambill, 106-359; Jeter v. Davis, 109-458; Gilchrist v. Middleton, 107-663; Pope v. Mathis, 83-169.

Where one tenant in common attempts to convey the whole estate: Alexander v. Cedar Works, 177-137; Lumber Co. v. Cedar Works, 168-344, 165-83. Where one tenant in common purchases: Alexander v. Cedar Works, 177-137; Jackson v. Baird, 148-29; Amis v. Stephens, 111-172; Gaylord v. Respass, 92-553. Possession under parol partition: Collier v. Paper Corporation, 172-74; Rhea v. Craig, 141-602. When sole seizin is pleaded, who has burden of proof: Lester v. Harward, 173-83; McKeel v. Holloman, 163-132; Honeycut v. Brooks, 116-793.

431. Action after entry. No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action is commenced thereupon within one year after the making of the entry, and within the time prescribed in this chapter.

Rev., s. 385; Code, s. 145; C. C. P., s. 24.

Clayton v. Cagle, 97-303.

432. Possession follows legal title. In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action.

Rev., s. 386; Code, s. 146; C. C. P., s. 25.

Possession presumed to follow the title in the absence of actual possession: Asbury v. Fair, 111-251; Gadsby v. Dyer, 91-311; Kitchin v. Wilson, 80-191; Williams v. Wallace, 78-354; Dobbs v. Gullidge, 20-197; Denning v. Gainey, 95-528; London v. Bear, 84-266; Knight v. Holden, 104-107. Presumption as to possession being adverse: Bland v. Beasley, 145-168; Monk v. Wilmington, 137-322; but see Ruffin v. Overby, 88-369; Alexander v. Gibbon, 118-796. Possession presumed to be under the true title until shown to be adverse: Vanderbilt v. Chapman, 175-11; Land Co. v. Floyd, 171-543; s. c., 167-686; McCaskill v. Walker, 147-195; Bland v. Beasley, 145-168; Straughan v. Tysor, 124-229; Gaylord v. Respass, 92-553.

Cases merely referring to section: Berry v. Lumber Co., 141-396; Dobbins v. Dobbins, 141-219; Kirkman v. Holland, 139-189; Monk v. Wilmington, 137-326, 327; Woodlief v. Wester, 136-166; Roscoe v. Lumber Co., 124-47.

433. Tenant's possession is landlord's. When the relation of landlord and tenant has existed, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that the tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

Rev., s. 387; Code, s. 147; C. C. P., s. 26.

Tenant's possession is landlord's: McNeill v. Fuller, 121-209. Tenant holding possession under parol gift holds adversely to landlord: Dean v. Gupton, 136-141; Wilson v. Wilson,

125-525. **Tenant estopped to deny landlord's title:** *Mobley v. Griffin*, 104-115; *Conwell v. Mann*, 100-234; *Melvin v. Waddell*, 75-361; *Springs v. Schenck*, 99-551; *Benton v. Benton*, 95-559; *Pate v. Turner*, 94-47; *Abbott v. Cromartie*, 72-292; *Lawrence v. Eller*, 169-211; *Nance v. Rourk*, 161-646. **Estoppel does not operate when tenancy brought about by fraud:** *McLaurin v. Williams*, 175-291. **Cases citing section:** *Bullock v. Bullock*, 131-30; *Day v. Howard*, 73-7.

434. No title by possession of right of way. No railroad, plank road, turnpike or canal company may be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which has been condemned, or otherwise obtained for its use, as a right of way, depot, stationhouse or place of landing, by any statute of limitation or by occupation of the same by any person whatever.

Rev., s. 388; Code, s. 150; C. C. P., s. 29; R. C., c. 65, s. 23.

Discussed at length in *Beattie v. R. R.*, 108-432, 433; see, also, *Purifoy v. R. R.*, 108-100; *R. R. v. McCaskill*, 94-746. **Does not apply to right of way not actually condemned, or purchased or taken possession of:** *R. R. v. Sturgeon*, 120-225; also see *Beattie v. R. R.*, 108-432, 433. **Cases citing section:** *Bass v. Navigation Co.*, 111-455; *Durham v. R. R.*, 104-264; *R. R. v. Bunting*, 168-579; *Earnhardt v. R. R.*, 157-358; *Muse v. R. R.*, 149-443; *R. R. v. Olive*, 142-257. **Does not apply to right to require railroad to change grade at street crossing:** *R. R. v. Goldsboro*, 155-356.

435. No title by possession of public ways. No person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations.

Rev., s. 389; 1891, c. 224.

For cases decided prior to passage of statute: *Moose v. Carson*, 104-431; *Turner v. Comrs.*, 127-153; *State v. Long*, 94-896; *Crump v. Mims*, 64-767. **No title to street can now be acquired by adverse possession:** *Threadgill v. Wadesboro*, 170-641; *Tillery v. Lumber Co.*, 172-296; *Lenoir v. Crabtree*, 158-357; *State v. Godwin*, 145-461. **Applied to public square:** *Gates v. Hill*, 158-584.

ART. 5. LIMITATIONS, OTHER THAN REAL PROPERTY

436. Periods prescribed. The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this article.

Rev., s. 390; Code, s. 151; C. C. P., s. 30.

See section 405. **The statute does not run when there is no one capable of suing:** *Grant v. Hughes*, 94-231. **No statute applicable to the testing of validity of election for bonds:** *Jones v. Comrs.*, 107-248. **Nor to the probate of a will:** *In re Dupree's Will*, 163-256; *Steadman v. Steadman*, 143-345; *McCormick v. Jernigan*, 110-406.

CHANGE OF STATUTE. Legislature may change time of limitation, but not without giving a reasonable time to sue, and not to interfere with vested rights: *State v. Haynie*, 169-277; *Graves v. Howard*, 159-594; *Matthews v. Peterson*, 150-132; *Dunn v. Beaman*, 126-766; *Culbreth v. Downing*, 121-205; *Nichols v. R. R.*, 120-495; *Strickland v. Draughan*, 91-103; *Whitehurst v. Dey*, 90-542; *Hinton v. Hinton*, 61-410.

437. Ten years. Within ten years an action—

1. Upon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its rendition. No such action may be brought more than once, or have the effect to continue the lien of the original judgment.

APPLICATION OF STATUTE. Takes place of statute of presumptions: *Brown v. Harding*, 171-686. Action upon a judgment barred in ten years: *McIlhenny v. Savings and Trust Co.*, 108-311; *Brittain v. Dickson*, 104-547; *Rogers v. Kinsey*, 101-559; *Lilly v. West*, 97-276; *Cook v. Moore*, 95-1; *Gaither v. Sain*, 91-304; *McDonald v. Dickson*, 87-404. Foreign judgments: *Arrington v. Arrington*, 127-190; *Miller v. Leach*, 95-231. Any proceeding to enforce a judgment, except simply issuing execution: *Barnes v. Fort*, 169-431; *Smith, ex parte*, 134-495; *Berry v. Corpening*, 90-395; but judgment can be satisfied by levy on property if execution issued every three years: *Williams v. Mullis*, 87-159; *Spicer v. Gambill*, 93-378; *Sawyers v. Sawyers*, 93-321; but see sections 667, 668. Lien of judgment not extended: *Barnes v. Fort*, 169-431; *Fox v. Kline*, 85-173; *Lyon v. Russ*, 84-588. This section does not preclude using judgment as a counterclaim: *McClennahan v. Cotten*, 83-332. Partial payment on judgment does not arrest the statute: *McCaskill v. McKinnon*, 121-192; *Hughes v. Boone*, 114-54; *McDonald v. Dickson*, 87-404.

Enforcement of decree of state court: *Smith, ex parte*, 134-495; of foreign court: *Arrington v. Arrington*, 127-190. Does not apply to interlocutory orders, as for payment of purchase money under decree of sale: *Davis v. Pierce*, 167-135; *Williams v. McFayden*, 145-156; *Clement v. Ireland*, 138-136; *Knight v. Houghtalling*, 94-408. As to expiration of lien, see section 614. Cases merely referring to section: *Shankle v. Ingram*, 133-259; *Owen v. Paxton*, 122-772; *Miller v. Leach*, 95-231.

2. Upon a sealed instrument against the principal thereto.

Bond v. Wilson, 129-387; *Broadfoot v. Fayetteville*, 124-478. Guaranty under seal: *Coleman v. Fuller*, 105-328. Interest on sealed instrument not barred until the principal is: *Knight v. Braswell*, 70-709. No statute of limitations as to sealed notes prior to 1868; but presumption of payment arose after ten years: *Glover v. Flowers*, 95-57; *Crawford v. McLellan*, 87-169. Specialties reduced to judgment are merged and the statute as to judgments applies: *Brittain v. Dickson*, 104-547. For effect of part payment, see section 416. As to sureties to sealed instruments, see section 441.

3. For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

Right of foreclosure barred: *Love v. West*, 169-13; *Ferrell v. Hinton*, 161-348; *Sandlin v. Kearney*, 154-596; *Bunn v. Braswell*, 142-113, 139-135; *Miller v. Coxe*, 133-578; *Stancill v. Spain*, 133-76; *Harper v. Edwards*, 115-246; *Williams v. Kerr*, 113-306; *Woody v. Jones*, 113-255; *Redmond v. Pippen*, 113-93; *Capehart v. Detrick*, 91-344; *Fraser v. Bean*, 96-327; *Hill v. Hilliard*, 103-34; if debt is not barred: *Geitner v. Jones*, 176-542; debt barred and foreclosure not barred: *Jenkins v. Griffin*, 175-184; *Menzel v. Hinton*, 132-660; *Capehart v. Detrick*, 91-344; *Parker v. Grant*, 91-338; *Rouss v. Ditmore*, 122-775; *Taylor v. Hunt*, 118-172; *Jenkins v. Wilkinson*, 113-532; *Hedrick v. Byerly*, 119-420; *Arrington v. Rowland*, 97-127; *Fraser v. Bean*, 96-327. Remainderman giving mortgage, time counted, how: *Woodlief v. Wester*, 136-162. Where mortgage was foreclosed and mortgagor still held possession, question arose as to estoppel of mortgagor to assert claim under original title: *Call v. Dancy*, 144-494. Foreclosure of mortgage barred by the statute, purchaser gets no title: *Hutaff v. Adrian*, 112-259. This section does not apply to foreclosure of equities by vendor: *Overman v. Jackson*, 104-4. In case where neither mortgagor nor mortgagee in possession: *Simmons v. Ballard*, 102-105.

4. For the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him has been in possession, within ten years after the right of action accrued.

ACTION FOR REDEMPTION OF LAND UNDER MORTGAGE OR TRUST DEED BARRED. Bernhart v. Hagamon, 144-526; Gray v. Williams, 130-53; Frederick v. Williams, 103-189; Edwards v. Tipton, 85-479; Smith v. Smith, 123-229; Sanderlin v. Cross, 172-234; Owens v. Hornthal, 156-19. Applied to absolute deed intended as a mortgage: Sandlin v. Kearney, 154-596. No adverse holding between mortgagor and mortgagee until condition broken: Weathersbee v. Goodwin, 175-234. In case where neither mortgagor nor mortgagee in possession: Simmons v. Ballard, 102-105; Cauley v. Sutton, 150-327. Second mortgagee cannot have first mortgage canceled because it is barred: Miller v. Coxe, 133-578. Section does not apply to possessory action: McFarland v. Cornwell, 151-428.

Rev., s. 391; Code, s. 152; C. C. P., ss. 14, 31.

NOTE. Sale under power of sale in mortgage barred in ten years, see Mortgages and Deeds of Trust, s. 2589.

Allotment of homestead suspends the statute. See this chapter, s. 728.

438. Seven years. Within seven years an action—

1. On a judgment rendered by a justice of the peace, from its date.

Pleading statute, see section 405. Where rehearing had before justice, the statute begins to run at the date of second judgment: Salmon v. McLean, 116-209. Death of debtor will not arrest running of statute: Mauney v. Holmes, 87-429; Daniel v. Laughlin, 87-433. This section applies to signers of stay of execution: Barringer v. Allison, 78-79; Humphreys v. Buie, 12-378. Applies to action in superior court: Oldham v. Rieger, 148-548. Docketing in superior court does not extend the limitation to ten years: Daniel v. Laughlin, 87-433; Broyles v. Young, 81-315; but see Adams v. Guy, 106-275; Matthews v. Peterson, 152-168; Oldham v. Rieger, 148-548.

2. By a creditor of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator and his making the advertisement required by law for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor. A creditor thus barred of a recovery against the representative of any principal debtor is also barred of a recovery against any surety to the debt.

Barred as to administrator: McIlhenny v. Savings and Trust Co., 108-312; Woody v. Brooks, 102-334; Morris v. Syme, 88-453; Lee v. McKoy, 118-518; Bobbitt v. Jones, 107-658; but see Clanton v. Price, 90-96. This subsection does not stop the operation of three-year statute as to sureties: Redmond v. Pippen, 113-90. Where administrator holds money in trust for creditors, statute does not run: Phifer v. Berry, 110-463. Claim filed with clerk taking account, statute does not run: Warden v. McKinnon, 94-378. This section applies only to rights already accrued when administrator qualified: Miller v. Shoaf, 110-319. Administrator must show that he made the advertisement: Love v. Ingram, 104-600; Cox v. Cox, 84-138—but this does not apply to administrator d. b. n., Smith v. Brown, 99-377. For caveat to will, see section 4158.

Rev., s. 392; Code, s. 153; C. C. P., s. 32.

439. Six years. Within six years an action—

1. Upon the official bond of a public officer.

Barred in six years: Comrs. v. McRae, 89-95. Statute runs from breach of bond: Comrs. v. McRae, 89-95; see, also, section 405. Clerk superior court: Shackelford v. Staton, 117-73.

County treasurer's bond: *Comrs. v. McRae*, 89-95. **Register of deeds' bond:** *Daniel v. Grizzard*, 117-105. **Sheriff's bond:** *Hobbs v. Barefoot*, 104-224; *Hughes v. Newsom*, 86-424; *Hewlett v. Schenck*, 82-234; *Furman v. Timberlake*, 93-66.

2. Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law.

Executor, administrator or collector's bonds: *Nunnery v. Averitt*, 111-394; *Gill v. Cooper*, 111-311; *Culp v. Lee*, 109-675; *Woody v. Brooks*, 102-334; *Reeves v. Davis*, 99-425; *Andres v. Powell*, 97-168; *Vaughan v. Hines*, 87-445. **'Final account' of administrator:** *Vaughan v. Hines*, 87-445; *Burgwyn v. Daniel*, 115-115. **Time between death of administrator and appointment of administrator d. b. n. not counted:** *Brawley v. Brawley*, 109-524. **Guardian's bond:** see sections 2162 and 405. *Self v. Shugart*, 135-185; *Kennedy v. Cromwell*, 108-1; *Norman v. Walker*, 101-24; *Williams v. McNair*, 98-332; *Davis v. Perry*, 89-420; *Humble v. Mebane*, 89-414.

3. For injury to any incorporeal hereditament.

Rev., s. 393; Code, s. 154; C. C. P., s. 33.

NOTE. Six-year limitation against directors of corporations for impairment of capital, see Corporations, s. 1179.

440. Five years. Within five years—

1. No suit, action or proceeding shall be brought or maintained against a railroad company owning or operating a railroad for damages or compensation for right of way or use and occupancy of any lands by the company for use of its railroad unless the action or proceeding is commenced within five years after the lands have been entered upon for the purpose of constructing the road, or within two years after it is in operation.

This is a statute of limitation and must be pleaded in defense: *Abernathy v. R. R.*, 159-340. Under special statute making limitation two years: *Baker v. R. R.*, 137-214; *Dargan v. R. R.*, 131-623; *Railroad v. McCaskill*, 94-746; *Gudger v. R. R.*, 106-481; *Purifoy v. R. R.*, 108-100; *Liverman v. R. R.*, 109-52.

2. No suit, action or proceeding shall be brought or maintained against a railroad company for damages caused by the construction of the road, or the repairs thereto, unless such suit, action or proceeding is commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property.

Rev., s. 394; 1893, c. 152; 1895, c. 224; 1897, c. 339.

Action barred in five years: *Campbell v. R. R.*, 159-586; *Parks v. R. R.*, 143-289; *Stack v. R. R.*, 139-366; *Carson v. R. R.*, 128-95; *Wiley J. Lassiter v. R. R.*, 126-509; *Beach v. R. R.*, 120-498. Under the old statute and under this section discussed: *Ridley v. R. R.*, 124-34, also 118-996; *Harrell v. R. R.*, 122-822; *Nichols v. R. R.*, 120-495. **Permanent damages allowed:** *Barelliff v. R. R.*, 176-39, 175-114, 168-268; *Caveness v. R. R.*, 172-305; *Duval v. R. R.*, 161-448; *Pickett v. R. R.*, 153-148; *Beasley v. R. R.*, 147-362; *Staton v. R. R.*, 147-428. **What damages recovered:** *McMahan v. R. R.*, 170-456.

Statute begins to run from the time the injury arises: *Barelliff v. R. R.*, 175-114; *Perry v. R. R.*, 171-38; *McMahan v. R. R.*, 170-456; *Clark v. R. R.*, 168-415; *Savage v. R. R.*, 168-241; *Owenby v. R. R.*, 165-641; *Duval v. R. R.*, 161-448; *Pickett v. R. R.*, 153-148; but not against an independent contractor: *Willis v. White*, 150-199. This section does not apply to canal companies: *Cherry v. Canal Co.*, 140-422—nor to water companies, *Geer v. Water Co.*, 127-349—nor to telegraph companies, *Teeter v. Telegraph Co.*, 172-783. See section 441 for continuing trespass.

441. Three years. Within three years an action—

1. Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections.

For running of statute, pleading statute, and part payment, see section 405. New promise, see section 416.

APPLICATION OF SECTION. Award not under seal, *Sprinkle v. Sprinkle*, 159-81; bill of lading, *Watch Case Co. v. Express Co.*, 120-352; promissory note, *Wells v. Hill*, 118-900; *Benson v. Bennett*, 112-505; *Copeland v. Collins*, 122-619; contract for labor, *Fulps v. Mock*, 108-601; services to intestate, *Miller v. Lash*, 38-51; *McCurry v. Purgason*, 170-463. Sureties on sealed instruments: *Jackson v. Martin*, 136-196; *Coffey v. Reinhardt*, 114-509; *Redmond v. Pippen*, 113-90; *Moore v. Goodwin*, 109-218; *Lewis v. Long*, 102-206; *Leak v. Covington*, 99-559; *Arrington v. Rowland*, 97-127; *Joyner v. Massey*, 97-148; *Torrence v. Alexander*, 85-143; *Kerr v. Brandon*, 84-128; *Capell v. Long*, 84-17; *Welfare v. Thompson*, 83-276; *Goodman v. Litaker*, 84-8; *Hewlett v. Schenek*, 82-234; *Parham v. Green*, 64-436; see, also, under subsection 6 of this section. Guarantor under seal not within this section: *Coleman v. Fuller*, 105-328. Contract signed in partnership name under seal: *Supply Co. v. Windley*, 176-18; *Burwell v. Linthicum*, 100-147. Action for contribution: *Liverman v. Cahoon*, 156-187. Action for subrogation: *Ins. Co. v. R. R.*, 165-136. Actions for reopening settlement of administrator: *Woody v. Brooks*, 102-334; *Slaughter v. Cannon*, 94-189—of guardian, *Timberlake v. Green*, 84-658. Action for fines and penalties collected by a city which belong to school board: *School Directors v. Asheville*, 128-249. Action against an executor who, as devisee of land charged with payments, took possession of such land: *Rice v. Rice*, 115-43; *Hines v. Hines*, 95-482. Action against trustee for commissions wrongly retained under contract, held that if contract is oral this section applies: *Adams v. Battle*, 125-152. The statute must be pleaded: *Jordan v. Simmons*, 169-140. This statute can be pleaded by one creditor of decedent's estate against the claim of another: *Lockhart v. Ballard*, 113-293; *Oates v. Lilly*, 86-643. Three years after coming of age allowed infants to disaffirm contracts: *Hogan v. Utter*, 175-332; *Chandler v. Jones*, 172-574; *Baggett v. Jackson*, 160-31; *Gaskins v. Allen*, 137-430; *Weeks v. Wilkins*, 134-522; *Lanier v. Lumber Co.*, 177-201.

2. Upon a liability created by statute, other than a penalty or forfeiture, unless some other time is mentioned in the statute creating it.

Action to wind up corporations: *Von Glahn v. DeRossett*, 81-467—against clerk individually for failing to index judgment: *Shackleford v. Staton*, 117-73—against authorities for the recovery of illegal taxes paid under protest, *Hatwood v. Fayetteville*, 121-207.

3. For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.

See section 440, which makes the limitation five years as to railroads trespassing. Actions for permissive waste: *Sherrill v. Connor*, 107-630—for damages for construction of canals, *Cherry v. Canal Co.*, 120-422—for damages for construction of telegraph line, *Hodges v. Tel. Co.*, 133-225; *Teeter v. Telegraph Co.*, 172-783. Diversion of water: *Perry v. R. R.*, 171-38; *Barcliff v. R. R.*, 168-268; *Savage v. R. R.*, 168-241; *Rice v. R. R.*, 167-1; *Geer v. Water Co.*, 127-349; *Earnhardt v. Comrs.*, 157-234. Trespass on land, continuing trespass: *Tillery v. Lumber Co.*, 172-296; *Caviness v. R. R.*, 172-305; *Perry v. R. R.*, 171-38; *Duval v. R. R.*, 161-448; *Campbell v. R. R.*, 159-586; *Roberts v. Baldwin*, 151-408; s. c., 155-276; *Sample v. Lumber Co.*, 150-161.

4. For taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.

Adams v. Battle, 125-153; *Parker v. Harden*, 121-57; *Shuffler v. Turner*, 111-297; *Bd. Education v. Bd. Education*, 107-366; *Osborne v. Wilkes*, 108-651; *University v. Bank*, 96-280; *Robertson v. Dunn*, 87-191; *Currie v. McNeill*, 83-176; *Edgerton v. Logan*, 81-172; *Dunn v. Dunn*, 137-533. For time when right of action accrues, see section 405.

5. For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereinafter enumerated.

6. Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of.

Actions against sureties of executor or administrator barred: *Settle v. Settle*, 141-574; *Burgwyn v. Daniel*, 115-115; *Kennedy v. Cromwell*, 108-1; *Gill v. Cooper*, 111-311; *Stonestreet v. Frost*, 123-290; *Brawley v. Brawley*, 109-526; *Wilson v. Pearson*, 102-317; *Reaves v. Davis*, 99-425; *Andres v. Powell*, 97-168; see, also, *Humble v. Mebane*, 89-410. Actions against sureties of guardian barred: *Self v. Shugart*, 135-185; *Norman v. Walker*, 101-24; *Hodges v. Council*, 86-181; *Anderson v. Fidelity Co.*, 174-417.

7. Against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.

Navigation Co. v. Williams, 111-35.

8. For fees due to a clerk, sheriff or other officer, by the judgment of a court; within three years from the rendition of the judgment, or the issuing of the last execution thereon.

Applies only to officers: *Cowles v. Hall*, 113-359.

9. For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

The time is counted from the discovery of the fraud or mistake, or when it could have been discovered: *Taylor v. Edmunds*, 176-325; *Arndt v. Ins. Co.*, 176-652; *Lanier v. Lumber Co.*, 177-200; *Mann v. Mann*, 176-353; *Sanderlin v. Cross*, 172-234; *Jefferson v. Lumber Co.*, 165-46; *Ewbank v. Lyman*, 170-505; *Pelletier v. Cooperage Co.*, 158-403; *Sinclair v. Teal*, 156-458; *Mfg. Co. v. Fertilizer Co.*, 150-417; *Tuttle v. Tuttle*, 146-484; *Modlin v. R. R.*, 145-218; *Peacock v. Barnes*, 142-218; *Bonner v. Statesbury*, 139-3; *Hooker v. Worthington*, 134-283; *Barden v. Stickney*, 132-416; *Lanning v. Comrs.*, 106-511; *Cotton Mills v. Cotton Mills*, 116-650; *Osborne v. Wilkes*, 108-651; *Houston v. Thornton*, 122-375; *Edgerton v. Logan*, 81-172; *Kahnweiler v. Anderson*, 78-133; *Briggs v. Smith*, 83-306; *Dunn v. Beaman*, 126-766; *Alpha Mills v. Engine Co.*, 116-797; *Stubbs v. Motz*, 113-458; *Rouss v. Ditmore*, 122-775; *Ely v. Early*, 94-1; *Knight v. Houghtaling*, 85-17; *Hughes v. Whitaker*, 84-640; *Day v. Day*, 84-408; *Barham v. Lomax*, 73-76; see, also, section 405. Assignee in bankruptcy is barred when creditor would be barred: *Garland v. Arrowood*, 172-591.

This subsection does not prevent statute running, in an action for fraudulent conversion, from the conversion and not from the discovery: *Spruill v. Sanderson*, 79-466; *Blount v. Parker*, 78-128; but see *Meekins v. Simpson*, 176-130, and section 405. This subsection does not apply to actions for breach of covenant of warranty in deed: *Shankle v. Ingram*, 133-259; *Burwell v. Linthicum*, 100-149.

10. For the recovery of real property sold for the nonpayment of taxes, within three years after the execution of the sheriff's deed.

Action to redeem land from tax sale: *Jordan v. Simmons*, 175-537; s. c., 169-140; *Kivett v. Gardner*, 169-78; *Lyman v. Hunter*, 123-508. For procedure and evidence in actions to recover land sold for taxes, see sections 8034, 8037. This subsection does not apply in an action to remove tax deed as a cloud upon title: *Beek v. Meroney*, 135-532.

Rev., s. 395; Code, s. 155; C. C. P., s. 34; 1895, c. 165; 1889, cc. 269, 218; 1899, c. 15, s. 71; 1901, c. 558, s. 23; 1913, c. 147, s. 4.

NOTE. For actions against bank officers, see this chapter, s. 423.

For bastardy proceedings, see *Bastardy*, s. 274.

For involuntary dissolution of a corporation on petition of holders of one-fifth of the stock, see *Corporations*, s. 1186.

442. Two years. Within two years—

1. All claims against counties, cities and towns of this state shall be presented to the chairman of the board of county commissioners, or to the chief officers of the cities and towns, within two years after the maturity of such claims, or the holders shall be forever barred from a recovery thereon.

This is not strictly a statute of limitations, but a condition, and objection may be taken by demurrer: *Dockery v. Hamlet*, 162-118; *Board of Education v. Greenville*, 132-4; *Wharton v. Comrs.*, 82-11. Cases supporting statute: *Lanning v. Comrs.*, 106-505; *Royster v. Comrs.*, 98-148; *Moore v. Comrs.*, 87-215; *Hawley v. Comrs.*, 82-22. For presenting claims, see sections 1330, 1331.

2. An action to recover the penalty for usury.

Barred in two years: *Williams v. B. and L. Assn.*, 131-267; *Carter v. Ins. Co.*, 122-338; *Smith v. B. and L. Assn.*, 119-257; *Roberts v. Ins. Co.*, 118-429; *Rogers v. Bank*, 108-574; *Pritchard v. Meekins*, 98-244. Before the act of 1895 the time was two years from the payment of usury; under act of 1895, it was after payment in full of the indebtedness. See cases cited above. For usury law, see section 2306.

Rev., s. 396; Code, ss. 756, 3836; 1874-5, c. 243; 1876-7, c. 91, s. 3; 1895, c. 69.

For actions by legatee or distributee against representative, see Administration, ss. 147, 156.

For sale of land conveyed by heirs within two years from grant of letters, see Administration, s. 76.

For action by holder of tax deed to foreclose the tax lien, see Taxation, s. 8037.

443. One year. Within one year an action—

1. Against a public officer, for a trespass under color of his office.

2. Upon a statute, for a penalty or forfeiture, where the action is given to the state alone, or in whole or in part to the party grieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

Action against clerk for penalty for failure to pay over costs and fines: *Hewlett v. Nutt*, 79-263.

3. For libel, assault, battery, or false imprisonment.

Agreement not to plead the statute: *Brown v. R. R.*, 147-217.

4. Against a public officer, for the escape of a prisoner arrested or imprisoned on civil process.

5. An application for a widow's year's allowance.

Cook v. Sexton, 79-305; *Perkins v. Brinkley*, 133-87. See section 4108.

Rev., s. 397; Code, s. 156; C. C. P., s. 35; 1885, c. 96.

For time within which personal representative may bring action for wrongful death, see s. 160.

For limit of time for creditors to present claims to personal representative, and effect, see s. 101.

For minimum limit in contract of insurance, within which to bring suit, see s. 6290.

For actions to redeem from tax sales, see s. 8038.

444. Six months. Within six months—

An action for slander.

Rev., s. 398; Code, s. 157; C. C. P., s. 36.

Claim against decedent disputed by personal representative, barred in six months, see Administration, s. 100.

Action barred: *Hester v. Mullen*, 107-724; effect of amendment to complaint: *Ibid.*

445. All other actions, ten years. An action for relief not herein provided for must be commenced within ten years after the cause of action has accrued.

Rev., s. 399; Code. s. 158; C. C. P., s. 37.

For limitations of ninety days on actions in nature of quo warranto, see this chapter, s. 877.

ACTIONS WITHIN THIS SECTION. To have party declared trustee: Johnson v. Lumber Co., 144-717; Norcum v. Savage, 140-472; McAden v. Palmer, 140-258; Ritchie v. Fowler, 132-788; Norton v. McDevit, 122-759; Lynch v. Johnson, 171-611; Phillips v. Lumber Co., 151-519; Frazier v. Cherokee Indians, 146-477. To recover Cherokee lands, relying on a grant: Frasier v. Gibson, 140-272. This section covers all causes, equitable and legal, not otherwise provided for: McAden v. Palmer, 140-258. To recover funds held under an implied trust where no demand and refusal: Dunn v. Dunn, 137-533; Edwards v. Lemmond, 136-329. To foreclose mortgage, by remainderman: Woodlief v. Webster, 136-162. To convert an absolute deed into a mortgage: Sandlin v. Kearney, 154-596. To remove cloud upon title: Bailey v. Hopkins, 152-748. To enforce owelty of partition: Newsome v. Harrell, 168-295; Smith, ex parte, 134-495. To enforce decree of court as to right of way in partition proceeding: Hunter v. West, 172-160.

To recover damages for breach of covenant in deed: Shankle v. Ingram, 133-255. By ward, to cause guardian to settle: Dunn v. Beaman, 126-766. By an administrator to recover his intestate's share of an estate: Hunt v. Wheeler, 116-422. By a mortgagor to avoid a sale where mortgagee purchased: Jones v. Pullen, 115-471—to call upon mortgagee for account of sale, Bruner v. Threadgill, 88-361. To recover a charge upon land: Rice v. Rice, 115-43. To surcharge and falsify an account of administrator: Nunnery v. Averitt, 111-394; Woody v. Brooks, 102-334. To obtain a divorce: O'Connor v. O'Connor, 109-139; see, also, Smith v. Smith, 72-139. Quære, as to action against guardian after settlement when no demand and refusal: Kennedy v. Cromwell, 108-1. To foreclose bond for title: Worth v. Wrenn, 144-656; Overman v. Jackson, 104-1; Barnes v. McCullers, 108-46. Statute of limitations before 1868 not now applicable: Brown v. Wilson, 174-668; Edwards v. Lemmond, 136-330.

SUBCHAPTER III. PARTIES

ART. 6. PARTIES

446. Real party in interest; grantees and assignees. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section does not authorize the assignment of a thing in action not arising out of contract. An action may be maintained by a grantee of real estate in his own name, when he or any grantor or other person through whom he derives title might maintain such action, notwithstanding the conveyance of the grantor is void, by reason of the actual possession of a person claiming under a title adverse to that of the grantor, or other person, at the time of the delivery of the conveyance. In case of an assignment of a thing in action the action by the assignee is without prejudice to any setoff or other defense, existing at the time of, or before notice of, the assignment; but this does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, upon good consideration, and before maturity.

Rev., s. 400; Code, s. 177; C. C. P., s. 55; 1874-5, c. 256.

For proper relators in actions on official bonds, see sections 353, 354; on fiduciary bonds, see sections 33, 40, 2162.

GENERALLY. Holder of equitable title is real party in interest: Thompson v. Lumber Co., 168-226; Ball-Thrash v. McCormick, 162-471; Mull v. R. R., 175-593 (suit for injury to land); Vaught v. Williams, 177-77; see hereunder, Ejectment—For assignees, as, see *infra*, "Assignments." Real party in interest does not include one who has theretofore parted with

his interest in property sued for: *Vaughan v. Davenport*, 157-156; s. c., 159-369—person made plaintiff without his consent is not bound by decree, though he knew of suit, *Patillo v. Lytle*, 158-92—alien enemy, if resident, may sue: *Krachanake v. Mfg. Co.*, 175-435—grantee of land held adversely may sue by express provision of this section, *Johnson v. Prairie*, 94-773; *Osborne v. Anderson*, 89-261; *Justice v. Eddings*, 75-581; *Buie v. Carver*, 75-559. If change of ownership during suit, new owner becomes party and files supplemental complaint: *Burnett v. Lyman*, 141-500; *Field v. Wheeler*, 120-264; *Leaving v. Smith*, 115-385; *Richards v. Smith*, 98-509; *Murray v. Blackledge*, 71-492; and see sections 460-462; and failure to make grantee party entitles to nonsuit: *Burnett v. Lyman*, 141-500. When plaintiff not real party in interest, action dismissed on motion as of nonsuit: *Chapman v. McLawhorn*, 150-166.

What claims are assignable: *Petty v. Rousseau*, 94-355, criticized in *Woodcock v. Bostic*, 118-822. Assignability of contracts: *R. R. v. R. R.*, 147-368.

RIGHT TO SUE IN VARIOUS ACTIONS. Administration, suits by and against representatives, etc.: To collect assets of intestate's estate, *Shields v. Life Ins. Co.*, 119-380; *Page v. Ins. Co.*, 131-116; *Rogers v. Gooch*, 87-442; *Cowles v. Hayes*, 71-230; *Sharpe v. Connelly*, 105-87; *Morefield v. Harris*, 126-628; see section 170—to subject land to payment of intestate's debts, *Lee v. McKoy*, 118-519; *Sinclair v. McBryde*, 88-438; see, also, sections 74-136—to recover property of intestate after administrator's death and to distribute estate, *Gilliam v. Watkins*, 104-180; *Ballinger v. Cureton*, 104-474; *Tulburt v. Hollar*, 102-407; *Merrill v. Merrill*, 92-657; *Hardy v. Miles*, 91-131; *University v. Hughes*, 90-537; *Alexander v. Wolfe*, 88-398; *Grant v. Bell*, 87-34; *Ham v. Kornegay*, 85-119; *Goodman v. Goodman*, 72-508—to recover distributive share from person other than representative, *Brooks v. Holton*, 136-306; *Varner v. Johnston*, 112-570; *Norwood v. O'Neal*, 112-127; *Redfern v. Austin*, 88-413—administrator of deceased guardian not proper plaintiff on note payable to guardian, *Alexander v. Wriston*, 81-191—where executor may sue to set aside for fraud deed to testator's land, *Speed v. Perry*, 167-122.

Agency: Undisclosed principal may sue, *Peanut Co. v. R. R.*, 155-148; *Williams v. Honeycutt*, 176-102.

Assignments: Assignee as real party in interest sues in own name, subject to equities, *Taylor v. Carmon*, 153-101; *Bank v. School Committee*, 121-107 (assignment of amount due on working contract); *Utey v. Foy*, 70-303 (assignee of bond for title)—even though assignment partial, *Willey v. Gatling*, 70-410; *Wynne v. Heck*, 92-414—of debt secured by mortgage, *Wright v. Fort*, 126-615; *Johnson v. Bray*, 174-176—of nonnegotiable instrument, *Sutton v. Owen*, 65-123; *Havens v. Potts*, 86-31; *Bank v. Bynum*, 84-24—of judgment, *Moore v. Nowell*, 94-265; *Rice v. Hearn*, 109-150—when assignment is in trust, beneficiary under assignment real party, *Field v. Wheeler*, 120-264.

Bailor or bailee may sue for injury to property: *R. R. v. Baird*, 164-253. Banks, action for loss of deposit through misconduct of officers: *Lacy v. Webb*, 130-545; *Coble v. Beall*, 130-533; *Tate v. Bates*, 118-288. Beneficiary in contract, though not a party, may sue: *Correll v. Water Co.*, 124-328; *Gastonia v. Engineering Co.*, 131-363; *Faust v. Faust*, 144-383; *Supply Co. v. Lumber Co.*, 160-428; *Withers v. Poe*, 167-372; *Morton v. Water Co.*, 168-582; *Powell v. Water Co.*, 171-290; *Crumpler v. Hines*, 174-283; *Schefflow v. Pierce*, 176-91; *Lumber Co. v. Johnson*, 177-44; see *Morehead v. Wriston*, 73-398; *Peacock v. Williams*, 98-324; *Woodcock v. Bostic*, 118-822. Consignor or consignee against carrier: *Ellington v. R. R.*, 170-36; *Grocery Co. v. R. R.*, 170-241; *Myers v. R. R.*, 171-190; *Aydlett v. R. R.*, 172-47; *Buggy Co. v. R. R.*, 152-119; *Gaskins v. R. R.*, 151-18; *Mfg. Co. v. R. R.*, 149-261; *Stone v. R. R.*, 144-220; *Summers v. R. R.*, 138-295; *Grocery Co. v. R. R.*, 136-396; *Gwynn v. R. R.*, 85-429. Creditor may sue holder of fund dedicated to his payment: *Voorhees v. Porter*, 134-591; *Hartness v. Wallace*, 106-430. Crops, tenant may sue for, except against landlord: *Bridgers v. Dill*, 97-222. Dead body, right of action for mutilation: *Floyd v. R. R.*, 167-55. Elections, suits to test validity of township, for bonds, etc.: *Jones v. Comrs.*, 107-251; *Perry v. Whitaker*, 71-477; also see *Rigsbee v. Durham*, 99-341, 98-81; *Wood v. Oxford*, 97-227; *Goforth v. Construction Co.*, 96-536; *McDowell v. Construction Co.*, 96-514; *McNair v. Comrs.*, 93-370; *Bradshaw v. Comrs.*, 92-278; *Caldwell v. Comrs.*, 90-453; *McCormac v. Comrs.*, 90-441; *Smallwood v. Newbern*, 90-36.

Ejectment, who may maintain: holder of equitable title, *Murray v. Blackledge*, 71-492; *Black v. Justice*, 86-504; *Condry v. Cheshire*, 88-375; *Taylor v. Eatman*, 92-601; *Graves v. Trueblood*, 96-495; *Grabb v. Lookabill*, 100-267; *Geer v. Geer*, 109-679; *Wright v. Fort*, 126-615; *Mining Co. v. Lumber Co.*, 170-273; but see *Henry v. Wilson*, 77-216 (distinguishing holder of mere equitable right)—mortgagee, *Kiser v. Combs*, 114-640; *Weathersbee v. Goodwin*, 175-234—administrator d. b. n., c. t. a., where executor was charged with management of property, *Smathers v. Moody*, 112-792. **Remainderman cannot bring ejectment**, *Blount v. Johnson*, 165-25.

Execution sale, recovery of amount bid at: *McKee v. Lineberger*, 69-217; see *Lackey v. Pearson*, 101-651. **Grant from state, suit to set aside for fraud:** *Henry v. McCoy*, 131-586; *State v. Bland*, 123-739. See section 7594. **Guardian and ward: ward's suit against surety on guardian's bond**, *McNeill v. McBryde*, 112-418; **ward's suit on bond payable to guardian**, *Usry v. Suit*, 91-406; **representative of deceased ward must sue guardian for decedent's property**, *Brown v. Wilson*, 174-636. **Indemnity contract**, *McCausland v. Construction Co.*, 172-708.

Insurance: Assignee of life policy without insurable interest in assignor's life, *Johnson v. Ins. Co.*, 157-106. **Insurer's payment of loss works equitable assignment and makes insurer real party in interest**, *Ins. Co. v. R. R.*, 132-75; *Cunningham v. R. R.*, 139-427; *Powell v. Water Co.*, 171-290. **Reinsurance held to inure to benefit of owner of property so as to make him real party in interest**, *Shoaf v. Ins. Co.*, 127-308. **Beneficiaries in certificate of benevolent society may sue without resorting to tribunals of society**, *Kelley v. Trimont Lodge*, 154-97; *Harris v. Junior Order*, 168-357.

Mortgages: Parties to foreclosure suits generally, *Etheridge v. Vernoy*, 71-184; *Jones v. Williams*, 155-179; *Grimes v. Andrews*, 170-515. **Mortgagee's rights against vendee of land assuming mortgage debt**, *Baber v. Hanie*, 163-588; *Woodcock v. Bostie*, 118-822.

Negotiable instruments: As to negotiation and the rights of holder, see sections 3010, 3032, 3033. Assignment and negotiation distinguished, *Miller v. Tharel*, 75-148. **Transferee without negotiation transfer no assignee, but may sue**, *Andrews v. McDaniel*, 68-385; *Jackson v. Love*, 82-405; *Kiff v. Weaver*, 94-274; *Loan Assn. v. Merritt*, 112-243; *Jenkins v. Wilkinson*, 113-532; *Breese v. Crumpton*, 121-122. **So indorsee of nonnegotiable instrument**, *Thompson v. Osborne*, 152-408; **or instrument indorsed past due**, *Lane v. Richardson*, 104-642. **Promissory note payable to agent**, *Martin v. Mask*, 158-436. **Indorsement for collection as indorser's agent held to confer no right to sue in indorsee's name**, *Abrams v. Cureton*, 74-523; *Bank v. Exum*, 163-199; **but contrast sections 3017, 3018. Indorsement past due by partner in insolvent firm for his own debt carries no right to sue**, *Hartness v. Wallace*, 106-430. **For former law as to sealed instruments, see** *Spence v. Tapscott*, 93-246.

Seduction, action for damages for: *Tillotson v. Currin*, 176-479; *Strider v. Lewey*, 176-448; *Snider v. Newell*, 132-616; *Willeford v. Bailey*, 132-404; *Abbott v. Hancock*, 123-99; *Searlett v. Norwood*, 115-284; *Hood v. Sudderth*, 111-215. **Slander, action for:** *Harper v. Pinkston*, 112-296; *Carter v. King*, 174-549. **Telegrams, action for nondelivery of:** *Landie v. Tel. Co.*, 124-528; *Sherrill v. Tel. Co.*, 117-352; *Young v. Tel. Co.*, 107-370; *Helms v. Tel. Co.*, 143-386; *Holler v. Tel. Co.*, 149-336; *Penn v. Tel. Co.*, 159-306. **Tenants in common, recovery of property of:** *Morehead v. Hall*, 126-213; *Foster v. Hackett*, 112-546; *Gilchrist v. Middleton*, 107-663; *Waller v. Bowling*, 108-289; *Allen v. Salinger*, 103-14; *Shearin v. Riggsbee*, 97-216; *Thames v. Jones*, 97-121; *Lafoon v. Shearin*, 95-391; *Dawkins v. Dawkins*, 93-283; *Yancey v. Greenlee*, 90-317; *Fox v. Stafford*, 90-296; *Overcash v. Kitchie*, 89-384. **Trespass to real property:** *Wheeler v. Tel. Co.*, 172-9; *Daniels v. R. R.*, 158-418 (rights of grantor and grantee when property conveyed); *Dale v. R. R.*, 132-705 (lessee for injury to term); *Norris v. Canal Co.*, 132-182 (lessor and lessee's right to sue).

Trusts: Beneficiary of resulting trust may sue for conveyance, *Lackey v. Martin*, 120-391; **suit to remove trustee of religious society**, *Nash v. Sutton*, 117-231; s. c., 109-550. **Warranty: breach of covenant in deed**, *Ravenel v. Ingram*, 131-549.

447. Suits for penalties. Where a penalty is imposed by any law, and it is not provided to what person the penalty is given, it may be recovered, for his own use, by any one who sues for it. When a penalty is allowed by statute,

and it is not prescribed in whose name suit therefor may be commenced, suit must be brought in the name of the state.

Rev., ss. 401, 402; Code, ss. 1212, 1213; R. C., c. 35, ss. 47, 48.

Carter v. R. R., 126-439; Goodwin v. Fertilizer Works, 119-120; Burrell v. Hughes, 116-430; Sutton v. Phillips, 116-502; Maggett v. Roberts, 108-174; Hodge v. R. R., 108-24; Middleton v. R. R., 95-167; Norman v. Dunbar, 53-319.

448. Action by purchaser under judicial sale. Any one given possession under a judicial sale confirmed, where the title is retained as a security for the price, is the legal owner of the property for all purposes of bringing suits for injuries thereto, after the day of sale, by trespass or wrongful possession, in the same manner as if the title had been conveyed to him on day of sale, unless restrained by some order of the court directing the sale; and the suit brought is under the control of the court ordering the sale.

Rev., s. 403; Code, s. 942; 1858-9, c. 50.

Purchaser has no right before confirmation: Vanderbilt v. Brown, 128-498—but confirmation being made, the bargain is complete and relates back to day of sale: Vass v. Arrington, 89-10. All that a purchaser at a judicial sale is required to know is that the court had jurisdiction of the subject-matter and of the person: Card v. Finch, 142-140; Rackley v. Roberts, 147-201; Harris v. Bennett, 160-339.

449. Action by executor or trustee. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, includes a person with whom, or in whose name, a contract is made for the benefit of another.

Rev., s. 404; Code, s. 179; C. C. P., s. 57.

Actions by executors and administrators, see sections 164, 170. Meaning of trustee of express trust: Martin v. Mask, 158-436. Trustee of express trust may sue alone under this section, or may join beneficiaries, who are proper parties under section 446: Hartness v. Wallace, 106-430; Wynne v. Heck, 92-414; Mebane v. Mebane, 66-334. When necessary to make trustee and cestui que trust parties: Barbee v. Penny, 172-653; s. c., 174-571. In action by trustee of judgment to set aside fraudulent conveyance, beneficiaries should be parties: Eddleman v. Lentz, 158-65. Cases applying section: Jenkins v. Wilkinson, 113-532; Jones v. McKinnon, 87-294; Warren v. Howard, 99-190; Rankin v. Allison, 64-673; Alexander v. Wriston, 81-191; Davis v. Fox, 69-435; Biggs v. Williams, 66-427; Davidson v. Elms, 67-228; Salisbury v. R. R., 91-490. Receiver appointed by U. S. court not a trustee within this section: Battle v. Davis, 66-257. Section referred to in Winders v. Hill, 141-704; Riley v. Pelletier, 134-317; Abrams v. Cureton, 74-523.

450. Infants, etc., sue by guardian or next friend. In actions and special proceedings when any of the parties plaintiff are infants, idiots, lunatics, or persons non compos mentis, whether residents or nonresidents of this state, they must appear by their general or testamentary guardian, if they have any within the state; but if the action or proceeding is against, or if there is no such guardian, then said persons may appear by their next friend. The duty of the state solicitors to prosecute in the cases specified in chapter entitled Guardian and Ward is not affected by this section.

Rev., s. 405; Code, s. 180; 1893, c. 5; C. C. P., s. 58; 1870-1, c. 233; 1871-2, c. 95.

For solicitor's duties with respect to orphans' estates, see Guardian and Ward, Article 9.

General doctrine of section stated in Settle v. Settle, 141-553; Holloman v. Holloman, 125-29; Ward v. Lowndes, 96-367; Smith v. Smith, 106-498. Duty of court in appointing next friend:

Morris v. Gentry, 89-248; Tate v. Mott, 96-19. Next friend must not be hostile: George v. High, 85-113—and ought always to be appointed by court, Tate v. Mott, 96-19—is officer of court, *Ibid.*—and is not taxable personally with costs unless he acts in bad faith, etc., Smith v. Smith, 108-365; Hockaday v. Lawrence, 156-319. Foreign guardian treated as next friend: Tate v. Mott, 96-19. Once recognized as next friend, appointment cannot be impeached in collateral proceedings: Sumner v. Sessoms, 94-371. Presumed that court protects interests of infants: Tyson v. Belcher, 102-112. When allegation of insanity of husband is admitted by demurrer, wife can be made next friend without inquiring lunatico: Abbott v. Hancock, 123-99. Next friend can be removed: Tate v. Mott, 96-19. Infant and not the guardian or next friend is the real party of record and the one estopped by it: Krachanake v. Mfg. Co., 175-435; Hockaday v. Lawrence, 156-319; Settle v. Settle, 141-553; Grantham v. Kennedy, 91-148; Smith v. Smith, 106-498; George v. High, 85-113; Mason v. McCormick, 75-263; Falls v. Gamble, 66-465; Branch v. Goddin, 60-493. Defendant cannot object to next friend appointed by the trial judge: Carroll v. Montgomery, 128-278. Objection that next friend not regularly appointed made by plea in abatement: Carroll v. Montgomery, 128-278. Effect where infant institutes action in his own name without guardian or next friend, see Hicks v. Beam, 112-642. Infant widow may dissent from will by guardian or next friend: Hollomon v. Hollomon, 125-29. In *ex parte* proceeding, when no suggestion of unfair advantage, administrator may represent minor as guardian: Harris v. Brown, 123-419. Next friend has no power to agree to arbitration: Millsaps v. Estes, 137-535—he can only consent to a judgment when all the facts are found by the court: Ferrell v. Broadway, 126-258. Fees of attorney for next friend within control of court: *In re Stone*, 176-336. Action by next friend in justice's court: Houser v. Bonsal, 149-51.

451. Infants, etc., defend by guardian ad litem. In all actions and special proceedings when any of the defendants are infants, idiots, lunatics, or persons non compos mentis, whether residents or nonresidents of this state, they must defend by their general or testamentary guardian, if they have one within this state; and if they have no general or testamentary guardian in the state, and any of them has been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, idiots, lunatics, or persons non compos mentis. The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After twenty days notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant, idiot, lunatic, or person non compos mentis, defendants.

Rev., s. 406; Code, s. 181; C. C. P., s. 59; 1870-1, c. 233, s. 5; 1871-2, c. 95, s. 2.
See Rule 17 of superior court.

Guardian ad litem must be served with summons: Gully v. Macy, 81-356; Moore v. Gidney, 75-34. Failure to serve infant defendants before guardian ad litem appointed is irregularity, curable by subsequent service and filing of answer by the guardian: Dudley v. Tyson, 167-67. Guardian ad litem not taxed with costs; exception noted: Smith v. Smith, 108-365. Guardian ad litem has no power to agree to arbitration: Millsaps v. Estes, 137-535. Service of process on infants must be made on general guardian, if any: Chambers v. Penland, 78-53; also see section 483. No recovery against minor unless represented by guardian ad litem: Thorp v. Minor, 109-152—and when he refuses to act and defend, judgment void: Isler v. Murphy, 71-440; but see Tate v. Mott, 96-19, and cases therein cited. Not laches on part of plaintiff if he fail to move for appointment of guardian ad litem such as to work a discontinuance: Turner v. Douglas, 72-127. Where infant has no guardian or guardian ad litem, but defends by attorney, held that judgment valid until reversed or set aside by motion: White v. Morris,

107-92; *Harrison v. Harrison*, 106-282; *Tate v. Mott*, 96-25; *Burgess v. Kirby*, 94-580; *England v. Garner*, 90-197; *Turner v. Douglas*, 72-127; *Marshall v. Fisher*, 46-111; *White v. Albertson*, 14-341; see, also, *Rackley v. Roberts*, 147-201. Where infant not served with process nor guardian ad litem appointed, judgment irregular and may be set aside: *Larkins v. Bullard*, 88-35. Where infants in partition proceeding are served with summons and guardian ad litem appointed, a judgment affirming sale cannot be collaterally attacked for fraud: *Smith v. Gray*, 116-311.

APPOINTMENT OF GUARDIAN AD LITEM. Only after application in writing: *White v. Morris*, 107-92; *Ward v. Lowndes*, 96-367; *Morris v. Gentry*, 89-248—and after infant defendant has been personally served with summons, *Hughes v. Pritchard*, 153-135; *Roseman v. Roseman*, 127-494; *Coffin v. Cook*, 106-376; *Cates v. Pickett*, 97-21; *Hare v. Holloman*, 94-14; *Sumner v. Sessoms*, 94-371; *Stancill v. Gay*, 92-462; *Young v. Young*, 91-359; *Fry v. Currie*, 91-436; *Matthews v. Joyce*, 85-258; *Nicholson v. Cox*, 83-44; *Moore v. Gidney*, 75-34; *Turner v. Douglas*, 72-127; *Hyman v. Jarnigan*, 65-96; *Allen v. Shields*, 72-504; *Gulley v. Macy*, 81-356—but infant cannot accept service, *Nicholson v. Cox*, 83-44; *Bass v. Bass*, 78-374—yet if he does accept service it is cured after guardian appointed: *Cates v. Pickett*, 97-21; *Perry v. Adams*, 98-167. Improper for court to appoint a plaintiff as guardian ad litem: *Ellis v. Massenburg*, 126-129—even though a nominal plaintiff made party plaintiff without his consent, *Ibid.* Appointment of guardian ad litem nunc pro tunc disapproved: *Ibid.* Even a colorable interest adverse to infant held by guardian ad litem or attorney disqualifies for appointment: *Ellis v. Massenburg*, 126-134; *Moore v. Gidney*, 75-34. Where guardian ad litem with adverse interest is appointed and it appears that infants' rights not protected, judgment set aside: *Holt v. Ziglar*, 159-272; s. c., 163-390. Administrator may represent minor in ex parte proceeding, if no suggestion of unfairness: *Harris v. Brown*, 123-419. Guardian ad litem may be appointed in supreme court: *Perry v. Perry*, 175-141.

452. Appointment of guardian ad litem in actions begun by publication. In all actions and special proceedings wherever any of the defendants are infants, idiots, lunatics, or persons non compos mentis, and it shall become necessary to serve the summons on said infants, idiots, lunatics, or persons non compos mentis by publication, it shall not be necessary to await the completion of the service of summons by publication before moving for the appointment of a guardian ad litem for said infants, idiots, lunatics, or persons non compos mentis, but a guardian ad litem may be appointed on motion at the time of the issuance of the order of publication; and the service of a summons, with a copy of the complaint or petition, can be made on the guardian ad litem returnable on the same date as the infant defendants are required to appear in the notice of publication; and after ten days notice of said summons and complaint in special proceedings and after answer filed as prescribed in section 451 under this article, the court may proceed in the same cause to final judgment and decree therein, in the same manner as if there had been personal service upon the said infant, idiot, lunatic, or person non compos mentis, defendants, and any decree or judgment in the cause shall conclude the infant, idiot, lunatic, or person non compos mentis, defendants, as effectually as if he, or they, had been personally summoned.

1919, c. 246.

453. Guardian ad litem to file answer. When a guardian ad litem is appointed, he shall file an answer in the action or special proceeding, admitting or denying the allegations thereof. The costs and expenses of the answer, in all applications to sell or divide the real estate of said infants, shall be paid out of the proceeds

of the property, or in case of a division shall be charged upon the land if the sale or division is ordered by the court, and, if not ordered, in any other manner the court directs.

Rev., s. 407; Code, s. 182; 1870-1, c. 233, s. 4.

Guardian ad litem filing answer prepared at plaintiff's instance, infant defendant not concluded: *Gulley v. Macy*, 81-356; *Moore v. Gidney*, 75-34; *Holt v. Ziglar*, 159-272. Where guardian ad litem refused and failed to file answer; effect: *Isler v. Murphy*, 71-440; *Faison v. Hardy*, 114-61—after lapse of many years after coming of age, defendants not allowed to assert their right, *Williams v. Williams*, 94-732; see *Morris v. House*, 125-550.

454. Married women. When a married woman is a party, her husband must be joined with her, except that—

In actions based on contract section is modified by section 2507 ("Martin Act" of 1911), and in such actions husband need not now be joined, whether wife is defendant, *Lipinsky v. Revell*, 167-508 (not necessary nor proper party), or plaintiff, *Patterson v. Franklin*, 168-75. See, as to former law, *Harvey v. Johnson*, 133-352. Wife, whose husband alien and has never resided here, may be sued alone in contract: *Levi v. Marsha*, 122-565.

In action to recover property fraudulently conveyed to wife, husband must be joined: *Pender v. Mallett*, 123-57. Wife suable alone in tort when husband abandons her, *Heath v. Morgan*, 117-504, or in ejectment when husband alien, resides abroad, or has abandoned her, *Finley v. Saunders*, 98-462. Husband need not be joined, where wife consents to judgment which fixes no personal liability on her, *Roseman v. Roseman*, 127-494. Where husband refuses to become plaintiff, wife may make him defendant: *Barnes v. Barnes*, 104-617; *McGlennery v. Miller*, 90-215. When husband joined, though unnecessarily, he is prima facie wife's agent to control action; aliter when wife insane: *Craddock v. Brinkley*, 177-125. See sections 2520, 2521.

1. When the action concerns her separate property, she may sue alone.

Right of suing alone is a personal privilege: *Lippard v. Troutman*, 72-551. She may sue alone as to her separate property: *Sipe v. Herman*, 161-107; *Willis v. White*, 150-199; In re *Beauchamp's Will*, 146-254; *Hart v. Cannon*, 133-10; *Walker v. Long*, 109-510; *McGlennery v. Miller*, 90-215; *McCormac v. Wiggins*, 84-278; *Thompson v. Wiggins*, 109-508; *Whitfield v. Boyd*, 158-451, and cases following. She may sue alone for tort committed against her: *Strother v. R. R.*, 123-197; but see *Brown v. Brown*, 124-20; also, 121-8; regulated now by section 2513. She may sue alone in action for breach of promise of marriage: *Shuler v. Millsaps*, 71-297. She may sue for the probate of her father's will in solemn form without joining husband, if he is opposed: In re *Beauchamp's Will*, 146-254. A married woman can accept service of summons: *Nicholson v. Cox*, 83-44; *Godwin v. Monds*, 106-450. Where her real estate is to be bound by an action, she must be served with process personally: *Rowland v. Perry*, 64-578. In action for specific performance of a contract, she may sue alone: *Earnhardt v. Clement*, 137-91. She cannot bind herself by agreement to arbitrate the question of title of her land: *Smith v. Bruton*, 137-79. For seduction of infant daughter she can sue without husband when he is insane, how: *Abbott v. Hancock*, 123-99—and can sue without husband when he is nonresident: *Ibid.* For slander of wife, husband cannot bring action in his name alone: *Harper v. Pinkston*, 112-293.

2. When the action is between herself and her husband, she may sue or be sued alone.

Wife can sue husband alone as plaintiff: *Graves v. Howard*, 159-594; *McCormac v. Wiggins*, 84-278; *Manning v. Manning*, 79-293; *McGlennery v. Miller*, 90-215; *Robinson v. Robinson*, 123-137; *Perkins v. Brinkley*, 133-158.

In no case need she prosecute or defend by a guardian or next friend.
Rev., s. 408; Code, s. 178; C. C. P., s. 56.

455. Who may be plaintiffs. All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs except as otherwise provided.

Rev., s. 409; Code, s. 183; C. C. P., s. 60.

For rules as to parties plaintiff generally and in specific circumstances and proceedings, see section 446 and references, the sections of this article, and Index, s. v. "Parties." Nonresidents can sue in this state: *Thompson v. Tel. Co.*, 107-449. Wholly immaterial that uninterested party is made plaintiff along with real owner in action for debt: *Perkins v. Berry*, 103-131.

456. Who may be defendants. Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved. In an action to recover the possession of real estate, the landlord and tenant may be joined as defendants. Any person claiming title or right of possession to real estate may be made party plaintiff or defendant, as the case requires, to such action.

Rev., s. 410; Code, s. 184; C. C. P., s. 61.

Where defendant dies after verdict and before judgment, personal representative need not be made party in order to entitle plaintiff to judgment: *Beard v. Hall*, 79-506. In hearing of motion to revive dormant judgment, defendant cannot set up that he was not properly a party: *Smathers v. Sprouse*, 144-637. Action of court in refusing motion to make additional party defendant is not reviewable where such party is a proper but not a necessary party: *Aiken v. Mfg. Co.*, 141-339. Appeal from order making parties cannot be allowed to other parties who do not show that some substantial right of their own is thereby affected: *Emry v. Parker*, 111-261. Joinder of unnecessary parties immaterial, save only that it may affect question of costs: *Ormond v. Life Ins. Co.*, 145-140; *Rowland v. Gardner*, 69-53. Failure to join necessary parties is an error to which exception lies: *Ormond v. Ins. Co.*, 145-140.

INTEREST IN CONTROVERSY. Words construed: *Jones v. Asheville*, 116-817; *Garrison v. Cox*, 99-482; *Asheville v. Aston*, 92-588; *McDonald v. Morris*, 89-99; *Colgrove v. Koonce*, 76-363; *Wade v. Sanders*, 70-277. All persons who may have such interest or may be necessary to complete determination of question should be made parties: *Ryder v. Oates*, 173-569; and see *McKeel v. Holloman*, 163-132.

PROPER PARTIES DEFENDANT. In action to recover real property: *Walton v. Parish*, 95-259; *Bryant v. Kinlaw*, 90-341; *Harkey v. Houston*, 65-137; *Maddrey v. Long*, 86-383; *Swepson v. Johnson*, 84-449; *Keathley v. Branch*, 84-202; *Lytle v. Burgin*, 82-301; *Cecil v. Smith*, 81-285; *Rollins v. Rollins*, 76-264; *Batchelor v. Macon*, 67-181; *Isler v. Foy*, 66-547—to quiet title, *Swindell v. Smaw*, 156-1 (devisees after life estate)—to recover from bank money loaned on individual credit of stockholders, *Bank v. Coeke*, 127-467—in suit against bank for paying check after notice, *Spruill v. Bank*, 163-43 (payee of check)—to subject mortgaged property to lien of attachment, *Bear v. Cohen*, 65-511—to recover debt of partnership, *Heaton v. Wilson*, 123-398—to recover price of land bought by intestate, *Paschal v. Brandon*, 79-504—to recover damages to property where reversioner refuses to become party plaintiff, *Jones v. Asheville*, 116-817—to recover damages to land in suit by equitable owner, holder of legal title is proper defendant, *Mull v. R. R.*, 175-593—to set aside fraudulent assignment, *Hancock v. Wooten*, 107-9; *Cheatham v. Rowland*, 92-340—to recover from corporation damages for fraud of officers, *Mining Co. v. Smelting Co.*, 99-445—to restrain the enforcement of a judgment or the performance of an act as public agent, *Stout v. McNeill*, 98-1; *Lumber Co. v. Smith*, 146-199—to foreclose a mortgage, *Lee v. Giles*, 161-541; *Jones v. Williams*, 155-179; *Chadbourne v. Johnston*, 119-282; *Styers v. Alspaugh*, 118-631; *Vanstory v. Thornton*, 114-376; *Nimrock v. Scanlin*, 87-118—to recover on replevin bond where two bonds were taken with different sureties, *Smith v. Whitten*, 117-390—to recover damages for separate acts of several persons having like interest adverse to plaintiff, *Long v. Swindell*, 77-176; *Mode v. Penland*, 93-292; *Tate v. Bates*, 118-287; *Solomon v. Bates*, 118-311; *Caldwell v. Bates*, 118-323—to recover from the state, *Reeves v. State*, 93-257; *Martin v. Worth*, 91-45—to recover from city

for injury from defective street, *Gregg v. Wilmington*, 155-18 (person causing defect)—to collect from city fines and penalties going to school fund, *Bearden v. Fullam*, 129-477.

In a proceeding by legatees and distributees against administrator for account and settlement, *Carlton v. Byers*, 93-302—by creditors to sell land of intestate to pay debts, *Perkins v. Berry*, 103-131—in nature of creditor's bill to subject defendant's property to payment of debts, *LeDuc v. Brandt*, 110-289—by administrator to sell land for assets, *Tilley v. Bivins*, 112-348—for partition of intestate's land, *Garrison v. Cox*, 99-478; *Gregory v. Gregory*, 69-522—to lay off dower, *Parton v. Allison*, 111-429; *Welfare v. Welfare*, 108-272; *Carney v. Whitehurst*, 64-426; *Moore ex parte*, 64-90; *Avery ex parte*, 64-113—to recover on life insurance policy where company had paid the amount to certain beneficiaries, *Ormond v. Ins. Co.*, 145-140. In partition lienholders on any share are proper parties, *Holley v. White*, 172-77.

Joinder of corporation and receiver proper in an action for tort before appointment of receiver: *Hollowell v. R. R.*, 153-19. In an action for the appointment of receiver only those interested in business of corporation are proper parties: *Dailey v. Fertilizer Works*, 165-60. This section applies to proceedings under *Torrens Act*: *Mfg. Co. v. Spruill*, 169-618.

457. Joinder of parties; action by or against one for benefit of a class. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. When the question is one of a common or general interest of many persons, or where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Rev., s. 411; Code, s. 185; C. C. P., s. 62.

See annotations under section 446. Additional parties can be joined by amendment: *Isler v. Koonce*, 83-55; but see *Morehead v. R. R.*, 98-362; see, also, sections 460 and 547. Supreme court adjudging that others are necessary parties to final determination of matters involved, case will be remanded that they be brought in: *Kornegay v. Morris*, 123-128; *Finlayson v. Kirby*, 121-106. Where party objects to making himself plaintiff, and he is a necessary party, he is made defendant: *Plemmons v. Imp. Co.*, 108-614; *McCormac v. Wiggins*, 84-279. Court will not join creditors as plaintiffs in creditor's bill so as to cause original plaintiffs to lose preference: *Hancock v. Wooten*, 107-9; *LeDuc v. Brandt*, 110-289. Where parties are numerous one can sue or defend for all: *Merrimon v. Paving Co.*, 142-539; *Foster v. Hackett*, 112-554; *Bronson v. Ins. Co.*, 85-411; but see *Williams v. R. R.*, 144-502; *Syme v. Bunting*, 86-175; *Logan v. Wallis*, 76-416—but where one sues for all because it is impracticable to bring so many before the court, he must so allege, *Foster v. Hackett*, 112-554. Joining improper parties harmless error: *Carter v. R. R.*, 126-444; *Perkins v. Berry*, 103-131; *Rowland v. Gardner*, 69-53; *Wool v. Edenton*, 113-33; *McAlpine v. Daniel*, 101-550. Appeal from order making additional parties not allowed other parties who do not show that some substantial right of their own is thereby affected: *Emry v. Parker*, 111-261.

WHO ARE NECESSARY PARTIES. In proceeding to enforce mechanic's lien: *Lumber Co. v. Hotel Co.*, 109-658—to recover property held in common, *Allred v. Smith*, 135-451; *Thames v. Jones*, 97-121; *Gregory v. Gregory*, 69-522—to wind up partnership and distribute assets, *Smith v. Summerfield*, 108-284—against partnerships, *Heaton v. Wilson*, 123-398—to recover price of land bought by intestate, *Paschal v. Brandon*, 79-504—for partition of intestate's land, *Garrison v. Cox*, 99-478; *Gregory v. Gregory*, 69-522—to lay off dower, *Parton v. Allison*, 111-429; *Welfare v. Welfare*, 108-275; *Carney v. Whitehurst*, 64-426; *Moore ex parte*, 64-90; *Avery ex parte*, 64-113; see section 4105—to recover damages for separate acts of several persons having like interest adverse to plaintiff, *Long v. Swindell*, 77-176; *Solomon v. Bates*, 118-311; *Mode v. Penland*, 93-292; *Caldwell v. Bates*, 118-323; *Tate v. Bates*, 118-287; *Von Glahn v. Harris*, 73-323; *Von Glahn v. Savage*, 73-333; *Von Glahn v. DeRossett*, 76-292—to follow land conveyed by deceased in fraud of creditors, *Webb v. Atkinson*, 122-683—to determine disposition of proceeds of sale under trust deed, *Meadows v. Marsh*, 123-189—to recover money paid clerk for distributees, *Brooks v. Holton*, 136-306—to force delinquent stock-

holders to pay for stock so proceeds could be used to pay debts of corporation, *Bronson v. Ins. Co.*, 85-411; *Cooper v. Security Co.*, 122-463—to recover for various trespasses on several contiguous tracts, where ownership consolidated, *Brown v. Spivey*, 106-95—to recover assets of intestate with which to pay debts when administrator d. b. n. refuses to prosecute, *Wilson v. Pearson*, 102-290; *Clement v. Cozart*, 107-695; *Tuck v. Walker*, 106-285—to recover from personal representative of deceased executor where next of kin or legatees seek a settlement, *Hardy v. Miles*, 91-131—to restore lost records, *Cowles v. Hardin*, 79-577—to recover on fire insurance policy made to further secure mortgagee, *Proctor v. Ins. Co.*, 124-265—to foreclose mortgage: *Gammon v. Johnson*, 126-64; *Stancel v. Spain*, 133-76; *Patterson v. Mills*, 121-258; *Chadbourne v. Johnston*, 119-282; *LeDuc v. Brandt*, 110-289; *Fraser v. Bean*, 96-327; *Hughes v. Hodges*, 94-56; *Hinson v. Adrian*, 86-61; *Pullen v. Heron Mining Co.*, 71-567; *Fidelity Assn. v. Lash*, 135-405; *Jones v. Williams*, 155-179; *Geitner v. Jones*, 173-591—to remove trustees for unfaithfulness and incompetency and compel the conveyance by them of trust property, *Nash v. Sutton*, 109-550—to enforce provisions of trust estate in land after trustee dead, *Graves v. Trueblood*, 96-495—by legatees to secure a fund where there is a devise over, *Peacock v. Harris*, 85-146—to test the validity of a will, *Hutson v. Sawyer*, 104-1; *Collins v. Collins*, 125-98—by creditors to sell land of intestate to pay debts, *Perkins v. Berry*, 103-131; *Wall v. Fairley*, 77-105; *Webb v. Atkinson*, 122-683—in the nature of creditor's bill to subject defendant's property to payment of debts, *LeDuc v. Brandt*, 110-289—by administrator to sell intestate's land to pay debts, *Tilley v. Bivins*, 112-348; see *Webb v. Atkinson*, 122-683, also annotations under section 74—to recover land, *Burnett v. Lyman*, 141-500; *Hughes v. Gay*, 132-50; *McAlpine v. Daniel*, 101-550; *Arrington v. Arrington*, 114-120; *Ten Broeck v. Orchard*, 74-409; see section 446—to subject unpaid subscription to corporate stock to payment of corporate debts, *Cooper v. Security Co.*, 122-463—to recover against trespasser upon land of cotenants: *Lenoir v. Mining Co.*, 113-513; *Moody v. Johnson*, 112-804; *Foster v. Hackett*, 112-546—to set aside fraudulent conveyances of several tracts of land made by debtor, *LeDuc v. Brandt*, 110-289; *Bank v. Harris*, 84-206—to recover land sold by sheriff under execution and for the execution of a deed, *McMillan v. Edwards*, 75-81—to recover penalty for sheriff making false return, *Peebles v. Newsome*, 74-473—to recover public office, *Foard v. Hall*, 111-369; *Tuck v. Hunt*, 73-24; *People v. Hilliard*, 72-169—to enjoin sale under mortgage: *Gaster v. Hardie*, 75-460—to compel a trustee to collect a bond, *Oliver v. Wiley*, 75-320. In action against officers of bankrupt corporation for conversion of funds held by them in trust for plaintiff, neither corporation nor trustee in bankruptcy is necessary party: *Chemical Co. v. Floyd*, 158-455. Action by purchaser from mortgagor to redeem: *Elliott v. Brady*, 172-828.

458. Persons severally liable. Persons severally liable upon the same obligation, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff.

Rev., s. 412; Code, s. 186; C. C. P., s. 63.

Where suit is brought against part of sureties on two official bonds; allowable: *Syme v. Bunting*, 86-175. Cause of action in which several are jointly liable cannot be joined with one in which only part of them are liable: *Logan v. Wallis*, 76-416. Plaintiff can sue any endorser without joining the maker or other endorser: *Bank v. Carr*, 130-479, also 121-113; *Moore v. Carr*, 123-426; *Bank v. Lumber Co.*, 123-26. Where one endorses a note after judgment on it, cannot be joined with maker and previous endorser: *Wooten v. Maultsby*, 69-462. Note is merged into the judgment on the note, but where sureties not made parties their liability still exists: *Bank v. Lumber Co.*, 123-24.

459. Persons jointly liable. In all cases of joint contracts of partners in trade or others, suit may be brought and prosecuted against all or any number of the persons making such contracts.

Rev., s. 413; Code, s. 187; R. C., c. 31, s. 84; 1871-2, c. 24, s. 1.

See *Merwin v. Ballard*, 65-168. Under the Code of Civil Procedure all contracts are several in legal effect, although joint in form: *Ruffy v. Claywell*, 93-308. A creditor has the right to pursue his remedy against all or any of the partners: *Hastein v. Johnson*, 112-254; *Daniel v. Bethell*, 167-218. Proper method to enforce liability of those not made defendants is by

a new action against them: *Davis v. Sanderlin*, 119-84. Action against members of joint-stock company same as action against partners as far as joinder of members concerned: *Bain v. Loan Assn.*, 112-248. See section 497.

460. **New parties by order of court; intervener.** The court either between the terms, or at a regular term, according to the nature of the controversy, may determine any controversy before it, when it can be done without prejudice to the rights of others, but when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in. When in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in its subject matter, applies to the court to be made a party, it may order him to be brought in by the proper amendment. A defendant against whom an action is pending upon a contract or for specific real or personal property, upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property without collusion with him, may at any time before answer apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property or its value to such person as the court directs. The court may make such an order.

Rev., s. 414; Code, s. 189; C. C. P., s. 65.

For necessary and proper parties, see this article, *passim*—demurrer for defect of parties, see section 511—intervention in attachment, see section 829—in claim and delivery, see section 840—section construed with sections 446, 461, when: *Burnett v. Lyman*, 141-500.

INTERVENERS IN ACTIONS. Right to intervene given to outsiders having interest in controversy: *Jones v. Asheville*, 116-817; *Asheville Div. v. Aston*, 92-588; *Colgrove v. Koonce*, 76-363; *Wade v. Saunders*, 70-270; *Sims v. Goettle*, 82-268. Not allowed after final judgment, *Sanders v. May*, 173-47. Intervener held not entitled to attorney's fees, *Knights of Honor v. Selby*, 153-203. Party interpleading must stand indifferent between the litigants: *Ibid.*; *Van Dyke v. Ins. Co.*, 174-78. Wife can intervene and defend in action of ejectment brought against husband: *Taylor v. Apple*, 90-343; *Cecil v. Smith*, 81-285; *Young v. Greenlee*, 82-346. Person can intervene and assert title to property in a proceeding supplementary to execution: *Munds v. Cassidey*, 98-558. The right to intervene given by this section applies to properly constituted cases in court only: *Milliken v. Fox*, 84-109; *Bates v. Lilly*, 65-232; *Dewey v. White*, 65-225. Execution creditors can come in under this section and have disposition of fund determined: *Fox v. Kline*, 85-173; *Dewey v. White*, 65-225. Intervener as to personal property controversy loses his right by delay of three years after notice of action: *Clemmons v. Hampton*, 70-534. A party may intervene when he has an interest in the controversy, but not when he has only an interest in the thing which is the subject of the controversy: *Asheville Div. v. Aston*, 92-588; *Colgrove v. Koonce*, 76-363; *Wade v. Saunders*, 70-270. In partition proceedings, the personal representative of ancestor cannot be allowed to intervene and ask to sell land for assets: *Garrison v. Cox*, 99-478. Landlord let in to defend an action of ejectment is not restricted to his tenant's defenses: *Isler v. Foy*, 66-547; *Maddrey v. Long*, 86-383. How landlord's application must be framed, see *Bryant v. Kinlaw*, 90-337. Where creditor wants to be made a plaintiff in action by one creditor for all; requirements, etc.: *Isler v. Murphy*, 76-52. Motion to intervene will be denied when useless or calculated to obstruct justice: *Bird v. Gilliam*, 125-76. Joint owner with defendant of land the subject of litigation has a right, upon affidavit, to be let in as party defendant: *Lytle v. Burgin*, 82-301. Separate trial allowed intervener when the court deems best: *Cotton Mills v. Weil*, 129-452. Distributees cannot intervene in a motion by administrator to set aside a judgment for irregularity: *McLeod v. Graham*, 132-473. Intervener is entitled to only one issue, and that is, "Does the fund belong to him?": *Maynard v. Ins. Co.*, 132-711. When plaintiff takes nonsuit, action continues as to intervener: *Dawson v. Thigpen*, 137-462. One refused the right to intervene

or become a party can appeal: *Rollins v. Rollins*, 76-264; *Keathly v. Branch*, 84-202. Creditor allowed to intervene in proceeding for widow's dower: *Welfare v. Welfare*, 108-272. A creditor can intervene in action to vacate corporate charter: *Atty. Gen. v. Simonton*, 78-57. Where both plaintiff and third party claim to be landlord of tenant, such third party has the right to be let in as party defendant: *Rollins v. Rollins*, 76-264. No person claiming land adversely to both plaintiff and defendant should be allowed to be made a party: *McDonald v. Morris*, 89-99; *Colgrove v. Koonce*, 76-363; *Asheville Div. v. Aston*, 92-588. The burden is always on the intervener to establish title: *Cotton Mills v. Weil*, 129-452; *Redman v. Ray*, 123-502; *Wallace v. Robeson*, 100-206. Interpleader in summary ejection in magistrate's court: *Cheek v. Sykes*, 126-210. Tort judgment creditor cannot intervene in the foreclosure of mortgage executed by a corporation: *Williams v. R. R.*, 126-918. Insurance company can intervene in action against railway for negligent burning: *Dobson v. Rwy.*, 129-290.

ADDITIONAL PARTIES BY ORDER OF COURT. No appeal from refusal to make additional party defendant: *Aiken v. Mfg. Co.*, 141-339; *Jarrett v. Gibbs*, 107-304; *Henderson v. Graham*, 84-496; it is within the discretion of the court: *Belding v. Archer*, 131-287. Appeal from order making additional parties is premature: *Etehison v. McGuire*, 147-388; *Bennett v. Shelton*, 117-103; *Emry v. Parker*, 111-261; *Lane v. Richardson*, 101-181. Motion to make additional parties not allowed after adverse verdict: *Styers v. Alspaugh*, 118-631. Case remanded by supreme court to make interested persons parties: *Meadows v. Marsh*, 123-189. Supplemental pleading required from new parties only when previous record does not show their interest in the controversy: *Hughes v. Hodges*, 94-56. Person claiming interest in land sought to be partitioned or sold for assets should be made a party, and he comes in as if an intervener and must establish his claim: *McKeel v. Holloman*, 163-132.

Where a third person demands from the defendant the property sued for, the defendant may ask that such person be substituted as a party defendant, and that he be allowed to surrender the property to the court and be discharged from liability: *Maynard v. Ins. Co.*, 132-711; *Johnson v. Ins. Co.*, 157-106. In an action against a city for damages due to obstruction caused by a third person, it is error to refuse to allow him to be made a party: *Guthrie v. Durham*, 168-573. Where action against A and B before a justice was dismissed as to A and judgment given against B, it is error to have A made a party on appeal to the superior court: *Morgan v. Benefit Society*, 167-262.

461. Abatement of actions. 1. No action abates by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survives, or continues. In case of death, except in suits for penalties and for damages merely vindictive, or in case of marriage or other disability of a party, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued, by, or against, his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.

See sections 159 and 162, as explained in *Watts v. Vanderbilt*, 167-567. After death of party or transfer of interest in an action for land, there is no abatement if cause survives. There can be no judgment without substitution or joinder of representative or grantee: *Burnett v. Lyman*, 141-500; *Moore v. Moore*, 151-555.

Abatement of action for assault and battery when plaintiff dies: *Bolick v. R. R.*, 138-370; *Hannah v. R. R.*, 87-351—for damages for tort of wife when wife dies, *Roberts v. Lisenbee*, 86-136—for personal injuries when plaintiff dies, *Harper v. Comrs.*, 123-118; *Hannah v. R. R.*, 87-351—for recovery of custody of children when respondent dies, *Brown v. Rainor*, 108-204—for penalty on official bond when officer dies, *Wallace v. McPherson*, 139-297—for recovery of damages for mental anguish, *Morton v. Tel. Co.*, 130-299.

No abatement of action for recovery of land by conveyance of the same: *Burnett v. Lyman*, 141-500; *Talbert v. Becton*, 111-543; *Davis v. Higgins*, 92-203—for recovery of damages for breach of promise of marriage when defendant dies, *Allen v. Baker*, 86-92; *Shuler v. Millsaps*, 71-297—for recovery of damages for wrongful death when defendant dies, *Collier v. Arrington*,

61-356; see, also, sections 160 and 161—for recovery on official bond, *Davenport v. McKee*, 98-500—for recovery of damages on contract, *Miller v. Leach*, 95-229—for recovery of sick benefit on death of member entitled, *Kelly v. Trimont Lodge*, 154-97—for damages for waste when life tenant dies, *Shields v. Lawrence*, 72-43—for damages for conversion, *Sledge v. Reid*, 73-440—for trespass, on death of plaintiff, *Rowe v. Lumber Co.*, 133-433—for foreclosure of mortgage, on death of mortgagee, *Hughes v. Gay*, 132-50—for recovery of land, on death of party, *Hughes v. Gay*, 132-50; *Rogerson v. Leggett*, 145-7; *Moore v. Moore*, 151-555.

2. After a verdict is rendered in any action for a wrong, the action does not abate by the death of a party.

Judgment against a dead man is irregular and voidable; in favor of a dead man is not void, nor on that account irregular: *Wood v. Watson*, 107-52; *Everett v. Reynolds*, 114-366; *Lynn v. Lowe*, 88-481; *Beard v. Hall*, 79-506.

3. At any time after the death, marriage, or other disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it directs and upon application of any person aggrieved, may order that the action be abated, unless it is continued by the proper parties, within a time to be fixed by the court, not less than six nor more than twelve months from the granting of the order.

Where right survives, action does not abate by death of party, except by order of court: *Burnett v. Lyman*, 141-500; *Moore v. Moore*, 151-555. The question of abatement under this subsection entirely in the discretion of court for the promotion of justice, see *Coggins v. Flythe*, 114-275; *Baggarly v. Calvert*, 70-688. Order of court directing continuance of an action upon death of unnecessary party will not be reviewed: *Jaffray v. Bear*, 98-58. Effect of delay for eight years in making order of abatement: *Rogerson v. Leggett*, 145-7.

4. No action against a receiver of a corporation abates by reason of his death, but, upon suggestion of the facts on the record, it continues against his successor, or against the corporation in case a new receiver is not appointed.

Rev., s. 415; Code, s. 188; 1901, c. 2, s. 85; C. C. P., s. 64; R. C., c. 1, s. 4; c. 46, s. 43.

462. Procedure on death of party. When party to an action in the superior court dies pending the action, his death may be suggested before the clerk of the court where the action is pending, during vacation. It is then the duty of the clerk to issue a summons to the party who succeeds to the rights or liabilities of a deceased defendant, commanding him to appear before him on a day named in the summons, which must be at least twenty days after its service, and answer the complaint, and the issue joined by the filing of the answer stands for trial at the succeeding term of the superior court. It is the duty of the clerk to issue a notice to the party succeeding to the rights of a deceased party who will be necessary to the prosecution of the action to final judgment to appear and become party plaintiff; and if the party made plaintiff files an amended complaint, the defendant has twenty days after notice of same in which to file an answer thereto, and the issue thus made up stands for trial at the succeeding term.

Rev., ss. 416, 417, 418; 1887, c. 389.

For substitution of administrator d. b. n. or c. t. a., see section 155. Adverse party should suggest the death: *Wood v. Watson*, 107-52; and upon such suggestion it is the duty of the clerk to issue summons to representative or successor of deceased plaintiff or defendant: *Rogerson v. Leggett*, 145-7. Failure of party for one year after adverse party's death to cause issuance and service of notice provided for in section 461 (1) will not work a discontinuance, since sections 480 and 481 are not applicable: *Ibid.* Where in an action begun against A, B was substituted as defendant in capacity of A's administrator and assumed the defense, regu-

larity of his admission as a party sufficiently appears, though the death of A does not appear upon the record: *Alexander v. Patton*, 90-557.

Death of defendant suggested, executor substituted: *Grant v. Bell*, 91-495. Clerk may order infants made defendants and appoint guardian ad litem: *Lowe v. Harris*, 121-287. In trespass, where one of two plaintiffs dies, his administrator should be joined, and not his devisee: *Rowe v. Lumber Co.*, 133-433. Clerk may make administrator party where plaintiff dies after appeal taken but before it is docketed: *Martin v. Martin*, 162-41.

SUBCHAPTER IV. VENUE

ART. 7. VENUE

463. Where subject of action situated. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in the cases provided by law:

Venue in criminal actions, see section 4606. Venue is under control of the legislature: *State v. Woodard*, 123-710; *Cooperage Co. v. Lumber Co.*, 151-455.

Wrong venue: remedies for, see section 470, etc.; waived unless objection in apt time: *McCullen v. R. R.*, 146-568. Cannot be taken advantage of by demurrer: *Ibid.*

Local and transitory actions distinguished: *Perry v. R. R.*, 153-117; *Brady v. Brady*, 161-324; *Cedar Works v. Lumber Co.*, 161-603 (for conversion of timber transitory, for damage to the land local). Section simply referred to, *Whitford v. Ins. Co.*, 156-42.

1. Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

See section 470, which applies to actions concerning real estate as well as personalty: *Lafoon v. Shearin*, 91-370. For recovery of an interest or estate in real property: *Lucas v. Railway*, 121-506; *Askew v. Bynum*, 81-350; *Springer v. Colwell*, 116-524. Injunction to prevent secretary of state from issuing grant to land: *McNamee v. Alexander*, 109-242. Action to declare grant void: *Hardwood Co. v. Waldo*, 161-196. Action for damages for breach of covenant of seizin and right to convey is not within this subsection, being a personal action: *Eames v. Armstrong*, 136-392; *Phillips v. Holmes*, 71-250. A docketed judgment creating a lien on land is not within this subsection, being no interest in land: *Baruch v. Long*, 117-509. Oysters severed from the bed are not real property, and action for wrongful conversion need not be tried where beds are located: *Makely v. Booth Co.*, 129-11—nor is timber cut from land an interest in realty, *Ibid.* For laying off dower: *Askew v. Bynum*, 81-350. Action on note secured by land mortgage need not be brought where land lies: *Max v. Harris*, 125-345. Action for injury to real property: *Cedar Works v. Lumber Co.*, 161-603; *Perry v. R. R.*, 153-117; *Cooperage Co. v. Lumber Co.*, 151-455; except where injury arises from conduct of municipal officers within the county: *Cecil v. High Point*, 165-431. Action for deed held in escrow: *Bridgers v. Ormond*, 148-375. Action to set aside deed for fraud: *Wofford v. Hampton*, 173-686. Action for damages for deficiency in acreage conveyed not local: *Griffin v. Barrett*, 176-473. Action for specific performance of contract to purchase land: *Councill v. Bailey*, 154-54; *Fralely v. March*, 68-160.

2. Partition of real property.

See section 3213, etc., for Partition.

3. Foreclosure of a mortgage of real property.

Subsection applied: *Connor v. Dillard*, 129-50; *Fralely v. March*, 68-160. Suit to have notes pledged as collateral sold is not suit for foreclosure, though the pledged note is secured by mortgage on land: *Warren v. Herrington*, 171-165. Action by vendor against vendee to enforce payment by sale of land: *Councill v. Bailey*, 154-54.

4. Recovery of personal property.

Whether subsection applies to all personal property actions or merely where claim and delivery resorted to, see *Brown v. Cogdell*, 136-32; *Woodard v. Sauls*, 134-274; *Mfg. Co. v. Brower*, 105-440; *Connor v. Dillard*, 129-50; *Smithdeal v. Wilkerson*, 100-52. Where recovery of personalty not the sole or chief relief demanded, subsection not applicable: *Piano Co. v. Newell*, 177-533; *Clow v. McNeill*, 167-212. An action to set aside a transfer of personal property and appoint a receiver is not an action for recovery of personal property: *Baruch v. Long*, 117-509. Where three causes of action set out, one of which is for the recovery of personalty, case removed to county where such property situated: *Edgerton v. Gaines*, 142-223.

Rev., s. 419; Code, s. 190; 1889, c. 219; C. C. P., s. 66.

464. Where cause of action arose. Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:

Seemingly, this section inapplicable to magistrates' courts: *Fisher v. Bullard*, 109-574; but see *Dixon v. Haar*, 158-341. This section embodies a general rule as to venue; section 468 is exception: *Hannon v. Power Co.*, 173-520. Section referred to as not applying: *Whitford v. Ins. Co.*, 156-42.

1. Recovery of a penalty or forfeiture, imposed by statute; except that, when it is imposed for an offense committed on a sound, bay, river, or other body of water, situated in two or more counties, the action may be brought in any county bordering on such body of water, and opposite to the place where the offense was committed.

Action for penalty: *McCullen v. R. R.*, 146-568. Action for false return of sheriff: *Watson v. Mitchell*, 108-364. This subsection as to penalties not applicable to magistrates' courts: *Fisher v. Bullard*, 109-574; but see *Dixon v. Haar*, 158-341. An action for penalty against a foreign corporation may be brought in the county in which cause arose or where plaintiff resides: *Allen-Fleming Co. v. Rwy.*, 145-37; see section 467.

2. Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer.

Actions against county commissioners must be brought in county of which they are commissioners: *Comrs. v. Comrs.*, 70-657; *Steele v. Comrs.*, 70-137; *Jones v. Comrs.*, 69-412; *Alexander v. Comrs.*, 67-330; *Johnston v. Comrs.*, 67-101; against register of deeds for issuing license, *Dixon v. Haar*, 158-341. Actions for false imprisonment: *Shaver v. Huntley*, 107-623. Where same property taxed in two counties, owner may sue to restrain collection in either: *Sherrod v. Dawson*, 154-525. Action against obligors in indemnifying bond is not an action against one who by sheriff's "command or in his aid" does anything touching his duties: *Harvey v. Brevard*, 98-93. Actions against cities and towns: *Jones v. Statesville*, 97-86; *Light Co. v. Comrs.*, 151-558; *Cecil v. High Point*, 165-431. Referred to casually in *Phillips v. Holmes*, 71-252.

Rev., s. 420; Code, s. 191; C. C. P., s. 67.

465. Official bonds, executors and administrators. All actions upon official bonds or against executors and administrators in their official capacity must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county.

Rev., s. 421; Code, s. 193; 1868-9, c. 258.

Actions against personal representative on his bond: *Alliance v. Murrell*, 119-124; *Wood v. Morgan*, 118-749; *Foy v. Morehead*, 69-512; *Bidwell v. King*, 71-287; *Stanley v. Mason*, 69-1. Action against administrator for settlement of estate: *Thomas v. Ellington*, 162-131. Action by executor for settlement of estate: *Perry v. Perry*, 172-62. Where administrator

gave bond and qualified in one county, but died in another and his administratrix qualified there; suit on bond of administrator, where brought, see *Clark v. Peebles*, 100-348. Guardian bond is within the provisions of this section: *McNeill v. Currie*, 117-341; *Clarke v. Peebles*, 100-348; *Cloman v. Staton*, 78-235. Where personal representative sued as to execution of a trust committed to him in a will: *Roberts v. Connor*, 125-45. Where executor continuing the business of intestate as a private banker is sued as banker, it is not the executor sued, but the bank, and this section does not apply: *Roberts v. Connor*, 125-45. Action to construe a will: *Devereux v. Devereux*, 81-12. Section not applicable to actions brought by executors and administrators: *Whitford v. Ins. Co.*, 156-42; *Hannon v. Power Co.*, 173-520—nor to actions for service rendered to administrator personally, *Craven v. Munger*, 170-424.

466. Domestic corporations. For the purpose of suing and being sued the principal place of business of a domestic corporation is its residence.

Rev., s. 422; 1903, c. 806.

This section nullifies the decisions of *Cline v. Mfg. Co.*, 116-837, and *Alliance v. Murrell*, 119-125, and like cases holding that a domestic corporation can be sued by a nonresident anywhere in the state. The "principal place of business" is the place the charter designates, the corporation having no power to change it: *Garrett v. Bear*, 144-23. Applicable to domestic corporations: *Roberson v. Lumber Co.*, 153-120; *Rackley v. Lumber Co.*, 153-171; *Wofford v. Hampton*, 173-686; *R. R. v. Spencer*, 166-522. Section to be construed with section 469: *Rackley v. Lumber Co.*, 153-171.

467. Foreign corporations. An action against a corporation created by or under the law of any other state or government may be brought in the superior court of any county in which the cause of action arose, or in which the corporation usually did business, or has property, or in which the plaintiffs, or either of them, reside, in the following cases:

1. By a resident of this state, for any cause of action.
2. By a nonresident of this state in any county where he or they are regularly engaged in carrying on business.
3. By a plaintiff, not a resident of this state, when the cause of action arose or the subject of the action is situated in this state.

Rev., s. 423; Code, s. 194; C. C. P., s. 361; 1876-7, c. 170; 1907, c. 460.

Section applied: *Cedar Works v. Lumber Co.*, 161-603; *Ange v. Woodmen*, 171-40; *Hannon v. Power Co.*, 173-520. See *Allen-Fleming Co. v. Rwy.*, 145-37; *Goodwin v. Clayton*, 137-224; *Brown v. Western Union*, 133-603; *Howard v. Ins. Co.*, 125-53; *Shields v. Ins. Co.*, 119-386.

REMOVAL TO FEDERAL COURT. Though not concerned with this section, cases in the North Carolina Supreme Court dealing with the right of a foreign corporation sued here to remove case to federal court are collected here.

Grounds for removal: *Tucker v. Life Assn.*, 112-796; *Tate v. Douglas*, 113-190; *Springer v. Sheets*, 115-370; *Dobson v. R. R.*, 129-289; *Staton v. R. R.*, 144-135; *Tobacco Co. v. Tobacco Co.*, 144-352; *Herrick v. R. R.*, 158-307; *Gurley v. Power Co.*, 173-447. One of two defendants nonresident, as ground for removal: *Lawson v. R. R.*, 112-390; *Faison v. Hardy*, 114-329; *McCulloch v. R. R.*, 149-305. Divisibility of action against joint tort-feasors: *Bowley v. R. R.*, 110-315; *Staton v. R. R.*, 144-135; *Hough v. R. R.*, 144-692; *White v. R. R.*, 146-340. Fraudulent joinder of resident defendant: *Fore v. Tanning Co.*, 175-583; *Patterson v. Lumber Co.*, 175-90; *Hollifield v. Tel. Co.*, 172-714; *Lloyd v. R. R.*, 166-24; *Rea v. Mirror Co.*, 158-24; *Davis v. Rexford*, 146-418; *Hough v. R. R.*, 144-692. Consolidation of foreign and domestic corporations: *Cox v. R. R.*, 166-652; *Staton v. R. R.*, 144-135. See *Coal Co. v. R. R.*, 144-732; *Hurst v. R. R.*, 162-368.

General rules governing removal: *Cogdill v. Clayton*, 170-526. Petition for removal: *Pruett v. Power Co.*, 165-416; *Smith v. Quarries Co.*, 164-338; *Rea v. Mirror Co.*, 158-24 (verification); *Higson v. Ins. Co.*, 153-35; *Corp. Com. v. R. R.*, 135-89; *Lewis v. S. S. Co.*, 131-652; *Springs v. R. R.*, 130-186; *Bradley v. R. R.*, 119-744; *Baird v. R. R.*, 113-603; *Lawson v. R. R.*, 112-390; *Herndon v. Ins. Co.*, 108-648. Filing petition: *Pruett v. Power Co.*, 165-416; s. c., 167-598;

Garrett v. Bear, 144-23; Riley v. Pelletier, 134-314; Meeke v. Mineral Co., 122-790; Howard v. R. R., 122-944; Williams v. Tel. Co., 116-558. Extension of time to answer, objected to by defendant, extends time to file petition: Hyder v. R. R., 167-584; but see Meeke v. Mineral Co., 122-790. But extension of time consented to is waiver of right to remove: Patterson v. Lumber Co., 175-90; Dills v. Fiber Co., 175-49; see, also, Garrett v. Bear, 144-23; Bryson v. R. R., 141-594; Howard v. R. R., 122-952; Riley v. Pelletier, 134-316.

A proceeding before the corporation commission for change in depot is not a "suit" to be subject to removal: Corporation Com. v. R. R., 151-447. The state court retains control until the petition shows right to remove: *Ibid.* But upon removal the federal court has entire control: Harrison v. Allen, 152-720. Jurisdictional amount for removal: *Ibid.*; Corp. Com. v. R. R., 151-447. Petition and bond for removal should be filed at term: Higson v. Ins. Co., 153-35.

468. Actions against railroads. In all actions against railroads the action must be tried either in the county where the cause of action arose or where the plaintiff resided at that time, or in some county adjoining that in which the cause of action arose, subject to the power of the court to change the place of trial as provided by statute.

Rev., s. 424.

Enacted in 1905 as proviso to section 469: Propst v. R. R., 139-397. Scope of enactment: Propst v. R. R., 139-397; Watson v. R. R., 152-215; Rackley v. Lumber Co., 153-171; Forney v. R. R., 159-157; Allen-Fleming Co. v. R. R., 145-37. Applies where railroad alone is party, not where others are joined with railroad: Smith v. Patterson, 159-138. "Residence" of administrator suing for decedent's death: Watson v. R. R., 152-215.

469. Venue in all other cases. In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement; or if none of the defendants reside in the state, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the state, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute.

Rev., s. 424; Code, s. 192; C. C. P., s. 68; 1868-9, cc. 59, 277; 1905, c. 367.

Section is exception to general rule laid down in section 464: Hannon v. Power Co., 173-520—construed with section 466, Rackley v. Lumber Co., 153-171. "Parties" referred to here are parties of record: Rankin v. Allison, 64-673. Locus at commencement of action determines venue: Hannon v. Power Co., 173-520. Residence of parties to contract presumed to be place where contract made: Taylor v. Sharp, 108-377. Action for breach of covenant tried where plaintiff or defendant resides: Phillips v. Holmes, 71-250; Eames v. Armstrong, 136-392. "Where plaintiff resides" in action by administrator interpreted: Smith v. Patterson, 159-138—in action by receiver, Biggs v. Bowen, 170-34. Administrator's suit on decedent's policy of life insurance in county of administrator's residence: Whitford v. Ins. Co., 156-42. Action against administrator for services rendered to him in management of estate controlled by this section: Craven v. Munger, 170-424. Effect on venue of nol. pros. taken as to part of defendants: Harvey v. Rich, 98-95.

470. Change of venue. If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

For removal to federal court, see annotations under section 467. In criminal actions wrong venue ground for plea in abatement, section 4606. How demand made and when heard: Alliance v. Murrell, 119-124. Motion must be made before judge: Howard v. R. R., 122-944—before clerk in vacation invalid, Riley v. Pelletier, 134-316; see Garrett v. Bear, 144-26.

Failure to demand change of venue in apt time is waiver of right: *McArthur v. Griffith*, 147-545; *Allen-Fleming Co. v. R. R.*, 145-37; *Garrett v. Bear*, 144-26; *Cooper v. Cooper*, 127-492; *Herring v. Pugh*, 126-852; *Hines v. Vann*, 118-7; *McNeill v. Currie*, 117-346; *Baruch v. Long*, 117-509; *Cherry v. Lilly*, 113-27; *Bd. of Education v. Bd. of Education*, 106-81; *Morgan v. Bank*, 93-355; *Lafoon v. Shearin*, 91-370; *Devereux v. Devereux*, 81-12; *Cloman v. Staton*, 78-236; *McMinn v. Hamilton*, 77-300. Pleading to merits waives defective venue: *Brown v. Harding*, 170-253; s. c., 171-686; *Morgan v. Bank*, 93-352; *McMinn v. Hamilton*, 77-300. Motion for change must be before time for answering expires: *Garrett v. Bear*, 144-26; *Lafoon v. Shearin*, 91-370; *Lucas v. R. R.*, 121-506; s. c., 122-937; *Shaver v. Huntley*, 107-623; *Trustees v. Fetzer*, 162-245.

Injunction granted without objection out of district waives objection to venue: *Cooper v. Cooper*, 127-492. An agreement to extend time of answering waives the right to remove: *Garrett v. Bear*, 144-26—though under second subsection motion to remove can be made at any time during progress of cause, *Riley v. Pelletier*, 134-316. Appeal may be taken from refusal of a motion to remove hereunder when in writing and in apt time: *Brown v. Cogdell*, 136-33; *Mfg. Co. v. Brower*, 105-440; *Jones v. Statesville*, 97-86; *Connor v. Dillard*, 129-50; *Roberts v. Connor*, 125-45. Where defect in record on removal of cause, proper method of amendment outlined: *State v. Swepson*, 81-571. The statutory expression, "may" change the place of trial, means "must" change it: *Mfg. Co. v. Brower*, 105-440; *Jones v. Statesville*, 97-86. One defendant cannot object to the wrong venue as to the other defendant: *Allen-Fleming Co. v. R. R.*, 145-37. Findings of fact by court on motion for removal are conclusive: *Watson v. R. R.*, 152-215. Prayer by defendant in answer to stay proceeding until action in another county determined not demand for removal: *McArthur v. Griffith*, 147-545. Section applied in action by domestic corporation: *R. R. v. Spencer*, 166-522. Motion for change refused by magistrate allowed by superior court on appeal: *Dixon v. Haar*, 158-341.

The court may change the place of trial in the following cases:

1. When the county designated for that purpose is not the proper one.

If not proper county, semble, judge may remove *ex mero motu*: *Cloman v. Staton*, 78-236. Defendant may demand removal or he may move to dismiss: *Stanley v. Mason*, 69-1; *Jones v. Comrs.*, 69-412. See *Cloman v. Staton*, 78-236; *Dixon v. Haar*, 158-341, that action should be removed and not dismissed.

2. When the convenience of witnesses and the ends of justice would be promoted by the change.

Removal hereunder lies in discretion of court: *Eames v. Armstrong*, 136-392; *Belding v. Archer*, 131-287; *Lassiter v. R. R.*, 126-507; *Craven v. Munger*, 170-424; *Oettinger v. Livestock Co.*, 170-152; *Ludwick v. Mining Co.*, 171-60. Time for motion to remove under subsection: *Riley v. Pelletier*, 134-316; *Lassiter v. R. R.*, 126-507. No hearing or determination of an action or of motion in a cause outside of county where action pending, except by consent: *McNeill v. Hodges*, 99-248; *Godwin v. Monds*, 101-354; *Skinner v. Terry*, 107-103—but this does not apply to applications for restraining orders, injunctions and receivers: *Ledbetter v. Pinner*, 120-457; *McNeill v. Hodges*, 99-249; see, also, sections 843, 851-853, 859, 860—nor to orders in proceedings for examination of parties, *Ledbetter v. Pinner*, 120-457; *Fertilizer Co. v. Taylor*, 112-141; see, also, sections 900-902—nor to any ancillary remedy, *Parker v. McPhail*, 112-502—nor to special proceedings nor appeals from clerk, *Ledbetter v. Pinner*, 120-457. No appeal from refusal of judge to remove under this subsection: *Lassiter v. R. R.*, 126-507. After removal hereunder, if no transcript docketed at first term of county to which removed, order may be stricken out: *Cline v. Mfg. Co.*, 116-837.

3. When the judge has, at any time, been interested as party or counsel.

See *Carter v. R. R.*, 68-346.

Rev., s. 425; Code, s. 195; C. C. P., s. 69; R. C., c. 31, ss 115, 118; 1870-1, c. 20.

471. Removal for fair trial. In all civil and criminal actions in the superior and criminal courts, when it is suggested on oath or affirmation, on behalf of the state or the traverser of the bill of indictment, or of the plaintiff or defendant,

that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed to some adjacent county for trial, if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by affidavits. The county from which the cause is removed must pay to the county in which the cause has been tried the full amount paid by the trial county for jurors' fees, and the full costs in the cause which are not taxable against or cannot be recovered from a party to the action, and for which the trial county is liable.

Rev., s. 426; Code, s. 196; 1879, c. 45; 1899, cc. 104, 508; 1806, c. 693, s. 12; 1917, c. 44.

AFFIDAVIT FOR REMOVAL. Purpose of affidavit: *Emery v. Hardee*, 94-787. Counsel can consent to let court hear facts as if stated in affidavit: *Ibid.* Contents of affidavit: *Emery v. Hardee*, 94-787; *State v. Seaborn*, 15-305; *Smith v. Greenlee*, 14-387. Motion for removal in criminal actions made after issue joined: *State v. Flowers*, 109-841; *State v. Haywood*, 94-847; *State v. Swepson*, 81-571; *State v. Reid*, 18-377—in civil actions before issue joined, see section 470.

REMOVAL. Need not be made to county within the same judicial district: *Lassiter v. R. R.*, 126-507. Order conclusive as to the facts upon which founded. The court can only scrutinize sufficiency of order: *Emery v. Hardee*, 94-788; *Boyden v. Williams*, 84-608; *State v. Barfield*, 30-344; *State v. Seaborn*, 15-305. Order stating "the trial of the prosecution shall be removed," is sufficient: *State v. Shepherd*, 30-195.

NO APPEAL FROM ORDER. Finding of facts by court conclusive and ruling thereupon not reviewable: *Garrett v. Bear*, 144-23; *State v. Turner*, 143-641; *Benton v. R. R.*, 122-1007; *State v. Smarr*, 121-669; *Albertson v. Terry*, 109-8; *State v. Johnson*, 104-780; *Phillips v. Lentz*, 83-240; *State v. Hall*, 73-134; *State v. Hill*, 72-345; *State v. Hildreth*, 31-429; *State v. Duncan*, 28-98; *State v. Plyler*, 153-630—but where affidavit contains no facts the court will review it, *Phillips v. Lentz*, 83-240.

Where court allows state to select the county, so it does not select county objected to by defendant, it cannot be complained of by defendant, he having failed to object at the time: *State v. Harrison*, 145-408.

472. Affidavits on hearing for removal; when removal ordered. No action, civil or criminal, shall be removed, unless the affidavit sets forth particularly and in detail the ground of the application. It is competent for the other side to controvert the allegations of fact in the application, and to offer counter affidavits to that end. The judge shall order the removal of the action, if he is satisfied after thorough examination of the evidence as aforesaid that the ends of justice demand it.

Rev., s. 427; Code, s. 197; 1879, c. 45; 1899, c. 104, s. 2.

See annotations under section 471 as to affidavit, etc.

473. Additional jurors from other counties instead of removal. Upon suggestion made as provided by the second section preceding, the presiding judge, instead of making order of removal may cause as many jurors as he deems necessary to be summoned from any adjoining county or any county in the same judicial district by the sheriff or other proper officer thereof, to attend, at such time as the judge designates, and serve as jurors in said action. The judge may direct the required number of names to be drawn from the jury box in said county in such manner as he may direct, and a list of the same to be delivered to the sheriff or other proper officer of the county, who shall at once summon the jurors so drawn to appear at the time and place specified in the order. In case a jury is not obtained from those so summoned the judge may, in like manner,

from time to time, order additional jurors summoned from any adjoining county or any county in the same judicial district, or from the county where the trial is being held, until a jury is obtained. These jurors are subject to challenge for cause as other jurors, but not because of nonresidence in the county of trial, or service within two years, or not being freeholders, and all jurors so summoned are entitled to compensation for mileage and time, to be paid by the county to which they are summoned, at the rate now provided by law for regular jurors in the county of their residence.

1913, c. 4, ss. 1, 2.

For jurors' fees, see Salaries and Fees, s. 3892.

474. Transcript of removal; subsequent proceedings. When a cause is directed to be removed, the clerk shall transmit to the court to which it is removed a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court.

Rev., s. 428; Code, ss. 195, 198; R. C., c. 31, s. 118; 1806, c. 694, s. 12; 1810, c. 787; C. C. P., s. 69.

Transcript verified: *State v. Lambert*, 93-618; *State v. Duncan*, 28-236. Where two transcripts sent up, what done: *State v. Collins*, 14-117. After order, but before transcript sent, either court can issue subpoenas, etc.: *Comrs. v. Lemly*, 85-341; *Smith v. Greenlee*, 14-387. **Defects in transcript, and amendments thereto:** *State v. Swepson*, 81-571; *State v. Anderson*, 92-732; *State v. Reid*, 18-377. **Docketing of transcript:** *Fisher v. Mining Co.*, 105-123; *Cline v. Mfg. Co.*, 116-839. **What sent with transcript:** *Clark v. Peebles*, 100-352.

SUBCHAPTER V. COMMENCEMENT OF ACTIONS

ART. 8. SUMMONS

475. Civil actions commenced by. Civil actions shall be commenced by issuing a summons; but no summons need issue in controversies submitted without action, and in confessions of judgment without action.

Rev., s. 429; Code, s. 199; C. C. P., s. 70.

For summons in special proceedings, see this chapter, s. 753.

For confession of judgment, see this chapter, s. 623.

For controversy without action, see this chapter, ss. 626-628.

See section 404. An action is commenced from the issuing of the summons and not from its service: *Pettigrew v. McCoin*, 165-472. Civil actions should be commenced by issuing a summons, except that in cases where property is attached and publication is made a summons is not necessary: *Mills v. Hansel*, 168-651; *Armstrong v. Kinsell*, 164-125; *Grocery Co. v. Bag Co.*, 142-174 (overruling *McClure v. Fellows*, 131-509); *Best v. Mortgage Co.*, 128-351; *Fisher v. Bank*, 132-776; *Lyon v. Comrs.*, 120-242; *Webster v. Sharpe*, 116-466; *Fleming v. Patterson*, 99-404; *Calvert v. Peebles*, 82-338; *Belmont v. Reilly*, 71-260; *Steele v. Comrs.*, 70-140; *Thompson v. Berry*, 64-79; *Patrick v. Joyner*, 63-573; *Ditmore v. Goins*, 128-327. **Special proceedings begun also by summons, the provision as to civil actions being applicable to special proceedings except as otherwise provided:** *Railway Co. v. Lumber Co.*, 132-644; also see section 753.

Office of the summons is to bring the parties into court: *Barneycastle v. Walker*, 92-198. **Injunction issued without summons is irregular:** *Armstrong v. Kinsell*, 164-125; *Fleming v. Patterson*, 99-404; *Grant v. Edwards*, 90-31; *Trexler v. Newsome*, 88-13; *Hirsh v. Whitehead*, 65-516; *McArthur v. McEachin*, 64-72; *Patrick v. Joyner*, 63-573. **Summons is issued, when:**

Smith v. Lumber Co., 142-26; Houston v. Thornton, 122-366; Currie v. Hawkins, 118-593; Neal v. Nelson, 117-401; Webster v. Sharpe, 116-466. **Appearance waives all defect or irregularity as to summons:** Caldwell v. Wilson, 121-425; Roberts v. Allman, 106-391; Etheridge v. Woodley, 83-11; Wheeler v. Cobb, 75-21; Middleton v. Duffy, 73-72; Duffy v. Averitt, 27-455; Hyatt v. Tomlin, 24-149; also see sections 401 and 490.

476. Contents; return; seal. The summons must run in the name of the state, be signed by the clerk of the superior court having jurisdiction to try the action, and be directed to the sheriff or other proper officer of the county in which any defendant resides or may be found. It must be returnable before the clerk at a date named therein, not less than ten nor more than twenty days from its issuance, and must command the sheriff, or other proper officer, to summon the defendant to appear and answer the complaint of the plaintiff within twenty days after its return day; and must contain a notice stating in substance that if the defendant fails to answer the complaint within the time specified, the plaintiff will apply to the court for the relief demanded in the complaint; and must be dated on the day of its issue. Every summons addressed to the sheriff or other officer of a county other than that from which it issued must be attested by the seal of the court; but when addressed to the sheriff or other officer of the county in which it issued, such seal is unnecessary.

Rev., ss. 430, 431; Code, ss. 200, 203, 213; C. C. P., s. 74; 1876-7, cc. 85, 241; 1919, c. 304, s. 1.

As to summons in special proceedings, see sections 112 and 753. As to action begun by issuing summons, see sections 404 and 475.

FORM OF SUMMONS. Plaintiffs' and defendants' names: Fisher v. Ins. Co., 136-217; Heath v. Morgan, 117-504; Plemmons v. Improvement Co., 108-614; Clawson v. Wolfe, 77-100; Patterson v. Walton, 119-500; Kerlee v. Corpening, 97-330; see Rosenbacher v. Martin, 170-236.

Misnomer is not ground for dismissal, but for plea in abatement to correct name: Drainage Dist. v. Comrs., 174-738; Dunn v. Aid Society, 151-133. Effect where required number of days not given by summons and where judgment is rendered: Stafford v. Gallops, 123-19. Summons returnable to the next ensuing term of court (under practice before the act of 1919, c. 304): Sondley v. Asheville, 110-84; also see Roberts v. Allman, 106-391; Jones v. Comrs., 135-218; Martin v. Clark, 135-178; see, also, sections 480, 1444, 1456; but not to the superior court of another county: Moore v. R. R., 67-209; Howerton v. Tate, 66-431.

AMENDING SUMMONS. Chancey v. R. R., 171-756; Fountain v. Pitt, 171-113; Page v. McDonald, 159-38; Ewbank v. Turner, 134-81; Piercy v. Watson, 118-978; Elliott v. Tyson, 117-116; Redmond v. Mullenax, 113-505; McLean v. Breece, 113-390; Henderson v. Graham, 84-496; Jackson v. McLean, 90-64; Cheatham v. Crews, 81-343; Phillips v. Holland, 78-31; Thomas v. Womack, 64-657; also see section 547.

WHEN SUMMONS IS ISSUED. See sections 404, 475. Presumed to issue on date it bears, but this presumption rebuttable: Houston v. Thornton, 122-365; Currie v. Hawkins, 118-593; Webster v. Sharpe, 116-466.

Case where summons made returnable to judge at chambers instead of to term; duty and power of the judge discussed: Ewbank v. Turner, 134-78.

AFFIXING SEAL. Cases holding that process issued to another county without seal is invalid: Shackelford v. McRea, 10-226; Shepherd v. Lane, 13-148; Finley v. Smith, 15-95; Freeman v. Lewis, 27-91; Taylor v. Taylor, 83-116; McArter v. Rhea, 122-614; but it may be amended: Clark v. Hellen, 23-421; Purcell v. McFarland, 23-34; Henderson v. Graham, 84-496; Vick v. Flournoy, 147-209; Calmes v. Lambert, 153-248.

477. Issued to several counties. The plaintiff may issue a summons, directed to the sheriff of any county where a defendant is most likely to be found, noting on each summons that it is issued in the same action. When the summons is

returned, it shall be docketed as if only one had issued, and if any defendant is not served with such process, the same proceeding shall be had as in other cases of similar process not executed.

Rev., s. 432; Code, s. 204; R. C., c. 31, s. 44; 1789, c. 314, ss. 1, 2; 1831, c. 14, s. 2.

478. When directed to officer of adjoining county. If at any time there is not in the county a proper officer to whom summons or other process of a court of record is or ought to be directed, who can lawfully execute it; or if such officer refuses or neglects to execute the same, the clerk of the court from which it has issued or shall issue, upon the facts being verified before him by written affidavit, subscribed by the plaintiff or his agent, shall issue such summons or process to the sheriff of any adjoining county, who has power to and shall execute the same in like manner as if he were sheriff of the county. In all cases where the sheriff of any county is interested, if there is no coroner in the county, process may be issued to and shall be executed by the sheriff of any adjoining county.

Rev., ss. 1530, 1531; Code, ss. 929, 930; R. C., c. 31, s. 55; 1779, c. 156; 1821, c. 1080; 1882, c. 1132; 1846, c. 61; 1869-70, c. 175.

For service of process by coroner, see section 1021. Where there is no coroner in county execution against sheriff will issue to sheriff of adjoining county: *Anonymous*, 2-422; *Witkowsky v. Wasson*, 69-38. Section merely referred to in *Evaus v. Etheridge*, 96-45; *Collais v. McLeod*, 30-224.

479. When officer must execute and return. The officer to whom the summons is addressed must note on it the day of its delivery to him, serve it as provided by law, and return it within the time specified therein for its return.

Rev., s. 433; Code, s. 200; 1876-7, c. 85; 1919, c. 304, s. 1.

The presumption that summons was issued on the day it bears date is not rebutted by the fact that the sheriff's endorsement of its receipt by him is of a later date: *Houston v. Thornton*, 122-365. Failure of sheriff to note day of receipt of summons is irregular, but does not make summons void: *Strayhorn v. Blalock*, 92-292. For service of summons, see sections 482-487. Duty of sheriff to serve process and penalty for failure, see sections 3936, 3938.

RETURN OF SHERIFF. Defined in *Watson v. Mitchell*, 108-364; *Strayhorn v. Blalock*, 92-292; see, also, sections 1507, 1517, 2817, and 2819. **Amendment of return:** *Swain v. Burden*, 124-16; *Campbell v. Smith*, 115-498; *Phillips v. Holland*, 78-31; *Manning v. R. R.*, 122-824; *Steelman v. Greenwood*, 113-355; *Mfg. Co. v. Buxton*, 105-74; *Finley v. Hayes*, 81-368; *Peebles v. Newsom*, 74-473; *Hassell v. Latham*, 52-465; *Patton v. Marr*, 44-377; *Tomlinson v. Long*, 53-469; *Albright v. Tapscott*, 53-473. **Making return nunc pro tunc:** *Williams v. Weaver*, 101-1; *Walters v. Moore*, 90-41; *Henderson v. Graham*, 84-496; *Clark v. Hellen*, 23-421. **Presumption as to truth of return made:** *Strayhorn v. Blalock*, 92-292; *Miller v. Powers*, 117-218; *Isley v. Boon*, 113-249; *Chadbourn v. Johnston*, 119-282; *Marler-Dalton-Gilmer Co. v. Clothing Co.*, 150-519.

480. Alias and pluries. When the defendant in a civil action or special proceeding is not served with summons within the time in which it is returnable, the plaintiff may sue out an alias or pluries summons, returnable in the same manner as original process.

Rev., s. 437; Code, s. 205; R. C., c. 31, s. 52; 1777, c. 115, ss. 23, 71.

An alias summons issues only when the original summons has not been served: *Powell v. Dail*, 172-261; *Rogerson v. Leggett*, 145-7. Where summons, intended to be an alias but not so ordered, was issued returnable to a future term, at which an amended complaint was filed naming a party as defendant, held sufficient, though no connecting summonses: *Battle v. Baird*, 118-854.

481. Discontinuance. A failure to keep up the chain of summonses issued against a party, but not served, by means of an alias or pluries summons, is a discontinuance as to such party; and if a summons is served after a break in the chain, it is a new action as to such party, begun when the summons was issued.

Rev., s. 438.

Cases decided before statute passed, but of interest: *Koonce v. Pelletier*, 115-233; *Penniman v. Daniel*, 93-332, 91-431; *Webster v. Laws*, 86-180; *Etheridge v. Woodley*, 83-11. A discontinuance does not occur except when summons has not been served: *Rogerson v. Leggett*, 145-7.

482. Service by reading. The summons shall be served in all cases, except as hereinafter provided, by the sheriff or other officer reading it to the party or parties named as defendant.

Rev., s. 439; Code, s. 214; 1876-7, c. 241.

For statute forbidding service on Sunday, see section 3958. Voluntary appearance of defendant equivalent to service of summons. See section 490. Whether summons was duly served is a question of law: *Williamson v. Cocks*, 124-585—and the judge should write his findings of fact for review, *Parker v. Ins. Co.*, 143-339; see, also, section 600.

SERVICE OF SUMMONS. Service must be made by reading the summons to defendant, unless he waives the reading: *Williamson v. Cocks*, 124-585; but reading over the telephone is not sufficient service: *Lowman v. Ballard*, 168-16. Service may be by deputy sheriff, though a minor: *R. R. v. Fisher*, 109-1. Service may be made upon a nonresident defendant temporarily and voluntarily within the state, but not when here in furtherance of the administration of justice: *Brown v. Taylor*, 174-423; *Mottu v. Davis*, 151-237; *Greenleaf v. Bank*, 133-292; *Cooper v. Wyman*, 122-784. Service on nonresident attorney attending to a case: *Greenleaf v. Bank*, 133-292. Service made on defendant in jail: *White v. Underwood*, 125-25. Service cannot be made outside of the state: *Hinton v. Ins. Co.*, 126-18; but see section 491.

ACCEPTANCE OF SERVICE. By parties generally: *Battle v. Baird*, 118-854; *Stancil v. Gay*, 92-455; *Johnson v. Futrell*, 86-122; *Nicholson v. Cox*, 83-44; *Bass v. Bass*, 78-374—though telling officer to mark it “served” will not do: *Godwin v. Mounds*, 106-448. Infant cannot accept service: *Nicholson v. Cox*, 83-44; *Bass v. Bass*, 78-374—yet if he does accept service it is cured after guardian ad litem appointed, *Cates v. Pickett*, 97-21; *Perry v. Adams*, 98-167. An attorney cannot accept service of summons without special authority: *Warlick v. Reynolds*, 151-606.

IRREGULARITY OF SERVICE WAIVED. By appearance of party: *Caldwell v. Wilson*, 121-425; *Moody v. Moody*, 118-926; *Cherry v. Lilly*, 113-26; *Turner v. Douglas*, 72-127; see, also, cases under sections 401, 475, and 490. By appearance of solvent attorneys, when: *Chadborn v. Johnston*, 118-282; *Hackett v. McMillan*, 112-513; *England v. Garner*, 90-197. As to return of sheriff, see section 479.

483. Service by copy. The summons shall be served by delivering a copy thereof in the following cases:

1. If the action is against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof. Any person receiving or collecting money in this state for a corporation of this or any other state or government is a local agent for the purpose of this section. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides, in this state, or when it can be made personally within the state upon the president, treasurer or secretary thereof.

For service on foreign corporation by service on local process agent, see section 1137—on insurance commissioner, see section 6414. For service on corporation for forfeiture of charter, see section 1192.

Service on unlicensed insurance company must be made according to this section: *Parker v. Ins. Co.*, 143-339. Service of summons must be made by leaving copy with one of the persons designated by this section: *Aaron v. Lumber Co.*, 112-189—and leaving copy with person's wife is not service, *Bank v. Wilson*, 80-200. The manner of service prescribed is reasonable: *Whitehurst v. Kerr*, 153-76.

Service is valid when made upon a general or local agent: *Anderson v. Fidelity Co.*, 174-417; *Pardue v. Absher*, 174-676; *Jones v. Ins. Co.*, 88-499; *Katzenstein v. R. R.*, 78-286. Meaning of "local agent": *Whitehurst v. Kerr*, 153-76; *Moore v. Bank*, 92-590. The term "local agent" not limited to those receiving money for company: *Copeland v. Tel. Co.*, 136-11. A manager of agencies in this state is a "managing agent" within this section: *Clinard v. White*, 129-250. One simply acting as a caretaker as a matter of friendship, without compensation, is not such an agent upon whom process can be served: *Kelly v. Lefaiver*, 144-4. A foreman acting under a superintendent who is present is not an agent for service of summons: *Simmons v. Box Co.*, 148-344. Traveling auditor, when company doing no business in this state, not proper party to be served in action against company: *Higgs v. Sperry*, 139-299. Service upon resident director is sufficient: *Menefee v. Cotton Mills*, 161-164.

Service may be made upon an officer of a foreign corporation while temporarily in the state, but not while attending the trial of an action against the corporation: *McDonald v. McArthur*, 154-122; *Greenleaf v. Bank*, 133-292; *Jester v. Steam Packet Co.*, 131-54; *Cooper v. Wyman*, 122-784. But service cannot be made outside of the state: *Hinton v. Ins. Co.*, 126-18. Service of summons upon local agent of the receiver of a corporation is service upon the receiver: *Grady v. R. R.*, 116-952; *Farris v. R. R.*, 115-600—and as fully upon the company as if served upon the president and superintendent: *Grady v. R. R.*, 116-952.

2. If against a minor under the age of fourteen years, to the minor personally, and also to his father, mother or guardian, or if there are none within the state, to any person having the care and control of the minor, or with whom he resides, or in whose service he is employed.

Service must be upon infant personally, and, if under fourteen years of age, upon his mother, father or guardian or some one having control of him, also; and when guardian ad litem appointed, upon such guardian ad litem: *Roseman v. Roseman*, 127-494; *Ward v. Lowndes*, 96-367; *Coffin v. Cook*, 106-376; *Cates v. Pickett*, 97-21; *Sumner v. Sessoms*, 94-371; *Hare v. Holloman*, 94-14; *Fry v. Currie*, 91-436; *Young v. Young*, 91-359; *Stancill v. Gay*, 92-462; *Gulley v. Macy*, 81-356; *Moore v. Gidney*, 75-34. Service by reading the summons is sufficient unless it appears that the minor is under fourteen: *Yarborough v. Moore*, 151-116; and if the minor is properly represented such service is only an irregularity: *Hughes v. Pritchard*, 153-135; *Rawls v. Henries*, 172-216. As to appointment and duties of guardian ad litem, see section 451.

3. If against a person judicially declared of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee or guardian has been appointed, to such committee or guardian, and to the defendant personally. If the superintendent or acting superintendent of an insane asylum informs the sheriff or other officer who is charged with the duty of serving a summons or other judicial process, or notice, on an insane person confined in such asylum, that the summons, or process, or notice, cannot be served without danger of injury to the insane person, it is sufficient for the officer to return the same without actual service, but with an endorsement that it was not personally served because of such information; and when an insane person is confined in a common jail it is sufficient for an officer charged with service of a notice, summons, or other judicial process, to return the same with the endorse-

ment that it was not served because of similar information as to the danger of service on such insane person given by the physician of the county in which the jail is situated.

Rev., s. 440; Code, s. 217; C. C. P., s. 82; 1874-5, c. 168; 1889, c. 89.

484. Service by publication. Where the person on whom the service of the summons is to be made cannot, after due diligence, be found in the state, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be made by publication of a notice in either of the following cases:

Attaching property and making publication may take the place of summons: *Mills v. Hansel*, 168-651; *Armstrong v. Kinsell*, 164-125; *Grocery Co. v. Bag Co.*, 142-174. See generally, as to service of summons: *Armstrong v. Kinsell*, 164-125; *Vick v. Flournoy*, 147-209; *Hinton v. Ins. Co.*, 126-18; *Graham v. O'Bryan*, 120-463; *Barnhardt v. Brown*, 118-700; *Clafin v. Harrison*, 108-157. "Due diligence" construed: *Rose v. Davis*, 140-269. Publication as to nonresident copartners not binding on resident partner: *Pender v. Griffin*, 72-270. Service by publication will not warrant a judgment in personam: *Johnson v. Whilden*, 166-104; s. c., 171-153; *Currie v. Mining Co.*, 157-209; *Goodwin v. Claytor*, 137-224; *Hinton v. Ins. Co.*, 126-18; *May v. Getty*, 140-310; *Long v. Ins. Co.*, 114-465; *Winfree v. Bagley*, 102-517. Publication is ineffectual unless property is brought within control of the court: *Everitt v. Austin*, 169-622; *Currie v. Mining Co.*, 157-209.

AFFIDAVIT. Sufficiency of: *Page v. McDonald*, 159-38; *Rose v. Davis*, 140-269; *Bacon v. Johnson*, 110-114; *Sheldon v. Kivett*, 110-408; *Faulk v. Smith*, 84-501; *Windley v. Broadway*, 71-333; *Wheeler v. Cobb*, 75-21; *Spiers v. Halstead*, 71-209. **When affidavit made:** *Bank v. Blossom*, 92-695. **By whom made:** *Weaver v. Roberts*, 84-493. **Amendment of:** *Mullen v. Canal Co.*, 112-109; *Weaver v. Roberts*, 84-493; *Branch v. Frank*, 81-180.

1. Where the defendant is a foreign corporation, and has property, or the cause of action arose, in the state.

Property hereunder embraces choses in action: *Boyd v. Ins. Co.*, 111-378; *Winfree v. Bagley*, 102-515.

2. Where the defendant, a resident of this state, has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of a summons.

See *Bernhardt v. Brown*, 118-701.

3. Where he is not a resident, but has property in this state, and the court has jurisdiction of the subject of the action.

Affidavit must state not only that he is "nonresident" but that he "has property within the same": *Spiers v. Halstead*, 71-209. Word "property" includes choses in action: *Boyd v. Ins. Co.*, 111-378; *Winfree v. Bagley*, 102-515; *Armstrong v. Kinsell*, 164-125.

4. Where the subject of the action is real or personal property in this state, and the defendant has, or claims, or the relief demanded consists wholly or partly in excluding him from any actual or contingent lien or interest therein.

See *Clafin v. Harrison*, 108-158; *Bernhardt v. Brown*, 118-700.

5. Where the action is for divorce.

See *King v. King*, 84-32.

6. Where the stockholders of a corporation are deemed to be necessary parties to an action and their names or residences are unknown; or where the names or residences of parties interested in real estate the subject of an action are unknown, if the name of at least one of the parties to the action and interested in the subject matter thereof is known, and he is a resident of the state, the court having jurisdiction may, upon affidavit that after due diligence the names or residences of such parties cannot be ascertained, authorize service by publication.

See *Bernhardt v. Brown*, 118-701.

7. Where in actions for the foreclosure of mortgages on real estate, if any party having any interest in, or lien upon, such mortgaged premises, is unknown to the plaintiff, and his residence cannot, with reasonable diligence, be ascertained, and such fact is made to appear by affidavit.

8. Where no officer or agent of a domestic corporation upon whom service can be made can, after due diligence, be found in the state, and such facts are made to appear by affidavit. This subsection also applies to all summonses, orders to show cause, orders and notices issued by any board of aldermen, board of town or county commissioners, or by individuals.

Rev., s. 442; Code, ss. 218, 221; 1885, c. 380; 1889, cc. 108, 263; 1895, c. 334.

485. Manner of publication. The order must direct the publication in one or two newspapers to be designated as most likely to give notice to the person to be served, and for such length of time as is deemed reasonable, not less than once a week for four successive weeks, of a notice, giving the title and purpose of the action, and requiring the defendant to appear and answer, or demur to the complaint at a time and place therein mentioned; and no publication of the summons, or mailing of the summons and complaint, is necessary. The cost of publishing in a newspaper shall not exceed one dollar and fifty cents an inch of solid type, and shall in no case exceed six dollars for the notice.

Rev., s. 443; Code, s. 219; 1903, c. 134; C. C. P., c. 84; 1876-7, c. 241, s. 3.

What publication must contain: *Guilford County v. The Georgia Co.*, 109-310; *Spillman v. Williams*, 91-483. **Where order for publication but no publication is made, no discontinuance, but judge may order returnable to future term of court:** *Penniman v. Daniel*, 93-332. **Where there was publication as to the attachment, but not as to summons, nor was it served, held judgment void:** *Ditmore v. Goins*, 128-325; but see *Grocery Co. v. Bag Co.*, 142-174, which apparently destroys its reasoning. **When service by publication defective, it can be remedied by new publication, but it is not always necessary:** *Penniman v. Daniel*, 90-154, also 93-332; *Bank v. Blossom*, 92-695; *Price v. Cox*, 83-261; *Church v. Furniss*, 64-659. **Effect of irregular service by publication upon judgments obtained:** *Spillman v. Williams*, 91-483, and cases there cited.

486. Filing complaint, in cases of publication. In all cases wherein publication is made, the complaint must be filed before the expiration of the time of publication ordered.

Rev., s. 442; Code, s. 218.

487. When service by publication complete. In the cases in which service by publication is allowed, the summons is deemed served at the expiration of the time prescribed by the order of publication, and the party is then in court.

Rev., s. 444; Code, s. 227; C. C. P., s. 88.

Where service not complete it may be remedied: *Penniman v. Daniel*, 90-154, also 93-332; *Bank v. Blossom*, 92-695; *Price v. Cox*, 83-261; *Church v. Furniss*, 64-659. **Publication from**

August 3d to August 31st where court began on the latter day sufficient for "once a week for four weeks": *Guilford Co. v. Georgia Co.*, 109-310. An adjudication that summons has been served is necessary before judgment rendered: *Hyman v. Jarnigan*, 65-96.

488. Jurisdiction acquired from service. From the time of service of the summons, in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings.

Rev., s. 445; Code, s. 229; C. C. P., s. 90.

Different ways in which the court may acquire jurisdiction: *Armstrong v. Kinsell*, 164-125; *Warlick v. Reynolds*, 151-606; *Vick v. Flournoy*, 147-209; *Bernhardt v. Brown*, 118-700. The entry, "Case continued; time to file pleadings," may indicate that defendant is in court, but issuing an alias summons rebuts this: *Powell v. Dail*, 172-261. From time of service of summons defendant is fixed with notice as to all subsequent orders in the cause: *Patrick v. Dunn*, 162-19; *LeDuc v. Slocumb*, 124-347; *Stith v. Young*, 119-428; *Ferrell v. Hales*, 119-213; *Harper v. Sugg*, 111-324; *Coon v. Smith*, 107-430; *Wilson v. Pearson*, 102-290; *Dawkins v. Dawkins*, 93-283; *Hemphill v. Moore*, 104-379; *Spencer v. Credle*, 102-68; *Williams v. Whiting*, 94-481; *Dempsey v. Rhodes*, 93-120; *Stancill v. Gay*, 92-455; *University v. Lassiter*, 83-38; *Sparrow v. Davidson*, 77-35.

489. Proof of service. Proof of the service of the summons or notice must be—
Proof of service made according to this section: *Allen v. Strickland*, 100-225.

1. By the certificate of the sheriff or other proper officer.

Presumption that the return states the truth: *Strayhorn v. Blalock*, 92-292; *Miller v. Powers*, 117-218; *Isley v. Boon*, 113-249; *Chadbourn v. Johnston*, 119-282; *Marler Co. v. Clothing Co.*, 150-519. See sections 479, 921.

2. In case of publication, the affidavit of the printer, or of his foreman or principal clerk, showing the same.

An adjudication that publication is complete and summons served necessary before judgment: *Hyman v. Jarnigan*, 65-96. Where record showed affidavit and order, and also affidavit of newspaper as to correct publication, no defect presumed: *Lyle v. Siler*, 103-261.

3. The written admission of the defendant.

ACCEPTANCE OF SERVICE. How executed: *Middleton v. Duffy*, 73-72; *Nicholson v. Cox*, 83-44; *Godwin v. Monds*, 106-448. As to authority to accept: *Edwards v. Moore*, 99-1; *Stancill v. Gay*, 92-455. Attorney cannot accept service of summons: *Star v. Hall*, 87-381; *Warlick v. Reynolds*, 151-606. A married woman can accept: *Nicholson v. Cox*, 83-44. Infant cannot accept: *Ibid.*; also, *Bass v. Bass*, 78-374—yet if he does accept it is cured after guardian appointed: *Cates v. Pickett*, 97-21; *Perry v. Adams*, 98-167. See section 482.

Rev., s. 446; Code, s. 228; C. C. P., s. 89.

490. Voluntary appearance by defendant. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

Rev., s. 447; Code, s. 229; C. C. P., s. 90.

See section 401. A general appearance waives all defects both as to summons and service. *Moore v. Packer*, 174-665; *Williamson v. Jerome*, 169-215; *Harris v. Bennett*, 160-339; *Lemly v. Ellis*, 143-200; *Hatcher v. Faison*, 142-364; *Johnson v. Reformers*, 135-385; *Caldwell v. Wilson*, 121-425; *Wheeler v. Cobb*, 75-21; *White v. Morris*, 107-92; *Roberts v. Allman*, 106-391; *Penniman v. Daniel*, 95-341; *Etheridge v. Woodley*, 83-11; *Bank v. Wilson*, 80-200; *Middle v. Duffy*, 73-72; *Moore v. R. R.*, 67-209; *Duffy v. Averitt*, 27-455; *Hyatt v. Tomlin*, 24-149; *Hervey v. Edmunds*, 68-243; *Heilig v. Stokes*, 63-612; *Jones v. Penland*, 19-358. When there is no service of summons an unauthorized appearance by counsel will not put the party in court and bind him: *Hatcher v. Faison*, 142-364—but where service is made and solvent

counsel appears without authority it is otherwise: *Ibid.* By treating with opposite party as to time of pleading, etc., one makes a voluntary appearance: *Cook v. Bank*, 129-151. General and special appearance distinguished: *Wooten v. Cunningham*, 171-123; *School v. Peirce*, 163-424. An application to be allowed to answer is a voluntary appearance: *Currie v. Mining Co.*, 157-209; so is an application and giving undertaking to discharge property taken under attachment: *Mitchell v. Lumber Co.*, 169-397.

491. Personal service on nonresident. When the place of residence is known and the same is made to appear by affidavit, in lieu of publication in a newspaper it is sufficient to mail a copy of the summons, notice or other process, accompanied by a statement as to the nature of the action or proceeding, to the sheriff or other process officer of the county and state where the defendant resides, who shall serve same according to its tenor. The process officer who serves the papers shall, in making his return, use a form of certificate substantially as follows:

State of _____

County of _____

I, _____, clerk of the _____ court of _____ county, in the state of _____, which court is a court of record having a seal, which is hereto attached, do certify that _____, to me well known as the sheriff of said county of _____, who being by me duly sworn, says that as such sheriff he has full power to serve any and all legal processes issuing from the courts of said state, and that on the _____ day of _____, 19____, he served the summons hereto attached by reading and delivering a copy of same to _____, the defendant therein named.

_____, Sheriff,
_____County,

State of _____

Sworn to and subscribed before me, this _____ day of _____, 19____

_____, Clerk _____ Court,

[L. s.]

County of _____

Rev., s. 448; 1891, c. 120.

The plaintiff may proceed under this section or by making publication: *Mullen v. Canal Co.*, 114-80. Such service will not support a personal judgment: *Hinton v. Ins. Co.*, 126-18; *May v. Getty*, 140-310; *Long v. Ins. Co.*, 114-465; *Winfree v. Bagley*, 102-517. The court acquires jurisdiction only in proceedings in rem and quasi in rem: *Vick v. Flournoy*, 147-209; *Long v. Ins. Co.*, 114-465. A summons not under seal actually served under this section is irregular: *Vick v. Flournoy*, 147-209. This section does not apply to service of subpoena in criminal case: *State v. Means*, 175-820.

492. Defense after judgment on substituted service. The defendant against whom publication is ordered, or who is served under the provisions of the preceding section, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms as are just; and if the defense is successful and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected. No fiduciary officer or trustee who has made distribution of a fund under such judgment in good faith is personally liable if the judgment is changed

by reason of such defense made after its rendition; nor in case the judgment was rendered for the partition of land, and any persons receiving any of the land in such partition sell it to a third person; the title of such third person is not affected if such defense is successful, but the redress of the person so defending after judgment shall be had by proper judgment against the parties to the original judgment and their heirs and personal representatives, and in no case affects persons who in good faith have dealt with such parties or their heirs or personal representatives on the basis of such judgment being permanent.

Rev., s. 449; Code, s. 220; C. C. P., s. 85; 1917, c. 68.

Summons after judgment, see this chapter, s. 498.

If application is made in proper time and good cause is shown, the defendant must be allowed to defend: *Moore v. Rankin*, 172-599; *Page v. McDonald*, 159-38; but not allowed after twelve months: *Currie v. Mining Co.*, 157-209. A party coming in under this section may make any objection which he might have made by answer: *Rhodes v. Rhodes*, 125-191; *Bank v. Palmer*, 153-501; but a bona fide purchaser of land will be protected: *Lawrence v. Hardy*, 151-123. If defendant guilty of inexcusable neglect, need not find whether defense is meritorious: *Turner v. Machine Co.*, 133-381. When application made to defend, judge must find the facts: *Bacon v. Johnson*, 110-114; *Utley v. Peters*, 72-525. This section does not apply to proceedings before a justice of the peace: *Thompson v. Notion Co.*, 160-520.

ART. 9. PROSECUTION BONDS

493. Plaintiff's, for costs. Before issuing the summons the clerk shall require the plaintiff to do one of the following:

1. Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.

2. Deposit two hundred dollars with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant a certificate to that effect.

3. File with him a written authority from a judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper.

Rev., s. 450; Code, s. 209; R. C., c. 31, s. 40; C. C. P., s. 71.

For bond in surety company, see section 339; for mortgage in lieu of bond, see section 350. The giving of prosecution bond is not a condition precedent to the bringing of a suit; the court may permit one to be filed after writ is returned: *Russell v. Saunders*, 48-432; *Shannonhouse v. Withers*, 121-380; *Cooper v. Warlick*, 109-673; *Albertson v. Terry*, 109-8; *McMillan v. Baker*, 92-115; *Wall v. Fairly*, 66-386; *Stancill v. Branch*, 61-218. Execution of undertaking is an incidental but not essential condition of the order allowing one to become a party: *Hughes v. Hodges*, 94-56. Sufficiency of undertaking discussed: *Comron v. Standland*, 103-207; *Holly v. Perry*, 94-30. Liability of surety on bond: *Smith v. Arthur*, 116-871; *Hallman v. Dellinger*, 84-1; *Swain v. McCulloch*, 75-495. Liable for costs of defendant in supreme court: *Kenney v. R. R.*, 166-566. The bond is not to secure the officers' fees, but the costs paid by defendant: *Waldo v. Wilson*, 177-461. Amendment of bond allowed: *Albertson v. Terry*, 109-8; *Russell v. Saunders*, 48-432; *Hughes v. Hodges*, 94-56; *Brittain v. Howell*, 19-107. The court may dismiss the case for plaintiff's failure to give bond: *Alston v. Holt*, 172-417. When objection may be made: *Albertson v. Terry*, 109-8; *Hughes v. Hodges*, 94-56. The dismissal of action for want of bond no estoppel to plaintiff suing on same cause in forma pauperis: *Autry v. Floyd*, 127-186. Refusal of trial judge to require prosecution bond is not appealable: *Christian v. R. R.*, 136-321.

Officers need not perform their duties as to actions brought unless costs advanced: *Ballard v. Gay*, 108-545; *Long v. Walker*, 105-90; *West v. Reynolds*, 94-333—but they must make demand for their fees: *West v. Reynolds*, 94-333. Where court orders summons to issue

which is to be personally served, clerk need not issue it until demanded by plaintiff; but when service is ordered to be made by publication, after plaintiff has paid expenses, it is his duty to obey the order and make publication: *Penniman v. Daniel*, 93-332.

494. Suit as a pauper; counsel. Any judge or clerk of the superior court may authorize a person to sue as a pauper in their respective courts when he proves, by one or more witnesses, that he has a good cause of action, and makes affidavit that he is unable to comply with the preceding section. The court to which such summons is returnable may assign to the person suing as a pauper learned counsel, who shall prosecute his action.

Rev., ss. 451, 452; Code, ss. 210, 211; C. C. P., s. 72; 1868-9, c. 96, s. 2.

For costs in action in forma pauperis, see *Costs*, s. 1247.

LEAVE TO SUE IN FORMA PAUPERIS. This applies to the superior court; an appeal being governed by section 649: *Speller v. Speller*, 119-356. A dismissal of action for want of prosecution bond will not estop plaintiff from bringing same action again as a pauper: *Autry v. Floyd*, 127-186; nor will sustaining a motion to "depauperize" operate as an estoppel: *Rich v. Morisey*, 149-37. Affidavit as to inability to give bond or deposit costs: *Maggett v. Roberts*, 108-174; *Taylor v. Apple*, 90-343. Effect of objection to affidavit after answer filed: *Corn v. Stepp*, 84-599. Order to sue as pauper may be revoked: *Dale v. Presnell*, 119-489; *McKiel v. Cutler*, 45-139. No appeal lies from refusal to revoke: *Modlin v. Ins. Co.*, 151-35; *Christian v. R. R.*, 136-321.

A judge, clerk, or justice of the peace may grant leave: *Brendle v. Heron*, 68-496; *Sumner v. Candler*, 74-266; *Rowark v. Gaston*, 67-291. No notice to adverse party necessary: *Deal v. Palmer*, 68-215. Assignment of interests by plaintiff pendente lite, court will dismiss action unless security for costs given: *Davis v. Higgins*, 91-382. The bringing of a pauper suit does not raise a presumption that the attorney took the case for a contingent fee and was therefore a party in interest: *Allison v. R. R.*, 129-336.

WHO CAN SUE AS PAUPER. Any litigant: *Christian v. R. R.*, 136-322. Infant: *Brendle v. Heron*, 68-496. Administrator, etc.: *Christian v. R. R.*, 136-321; *Allison v. R. R.*, 129-344; *Hamlin v. Neighbors*, 75-66; *Mason v. Osgood*, 71-212. Guardian: *Brendle v. Heron*, 68-496; *Christian v. R. R.*, 136-322. Nonresident: *Christian v. R. R.*, 136-322; *Porter v. Jones*, 68-320.

PROVING THAT HE HAS A GOOD CAUSE. May do so by his own oath: *Sumner v. Candler*, 74-265; *Brendle v. Heron*, 68-496—or by certificate of counsel or otherwise, *Miazza v. Calloway*, 74-31.

495. Defendant's, for costs and damages in actions for land. In all actions for the recovery or possession of real property, the defendant, before he is permitted to plead, must execute and file in the office of the clerk of the superior court of the county where the suit is pending an undertaking with sufficient surety, in an amount fixed by the court, not less than two hundred dollars, to be void on condition that the defendant pays to the plaintiff all costs and damages which the latter recovers in the action, including damages for the loss of rents and profits.

Rev., s. 453; Code, s. 237; 1869-70, c. 193.

See section 595. Court can extend time for filing the undertaking: *Dunn v. Marks*, 141-232; *White v. Lokey*, 131-72; *Henning v. Warner*, 109-406; *Taylor v. Pope*, 106-271—and from such order there is no appeal: *Dunn v. Marks*, 141-232. Where separate trial for each defendant, each gives bond: *Bryan v. Spivey*, 106-99. Where defense bond not given and no leave to sue as pauper, judgment should be given against defendant for possession without damages: *Junge v. MacKnight*, 135-107, 137-285; *Credle v. Ayers*, 126-15; *Norton v. McLaurin*, 125-185; *Vick v. Baker*, 122-98; *Jones v. Best*, 121-154; see *Horton v. White*, 84-291; *School v. Peirce*, 163-424; *Patrick v. Dunn*, 162-19. Answer not stricken out for want of bond without notice: *Becton v. Dunn*, 137-563; *McMillan v. Baker*, 92-111; *Cooper v. Warlick*, 109-672; *Russell v. Saunders*, 48-432; *Brittain v. Howell*, 19-107. Court can order additional security

and, upon failure to give it, answer stricken out and judgment awarded: *Vaughan v. Vincent*, 88-116. When plaintiff deemed to have waived bond: *Dempsey v. Rhodes*, 93-120; *McMillan v. Baker*, 92-110.

This section applies to partition when defendant pleads sole seizin: *Gill v. Porter*, 174-569; *Huneycutt v. Brooks*, 116-788; *Cooper v. Warlick*, 109-672; *Vaughan v. Vincent*, 88-116. Grantee sued by grantor for possession, grantee having never paid purchase money, grantee must give bond to defend: *Allen v. Taylor*, 96-37. Defense bond not required in action to remove cloud from title: *Timber Co. v. Butler*, 134-50.

Where undertaking is in form of bond, seal does not defeat its purpose, and it will be treated as an undertaking under seal: *Holly v. Perry*, 94-30. Where undertaking written on back of summons, but did not contain names of plaintiff, defendant or surety, held to be sufficient: *Ibid.* What bond secures: *Hughes v. Pritchard*, 129-42; *White v. Fox*, 125-547; *Rollins v. Henry*, 77-467. It covers costs on appeal: *Grimes v. Andrews*, 171-367. It does not interfere with appointment of receiver: *Arey v. Williams*, 154-610.

Summary judgment on bond can be entered up against the sureties upon judgment being rendered against defendant: *Rollins v. Henry*, 84-569—and where mortgage in lieu of bond is given, foreclosure will be decreed on motion after notice, *Ryan v. Martin*, 103-282, 104-176. Landlord and tenant both parties defendant, and when tenant for failure to give bond or leave to defend as a pauper has judgment entered against him, execution will not issue until landlord's defense passed upon: *Rollins v. Rollins*, 76-264; *Harkey v. Houston*, 65-137.

496. Defense without bond. The undertaking prescribed in the preceding section is not necessary if an attorney practicing in the court where the action is pending certifies to the court in writing that he has examined the case of the defendant and is of the opinion that the plaintiff is not entitled to recover; and if the defendant also files an affidavit stating that he is unable to give and is not worth the amount of the undertaking in any property whatsoever.

Rev., s. 454; Code, s. 237; 1869-70, c. 193.

Certificate of attorney as to meritorious defense: *Wilson v. Fowler*, 104-471; *Taylor v. Apple*, 90-345. Affidavit of defendant required: *Wilson v. Fowler*, 104-471; *Taylor v. Apple*, 90-345. No notice to plaintiff of defendant's application necessary: *Deal v. Palmer*, 68-215. Where this section complied with, court must grant leave; has no discretion: *Dempsey v. Rhodes*, 93-120; *Jones v. Fortune*, 69-322.

ART. 10. JOINT AND SEVERAL DEBTORS

497. Defendants jointly or severally liable. Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action is against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise directs, and if he recovers judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served.

Daniel v. Bethell, 167-218; *Davis v. Sanderlin*, 119-84; *Hastein v. Johnson*, 112-258; *Ruffy v. Claywell*, 93-308; *Bain v. Loan Assn.*, 112-248.

2. If the action is against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone.

4. If the name of one or more partners has, for any cause, been omitted in an action in which judgment has been rendered against the defendants named in the summons, and the omission was not pleaded in the action, the plaintiff, in case the judgment remains unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding he was not named in the original action; but the plaintiff may have satisfaction of only one judgment rendered for the same cause of action.

See *Davis v. Sanderlin*, 119-84; *Hastein v. Johnson*, 112-258; *Navassa Guano Co. v. Willard*, 73-522; *Mervin v. Ballard*, 65-168.

Rev., s. 455; Code, s. 222; C. C. P., s. 87.

For joinder of parties, see this chapter, ss. 456-459.

498. Summoned after judgment; defense. When a judgment is recovered against one or more of several persons jointly indebted upon a contract in accordance with the preceding section, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned. A party so summoned may answer within the time specified denying the judgment, or setting up any defense thereto which has arisen subsequent to such judgment; and may make any defense which he might have made to the action if the summons had been served on him originally.

Rev., ss. 456, 457; Code, ss. 223, 224; C. C. P., ss. 318, 322.

See this chapter, s. 492.

Where partner served with notice after three years from time cause of action accrued, held barred by the statute of limitations: *Koonce v. Pelletier*, 115-233; *Rufty v. Claywell*, 93-306—so also in case of secret partner just discovered, *Navassa Guano Co. v. Willard*, 73-521. It is only when the cause of action is joint and not several that a motion in the cause is proper: *Davis v. Sanderlin*, 119-84.

499. Pleadings and proceedings same as in action. The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply. The answer and reply must be verified in like cases and manner and be subject to the same rules that apply in an action, and the issues may be tried and judgment given in the same manner as in an action and enforced by execution if necessary.

Rev., ss. 458, 459; Code, ss. 225, 226; C. C. P., ss. 323, 324.

ART. 11. LIS PENDENS

500. Filing of notice of suit. In an action affecting the title to real property, the plaintiff, at or any time after the time of filing the complaint or when or any time after a warrant of attachment is issued, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, at or any time after the time of filing his answer, if it is intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby.

Rev., s. 460; Code, s. 229; C. C. P., s. 90; 1917, c. 106.

Need not be filed in county where action is brought: *Jones v. Williams*, 155-179; *Harris v. Davenport*, 132-701; *Arrington v. Arrington*, 114-151; *Bird v. Gilliam*, 125-79; *Rollins v. Henry*, 78-352; *Spencer v. Credle*, 102-68; *Collingwood v. Brown*, 106-362; *Morgan v. Bostie*,

132-751. Where case transferred, with all original papers, to another county, *lis pendens* in first county fails: *Arrington v. Arrington*, 114-151. One refused leave to be made party can protect his interest by filing *lis pendens* and instituting proceedings: *Toms v. Warson*, 63-417. Description of property necessary for *lis pendens*: *Badger v. Daniel*, 77-251; *Todd v. Outlaw*, 79-235; *Arrington v. Arrington*, 114-151; *Morgan v. Bostic*, 132-750; *Spencer v. Credle*, 102-68. Effect on property transferred pending suit: *Dancy v. Duncan*, 96-111. Applies to actions concerning alimony, when: *Daniel v. Hodges*, 87-95. Where motion to issue execution pending: *Isler v. Brown*, 66-556; *Badger v. Daniel*, 77-251. This section applied to action for specific performance of contract to sell timber: *Timber Co. v. Wilson*, 151-154; to foreclosure of mortgage on land: *Jones v. Williams*, 155-179; to creditors' bill: *Lee v. Giles*, 161-541.

501. Cross-index of *lis pendens*. Any party to an action desiring to claim the benefit of a notice of *lis pendens*, whether given formally under this article or in the pleadings filed in the case, shall cause such notice to be cross-indexed by the clerk of the superior court in a docket to be kept by him, to be called Record of *Lis Pendens*, which index shall contain the names of the parties to the action, where such notice (whether formal or in the pleadings) is filed, the object of the action, the date of indexing, and sufficient description of the land to be affected to enable any person to locate said lands. The clerk shall be entitled to a fee of twenty-five cents for indexing said notice, to be paid as are other costs in the pending action.

Rev., s. 464; 1903, c. 472; 1919, c. 31.

502. Effect on subsequent purchasers. From the cross-indexing of the notice of *lis pendens* only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. For the purposes of this section an action is pending from the time of cross-indexing the notice.

Rev., s. 462; Code, s. 229; C. C. P., s. 90; 1919, c. 31.

(The following cases are based upon the statute before the amendment as to cross-indexing.) As to the county wherein suit is brought, if a complaint, with description of property and purpose of action stated, be filed upon issuing of summons, it is a filing of notice: *Lamm v. Lamm*, 163-71; *Culbreth v. Hall*, 159-588; *Simmons v. Fleming*, 157-389; *Morgan v. Bostic*, 132-751; *Harris v. Davenport*, 132-701; *Arrington v. Arrington*, 114-151; *Bird v. Gilliam*, 125-79; *Collingwood v. Brown*, 106-362; *Spencer v. Credle*, 102-68; *Dancy v. Duncan*, 96-116; *Rollins v. Henry*, 78-352; *Todd v. Outlaw*, 79-240; *Badger v. Daniel*, 77-251. Not affected with constructive notice outside of county where suit brought: *Spencer v. Credle*, 102-68.

The effect of such notice is confined to the property directly in litigation: *Badger v. Daniel*, 77-251. A purchaser for value after filing of *lis pendens* but before filing of complaint is not charged with notice: *Morgan v. Bostic*, 132-743. Complaint to remove cloud from title operates as *lis pendens*: *Puryear v. Sanford*, 124-282. Purchaser of land under trust sale, after suit brought, with notice, acquires no title: *Overton v. Hinton*, 123-6. One who registers his deed *pendente lite* is bound by the judgment: *Williams v. Kerr*, 113-306.

503. Notice void unless action prosecuted. The notice of *lis pendens* is of no avail unless it is followed by the first publication of notice of the summons or by an order therefor, or by the personal service on the defendant within sixty days after the cross-indexing.

Rev., s. 461; Code, s. 229; C. C. P., s. 90; 1919, c. 31.

Powell v. Dail, 172-261; *Taylor v. Smith*, 121-81.

504. Cancellation of notice. The court in which the said action was commenced may, at any time after it is settled, discontinued or abated, on application of any person aggrieved, on good cause shown, and on such notice as is directed or approved by the court, order the notice authorized by this article to be canceled of record, by the clerk of any county in whose office the same has been filed or recorded; and this cancellation must be made by an endorsement to that effect on the margin of the record, which shall refer to the order.

Rev., s. 463; Code, s. 229; C. C. P., s. 90.

SUBCHAPTER VI. PLEADINGS

ART. 12. COMPLAINT

505. First pleading and its filing. The first pleading on the part of the plaintiff is the complaint. It must be filed in the clerk's office on or before the return day of the summons, otherwise the suit may, on motion, be dismissed at the cost of the plaintiff; but the clerk, for good cause shown, may extend the time to a day certain.

Rev., ss. 465, 466; Code, ss. 206, 232, 238; C. C. P., s. 92; 1868-9, c. 76, s. 3; 1870-1, c. 42, s. 3; 1919, c. 304, s. 2.

NECESSITY FOR COMPLAINT. Nature of the action is shown by the complaint: *Barneycastle v. Walker*, 92-198. As to variance between summons and complaint: *Burrell v. Hughes*, 116-430; *Warrenton v. Arrington*, 101-112. When judgment will cure absence of complaint: *Peebles v. Braswell*, 107-68; *Robeson v. Hodges*, 105-49; *McNeill v. Hodges*, 105-52; *Stancill v. Gay*, 92-455; *Peoples v. Norwood*, 94-167; *Little v. McCarter*, 89-233; *Vick v. Pope*, 81-22; *Leach v. R. R.*, 65-486.

FILING COMPLAINT. What is a filing: *White v. Carroll*, 146-230. Time for filing extended: *Mitchell v. Hoggard*, 105-173; *Howard v. R. R.*, 122-946; *Brendle v. Heron*, 68-495; *Gilchrist v. Kitchin*, 86-20; exercise of power not reviewable: *Gwinn v. Parker*, 119-19; *Brown v. Hale*, 93-188. Pleading filed after adjournment of court: *Foley v. Bank*, 92-476. The failure to file complaint is ground to dismiss the action, if objection is taken in apt time, but its absence will be cured by acquiescence in the judgment: *McLeod v. Graham*, 132-474; *McLean v. Breece*, 113-390; *Peebles v. Braswell*, 107-68; *McNeill v. Hodges*, 105-52; *Robeson v. Hodges*, 105-49; *Little v. McCarter*, 89-233; *Peoples v. Norwood*, 94-167; *Stancill v. Gay*, 92-455; *Leach v. R. R.*, 65-485; *Vick v. Pope*, 81-22. The cases above were before the act of 1919.

506. Contents. The complaint must contain—

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the trial is required to be had, and the names of the parties to the action, plaintiff and defendant.

A general designation of parties as "the heirs of M. C." will not do: *Kerlee v. Corpening*, 97-330—nor will "H. M. & Co.," without naming the partners, *Heath v. Morgan*, 117-504; but there may be an amendment, *Rosenbacher v. Martin*, 170-236. A paper which does not designate the name of the court, the county or the parties, is not a complaint: *Building Co. v. Hardware Co.*, 173-55.

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation must be distinctly numbered.

The principles of good pleading are retained, and the complaint must contain every material allegation: *Hartsfield v. Bryan*, 177-166; and it must set out facts in "plain and concise statement": *Blackmore v. Winders*, 144-216; *Lassiter v. Roper*, 114-17; *Stokes v. Taylor*,

104-394; Knowles v. R. R., 102-65; Junge v. MacKnight, 135-110; Pierce v. R. R., 124-98; McElwee v. Blackwell, 94-261; Hussey v. R. R., 98-39; Womble v. Leach, 83-84; Kiff v. Weaver, 94-278; Jones v. Mial, 82-252; Gorman v. Bellamy, 82-496; Moore v. Hobbs, 77-66; Rountree v. Brinson, 98-107. **Facts, not evidence, must be stated:** Crump v. Mims, 64-767; **nor conclusions of law:** Webb v. Hicks, 116-598. **Complaint for fraud should allege the facts constituting the fraud:** Lanier v. Lumber Co., 177-201; Bank v. Walser, 162-53. **No cause can be set out that did not exist when summons issued:** Crawford v. Barnes, 118-912; Bynum v. Comrs., 101-412; Clendenin v. Turner, 96-416; Metcalf v. Guthrie, 94-447. **Itemized account need not be set out:** McPhail v. Johnson, 115-298. **Pleading quantum meruit:** Holden v. Warren, 118-326; Moffitt v. Glass, 117-142; Roberts v. Woodworking Co., 111-432; Fulps v. Mock, 108-601; Stokes v. Taylor, 104-394. **Failure to aver a demand made upon defendant not fatal when defense shows it would have been futile:** Moore v. Hurtt, 124-27; Worth v. Wharton, 122-376; Hinson v. Smith, 118-503; McQueen v. Smith, 118-450; Heath v. Morgan, 117-504; Woolen Co. v. McKinnon, 114-661; Buffkins v. Eason, 112-162; Rich v. Hobson, 112-79; Taylor v. Hodges, 105-344; Shuford v. Cook, 164-46.

The rules of pleading are not so stringent as to require a special averment in a complaint of every immediate cause in an action for damages: Hammond v. Schiff, 100-161. The plaintiff must allege his cause of action in the complaint, and he cannot recover on a cause of action set out in the pleadings of his adversary: Willis v. Branch, 94-142. **Pleading a proviso in a statute:** Wadsworth v. Stewart, 97-116. **Allegations as to special damage:** Conrad v. Shuford, 174-719. **Complaint is sufficient which apprises defendant of the grievance against him and the redress demanded:** Gillikin v. Canal Co., 147-39.

COMPLAINTS IN SPECIFIC CASES. In action for seduction: Snider v. Newell, 132-614; Hood v. Sudderth, 111-215—for recovery of personal property: Singer Mfg. Co. v. Barrett, 95-36—for injury to building by adjacent owner flooding wall with water: Davis v. Smith, 141-108—for breach of promise to marry: Hood v. Sudderth, 111-215—for penalty against sheriff for false return: Harrell v. Warren, 100-259; Finley v. Hayes, 81-368; Peebles v. Newsome, 74-473—for fraud: Merrimon v. Paving Co., 142-539; Bean v. R. R., 107-731; Worth v. Stewart, 122-263; Riley v. Hall, 119-406; Beaman v. Ward, 132-68—for cancellation of a deed secured by circumvention: Harshaw v. Dobson, 64-384—to require the application of certain special tax funds to purpose for which tax levied: McCless v. Meekins, 117-34—for damages for trespass on real property: Whitaker v. Forbes, 68-228—to enjoin municipality from making unauthorized use of the public funds: Merrimon v. Paving Co., 142-539—to recover on a guaranty: Hughes v. Warehouse Co., 139-158—to recover on bonds of indemnity: Wood v. Kincaid, 144-393; Seaboard Air Line v. Main, 132-445—for libel: Osborn v. Leach, 135-628; Williams v. Smith, 134-249—for recovery of life insurance premiums where agent induced payment through fraud and deceit: Gwaltney v. Assurance Co., 130-629—for recovery on constable's bond for false imprisonment: Warren v. Boyd, 120-56—for breach of covenant of seizin: Eames v. Armstrong, 142-506—for breach of warranty of title to land: Zimmerman v. Lynch, 130-61; Ravenal v. Ingram, 131-549; Mizzell v. Ruffin, 118-69; Wilson v. Vreeland, 176-504; Goodman v. Heilig, 157-6—for recovery of damages for right of way of railroad: Hill v. Mining Co., 113-259—for damages on contract for the sale of goods of specific quality: Cox v. Long, 69-7—for goods sold and delivered: Smith v. Summerfield, 108-284—for recovery by husband, who is tenant by curtesy initiate, of possession of his wife's land: Wilson v. Arentz, 70-670—to recover cotton claimed as rent: Haywood v. Rogers, 73-320—for accounting and settlement of guardian: Adams v. Quinn, 74-359—to have executor's administrator declared trustee for legatee of executor's testator: McFarland v. McKay, 74-258—action to recover payment of claim against county: Leach v. Comrs., 84-830; Jones v. Comrs., 73-182; Love v. Comrs., 64-706—for possession of personal property by officer, the officer having levied thereon: Penland v. Leatherwood, 101-509—for slander: Wozelka v. Hettrick, 93-10; Burns v. Williams, 88-159—for ponding water on land: Parker v. R. R., 119-677—to restrain waste: Farabow v. Green, 108-339; Jones v. Britton, 102-166; Gordon v. Lowther, 75-193—for wrongly evicting tenant: Burwell v. Brodie, 134-540—to enforce the double liability of bank stockholders: Smathers v. Bank, 135-410—to enforce a right of way through neighbor's land: Boyden v. Achenbach, 79-539—to impeach a deed from husband to trustee for wife because based upon contemplated separation: Barnes v. Barnes, 104-613—for accounting by administrator within two years: Allen v. Royster, 107-278—for trespass in cutting timber trees: Davis v. Wall, 142-450—against an administrator for negligence in dis-

charge of duty: Wood v. Morgan, 118-749—to recover on a promissory note: Deloatch v. Vinson, 108-147—to recover debt on contract: Burbage v. Windley, 108-357; Lassiter v. Roper, 114-17; Moore v. Hobbs, 79-535—for penalty for register of deeds issuing marriage license unlawfully: Maggett v. Roberts, 112-71; also 108-174—for conspiracy to defraud administrator and others: Murray v. Southerland, 125-177—to recover land: Westfelt v. Adams, 131-379; Stancill v. James, 126-190; Asbury v. Fair, 111-258; Brown v. King, 107-313; Bryan v. Spivey, 106-99; Speight v. Jenkins, 99-143; Richards v. Smith, 98-509; Thames v. Jones, 97-121; Tyson v. Shepherd, 90-314; Johnston v. Pate, 83-110; Falls v. Gamble, 66-455; Garrett v. Trotter, 65-430—to review and revise a judgment: Farrar v. Staton, 101-78—to set aside judgment for fraud: Moore v. Gulley, 144-81; Kinsland v. Adams, 172-765.

Action to cancel assignment of a public franchise and enjoin use of same: Atkinson v. Ry. Co., 113-581—for conversion: Parker v. Harden, 121-57; Womble v. Leach, 83-84—for usury: Churchill v. Turnage, 122-426; Morgan v. Bank, 93-352—for recovery of an office: Kilburn v. Patterson, 98-593; Hancock v. Hubbs, 98-590; Hahn v. Stinson, 98-591—to recover taxes collected by tax collector or sheriff: Comrs. v. Candler, 123-682; Bd. of Ed. v. Walls, 117-382; Coffield v. McNeill, 74-535; Comrs. of Pender v. McPherson, 79-524—against a bank officer personally for deceiving depositor as to solvency of bank: Solomon v. Bates, 118-311; Townsend v. Williams, 117-330; Tate, Treas., v. Bates, 118-289—to recover payment for subscribed stock from delinquent stockholder: Worth v. Wharton, 122-376—to set aside a deed for fraud or undue influence: Riley v. Hall, 119-406; Bank v. Harris, 84-206; Eddleman v. Lentz, 158-65—against distributees on their refunding bonds given administrator: Lowery v. Perry, 85-131—to enforce laborer's lien: Moore v. R. R., 112-236; Wray v. Harris, 77-77; Cook v. Cobb, 101-68—against sheriff for refusing to set aside personal property exemption: Scott v. Kenan, 94-296—for recovery on life insurance policy: Britt v. Ins. Co., 105-175; Cheek v. Lodge, 129-179—for recovery on fire insurance policy: Hayes v. Ins. Co., 132-702; Wright v. Ins. Co., 138-488.

Action for negligence (but for specific actions see further under this paragraph of annotations): Thomason v. R. R., 142-318; Black v. R. R. Co., 115-667; Harris v. Quarry Co., 131-553; Hagins v. R. R., 106-537—for negligence by express company in failing to deliver whiskey intended for sickness: Thompson v. Exp. Co., 144-389—for wrongful death: Lassiter v. R. R., 136-89; Conley v. R. R., 109-692, see section 160—for injury to house, furniture, etc., and for nuisance caused by vibrations of engine, and from sparks, cinders, etc.: Thomason v. R. R., 142-318—for providing machinery not reasonably safe to servant: Bradley v. Coal Co., 169-255; Klunk v. Granite Co., 170-70; Moore v. R. R., 141-111—for providing for servant unsafe place to work: Bradley v. R. R., 144-555—for moving train while employee unloading car: Smith v. R. R., 129-374—for burning property by sparks from railroad engines: Black v. R. R., 115-667—for injury by negligence of engineer: Hagins v. R. R., 106-537; Ramsay v. R. R., 91-418; Stanly v. R. R., 89-331—for physical injury or disease resulting from fright and shocks caused by negligence: Watkins v. Mfg. Co., 131-536—to set aside tax deed as cloud upon title: Beck v. Meroney, 135-532—for recovery of penalty for refusal to receive freight: Currie v. R. R., 135-535—to enjoin treasurer from paying interest on county bonds: Comrs. v. Williams, 135-660—for breach of married woman's contract: Bank v. Howell, 118-274; Witz v. Gray, 116-48; Ulman v. Mace, 115-24; Jones v. Craigmiles, 114-613; Long v. Rankin, 108-333; Farthing v. Shields, 106-289; Flaum v. Wallace, 103-296; Dougherty v. Sprinkle, 88-300—against railroad company for failing to protect passenger: Manning v. R. R., 122-824; Chancey v. R. R., 174-351.

Action to recover from life insurance company money paid for policy when no policy received: Barnes v. Piedmont Ins. Co., 74-22—for divorce: Ladd v. Ladd, 121-118; O'Connor v. O'Connor, 109-139; Jackson v. Jackson, 105-433; White v. White, 84-340—by administrator, to recover back legacy wrongfully paid: Bumpass v. Chambers, 77-357—for negligence in delivery of telegram: Sherrill v. Tel. Co., 109-527; Mayo v. Tel. Co., 112-343; Johnson v. Tel. Co., 175-588—to restrain sale of land under mortgage: Hemmings v. Doss, 125-400—**malicious prosecution and abuse of process:** Jerome v. Shaw, 172-862; Estates v. Bank, 171-579; R. R. v. Hardware Co., 143-54; s. c., 138-175; Lockhart v. Bear, 117-299; Davis v. Terry, 114-27; Ely v. Davis, 111-24; Sneed v. Harris, 109-349; Barfield v. Turner, 101-357; Johnson v. Finch, 93-205—negligence in use of automobile, Williams v. Blue, 173-452—**negligence of physician,** Bailey v. Long, 172-661—**encroachment by overhanging wall,** Shrago v. Gulley, 174-135—**action for destroying part of a will,** Dulin v. Bailey, 172-608—to convert

an absolute deed into a mortgage, *Williamson v. Rabon*, 177-302; *Newton v. Clark*, 174-393, overruling *Fuller v. Jenkins*, 130-554—action by purchaser to ascertain amount due on a mortgage, *Elliott v. Brady*, 172-828—for wrongful expulsion from a society, *Dunn v. Aid Society*, 151-133—negligence of two railroads at crossing, *Martin v. R. R.*, 148-259—against railroad for malpractice of surgeon, *Barden v. R. R.*, 152-318—for negligence in grading street, *Jones v. Henderson*, 147-120—by one indorser against subsequent indorser, *Lynch v. Loftin*, 153-270—to enjoin town from purchasing waterworks, *Jones v. North Wilkesboro*, 150-646—action against defendant for failure to comply with contract of a third person which he had assumed, *Younce v. Lumber Co.*, 148-35.

3. A demand for the relief to which the plaintiff supposes himself entitled. If the recovery of money is demanded, the amount must be stated.

A formal prayer for relief is not now necessary; party can obtain any relief to which the facts alleged entitle him, or that is not inconsistent with his pleadings: *McCullock v. R. R.*, 146-316; *Warren v. Dail*, 170-406; *Mfg. Co. v. Mfg. Co.*, 161-430; *Herring v. Lumber Co.*, 159-382; s. c., 163-481; *Councill v. Bailey*, 154-54; *Carson v. Bunting*, 154-530; *Bradburn v. Roberts*, 148-214; *Davis v. Wall*, 142-450; *Staton v. Webb*, 137-35; *Voorhees v. Porter*, 134-591; *Hendon v. R. R.*, 127-110; *Gattis v. Kilgo*, 125-135; *Gillam v. Ins. Co.*, 121-369; *Simmons v. Allison*, 118-763; *Sams v. Price*, 119-574; *Parker v. R. R.*, 119-677; *Scarlett v. Norwood*, 115-284; *Fowler v. Osborne*, 111-409; *Gudger v. Penland*, 108-593; *McEachin v. Stewart*, 106-336; *McNeill v. Hodges*, 105-52; *Harris v. Sneeden*, 104-369; *Barnes v. Barnes*, 104-613; *Davis v. Ely*, 100-283; *Moore v. Cameron*, 93-51; *Lumber Co. v. Wallace*, 93-22; *Patrick v. R. R.*, 93-422; *Jones v. Mial*, 79-168; *Dunn v. Barnes*, 73-273; *Knight v. Hough-talling*, 85-17. Facts alleged, not the prayer for relief, govern the relief granted: *Shrago v. Gulley*, 174-135; *Baber v. Hanie*, 163-588; *Reid v. King*, 158-85; *Adams v. Hayes*, 120-383; *Reade v. Street*, 122-301; *Johnson v. Loftin*, 111-319; *Moore v. Nowell*, 94-265. The sum demanded in good faith governs the jurisdiction: *Martin v. Goode*, 111-288; *Thompson v. Exp. Co.*, 144-389; *Bowers v. R. R.*, 107-721; *Moore v. Nowell*, 94-265; *Brantley v. Finch*, 97-91; *Wiseman v. Witherow*, 90-140.

4. In actions for the recovery of a debt contracted for the purchase of land, a statement that the consideration of the debt was the purchase money of certain land, describing the land in an intelligible manner, such as the location, boundaries, and acreage.

Not necessary to allege in complaint on note for purchase money of land that the title to the land is good or that plaintiff has tendered a deed: *Toms v. Fite*, 93-274. This section does not apply to cases where deed has not been executed to the vendee: *Lewis v. McDowell*, 88-261. A note under seal, reciting that it was given for the balance of the purchase price of certain land, executed and registered, does not attach to the legal title a trust for its payment or constitute a lien thereon: *Carpenter v. Duke*, 144-291. See sections 520 and 675 (5).

Rev., ss. 467-8; Code, ss. 233-4; C. C. P., s. 93; 1879, c. 217.

507. What causes of action may be joined. The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—

The same principle which forbids the improper joinder of causes in civil actions applies to special proceedings: *Garrison v. Cox*, 99-478. Where different causes of action exist between plaintiffs and defendants, all of same character, to prevent multifarious actions, court will permit joinder for convenience: *Hancock v. Wooten*, 107-9; *Heggie v. Hill*, 95-303; also see *Williams v. R. R.*, 144-502, and cases cited. An action in tort against several defendants is joint or several according to the complaint, and the plaintiff's election determines the character of the tort, whether joint or several: *Hough v. R. R.*, 144-692; *Lyon v. R. R.*, 165-143. Where plaintiff seeks relief against a number of defendants all in some way interested in subject of action, see *Oyster v. Mining Co.*, 140-135; *Blackburn v. Ins. Co.*, 116-824; *Pretzfelder v. Ins. Co.*, 116-491; *Springer v. Sheets*, 115-370; *LeDue v. Brandt*, 110-289; *Young v. Young*, 81-92; *Fisher v. Trust Co.*, 138-224; *Winders v. Sutherland*, 174-235; *Ayers v. Bailey*, 162-

209. Objection to misjoinder must be taken by demurrer or answer, and if taken by neither, cannot be taken by motion upon trial: *Kiger v. Harmon*, 113-408; *Finley v. Hayes*, 81-368; *McMillan v. Edwards*, 75-83; *Burns v. Ashworth*, 72-496—and never in the supreme court: *Wright v. Kinney*, 123-618.

1. The same transaction, or transaction connected with the same subject of action.

“Same transaction” discussed: *Hawk v. Pine Lumber Co.*, 145-48; *Fisher v. Trust Co.*, 138-224; *Cook v. Smith*, 119-350; *Benton v. Collins*, 118-196; *Cheatham v. Bobbitt*, 118-346; *Young v. Young*, 81-92. “Transactions connected with the same subject of action”: *Sloan v. R. R.*, 126-490; *Benton v. Collins*, 118-196; *Cook v. Smith*, 119-350; *Hamlin v. Tucker*, 72-502; *Solomon v. Bates*, 118-316; *McGowan v. Ins. Co.*, 141-368; *Ingram v. Corbit*, 177-318; *Lee v. Thornton*, 171-209; *Quarry Co. v. Construction Co.*, 151-345. Causes of action strictly legal and strictly equitable can be united in one action: *Lumber Co. v. Wallace*, 93-22; *Gregory v. Hobbs*, 93-1.

PROPER JOINDER. Cause of action for contract with cause for tort: *Reynolds v. R. R.*, 136-345; *Daniels v. Fowler*, 120-14; *Hodges v. R. R.*, 105-170; *Cook v. Smith*, 119-350; *Benton v. Collins*, 118-196; *Railroad Co. v. Hardware Co.*, 135-75; *Hawk v. Lumber Co.*, 145-48; *Robertson v. Halton*, 156-215; *Long v. Fields*, 104-221; *Ashe v. Gray*, 88-190—for debt and to subject property to payment: *Outland v. Outland*, 113-74—for debt with cause for setting aside fraudulent conveyances: *Bank v. Harris*, 84-206; *Benton v. Collins*, 118-196; *Chemical Co. v. Floyd*, 158-455—for reëxecution of lost deed with cause for possession of land: *McMillan v. Edwards*, 75-81—against bank directors for loss of deposit by neglect with cause for fraud and deceit: *Solomon v. Bates*, 118-311; *Tate, Treas.*, v. *Bates*, 118-287—against partner on partnership liability with personal liability, in certain cases: *Logan v. Wallis*, 76-416—for harboring and maintaining wife with causes for conversion of personalty and for inducing wife to make deed to land: *Hamlin v. Tucker*, 72-502—for recovery of premiums paid on different insurance policies under false representations: *McGowan v. Ins. Co.*, 141-367.

MISJOINDER. Cause of action on clerk's bond with cause on administrator's bond: *Street guarantor of judgment on the note: Wooten v. Maulsby*, 69-462—to remove trustees, to set up lost deed and have trust in property declared: *Nash v. Sutton*, 109-550—to foreclose mortgage on one tract with cause to recover possession of another: *Edgerton v. Powell*, 72-64—to partition one tract held in common and another not held in common by the same tenants: *Simpson v. Wallace*, 83-477.

2. Contract, express or implied.

PROPER JOINDER. Cause of action on official bond for one term of office with cause on bond for succeeding term: *Syme v. Bunting*, 86-175—on one judgment with causes on another against same party: *Moore v. Nowell*, 94-265—for recovery of one penalty with cause for recovery of another against same party: *Burrell v. Hughes*, 116-430; *Maggett v. Roberts*, 108-174—for specific performance of contract with damages for breach of same: *Winders v. Hill*, 141-694—debt on note and open account: *Sutton v. McMillan*, 72-102.

MISJOINDER. Cause of action on clerk's bond with cause on administrator's bond: *Street v. Tuck*, 84-605.

3. Injuries with or without force to person or property.

PROPER JOINDER. Cause of action for illegal levy and sale by sheriff with cause against party who directed sheriff to levy and gave indemnifying bond: *Cook v. Smith*, 119-350; negligence of employer and employee: *Howell v. Fuller*, 151-315.

MISJOINDER. A cause of action for wrongful attachment and a cause against surety to attachment bond: *Railroad v. Hardware Co.*, 135-73; *Martin v. Rexford*, 170-540—action by father and son for injury to son: *Thigpen v. Cotton Mills*, 151-97.

4. Injuries to character.

Gattis v. Kilgo, 125-135.

5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same.

PROPER JOINDER. Cause of action by vendor against vendee personally, with cause against him in rem, and also with cause to recover possession of property: *Bank v. Pearson*, 119-494; *Allen v. Taylor*, 96-37—for recovery of possession of land with cause to set up a mistake in a deed: *Ely v. Early*, 94-1—for possession of real property as against several different trespassers: *Bryan v. Spivey*, 106-95—for possession with cause for reëxecution of unregistered lost deed: *Jennings v. Reeves*, 101-447—to recover two contiguous tracts of land, where they form part of larger body: *Weeks v. McPhail*, 128-134; *Bryan v. Spivey*, 106-95—an action to set aside a deed and for possession of the land: *Lee v. Thornton*, 176-208.

MISJOINDER. Cause of action for foreclosure of mortgage on realty with cause for possession of a different tract: *Edgerton v. Powell*, 72-64. Cases where subsection merely cited: *Sherrill v. Connor*, 107-637; *Jones v. Coffey*, 109-519.

6. Claims to recover personal property, with or without damages for the withholding thereof; or,

7. Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated.

Cause must belong to one class and must affect all the parties, except as to foreclosure of mortgages: *Railroad Co. v. Hardware Co.*, 135-75; *Morton v. Tel. Co.*, 130-303; *Gattis v. Kilgo*, 125-133; *Cromartie v. Parker*, 121-204; *Hodges v. R. R.*, 105-170; *Doughty v. R. R.*, 78-22; *Street v. Tuck*, 84-605; *Logan v. Wallis*, 76-416; *Land Co. v. Beatty*, 69-329; *Heggie v. Hill*, 95-303—causes of action requiring different places of trial: *Cedar Works v. Lumber Co.*, 161-603.

In actions to foreclose mortgages, the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that remains unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor is personally liable for the debt secured; and if the mortgage debt is secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make that person a party to the action, and the court may adjudge payment of the residue of the debt remaining unsatisfied after a sale of the mortgaged premises, against the other person, and may enforce such judgment as in other cases.

Rev., s. 469; Code, s. 267; C. C. P., s. 126.

ART. 13. DEFENDANT'S PLEADINGS

508. Demurrer and answer. The only pleading on the part of the defendant is either a demurrer or an answer. He may demur to one or more of several causes of action stated in the complaint, and answer to the residue.

Rev., ss. 470, 471; Code, ss. 238, 246; C. C. P., ss. 94, 103.

DEFENDANT MUST DEMUR OR ANSWER: *McClenahan v. Cotten*, 83-332. Demurrer precedes the answer: *Finch v. Baskerville*, 85-205. Answering waives the demurrer: *Wilson v. Pearson*, 102-290; *Hyman v. Devereux*, 63-624; *Moseley v. Johnson*, 144-258; *Ransom v. McClees*, 64-17. Where defendants jointly liable, one cannot answer and the other demur: *Von Glahn v. DeRossett*, 76-292. Motion for nonsuit cannot be made a substitute for a demurrer: *Andrews v. Pritchett*, 66-387. One defendant cannot file a cross-complaint against a codefendant: *Dillon v. Raleigh*, 124-184; nor can a defendant demur to a codefendant's answer: *Gregg v. Wilmington*, 155-18.

DEMURRER AND ANSWER TO SEPARATE CAUSES. Defendant cannot answer and demur to the same cause of action: Speight v. Jenkins, 99-143; Finch v. Baskerville, 85-205; Ransom v. McClees, 64-17; Von Glahn v. DeRossett, 76-292. He may demur to one cause and answer to another: Cowand v. Meyers, 99-198; Sumner v. Young, 65-579. Where defendants are jointly liable a part cannot demur while the remainder answers: Von Glahn v. DeRossett, 76-292—but otherwise when not jointly liable: Conant v. Barnard, 103-320.

509. When defendant appears and pleads; time for. The defendant must appear and demur or answer within twenty days after the return day of the summons, or if the time is extended for filing the complaint, then the defendant shall have twenty days after the date fixed by such extension; but the clerk, for good cause shown, may extend the time for filing the answer or demurrer; otherwise the plaintiff may have judgment by default.

Rev., s. 473; Code, 207; 1870-1, c. 42, s. 4; 1919, c. 304, s. 3.

For order enlarging time to plead, see this chapter, s. 536.

Cases decided before the act of 1919. Extension of time to file pleadings a matter of discretion: Gilchrist v. Kitchin, 86-20; Gwinn v. Parker, 119-19; Reese v. Jones, 84-597; Boddie v. Woodard, 83-2. A pleading placed in the files after the judge has left court is not filed in contemplation of law: Foley v. Blank, 92-476; but an answer forwarded by mail and received by clerk before adjournment is sufficient: Gallins v. Ins. Co., 174-553. Cases merely citing section: Meeke v. Mineral Co., 122-796; Barnes v. Crawford, 115-80; Fertilizer Co. v. Black, 114-593. Judgment by default at return term when defendant fails to answer or demur: Brown v. Rhinehart, 112-772; also see section 595.

510. Sham and irrelevant defenses. Sham and irrelevant answers and defenses may be stricken out on motion, upon such terms as the court may in its discretion impose.

Rev., s. 472; Code, s. 247; C. C. P., s. 104.

For judgment on frivolous pleading, see this chapter, s. 599.

SHAM AND IRRELEVANT DEMURRER. Definition: Morgan v. Harris, 141-358; Porter v. Grimsley, 98-550; Johnston v. Pate, 83-110; Bank v. Duffy, 156-83. Illustrations of sham and irrelevant demurrers: Hurst v. Addington, 84-143; Dunn v. Barnes, 73-273. When demurrer is held frivolous, judgment for plaintiff can be entered: Cowan v. Baird, 77-201; also see section 599. Refusal to hold demurrer frivolous is not appealable: Morgan v. Harris, 141-358; Abbott v. Hancock, 123-89.

SHAM AND IRRELEVANT ANSWERS. Sham and irrelevant answer defined: Vass v. Brewer, 122-226; Weil v. Uzzell, 92-517; Atkinson v. McIntyre, 90-147; Howell v. Ferguson, 87-113; Hurst v. Addington, 84-143; Johnston v. Pate, 83-110. Cases where answers were contended to be sham or irrelevant, but held good: Buie v. Brown, 104-335; Bank v. Atkinson, 113-478; Campbell v. Patton, 113-481; Bank v. Charlotte, 75-45; Swepson v. Harvey, 66-436. Illustration of sham and irrelevant answers: Deloatch v. Vinson, 108-147; Rumbough v. Imp. Co., 106-461; Atkinson v. McIntyre, 90-147; Brogden v. Henry, 83-274; Dail v. Harper, 83-4; Comrs. v. Piercy, 72-181; Schehan v. Malone, 71-440; Holmes v. Godwin, 69-470; Flack v. Dawson, 69-42. Answers should not be stricken out as frivolous unless palpably so: Womble v. Fraps, 77-98; Hull v. Carter, 83-249; Erwin v. Lowery, 64-321; Boone v. Hardie, 83-470; Whitaker v. Jenkins, 138-476—and judge's refusal to strike out answer as frivolous is not appealable: Walters v. Starnes, 118-842.

ART. 14. DEMURRER

511. Grounds for. The defendant may demur to the complaint when it appears upon the face thereof, either that:

Demurrer explained: Wood v. Kincaid, 144-393. Can be taken only for the causes herein stated: Dunn v. Barnes, 73-273. Defect must appear upon the face of the complaint: Bes-seliew v. Brown, 177-65; Dalrymple v. Cole, 156-353; Davison v. Gregory, 132-389; Von Glahn

v. DeRossett, 76-292; *Bank v. Britton*, 66-365. A "speaking demurrer" is not allowed. See cases above cited. For defects not appearing in complaint, see section 517. A demurrer admits every material fact sufficiently alleged in the complaint: *Hartsfield v. Bryan*, 177-166; *Board of Health v. Comrs.*, 173-250; *Hendrix v. R. R.*, 162-9; *Brewer v. Wynne*, 154-467; *Smith v. Hartsell*, 150-71; *Wood v. Kincaid*, 144-393; *Merrimon v. Paving Co.*, 142-539; *Loughran v. Giles*, 110-426—but not conclusions of law, nor facts contrary to law: *Board of Health v. Comrs.*, 173-250; *Pritchard v. Comrs.*, 126-908. For waiver of demurrer, see section 508.

Defects merely formal are not demurrable: *Fulps v. Mock*, 108-605; *Stokes v. Taylor*, 104-394; *Moore v. Edmiston*, 70-510; *Heath v. Morgan*, 117-504; *Rosenbacher v. Martin*, 170-236—that the complaint is argumentative or redundant: *Pender v. Mallett*, 123-57; *Daniels v. Fowler*, 120-14; *Smith v. Summerfield*, 108-284; *McGill v. Buie*, 106-242; *Thames v. Jones*, 97-121. See section 537. The statute of limitations cannot be taken advantage of by demurrer, see section 405; nor the statute of frauds, see section 988; nor contributory negligence, see section 523; nor a wrong venue, *McCullen v. R. R.*, 146-568. If one allegation is defective it will extend to the whole cause of action: *Speight v. Jenkins*, 99-143. There is no law or practice that will permit a tender of judgment of one dollar as an aid to a defective demurrer: *Hall v. Tel. Co.*, 139-369. As to frivolous demurrers, see section 510.

1. The court has no jurisdiction of the person of the defendant, or of the subject of the action; or,

A demurrer to the jurisdiction admits the facts for the purposes of the demurrer: *Merrimon v. Paving Co.*, 142-539. Lack of jurisdiction must appear upon face of complaint: *Bank v. Britton*, 66-365. But that the court does not properly exist as a court cannot be taken advantage of in this way: *State v. Hall*, 142-710. In a case transferred from the clerk to the term, upon issues joined, the complaint amended to include matters not within clerk's jurisdiction is demurrable: *Capps v. Capps*, 85-408; but see section 637.

Cases where question of jurisdiction of the person raised by demurrer: *Hughes v. Comrs.*, 107-598; *Cain v. Nicholson*, 77-411; *Oliver v. Wiley*, 75-320; *McFarland v. McKay*, 74-258; *Winslow v. Comrs.*, 64-218. For questions as to jurisdiction of superior court, see section 1436; justices of the peace, sections 1473, 1474; clerk of superior court, section 938. Failure to demur formally does not waive defect of jurisdiction, see section 518.

2. The plaintiff has not legal capacity to sue; or,

A demurrer for incapacity of plaintiff admits the facts of the complaint for the purposes of the demurrer: *Merrimon v. Paving Co.*, 142-539. Contingent remainderman allowed to restrain waste: *Cowand v. Meyers*, 99-198; *Gordon v. Lowther*, 75-193. Party injured by false return of the sheriff can bring action for penalty, although the former action was brought in name of the state to the use of the party: *Peebles v. Newsom*, 74-473. In an action by infant, a plea in bar waives the right to demur: *Hicks v. Beam*, 112-642.

3. There is another action pending between the same parties for the same cause; or,

Where the pendency of an action between same parties over same cause appears in complaint it must be taken advantage of by demurrer: *Alexander v. Norwood*, 118-381; *Harris v. Johnson*, 65-478; *Redfearn v. Austin*, 88-413; *Cook v. Cook*, 159-47. Must be between same parties for same cause: *McNeill v. Currie*, 117-341; *Claywell v. Sudderth*, 77-287; *Turner v. Rosenthal*, 116-437; *Probst v. Mathis*, 115-526; *Curtis v. Piedmont*, 109-401; *Tobacco Co. v. McElwee*, 94-425; *Pendleton v. Davis*, 92-185; *Sloan v. McDowell*, 75-29; *Woody v. Jordan*, 69-189; *Harris v. Johnson*, 65-478—and must be pending in this state, *Ridley v. R. R.*, 118-996; *Sloan v. McDowell*, 75-29; *Carpenter v. Hanes*, 162-46. Parties cannot by consent give court jurisdiction of second action brought: *Alexander v. Norwood*, 118-381. An action is pending from the time the summons is issued: *Pettigrew v. McCoin*, 165-472. Where summons issued by a justice was never served and on its return day another justice issued summons on same cause, first terminated when summons in second was issued: *Webster v. Laws*, 86-179, 89-224.

4. There is a defect of parties plaintiff or defendant; or,

For "defect of parties" objection must be interposed by demurrer, if the complaint shows the defect, and if it does not, then by answer: *Styers v. Alspaugh*, 118-631; *Kornegay v. Steamboat Co.*, 107-115; *Leak v. Covington*, 99-559; *Mining Co. v. Smelting Co.*, 99-445; *Lunn v. Shermer*, 93-164; *Usry v. Suit*, 91-406. This applies to necessary parties: *Winders v. Hill*, 141-694; *Barrett v. Brown*, 86-556; *Hunter v. Yarborough*, 92-68; *Gill v. Young*, 82-273—and as to who is "necessary party," see annotations under section 457. It is no "defect of parties" to have unnecessary parties: *Abbott v. Hancock*, 123-99; *Sullivan v. Field*, 118-358; *McMillan v. Baxley*, 112-578; *Moore v. Nowell*, 94-265; *Hoover v. Berryhill*, 84-137; *Burns v. Ashworth*, 72-496; *Hargrove v. Hunt*, 73-24; *Righton v. Pruden*, 73-64; *Wool v. Edenton*, 113-33; *Winders v. Sutherland*, 174-235; *Withrow v. R. R.*, 159-222; *Worth v. Trust Co.*, 152-242. The defect is waived if no objection interposed properly: *Howe v. Harper*, 127-356; *Kornegay v. Steamboat Co.*, 107-117; *Mining Co. v. Smelting Co.*, 99-445; *Lunn v. Shermer*, 93-164; *Rosenbacher v. Martin*, 170-236; *Bridgers v. Staton*, 150-216. When after demurrer filed parties came in and made themselves parties, demurrer untenable: *Hill v. Mining Co.*, 113-259. A demurrer for misjoinder of parties admits the facts for the purposes of the demurrer: *Merrimon v. Paving Co.*, 142-539.

In an action for an injury to a passenger, the joinder of two railroad corporations operating over the same track through a lessee is not improper: *Carleton v. R. R.*, 143-43. Failure to join the husband in an action by the wife to declare a trust is not a defect: *Ricks v. Wilson*, 151-46. A petition filed by an attorney in his own name as attorney for certain persons named is not defective for want of parties: *Hartsfield v. Bryan*, 177-166. Joinder of father and son in an action for personal injury to the son is improper: *Thigpen v. Cotton Mills*, 151-97. Failure to join personal representative of deceased mortgagor in a suit for foreclosure is a defect: *Geitner v. Jones*, 173-591.

5. Several causes of action have been improperly united; or,

For causes of action that can be joined, see section 507. Objection waived if misjoinder not demurred to when defect appears in complaint: *Teague v. Collins*, 134-62; *Hocutt v. R. R.*, 124-216; *McMillan v. Baxley*, 112-578; *Hall v. Turner*, 111-180; *Finley v. Hayes*, 81-368; *Boney v. R. R.*, 175-354.

Complaint setting up separate causes of action against several parties among whom there is no community of interest is demurrable: *Cromartie v. Parker*, 121-198. Joinder of action for damages for land taken without condemnation and an action for trespass is improper: *Abernathy v. R. R.*, 150-97. Action by father and son for injury to son is a misjoinder: *Thigpen v. Cotton Mills*, 151-97. Two causes of action for injury to plaintiff's interest in a corporation by unlawful combination not a misjoinder: *Worth v. Trust Co.*, 152-242. Action for tort against two defendants and a separate cause against each for the same tort, the last two causes are surplusage: *Tyler v. Lumber Co.*, 165-163. Action to set aside two deeds obtained from the same person by undue influence of defendants is not a misjoinder: *Lee v. Thornton*, 171-209.

6. The complaint does not state facts sufficient to constitute a cause of action.

For complaints stating a cause of action, see section 506 (2). A demurrer admits the facts alleged in the complaint, and if any part presents a cause of action the demurrer is overruled: *Hartsfield v. Bryan*, 177-166; *Hendrix v. R. R.*, 162-9; *Brewer v. Wynne*, 154-467; *Olive v. R. R.*, 152-279; *Wilcox v. R. R.*, 152-316; *Wood v. Kineaid*, 144-393; *Moore v. Hobbs*, 79-535. The complaint must be wholly insufficient: *Foy v. Stephens*, 168-438; *Hoke v. Glenn*, 167-594; *Womaek v. Carter*, 160-286; *Bank v. Duffy*, 156-83; *Blackmore v. Winders*, 144-215.

Defective statement of good cause of action and statement of a defective cause of action distinguished: *Eddleman v. Lentz*, 158-65; *Ladd v. Ladd*, 121-121; *Knowles v. R. R.*, 102-59; *Halstead v. Mullen*, 93-252. A defective cause of action is fatal on demurrer: *Cavanaugh v. Jarman*, 164-373; *Eddleman v. Lentz*, 158-65; a failure to demur does not waive the defect, and if demurrer is overruled objection may still be taken by motion under section 518: *Baker v. Garris*, 108-218.

A defective statement of good cause of action is not fatal and may be cured by amendment: *Foy v. Stephens*, 168-438; *Dockery v. Hamlet*, 162-118; *Shingle Mills v. Sanderson*, 161-452;

Eddleman v. Lentz, 158-65; Blalock v. Clark, 133-308; Ladd v. Ladd, 121-121; Mizzell v. Ruffin, 118-69; Bowling v. Burton, 101-176. It is waived if no objection is raised: Harrison v. Garrett, 132-172; Bennett v. Telegraph Co., 128-103; Knowles v. R. R., 102-59; Johnson v. Finch, 93-205; Halstead v. Mullen, 93-252; Wilson v. Sykes, 84-215; and it may be aided by subsequent pleading: King v. R. R., 176-301; Shute v. Austin, 120-440; Whitley v. R. R., 119-724; Mizzell v. Ruffin, 118-69; Wiggins v. Kirkpatrick, 114-298; Bonds v. Smith, 106-554; Harris v. Sneeden, 104-369; Knowles v. R. R., 102-59; Wilson v. Lineberger, 94-641; Willis v. Branch, 94-142; Warner v. R. R., 94-250; Johnson v. Finch, 93-205; Garrett v. Trotter, 65-430.

Complaint against a county for damages because county authorities burned a house infected with contagion, is demurrable: Pritchard v. Comrs., 126-908. Complaint against register of deeds for damages for unlawfully issuing marriage license, demurrable for failure to state cause of action: Wilkinson v. Dellinger, 126-462. If two defendants join in a demurrer and the cause of action is good against either, the demurrer will be overruled: Winders v. Sutherland, 174-235; but see Blackmore v. Winders, 144-215. An action against indemnitors of a codefendant, when demurrable: Clark v. Bonsal, 157-270. Cause of action for trespass on land: Hood v. Telegraph Co., 162-70. Cause of action by father for seduction of child: Howell v. Howell, 162-283. Failure to allege corporate existence of defendant corporation is not demurrable: Bank v. Duffy, 156-83; Elevator Co. v. Hotel Co., 172-319. Failure to allege presentation of claim against a town within two years is demurrable: Doekery v. Hamlet, 162-118; see, also, Burnett v. R. R., 163-186. In an action for damages to land by highway commission, objection must be taken by answer and not by demurrer: Kendall v. Highway Com., 165-600. In an action for a cause arising in another state objection as to the law of that state must be taken by answer and not by demurrer: Miller v. R. R., 154-441.

Rev., s. 474; Code, s. 239; C. C. P., s. 95.

512. Must specify grounds. The demurrer must distinctly specify the grounds of objection to the complaint, or it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

Rev., s. 475; Code, s. 240; C. C. P., s. 96.

A general demurrer will not do; it must specify the ground of objection: Ball v. Paquin, 140-83; Milliken v. Denny, 135-24; Elam v. Barnes, 110-73; Hunter v. Yarboro, 92-68; Goss v. Waller, 90-149; Bank v. Bogle, 85-203; George v. Hicks, 85-99; Jones v. Comrs., 85-278; Love v. Comrs., 64-706; Ullery v. Guthrie, 148-417. What defects not waived, see section 518. As to answering some causes set forth in complaint and demurring to others, see section 508.

513. Amendment; hearing. If a demurrer is filed the plaintiff may be allowed to amend. If he fail to amend within three days after notice, and there be no agreement between the parties as to the time and place of hearing the same before some judge of the superior court, then it shall be the duty of the clerk of the superior court forthwith to send up the complaint and demurrer to the judge holding the courts of the district or to the resident judge of the district, who shall fix time and place of hearing and notify parties or their counsel when and where he shall hear and pass upon the demurrer.

1919, c. 304, s. 4.

514. Appeals. Upon the return of the decision upon the demurrer, if either party desires to appeal, notice shall be given and the appeal perfected as is now provided in case of appeals in term time.

1919, c. 304, s. 5.

515. Procedure after return of judgment. Within ten days after the return of the judgment upon the demurrer, if there is no appeal, or within ten days after the receipt of the certificate from the supreme court if there is an appeal, if the demurrer is sustained the plaintiff may move, upon three days notice, for leave to amend the complaint. If this is not granted, judgment shall be entered

dismissing the action. If the demurrer is overruled the answer shall be filed within ten days after the receipt of the decision overruling the demurrer, if there is no appeal, or within ten days after receipt of the certificate of the supreme court if there is an appeal. Otherwise the plaintiff shall be entitled to judgment by default final or by default and inquiry according to the course and practice of the court.

1919, c. 304, ss. 6, 7.

For power to allow amendments and allow answer after demurrer, see sections 545 to 548.

516. Decision of actions when misjoinder. If the demurrer is sustained for the reason that several causes of action have been improperly united, the judge shall, upon such terms as are just, order the action to be divided into as many actions as are necessary for the proper determination of the causes of action therein mentioned.

Rev., s. 476; Code, s. 272; C. C. P., s. 131.

See generally: Railroad Co. v. Hardware Co., 135-73; Weeks v. McPhail, 128-134; Pretzfelder v. Ins. Co., 116-496; Hodges v. R. R., 105-170; Finch v. Baskerville, 85-207; Street v. Tuck, 84-605; Ayers v. Bailey, 162-209. Upon demurrer sustained for misjoinder, it becomes the judge's duty to divide the action upon just terms: Gattis v. Kilgo, 125-133; Ricks v. Wilson, 151-46; Dunn v. Aid Society, 151-133; Huggins v. Waters, 167-197; s. c., 154-444; Martin v. Rexford, 170-540. Action cannot be divided under this section when there is also misjoinder of parties: Morton v. Tel. Co., 130-299; Cromartie v. Parker, 121-199; Mitchell v. Mitchell, 96-14; Thigpen v. Cotton Mills, 151-97; Campbell v. Power Co., 166-488. Section casually referred to: Fisher v. Trust Co., 138-242; Cook v. Smith, 119-355; Solomon v. Bates, 118-316; Cedar Works v. Lumber Co., 161-603.

517. Grounds not appearing in complaint. When any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer.

Rev., s. 477; Code, s. 241; C. C. P., s. 98.

Objection taken by answer: Kochs v. Jackson, 156-326; Moore v. Hobbs, 77-65. Objection as to jurisdiction: Bank v. Britton, 66-365—as to defect of parties: Fisher v. Ins. Co., 136-219; R. R. v. Lumber Co., 114-690; Styers v. Alspaugh, 118-631; Johnson v. Gooch, 114-62; Kornegay v. Steamboat Co., 107-115; State v. Grant, 104-908; Leak v. Covington, 99-559; Mining Co. v. Smelting Co., 99-445; Lunn v. Shermer, 93-164; Usry v. Suit, 91-406; Stanly v. R. R., 89-331; Ramsay v. R. R., 91-418—as to misjoinder of actions: Laney v. Hutton, 149-264; Kiger v. Harmon, 113-408; Burns v. Ashworth, 72-496; Durham v. Bostwick, 72-357—as to defective statements of good causes of action: Knowles v. R. R., 102-59—another action pending in divorce: Cook v. Cook, 159-47; s. c., 164-272.

518. Objection waived. If objection is not taken either by demurrer or answer, the defendant waives the same, except the objections to the jurisdiction of the court and that the complaint does not state facts sufficient to constitute a cause of action.

Rev., s. 478; Code, s. 242; C. C. P., s. 99.

Objection appearing upon face of complaint is waived if no demurrer interposed; also objection not so appearing is waived if not taken advantage of by answer: Godwin v. Jernigan, 174-76; Petree v. Savage, 171-437; Rosenbacher v. Martin, 170-236; Brown v. Harding, 170-253; s. c., 171-686; Coulter v. Wilson, 171-537; Kochs v. Jackson, 156-326; Brewer v. Abernathy, 159-283; Knights of Honor v. Selby, 153-203; Teague v. Collins, 134-62; Hitch v. Comrs., 132-573; Cook v. Bank, 129-149; Ladd v. Ladd, 121-118; Knowles v. R. R., 102-59; Pescud v. Hawkins, 71-299; Hocutt v. R. R., 124-214; Mining Co. v. Smelting Co., 99-462; Burns v. Ashworth, 72-496; Durham v. Bostwick, 72-353; Hawkins v. Hughes, 87-115; Lunn v. Shermer, 93-164; Howe v. Harper, 127-356; Kornegay v. Steamboat Co., 107-117; Styers

v. Alspaugh, 118-631; Leak v. Covington, 99-559; Usry v. Suit, 91-406; McMillan v. Baxley, 112-588; Hall v. Turner, 111-180; Finley v. Hayes, 81-368; Kiger v. Harmon, 113-406—but objection to the jurisdiction of the court and that complaint does not state facts constituting a cause of action are not waived and can be taken advantage of at any time even in the supreme court, in writing or ore tenus: State v. Houston, 155-432; Garrison v. Williams, 150-674; Realty Co. v. Corpening, 147-613; Blackmore v. Winders, 144-212; Fidelity Co. v. Jordan, 134-236; Parker v. Express Co., 132-128; Nichols v. Nichols, 128-108; Hendon v. R. R., 127-110; Fertilizer Co. v. Marshburn, 122-411; Manning v. R. R., 122-824; Ladd v. Ladd, 121-118; Halstead v. Mullen, 93-252; Knowles v. R. R., 102-59; Elam v. Barnes, 110-73; Sutton v. Walters, 118-495; Baker v. Garris, 108-218; Pescud v. Hawkins, 71-299; Rogers v. Jenkins, 98-129; Johnson v. Finch, 93-205; Tucker v. Baker, 86-1; Bryant v. Fisher, 85-71; Love v. Comrs., 64-706; Jones v. Comrs., 85-280; Jackson v. Jackson, 105-433; Whitehurst v. Pettipher, 105-40; Mfg. Co. v. Simmons, 97-89; Fagg v. Loan Assn., 113-364; Leatherwood v. Fulbright, 109-683; Hunter v. Yarboro, 92-70—and court may ex mero motu dismiss when lack of jurisdiction or when complaint fails to state a cause of action: Blackmore v. Winders, 144-212; Cressler v. Asheville, 138-482; Short v. Gill, 126-803; Cary v. Allegood, 121-54; Nash v. Ferrabow, 115-303; Hagins v. R. R., 106-537; Bank v. Bobbitt, 108-525; Norris v. McLam, 104-159; State v. Miller, 100-545; Rogers v. Jenkins, 98-129; Noville v. Dew, 94-43; Peacock v. Stott, 104-154; Smaw v. Cohen, 95-85; Tucker v. Baker, 86-1; Jones v. Comrs., 85-278; State v. Benthall, 82-664.

ART. 15. ANSWER

519. Contents. The answer of the defendant must contain—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

Directly supporting this subsection: Cobb v. Clegg, 137-153. For frivolous answers, see section 510. An answer adopting each and every section of another answer filed in the case is sufficient if the adopted answer is sufficient: Hooker v. Worthington, 134-283.

SUFFICIENT DENIALS. “He denies the truth of the averments contained in the first, second, third, fourth, fifth, and sixth paragraphs of complaint and insists that plaintiff be held to strict proof thereof”: Brown v. Cooper, 89-237. Denial “on information and belief” that plaintiff ever had possession of certain lands is sufficient: Kitchin v. Wilson, 80-192; but see Harrill v. R. R., 135-606. Defendant in action to recover land may deny possession of part and disclaim title, and admit possession of part, denying that it is wrongful, and claim title: Graybeal v. Powers, 83-561. “They have not sufficient information to admit or deny the same”: Person v. Leary, 127-116. Defendant “is advised, informed and believes that the first article of the complaint is not true, and therefore denies the same”: Gardner v. Lumber Co., 144-110. Answer need not state why defendant has not sufficient knowledge or information to form a belief: Morgan v. Roper, 119-367. A denial “according to his best recollection and belief” is sufficient: Conder v. Stallings, 161-17.

INSUFFICIENT DENIALS. “No allegation of the complaint is true”: Flaek v. Dawson, 69-42; Heyer v. Beatty, 76-28. “They deny the said complaint and each and every allegation contained therein”: Sehehan v. Malone, 71-441. A general denial of plaintiff’s ownership of land is not sufficient where a judgment working an estoppel upon defendant is pleaded: Johnson v. Pate, 90-334. “The allegations of sixth paragraph of complaint are untrue in manner and form as therein stated”: Rumbough v. Imp. Co., 106-461. Where complaint alleges matters as within the personal knowledge of defendant it is not sufficient denial “that defendant has no knowledge or information sufficient to form a belief”: Streator v. Streator, 145-337; Gas Machine Co. v. Neuse Mfg. Co., 91-74—nor sufficient to answer “he is informed and believes that the allegations of the third article are not true, and denies the same”: Avery v. Stewart, 134-299. In action to recover land, defendant denying title of plaintiff, but not denying unlawful possession by him (defendant), plaintiff gets judgment: Tyson v. Shepherd, 90-314. “He has no knowledge of the facts alleged in paragraph two”: Woodcock v. Bostick, 128-246. “He has no information as to the truth of the

allegation of paragraph seven": *Ibid.* The denial that defendant has knowledge, which does not also deny that he has information sufficient to form a belief, is insufficient: *Fagg v. Loan Assn.*, 113-364; *Durden v. Simmons*, 84-557; *Bank v. Charlotte*, 75-45. "It denies on information and belief the statement of facts in the fifth paragraph of the complaint": *Harrill v. R. R. Co.*, 135-606; but see *Kitchin v. Wilson*, 80-192.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition.

As to counterclaim, see section 521.

NEW MATTER IN ANSWER. What may be shown under a general denial in an action for land: *Fleming v. Sexton*, 172-250. New matter must be set up or else no advantage of it can be taken: *Johnson v. Bell*, 74-356; *Raynor v. R. R.*, 129-195. Should be set up with the same precision as that required in complaint: *Lassiter v. Roper*, 114-17; *Anderson v. Logan*, 105-269; *Montague v. Brown*, 104-165; *Buie v. Brown*, 104-335; *Rountree v. Brinson*, 98-107; *Talbert v. Becton*, 111-543; *Cotton Mills v. Cotton Mills*, 116-647; *DeLoatch v. Vinson*, 108-147—and must not state evidential facts: *Farrior v. Houston*, 95-578—and may contain both legal and equitable defenses: *Bean v. R. R.*, 107-731. An equitable defense must be pleaded: *Holden v. Houck*, 176-235; *Buchanan v. Harrington*, 141-39; *McLaurin v. Cronly*, 90-51. The plea of payment: *Banking Co. v. Walker*, 121-115; *Threadgill v. Comrs.*, 116-627; *Pemberton v. Simmons*, 100-316. Pleading the statute of limitations, see section 405—pleading usury: *Rountree v. Brinson*, 98-107; *Oldham v. Bank*, 85-241; *Moore v. Woodward*, 83-531—pleading fraud: *Cotton Mills v. Cotton Mills*, 116-647—pleading equitable defenses in action for the recovery of real property: *Wilson v. Wilson*, 117-351; *Talbert v. Becton*, 111-543; *Anderson v. Logan*, 105-266; *Hinton v. Pritchard*, 102-94; *Dempsey v. Rhodes*, 93-120; *Bodenhamer v. Welch*, 89-78; *Johnson v. McArthur*, 64-675—counterclaim: *Smith v. French*, 141-7, and cases cited; *Brown v. Carter*, 111-183; *Davis v. Terry*, 114-28; *Milling Co. v. Finlay*, 110-411; *Anderson v. Logan*, 105-266; *Smith v. McGregor*, 96-101; *Byerly v. Humphreys*, 95-151; *Hurst v. Everett*, 91-399; *Garrett v. Love*, 89-205—pleading want of consideration in deed sued on: *Ivey v. Granberry*, 66-223—accord and satisfaction: *Hayes v. R. R.*, 143-125—sheriff's defense against penalty for failing to execute process that fees were not paid: *Johnson v. Kennedy*, 70-435—former judgment: *Blackwell v. Dibblell*, 103-270; *Harrison v. Hoff*, 102-126—matter in avoidance: *Eames v. Armstrong*, 142-507; *Smith v. Newberry*, 140-385; *Threadgill v. Comrs.*, 116-628; *Reed v. Reed*, 93-462; *Knott v. Burwell*, 96-272; see, also, section 523—another action pending for same cause: *Curtis v. Piedmont*, 109-401; *Hawkins v. Hughes*, 104-161; *Brock v. Scott*, 159-513—contributory negligence: *DeBerry v. R. R.*, 100-310; also see section 523. New matter treated as a plea "since last continuance": *Puffer v. Lucas*, 101-281. Effect of plea "since last continuance": *Williams v. Hutton*, 164-216.

Rev., s. 479; *Code*, s. 243; *C. C. P.*, s. 100.

520. Debt for purchase money of land denied. If the defendant denies in his answer that the obligation sued on was for the purchase money of the land described in the complaint, it is the duty of the court to submit the issue so joined to the jury.

Rev., s. 480; *Code*, s. 235; 1879, c. 217.

Davis v. Evans, 142-464; *Durham v. Wilson*, 104-595; *Toms v. Fite*, 93-275. See sections 506 and 675 (5).

521. Counterclaim. The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

COUNTERCLAIM DEFINED. Subject to the limitations expressed in this statute, a counterclaim includes well-nigh every kind of cross-demand existing in favor of defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law or a

bill in chancery or a cross-bill would have secured to him on the same state of facts: *Yellowday v. Perkinson*, 167-144; *Cheese Co. v. Pipkin*, 155-397; *Smith v. French*, 141-1; *Electric Co. v. Williams*, 123-51; *Wilson v. Hughes*, 94-182; *Lee v. Eure*, 93-5; *Hurst v. Everett*, 91-399; *Bitting v. Thaxton*, 72-541. Other definitions of "counterclaim": *Askew v. Koonce*, 118-526; *Guano Co. v. Tilley*, 110-29; *Raisin v. Thomas*, 88-148. It is a creature of the Code of Civil Procedure and must conform to its provisions: *Bank v. Wilson*, 124-562; *Electric Co. v. Williams*, 123-51.

Counterclaim in its relation to set-off and recoupment: *Electric Co. v. Williams*, 123-51; *Mfg. Co. v. Gray*, 126-108; *Davis v. Mfg. Co.*, 114-321; *Adams v. Bank*, 113-332; *Neal v. Lea*, 64-678.

PLEADING COUNTERCLAIM. The counterclaim should set out the facts constituting the claim with clearness and conciseness: *Bank v. Northeutt*, 169-219; *Bank v. Hill*, 169-235. Plaintiff cannot plead a counterclaim to defendant's counterclaim: *Boyett v. Vaughan*, 85-363, overruling *Boyett v. Vaughan*, 79-528; but see *Scott v. Bryan*, 96-289.

Pleading a counterclaim is optional with defendant; he can bring an independent action on it: *Mauney v. Hamilton*, 132-306; *Shankle v. Whitley*, 131-168; *Asher v. Reizenstein*, 105-216; *Tobacco Co. v. McElwee*, 94-425; *Gregory v. Hobbs*, 93-1; *McClenahan v. Cotten*, 83-332; *Francis v. Edwards*, 77-271; *Woody v. Jordan*, 69-189. Must be set up by answer: *Reynolds v. Smathers*, 87-24; *Johnson v. Bell*, 74-356. In actions on separate notes for purchase price of machinery, counterclaim for damages for defects, etc., can be set up but once: *Mfg. Co. v. Moore*, 144-527. A covenant not to sue available as counterclaim: *Harshaw v. Woodfin*, 64-568. Where counterclaim pleaded under first subsection, plaintiff cannot take a nonsuit and thereby debar defendant from prosecuting his counterclaim or from having tried any other right set out in answer: *Well Co. v. Ice Co.*, 125-80; *Rumbough v. Young*, 119-567; *Bank v. Comrs.*, 116-380; *Wilkins v. Suttles*, 114-551; *Pass v. Pass*, 109-484; *Mfg. Co. v. Buxton*, 105-74; *Gatewood v. Leak*, 99-363; *Bynum v. Powe*, 97-374; *McNeill v. Lawton*, 97-16; *Whedbee v. Leggett*, 92-469; *Purnell v. Vaughan*, 80-46—but where counterclaim pleaded under second subsection plaintiff can take a nonsuit: *Olmstead v. Smith*, 133-584; *Pass v. Pass*, 109-484; *McNeill v. Lawton*, 97-16; *Whedbee v. Leggett*, 92-469; *McLean v. McDonald*, 173-429. See section 604. Where counterclaim pleaded is the subject of another action pending: *Davis v. Terry*, 114-27.

Justice of the peace cannot entertain counterclaim beyond his jurisdiction: *Electric Co. v. Williams*, 123-51; *Hurst v. Everett*, 91-399; *Raisin v. Thomas*, 88-148; *Boyett v. Vaughan*, 85-363; *Meneely v. Craven*, 86-364; *Derr v. Stubbs*, 83-559; *McClenahan v. Cotten*, 83-332; but see *Heyser v. Gunter*, 118-964. The justice may consider such claim by way of set-off in reduction or satisfaction of plaintiff's claim: *Cheese Co. v. Pipkin*, 155-394; *Fertilizer Works v. Aiken*, 175-398. Superior court may allow counterclaim to be entered in cases appealed from justice, but not beyond justice's jurisdiction: *Moore v. Garner*, 109-157; *Hurst v. Everett*, 91-399; *Raisin v. Thomas*, 88-148; *Meneely v. Craven*, 86-364; *Thomas v. Simpson*, 80-4; *Johnson v. Rowland*, 80-1. Failure to plead counterclaim in former suit no estoppel: *Shankle v. Whitley*, 131-168. As to pleading benefit derived by plaintiff from defendant's improvements, etc.: *McGee v. Fox*, 107-766. When counterclaim ruled out on demurrer, defendant's appeal is premature: *Knott v. Burwell*, 96-272. Defendant cannot set up as counterclaim any and every cause of action he may have against plaintiff: *Byerly v. Humphrey*, 95-151. Too late to object that counterclaim improperly pleaded after submission to arbitration: *Robbins v. Killebrew*, 95-19. Where no cause of action stated in counterclaim: *Ayers v. Makely*, 131-63. The fact that plaintiff is not worth his personal property exemption does not preclude defendant from setting up counterclaim: *Lynn v. Cotton Mills*, 130-621. Where plaintiff alleged a contract of sale and a breach, and the answer denied the sale and alleged a consignment, a judgment by default on the counterclaim was improper: *Tillinghast v. Cotton Mills*, 143-268.

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

And it must exist at the commencement of the action: *Griffin v. Thomas*, 128-310; *Kramer v. Electric Light Co.*, 95-277; but see *Smith v. French*, 141-1, and *Williams v. Sutton*, 164-216.

Counterclaim under this subsection defined: *Gibson v. Barbour*, 100-192. It may arise out of either contract or tort: *Phipps v. Wilson*, 125-106; *Branch v. Chappell*, 119-81; *Puffer v. Lucas*, 112-377; *McKinnon v. Morrison*, 104-354; *Kramer v. Electric Light Co.*, 95-277; *Lee v. Eure*, 93-5; *Trotter v. Connor*, 90-455; *Bitting v. Thaxton*, 72-541. Instances of counterclaim attempted to be interposed arising out of tort: *Street v. Andrews*, 115-417; *Gaskins v. Davis*, 115-86; *Smith v. Young*, 109-224. As to claims sounding in damages as counterclaims: *Wilson v. Charlotte*, 108-121; *Bush v. Hall*, 95-82; *Raisin v. Thomas*, 88-148.

SPECIFIC COUNTERCLAIMS. Improvements on land (betterments) in action to recover land: *Scott v. Battle*, 85-184; *Reed v. Exum*, 84-430; *Daniel v. Crumpler*, 75-184. In action for goods sold and delivered, defendant cannot set up latent defects: *Max v. Harris*, 125-345. In action by vendor for possession of land sold under bond for title, vendee may set up and demand money paid: *Wellborn v. Simonton*, 88-266; *Pearsall v. Mayers*, 64-549; *Daniel v. Crumpler*, 75-184—but where vendee repudiates contract he cannot recover as a counterclaim money paid thereon, *Davison v. Land Co.*, 121-146. Usury may be pleaded as counterclaim: *Bank v. Ireland*, 122-571—but not if paid, *Meares v. Butler*, 123-206. In action for trespass for cutting timber defendant cannot set up damage for ponding water: *Street v. Andrews*, 115-417; *Bazemore v. Bridgers*, 105-191. Owner of land charged with owelty may set up as counterclaim that he has been evicted by superior title: *Huntley v. Cline*, 93-458. Defective title is a defense in an action for purchase money of land, and not a counterclaim; and it seems defective acreage is also: *Bank v. Loughran*, 122-668; *Hutchinson v. Smith*, 68-351. In action for cutting timber defendant may claim title and ask for accounting of timber cut: *Lumber Co. v. Wallace*, 93-22. Where defendant received a different machine from the one ordered, and converted it to his own use, he is liable for its value, and his counterclaim for the difference in price of the two machines must fail: *Machine Co. v. Chalkley*, 143-181. Fraud as counterclaim: *Hobbs v. Bland*, 124-284; *Wilson v. Hughes*, 94-182; *Garrett v. Love*, 89-205; *Hall v. Comrs.*, 74-130; *Walsh v. Hall*, 66-233; *Cotton Mills v. Cotton Mills*, 116-647. False warranty as defense to action for purchase of horse: *Hobbs v. Bland*, 124-284; *Wilson v. Hughes*, 94-182. Implied warranty as a counterclaim or defense in an action for the price of a machine: *Register Co. v. Bradshaw*, 174-414. Breach of warranty in sale of goods: *Cable Co. v. Macon*, 153-150; but the breach must be specially pleaded: *Woodridge v. Brown*, 149-299.

Where bank is being liquidated, a stockholder sued on a note due bank secured by pledge of stock cannot set up as counterclaim his supposed share in the assets: *Bank v. Riggins*, 124-534. Where bank in hands of receiver, assigned claims against bank cannot be used as set-off, when: *Davis v. Mfg. Co.*, 114-321. In action against bank to recover individual deposit the indebtedness of the partnership is a counterclaim: *Adams v. Bank*, 113-332. In claim and delivery by administrator to recover a horse belonging to estate, bailee cannot set up account for feeding: *Mauney v. Ingram*, 78-96. Counterclaim by finder for expense of keeping a lost dog: *Meekins v. Simpson*, 176-130. In action to recover wife's property no debt owing by husband can be counterclaim: *Houck v. Somers*, 118-607; *Halliday v. McMillan*, 83-270. In action for damages to land a proceeding for the condemnation of an easement cannot be set up as counterclaim: *Leigh v. Garysburg Mfg. Co.*, 132-167. In action for possession of mortgaged chattels damages for wrongful seizure of same is no counterclaim: *Satterthwaite v. Ellis*, 129-67. In action for purchase price, defendant may set up deficiency in articles contracted for: *Guano Co. v. Tillery*, 110-29; *Hurst v. Everett*, 91-399; *Howie v. Rea*, 70-559; *Cox v. Long*, 69-7. In action for rent, lessees may plead lessors have no title: *McKesson v. Mendenhall*, 64-286. In action for purchase money of life estate, plaintiff and defendant being tenants in common of reversion, defendant cannot set up waste for plaintiff cutting timber before the sale: *Devries v. Warren*, 82-356. An equitable counterclaim to a purely legal cause of action is good: *Dempsey v. Rhodes*, 93-120.

A right of action to remove a cloud upon title as proper counterclaim in an action for land: *McLean v. McDonald*, 173-429. In an action for price of sewing machines, a counterclaim for loss through negligence of the plaintiff's agent: *Slaughter v. Machine Co.*, 148-471. In an action on contract for cotton a counterclaim for malicious prosecution in another state was not allowed: *Carpenter v. Hanes*, 167-551. No counterclaim allowed against a claim for taxes due: *Graded School v. McDowell*, 157-316; *Comrs. v. Hall*, 177-490. Defendant in a divorce proceeding may ask for divorce, as a counterclaim or cross-action: *Cook v. Cook*, 159-46; s. c., 164-272.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

This section directly supported: *Bank v. Wilson*, 124-562. The counterclaim is available if arising upon contract express or implied: *Davidson v. Land Co.*, 126-704. Counterclaim must exist when action brought: *Phipps v. Wilson*, 125-106; *Puffer v. Lucas*, 112-377; *Reynolds v. Smathers*, 87-24; *Hogan v. Kirkland*, 64-253. Question as to counterclaim being set up as against the state: *Battle v. Thompson*, 65-406—as against a county, *Gatling v. Comrs.*, 92-536—as against a city, *Cobb v. Elizabeth City*, 75-1. See cases under subsection 1.

INSTANCES OF PROPER COUNTERCLAIMS SET UP. In actions by personal representative: *Carr v. Askew*, 94-194; *Barbee v. Green*, 86-158; *Whedbee v. Reddick*, 79-521; *McLean v. Leach*, 68-98; *Ransom v. McLees*, 64-17—in action by endorsee of negotiable note after maturity: *Causey v. Snow*, 122-326; *Martin v. Richardson*, 68-255; *Harris v. Burwell*, 65-584—in action by insolvent plaintiff against one who is his surety in another matter: *Baker v. Brem*, 103-80; *Scott v. Timberlake*, 83-382; *Walker v. Dicks*, 80-263—in action by and against receiver of insolvent railroad company: *Railroad v. Railroad*, 118-1078—in action by partnership against creditor of one or more partners: *Sloan v. McDowell*, 71-356—in action to recover wages of minor children against cotton mill to whose store father owed an account: *Lynn v. Cotton Mills*, 130-621. Action on joint note of husband and wife, counterclaim set up by husband: *Shell v. Aiken*, 155-212. Action by wife to recover deposit, how bank may set off a debt of the husband: *Moore v. Bank*, 173-180.

INSTANCES OF IMPROPER COUNTERCLAIMS SET UP. In action against personal representative of deceased: *Mull v. Walker*, 100-46; *McClenahan v. Cotten*, 83-332—in action by personal representative: *Pate v. Oliver*, 104-458; *Rountree v. Britt*, 94-104—in action by endorsee before maturity against maker of a negotiable note: *Bank v. McNair*, 116-550; *Farthing v. Dark*, 111-243; *Bank v. Burgwyn*, 108-62; *Tredwell v. Blount*, 86-33—in action by trustee in deed for benefit of creditors against creditor for debt due by him to assignor: *Davis v. Mfg. Co.*, 114-321; *Brown v. Brittain*, 84-552.

Rev., s. 481; Code, s. 244; C. C. P., s. 101.

522. Several defenses. The defendant may set forth by answer as many defenses and counterclaims as he has, whether they are of a legal or equitable nature, or both. They must be separately stated and numbered, and refer to the cause of action which they are intended to answer in such manner that they may be intelligibly distinguished.

Rev., s. 482; Code, s. 245; C. C. P., s. 102.

Statute of limitations pleaded by answer only, see this chapter. s. 405.

Where several defenses, they may all be pleaded, but each is a separate defense: *Keathley v. Branch*, 88-379; *Sumner v. Shipman*, 65-623. And the defenses may be legal or equitable: *Bean v. R. R.*, 107-731; *Melvin v. Stephens*, 82-283; *Clark v. Clark*, 65-655. Answer failing to state the several defenses separately will be rejected if excepted to in apt time: *Keathley v. Branch*, 88-379.

Contradictory defenses are admissible under this section if properly set out: *Upton v. R. R.*, 128-173; *McLamb v. McPhail*, 126-218; *Threadgill v. Comrs.*, 116-628; *Reed v. Reed*, 93-462; *Ten Broeck v. Orchard*, 79-518; *Higson v. Ins. Co.*, 152-206. Defendant may plead matter in abatement, as another action pending, with a defense to the merits: *Cook v. Cook*, 159-46; s. c., 164-272. Cases merely referring to the section: *Gossler v. Wood*, 120-73; *McLaurin v. Conly*, 90-53.

523. Contributory negligence pleaded and proved. In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial.

Rev., s. 483; 1887, c. 33.

Reasons for enacting section: *Horton v. R. R.*, 157-146; *Owens v. R. R.*, 88-502. This is an affirmative defense and must be pleaded and proved; and if there is any evidence it is a

question for the jury and not for the judge: *Kearney v. R. R.*, 177-251; *Boney v. R. R.*, 155-95; *Fann v. R. R.*, 155-136; *Wright v. R. R.*, 155-323; *Cook v. Furnace Co.*, 161-39; *Farris v. R. R.*, 151-483; *Ives v. Gring*, 150-137; *Inman v. R. R.*, 149-123; *Stewart v. R. R.*, 137-687; *Powell v. R. R.*, 125-370; *Bolden v. R. R.*, 123-614. This applies to actions by employee against employer: *Hudson v. R. R.*, 104-491. It also applies to an action under the Federal Employers' Liability Act in the state court: *Fleming v. R. R.*, 160-197. For contributory negligence under the Fellow-servant Act, see section 3465.

Pleading contributory negligence: *Davis v. R. R.*, 136-115. "That plaintiff was injured by his own negligence" is not a sufficient plea: *Cogdell v. R. R.*, 132-852, overruling *Cogdell v. R. R.*, 130-313; the facts constituting such negligence should be set out: *Watson v. Farmer*, 141-452. When contributory negligence appears in the complaint sufficiently to bar a recovery, advantage may be taken by demurrer: *Parks v. Tanning Co.*, 175-29; *Burgin v. R. R.*, 115-673; otherwise the question cannot be raised by demurrer: *Smith v. R. R.*, 129-374.

Proving contributory negligence: *Brewster v. Elizabeth City*, 137-392. The burden is upon defendant: *Goforth v. R. R.*, 144-572; *House v. R. R.*, 131-103; *Frazier v. R. R.*, 130-355; *Cogdell v. R. R.*, 130-313; *Thomas v. R. R.*, 129-392; *Halton v. R. R.*, 127-255; *Cogdell v. R. R.*, 124-302; *Bolden v. R. R.*, 123-614; *Cox v. R. R.*, 123-604; *Bank v. School Comrs.*, 121-109; *Hardison v. R. R.*, 120-492; *Mfg. Co. v. R. R.*, 122-881; *Wood v. Bartholomew*, 122-177; *Smith v. Electric Co.*, 173-489; *Medlin v. Telegraph Co.*, 169-495; *Cook v. Furnace Co.*, 161-39; *Mullinax v. Telegraph Co.*, 156-541. A matter of proof, not of conjecture: *Morrison v. R. R.*, 123-414. If contributory negligence appears in plaintiff's evidence, defendant may make motion of nonsuit: *Thompson v. Construction Co.*, 160-390; *Zachary v. R. R.*, 156-496; *Wright v. R. R.*, 155-325; *Strickland v. R. R.*, 150-4.

The presumption is against contributory negligence: *Norton v. R. R.*, 122-910. Under the age prohibited by statute, the presumption is that the child injured while working in a factory or manufacturing establishment is incapable of contributory negligence, subject to be overcome by evidence in rebuttal under proper instructions from the court: *Leathers v. Tob. Co.*, 144-330. At what age a child may be guilty of contributory negligence is a question for the court and not for the jury: *Foard v. Power Co.*, 170-48; *Baker v. R. R.*, 150-562. Rules of care required in crossing railroad track: *Brown v. R. R.*, 171-266; *Shepard v. R. R.*, 166-539; *Cooper v. R. R.*, 140-209.

ART. 16. REPLY

524. Demurrer or reply to answer. The plaintiff shall demur or reply to the answer within twenty days after the filing of the answer; and the demurrer shall be heard as provided in case of demurrer to the complaint.

Rev., c. 484; Code, s. 208; 1870-71, c. 42, s. 5; 1919, c. 304.

Reply should not be stricken out because not formally filed, nor marked "filed," if it has been in the papers several terms without objection by defendant: *White v. Carroll*, 146-230 (under former statute).

525. Content; demurrer to answer. When the answer contains new matter constituting a counterclaim, the plaintiff may reply to the new matter, denying generally or specifically each allegation controverted by him or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to the new matter in the answer. The plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counterclaim or defense; and he may demur to one or more of such defenses or counterclaims, and reply to the residue. Such demurrer shall be heard and determined as provided for demurrers to the complaint. In other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may in its discretion, on the defendant's

motion, require a reply to such new matter, and such reply shall be subject to the same rules as a reply to a counterclaim.

Rev., s. 485; Code, s. 248; C. C. P., s. 105; 1919, c. 304.

DEMURRER TO ANSWER. The question arises, will the facts admitted by the demurrer determine the rights of parties: *Blackwell v. Willard*, 65-555. Failure to demur waives defects in answer: *Printing Co. v. McAden*, 131-178. Instances of demurrers to answers: *Lee v. Beaman*, 73-410. Demurrer sustained, judgment will be entered for plaintiff, unless defect can be cured by amendment: *Foy v. Haughton*, 83-467. Demurrer to one of two separate defenses: *Chambers v. R. R.*, 172-555; *Shelby v. R. R.*, 147-537. A reply which is in effect a demurrer: *Mottu v. Davis*, 151-237. A motion to strike out part of an answer may be treated as a demurrer *ore tenus*: *Bank v. Hill*, 169-235. A motion by plaintiff for judgment upon the pleadings is in effect a demurrer: *Alston v. Hill*, 165-255; *Helms v. Holton*, 152-587.

REPLY TO NEW MATTER IN ANSWER. Reply can only be made to new matter: *Olmstead v. Raleigh*, 130-243. Judge can permit it even after verdict: *Strause v. Ins. Co.*, 128-66; see sections 536 and 552. Every allegation of new matter deemed to be denied except where counterclaim set up: *Galloway v. Goolsby*, 176-635; *Ferrell v. Hinton*, 161-348; *Oldham v. Rieger*, 145-254; *Fishplate v. Fidelity Co.*, 140-594; *Wilson v. Brown*, 134-408; *Askew v. Koonce*, 118-526; *Vance v. Vance*, 118-864; *Buffkin v. Eason*, 110-266; *Walker v. Scott*, 106-61; *Stanton v. Hughes*, 97-321; *Fitzgerald v. Shelton*, 95-519; *Barnhardt v. Smith*, 86-483; *Jones v. Cohen*, 82-80; *Price v. Eccles*, 73-162. Sufficient reply to counterclaim: *Gregg v. Mallett*, 111-74. Court may order reply when defense is by way of avoidance: *Fishplate v. Fidelity Co.*, 140-594; *James v. R. R.*, 121-530; *Fitzgerald v. Shelton*, 95-519; *Stanton v. Hughes*, 97-321; *Price v. Eccles*, 73-162. Replication necessary when seeking to avoid the plea of the statute of limitations: *Stubbs v. Motz*, 113-458—but otherwise no reply is necessary when statute of limitations pleaded, *Oldham v. Rieger*, 145-254.

SETTING UP NEW MATTER IN REPLY. Can be done, so it is not inconsistent with complaint: *Lindsay v. Mitchell*, 174-458; *Boyett v. Vaughan*, 85-363; also see same case in 79-528. A counterclaim cannot be pleaded to a counterclaim unless in such a way as to be treated as part of complaint: *Boyett v. Vaughan*, 85-363; *Scott v. Bryan*, 96-289. Equitable matter may be set up against equitable defense in answer, when: *Houston v. Sledge*, 101-640; *Hardin v. Ray*, 94-456; *Bean v. R. R.*, 107-731.

526. Demurrer to reply. If a reply of the plaintiff to a defense set up by the answer of the defendant is insufficient, the defendant may demur thereto, and must state the grounds thereof.

Rev., s. 486; Code, s. 250; C. C. P., s. 107.

See *Walker v. Scott*, 106-61; *Houston v. Sledge*, 98-414; *Culver v. Eggers*, 63-631.

ART. 17. PLEADINGS, GENERAL PROVISIONS

527. Forms of pleading. The forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this chapter.

Rev., s. 487; Code, s. 231; C. C. P., s. 91.

All forms of action previous to the adoption of the C. C. P. are abolished and now we have only one form, and the pleadings and the rules by which their sufficiency is to be determined as prescribed in this chapter: *Jones v. Mial*, 82-257; *Turner v. McKee*, 137-259; *Sneeden v. Harris*, 109-349; also see section 399.

528. Subscription and verification of pleading. Every pleading in a court of record must be subscribed by the party or his attorney, and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

Rev., s. 488; Code, s. 257; C. C. P., s. 116.

That a pleading is not signed is an irregularity and not a fatal defect: *Harris v. Bennett*, 160-339.

The verification must be to a complaint, and not a statement of account; it must be in proper form; and the rule applies only to a court of record: *Building Co. v. Hardware Co.*, 173-55. The object in verifying pleadings: *Miller v. Curl*, 162-1; *Griffin v. Light Co.*, 111-434. Where pleading is verified every subsequent pleading, except a demurrer, must be verified: *Alford v. McCormac*, 90-151; *Lindsay v. Beaman*, 128-191. The effect of filing complaint unverified is to dispense with the necessity of subsequent pleadings being verified: *Reynolds v. Smathers*, 87-24. When pleading amended after verification it stands as unverified, and no subsequent pleading need be verified: *Rankin v. Allison*, 64-673.

When verified complaint filed and no answer is filed plaintiff is entitled to judgment: *Kruger v. Bank*, 123-16; *Curran v. Kerchner*, 117-264; *Griffin v. Light Co.*, 111-434—also entitled when answer not verified is filed, *Alford v. McCormac*, 90-151; *Alspaugh v. Winstead*, 79-526—but where a properly verified complaint would entitle a plaintiff to final judgment for want of answer, if complaint is not properly verified, judgment should be by default and inquiry, *Cole v. Boyd*, 125-496. Effect of landlord verifying pleading in action of ejectment and tenant failing to verify: *Harkey v. Houston*, 65-137.

529. Form of verification. The verification must be in substance that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by affidavit of the party, or if there are several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if the party is in the county where the attorney resides and is capable of making the affidavit.

Rev., s. 489; Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7.

For special form of verification in action for divorce, see section 1661. The verification is sufficient if taken before an officer authorized to administer oaths, and it need not be subscribed: *Currie v. Mining Co.*, 157-209; *Alford v. McCormac*, 90-151. A verified complaint, amended by unverified amendment, renders amended complaint unverified: *Brown v. Rhinehart*, 112-772. Court may grant amendment to verification: *Cantwell v. Herring*, 127-81; *Best v. Dunn*, 126-560; *Payne v. Boyd*, 125-499.

SUFFICIENT VERIFICATIONS. "The facts set forth in the foregoing complaint of his own knowledge are true, except as to those matters stated upon information and belief, and as to those matters, he believes it to be true": *Alspaugh v. Winstead*, 79-526; but see *Phifer v. Ins. Co.*, 123-414. "Foregoing answer of defendant is true of his own knowledge, except those matters stated on information and belief, and he believes those to be true": *McLamb v. McPhail*, 126-218.

INSUFFICIENT VERIFICATIONS. "The facts herein stated are true to the best of his knowledge, information and belief": *Cowles v. Hardin*, 79-577; *Benedict v. Hall*, 76-114. "The facts stated in this complaint of his own knowledge are true, and those stated on information and belief he believes to be true": *Miller v. Curl*, 162-1; *Carroll v. McMillan*, 133-140; *Phifer v. Ins. Co.*, 123-410; *Payne v. Boyd*, 125-499; *Cole v. Boyd*, 125-496. "Sworn and subscribed to": *Martin v. Martin*, 130-28.

530. Verification by agent or attorney. The affidavit may also be made by the agent or attorney, if the action or defense is founded upon a written instrument for the payment of money only and the instrument is in the possession of the agent or attorney, or if all the material allegations of the pleadings are within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reasons why it is not made by the party.

Rev., s. 490; Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7.

Verification by agent: *Griffin v. Light Co.*, 111-434; *Hammerslaugh v. Farrior*, 95-135; *Johnson v. Maxwell*, 87-18. Should state his knowledge, grounds for belief, and reason for

making it: *Miller v. Curl*, 162-1; *Griffin v. Light Co.*, 111-434; *Hammerslaugh v. Farrior*, 95-135; *Banks v. Mfg. Co.*, 108-282.

531. Verification by corporation or the state. When a corporation is a party the verification may be made by any officer, or managing or local agent thereof upon whom summons might be served; and when the state or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts.

Rev., s. 491; Code, s. 258; 1901, c. 610; C. C. P., s. 117; 1868-9, c. 159, s. 7.

The verification by an officer is the verification of the corporation: *Bank v. Hutchinson*, 87-22. The officer of corporation need not state the ground of his knowledge, etc.: *Ibid.* Since the amendment of 1901, c. 610, decisions holding that agents cannot verify are of no effect; a managing or local agent can now verify: *Godwin v. Tel. Co.*, 136-258—also a managing director, *Best v. Mortgage Co.*, 131-71.

532. Verification before what officer. Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the superior court, notary public, in or out of the state, or justice of the peace, is competent to take affidavits for the verification of pleadings, in any court or county in the state, and for general purposes.

Rev., s. 492; Code, s. 258; 1891, c. 140; C. C. P., s. 117; 1868-9, c. 159, s. 7.

May be made before clerk of court of record in another state: *Hinton v. Ins. Co.*, 116-22; *Barcello v. Hapgood*, 118-712. Courts take judicial notice of the seals of courts of another state to determine validity of verification: *Hinton v. Ins. Co.*, 116-22. Notary not affixing seal, verification invalid: *Tucker v. Life Assn.*, 112-796.

533. When verification omitted; use in criminal prosecutions. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it.

Rev., s. 493; Code, s. 258; C. C. P., s. 117; 1868-9, c. 159, s. 7.

Section referred to in *State v. Smith*, 164-475.

534. Items of account; bill of particulars. It is not necessary for a party to set forth in a pleading the items of an account alleged in it; but he must deliver to the adverse party, within ten days after a demand therefor in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney if within the personal knowledge of the agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court or judge may order a further account when the one delivered is defective, and may, in all cases, order a bill of particulars of the claim of either party to be furnished.

Rev., s. 494; Code, s. 259; C. C. P., s. 118.

It is not requisite that the items should be set out in the pleadings; a bill of particulars can be ordered by the court if demanded: *McPhail v. Johnson*, 115-302.

BILLS OF PARTICULARS. When court will order: *Lumber Co. v. R. R.*, 141-179; *Turner v. McKee*, 137-254; *Allen v. Rwy.*, 120-548; *Lucas v. R. R.*, 121-509; *State v. Pickett*, 118-1231; *Townsend v. Williams*, 117-330; *State v. Shade*, 115-757; *State v. Dunn*, 109-839; *State v. Gates*, 107-835; *State v. Bryant*, 111-693; *Bryan v. Spivey*, 106-95; *Conley v. R. R.*, 109-692; *Bristol v. R. R.*, 175-509. Purpose and effect of bill: *Cropsey v. Markham*, 171-43; *Wiggins v. Guthrie*, 101-661. Where solicitor files a bill, state is confined in its proof to items set out: *State v. Van Pelt*, 136-633. Person insisting upon rejecting testimony, because bill of particulars not furnished, must have question settled before trial: *State v. Brady*, 107-822; *Wiggins v. Guthrie*, 101-661. Bills of particulars in contested election cases: *Boyer v. Teague*,

106-576. A bill does not supply defects in indictment: *State v. Van Pelt*, 136-633. For bills of particulars in criminal actions, see section 4613.

535. Pleadings construed liberally. In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties.

Rev., s. 495; Code, s. 260; C. C. P., s. 119.

A pleading is liberally construed, with every reasonable intendment in favor of the pleader, and if it contains facts sufficient to constitute a cause of action or defense it will be sustained: *Hartsfield v. Bryan*, 177-166; *Parker v. Parker*, 176-198; *Muse v. Motor Co.*, 175-466; *Simmons v. Lumber Co.*, 174-220; *Talley v. Granite Co.*, 174-445; *Renn v. R. R.*, 170-128; *Green v. Biggs*, 167-417; *Hoke v. Glenn*, 167-594; *Lyon v. R. R.*, 165-143; *Bank v. Duffy*, 156-83; *Wyatt v. R. R.*, 156-307; *Brewer v. Wynne*, 154-467; *Machine Co. v. Feezer*, 152-516; *Jones v. Henderson*, 147-120; *White v. Carroll*, 146-230; *Blackmore v. Winders*, 144-214; *Turner v. McKee*, 137-259; *Davis v. R. R.*, 136-121; *R. R. Co. v. Main*, 132-452; *Adams v. Hayes*, 120-388; *Stubbs v. Motz*, 113-459; *Stokes v. Taylor*, 104-394; *Buie v. Brown*, 104-335. While pleadings are to be construed liberally they are to be so construed as to give the defendant an opportunity to know the grounds upon which he is charged with liability: *Thomason v. R. R.*, 142-318; and material allegations must not be omitted: *Eddleman v. Lentz*, 158-65; *Bank v. Duffy*, 156-83; *Blackmore v. Winders*, 144-212. Affidavit for restraining order treated as a complaint: *Mason v. Stephens*, 168-369.

The common-law rule that every pleading should be construed against the pleader is modified by this section: *Wright v. Ins. Co.*, 138-488; *Wood v. Kincaid*, 144-393; *Brewer v. Wynne*, 154-467. See section 399. Cases merely referring to section: *Knott v. R. R.*, 142-241; *Oyster v. Mining Co.*, 140-138; *Staton v. Webb*, 137-38; *Ravenal v. Ingram*, 131-551; *Watkins v. Mfg. Co.*, 131-540; *Sloan v. R. R.*, 126-489; *Smith v. Building and Loan*, 119-254.

536. Time for pleading enlarged. The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order to enlarge the time.

Rev., s. 512; Code, s. 274; C. C. P., s. 133.

As to amendments of pleadings, process, etc., see sections 545-551. Time allowed to plead, upon request, is an appearance: *Cook v. Bank*, 129-149. The extension of time hereunder cannot be beyond the next term without consent: *Sheek v. Sain*, 127-271. An agreement between counsel for time to file answer is an acceptance of jurisdiction and a waiver of any right to remove: *Garrett v. Bear*, 144-23. The trial court may permit an answer to be filed after the supreme court has decided that judgment by default should have been entered for the plaintiff: *Cook v. Bank*, 131-96, overruling *Cook v. Bank*, 131-83; see, also, *Griffin v. Light Co.*, 111-434; *Bank v. Ireland*, 122-576. Extension of time to file pleadings should not be encouraged: *Dempsey v. Rhodes*, 93-120; *Griffin v. Light Co.*, 111-438. Extensions of time and amendments hereunder entirely within court's discretion and not reviewable: *Wilmington v. McDonald*, 133-548; *White v. Lokey*, 131-72; *Best v. Mortgage Co.*, 131-70; *Woodecock v. Merrimon*, 122-731; *Gwinn v. Parker*, 119-19; *Armour Packing Co. v. Williams*, 122-408; *Bailey v. Comrs.*, 120-388; *Mallard v. Patterson*, 108-255; *McMillan v. Baxley*, 112-578; *Gore v. Davis*, 124-234; *Kruger v. Bank*, 123-17; *Gilchrist v. Kitchin*, 86-20; *Reese v. Jones*, 84-597; *Austin v. Clarke*, 70-458. Dismissing action for failure to file complaint in time not reviewable: *Armour Packing Co. v. Williams*, 122-408. Order at request of one party allowing to both parties time to file pleadings, with no exception by adverse party, is binding on both: *Meeke v. Mineral Co.*, 122-790. As to extension of time to file answer: *Morgan v. Harris*, 141-360; *Wilmington v. McDonald*, 133-548; *Mauney v. Hamilton*, 132-295; *White v. Lokey*, 131-72; *Cook v. Bank*, 131-96; *Gore v. Davis*, 124-234; *Bailey v. Comrs.*, 120-388; *Woodecock v. Merrimon*, 122-731; *Gwinn v. Parker*, 119-19; *Mallard v. Patterson*, 108-255; *Reese v. Jones*, 84-597; *Best v. Mortgage Co.*, 131-70; *Griffin v. Light Co.*, 111-434; *Banks v. Mfg. Co.*, 108-282—reply, *Strause v. Ins. Co.*, 128-64; *McMillan v. Baxley*, 112-578; *Bank v. Ireland*, 122-576—defense bond, *Dunn v. Marks*, 141-232; *Beeton v. Dunn*, 137-563; *Timber Co. v. Butler*, 130-50. Upon failing to file answer within the extended time, the court may still allow filing: *Church v. Church*, 158-564. Section applies to proceedings under the Torrens Act: *Mfg. Co. v. Spruill*, 169-618. Filing of answer after supreme court reverses ruling of lower court in sus-

taining demurrer and dismissing action: *Sloan v. R. R.*, 126-487. Cases merely referring to section: *Stockton v. Mining Co.*, 144-599; *Laney v. Mackey*, 144-632.

537. Irrelevant, redundant, indefinite pleadings. If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

Rev., s. 496; Code, s. 261; C. C. P., s. 120.

For sham and irrelevant defenses, see this chapter, s. 510.

If a pleading is too indefinite or uncertain, it should be corrected on motion: *Bank v. Duffy*, 156-83; and not by demurrer: *Womack v. Carter*, 160-286; *Jones v. Henderson*, 147-120. Judge acts upon motion: *Blackmore v. Winders*, 144-216; *Wood v. Kincaid*, 144-396; *Oyster v. Mining Co.*, 140-138; *Wright v. Ins. Co.*, 138-493; *Rwy. Co. v. Main*, 132-445; *Skittleharpe v. Skittleharpe*, 130-75; *Allen v. R. R.*, 120-548; *Buie v. Brown*, 104-335; *Fulps v. Mock*, 108-605; *Smith v. Summerfield*, 108-284; *Stokes v. Taylor*, 104-394; *Speight v. Jones*, 99-145; *Johnston v. Pate*, 83-110—or *ex mero motu*: *Allen v. R. R.*, 120-548; *Buie v. Brown*, 104-335; *McKinnon v. McIntosh*, 98-89; *Turner v. Cuthrell*, 94-239. Motion must be made before answer or demurrer: *Lee v. Thornton*, 171-209; *Pender v. Mallett*, 123-57; *Lucas v. R. R.*, 121-506; *Daniels v. Fowler*, 120-14; *Fulps v. Mock*, 108-605; *Smith v. Summerfield*, 108-284; *Stokes v. Taylor*, 104-394; *Irvin v. Clark*, 98-437; *Morgan v. Bank*, 93-352; *Best v. Clyde*, 86-4; but see as to appeals from justice's court, *Smith v. Newberry*, 140-387. Motion addressed entirely to discretion of trial judge: *Allen v. R. R.*, 120-550; *Conley v. R. R.*, 109-692; and the party should make reasonable attempt to comply: *Bristol v. R. R.*, 175-509; but the court cannot direct the party to accept and plead a particular fact: *Hensley v. Furniture Co.*, 164-148. Pleadings containing offensive matter should be removed from the files: *Mitchell v. Brown*, 88-156. If there is any formal defect which renders the pleading unintelligible, or the precise nature of the charge or defense be not apparent by reason thereof, it can be corrected on motion: *Blackmore v. Winders*, 144-216.

538. Pleading judgments. In pleading a judgment or other determination of a court or of an officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made. If this allegation is controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction.

Rev., s. 497; Code, s. 262; C. C. P., s. 121.

The defense of a former judgment must be pleaded, even if judgment was rendered by the same court: *Smith v. Lumber Co.*, 140-375; *Blackwell v. Dibbrell*, 103-270; *Daniel v. Bellamy*, 91-78.

539. How conditions precedent pleaded. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing performance, but it may be stated generally that the party duly performed all the conditions on his part. If this allegation is controverted, the party pleading must establish, on the trial, the facts showing performance.

Rev., s. 498; Code, s. 263; C. C. P., s. 122.

Allegation that plaintiff "duly performed" sufficient: *Britt v. Ins. Co.*, 105-175.

540. How instrument for payment of money pleaded. In an action or defense founded upon an instrument for the payment of money only, it is sufficient for the party pleading to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims.

Rev., s. 499; Code, s. 263; C. C. P., s. 122.

541. How private statutes pleaded. In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification, and the court shall thereupon take judicial notice of it.

Rev., s. 500; Code, s. 264; C. C. P., s. 123.

This is a rule of pleading to prevent the litigant from being taken by surprise: *Reid v. R. R.*, 162-355. Necessity of pleading the statute: *Corporation Com. v. R. R.*, 127-283; *Durham v. R. R.*, 108-399; *Hughes v. Comrs.*, 107-598. How to plead it: *Trustee v. Satchwell*, 77-111. That a private statute is published in the public statutes or a public statute in the private statutes does not change its nature: *Durham v. R. R.*, 108-399; *Hancock v. R. R.*, 124-222.

542. Pleadings in libel and slander. In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on trial that it was so published or spoken.

The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

Rev., ss. 501-2; Code, ss. 265-6; C. C. P., ss. 124-5.

COMPLAINT. See section 2429 et seq. Refined and subtle distinctions of the common-law pleading done away with: *Carson v. Mills*, 69-124. Only necessary now to state that the words were published or spoken concerning the plaintiff: *Ibid.*; also *Wozelka v. Hettrick*, 93-10; *Burns v. Williams*, 88-159. Complaint need not negative the idea that the words were privileged: *Gudger v. Penland*, 108-593. Action for slander or libel where the words were spoken of a class, as a jury: *Carter v. King*, 174-549. Upon a demurrer sustained to a complaint against two defendants for uttering different slanderous words, plaintiff amended alleging conspiracy: *Rice v. McAdams*, 149-29.

ANSWER. See section 2429 et seq. Plea of justification: *Logan v. Hodges*, 146-38; *Moore v. Edmiston*, 70-510. Mitigating circumstances pleaded and given in evidence: *Logan v. Hodges*, 146-38; *Ivie v. King*, 167-174; *Upchurch v. Robertson*, 127-128; *Gudger v. Penland*, 108-593; *State v. Hinson*, 103-375; *Knott v. Burwell*, 96-272; *McDougald v. Coward*, 95-368; *Sowers v. Sowers*, 87-303; *McCurry v. McCurry*, 82-296. When defendant pleads the general issue in a suit for slander, evidence in justification or mitigation is incompetent: *Upchurch v. Robertson*, 127-127; *Burris v. Bush*, 170-394. A plea of justification not supported by evidence may be considered in aggravation of damages: *Ivie v. King*, 167-174; s. e., 169-261. Self-defense in libel applies only to a denial or explanation: *Ivie v. King*, 167-174.

543. Allegations not denied, deemed true. Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply is, for the purposes of the action, taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case requires.

Rev., s. 503; Code, s. 268; C. C. P., s. 127.

Not necessary to put pleadings in evidence to show that allegations not denied: *West v. Grocery Co.*, 138-168. Allegations in complaint, not denied, deemed true: *Fleming v. R. R.*, 160-197; *Hauser v. Harding*, 126-295; *Cook v. Guirkin*, 119-13; *McMillan v. Gambill*, 115-352; *Stephenson v. Felton*, 106-114; *Grant v. Gooch*, 105-281; *Tucker v. Wilkins*, 105-272; *Harris v. Sneed*, 104-369; *Bonham v. Craig*, 80-224; *Oates v. Gray*, 66-442; *Jenkins v. Ore Co.*, 65-563—

except in divorce, when failure to deny has no effect, *Toole v. Toole*, 112-152; *Steel v. Steel*, 104-631—and except when legal proposition stated in complaint, *Tiddy v. Graves*, 126-624; *Gatlin v. Tarboro*, 78-119; *Kelly v. McCallum*, 83-563.

Allegations in answer constituting counterclaim, not denied, deemed true: *Rountree v. Britt*, 94-104; *Green v. R. R.*, 77-95; *McKesson v. Mendenhall*, 64-287—but new matter in answer not constituting a counterclaim is deemed denied: *White v. Carroll*, 146-230; *Fishplate v. Fidelity Co.*, 140-594; *Smith v. Bruton*, 137-79; *Jeffreys v. R. R.*, 127-381; *McLamb v. McPhail*, 126-221; *Bank v. Loughran*, 122-674; *James v. R. R.*, 121-530; *Wagon Co. v. Byrd*, 119-461; *Morgan v. Roper*, 119-368; *Askew v. Koonce*, 118-526; *Vance v. Vance*, 118-864; *McQueen v. Bank*, 111-515; *Buffkins v. Eason*, 110-264; *Grant v. Gooch*, 105-278; *Stanton v. Hughes*, 97-318; *Fitzgerald v. Shelton*, 95-519; *Dempsey v. Rhodes*, 93-120; *Skinner v. Wood*, 76-110; *Price v. Eccles*, 73-162. Admission by failure to deny is as available as if found by a jury: *Grant v. Gooch*, 105-281; *Kelly v. McCallum*, 83-563; *Bonham v. Craig*, 80-224; *Jenkins v. Ore Co.*, 65-563. When allegations of complaint are admitted by answer and counterclaim partly admitted and partly denied, and no evidence introduced, judgment will be rendered according to admissions: *Adams v. Beasley*, 174-118. How pleadings may be used in evidence: *Jones v. R. R.*, 176-260; *Wade v. Contracting Co.*, 149-177. Section merely referred to in *Junge v. MacKnight*, 135-110; *Page v. Ins. Co.*, 131-116; *Gattis v. Kilgo*, 128-423; *Gregg v. Mallett*, 111-78.

544. Pleading lost, copy used. If an original pleading or paper is lost or withheld by any person, the court may authorize a copy to be filed and used instead of the original.

Rev., s. 504; Code, s. 600; C. C. P., s. 357.

Copy should always be supplied before case argued before supreme court: *Blackmore v. Winders*, 144-219. An order permitting pleadings to be substituted for those lost is not reviewable: *Bray v. Creekmore*, 109-49.

ART. 18. AMENDMENTS

545. Amendment as of course. Any pleading may be once amended of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires; or it can be so amended at any time, unless it is made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a term for which the cause is, or may be, docketed for trial; and if it appears to the court or judge that the amendment was made for that purpose, it may be stricken out, and such terms imposed as seem just to the court or judge.

Rev., s. 505; Code, s. 272; C. C. P., s. 131.

Any pleading may be once amended as of course without cost: *Barnes v. Crawford*, 115-80. As to amendments to pleadings, process and other proceedings, see section 547.

546. Pleading over after demurrer. After the decision on a demurrer, the judge shall, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just.

Rev., s. 506; Code, s. 272; C. C. P., s. 131; 1871-2, c. 173.

See sections 510, 513, 514, 515, 599. This section gives a right to answer over at the same term of court, if demurrer interposed in good faith: *Kearnes v. Gray*, 173-555; *Ayers v. Bailey*, 162-209; *Olive v. R. R.*, 152-279; *Wilcox v. R. R.*, 152-316; *Morgan v. Harris*, 141-358; *Perry v. Comrs.*, 130-558; *Sloan v. R. R.*, 126-487; *Turner v. McKee*, 137-255; *Gore v. Davis*, 124-234; *Gorrell v. Water Supply Co.*, 124-337; *Barnes v. Crawford*, 115-76; *Hornthal v. Burwell*, 109-18; *Bronson v. Ins. Co.*, 85-415; *Moore v. Hobbs*, 77-66—but if demurrer is frivolous, defendant may answer over only in the discretion of the court: *Parker v. R. R.*, 150-433; *Morgan v. Harris*, 141-358; *Cowan v. Baird*, 77-201—and refusal to hold demurrer frivolous

is not appealable, *Morgan v. Harris*, 141-358; *Abbott v. Hancock*, 123-89; *Walters v. Starnes*, 118-842. Where demurrer sustained, plaintiff allowed to amend in discretion of court only: *Fidelity Co. v. Jordan*, 134-236; *Woodcock v. Bostic*, 128-243; *Barnes v. Crawford*, 115-76; *Netherton v. Candler*, 78-88; but see *Williams v. Smith*, 134-249.

547. Amendments in discretion of court. The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; by correcting a mistake in the name of a party, or a mistake in any other respect; by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved. When a proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it conformable thereto.

Rev., ss. 507, 512; Code, ss. 273, 274; C. C. P., ss. 132, 133.

See sections 545, 546, 548-553.

GENERAL POWER OF AMENDMENT. The courts pursue a liberal policy in amendments in order to have a trial upon the merits and to prevent injustice: *Brewer v. Ring and Valk*, 177-476; *Deligny v. Furniture Co.*, 170-189; *Blalock v. Clark*, 133-309; *Simpson v. Lumber Co.*, 133-99; *Railway Co. v. King*, 125-455; *North v. Dunn*, 122-766; *Bank v. Cotton Mills*, 115-524; *Cox v. Grisham*, 113-279; *Kron v. Smith*, 96-389; *Halstead v. Mullen*, 93-252; *Comrs. v. Blair*, 76-136; *Wilson v. Moore*, 72-558; *Garrett v. Trotter*, 65-430—and such amendments may be made *ex mero motu*, *Allen v. R. R.*, 120-548.

Amendment is discretionary and not reviewable: *Brewer v. Ring and Valk*, 177-476; *Cauley v. Dunn*, 167-32; *Adickes v. Chatham*, 167-681; *Hardin v. Greene*, 164-99; *Hockfield v. R. R.*, 150-419; *Coleman v. Coleman*, 148-299; *Streator v. Streator*, 145-337; *Aiken v. Mfg. Co.*, 141-339; *Balk v. Harris*, 130-383; *Goodwin v. Fertilizer Co.*, 121-91; *Brendle v. Reese*, 115-552; *Donnelly v. Wilcox*, 113-410; *Maxwell v. McIver*, 113-288; *Allen v. McLendon*, 113-321; *Sinclair v. R. R.*, 111-507; *Moore v. Garner*, 109-157; *Bray v. Creedmore*, 109-49; *Jarrett v. Gibbs*, 107-303; *Bank v. McElwee*, 104-305; *Blackwell v. Dibble*, 103-270; *Warden v. McKinnon*, 99-251; *Knott v. Taylor*, 96-553; *Brooks v. Brooks*, 90-142; *Grant v. Burgwyn*, 88-95; *Wiggins v. McCoy*, 87-499; *Carpenter v. Huffsteller*, 87-273; *Reynolds v. Smathers*, 87-24; *Poston v. Rose*, 87-279; *Henry v. Cannon*, 86-24; *Gill v. Young*, 88-61; *Gilechrist v. Kitchen*, 86-20; *Boddie v. Woodard*, 83-2; *Reese v. Jones*, 84-597; *Dobson v. Chambers*, 78-334; *Hinton v. Deans*, 75-18. The discretion of the court is inherent as well as statutory: *Gilechrist v. Kitchen*, 86-20; *Knott v. Taylor*, 96-553.

But where court refuses amendment for want of power, it is reviewable: *Balk v. Harris*, 130-381; *Martin v. Bank*, 131-123; *State v. Fuller*, 114-885. An appeal from an order refusing amendment to pleadings is premature: *Streator v. Streator*, 145-337; *Ayers v. Makely*, 131-60—as is also appeal from order making an additional party, *Bennett v. Shelton*, 117-103. Where amendment not allowed it will be presumed that it was within the exercise of the court's discretion: *Balk v. Harris*, 130-381—but may be rebutted by statement of the trial judge to the contrary, *Ayers v. Makely*, 131-60. Too late to object after amendment made: *Wilson v. Pearson*, 102-290.

IN WHAT COURT. Supreme court, see section 1414. In superior court, see cases *supra*. Before the clerk: *Simmons v. Jones*, 118-472; *Cushing v. Styron*, 104-338; *Maxwell v. Blair*, 95-317. In justice's court: *McPhail v. Johnson*, 115-298; *Cox v. Grisham*, 113-279. On appeal from justice: *Hosiery Mills v. R. R.*, 174-449; *R. R. v. Dill*, 171-176; *Laney v. Mackey*, 144-630; *McBride v. Welborn*, 119-508; *Starke v. Cotten*, 115-81; *McPhail v. Johnson*, 115-298; *Sheldon v. Kivett*, 110-408; *Moore v. Garner*, 109-157; *Leathers v. Morris*, 101-184; *Allen v. Jackson*, 86-321; *Bank v. McArthur*, 82-107; *Beville v. Cox*, 109-265; *Thomas v. Simpson*, 80-4; *Johnson v. Rowland*, 80-1; *Lane v. Morton*, 78-7; *Hinton v. Deans*, 75-18; *State v. Cauble*, 70-62; *Bullard v. Johnson*, 65-436—and in cases appealed from clerk, *Faison v. Williams*, 121-152; *Elliott v. Tyson*, 117-114; *McLean v. Breece*, 113-390; *Lietie v. Chappell*, 111-347; *Robeson v. Hodges*, 105-49; *Finch v. Baskerville*, 85-205; *Capps v. Capps*, 85-408; *Sudderth v.*

McCombs, 67-353. See section 637. After new trial granted in supreme court, court below may allow amendment: Lefler v. Lane, 170-181; Martin v. Martin, 130-27; Comrs. v. Kenan, 127-181; but see Cook v. Bank, 130-183.

TERMS OF AMENDMENT. Are entirely in court's discretion: Robinson v. Willoughby, 67-84—and must be strictly complied with, Hinton v. Ins. Co., 116-25; Crump v. Thomas, 89-241. May refuse to allow an amendment to plead statute of limitations: R. R. v. Dill, 171-176; but general leave to amend allows such plea: Hardin v. Greene, 164-99. Where the amendment does not comply with the order another judge may strike it out, but not because the former judge had no power to make the order: Dockery v. Fairbanks, 172-529.

LIMITATION OF POWER. An amendment cannot change the nature of the action or defense without consent: King v. R. R., 176-301; Patterson v. Lumber Co., 175-90; Hardware Co. v. Banking Co., 169-744; Cooper v. R. R., 165-578; s. c., 170-490; Bennett v. R. R., 159-345; Bonner v. Stotesbury, 139-3; Finch v. Strickland, 132-103; Simpson v. Lumber Co., 133-99; Shell v. West, 130-171; Smith v. Smith, 123-229; Goodwin v. Fertilizer Works, 123-162; Gillam v. Life Ins. Co., 121-369; Craven v. Russell, 118-564; Martin v. Bank, 131-121; Mizzell v. Ruffin, 118-69; Friedenwald Co. v. Tobacco Works, 117-544; Hester v. Mullen, 107-724; Richards v. Smith, 98-509; Knott v. Taylor, 96-553; Kron v. Smith, 96-389; Clendenin v. Turner, 96-416; Robbins v. Harris, 96-557; Ely v. Early, 94-1; McNair v. Comrs., 93-364; Grant v. Burgwyn, 88-95; Carpenter v. Huffsteller, 87-273; Gilchrist v. Kitchen, 86-20; March v. Verble, 79-19; but see Reynolds v. R. R. Co., 136-348; Simpson v. Lumber Co., 133-95; Pender v. Mallett, 123-61; King v. Dudley, 113-167—or where defendant not allowed also to amend to meet added allegations of complaint, Dobson v. R. R., 129-289; Brooks v. Brooks, 90-142—or where defendant is deprived of a defense, Gillam v. Ins. Co., 121-369; Goodwin v. Fertilizer Works, 123-162; Parker v. Harden, 122-111; Pender v. Mallett, 123-57; Gill v. Young, 88-58; Henderson v. Graham, 84-496; Cogdell v. Exum, 69-464; Christmas v. Mitchell, 38-535—or where it will defeat a statutory provision, Patterson v. Wadsworth, 94-538; Cogdell v. Exum, 69-464—or to confer jurisdiction, Gillam v. Ins. Co., 121-369—or to set up cause of action accruing subsequently, Powell v. Allen, 103-46; Jackson v. McLean, 96-474; Clendenin v. Turner, 96-416—or to disturb a vested right, Brown v. Mitchell, 102-374—or to add a party that necessarily changes the cause of action, Shell v. West, 130-171. If amendment changing the nature of the action is allowed, the statute of limitations runs up to the time of the amendment: Ely v. Early, 94-1; Sams v. Price, 121-392; but increasing the amount of damage does not change the cause of action and relates back to commencement of action: McLaughlin v. R. R., 174-182; Pickett v. R. R., 153-149. Amending a defective statement of a cause of action does not change the cause: Renn v. R. R., 170-128; Lefler v. Lane, 170-181; Deligny v. Furniture Co., 170-189; Steeley v. Lumber Co., 165-27. Supreme court will not allow an amendment to destroy an exception duly taken: West v. R. R., 140-620.

AMENDMENT OF PLEADINGS. To make necessary parties: Belding v. Archer, 131-287; Proctor v. Ins. Co., 124-265; Walker v. Miller, 139-448; Comrs. v. Candler, 123-682; Reynolds v. Smathers, 87-24—to make additional parties: Kerr v. Hicks, 154-265; Hosiery Mills v. R. R., 174-449; Aiken v. Mfg. Co., 141-339; Bernard v. Shemwell, 139-447; Mills v. Callahan, 126-756; Tillery v. Candler, 118-888; Bullard v. Johnson, 65-436; Bruce v. Nicholson, 109-202; Plemmons v. Imp. Co., 108-614; Tucker v. Markland, 101-422; Clendenin v. Turner, 96-416; Merrill v. Merrill, 92-657; Isler v. Koonce, 83-55; Glenn v. Bank, 80-97; Bank v. Creditors, 80-9—to strike out name of party, Campbell v. Power Co., 166-488; McLaughlin v. R. R., 174-182; Bullard v. Johnson, 65-436; Forte v. Boone, 114-176; Maggett v. Roberts, 108-174; Brown v. Mitchell, 102-347; Gatewood v. Leake, 99-363; Jarrett v. Gibbs, 107-303—to show jurisdiction: Elliott v. Tyson, 117-114; Planing Mills v. McNinch, 99-517; Singer Mfg. Co. v. Barrett, 95-36; but see Gillam v. Life Ins. Co., 121-369; Boyd v. R. R., 132-184—to make proper relator, Comrs. v. Candler, 123-682; Forte v. Boone, 114-176—to substitute parties, R. R. v. Tel. Co., 113-220; Hodge v. R. R., 108-24; Wilson v. Pearson, 102-290; Bray v. Creekmore, 109-49—to make the action against county instead of county commissioners, Fountain v. Pitt, 171-113—to use names of individual plaintiffs instead of firm name, Rosenbacher v. Martin, 170-236—to make wife party with husband, Hooker v. R. R., 156-155.

To perfect complaint that does not wholly state a cause of action: Stone v. R. R., 144-220; Williams v. Smith, 134-252; Blalock v. Clark, 133-306; Lassiter v. R. R., 136-92; Parker v. Harden, 122-111; Woodbury v. Evans, 122-179; Simpson v. Lumber Co., 133-95; Mizzell v.

Ruffin, 118-69; Jackson v. Jackson, 105-433; Moore v. Nowell, 94-265; Halstead v. Mullen, 93-255; Pearce v. Mason, 78-37; Garrett v. Trotter, 65-435; Johnson v. Finch, 93-205; Renn v. R. R., 170-128—to make pleading plain, definite and certain, McKinnon v. McIntosh, 98-89—to add to defense in action of ejectment, Taylor v. Gooch, 110-387—to set up mistake in a deed in action concerning land, Ely v. Early, 94-1—to make answer responsive to amended complaint, Sams v. Price, 121-392; Brooks v. Brooks, 90-142; Gill v. Young, 88-58—to enable plaintiff to recover for tort instead of on contract by changing mode of stating same facts, Reynolds v. R. R., 136-345—to conform pleading to proof, when does not change cause of action, King v. R. R., 176-301; Woodbury v. Evans, 122-780; Bedsole v. R. R., 151-152; Andrews v. Grimes, 148-437; Dickens v. Perkins, 134-223; Nims Mfg. Co. v. Blythe, 127-325; Hendon v. R. R., 127-114; Abernathy v. Seagle, 98-553; Kiger v. Harmon, 113-407; Spivey v. Grant, 96-214; Barnes v. Barnes, 104-613; Gibbs v. Fuller, 66-116—to cure affidavit in divorce, Moore v. Moore, 130-333; Holloman v. Holloman, 127-15—to set up statute of limitations, Smith v. Smith, 123-229—to conform to agreed facts, Dalby v. Hancock, 125-327—to include right of attachment as against intervener, Finch v. Gregg, 126-179—to perfect lost pleadings on appeal from justice's court: Faison v. Johnson, 78-78—to allow counterclaim on appeal, not set up before justice: Thomas v. Simpson, 80-4; Johnson v. Rowland, 80-1—to enable recovery of expenses instead of commissions by trustee under deed of trust, Fry v. Graham, 122-773—to conform to decision of supreme court, McCulloch v. R. R., 146-316; Banking Co. v. Morehead, 126-279; Vick v. Vick, 126-127; Faison v. Williams, 121-153; Holley v. Holley, 96-229—to change amount demanded, Boyd v. R. R., 132-184—to correct date of release pleaded, R. R. v. Main, 132-445—to show better profile in action to condemn land, R. R. v. Newton, 133-132—to set up estoppel in proceeding to drain land, Porter v. Armstrong, 134-455—to conform complaint to verdict, Gillis v. Arringdale, 135-295—to permit recovery on quantum meruit, Roberts v. Woodworking Co., 111-432—to permit widow to claim crops on dower land instead of as agent for minor child, King v. Dudley, 113-167—to perfect cause of action for deceit and false warranty, Joyner v. Early, 139-49. Amendment to verification: Cantwell v. Herring, 127-81; Best v. Dunn, 126-560. An amended pleading does not exclude a party from the benefit of allegations in the original pleading: Threadgill v. Comrs., 116-616.

AMENDMENT OF PROCESS. Power of amendment is broad, both by statute and on account of the inherent powers of the court, and is entirely discretionary: Swain v. Burden, 124-16; Jackson v. McLean, 90-64; Henderson v. Graham, 84-496; see section 1500. Amendment of summons: Calmes v. Lambert, 153-248; State v. Wells, 142-590; Ewbank v. Turner, 134-80; Burwell v. Hughes, 116-430; McBride v. Welborn, 119-508; Piercy v. Watson, 118-976; Forte v. Boone, 114-176; McPhail v. Johnson, 115-298; Cox v. Grisham, 113-279; Redmond v. Mullenax, 113-505; Jackson v. McLean, 90-64; Capps v. Capps, 85-408; Henderson v. Graham, 84-496; Chatham v. Crews, 81-343; Thomas v. Womack, 64-657—of return of summons, Grady v. R. R., 116-952; Campbell v. Smith, 115-498; Luttrell v. Martin, 112-593—of affidavit for publication of summons, Mullen v. Canal Co., 112-109—of return of execution, Dysart v. Brandreth, 118-968; Williams v. Weaver, 101-1; Walters v. Moore, 90-41—of warrant issued by justice, State v. Cauble, 70-62; Bullard v. Johnson, 65-436—of pleadings in justice's court, Moore v. Garner, 109-157. Process in attachment: Page v. McDonald, 159-38.

AMENDMENT OF PROCEEDINGS OTHER THAN PLEADINGS AND PROCESS. Of affidavit in attachment: Cook v. Mining Co., 114-617; Sheldon v. Kivett, 110-408; Cushing v. Styron, 104-338; Pope v. Frank, 81-180; Bank v. Blossom, 92-695; Penniman v. Daniel, 93-332; Brown v. Hawkins, 65-645; Clark v. Clark, 64-150—and such affidavit can be amended even though original affidavit totally insufficient, Brown v. Hawkins, 65-645. Of nature of attorney's appearance for client: Suiter v. Brittle, 90-19. Of affidavit in proceedings supplementary to execution: Weiller v. Lawrence, 81-69. Of judgment: Banking Co. v. Duke, 121-110; Rosenthal v. Roberson, 114-594; Beam v. Bridgers, 111-269; Brooks v. Stephens, 100-297; Cook v. Moore, 100-294; Wall v. Covington, 83-144; Farmer v. Willard, 75-401. Amendment of judgment must be made in court that rendered it: Adams v. Reeves, 76-412; Morton v. Rippey, 84-611—but magistrate's judgment docketed in superior court may be amended, when, Patterson v. Walton, 119-500. Of the record: Mann v. Mann, 176-353; Cook v. Telegraph Co., 150-428; Kerr v. Hicks, 131-90; Pipkin v. McArtan, 122-194; State v. Jenkins, 121-637; Woodworking Co. v. Southwick, 119-611; State v. Gillikin, 114-832; State v. Pool, 106-698; Walton v. McKesson, 101-428; Wynne v. Small, 102-132; Brooks v. Stephens, 100-297; State v. Warren, 95-674;

McDowell v. McDowell, 92-227; Walton v. Pearson, 85-34; State v. Swepson, 83-584; Perry v. Adams, 83-266; Bank v. McArthur, 82-107; State v. Davis, 80-384; Murrill v. Humphrey, 76-414; State v. King, 27-203; State v. Roberts, 19-540; State v. Calhoun, 18-374. **Of magistrate's record when case appealed to superior court:** Bank v. McArthur, 82-107. Courts will not allow amendment of its records, particularly after long lapse of time, without strong and convincing proof: Walton v. McKesson, 101-428. The court cannot amend the filing of a lien to make it comply with the statute: Jefferson v. Bryant, 161-404. **Special venire ordered and no writ issued, writ may be issued nunc pro tunc:** State v. Lewis, 177-555.

TIME OF AMENDING. Record may be amended at chambers: Falkner v. Hunt, 68-475. Pleadings may be amended during trial, when: Woodbury v. Evans, 122-780; Sams v. Price, 119-574; Craven v. Russell, 118-564; King v. Dudley, 113-167; Allen v. McLendon, 113-322; Lilly v. Baker, 88-151; Garrett v. Trotter, 65-430—after judgment, when, Waters v. Waters, 125-593; Knott v. Taylor, 96-553—after verdict, Boyd v. R. R., 132-184; Blalock v. Clark, 133-308; Roberts v. Woodworking Co., 111-433; Brown v. Mitchell, 102-347; Robeson v. Hodges, 105-49; Morgan v. Smith, 95-396; Pearce v. Mason, 78-37; Dobson v. Chambers, 78-334; Righton v. Pruden, 73-61; Penny v. Smith, 65-35—after referee's report, Mfg. Co. v. Blythe, 127-325. The court may allow amendment at the term or afterward: Mann v. Mann, 176-353. **Before or after judgment:** Hardware Co. v. Banking Co., 169-744. **Presumption that an amendment is regularly made:** Monger v. Kelly, 115-294; Patterson v. Wadsworth, 94-538.

548. Amendment changing nature of action or relief; effect. When the complaint is so amended as to change the nature of the action and the character of the relief demanded, the judgment rendered does not operate as an estoppel upon any person acquiring an interest in the property in controversy prior to the allowance of the amendment.

Rev., s. 508; 1901, c. 486.

See section 547.

549. Unsubstantial defects disregarded. The court or judge shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party; and no judgment may be reversed or affected by reason of such error or defect.

Rev., s. 509; Code, s. 276; R. C., c. 3, ss. 5, 6; C. C. P., s. 135.

As to immaterial variance between pleading and proof, see section 552. Cases directly supporting section: Wright v. Ins. Co., 138-488; Halstead v. Mullen, 93-255. Exceptions to pleadings that are reasonably certain and understood will be disregarded: Moore v. Edmiston, 70-510; Watkins v. Mfg. Co., 131-539; Gorman v. Bellamy, 82-499. Such defects in pleadings as would be remediable by amendment that does not change substantially the claim or defense will not sustain a dismissal of the action: Halstead v. Mullen, 93-255. Certain defects in procedure and process held not material: Barneyeastle v. Walker, 92-198; Wilson v. Moore, 72-558; Best v. Mortgage Co., 128-351; Patterson v. Walton, 119-500; White v. Morris, 107-98; Page v. McDonald, 159-38; Fountain v. Pitt, 171-113.

550. Defendant sued in fictitious name; amendment. When the plaintiff is ignorant of the name of a defendant the latter may be designated in a pleading or proceeding by any name; and when his true name is discovered, the pleading or proceeding may be amended accordingly.

Rev., s. 510; Code, s. 275; C. C. P., s. 134.

A defect in name cured by judgment by default or by appeal by defendant without having moved to dismiss: Clawson v. Wolfe, 77-100; Patterson v. Walton, 119-500; Ryan v. Martin, 91-464. Variation in middle initial of name is immaterial: Evans v. Brendle, 173-149.

551. Supplemental pleadings. The plaintiff or defendant respectively may be allowed on motion to make a supplemental complaint, answer or reply, alleging

facts material to the case occurring after, or of which the party was ignorant when his former pleading was filed. Either party may set up by a supplemental pleading, the judgment or decree of any court of competent jurisdiction, rendered since the commencement of an action, determining all or any part of the matter in controversy in said action, and if the judgment is set up by the plaintiff, it shall be without prejudice to any provisional remedy theretofore issued or other proceedings had in the action on his behalf.

Rev., s. 511; Code, s. 277; C. C. P., s. 136.

See for amendment of pleadings, process, etc., sections 545-547, 552, 553. Plea puis darrein continuance is a supplemental pleading: *Balk v. Harris*, 130-381—and, if a bar to the action, can be allowed in court's discretion; but as to whether it is a bar the court's ruling is reviewable: *Ibid.*; also *Warden v. McKinnon*, 99-251. Such a plea does not waive other defenses: *Williams v. Hutton*, 164-216. Allowed when case comes back from appellate court: *Holley v. Holley*, 96-229; *Faison v. Williams*, 121-153; *Vick v. Vick*, 126-127; *Banking Co. v. Morehead*, 126-279—when new parties made and their connection with controversy not appearing, *Hughes v. Hodges*, 94-56; *Coggins v. Flythe*, 114-277; *Moore v. R. R.*, 74-528; *Baggarly v. Calvert*, 70-688—when one of two plaintiffs enters a retraxit, *Sinclair v. R. R.*, 111-507—where defects in plaintiff's title or matters validating defendant's title have accrued since action begun, *Taylor v. Gooch*, 110-387—when defendant has been discharged in bankruptcy, *Balk v. Harris*, 130-381.

Not allowed when party dies and relationship of new parties to him are ascertained from record: *Hughes v. Hodges*, 94-56—nor for purpose of injecting cause of action accrued since suit instituted: *Metcalfe v. Guthrie*, 94-447—nor for purpose of setting up counterclaim after nonsuit has been entered: *Well Co. v. Ice Co.*, 125-80.

552. Variance, material and immaterial. 1. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it is alleged that a party has been so misled, that fact and in what respect he has been misled must be proved to the satisfaction of the court; and thereupon the judge may order the pleading to be amended upon such terms as shall be just.

2. Where the variance is not material as herein provided, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

Rev., ss. 515, 516; Code, ss. 269, 270; C. C. P., ss. 128, 129.

For power of amendment and to make the pleading conform to the proof, see section 547. Proof without allegation is as unavailing as allegation without proof: *Sultan v. R. R.*, 176-136; *McCoy v. R. R.*, 142-383; *Smith v. B. and L. Assn.*, 116-102; *Abernathy v. Seagle*, 98-553. The court cannot hear proof without allegation: *Faulk v. Thornton*, 108-314; *Greer v. Herren*, 99-492; *Brittain v. Daniels*, 94-781; *McLaurin v. Cronly*, 90-50. Material and immaterial variance and failure of proof: *Deligny v. Furniture Co.*, 170-189. Variance is immaterial unless the adverse party has been misled: *Brown v. Telegraph Co.*, 169-509; *Bank v. Burgwyn*, 116-122; *Morgan v. Bank*, 93-352; *Patrick v. R. R.*, 93-422; *Lawrence v. Hester*, 93-79; *Usry v. Suit*, 91-406; *Lilly v. Baker*, 88-151.

If variance is immaterial, it is disregarded; if material, the adverse party must take advantage of it under this section: *Muse v. Motor Co.*, 175-466; *Simmons v. Lumber Co.*, 174-220; *Coore v. R. R.*, 152-702; *Andrews v. Grimes*, 148-437; *Hendon v. R. R.*, 127-110. Cases where variance was held immaterial: *Edwards v. R. R.*, 162-278; *Dellinger v. Electric R. R.*, 160-532; *Hamilton v. Nance*, 159-56; *Asbury v. R. R.*, 125-573; *Bank v. Burgwyn*, 116-122; *Knowles v. R. R.*, 102-66; *Morgan v. Bank*, 93-352; *Mode v. Penland*, 93-292. Where party is misled, amendment allowed: *Willis v. Branch*, 94-143; *Webb v. Taylor*, 80-305; *Houghton v. Newberry*, 69-459; *Shelton v. Davis*, 59-324; *Pegram v. Stoltz*, 67-144; and the case may be continued: *Martin v. Bank*, 131-121. If no particular line of title is alleged, plaintiff may make out title from any source: *Stewart v. Stephenson*, 172-81; *Taylor v. Meadows*, 169-124.

553. Total failure of proof. Where the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not deemed a case of variance, but a failure of proof.

Rev., s. 517; Code, s. 397; C. C. P., s. 223.

See *Smith v. Loan Assn.*, 116-102; *Hunt v. Vanderbilt*, 115-559; *Smith v. McGregor*, 96-101; *Grant v. Burgwyn*, 88-95; *Carpenter v. Huffsteller*, 87-273; *Pendleton v. Dalton*, 96-507; *Deligny v. Furniture Co.*, 170-189; *Talley v. Granite Quarries Co.*, 174-445.

SUBCHAPTER VII. TRIAL AND ITS INCIDENTS

ART. 19. TRIAL

554. Defined. A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

Rev., s. 526; Code, s. 397; C. C. P., s. 223.

All the issues that are material must be tried unless waived: *Gordon v. Collett*, 102-532; *Davidson v. Gifford*, 100-18; *Porter v. R. R.*, 97-66.

555. Joinder of issue and trial. Pleadings shall be made up and issues joined before the clerk. After pleadings have been so made up and issues joined, the clerk shall forthwith transmit the original papers in the cause to the court at term for trial upon the issues, when the case shall be proceeded with according to the course and practice of the court, and on appeal with the same procedure as is now in force.

1919, c. 304, s. 8.

556. How issue tried. An issue of law must be tried by the judge or court, unless it is referred. An issue of fact must be tried by a jury, unless a trial by jury is waived or a reference ordered. Every other issue is triable by the court, or judge, who, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it.

Rev., s. 527; Code, ss. 398, 399; C. C. P., ss. 224, 225.

For compulsory reference, see section 573. So much of the pleadings ought to be read to the jury as may be necessary to explain and to present the issues: *Smith v. Nimocks*, 94-243. The consent to waive a jury trial may be made by counsel without special authority: *Stevenson v. Felton*, 99-58. Where parties agree to a particular mode of trial they are bound by it: *Runnion v. Ramsay*, 93-410. Error for judge to decide the issues unless both sides consent: *Wilson v. Bynum*, 92-717.

TRIAL BY JURY. A matter of right, when: *Power Co. v. Power Co.*, 171-248; *Driller Co. v. Worth*, 117-515; *Gwaltney v. Timber Co.*, 111-547; *McQueen v. Bank*, 111-509; *McCanless v. Flinchum*, 98-358; *Jones v. Call*, 93-170; *Yelverton v. Coley*, 101-248; *Hull v. Carter*, 83-249; *Womble v. Fraps*, 77-198; *Lippard v. Roseman*, 72-427; *Stith v. Lookabill*, 71-25; *Isler v. Murphy*, 71-436; *Armfield v. Brown*, 70-27; *Andrews v. Pritchett*, 66-387; *Erwin v. Lowery*, 64-322—but party can waive it, *Armfield v. Brown*, 70-27; see, also, *State v. Mitchell*, 119-786, and cases cited. A reference made by consent waives the right: *Battle v. Mayo*, 102-413; see, also, section 579. This right to trial of issues of fact by a jury applies to equitable as well as legal actions: *Ely v. Early*, 94-1; *Worthy v. Shields*, 90-192. Party not entitled to trial by jury in civil matters except in cases where, under the common law, the demand that the facts should be so found could not be refused: *Railroad v. Parker*, 105-246; *R. R. v. Ely*, 101-8; *State v. Lyle*, 100-497; *R. R. v. Davis*, 19-451. A person charged with contempt is not

entitled: *Baker v. Cordon*, 86-116; *In re Deaton*, 105-59; consider *Moye v. Cogdell*, 66-403. It is error to leave to the jury a material fact upon which there is no evidence: *Fortescue v. Makeley*, 92-56.

Section casually referred to: *Lumber Co. v. Lumber Co.*, 137-439; *Stancill v. Spain*, 133-79; *Wilson v. Markley*, 133-616; *Carr v. Askew*, 94-212; *Young v. Lumber Co.*, 147-26.

557. Issues of fact. Every issue of fact joined on the pleadings, and inquiry of damages ordered to be tried by a jury, must be tried at the term of the court next ensuing the joinder of issue or order for inquiry, if the issue was joined or order made more than thirty days before such term, but if not, they must be tried at the second term after the joinder or order.

Rev., s. 528; Code, s. 400; C. C. P., s. 226.

See terms of courts in Lee County, chapter Courts, s. 1443.

Where at trial term an amended answer to an amended complaint raises additional issues, defendant entitled to continuance: *Dobson v. R. R.*, 129-289. Section referred to: *State v. Spivey*, 132-990; *State v. Smarr*, 121-670; *Denmark v. R. R.*, 107-188.

558. Issues of fact before the clerk. All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding term, and in case of such transfer neither party is required to give an undertaking for costs.

Rev., s. 529.

See section 758. Issues of fact to be transferred for jury trial; issues of law and questions of fact for the court: *Mills v. McDaniel*, 161-113; *R. R. v. Gahogan*, 161-190; *R. R. v. R. R.*, 148-59; so in proceeding for divorce and alimony: *Crews v. Crews*, 175-168.

559. Continuance before term; affidavit. A party to an action may apply to the court in which it is pending, or to the judge thereof, by affidavit, thirty days before the trial term, and after three days notice in writing to the adverse party, to have the trial continued to a term subsequent to that in which it is regularly triable. The court or judge may continue the trial as asked for, on such terms as may be just, if satisfied—

1. That the applicant has used due diligence to have his case ready for trial.

2. That by reason of circumstances beyond his control, which he must set forth, he cannot have a fair trial at the regular trial term. If the application is made by reason of the expected absence of a witness, it must state the name and residence of the witness, the facts expected to be proved by him, the grounds for the expectation of his nonattendance, and that the applicant expects to procure his evidence at or before some named subsequent term. The applicant must in all cases pay the costs of the application.

Continuances are not favored by the law: *Wagon Co. v. Bostic*, 118-759. Where, pending action for divorce, defendant becomes insane, the cause will be continued as long as there is a hope of the defendant's regaining reason: *Stratford v. Stratford*, 92-297—but when all hope gone, semble that plaintiff allowed to proceed, *Ibid.*

Rev., s. 530; Code, s. 401; C. C. P., s. 227.

560. Continuance during term. The judge at any time during the term at which an action is triable may continue the trial on the application of either party, and on such terms as shall be just, if satisfied—

1. That the applicant has used due diligence to be ready for trial.

2. That he cannot have a fair trial at that term, by reason of circumstances stated, and if the ground of application is the nonattendance of a witness, the

affidavit must contain the particulars required by subdivision two of the preceding section. Unless the applicant also sets forth in his affidavit that the facts upon which his application is grounded occurred or came to his knowledge too late to allow him to apply as prescribed in the preceding section, and that his application is made as soon as it reasonably could be after the knowledge of those facts, the continuance shall not be granted, except on the payment of the costs in the action for the term.

Rev., s. 531; Code, s. 402; C. C. P., s. 228; R. C., c. 31, s. 57.

CONTINUANCE. A continuance is within the discretion of the judge and is not reviewable unless discretion is abused: *Morton v. Water Co.*, 168-582; *Watson v. R. R.*, 164-176; *Cromartie v. R. R.*, 156-97; *State v. Daniels*, 164-464; *State v. English*, 164-497; *Lanier v. Ins. Co.*, 142-14; *State v. Sultan*, 142-569; *State v. Dewey*, 139-560; *Slingluff v. Hall*, 124-397; *Wagon Co. v. Bostie*, 118-758; *Banks v. Mfg. Co.*, 108-282; *Dupree v. Ins. Co.*, 92-417; *McCurry v. McCurry*, 82-296; *Gay v. Brookshire*, 82-411; *State v. Vann*, 84-722; *State v. Scott*, 80-365; *State v. Lindsey*, 78-499; *Moore v. Dickson*, 74-423; *Austin v. Clarke*, 70-458; *State v. Duncan*, 28-98; *Armstrong v. Wright*, 8-93—or unless it affects a substantial right, *Stratford v. Stratford*, 92-297—though an appeal is useless, it working a continuance of itself, *Jaffray v. Bear*, 98-58; *Isler v. Dewey*, 79-1. If defendant fails to comply with terms upon which a continuance was granted his answer may be stricken out and judgment rendered against him: *Lumber Co. v. Cottingham*, 173-323.

GROUND OF CONTINUANCE. Insanity of party since action brought: *Stratford v. Stratford*, 92-297. Amendment of pleadings causing surprise: *Martin v. Bank*, 131-121. Amendment of pleading producing other issues: *Dobson v. R. R.*, 129-289. New evidence discovered: *Herndon v. R. R.*, 121-498.

NOT GROUND OF CONTINUANCE. The fact that attorney in case is son of trial judge: *Allison v. R. R.*, 129-336. Where witnesses absent, but it appeared that they had not been subpoenaed while party had ample opportunity to subpoena them: *McQueen v. Bank*, 111-509. Where absent witness would only be competent after verdict in mitigation of sentence: *State v. Sheppard*, 1-51.

An admission of fact made to prevent a continuance for absence of witness cannot be used in a subsequent trial, the witness being present: *Cutler v. Cutler*, 130-1. It is error to order defendant's affidavit for continuance in a criminal case read to jury, he objecting: *State v. Twiggs*, 60-142. Whether an admission that an absent witness would testify as stated is sufficient: *State v. Fain*, 177-120.

561. Counter affidavits as to continuance. It is competent in all civil cases only for the opposing side to controvert the allegations of fact in applications for continuance, and to offer counter affidavits to that end. The judge shall not allow the continuance unless satisfied, after thorough examination of the evidence aforesaid, that the ends of justice demand it.

Rev., s. 532; 1885, c. 394.

562. Order of business. The criminal calendar must be first disposed of, unless, by consent of counsel, or for reasons satisfactory to the judge, particular criminal actions may be deferred. The issues on the civil calendar must be disposed of in the following order, unless, for the convenience of parties or the dispatch of business, the court otherwise directs:

1. Issues of fact to be tried by a jury.
2. Issues of fact to be tried by the court.
3. Issues of law.

Rev., s. 533; Code, s. 403; C. C. P., s. 229.

563. Separate trials. A separate trial between a plaintiff and any of several defendants may be allowed by the court when, in its opinion, justice will thereby be promoted.

Rev., s. 534; Code, s. 407; C. C. P., s. 230.

Severance is not a matter of right, but is discretionary with judge, and his decision is not reviewable, except when discretion abused; it is like dividing the action into several suits with the usual provisions for costs, etc.: *State v. Kirkland*, 175-770; *State v. Carraway*, 142-575; *Bryan v. Spivey*, 106-95; *State v. Moore*, 120-570; *State v. Finley*, 118-1161; *State v. Jackson*, 112-851; *State v. Oxendine*, 107-783; *State v. Gooch*, 94-1006; *State v. Smith*, 24-402; *State v. Dixon*, 78-558; *State v. Duncan*, 28-98; *State v. Lindsey*, 78-499; *State v. Scott*, 80-365. Where there is misjoinder of parties the court in its discretion can divide the action: *Pretzfelder v. Ins. Co.*, 116-496; see, also, section 516.

564. Judge to explain law, but give no opinion on facts. No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon.

Rev., s. 535; Code, s. 413; C. C. P., s. 237; R. C., c. 31, s. 130; 1796, c. 452.

EXPRESSION OF OPINION. Judge must not at any time during trial express an opinion on the weight of the evidence, nor make any remark from which an inference can be drawn as to his opinion of the facts: *State v. Horner*, 174-788; *Swain v. Clemmons*, 172-277; *State v. Williams*, 172-894; *State v. Beal*, 170-764; *Speed v. Perry*, 167-122; *May v. Mfg. Co.*, 164-262; *State v. R. R.*, 145-269; *Smith v. Moore*, 145-570; *Universal Metal Co. v. Railroad*, 145-293; *Withers v. Lane*, 144-184; *Dobbins v. Dobbins*, 141-213; *Kearns v. R. R.*, 139-483; *Earnhart v. Clement*, 137-95; *Harper v. Anderson*, 130-358; *State v. McDowell*, 129-523; *Neal v. R. R.*, 126-653; *Davis v. Blevins*, 125-433; *Bank v. Gilmer*, 116-684; *Young v. Construction Co.*, 109-618; *Albertson v. Terry*, 109-10; *State v. Hardee*, 83-619; *Fickey v. Merrimon*, 79-585; *March v. Verble*, 79-19; *State v. Browning*, 78-555; *State v. Dancy*, 78-437; *State v. Locke*, 77-481; *State v. Dixon*, 75-275; *State v. Dick*, 60-440; *State v. Allen*, 48-257; *Nash v. Morton*, 48-3; *Powell v. R. R.*, 68-395; *State v. Cardwell*, 44-245; *State v. Presley*, 35-494; *State v. Angel*, 29-27; *State v. Johnson*, 23-358; *Reel v. Reel*, 9-63; *Orbison v. Morrison*, 7-551; *Tate v. Greenlee*, 7-556. The "facts" referred to are those in dispute: *State v. Angel*, 29-27; *State v. Rogers*, 168-112.

The judge may violate the rule as to expressing opinion by his manner and emphasis: *Withers v. Lane*, 144-184, and cases cited; *Reiger v. Davis*, 67-185; *State v. Dancy*, 78-437; *State v. Brown*, 67-435—but such manner and emphasis must be so set out that the supreme court can judge of it, *Davis v. Blevins*, 125-433; *Reiger v. Davis*, 67-185; *State v. Jones*, 67-285. Remarks by the court of doubtful propriety are not ground of exception where it appears they did no harm to party excepting: *State v. Brabham*, 108-793; *State v. Rowe*, 155-436. Remarks by judge before trial: *State v. Jacobs*, 106-695; *State v. Howard*, 129-584—by bystander, *State v. Jackson*, 112-851. It must appear to the supreme court with ordinary certainty that the remarks or actions of the judge were likely to have had an unfair influence or to have conveyed to the jury his opinion on the weight of the testimony: *State v. Jones*, 67-285; *State v. Lipsey*, 14-485. It is only when the law gives to testimony an artificial weight that the judge is at liberty to express an opinion as to its weight: *Bonner v. Hodges*, 111-66.

Instances of expression of opinion, and of conduct likely to influence the jury: *State v. Seaboard Air Line*, 145-570; *Universal Metal Co. v. Railroad*, 145-293; *Perry v. Perry*, 144-328; *State v. Simmons*, 143-613; *State v. Davis*, 136-568; *Faulkner v. King*, 130-494; *State v. McDowell*, 129-523; *Marcom v. Adams*, 122-223; *Kinney v. R. R.*, 122-961; *Threadgill v. Comrs.*, 116-616; *Sherrill v. Tel. Co.*, 116-655; *Fleming v. R. R.*, 115-699; *Bonner v. Hodges*, 111-66; *State v. Jenkins*, 85-544; *State v. Dancy*, 78-437; *State v. Sykes*, 79-618; *Powell v. R. R.*, 68-395; *State v. Parker*, 66-624; *State v. Simmons*, 51-21; *Melvin v. Easley*, 46-386; *State v. Thomas*, 29-381. For the judge to say that he would not allow a verdict for defendant to stand: *Park v. Exum*, 156-228. Ordering a witness into custody for perjury during the progress of the trial: *State v. Swink*, 151-726. To say that one witness corroborates another:

Lassiter v. R. R., 171-283; Swan v. Carawan, 168-472. Giving undue emphasis to the testimony of one witness: Wallace v. R. R., 174-171; Starling v. Cotton Mills, 171-222; State v. Horne, 171-787; Bowman v. Trust Co., 170-301; State v. Weathers, 98-685; Weisenfeld v. McLean, 96-248; State v. Baker, 69-147. In excluding part of the answer of a witness, to say "this witness is too smart": Chance v. Ice Co., 166-495. Saying to defendant as a witness to answer the question and "not be dodging": State v. Rogers, 173-755. To say that a certain witness is not interested in the verdict: State v. Ownby, 146-677. To say "if this contention be true, it is an attempt to stigmatize defendants as being guilty of a base and dirty fraud": Ray v. Patterson, 165-512. An expression of opinion is not corrected by telling the jury that they are to be the judges of the evidence: State v. Cook, 162-586. To use expression, "the proverbial slowness of a messenger boy," in an action against telegraph company: Meadows v. Tel. Co., 131-73.

Instances where court held did not amount to an expression of opinion or an invasion of jury's prerogative: Lewis v. R. R., 132-382; State v. Edwards, 126-1053; Means v. R. R., 126-424; State v. Chastain, 104-904; Davis v. Blevins, 125-433; State v. Robertson, 121-551; State v. Dewey, 139-566; Garrett v. Pegram, 120-288; State v. Journigan, 120-568; Little v. R. R., 119-771; Williams v. Lumber Co., 118-928; Bank v. Gilmer, 116-684; Osborne v. Wilkes, 108-651; Berry v. Hall, 105-164; DeBerry v. Nicholson, 102-465; State v. Brown, 100-519; State v. Freeman, 100-429; DeBerry v. R. R., 100-310; State v. Debnam, 98-712; Ferrall v. Broadway, 95-551; State v. Gardner, 94-953; Greenlee v. Greenlee, 93-278; State v. McNeill, 93-553; Buxly v. Buxton, 92-479; Comrs. v. Lash, 89-159; Stilley v. McCox, 88-18; State v. Robertson, 86-628; Flynt v. Bodenhamer, 80-205; State v. Laxton, 78-564; State v. Neville, 51-423; State v. Butner, 76-118; State v. Jones, 67-288; State v. Davis, 15-612—but held so here because corrected later by the court, State v. May, 15-328. To say that each party might select a man to try a horse, in an action for breach of warranty: Long v. Byrd, 169-658. Saying "I am not sure I understand fully the plaintiff's claim": McDonald v. McArthur, 154-11.

THE CHARGE. The manner in which the judge is to state the law and assist the jury in applying the law to the facts must be left to a great extent to the good sense and sound judgment of the judge: State v. Beard, 124-811; overruling State v. Boyle, 104-800, on the same point; see, also, Holly v. Holly, 94-96. The judge must charge on all the different aspects presented by the evidence; should give the law applicable to every state of facts which may be reasonably assumed: Hauser v. Furniture Co., 174-463; Worthington v. Jolly, 174-266; Orvis v. Holt, 173-231; Matthews v. Myatt, 172-230; State v. Merrick, 171-788; Blake v. Smith, 163-274; Simmons v. Davenport, 140-407; State v. Rippy, 104-756; State v. Brewer, 98-607; State v. Gilmer, 97-429; Spence v. Clapp, 95-545; State v. Dunlop, 65-288; State v. Matthews, 78-523; State v. Gaskins, 93-547—must divest the issues, so far as practicable, of all irrelevant matter and submit only those aspects presented by the evidence, State v. Wilson, 104-868; State v. Haney, 19-390; State v. Moses, 13-452; State v. Lipsey, 14-485—must not charge upon an aspect of the case not presented by the evidence: Smith v. R. R., 174-111; Hoyle v. Hickory, 164-79; Raby v. Cozad, 164-288; Craig v. Stewart, 163-531; Patterson v. Nichols, 157-406; Worley v. Logging Co., 157-490; State v. McKinney, 111-683; Stewart v. Carpet Co., 138-60; Griffin v. R. R., 137-247; Stewart v. R. R., 136-385; Bryan v. R. R., 134-538; Joines v. Johnson, 133-487; Trust Co. v. Benbow, 131-413; Carson v. R. R., 128-95; Felmet v. Exp. Co., 123-499; Greer v. Herren, 99-492; Carpenter v. Tucker, 98-316; Burwell v. R. R., 94-451; State v. Gooch, 94-987; State v. Hunter, 94-829; State v. Speaks, 94-865; State v. Smith, 100-550; but see Peniman v. Alexander, 115-555—should not encumber the case by an instruction upon hypothetical state of facts: State v. Craine, 120-601; State v. Hicks, 125-636; Burton v. Rosemary Mfg. Co., 132-17; Morrison v. Ry., 123-414; Leak v. Covington, 99-559; State v. Lambert, 93-618; State v. Anderson, 92-732; State v. Harrison, 50-115; State v. Collins, 30-407.

The judge must plainly and correctly state the evidence and declare and explain the law arising thereon: Withers v. Lane, 144-184; State v. Green, 134-661; State v. Fulford, 124-798; State v. Brady, 107-822; State v. Pritchett, 106-667; State v. Lawson, 98-759; State v. Jones, 97-473; State v. Chavis, 80-353; State v. Cain, 47-201; State v. Peace, 46-251; State v. Rash, 34-382; State v. Martin, 24-101; State v. Dunlop, 65-288; State v. Moses, 13-452—should array on both sides the evidence bearing upon the material issues and apply the principles of law thereto; must not charge on the contentions of one side: Jarrett v. Trunk Co.,

144-299, and cases cited; *Boon v. Murphy*, 108-187; *State v. Brady*, 107-822; *State v. Pritchett*, 106-667; *Bank v. Sumner*, 119-591; *State v. Jones*, 97-469; *Phifer v. Alexander*, 97-335; *State v. Jones*, 87-547; *Wilson v. Taylor*, 98-275; *State v. Rogers*, 93-523—must not weigh the evidence and declare the result to the jury as a matter of law: *Miller v. R. R.*, 143-115; *State v. Green*, 134-658; *Harper v. Anderson*, 130-538; *Vanderbilt v. Brown*, 128-498; *Benton v. Toler*, 109-238; *McCanless v. Flinchum*, 98-358—need not recapitulate all the evidence to the jury, *State v. Ussery*, 118-1177; *Bank v. Sumner*, 119-591; *Boon v. Murphy*, 108-187; *State v. Jones*, 97-469; *State v. Jones*, 87-547; *Wiseman v. Penland*, 79-197; *State v. Sykes*, 79-618; *State v. Caviness*, 78-484; *State v. O'Neal*, 29-251; *State v. Morris*, 10-388; *State v. Haney*, 19-390; *State v. Lipsey*, 14-485; *State v. Moses*, 13-457—stating the substance of the evidence is sufficient, *Ball v. McCormack*, 172-677; *Simmons v. Davenport*, 140-407; *State v. Gould*, 90-658—need not take down the evidence himself, but may have it done, *Buckner v. R. R.*, 164-201. If defendant wants any special portion of evidence recapitulated he must request it in apt time: *State v. Ussery*, 118-1177. Where counsel and judge disagree as to the testimony the judge may submit his notes to the jury and tell them they are to say what the testimony is and they could refresh their memories by his notes: *State v. Keath*, 83-626; *Glover v. Flowers*, 101-134; *Spence v. Baxter*, 95-170. The judge should charge “if the jury believe from the evidence” or “find from the evidence,” and not “if the jury believe the evidence”: *Holt v. Wellons*, 163-124; *State v. Starnes*, 151-724; *State v. R. R.*, 149-508; *Sossamon v. Cruse*, 133-470; *Merrill v. Dudley*, 139-57; *State v. Barrett*, 123-753; *State v. Green*, 134-658; *State v. Horton*, 100-443—may recapitulate fairly the contentions of counsel as to the bearing of the evidence upon the issues, *Clark v. R. R.*, 109-430—may state the contention of both sides with respect to the evidence, *State v. Little*, 174-800; *McLaurin v. Williams*, 175-291; *Walker v. Walker*, 151-164.

The judge may instruct jury, where no conflict of evidence, that if they believe the witnesses they should find accordingly: *McQuay v. R. R.*, 109-585; *State v. Dixon*, 104-704; *Nelson v. Ins. Co.*, 120-302; *State v. Neal*, 120-613; *State v. Journigan*, 120-568; *State v. Woolard*, 119-779; *Love v. Gregg*, 117-467; *Harmon v. Hunt*, 116-678; *Purifoy v. R. R.*, 108-100; *State v. McLain*, 104-894; *Chemical Co. v. Johnson*, 101-223; *State v. Jones*, 98-651; *State v. Crane*, 95-619; *Hannon v. Grizzard*, 89-115; *State v. Burke*, 82-551; *Gaither v. Ferebee*, 60-303; *Sneed v. Creath*, 8-309—may charge that there is no evidence to support contention of defendant, when such is the case, *State v. Allen*, 48-257; *State v. Sows*, 61-151—should, where there is no evidence which in any aspect will warrant the jury in drawing an inference or conclusion as to an issue, so state to the jury, *Harper v. Anderson*, 130-538; *Royster v. Stallings*, 124-55; *State v. Byrd*, 121-684; *Barber v. Roseboro*, 97-192; *Willis v. Branch*, 94-142; *State v. McKinsey*, 80-458; *Witkowsky v. Wasson*, 71-451; *State v. Dunlop*, 65-288; *State v. Allen*, 48-257; *Wells v. Clements*, 48-168; *Reed v. Shenck*, 13-415—may charge that if they believe the evidence of defendant he is guilty, *State v. Riley*, 113-648; *State v. Woolard*, 119-779—while he may tell the jury there is no evidence of a certain fact, he cannot tell them to disregard what the attorney says in argument on the evidence, *State v. Lee*, 166-250—nor may he tell the jury there is no evidence as to a particular fact in conflict with the party's contention as to the effect of the evidence, *Royal v. Dodd*, 177-206.

The judge may say to the jury that the testimony of a man of good character is entitled to more weight than that of a man who has proven a bad character: *State v. Gay*, 94-814—should charge as to interest party entitled to, *Brem v. Covington*, 104-589; *Jolly v. Bryan*, 86-458; *Barlow v. Norfleet*, 72-535—may, when he hands the written charge to the jury, at their request send written memoranda of certain dates necessary for them to have to arrive at conclusions, *State v. Cagle*, 114-835—can state that evidence of defendant, if believed, should be given same weight as any other witness, *State v. Gilmer*, 97-429—must, if requested in apt time, caution jury as to the credibility of suspicious testimony of accomplices, near relatives, etc., *Bonner v. Hodges*, 111-66; *Berry v. Hall*, 105-164; *Ferrall v. Broadway*, 95-551; *State v. Nash*, 30-35—must, in a criminal action, give such instructions as will enable jury to understand nature of the crime and properly determine each material fact upon which may depend the guilt or innocence of accused, *State v. Godwin*, 145-461; *State v. Fulford*, 124-801; *State v. Kale*, 124-818—may recall jury for further instructions, *Lafoon v. Shearin*, 95-391; *Scott v. Green*, 89-278—may recapitulate confessions illegally obtained in order to caution jury not to consider them, *State v. Gregory*, 50-315—may state to jury that there is no contradiction between witnesses, if so, *State v. Horan*, 61-571—can say that evidence as

to guilt of white man need not be any stronger than to convict a negro, *State v. Norwood*, 74-247—not error to tell the jury to try white and black alike, *McLaurin v. Williams*, 175-291—may lay down any proposition that is universally admitted, *State v. Gay*, 94-814—may comment upon deportment of witness, when, *State v. Nat*, 51-114—may tell jury it is their province to judge of the credibility of a witness, *State v. Spencer*, 64-316—may tell jury they are not concluded by the testimony of an expert, one having testified, *State v. Owen*, 72-605—may inform the jury of the punishment prescribed if prisoner found guilty, *State v. Garner*, 129-536—should not charge that “if the jury believe a certain state of facts the plaintiff is not entitled to recover,” *Farrell v. R. R.*, 102-390—should not charge on matters not pertinent to the issues, *Gaines v. McAllister*, 122-340—must not say which of two conflicting statements of witness is correct, *Ward v. Mfg. Co.*, 123-248—must not tell jury to “adopt most plausible theory” in a criminal case, *State v. Dewey*, 139-556—must not say that evidence of character is of little weight when facts are positively sworn to, *State v. Lipsey*, 14-485—must not state a hypothesis in a criminal action without evidence to support it, *State v. Lizemore*, 52-206—must not, in his charge on homicide, make a hypothesis omitting the leading fact which goes to acquit the accused, *State v. Floyd*, 51-392—must not charge jury to take the testimony of a certain witness as true, *State v. Parker*, 66-624—must not charge that swearing falsely on trial is an additional evidence of guilt, *State v. Byers*, 80-426—must not charge that where one juror doubts guilt of prisoner other jurors should yield to him, *State v. Bowman*, 80-432—must not instruct that defendant be convicted of murder in first degree when no evidence introduced for him, *State v. Gadbury*, 117-811—must not charge that there is a presumption that men testify truly and not falsely, *State v. Jones*, 77-520. The judge cannot comment upon the fact that a party failed to call a certain witness: *Bank v. McArthur*, 168-48.

The judge may instruct the jury to consider the interest of the witnesses in determining the weight of their testimony: *State v. Burton*, 172-939; *Ferebee v. R. R.*, 167-290; *State v. Fogleman*, 164-458; *In re Smith's Will*, 163-464; *Herndon v. R. R.*, 162-317; *State v. Dixon*, 149-460—that they may consider the fact that the state failed to introduce a witness shown to have knowledge of the facts, *State v. Harris*, 166-243—that they may believe a witness of bad character and disbelieve one of good character as it may satisfy them, *State v. Little*, 174-800—that the admission of a party, fully established, is strong evidence, *Hubbard v. Goodwin*, 175-174. The fact that a witness makes contradictory statements does not justify withdrawing his testimony from the jury: *Christman v. Hilliard*, 167-4; *Bank v. Brockett*, 174-41. It is error to charge that character may be considered in determining whether a party is guilty of fraud: *Lumber Co. v. Atkinson*, 162-298. Should instruct the jury not to consider the fact that the defendant did not introduce his wife as a witness: *State v. Cox*, 150-846. May instruct jury not to be controlled by the opinion of witnesses, but to use their common knowledge in the light of experience: *Hamilton v. R. R.*, 150-193. Charge as to weight to be given to positive and negative evidence: *Rosser v. Bynum*, 168-340. That plaintiff is entitled to recover full amount of damages: *Jones v. R. R.*, 176-260. Charge as to dying declarations: *State v. Kennedy*, 169-326. Error to admit irrelevant evidence to prejudice the jury: *Shepherd v. Lumber Co.*, 166-130.

An erroneous charge as to the burden of proof is not neutralized by another instruction stating the rule correctly: *Lea v. Utilities Co.*, 176-511; *s. c.*, 175-461. Plea of payment, burden upon defendant: *Swan v. Carawan*, 168-472. Burden of proof as to execution of a deed duly registered: *Belk v. Belk*, 175-69; as to self-defense in killing an animal: *Scott v. Cates*, 175-336. Charge as to recent possession of stolen goods: *State v. Harrington*, 176-716; *State v. Ford*, 175-797; *State v. Anderson*, 162-571; *State v. Neville*, 157-591. Charge as to degree of proof in circumstantial evidence: *State v. Trull*, 169-363. In indictment for running train on Sunday: *State v. R. R.*, 149-470. Clear, strong and convincing proof required to convert absolute deed into a mortgage: *Ray v. Patterson*, 170-226; to establish parol trust: *Boone v. Lee*, 175-383; *Johnson v. Johnson*, 172-530; *Grimes v. Andrews*, 170-515; *Lamb v. Perry*, 169-436; *Glenn v. Glenn*, 169-729. Preponderance of evidence required to set aside deed for fraud: *Poe v. Smith*, 172-67; in an action for land: *Land Co. v. Floyd*, 171-543; in an action for damages for burning barn: *Champion v. Daniel*, 170-331; in divorce cases, *Ellett v. Ellett*, 157-161.

Charging quantum of proof in actions which were formerly suits in equity: *Perry v. Ins. Co.*, 137-402; *Lehew v. Hewett*, 138-6; 130-22; *Gaskins v. Allen*, 137-426; *Earnhart v. Clement*, 137-91; *Chaffin v. Mfg. Co.*, 135-95; *Jones v. Warren*, 134-390; *Wilson v. Brown*, 134-400;

Warehouse Co. v. Ozment, 132-839; Ray v. Long, 132-891; Sallenger v. Perry, 130-134; Porter v. White, 128-45; Watkins v. Williams, 123-174; Benedict v. Jones, 129-470; Hemmings v. Doss, 125-400; Nimocks v. McIntyre, 120-325; Kelly v. McNeill, 118-354; Cobb v. Edwards, 117-244; Summers v. Moore, 113-394; Faison v. Hardy, 114-58; McMillan v. Baxley, 112-578; Hamilton v. Buchanan, 112-463; Haynes v. Rogers, 111-228; Bergeron v. Ins. Co., 111-45; Bonner v. Hodges, 111-66; Cornelius v. Brawley, 109-542; Berry v. Hall, 105-154; Harding v. Long, 103-1; Brown v. Mitchell, 102-347; Kornegay v. Everett, 99-30; Loftin v. Loftin, 96-94; Ely v. Early, 94-1—in other actions, Hodges v. R. R., 122-992; Blackburn v. Ins. Co., 116-821; Bergeron v. Ins. Co., 111-45; Perry v. Ins. Co., 137-402; State v. Jaynes, 78-504; State v. Carson, 115-743; State v. Starnes, 94-973; State v. Gee, 92-756; State v. Josey, 64-56. **Charging as to "reasonable doubt" in criminal actions:** State v. Whitson, 111-695; State v. Brabham, 108-793; State v. Debnam, 98-712; State v. Matthews, 66-106; State v. Sears, 61-146; State v. Parker, 61-473; State v. Fulkerson, 61-233; State v. Oscar, 52-305; State v. Hodge, 61-231; State v. Frank, 50-384; State v. Johnson, 48-266; State v. Cochran, 13-63; State v. Charles, 161-287.

Whether there is evidence is for the court, but it is for the jury to determine the weight of it when there is any: State v. Powell, 94-965; State v. Simmons, 143-618; Benton v. Toler, 109-238; State v. Goings, 101-706; State v. McBryde, 97-393; Wittkowsky v. Wasson, 71-451; State v. Moses, 13-452. **Where there is any evidence to support a contention it should be submitted to the jury:** Cross v. R. R., 172-119; Machine Co. v. Bullock, 161-1; s. e., 163-547; Brown v. Power Co., 140-333; Dorsett v. Mfg. Co., 131-254; Bolden v. R. R., 123-614; Wood v. Bartholomew, 122-177; Powell v. R. R., 125-370; Cowles v. McNeill, 125-385; Gates v. Max, 125-139; Cox v. R. R., 123-604; State v. Kiger, 115-746; Haynes v. Rogers, 111-228; Machine Co. v. Lumber Co., 109-576. **But very slight evidence, a mere scintilla, should not go to the jury:** Cabe v. R. R., 155-402; State v. Hawkins, 155-466; State v. Walker, 149-530; Lewis v. Steamship Co., 132-904; Liquor Co. v. Johnson, 161-74; Rice v. R. R., 174-268; Cable v. R. R., 122-892; Spruill v. Ins. Co., 120-141, and cases therein cited; Royster v. Stallings, 124-55; Oakley v. Tate, 118-361; State v. Green, 117-695; Covington v. Newberger, 99-523, and cases therein cited; Smith v. McGregor, 96-101; State v. Powell, 94-965.

The judge cannot direct a verdict in favor of one who has the burden of proof: Britt v. R. R., 148-37; House v. R. R., 131-103; Boutten v. R. R., 128-337; Mfg. Co. v. R. R., 128-280; Crews v. Cantwell, 125-516; Gates v. Max, 125-143; Cox v. R. R., 123-604; Collins v. Swanson, 121-67; Eller v. Church, 121-269; Bank v. School Com., 121-107; White v. R. R., 121-484; **but may direct a finding against such party:** Everett v. Williams, 152-117. **When the facts are admitted or established and only one inference may be drawn, the judge may direct a finding:** Barfield v. Hill, 163-262. **May not direct a verdict when the evidence is conflicting:** In re Will of Margaret Deyton, 177-494; Phillips v. Giles, 175-409; Forsyth v. Oil Co., 167-179; Brown v. R. R., 161-573; Westfeldt v. Adams, 159-409; Snowden v. Bell, 159-497; Davidson v. R. R., 156-578; Davis v. Traction Co., 141-134; Corporation Com. v. R. R., 137-1; Gordon v. R. R., 132-565; House v. R. R., 131-103; Harper v. Anderson, 130-533; Parks v. R. R., 124-136; Rickert v. R. R., 123-255; Thompson v. Winston, 118-662; Burrus v. Ins. Co., 121-62; Everett v. Receivers, 121-519; Hardison v. R. R., 120-492; Harris v. Carrington, 115-187; Curtis v. Lumber Co., 113-417; Haynes v. Rogers, 111-228; Asbury v. Fair, 111-251; Buffkin v. Eason, 110-264; Farthing v. Dark, 109-291; Machine Co. v. Lumber Co., 109-576; State v. Weathers, 98-685; Long v. Hall, 97-286; Laffoon v. Shearin, 95-391; Morgan v. Lewis, 95-296; State v. Rollins, 113-723; Weisenfield v. McLean, 96-248; State v. Rogers, 93-523; Brazil v. R. R., 93-313; see, also, Harris v. Murphy, 119-34—**should not direct a verdict at all in criminal cases, even though evidence not conflicting,** State v. Godwin, 145-461, and cases cited; State v. Hill, 141-769; State v. Riley, 113-648; State v. Winchester, 113-641; **but see** State v. Dixon, 104-704; State v. Boyd, 175-791—**must not state a fact as to which the evidence is conflicting,** Davis v. Summerfield, 133-325; Fleming v. R. R., 115-676; Emery v. R. R., 102-209; Bumgardner v. R. R., 132-438—**should not direct a verdict, after plaintiff rests, and refuse to allow defendant to introduce competent evidence,** Porter v. White, 127-73.

The judge should not give inconsistent and conflicting instructions: Vanderbilt v. Chapman, 175-11; Champion v. Daniel, 170-331; Grocery Co. v. Taylor, 162-307; Hoaglin v. Telegraph Co., 161-390; Patterson v. Nichols, 157-406; McWhirter v. McWhirter, 155-145; Mott v. Tel. Co., 142-532; Pegram v. R. R., 139-303; Drum v. Miller, 135-218; Edwards v. R. R., 132-101; State v. Clark, 134-712; Edwards v. R. R., 129-78; Bragaw v. Supreme Lodge, 124-154;

Wright v. R. R., 123-282; Tillett v. R. R., 115-662; Alexander v. Gibbon, 118-796—**must not simply call attention to the issues without further instruction**, Phifer v. Alexander, 97-335—**must not give to the jury an abstract proposition of law without any evidence to support it**, Williams v. Harris, 137-460; Leach v. Linde, 108-547—**must not charge on a selected fact, but charge the law on the whole case**, Dobson v. Wisenhunt, 101-645; Michael v. Foil, 100-178—**must not omit essential ingredient in undertaking to state the law applicable to a material fact**, Rumbough v. Sackett, 141-495; Pierce v. Alspaugh, 83-258; State v. Austin, 79-624; Bynum v. Bynum, 33-632; State v. O'Neal, 29-251; State v. Johnson, 23-354—**need not repeat instructions already given, even when specially asked to do so by prayer**, Sprinkle v. Wellborn, 140-163—**must not single out issues and charge specially as to them and give only general instructions as to others**, Knight v. R. R., 110-58; State v. Ellick, 60-450—**should not merely deal in generalities, such as reading headnotes of cases, without making any application of them to the facts**, State v. Groves, 121-563; State v. Jones, 87-547—**must not use broad statement calculated to mislead**, Fleming v. R. R., 131-476—**need not charge on a particular point when no special instructions asked**: Patterson v. Mills, 121-259, and cases therein cited; also see section 565; Gay v. Mitchell, 146-509; Willis v. Tel. Co., 150-318.

The charge should be considered as a whole: State v. Orr, 175-773; Leggett v. R. R., 173-698; State v. Killian, 173-792; Deligny v. Furniture Co., 170-189; McNeill v. R. R., 167-390; In re Drainage District, 162-127; State v. Vann, 162-534; Speight v. R. R., 161-80; Aman v. Lumber Co., 160-370; Kornegay v. R. R., 154-389; State v. Lilliston, 141-857; Liles v. Lumber Co., 142-39; Gilliland v. Bd. of Education, 141-482; State v. Tilley, 25-424; State v. Boon, 82-637; State v. Holman, 104-867. **It not appearing affirmatively that there was error in the judge's charge, it is assumed to be correct**: State v. Brabham, 108-793; State v. Dickerson, 98-708; Southerland v. R. R., 106-100; State v. Powell, 106-635; Paper Co. v. Chronicle, 115-147; Upchurch v. Robertson, 127-127; Tise v. Thomasville, 151-281; Haines v. Smith, 149-279. **Where a charge covers the entire case and submits it fairly and correctly to the jury under all circumstances, parties have no just ground of complaint**: Marable v. R. R., 142-557; Gilliland v. Bd. of Ed., 141-482; State v. Parker, 61-473; State v. Shaw, 49-440; State v. Exum, 138-599. **Although the trial judge lays down the law correctly, unless it is applicable to the facts of the case and warranted by the evidence, a new trial will be granted**: King v. Wells, 94-344.

An erroneous instruction may be corrected: Buggy Co. v. Dukes, 140-393; Trust Co. v. Forbes, 120-355; Wilson v. Mfg. Co., 120-94; Toole v. Toole, 112-152; State v. Keen, 95-646; Lewis v. R. R., 95-179; State v. McNair, 93-628; Gilbert v. James, 86-244; State v. Robbins, 48-250; State v. May, 15-328; but in some cases a correction will not remove the error: State v. Morgan, 136-628; Bragaw v. Supreme Lodge, 124-154; Williams v. Haid, 118-481; Alexander v. Gibbon, 118-796; Tillett v. R. R., 115-662; State v. Fuller, 114-885; Taylor v. Taylor, 112-27; Wilson v. R. R., 142-333; see, also, State v. Sanders, 84-728. **An omission to state the evidence or to charge in a particular way should be called to the attention of the court before verdict**: Davis v. Keen, 142-496; Muse v. Motor Co., 175-466.

Charge as to measure of damages for personal injury: Watson v. R. R., 133-189; Johnson v. R. R., 163-431. **Charge as to punitive damages**: Hodges v. Hall, 172-29; **proper charge in issue devisavit vel non**: In re Thorp, 150-487; **charge as to probable cause in malicious prosecution**: Wilkinson v. Wilkinson, 159-265; **charge as to self-defense in homicide**: State v. Crisp, 170-785; State v. Kennedy, 169-326; State v. Pollard, 168-116; State v. Gaddy, 166-341; State v. Robertson, 166-356; State v. Johnson, 166-392; State v. Ray, 166-420; State v. Lucas, 164-471; State v. Greer, 162-640; State v. Blackwell, 162-672; State v. Fowler, 151-731; **as to insanity in homicide**: State v. Terry, 173-761; State v. English, 164-498; State v. Shelton, 164-513.

Relative rights and powers of court and jury in actions involving questions of negligence and contributory negligence: Russell v. R. R., 118-1098; Parks v. R. R., 124-136; White v. R. R., 121-484; McCracken v. Smathers, 119-617; Chesson v. Lumber Co., 118-59; Knight v. R. R., 110-58; Bolden v. R. R., 123-614; Ellerbe v. R. R., 118-1024; Thompson v. Winston, 118-662; McQuay v. R. R., 109-585; Wright v. R. R., 127-225; Grant v. Bottling Works, 176-256; Hargis v. Power Co., 175-31; Cohoon v. Davis, 175-145; Lea v. Utilities Co., 175-459; Davis v. R. R., 175-648; Ware v. R. R., 175-501; Dunn v. Lumber Co., 172-129; Lassiter v. R. R., 171-283; Buchanan v. Lumber Co., 168-40; Bagwell v. R. R., 167-611; Clark v. Wright, 167-646; Carter v. R. R., 165-244.

ERROR IN CHARGE HARMLESS OR CURED. Instances of harmless error in making charge: *Dills v. Hampton*, 92-565; *Jones v. Call*, 93-170; *Barbee v. Scoggins*, 121-125; *Mitchell v. Hoggard*, 108-353; *Kiser v. Combs*, 114-640; *State v. Parker*, 106-711; *State v. Gardner*, 94-953. Where judge charges incorrectly on issue of law, but jury finds it properly, the error is cured: *State v. Grady*, 83-643; *Hinshaw v. R. R.*, 118-1047; *Moore v. Parker*, 91-275; *Terry v. R. R.*, 91-236; *Jones v. Bunker*, 83-324; *Glenn v. R. R.*, 63-510; *Johnson v. Ray*, 72-273; *Carter v. R. R.*, 165-244. In admitting incompetent evidence which is not prejudicial: *State v. Bradley*, 161-290. Use of the word "plaintiff" for "defendant" when not prejudicial: *Pittman v. Weeks*, 132-81. When the jury finds in favor of the party objecting: *Smith v. Alphin*, 150-425.

JUDGE ADMONISHING JURY TO AGREE. The following cases are instances of the judge's admonishing the jury as to their duty to agree: *Bank v. Gilmer*, 116-684; *Osborne v. Wilkes*, 108-651; *Warlick v. Plonk*, 103-81; *Hannon v. Grizzard*, 89-115; *Nash v. Morton*, 48-3; *Nixon v. Oil Mill*, 174-730. Judge going to jury room and asking if they can agree: *Willeford v. Bailey*, 132-402. Suggesting to the jury to postpone consideration of verdict until morning: *State v. Houston*, 155-432.

Section merely referred to: *Duckworth v. Orr*, 126-674; *State v. Johnston*, 119-898; *McMillan v. Baxley*, 112-587; *Dupree v. Ins. Co.*, 92-433. Charging as to confession of prisoner: *State v. Patrick*, 48-443; *State v. Davis*, 63-578.

565. Requests for instructions. Counsel praying of the judge instructions to the jury, must put their requests in writing entitled of the cause, and sign them; otherwise the judge may disregard them. They must be filed with the clerk as a part of the record.

Rev., s. 538; Code, s. 415; C. C. P., s. 239.

NECESSITY FOR INSTRUCTIONS. If more specific instructions are desired, they should be asked for specially: *Alexander v. Cedar Works*, 177-137; *Webb v. Rosemond*, 172-848; *Pate v. Bank*, 162-508; *Trollinger v. Fleer*, 157-81; *Ives v. R. R.*, 142-131; *Simmons v. Davenport*, 140-407; *Turrentine v. Wellington*, 136-313; *State v. Kinsauls*, 126-1097; *Patterson v. Mills*, 121-258; *Nelson v. Ins. Co.*, 120-306; *Boon v. Murphy*, 108-187; *Willey v. R. R.*, 96-408; *Morgan v. Lewis*, 95-296; *Morgan v. Smith*, 77-37; *Isley v. Bridge Co.*, 141-220.

Where no instructions prayed for in writing it is not error to fail to charge on a certain aspect of a case: *Nelson v. Tob. Co.*, 144-418; *Jarrett v. Trunk Co.*, 144-299; *Gaither v. Carpenter*, 143-240; *State v. Worley*, 141-764; *Yow v. Hamilton*, 136-357; *Justice v. Gallert*, 131-393; *Russell v. R. R.*, 118-1098; *State v. Ridge*, 125-655; *Howard v. Turner*, 125-107; *State v. Groves*, 119-822; *State v. Ussery*, 118-1177; *Boon v. Murphy*, 108-187; *Nelson v. Ins. Co.*, 120-302; *Kendrick v. Dellinger*, 117-491; *State v. Varner*, 115-744; *Hooks v. Houston*, 109-623; *State v. Fleming*, 107-909; *Bethea v. R. R.*, 106-279; *McFarland v. Southern Imp. Co.*, 107-368; *State v. Pritchett*, 106-667; *Thompson v. Tel. Co.*, 107-449; *Taylor v. Plummer*, 105-56; *State v. Bailey*, 100-528; *State v. Debnam*, 98-712; *King v. Blackwell*, 96-322; *Branton v. O'Briant*, 93-99; *Davis v. Council*, 92-725; *Fry v. Currie*, 91-436; *State v. Nicholson*, 85-548; *Terry v. R. R.*, 91-236; *State v. Hardee*, 83-619; *State v. Caviness*, 78-484.

FORM OF REQUEST. Special instructions must be asked for in writing: *State v. Wilkes*, 170-735; *Saunders v. Gilbert*, 156-463; *Craddock v. Barnes*, 142-89; *Merrell v. Whitmire*, 110-367; *Lowe v. Elliott*, 107-720; *Pleasants v. R. R.*, 95-198; and oral prayers may be disregarded: *State v. Horton*, 100-443; *Justice v. Gallert*, 131-393. Prayer should be addressed to the issue so as to avoid confusion: *Lynch v. Veneer Co.*, 169-169; *Overcash v. Electric Co.*, 144-572. It should not present a simple abstraction without material facts and conclusions therefrom: *Edwards v. Tel. Co.*, 147-126. It should be supported by the evidence: *Lumber Co. v. R. R.*, 152-70. Should not request that the issues be answered in a certain way when the evidence is conflicting: *Savings Bank v. Chase*, 151-108. If the request is correct only in part, it is not the duty of the judge to dissect it: *State v. Greer*, 162-640; *Harris v. R. R.*, 132-160; *Vanderbilt v. Brown*, 128-498; *State v. Neal*, 120-613. The request must be signed: *Pritchett v. R. R.*, 157-88.

TIME OF REQUEST. Prayers should be presented before argument, but not necessarily at or before the close of the evidence; it is within the sound discretion of the judge, allowing

a reasonable time to prepare and consider them: *State v. Claudius*, 164-521; *Barringer v. Deal*, 164-246; *Holder v. Lumber Co.*, 161-177; *Pritchett v. R. R.*, 157-88; *Biggs v. Gurganus*, 152-173; *Universal Metal Co. v. Durham Ry.*, 145-293; *Craddock v. Barnes*, 142-89; *Shober v. Wheeler*, 113-370; apparently overruling the following: *State v. Hairston*, 121-579; *State v. Ussery*, 118-1177; *Luttrell v. Martin*, 112-593; *Ward v. R. R.*, 112-168; *Merrell v. Whitmire*, 110-367; *Blackburn v. Fair*, 109-465; *Posey v. Patton*, 109-455; *Grubbs v. Ins. Co.*, 108-472; *Marsh v. Richardson*, 106-539; *Taylor v. Plummer*, 105-56; *State v. Rowe*, 98-629; *Owens v. Phelps*, 95-286; *Davis v. Council*, 92-725; *State v. Barbee*, 92-820; *Powell v. R. R.*, 68-395.

INSTRUCTIONS SUBSTANTIALLY GIVEN. Instructions need not be in the very words asked, if the charge substantially covers the same ground, giving the same application of the law to the evidence: *Carter v. R. R.*, 165-244; *Daniel v. Dixon*, 161-377; *State v. Tate*, 161-280; *State v. Price*, 158-641; *Hooker v. R. R.*, 156-155; *Lumber Co. v. R. R.*, 152-70; *State v. Bowman*, 152-817; *State v. Spivey*, 151-676; *Graves v. Jackson*, 150-383; *State v. Dobbins*, 149-465; *Horton v. R. R.*, 145-132; *Moseley v. Johnson*, 144-257; *State v. Burnett*, 142-577; *Horne v. Power Co.*, 141-50; *Brown v. Power Co.*, 140-333; *Yarborough v. Hughes*, 139-199; *Griffin v. R. R.*, 138-55; *State v. Davis*, 134-633; *Harris v. R. R.*, 132-160; *State v. Wilcox*, 132-1120; *Wilkie v. R. R.*, 127-203; *Norton v. R. R.*, 122-911; *Cox v. R. R.*, 126-103; *State v. Booker*, 123-713; *Edwards v. Phifer*, 121-388; *Mitchell v. Corpening*, 124-472; *State v. Mills*, 116-992; *Downs v. High Point*, 115-182; *Alexander v. R. R.*, 112-720; *Leaving v. Smith*, 115-385; *Cornelius v. Brawley*, 109-542; *Whitford v. Newbern*, 111-272; *McMillan v. Baxley*, 112-578; *Black v. Black*, 110-398; *State v. Brabham*, 108-793; *Thompson v. Tel. Co.*, 107-449; *Everett v. Williamson*, 107-204; *Bethea v. R. R.*, 106-279; *Carlton v. R. R.*, 104-365; *Michael v. Foil*, 100-178; *Conwell v. Mann*, 100-234; *Newby v. Harrell*, 99-149; *State v. Brewer*, 98-607; *State v. Jones*, 97-469; *Clements v. Rogers*, 95-248; *McDonald v. Carson*, 94-497; *State v. Anderson*, 92-732; *State v. McNeill*, 92-812; *Patterson v. McIver*, 90-493; *Overcash v. Kitchie*, 89-384; *Rencher v. Wynne*, 86-269; *State v. Hinson*, 83-640; *State v. Boon*, 82-637; *Brink v. Black*, 77-59; *State v. Scott*, 64-586.

REFUSAL OF PROPER INSTRUCTIONS. Refusal to give proper instructions duly requested is error: *Marcom v. R. R.*, 165-259; *Lanning v. Telegraph Co.*, 155-344; *Bryan v. Lumber Co.*, 154-485; s. c., 161-455; *Moseley v. Johnson*, 144-257; *Baker v. R. R.*, 144-36; *Davis v. Evans*, 139-440; *Thompson v. Tel. Co.*, 106-549; *State v. Gaskins*, 93-547; *Brink v. Black*, 77-59. An improper modification is a refusal: *Flanner v. Cotton Mills*, 154-394. Refusal deemed excepted to, though exception is waived unless set out in case on appeal: *State v. Blankenship*, 117-808; *Davis v. Duval*, 112-833; *Marshall v. Stine*, 112-697; *Taylor v. Plummer*, 105-56; *McKinnon v. Morrison*, 104-354; *Wilson v. Fisher*, 148-535. A general and abstract charge of the law applicable to the case is not sufficient. The error is not cured by giving such requested charge upon an unanswered issue concerning which the instruction was not asked: *Baker v. R. R.*, 144-36; *Irvin v. R. R.*, 164-6. Verdict may sometimes cure error in not giving instructions asked: *Andrews v. Tel. Co.*, 119-403. Where erroneous instruction excepted to, party excepting may avail himself of the error, though he asked no special instruction: *Chaffin v. Mfg. Co.*, 135-95.

566. **Instructions in writing; when to be taken to jury room.** The judge, at the request of any party to an action on trial, made at or before the close of the evidence, before instructing the jury on the law, must put his instructions in writing, and read them to the jury. He shall then sign and file them with the clerk as a part of the record of the action.

When a judge puts his instructions in writing either of his own will or at the request of a party to the action, he must, at the request of either party to the action, allow the jury to take his instructions with them on their retirement, and the jury must return the instructions with their verdict to the court.

Rev., ss. 536, 537; Code, s. 414; C. C. P., s. 238; 1885, c. 137.

WRITTEN INSTRUCTIONS. The word "instructions" construed with reference to this section: *State v. Dewey*, 139-556. The judge must put the charge as to the law in writing, if either party requests it in apt time: *State v. Black*, 162-637; *Sawyer v. Lumber Co.*, 142-162;

State v. Crowell, 116-1052; State v. Adams, 115-783; Ward v. R. R., 112-168; State v. Young, 111-715; Jenkins v. R. R., 110-438; Drake v. Connelly, 107-463; Lowe v. Elliott, 107-718; Dupree v. Ins. Co., 92-417; Phillips v. R. R., 130-582; Currie v. Clark, 90-355—but he cannot be forced to put the recapitulation of evidence in writing: Sawyer v. Lumber Co., 142-162; Jenkins v. R. R., 110-442; Dupree v. Ins. Co., 92-417. The judge may state orally the contentions of the parties or supplement slight omissions: State v. Khoury, 149-454. He may read notes of evidence to the jury: State v. Dixon, 149-460. An exception to judge's failure to put charge in writing is taken in time if set out in case on appeal: Sawyer v. Lumber Co., 142-162, and cases cited; but see Phillips v. R. R., 130-582. Requests that charge be put in writing awkwardly made and not considered a proper request: Phillips v. R. R., 130-582. He must read the charge to the jury, when requested to be put in writing, as written, and sign and file same as a part of the record: State v. Dewey, 139-564; Justice v. Gallert, 131-394; see, also, Cressler v. Asheville, 138-485. Section merely referred to: Cameron v. Power Co., 137-101; Justice v. Gallert, 131-393.

USED BY JURY. At request of either party judge may permit the jury to take instructions to jury room: Little v. R. R., 119-771; State v. Cagle, 114-835—also at the request of a juror: Gaither v. Carpenter, 143-240—and it is not error, after they have retired, to send, upon their request, a written memorandum of certain dates necessary to be remembered in reaching a proper conclusion: State v. Cagle, 114-835—or to send deposition read on trial, where all request it: Lafoon v. Shearin, 95-391—but judge cannot send papers read in evidence to the jury when objection made: Nicholson v. Lumber Co., 156-59; Williamson v. Thomas, 78-47; Burton v. Wilkes, 66-604; Watson v. Davis, 52-178. Where charge taken to jury room, but instructions prayed for and given were not taken, not error where counsel present and no objection raised before verdict: Gaither v. Carpenter, 143-240. Reason for the law compelling judge to put charge in writing, to provide for jurors taking it with them: State v. Dewey, 139-561; Jenkins v. R. R., 110-442; State v. Crowell, 116-1058.

567. Demurrer to evidence. When on trial of an issue of fact in a civil action or special proceeding, the plaintiff has introduced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. If the motion is allowed the plaintiff may except and appeal to the supreme court. If the motion is refused the defendant may except, and if the defendant introduces no evidence the jury shall pass upon the issues in the action, and the defendant has the benefit of his exception on appeal to the supreme court. After the motion is refused he may waive his exception and introduce his evidence just as if he had not made the motion, and he may again move to dismiss after all the evidence on both sides is in. If the motion is then refused, upon consideration of all the evidence, he may except, and after the jury has rendered its verdict, he has the benefit of the latter exception on appeal to the supreme court.

Rev., s. 539; 1897, c. 109; 1899, c. 131; 1901, c. 594.

CHANGE OF PRACTICE. This section changes the practice in demurrer to the evidence: Riley v. Stone, 169-421; Prevatt v. Harrelson, 132-252; Means v. R. R., 126-424. Under the act of 1897, prior to act of 1899: Parlier v. R. R., 129-262; Purnell v. R. R., 122-832; Worth v. Ferguson, 122-381; Wood v. Bartholomew, 122-177. It does not apply to a defense, Lester v. Harward, 173-83; but may apply to a counterclaim, Tarault v. Seip, 158-363. Held not to apply to criminal action, State v. Hagan, 131-803; but may now under section 4643.

TIME OF MAKING MOTION. It must be made first at the close of plaintiff's evidence, and before defendant introduces any evidence: Smith v. Pritchard, 173-720; McKellar v. McKay, 156-283; Boddie v. Bond, 154-359. It is not allowed after verdict, Vaughan v. Davenport, 159-369; nor after verdict set aside, Riley v. Stone, 169-421; nor after judgment by default and inquiry, Mason v. Stephens, 168-370.

If the first motion is overruled, the defendant may except and go to the jury; or except, introduce evidence and renew motion after all the evidence: Parlier v. R. R., 129-262; Means v. R. R., 126-424; Worth v. Ferguson, 122-381; Miller v. R. R., 128-26; Riley v. Stone, 169-

421. **Exception is waived if motion is not renewed:** Rackley v. Roberts, 147-201; Bordeaux v. R. R., 150-528; Earnhardt v. Clement, 137-91; Blalock v. Clark, 137-140; Fritz v. R. R., 130-279; McCall v. R. R., 129-298.

EFFECT OF MOTION. The motion admits the truth of plaintiff's evidence in light most favorable for him: Rush v. McPherson, 176-562; Wood v. Public-Serv. Corp., 174-697; Johnson v. R. R., 163-431; Madry v. Moore, 161-295; Poe v. Tel. Co., 160-315; Bell v. Power Co., 156-316; Mullinax v. R. R., 156-541; West v. Tanning Co., 154-44; Mercer v. R. R., 154-399; Horne v. R. R., 153-239; Deppe v. R. R., 152-79; Morton v. Lumber Co., 152-54; Settle v. R. R., 150-643; Cotton v. R. R., 149-227; Biles v. R. R., 143-78, 139-528; Gerock v. Tel. Co., 142-22; Bd. of Education v. Makely, 139-31; Craft v. R. R., 136-49; Hancock v. Comrs., 132-213; Snider v. Newell, 132-614; House v. R. R., 131-103; Hopkins v. R. R., 131-463; Coley v. R. R., 129-413, and cases cited; Moore v. R. R., 128-455; Brinkley v. R. R., 126-88; Cowles v. McNeill, 125-385; Printing Co. v. Raleigh, 126-516; McMillan v. R. R., 126-725; Gates v. Max, 125-139; Cox v. R. R., 123-604; Cable v. R. R., 122-892; Johnson v. R. R., 122-955; Purnell v. R. R., 122-832; Spruill v. Ins. Co., 120-141; Collins v. Swanson, 121-67; Howell v. R. R., 124-24; Roscoe v. Lumber Co., 124-42; Dunn v. R. R., 124-252; Whitley v. R. R., 122-987; Bazemore v. Mountain, 121-59; Everett v. Receivers, 121-519; **but not the evidence of defendant against the plaintiff:** Lamb v. Perry, 169-436; Brewer v. Wynne, 163-319; Smith v. Agricultural Society, 163-346.

The motion should not be allowed when there is any evidence, more than a scintilla, upon which to base a verdict: Rogerson v. Hontz, 174-27; King v. R. R., 174-39; Moore v. R. R., 173-311; Lindsey v. R. R., 173-390; Meares v. Lumber Co., 172-289; Collins v. Casualty Co., 172-543; Barnes v. R. R., 168-512; McRainey v. R. R., 168-570; Pate v. Blades, 163-267; Talley v. R. R., 163-567; Armfield v. R. R., 162-24; Smith v. R. R., 162-30; Ward v. R. R., 161-179; Greer v. Lumber Co., 161-144; Draper v. R. R., 161-308; Anderson v. R. R., 161-462; Cotton Mills v. Assurance Corporation, 161-562; Stewart v. McCormick, 161-625; Henderson v. R. R., 159-581; Mizzell v. Mfg. Co., 158-265; Sutton v. Lyons, 156-3; Hamilton v. Lumber Co., 156-520; Houston v. Traction Co., 155-4; Boney v. R. R., 155-95; Cabe v. R. R., 155-402; Maguire v. R. R., 154-384; Kyles v. R. R., 147-394; Currie v. Gilchrist, 147-648; Brown v. R. R., 144-634; Mfg. Co. v. Machine Works, 144-689; Bivings v. Gosnell, 133-574; Bingham v. R. R., 130-625; Cogdell v. R. R., 129-398; Cobb v. Perry, 127-81; Gates v. Max, 125-139; Brinkley v. R. R., 126-88; Cable v. R. R., 122-892; Wood v. Bartholomew, 122-177.

When contributory negligence appears from the plaintiff's evidence a nonsuit is properly granted: Foard v. Power Co., 170-48; Dunnevant v. R. R., 167-232; Fulghum v. R. R., 158-555; Wright v. R. R., 155-325; Neal v. R. R., 126-634; **but not when such evidence is from the defendant:** Horne v. R. R., 170-645; Whitesides v. R. R., 128-229; **nor in cases of comparative negligence under section 3467:** Horton v. R. R., 157-146. **Nonsuit ordered in action for malicious prosecution:** Brinkley v. Knight, 163-194; **upon the statute of limitations,** Earnhardt v. Comrs., 157-234; **where plaintiff not party in interest,** Chapman v. McLawhorn, 150-166.

The ruling of the court must defeat plaintiff's action; if any remedy is left, he should except, proceed with the case, and appeal: Chandler v. Mills, 172-366. As to whether the judge, in his discretion, can allow plaintiff, after motion to dismiss, to introduce further testimony: Featherston v. Wilson, 123-623. Where judge intimates an opinion on the law which lies at the foundation of the action, adverse to plaintiff, or excludes evidence offered by plaintiff which is material, he may submit to nonsuit and appeal: Merrick v. Bedford, 141-505; Hayes v. R. R., 140-131; Hickory v. R. R., 138-311; Mobley v. Watts, 98-284; Tiddy v. Harris, 101-589; Hedrick v. Pratt, 94-101; Gregory v. Forbes, 94-221—and the plaintiff's evidence is entitled to the most favorable interpretation: McCaskill v. Walker, 145-252; Millhiser v. Leatherwood, 140-231; Heilig v. R. R., 152-469—but in the following cases nonsuit and appeal held premature: Merrick v. Bedford, 141-504; Midgett v. Mfg. Co., 140-361. Where involuntary nonsuit reversed on appeal, parties start even again with trial de novo: Hickory v. R. R., 138-311. A refusal of nonsuit reversed on appeal is equivalent to a direction to dismiss: Hollingsworth v. Skelding, 142-246; Tussey v. Owen, 147-335; Baker v. R. R., 150-562.

Not the intention of this section to make the weight and effect of evidence questions of law: Willis v. R. R., 122-905. Cases based upon this section but not construing section: Winders v. Hill, 144-614; Doggett v. Hardin, 132-690; Bessent v. Ry. Co., 132-934; Shoaf v. Ins. Co., 127-312.

568. Waiver of jury trial. Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and with the assent of the court in other actions, in the manner following:

See, also, annotations under section 573, as to waiver of trial by jury in references; see, also, generally: *Armfield v. Brown*, 70-27. Counsel may waive jury trial without special authority: *Stevenson v. Felton*, 99-58; see, also, *White v. Morris*, 107-92. A reference by consent waives right of trial by jury: *Driller Co. v. Worth*, 117-515; *Grant v. Reese*, 82-72; also see cases under sections 572 and 579. As to whether jury trial may be waived in criminal actions appealed from justice where he has final jurisdiction, see *State v. Wells*, 142-590. The trial judge may disregard the agreement that a jury trial be waived: *Lumber Co. v. Lumber Co.*, 137-431. Waiver of jury trial on questions of fact in special proceedings by failure to demand in time: *Navigation Co. v. Worrell*, 133-93; *Ledbetter v. Pinner*, 120-455; *Railroad v. Parker*, 105-246. The provision of the federal constitution that "no person shall be deprived of his property without due process of law" does not imply that all trials in state courts shall be by jury: *Caldwell v. Wilson*, 121-425. Jury trial may be waived as stated below, but there must be issues of fact: *Hockaday v. Lawrence*, 156-319; see, also, *Buchanan v. Clark*, 164-56, and *Crews v. Crews*, 175-168.

1. By failing to appear at the trial.

Caldwell v. Wilson, 121-466.

2. By written consent, in person or by attorney, filed with the clerk.

Waiver must be written and filed with the papers in the case, or oral and entered on the minute docket: *Hahn v. Brinson*, 133-7; *Caldwell v. Wilson*, 121-466.

3. By oral consent, entered in the minutes.

Must be entered on the minute docket: *Hahn v. Brinson*, 133-7. Where case heard by judge by consent and decision of law reversed on appeal, on coming back to superior court parties must have trial by jury unless waived: *Isler v. Koonce*, 83-55; *Benbow v. Robbins*, 72-422.

Rev., s. 540; Code, s. 416; C. C. P., s. 240.

For submission of controversy without action, see this chapter, ss. 626-628.

569. Findings of fact and conclusions of law by judge. Upon trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately. Upon trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision must be filed with the clerk during the court at which the trial takes place, and judgment upon it shall be entered accordingly.

Rev., s. 541; Code, s. 417; C. C. P., s. 241.

Judge can pass upon issues of fact only when jury trial waived: *Wilson v. Bynum*, 92-717; *McCanless v. Flinchum*, 98-358; *Chasteen v. Martin*, 81-51; *Leggett v. Leggett*, 66-420. Where trial by jury waived, the court should find the facts and state its conclusions separately and in writing, and then enter judgment in accordance therewith: *Parks v. Davis*, 98-481; *Foushee v. Pattershall*, 67-453; *Mining Co. v. Smelting Co.*, 99-464. What is a sufficient statement of findings: *Eley v. R. R.*, 165-78. This section not applicable to a motion in a provisional remedy: *Millhiser v. Balsley*, 106-433; *Whitehead v. Hale*, 118-601. Where court fails to find some material fact, supreme court may remand it that such fact may be found: *Knott v. Taylor*, 96-553. For findings of fact in cases of reference, see section 579. Where judge's findings of fact not excepted to by defendant, and plaintiff appeals from the judgment for defendant on such facts and supreme court reverses the judgment, defendant not entitled to trial de novo: *Matthews v. Fry*, 143-384.

The findings of fact by the judge, when authorized by law or by consent of parties, are as conclusive as when found by a jury, if there is any evidence to support them: *Buchanan v. Clark*, 164-56; *Yarborough v. Moore*, 151-116; *Matthews v. Fry*, 143-384; *Shoaf v. Frost*,

127-306; Brafford v. Reed, 125-311; Roberts v. Ins. Co., 118-429; Nimocks v. Shingle Co., 110-230; Travers v. Deaton, 107-500; Millhiser v. Balsley, 106-433; Branton v. O'Briant, 93-99; see, also, sections 570, 600—but the judgment thereon is reviewable: Ladd v. Teague, 126-544; Norton v. McLaurin, 125-185; Baker v. Belvin, 122-190.

Where judge in finding the facts adopts the findings of fact in a certain deposition, the supreme court will consider the evidence incorporated in the deposition: Lee v. Baird, 134-410—also when evidence made a part of the findings, etc., Bank v. Swink, 129-255. Where findings of fact are contradictory and irreconcilably conflicting, judgment cannot be pronounced, and a new trial will be awarded: Davis v. Lumber Co., 130-174. Exceptions to findings of fact by the trial judge, filed after the adjournment of the court for the term, will not be entertained: Electric Light Co. v. Electric Light Co., 116-112. When judge finds the facts it is presumed, unless objection appears, that it was by consent of the parties: White v. Morris, 107-92. Where jury waived, and judge tries the facts, errors committed by him in the reception or rejection of evidence are reviewable: Puffer v. Baker, 104-148. Agreement that trial judge find facts waives defects in pleadings: Early v. Early, 134-258.

Findings of fact by the judge are not subject to exceptions: Matthews v. Fry, 143-384; Parker v. McPhail, 112-502; Travers v. Deaton, 107-500; Taylor v. Pope, 106-267; Avent v. Arrington, 105-377; McAden v. Banister, 63-479; Greensboro v. Scott, 84-184; Burke v. Turner, 85-500. For exceptions to referee's report, see under section 579.

570. Exceptions to decision of court. 1. For the purposes of an appeal, either party may except to a decision on a matter of law arising upon a trial by the court within ten days after the judgment, in the same manner and with the same effect as upon a trial by jury. Where the decision does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may except thereto, and make a case or exception as above provided in case of an appeal.

2. Either party desiring a review, upon the evidence appearing on the trial of the questions of law, may at any time within ten days after the judgment, or within such time as is prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge in settling the case must briefly specify the facts found by him, and his conclusions of law.

Rev., s. 542; Code, s. 418; C. C. P., s. 242.

For exceptions generally to judge's ruling, see section 589.

571. Proceedings upon judgment on issue of law. On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of section 595 herein upon failure of the defendant to answer, where the summons was personally served. If judgment is for the defendant, upon an issue of law, and if taking of an account or the proof of any fact is necessary to enable the court to complete the judgment, a reference or assessment by jury may be ordered, as provided in section 596 herein.

Rev., s. 543; Code, s. 419; C. C. P., s. 243.

ART. 20. REFERENCE

572. By consent. Any or all of the issues in an action, whether of fact or law, may be referred, upon the written consent of the parties, except in actions to annul a marriage, or for divorce and separation.

Rev., s. 518; Code, s. 420; C. C. P., s. 244.

It is proper that the agreement to refer should specify the issues of law and fact: Morisey v. Swinson, 104-555; see, also, Barrett v. Henry, 85-325. Consent once given to a reference can-

not be recalled: *McDaniel v. Scurlock*, 115-295; *Morisey v. Swinson*, 104-555; *White v. Utley*, 86-415; *Fleming v. Roberts*, 77-415—and a waiver of a jury trial cannot be withdrawn; such waiver can be made by counsel without special authority, *Stevenson v. Felton*, 99-58. Order entered of record is sufficient “written consent”: *White v. Utley*, 86-415. Where no written consent, yet both parties appear and examine witnesses and report is made and confirmed and judgment rendered, from which there is appeal, too late to object to order of reference: *Johnston v. Haynes*, 68-509. It applies to all civil cases with the exceptions mentioned: *Lee v. Thornton*, 176-208. An order requiring a receiver to pass upon certain claims of creditors is in effect a reference: *Riley v. Sears*, 151-187.

A reference not excepted to is a reference by consent: *Roughton v. Sawyer*, 144-766; *Kerr v. Hicks*, 129-141; *Blalock v. Mfg. Co.*, 110-107; *Smith v. Hicks*, 108-248; *Rogers v. Bank*, 108-574; *Nissen v. Mining Co.*, 104-309; *Grant v. Hughes*, 96-177; *Harris v. Shaffer*, 92-30; *Belvin v. Paper Co.*, 123-138; *White v. Utley*, 86-417; *Atkinson v. Whitehead*, 77-418; *Armfield v. Brown*, 70-27—and a reference by consent is a waiver of a jury trial, *Simpson v. Scronce*, 152-594; *Roughton v. Sawyer*, 144-766; *Driller Co. v. Worth*, 117-515; *Collins v. Young*, 118-265; *Nissen v. Mining Co.*, 104-309; *Grant v. Hughes*, 96-177; *Fertilizer Co. v. Reams*, 105-291; *Battle v. Mayo*, 102-413; *Grant v. Reese*, 82-72; *Overby v. Fayetteville*, 81-56; *Britt v. Benton*, 79-177; *Atkinson v. Whitehead*, 77-418; *Perry v. Tupper*, 77-413; *Lippard v. Roseman*, 72-427; *Armfield v. Brown*, 70-27; *Green v. Castlebury*, 70-20; *Kluttz v. McKenzie*, 65-102; *Stevenson v. Felton*, 99-58; *Carr v. Askew*, 94-412.

The court cannot discontinue a reference by consent; it may be discontinued by the death of the referee or his removal for good cause: *Perry v. Tupper*, 77-413; *Smith v. Hicks*, 108-248; *Patrick v. R. R.*, 101-602; *Lance v. Russell*, 157-448. Difference between reference hereunder and an arbitration: *Lusk v. Clayton*, 70-185; *Peele v. R. R.*, 159-60. The court retains jurisdiction, with power to review and reverse the conclusions of law of the referee, and a discretion to modify or set aside the report, and its ruling in the latter respect is not reviewable unless it appears that such discretion has been abused: *Brackett v. Gilliam*, 125-380; *Cummings v. Swepson*, 124-579—also has power to make all necessary orders pending the trial, *McNeill v. Lawton*, 97-16; *Credle v. Ayers*, 126-11. A consent order may be changed to a compulsory order only by consent: *Kerr v. Hicks*, 129-141—and it will date as a compulsory order from the first, *Ibid.* Case citing section: *Lumber Co. v. Lumber Co.*, 137-439.

573. Compulsory. Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

Reference should not be ordered while there are pleas in bar not yet determined: *Oldham v. Rieger*, 145-254; *Duckworth v. Duckworth*, 144-620; *Kerr v. Hicks*, 129-141; *Austin v. Stewart*, 126-525; *Bank v. Fid. Co.*, 126-320; *Comrs. v. White*, 123-534; *Smith v. Goldsboro*, 121-351; *Roysters v. Wright*, 118-152; *Jones v. Beaman*, 117-259; *McMillan v. Baxley*, 112-578; *Bridgers v. Bridgers*, 101-71; *Grant v. Hughes*, 96-177; *Humble v. Mebane*, 89-410; *Price v. Eccles*, 73-162; *Neal v. Blackwell*, 85-299; *Sloan v. McMahon*, 85-296; *Cox v. Cox*, 84-138; *Clements v. Rogers*, 95-248; *Quarles v. Jenkins*, 98-258; *Comrs. v. Raleigh*, 88-120; *R. R. v. Morrison*, 82-141; *Douglas v. Caldwell*, 64-372; *Garland v. Arrowood*, 172-591; *Bank v. Warehouse Co.*, 172-602; *Lee v. Thornton*, 176-208; unless the plea does not apply to the whole cause of action: *Alley v. Rogers*, 170-538. Party objecting may appeal at once or after final judgment: *Pritchett v. Greensboro Supply Co.*, 153-344.

Cases upon the question as to whether cause is a proper one to be referred: *Pinchback v. Mining Co.*, 137-171; *Bond v. Wilson*, 137-145; *Jones v. Sugg*, 136-143. The refusal to refer is appealable: *Jones v. Sugg*, 136-143; *Lee v. Baird*, 134-410. Reference ought not to be made before issues are raised: *Syme v. Bunting*, 86-175; *Lumber Co. v. McPherson*, 133-287; *Kerr v. Hicks*, 131-90. The judge retains control of case under reference and may find facts himself from the evidence reported without a reference: *Credle v. Ayers*, 126-11; *Brackett v. Gilliam*, 125-380. Not error to refuse a compulsory reference when the motion to refer is not made until after the close of the evidence: *Hughes v. Boone*, 102-137; or after the jury has been impaneled: *Peyton v. Shoe Co.*, 167-280.

1. Where the trial of an issue of fact requires the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.

Ragland v. Lassiter, 174-579.

2. Where the taking of an account is necessary for the information of the court, before judgment, or for carrying a judgment or order into effect.

Smith v. Smith, 150-81; Albright v. Albright, 91-220; Chalk v. Bank, 87-200; Comrs. v. Magnin, 85-114; Leak v. Covington, 87-501; Grant v. Hughes, 94-755; Little v. Duncan, 89-416; Heilig v. Foard, 64-710. **No reference ordered after final decree to ascertain facts taking place after judgment:** White v. Butcher, 97-7; Pearson v. Carr, 97-194; McCall v. Webb, 126-762, and cases cited. **Where an order of reference is made after the right to an account is established by the verdict of a jury, appeal can only be taken from final judgment after report:** Jones v. Wooten, 137-421; Shankle v. Whitley, 131-168.

3. Where the case involves a complicated question of boundary, or one which requires a personal view of the premises.

Kelly v. Lumber Co., 157-175.

4. Where a question of fact other than upon the pleadings arises upon motion or otherwise, in any stage of the action.

5. Where the issues of fact and questions of fact arise in an action of which the courts of equity of the state had exclusive jurisdiction prior to the adoption of the constitution of one thousand eight hundred and sixty-eight, and in which the matter or amount in dispute is not less than the sum or value of five hundred dollars.

The compulsory reference under this section does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before the referee.

Either party is entitled to a jury trial, where the reference is compulsory, if demanded in apt time, and he should, by exceptions, distinctly designate the controverted facts that he demands shall be determined: Baker v. Edwards, 176-229; Goldwin v. Jernigan, 174-76; Robinson v. Johnson, 174-232; Loan Co. v. Yokley, 174-573; Bradshaw v. Lumber Co., 172-219; Marler v. Golden, 172-823; Alley v. Rogers, 170-538; Keerl v. Hayes, 166-553; Wynn v. Bullock, 154-383; Ogden v. Land Co., 146-443; Bruce v. Mining Co., 147-642; Kerr v. Hicks, 131-90; Wilson v. Featherstone, 120-446; Taylor v. Smith, 118-127; Driller Co. v. Worth, 117-515; Yelverton v. Coley, 101-248; McDaniel v. Scurlock, 115-295; Blalock v. Mfg. Co., 110-99; Smith v. Hicks, 108-248; Grant v. Hughes, 96-177; Carr v. Askew, 94-194; Harris v. Shaffer, 92-30; Gold Co. v. Ore Co., 79-48; Atkinson v. Whitehead, 77-419; Keener v. Finger, 70-35; Green v. Castleberry, 70-20; Armfield v. Brown, 70-27. **A party demanding jury trial may withdraw such demand:** Greenlee v. Greenlee, 150-638. **The court may set aside a compulsory reference and grant a jury trial:** Rogers v. Lumber Co., 154-108. **A jury trial, upon exceptions taken, is had upon the evidence taken by the referee:** Moore v. Westbrook, 156-482; see Kerr v. Hicks, 131-90; but the referee's findings of fact are not admissible: Bradshaw v. Lumber Co., 172-219.

Rev., s. 519; Code, s. 421; 1897, c. 237, ss. 1, 2; C. C. P., s. 245; 1917, c. 280; 1919, c. 7.

574. How referee chosen or appointed. In all cases of reference the parties as to whom issues are joined in the action (except when the defendant is an infant or an absentee) may agree in writing upon a person or persons, not exceeding three, and a reference shall be ordered to him or them, and to no

other person or persons. And if such parties do not agree, the court shall appoint one or more referees, not more than three, who are free from exception. No person may be appointed referee to whom all parties in the action object. No judge or justice of any court may sit as referee in an action pending in the court of which he is judge or justice, and not already referred, unless the parties otherwise stipulate.

Rev., s. 520; Code, s. 423; C. C. P., s. 247.

See annotations under section 572.

575. Referees may administer oaths. Every referee has power to administer oaths in any proceeding before him, and has generally the power vested in a referee by law.

Rev., s. 521; Code, s. 599; C. C. P., s. 356.

See section 576.

576. Powers of referee of trial. The trial by referees shall be conducted in the same manner as a trial by the court. Referees have the same power to grant adjournments and to allow amendments to pleadings and to the summons as the court upon such trial, upon the same terms and with like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment and to punish them as for contempt for nonattendance or refusal to be sworn or to testify, as is possessed by the court.

Rev., s. 522; Code, s. 422; C. C. P., s. 246.

For report, exceptions, trial by jury of issues, etc., see under section 579.

POWERS OF REFEREE. Has no inherent powers, but those granted by law and authorized by the court: *Cummings v. Swepson*, 124-584; *Jones v. Beaman*, 117-259. Has power to enforce obedience to his rulings just as the court would have at trial: *LaFontaine v. Underwriters*, 83-132—to make new parties, *Koonce v. Pelletier*, 115-235; *Perkins v. Berry*, 103-131—to allow amendments to pleadings, *Blanton v. Bostie*, 126-418; *Jones v. Beaman*, 117-259; *Gillam v. Ins. Co.*, 121-373—to direct a nonsuit, *Stith v. Jones*, 119-428; *McNeill v. Lawton*, 97-16—to tax costs of reference, *Wharton v. Gattis*, 91-53. Has no power to dismiss action for want of jurisdiction in the superior court: *Austin v. Stewart*, 126-525. Credibility of a witness is for the referee to determine, *Harris v. Smith*, 144-439. When three referees have been selected, two cannot act without due notice to third to attend: *Drainage District v. Parks*, 170-435. To punish for contempt, see section 983.

THE TRIAL BY REFEREE. Rules for trial: *Green v. Castlebury*, 70-20; *Battle v. Mayo*, 102-413. Method of noting exceptions to referee's ruling in apt time: *Armfield v. Colvert*, 103-147. What referee should find in action against guardian for renting ward's land privately: *Duffy v. Williams*, 133-195. In a reference in an action involving the validity of a deed, referee must find as to bona fides of conveyance: *Blalock v. Mfg. Co.*, 110-99. Referee is justified in not considering evidence when it is not competent for jury to consider: *Stephenson v. Felton*, 106-114. A referee is not bound to the findings of fact of the trial court when such findings were, by agreement of parties, only for the purpose of construing the will: *Lee v. Baird*, 134-410.

577. Testimony reduced to writing. The testimony of all witnesses on both sides must be reduced to writing by the referee, or under his direction, and signed by the witnesses, and the evidence so taken and signed shall be filed in the cause, and constitute a part of the record.

Rev., s. 523; 1897, c. 237, s. 3.

All the testimony must be reported as taken and copies of all documents considered by referee must be filed with the papers: *Tharington v. Tharington*, 99-118; *Perkins v. Berry*,

103-131; *Comrs. v. Magnin*, 85-114; *Cain v. Nicholson*, 77-411—and if all the evidence is not sent up, the court can order the remainder to be sent up, *Perkins v. Berry*, 103-131; *Williams v. Whiting*, 92-683—but the fact that evidence is not sent up is no ground for exception, *Perkins v. Berry*, 103-131; *Mfg. Co. v. Williamson*, 100-83.

578. Report; review and judgment. The referee shall make and deliver a report, within the time ordered by the court, to the clerk of the court in which the action is pending. Either party, during the term or upon ten days notice to the adverse party out of term, may move the judge to review the report, and set aside, modify or confirm it in whole or in part, and no judgment may be entered on any reference except by order of the judge.

Rev., s. 524; Code, s. 423; C. C. P., s. 247.

For annotations on contents of report, exceptions, confirmation, trial by jury, appeal, see section 579. The judge, in his discretion, may set aside a reference after the report is filed and proceed to try the case: *Cummings v. Swepson*, 124-579; *Bushee v. Surles*, 79-51—and his ruling in this respect is not reviewable: *Cummings v. Swepson*, 124-579; *Bushee v. Surles*, 79-51. He may review the report and modify it, or set it aside and make the findings himself from the evidence presented: *Dumas v. Morrison*, 175-431. When and to whom report made and where motions with reference thereto heard: *McNeill v. Hodges*, 99-248. Judge cannot exercise his authority "out of term" except in county where action pending: *McNeill v. Hodges*, 99-248; *Ledbetter v. Pinner*, 120-457; *Skinner v. Terry*, 107-103; *Godwin v. Monds*, 101-354.

579. Report, contents and effect. The referee must state the facts found and the conclusions of law separately. His decision must be given, and may be excepted to and reviewed in like manner and with like effect in all respects as in cases of appeal; and he may in like manner settle a case or exceptions. The report of the referee upon the whole issue stands as the decision of the court, and judgment may be entered thereon upon application to the judge. When the reference is to report the facts, the report has the effect of a special verdict.

Rev., s. 525; Code, s. 422; C. C. P., s. 246.

THE REPORT. It should not be argumentative: *Weisel v. Cobb*, 118-11. The report should state distinctly and separately the conclusions as to law and fact: *Barcroft v. Roberts*, 91-363; *Cooper v. Middleton*, 94-86; *Earp v. Richardson*, 75-84; *Klutts v. McKenzie*, 65-102—must state all facts constituting the defense and not leave to inference what is the fact to be found, *Cooper v. Middleton*, 94-93—must state all the items of account in detail between the parties, *Sharpe v. Eliason*, 116-665; *Gore v. Lewis*, 109-539; *Cain v. Nicholson*, 77-411; *McCampbell v. McClung*, 75-393—must state the account according to method pointed out by order, *Burke v. Turner*, 89-246—must be accompanied by the testimony, *Perkins v. Berry*, 103-131; *Barbee v. Green*, 92-471; *Comrs. v. Magnin*, 85-114; *Cain v. Nicholson*, 77-411; see, also, section 577—and if not so accompanied, court may order sent up, *Perkins v. Berry*, 103-131. Cases where question of designation of parties to whom accounts due arises: *Perkins v. Berry*, 103-131. Proper method of stating account in foreclosure of mortgage: *Knight v. Houghtalling*, 91-246. Findings of fact as a special verdict: *Morisey v. Swinson*, 104-555; see *Lawrence v. Hyman*, 79-209.

EXCEPTIONS TO REPORT. Report is reviewed, not by appeal, but by exceptions taken to the report: *Green v. Castlebury*, 70-20. The exceptions must point out specifically the errors complained of: *Ogden v. Land Co.*, 146-443; *Battle v. Mayo*, 102-413; *Wilson v. Featherstone*, 120-446; *Perkins v. Berry*, 103-131; *Mfg. Co. v. Brooks*, 106-113; *Tilley v. Bivens*, 110-343; *Wiley v. Logan*, 95-358; *Cooper v. Middleton*, 94-86; *Worthy v. Brower*, 93-344; *Morrison v. Baker*, 81-76; *Suit v. Suit*, 78-272; *Currie v. McNeill*, 83-176; *Green v. Castleberry*, 77-164; *Brumble v. Brown*, 71-513; *Whitford v. Foy*, 71-527—for the court will not examine into every item of every line of record to ascertain its meaning, *Whitford v. Foy*, 71-527; *Battle v. Mayo*, 102-413; *Young v. Kennedy*, 95-265; *Mfg. Co. v. Brooks*, 106-113. A motion

to exclude certain items in a final report will be treated as an exception thereto: *Rogers v. Bank*, 108-574. An exception for finding upon insufficient evidence should be filed with the referee and reviewed by the judge: *Moore v. Westbrook*, 156-482. An exception as to a finding of fact will not be heard where claim not presented, nor evidence introduced before the referee in apt time: *Overby v. Fayetteville*, 81-56; *Nash v. Taylor*, 3-174. Exception must be filed at the term to which the report is made, though court can extend time: *Kerr v. Hicks*, 131-90; *R. R. v. King*, 125-454; *Johnson v. Loftin*, 111-323; *McNeill v. Hodges*, 105-52; *Long v. Logan*, 86-535; *Comrs. v. Magnin*, 85-117; *University v. Lassiter*, 83-38; *State v. Peebles*, 67-97—but judge can refuse to consider them when not filed in time, *Shields v. McNeill*, 118-590. Exceptions to ruling of referee as to competency of evidence: *Vestal v. Sloan*, 83-555; *Shehan v. Malone*, 71-440.

HEARING UPON EXCEPTIONS. The court must review and pass upon all exceptions to the report, and modify or confirm them according to his judgment; his conclusions upon exceptions of law are reviewable, but not upon exceptions of fact: *Miller v. Groome*, 109-148. His refusal to pass upon report under consent reference is reviewable: *Stevenson v. Felton*, 99-58. He must review the findings of the referee, not simply decide whether there is any evidence to sustain them: *Thompson v. Smith*, 156-345; *s. c.*, 160-256; *Overman v. Lanier*, 156-537.

Referee's findings of fact are presumed to be right, but presumption rebuttable, when: *Green v. Jones*, 78-265. Referee's findings of fact are conclusive when not excepted to, and if they are adopted by the court, by being affirmed, such findings are conclusive unless found without evidence or upon improper evidence: *Mfg. Co. v. Lumber Co.*, 177-404; *McGeorge v. Nicola*, 173-707; *Marler v. Golden*, 172-823; *McCullers v. Cheatham*, 163-61; *Mirror Co. v. Casualty Co.*, 153-373; *Williams v. Hyman*, 153-166; *Baggett v. Wilson*, 152-182; *Bailey v. Hopkins*, 152-748; *Foy v. Gray*, 148-436; *Henderson v. McLain*, 146-329; *Frey v. Lumber Co.*, 144-759; *Thornton v. McNeely*, 144-622; *Harris v. Smith*, 144-439; *Ramsey v. Browder*, 136-251; *Lambertson v. Vann*, 134-109; *Malloy v. Cotton Mills*, 132-432; *Lewis v. Covington*, 130-541; *Holt v. Johnson*, 129-138; *Dunn v. Beaman*, 126-764; *Bank v. Loughran*, 126-814; *Lenoir v. Linville Imp. Co.*, 126-922; *Lewis v. Overby*, 126-347; *Cochran v. Imp. Co.*, 127-386; *Holt v. Couch*, 125-456; *Boyle v. Stallings*, 140-527; *Wadesboro v. Atkinson*, 107-317; *Jordan v. Bryan*, 103-59; *Kitchin v. Grandy*, 101-86; *Strauss v. Frederick*, 98-60; *Battle v. Mayo*, 102-435, and cases cited; *Vaughan v. Lewellyn*, 94-472; *Cooper v. Middleton*, 94-86; *DePriest v. Patterson*, 92-399; *Usry v. Suit*, 91-406; see, also, *Dunavant v. R. R.*, 122-999; *Collins v. Young*, 118-265. If the judge below makes no findings of facts, it will be presumed he adopted the referee's findings: *McEwen v. Loucheim*, 115-348; *Battle v. Mayo*, 102-413; *Barbee v. Green*, 92-471. Where exception is made that referee failed to pass upon certain evidence, it is competent for the judge to pass thereon and find the facts: *Credle v. Ayers*, 126-11; *Wallace v. Douglas*, 103-19.

Where exception because referee failed to find as to a particular fact, and report recommended, he will not be allowed to except to second report on ground that it is a mixed question of law and fact: *Tyson v. Tyson*, 92-288. An exception to referee's conclusion that plaintiff cannot recover opens up both findings of law and fact for review by the judge: *Brackett v. Gilliam*, 125-382. When facts stated as ground for exception conflict with the findings of the referee, the exception should be overruled: *Smith v. Smith*, 101-461. It is error for judge to pass upon exceptions to unfinished report: *White v. Utley*, 86-415. Except by consent, exceptions cannot be heard or orders made outside of county where action pending: *McNeill v. Hodges*, 99-248.

The court can, in its discretion, set aside a reference to state an account, after report made and exceptions filed, and proceed to try the case: *Bushee v. Surles*, 79-51; *Cummings v. Swepson*, 124-579. A party paying the amount found to be due by report before confirmation does so subject to the power of the court to modify the report: *West v. Laughinghouse*, 174-214.

RECOMMENDED TO REFEREE, WHEN. The fact that a referee has not found the facts upon which the report is based must be taken advantage of by a motion to recommit: *Blalock v. Mfg. Co.*, 110-99; *Scroggs v. Stevenson*, 100-354; *Tilley v. Bivens*, 110-343. Where referee fails to find the facts upon which the plea of the statute of limitations can be determined: *French v. Richardson*, 167-41; *Lanning v. Comrs.*, 106-505; see, also, *Foushee v. Beckwith*, 119-178—where fails to state fully the findings of fact so the conclusions of law thereon may be

reviewed: *Tilley v. Bivens*, 110-343; *Norment v. Brown*, 79-363—where no facts are found by either referee or judge, *Foushee v. Beckwith*, 119-178; *Lanning v. Comrs.*, 106-505—where report is imperfect or unsatisfactory, *Grant v. Bell*, 90-558; but see *Grant v. Edwards*, 92-442. No appeal from an order to recommit: *Chemical Co. v. Lackey*, 140-32. Where report recommitment to referee to have report reformed so as to conform to jury's verdict upon the issues based upon exceptions, not reviewable: *Kerr v. Hicks*, 122-409. When superior court recommitments without objection, complaining party cannot except to report reformed in the manner directed: *Cowles v. Curry*, 96-331. A report will not be rereferred where the same, though informal, furnishes the information required: *Gulley v. Macy*, 89-343. For right to jury trial, see section 573.

JUDGMENT UPON REPORT. The findings of the referee, when reviewed and corrected, becomes the judgment of the court: *Armfield v. Brown*, 70-29—and such reviewing and correcting is *res judicata* and cannot be passed upon by another judge: *Alexander v. Alexander*, 120-472; *Scroggs v. Stevenson*, 100-354. If no exception filed, the referee's finding as to a particular fact should be confirmed: *Chard v. Warren*, 122-75. In cases purely equitable in their nature, if an account has been taken and report made, the plaintiff will not be allowed to suffer judgment of nonsuit: *Boyle v. Stallings*, 140-524.

APPEALS TO SUPREME COURT. Where report recommitment to be conformed to a ruling by the superior court upon an exception, the appeal must be from the judgment on final report and not from decision on exception: *Wallace v. Douglas*, 105-42; *McLean v. Breece*, 113-390; *Leak v. Covington*, 95-193; *Torrence v. Davidson*, 90-2; *Grant v. Reese*, 90-3; *Lutz v. Cline*, 89-186; *Jones v. Call*, 89-188. The supreme court will only consider exceptions to the rulings of the court below in confirming or disaffirming the report: *Perry v. Hardison*, 99-21; see, also, *Scroggs v. Stevenson*, 100-354, and *Tyson v. Tyson*, 100-360; *Williamson v. Bitting*, 159-321. Where the findings of fact are approved by the court below, and there is some evidence to support them, the supreme court can only correct the errors of law: *Rhyne v. Love*, 98-486; *Thornton v. McNeely*, 144-622; *Wiley v. Logan*, 95-358; *Wadesboro v. Atkinson*, 107-317; *Morisey v. Swinson*, 104-555; *Nissen v. Mining Co.*, 104-309; *Howerton v. Sexton*, 104-75; *Kitchin v. Grandy*, 101-86; *Abernathy v. Withers*, 99-520; *Reaves v. Davis*, 99-425; *Jeffords v. Waterworks Co.*, 157-10; *Thompson v. Smith*, 156-345; s. e., 160-256; *Brown v. R. R.*, 154-300.

Where reference was by consent, the findings of fact will not be reviewed when approved by the superior court, except upon the ground, if taken in apt time, that there is no testimony to support them or that testimony is incompetent: *Cotton Mills v. Cotton Mills*, 115-475; *McEwen v. Loucheim*, 115-348; *Turner v. Shuffler*, 108-642; *Whitehead v. Whitehurst*, 108-458; *Joyner v. Stancill*, 108-153; *Roper v. Burton*, 107-526; *Battle v. Mayo*, 102-413; *Smith v. Smith*, 101-461; *Grant v. Reese*, 94-720; *Vaughan v. Lewellyn*, 94-472; *Hanner v. McAdoo*, 86-370; *Hunter v. Kelly*, 92-285. The supreme court will not entertain an objection made for the first time that the findings of fact were not supported by evidence: *Joyner v. Stancill*, 108-153; *Hawkins v. Cedar Works*, 122-87. After supreme court has rendered final judgment, the superior court cannot order a further reference: *Pearson v. Carr*, 97-194. Supreme court may order account restated: *Gore v. Lewis*, 109-539.

Exceptions should be specific and not general: *Sturtevant v. Cotton Mills*, 171-119; *Comrs. v. Erwin*, 140-193; see, also, *Wiley v. Logan*, 95-358. How appeals taken on the ground that there is no evidence to support the findings of fact made or adopted by the judge below: *Battle v. Mayo*, 102-413. A ruling by referee, confirmed by judge, will not be disturbed when no exception appears in record: *Bank v. Bank*, 138-467. When exceptions to referee's report are overruled and judgment is affirmed, such exceptions cannot be reviewed: *Burwell v. Burgwyn*, 105-507. Sending case up to the supreme court, how exceptions, etc., set out: *Bank v. Mfg. Co.*, 96-298. The supreme court does not try to ascertain what facts the evidence warranted: *Battle v. Mayo*, 102-413; *Patterson v. Wadsworth*, 89-407. Refusal of superior court to set aside referee's report for newly discovered evidence not reviewable: *Henderson v. McLain*, 146-329. Where case is remanded by supreme court with orders that referee modify his report to conform to rulings of the court, the referee need not give notice to the parties: *Gay v. Grant*, 116-93. Where jury trial is reserved and the report is heard on exceptions, an appeal from judgment rendered is premature: *Pritchett v. R. R.*, 157-88.

ART. 21. ISSUES

580. Defined. Issues arise upon the pleadings, when a material fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds:

Tucker v. Satterthwaite, 120-121; Christmas v. Haywood, 119-130; Miller v. Miller, 89-209; McElwee v. Blackwell, 82-345; Fortescue v. Crawford, 105-29; Patton v. R. R., 96-455; Wright v. Cain, 93-296; Armfield v. Brown, 70-27; Klutts v. McKenzie, 65-102; Heilig v. Stokes, 63-612.

1. Of law.

See section 581.

2. Of fact.

“Issues of fact” are technical words; they mean such matters of fact as are put in issue by pleadings and a decision of which would be final and conclude the parties upon the matters in controversy: Heilig v. Stokes, 63-614; see, also, cases under section 582. Section merely referred to: Stancill v. Spain, 133-79; McQueen v. Bank, 111-515; Gregory v. Pinnix, 158-147.

Rev., s. 544; Code, s. 391; C. C. P., s. 219.

581. Of law. An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof.

Rev., s. 545; Code, s. 392; C. C. P., s. 220.

Andrews v. Pritchett, 66-387; see, also, section 511.

582. Of fact. An issue of fact arises—

1. Upon a material allegation in the complaint controverted by the answer; or,

An issue of fact is where a matter is alleged on one side and denied on the other, the decision of which would be final and conclude the parties as to the matter in controversy: Roper v. Leary, 171-35; Kirk v. R. R., 97-82; Wright v. Cotten, 140-1; Crawford v. Masters, 140-205; Tucker v. Satterthwaite, 120-118; Patton v. R. R., 96-455; McAdoo v. R. R., 105-140; Armfield v. Brown, 70-27; Heilig v. Stokes, 63-612; Klutts v. McKenzie, 65-102. An issue as to whether one is indebted to another is an issue of fact and not of law: Jordan v. Farthing, 117-181. “Whether plaintiff is entitled to recover” is a question of law arising upon the answers to the issues, and is not an issue of fact: Braswell v. Johnston, 108-150; Nathan v. R. R., 118-1066; Denmark v. R. R., 107-185. Where answer raises a material issue, though matter not alleged in complaint, the issue may be submitted: Shaw v. McNeill, 95-535; Main v. Field, 144-307. Where a material defense is pleaded, an issue should be submitted on it: Owens v. Phelps, 95-286. The answer simply denying knowledge of facts alleged in complaint does not put these facts in issue: Woodcock v. Bostie, 128-243—nor does a demand of strict proof of such facts, *Ibid*.

Issues of fact and questions of fact distinguished: Vanderbilt v. Roberts, 162-273; R. R. v. Gahagan, 161-191; York v. McCall, 160-276; Creed v. Marshall, 160-394; Goode v. Rogers, 126-62; Keener v. Finger, 70-35; Beavans v. Goodrich, 98-217; Foushee v. Pattershall, 67-453.

Only such issues as arise on the pleadings and are material to the final adjudication of the controversy should be submitted: McKenzie v. McKenzie, 153-242; Shoe Co. v. Hughes, 122-296; Clark v. Guano Co., 144-64; Patterson v. Mills, 121-258; Coley v. Statesville, 121-301; Tucker v. Satterthwaite, 120-118; Cornelius v. Brawley, 109-542; Fortescue v. Crawford, 105-29; Howard v. Early, 126-170; Sprinkle v. Ins. Co., 126-678; Bean v. R. R., 107-731; Emery v. R. R., 102-209; Davidson v. Gifford, 100-18; Carpenter v. Tucker, 98-316; Patton v. R. R., 96-455; Cuthbertson v. Ins. Co., 96-480; Quarles v. Jenkins, 98-258; Kirk v. R. R., 97-82; Carr v. Askew, 94-212; Wright v. Cain, 93-296; Miller v. Miller, 89-209; Grant v. Bell, 87-34; Cedar Falls Co. v. Wallace, 83-225; Armfield v. Brown, 70-27; Heilig v. Stokes, 63-612.

Issues should not be submitted which are not raised by the pleadings: Henderson v. R. R., 171-397; Carroll v. James, 156-68; Streator v. Streator, 145-337; Dickens v. Perkins, 134-220,

and cases therein cited; Sprinkle v. Indemnity Co., 126-678; Christman v. Haywood, 119-130; Clark v. Guano Co., 144-64; Sprague v. Bond, 113-551; McAbsher v. R. R., 108-344; Carpenter v. Tucker, 98-316; Lewis v. R. R., 95-179; Willis v. Branch, 94-142—which have no evidence to support them, Ellerbe v. R. R., 118-1024; Vanstory v. Thornton, 112-196; Best v. Frederick, 84-176—which are on points not material to the adjudication of the case, Henry v. Rich, 64-379; Simmons v. Allison, 118-761; Horne v. Bank, 108-109; Mace v. Life Assn., 101-122; Cummings v. Barber, 99-332; McMillan v. Baker, 97-197; Cuthbertson v. Ins. Co., 96-480; McDonald v. Carson, 94-497; Willis v. Branch, 94-142—where issues arise upon matters evidential, Wright v. Cotten, 140-1; Jackson v. Tel. Co., 139-347; Coxe v. Singleton, 139-361; Patterson v. Mills, 121-266; Cornelius v. Brawley, 109-548; Howard v. Early, 126-170; Patton v. R. R., 96-455; Fortescue v. Crawford, 105-29; Wright v. Cain, 93-296.

Issues are sufficient when they are so framed as to allow the parties to present every phase of the controversy arising upon the pleadings: Power Co. v. Power Co., 171-248; Carr v. Alexander, 169-665; Goins v. Indian Training School, 169-736; Gross v. McBrayer, 159-372; Roberts v. Baldwin, 155-276; Bell v. McJones, 151-85; Tuttle v. Tuttle, 146-484; Johnston v. Lumber Co., 144-717; Clark v. Guano Co., 144-64; Main v. Field, 144-307; Kimberly v. Howland, 143-398; Jackson v. Tel. Co., 139-347; Grocery Co. v. R. R., 136-396; Albert v. Ins. Co., 122-92; Luttrell v. Martin, 112-593; Pretzfelder v. Ins. Co., 123-164; Ricks v. Stancill, 119-99; Bradsher v. Hightower, 118-399; Downs v. High Point, 115-182; Kimsey v. Munday, 112-816; Hamilton v. Buchanan, 112-463; Meredith v. Cranberry Co., 99-576; Willis v. R. R., 122-905; Black v. Black, 110-398. See section 584.

Where issues not arising on pleadings are submitted without objection, the findings must stand: Ferrell v. Hinton, 161-348; Porter v. R. R., 97-66; Carey v. Carey, 108-267; Chemical Co. v. Johnson, 101-223; Gatling v. Boone, 101-61; Clements v. Rogers, 95-248; Wilson v. Hughes, 94-182—also where an issue arising on pleadings is not submitted and party does not object, Wagon Co. v. Byrd, 119-461.

CASES THROWING SOME LIGHT ON PROPER ISSUES OF FACT: In action for goods sold and delivered, Coal Co. v. Ice Co., 134-574; Pickey v. Merrimon, 79-585—for specific recovery of a chattel, Wilson v. Hughes, 94-182—for recovery on policy of fire insurance, Pretzfelder v. Ins. Co., 123-164; Cuthbertson v. Ins. Co., 96-480—for recovery on policy of life insurance, Kendrick v. Ins. Co., 124-315; Maynard v. Ins. Co., 132-711—for damages for conversion of personal property, Rhea v. Deaver, 85-337—for recovery of land, generally, Vanderbilt v. Brown, 128-498; Love v. Gregg, 117-467; Vaughan v. Parker, 112-96; Kimsey v. Munday, 112-816; Redmond v. Mullenax, 113-505; Gordon v. Collett, 102-532; Davidson v. Gifford, 100-18; Casey v. Cooper, 99-395; Morrison v. Watson, 95-479; Check v. Watson, 90-302; Overcash v. Kitchie, 89-384—for recovery of land partly owned by wife which was sold under execution against husband, Ray v. Long, 132-891—for sale of decedent's land for assets, Stainback v. Harris, 115-100—for land fraudulently sold by administrator, Morrow v. Cole, 132-678—for reexecution of paper alleged to be lost, Hendon v. R. R., 125-124—for debt on promissory note, Parrish v. Graham, 129-230; Reade v. Street, 122-301; Wiggins v. Kirkpatrick, 114-298; Carrington v. Allen, 87-354—for debt on note of deceased where administrator sets up mental incapacity, etc., on part of maker, Ducker v. Whitson, 112-44—for processioning boundary lines, Williams v. Hughes, 124-3—to set aside deed as fraudulent, Redmond v. Chandley, 119-575—for breach of contract, Crews v. Cantwell, 125-516; Spencer v. Fortescue, 112-268.

In an action for injury or death by negligence of other than railroad company, Womble v. Gro. Co., 135-474; McDougald v. Lumberton, 129-200; Rittenhouse v. Street Ry. Co., 120-544; Andrews v. Tel. Co., 119-403; Sherrill v. Tel. Co., 117-352; Brunhild v. Potter, 107-415—for injury or death by negligence of railroad company, Griffin v. R. R., 134-101; Mott v. R. R., 131-234; Curtis v. R. R., 130-437; McCall v. R. R., 129-298; Edwards v. R. R., 129-78; Pierce v. R. R., 124-83; Bradley v. R. R., 126-735; Cox v. R. R., 123-604; Norton v. R. R., 122-910; Willis v. R. R., 122-905; Kinney v. R. R., 122-961; Nathan v. R. R., 118-1066; Baker v. R. R., 118-1015; Ellerbe v. R. R., 118-1024; Pickett v. R. R., 117-616; Denmark v. R. R., 107-185; McAdoo v. R. R., 105-140; Deberry v. R. R., 100-310; Bottoms v. R. R., 109-72; Smith v. R. R., 99-241; Kirk v. R. R., 97-82; Scott v. R. R., 96-428—issue as to contributory negligence should generally be submitted separately: Hall v. R. R., 172-347; s. e., 167-284.

In a proceeding for probate of will, Cornelius v. Brawley, 109-542—for recovery for services rendered decedent under a special contract, Tussey v. Owen, 139-457; Hatcher v. Dabbs, 133-

239—for damages for malicious prosecution and false arrest, *Kelly v. Traction Co.*, 133-418—for malicious prosecution and slander, *McGowan v. McGowan*, 122-148—for negligent injury to land by canal, *Pinnix v. Canal Co.*, 132-124—for recovery against surety where he relies on release by extension of time to principal: *Sutton v. Walters*, 118-495—for partition of land where issue of sole seizin, *Henning v. Warner*, 109-406; *Gregory v. Pinnix*, 158-147—for damages for diverting water, *Geer v. Water Co.*, 127-350—for false warranty of machinery accepted, *Mfg. Co. v. Gray*, 129-438—to correct mistake in deed, *Warehouse Co. v. Ozment*, 132-839—for specific performance of contract, *Boles v. Caudle*, 133-532—where interpleader in attachment, *Mfg. Co. v. Tierney*, 133-630—for cancellation of deed and damages, *Gillis v. Arringdale*, 135-295—for damages for mental anguish, *Hunter v. Tel. Co.*, 135-458; *Sherrill v. Tel. Co.*, 117-532—for trespass on land, *Lumber Co. v. Lumber Co.*, 137-432—for negligence of two railroads, *Martin v. R. R.*, 148-259.

2. Upon new matter in the answer, controverted by the reply; or,
3. Upon new matter in the reply, unless an issue of law is joined thereon.

Nimocks v. McIntyre, 120-325.

Rev., s. 546; Code, s. 393; C. C. P., s. 221.

583. Order of trial. Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In these cases the issues of law must be first tried, unless the court otherwise directs.

Rev., s. 547; Code, s. 394; C. C. P., s. 222.

Pleas in bar must be tried before a reference ordered: *Sloan v. McMahan*, 85-296; *Smith v. Goldsboro*, 121-350; *Woody v. Brooks*, 102-334; see, also, cases under section 573.

584. Form and preparation. Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues. The issues arising upon the pleadings, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reduced to writing, before or during the trial.

Rev., ss. 548-9; Code, ss. 395-6.

FORM OF ISSUES. The number and form of issues within the discretion of the judge; they should present the material facts arising upon the pleadings, and afford an opportunity to the parties to present every phase of the controversy: *Potato Co. v. Jeanette*, 174-236; *Vinson v. Pugh*, 173-189; *Milliken v. Sessoms*, 173-723; *McNeeley v. Shoe Co.*, 170-278; *Lumber Co. v. Mfg. Co.*, 162-395; *Alford v. Moore*, 161-382; *Garrison v. Machine Co.*, 159-285; *Kivett v. Telegraph Co.*, 156-296; *Fields v. Bynum*, 156-413; *Gallimore v. Grubb*, 156-575; *Houston v. Traction Co.*, 155-4; *In re Herring's Will*, 152-258; *Dortch v. R. R.*, 148-575; *Tuttle v. Tuttle*, 146-484; *Ormond v. Ins. Co.*, 145-140; *Elks v. Hemby*, 160-20; *Paper Co. v. Chronicle*, 115-147; *Moseley v. Johnson*, 144-263; *Ruffin v. R. R.*, 142-120; *Wilson v. Cotton Mills*, 140-52; *Coxe v. Singleton*, 139-361; *Deaver v. Deaver*, 137-246; *Ratliff v. Ratliff*, 131-425; *Rittenhouse v. Street Ry.*, 120-544; *Bradley v. R. R.*, 126-735; *Williams v. Gill*, 122-967; *Redmond v. Chandley*, 119-575; *Sherrill v. Tel. Co.*, 117-352; *Pickett v. R. R.*, 117-616; *Simmons v. Allison*, 118-778; *Jordan v. Farthing*, 117-181; *Cotton Mills v. Abernathy*, 115-402; *Fleming v. R. R.*, 115-676; *Redmond v. Mullenax*, 113-505; *Vaughan v. Parker*, 112-96; *Allen v. Allen*, 114-121; *Humphrey v. Church*, 109-132; *Bonds v. Smith*, 106-553; *Grubbs v. Ins. Co.*, 108-478; *Waller v. Bowling*, 108-294; *Everett v. Williamson*, 107-204; *Boyer v. Teague*, 106-576; *Lineberger v. Tidwell*, 104-506; *Emery v. R. R.*, 102-209; *Brown v. Mitchell*, 102-347; *Mace v. Life Ins. Co.*, 101-122; *Cuthbertson v. Ins. Co.*, 96-480. See other cases cited below in this section, and also cases under section 582.

Failure to submit an issue on contributory negligence is not error where the party has had the benefit of his contention on other issues: *Carter v. Leaksville*, 174-561. A separate issue as to contributory negligence is not necessary under the Federal Employers' Liability Act: *Lloyd v. R. R.*, 166-24. For improper form of issue as to the last clear chance: *Cullifer v. R. R.*, 168-309. Each cause of action or defense should have a separate issue: *Carter v.*

McGill, 168-507; s. c., 171-775. In an action for breach of warranty there should be two issues, as to the warranty and the damages: *Grocery Co. v. Vernoy*, 167-427. Form of issues in slander: *Hamilton v. Nance*, 159-56. A defective issue may be cured by the manner of the judge's presenting it to the jury: *Richardson v. Edwards*, 156-590.

SUBMISSION OF ISSUES. This section contemplates that the issues shall be drawn before the introduction of testimony: *Beasley v. Surles*, 140-605; and only such as are material to be tried, *Cecil v. Henderson*, 121-246. The court should submit every material issue raised by the pleadings unless waived by the parties: *Gordon v. Collett*, 104-381; *McDonald v. Carson*, 94-497. This section is mandatory, and binding equally upon the court and counsel, and it is the duty of the judge to submit all necessary issues arising upon the pleadings: *Tucker v. Satterthwaite*, 120-118; *Falkner v. Pileher*, 137-449; *Burton v. Mfg. Co.*, 132-17; *Shoe Co. v. Hughes*, 122-296; *Strauss v. Wilmington*, 129-99; *Denmark v. R. R.*, 107-185; *Davidson v. Gifford*, 100-18; *Porter v. R. R.*, 97-66; *Bowen v. Whitaker*, 92-367; *Arnold v. Estis*, 92-162; *Rudasill v. Falls*, 92-222. The discretion of the judge in settling the issues is not reviewable, if the parties have reasonable opportunity to present the whole controversy: *Bank v. Ins. Co.*, 150-770; *Ives v. Lumber Co.*, 147-306; *Cunningham v. R. R.*, 139-427; unless the discretion operates to a party's injury: *Williams v. Gill*, 122-967; *Pickett v. R. R.*, 117-616. See, also, cases cited above in this section and under section 582.

The issues must be made up by the attorneys: *Tucker v. Satterthwaite*, 120-121; *Wilson v. Featherstone*, 120-448; *Bowen v. Whitaker*, 92-367; or by the judge: see the same cases, and also *Springer v. Shavender*, 116-12; *Emery v. R. R.*, 102-209; *Fisher v. Mining Co.*, 94-397; *McDonald v. Carson*, 94-497. The judge may submit others when the parties have agreed upon the issues: *Lumber Co. v. Lumber Co.*, 135-744; or he may change them during the trial: *Blackwell v. R. R.*, 111-151; *Buffkins v. Eason*, 112-162. Submitting an unnecessary issue, which does not prejudice the rights of the party objecting, is harmless error: *Walker v. Walker*, 151-164.

Counsel's duty to tender the issues: *Mfg. Co. v. Cloer*, 140-128; *Pollock v. Warwick*, 104-638; *Mining Co. v. Smelting Co.*, 99-445; *Simmons v. Mann*, 92-12; *Oakley v. Van Noppen*, 95-60—and if he does not, he cannot be heard to say after the trial that issues which might properly have been submitted were not: *McCall v. Galloway*, 162-353; *Davidson v. R. R.*, 156-579; *Rich v. Morisey*, 149-37; *Wagon Co. v. Byrd*, 119-460; *Walker v. Scott*, 106-56, and cases cited; *Pollock v. Warwick*, 104-638; *Alexander v. Robinson*, 85-275; *Silver Valley Co. v. Baltimore Co.*, 99-445; *Oakley v. Van Noppen*, 95-60; *Simmons v. Mann*, 92-12; *McDonald v. Carson*, 95-377; *Kidder v. McIlhenny*, 81-123; *Curtis v. Cash*, 84-41—and if a material issue is not tendered and the issues submitted are not objected to, party cannot complain, *Maxwell v. McIver*, 113-288—but it is not incumbent upon party to tender issue when court has already declared it would not be submitted, *Falkner v. Pileher*, 137-451. When the issues tendered refer to facts admitted or embraced in other issues, it is not error to refuse them: *Newkirk v. Stevens*, 152-498. Issues tendered upon evidential matter, or upon which no evidence is offered, should be refused: *Morrisette v. Cotton Mills*, 151-31; *Ives v. Lumber Co.*, 147-306; *Clothing Co. v. Stadiem*, 149-6.

Issues that are submitted by the judge without objection on the part of counsel cannot be made the ground of exception: *Carey v. Carey*, 108-267; *Cotton Mills v. Abernathy*, 115-402; *Lewis v. Foard*, 112-402; *Lowe v. Elliott*, 107-718; *Chemical Co. v. Johnson*, 101-223; *Gatling v. Boone*, 101-61; *Phifer v. Alexander*, 97-335; *Porter v. R. R.*, 97-66; *Clements v. Rogers*, 95-248; *Moore v. Hill*, 85-218; *Wilson v. Hughes*, 94-182; *Robinson v. Sampson*, 121-99; *Sharpe v. Sowers*, 152-379; *McKenzie v. McKenzie*, 153-242; *McNeeley v. Shoe Co.*, 170-278.

Where issues are so framed that the answers thereto are confused a new trial will be ordered: *Bottoms v. R. R.*, 109-72; *Allen v. Sallinger*, 105-333. Elimination of superfluous words: *Allen v. R. R.*, 119-710; *Davis v. Keen*, 142-496. It is sufficient if the issue be submitted in the language of the pleading: *McKinnon v. Morrison*, 104-354. Two propositions to which different responses might be made must not be embodied in one issue: *Carey v. Carey*, 108-271; *Mfg. Co. v. Assurance Co.*, 106-28; *Emery v. R. R.*, 102-209.

For matters to keep in mind in framing issues, see *Coxe v. Singleton*, 139-361; *Baker v. R. R.*, 118-1015; *McAdoo v. R. R.*, 105-140; *Emery v. R. R.*, 102-209; *Denmark v. R. R.*, 107-185; *Braswell v. Johnston*, 108-150; *Miller v. Miller*, 89-209; see, also, *Kimberly v. Howland*, 143-398; *Clark v. Guano Co.*, 144-64; *Wright v. Cotten*, 140-1.

Issues must not be so framed as to exclude any pertinent evidence affecting the merits, but to embrace the whole of the material allegations controverted: *Davidson v. Gifford*, 100-18.

ART. 22. VERDICT

585. General and special. A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only, leaving the judgment to the court.

Rev., s. 550; Code, s. 408; C. C. P., s. 232.

GENERAL VERDICT. A general verdict is a finding in favor of one of the parties: *Morrison v. Watson*, 95-479—where the jury responds affirmatively or negatively to the issues, *Porter v. R. R.*, 97-66.

SPECIAL VERDICT. A special verdict finds the facts, but not in favor of either party, leaving the court to apply the law to them: *Porter v. R. R.*, 97-66; *Morrison v. Watson*, 95-479—and it must find in an intelligible manner all the facts necessary to enable the court to give judgment, *State v. Hanner*, 143-652; *State v. Corporation*, 111-661; *State v. Yount*, 110-597; *State v. Oakley*, 103-408; *State v. Crump*, 104-763; *State v. Finlayson*, 113-628; *Hilliard v. Outlaw*, 92-266; *State v. Bray*, 89-480; *State v. Blue*, 84-807; *State v. Lowry*, 74-121; *State v. Curtis*, 71-56; *State v. Custer*, 65-339—and not merely state the evidence which may tend to prove them, *State v. Hanner*, 143-633; *State v. Fenner*, 166-247; nor leave an inference of fact to the judge: *State v. Allen*, 166-265. The judge may refuse to receive a special verdict, but he cannot add a fact to it: *State v. Colonial Club*, 154-177.

RETURN OF VERDICT. A party is entitled to be present when the verdict is rendered, but he may waive that right except in a capital case, and it is not necessary that counsel should be present: *Barger v. Alley*, 167-362; *State v. Austin*, 108-780; *State v. Jones*, 91-654. A special verdict being rendered in criminal action, judge should not have formal verdict entered: *State v. Spray*, 113-686; *State v. Ewing*, 108-759; *State v. Hammer*, 143-632; overruling *State v. Monger*, 107-771; *State v. Nies*, 107-820; *State v. Moore*, 107-770; *State v. Smith*, 95-680; *State v. Morris*, 104-837. A verdict “guilty of taking the money” is not larceny: *State v. Overby*, 127-514.

POLLING JURY. Jury need not be polled: *State v. Best*, 111-638; *State v. Toole*, 106-736; *State v. Jones*, 91-654—but either party in an action can have it polled, *Smith v. Paul*, 133-66; *State v. Best*, 111-638; *State v. Young*, 77-498; *State v. Sheets*, 89-543—and if polled and a juror is reluctant but assents to verdict, it is still a valid verdict, *Lowe v. Dorsett*, 125-301; *State v. Sheets*, 89-543—not a valid verdict, however, if one dissents, even though having concurred previously, *Owens v. R. R.*, 123-183. When foreman states the verdict as “guilty of murder in the first degree,” and upon a poll the others reply “guilty,” the verdict is sufficient: *State v. Walker*, 170-716.

VERDICT CONSTRUED. *Rollins v. Ebbs*, 138-140; *Johnson v. Townsend*, 122-442; *R. R. v. Purifoy*, 95-302. The verdict, whether in response to one or many issues, must establish facts sufficient to enable the court to proceed to judgment: *Emery v. R. R.*, 102-209. The verdict may be construed by reference to the pleadings, the evidence and the charge of the court: *Weldon v. R. R.*, 177-179; *Bank v. Wysong & Miles Co.*, 177-284; *Jones v. R. R.*, 176-260; *Reynolds v. Express Co.*, 172-487; *Bank v. Wilson*, 168-557; *Donnell v. Greensboro*, 164-330; *State v. Murphy*, 157-614; *Richardson v. Edwards*, 156-590; *Grove v. Baker*, 174-745. The verdict is to be construed according to its reasonable intent: *State v. Spear*, 164-452; *State v. Whisenant*, 149-515; *State v. Godwin*, 138-586.

586. Special controls general. Where a special finding of facts is inconsistent with the general verdict, the former controls, and the court shall give judgment accordingly.

Rev., s. 552; Code, s. 410; C. C. P., s. 234.

Morrison v. Watson, 95-481; *Porter v. R. R.*, 97-69.

587. Character of, for different actions. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict is in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding the property. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes.

Rev., s. 551; Code, s. 409; C. C. P., s. 233.

Cases bearing upon verdicts rendered hereunder in actions for the recovery of specific personal property: Hall v. Tillman, 110-220; Bank v. Furniture Co., 120-475; Holmes v. Godwin, 69-467—for the recovery of money only or of specific real property, Comrs. v. Lash, 89-159; Porter v. R. R., 97-66; Foster v. Hackett, 112-546; Moody v. Johnson, 112-804; Henning v. Warner, 109-406; Gilchrist v. Middleton, 107-663; Bean v. R. R., 107-731; Allen v. Sallinger, 103-14; Porter v. R. R., 97-66. In all actions except for recovery of money only or "specific real property" the court has the power to direct a special verdict: Comrs. v. Lash, 89-159; Bean v. R. R., 107-742.

588. Jury to assess damages; counterclaim. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the answer. If a counterclaim, established at the trial, exceeds the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appears that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

Rev., s. 553; Code, s. 411; C. C. P., s. 235.

Verdicts as to interest on debts: Reade v. Street, 122-301; Bank v. Furniture Co., 120-475; Greenleaf v. R. R., 91-33—on damages recovered, Lance v. Butler, 135-419—on taxes, Wilmington v. McDonald, 133-548. The trial judge has no power to reduce the amount awarded in a verdict without the consent of the person in whose favor verdict rendered: Isley v. Bridge Co., 143-51. It is for the judge to state the law as to punitive damages in a particular case, and for the jury to determine whether such damages shall be given and to fix the amount: Blow v. Joyner, 156-140.

589. Entry of verdict and judgment. Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration. If a different direction is not given by the court, the clerk must enter judgment in conformity with the verdict.

Rev., s. 554; Code, s. 412; C. C. P., s. 236.

The verdict should be returned before the judge, but by consent of parties or order of court the clerk may receive it: *Zageir v. Express Co.*, 171-692; *Barger v. Alley*, 167-362; *Mitchell v. Mitchell*, 122-332; *Ferrell v. Hales*, 119-199; *State v. Austin*, 108-780; *Petty v. Rousseau*, 94-355; but the latter course is not approved: *Tillett v. R. R.*, 166-515. And the clerk has no right to instruct the jury with reference to their verdict: *Cullifer v. R. R.*, 168-309. The court may ask the jury about the verdict if returned improperly: *Zageir v. Express Co.*, 171-692; *Tillett v. R. R.*, 166-515. If the verdict is informal, irregular or inconsistent, the judge may ask the jury to correct it: *State v. Godwin*, 138-582; *State v. Whitson*, 111-695; *State v. Whitaker*, 89-472; *State v. Arrington*, 7-571; *Britton v. Ruffin*, 123-70; *State v. Shelly*, 98-673. If it is taken by the clerk and is imperfect the judge may have the jury correct it: *Mitchell v. Mitchell*, 122-322; *Petty v. Rousseau*, 94-355; *Wright v. Hemphill*, 81-33; *Robeson v. Lewis*, 73-107; *Willoughby v. Threadgill*, 72-438; see, also, *Cole v. Laws*, 104-651.

Entering the judgment, generally: *Taylor v. Ervin*, 119-277; *Hardy v. Carr*, 104-33; *Dickerson v. Wilcoxon*, 97-309; *Kenner v. Mfg. Co.*, 91-421—by the clerk upon the verdict, *Ferrell v. Hales*, 119-199; *Jacobs v. Burgwyn*, 63-193; *Davis v. Shaver*, 61-18; *Brown v. Harding*, 170-253; s. c., 171-686. The judgment must be in accordance with the verdict: *Winn v. Finch*, 171-272. When the jury finds defendant guilty of negligence and the plaintiff of contributory negligence, when judgment should be for defendant: *Holton v. Moore*, 165-549. Entering judgment nunc pro tunc: *Pfeifer v. Drug Co.*, 171-214; *Creed v. Marshall*, 160-394. If judgment or order inadvertently entered, the court may, on application of one interested, or ex mero motu, have same corrected: *Cook v. Moore*, 100-294; *Strickland v. Strickland*, 95-471. Verdict can be rendered on Sunday: *Tuttle v. Tuttle*, 146-484. Judgment may be entered on Sunday, when: *Taylor v. Ervin*, 119-274—but not on Monday after verdict rendered Saturday night of the last week of term, *Ferrell v. Hales*, 119-199. Refusal of judgment upon verdict is appealable: *Oil Co. v. Gro. Co.*, 136-354.

590. Exceptions. 1. If an exception is taken upon the trial, it must be reduced to writing at the time with so much of the evidence or subject matter as may be material to the exception taken; the same must be entered in the judge's minutes and filed with the clerk as a part of the case upon appeal.

Objections must be made and exceptions entered in apt time: *State v. Foster*, 172-960; *Kornegay v. R. R.*, 154-389; and they should point out specifically the error complained of, *Greensboro v. McAdoo*, 110-430, and cases cited below. The exceptions must be reduced to writing, and the judge may do this himself or have it done: *Buckner v. R. R.*, 164-201. Assignments of error not based upon exceptions will be disregarded: *Rawls v. R. R.*, 172-211; *Todd v. Mackie*, 160-352; *Allred v. Kirkman*, 160-392; *Worley v. Logging Co.*, 157-490.

Exceptions must be made to all errors and all misconduct at the trial, at the time such take place, except errors in the judge's charge itself: *Jones v. High Point*, 153-371; *Moseley v. Johnson*, 144-257; *Alley v. Howell*, 141-113; *State v. Murray*, 139-540; *Hart v. Cannon*, 133-10; *Wilson v. Lumber Co.*, 131-163; *Dobson v. Ry.*, 132-900; *Phillips v. R. R.*, 130-582; *Cotton Mills v. Abernathy*, 115-402; *Posey v. Patton*, 109-455; *Lowe v. Elliott*, 107-718; *Carr v. Alexander*, 112-783; *Taylor v. Plummer*, 105-56; *State v. Braddy*, 104-737; *State v. Brown*, 100-519; *Wiggins v. Guthrie*, 101-661; *Gibbs v. Lyon*, 95-146; *Jones v. Jones*, 94-111; *Shields v. Whitaker*, 82-516; *State v. Ballard*, 79-627—but where evidence is made incompetent by statute, this is not required; exception may be taken after verdict, *Broom v. Broom*, 130-562; *Presnell v. Garrison*, 121-367; *Johnson v. Allen*, 100-131; *State v. Gee*, 92-756; *State v. Ballard*, 79-627; *Hooper v. Hooper*, 165-605. Exceptions to the reception of evidence must point out the evidence specifically and must show the nature of the error complained of: *Pope v. Pope*, 176-283; *Lynch v. Veneer Co.*, 169-169; *State v. English*, 164-498; *Stout v. Turnpike Co.*, 157-366; *Rollins v. Wicker*, 154-559; *Tilley v. Bivens*, 110-343; *Everett v. Williamson*, 107-204; *Allred v. Burns*, 106-247; *Wilhelm v. Burleyson*, 106-381; *Sumner v. Candler*, 92-634—to the rejection of evidence must show what was the proposed evidence and also that prejudice was caused by its rejection, *Knight v. Killebrew*, 86-400; *State v. Rhyne*, 109-794; *State v. McNair*, 93-628; *Sumner v. Candler*, 92-636; *State v. Purdie*, 67-326; *Street v. Bryan*, 65-619; *Bland v. O'Hagan*, 64-471; *Whitesides v. Twitty*, 30-431; *Gibson v. Terry*, 176-533; *In re Smith's Will*, 163-464; *Armfield v. R. R.*, 162-24; *Allred v. Kirkman*, 160-392. Evidence competent for some purposes, but not for all, is not ground for exception unless asked to be restricted:

Nance v. Telegraph Co., 177-313; State v. McGlammery, 173-748. An exception to evidence must show that objection was taken when evidence was offered, that it was overruled and that exception was entered: Jordan v. Furnace Co., 126-143.

Attorney's language in argument objected to, judge should write down words at once with exception: Moseley v. Johnson, 144-257; State v. Davenport, 156-597; Massey v. Alston, 173-215. Objection waived if not objected to at the time: Byrd v. Hudson, 113-203; State v. Wilson, 158-599. Where party refused, upon request of court, to state his objection to evidence excepted to, his exception will avail nothing on appeal: State v. Wilkerson, 103-337. The judge's notes, on exceptions being made, should be filed with the papers in the case: Wood v. R. R., 118-1056. Exception that there is no evidence upon which to go to the jury must be taken before verdict: Printing Co. v. Herbert, 137-317; Hart v. Cannon, 133-10; State v. Huggins, 126-1055; State v. Harris, 120-577, and many cases therein cited. Where nonsuit should have been entered, exceptions to instructions and requests for instructions will not be considered on appeal: Smith v. R. R., 145-98. That the evidence does not support the charge in the indictment should be taken advantage of before verdict and not by motion in arrest: State v. Jenkins, 164-527.

2. If there is error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same is deemed excepted to without the filing of any formal objections.

Error of law in the charge is deemed to be objected to, but a statement of fact by the judge, as of an admission, must be objected to at the time: Hardy v. Mitchell, 161-351. It is better practice to state exceptions to the charge in a motion for a new trial, but they may be stated for the first time in the case on appeal: Bank v. Sumner, 119-591; Lowe v. Elliott, 107-718; State v. Harris, 120-577; Wilson v. Lumber Co., 131-164; Bernhardt v. Brown, 118-700; Marriner v. Lumber Co., 113-52; Blackburn v. Ins. Co., 116-821; Tillett v. R. R., 116-937; Smith v. Smith, 108-365; State v. Varner, 115-744; Lee v. Williams, 112-510; Hinson v. Powell, 109-534; Taylor v. Plummer, 105-56; Boon v. Murphy, 108-187; Walker v. Scott, 106-56; Pollock v. Warwick, 104-638; McKinnon v. Morrison, 104-354—but they cannot be stated for the first time in the supreme court, being waived by failure to state them on case on appeal: Barrett v. McCrummen, 128-81; State v. Harris, 120-577; Blackburn v. Ins. Co., 116-821; Lee v. Williams, 111-200; Lowe v. Elliott, 107-718; McKinnon v. Morrison, 104-354; Pollock v. Warwick, 104-638; Scott v. R. R., 96-428; Pleasants v. R. R., 95-195; Ware v. Nesbit, 94-664; Lytle v. Lytle, 94-552; State v. Craige, 89-475; White v. Clark, 82-6; State v. Hardee, 83-619; Whisenhunt v. Jones, 80-348; State v. Seerest, 80-450; Sampson v. R. R., 70-404; State v. Jones, 69-16; Davis v. Duval, 112-833; Wilson v. Wilson, 125-527; Whitehurst v. Pettipher, 105-41. An exception for failure to give instruction requested should point out error and if it involves any question as to evidence it should be set out: Coltrane v. Lamb, 109-209—but instruction must be requested to be subject of exception for failure to charge, Emry v. R. R., 109-602.

Exceptions must be specific and not a "broadside" or general exception to the charge as given: State v. Johnson, 161-264; Jackson v. Williams, 152-203; Woodbridge v. Brown, 149-299; Streator v. Streator, 145-337; Davis v. Keen, 142-496; State v. Dewey, 139-556; Sigman v. R. R., 135-181; Kelly v. Johnson, 135-650; Joines v. Johnson, 133-487; Wilson v. Lumber Co., 131-163; Carson v. R. R., 128-95; Pierce v. R. R., 124-83; Wood v. Bartholomew, 122-177; State v. Webster, 121-586; State v. Moore, 120-570; Burnett v. R. R., 120-517; Hampton v. R. R., 120-534; State v. Melton, 120-591; Gossler v. Wood, 120-69; Andrews v. Tel. Co., 119-403; Barcello v. Hapgood, 118-712; State v. Downs, 118-1242; Kendrick v. Dellinger, 117-491; State v. Page, 116-1016; State v. Varner, 115-744; Gwaltney v. Timber Co., 115-579; Paper Co. v. Chronicle, 115-147; Shober v. Wheeler, 113-370; Ward v. R. R., 112-168; Hemphill v. Morrison, 112-757; Hopkins v. Bowers, 111-175; State v. McKinney, 111-683; Davis v. Duval, 112-833; Greensboro v. McAdoo, 110-430; Bottoms v. R. R., 109-72; Hooks v. Houston, 109-623; Hinson v. Powell, 109-534; State v. Brabham, 108-793; Everett v. Williamson, 107-204; State v. McDuffie, 107-885; Thompson v. Tel. Co., 107-449; State v. Parker, 106-711; Taylor v. Navigation Co., 105-484; Helms v. Green, 105-251; Carlton v. R. R., 104-365; McKinnon v. Morrison, 104-362; Pollock v. Warwick, 104-638; Hammond v. Schiff, 100-161; Dugger v. McKesson, 100-1; Leak v. Covington, 99-559; Newby v. Harrell, 99-149; Caudle v.

Fallen, 98-411; Sellers v. Sellers, 98-13; Boggan v. Horne, 97-268; Barber v. Roseboro, 97-192; State v. Nipper, 95-653; Clements v. Rogers, 95-248; Pleasants v. R. R., 95-195; Williams v. Johnston, 94-633; Lytle v. Lytle, 94-522; McDonald v. Carson, 94-497; State v. Eliason, 91-564; Bost v. Bost, 87-477—and must be stated separately, in articles numbered, and no exception should contain more than one proposition, Gwaltney v. Assurance Society, 132-925—but general exception sufficient if only one proposition of law is in charge, Mitchell v. Baker, 129-63. An appellant is not bound to except to an instruction when there is no evidence to warrant it: Barrett v. Brewer, 143-88. See section 642.

Rev., s. 554; Code, s. 412; C. C. P., s. 236.

591. Motion to set aside. The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion can only be heard at the same term at which the trial is had. When the motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had.

Rev., s. 554; Code, s. 412; C. C. P., s. 236.

For case on appeal, see section 642. Motion for new trial must be made and heard at the same term the case is first tried, and there can be no continuance of the motion: Turner v. Davis, 132-187; England v. Duckworth, 75-309; Flowers v. Alford, 111-248; Clemmons v. Field, 99-400; Beck v. Bellamy, 93-129; Moore v. Hinnant, 90-163; Quincy v. Perkins, 76-295—but, by consent of both parties, the trial judge may hear the motion at a subsequent time, Myers v. Stafford, 114-231.

Application for a new trial, except for error of law in the conduct of the trial, is addressed solely to the discretion of the judge, which he must exercise by a sound and enlightened judgment, and his decision is not appealable unless this discretion has been grossly abused and resulted in oppression: Hoke v. Whisnant, 174-658; Fowler v. Murdock, 172-349; Settee v. Electric Ry., 170-365; State v. Hancock, 151-699; Jarrett v. Trunk Co., 142-466; Slocumb v. Construction Co., 142-349; Bird v. Bradburn, 131-490; Benton v. R. R., 122-1007; Edwards v. Phifer, 120-405; State v. Perry, 121-533; Hinkle v. R. R., 109-472; Allison v. Whittier, 101-490; State v. Braddy, 104-737; State v. Harper, 101-761; State v. Rogers, 94-860; Jones v. Parker, 97-33; Owens v. Phelps, 95-286; Spence v. Clapp, 95-545; Carson v. Dellinger, 90-226; State v. Gould, 90-658; State v. Brittain, 89-481—and where he sets it aside in his discretion it is not necessary to find and report the facts, Bird v. Bradburn, 131-490, and cases cited. Every presumption is in favor of the verdict, and it should not lightly be set aside: Cable v. R. R., 122-902. Judge must state whether or not he set the verdict aside “in his discretion”: Jarrett v. Trunk Co., 142-466; Abernethy v. Yount, 138-337. The verdict having been set aside, not as a matter of discretion, but upon a ruling as to its legal effect, an appeal lies: Tuthill v. R. R., 174-77; Grove v. Baker, 174-745; Teeter v. Military School, 165-564; Oil Co. v. Grocery Co., 136-354; Johnson v. Reformers, 135-385; Wood v. R. R., 131-48; Thomas v. Meyers, 87-31; Gay v. Nash, 84-333—and in such case the judge should find and report the facts, Bird v. Bradburn, 131-490; Moore v. Edmiston, 70-471; Johnson v. Bell, 74-355.

Judge cannot reverse the answer of a jury, though he may set the verdict aside: Sprinkle v. Wellborn, 140-163—and cannot amend or modify, Hemphill v. Hemphill, 99-436; Leggett v. Leggett, 88-108; Shields v. Lawrence, 72-43. Cannot set aside a verdict of not guilty: State v. Craig, 176-740. Where one material issue is found for the defendant and the others for the plaintiff, judgment should not be for plaintiff without setting aside the other finding: Green v. Miller, 161-25. The court may grant a partial new trial by setting aside the finding on some issues and retaining others: Lumber Co. v. Branch, 158-251; Gregg v. Wilmington, 155-18; Tuttle v. Tuttle, 146-484; Burnett v. Mills Co., 152-35; Jarrett v. Trunk Co., 144-299; Benton v. Collins, 125-83; Satterthwaite v. Goodyear, 137-304; Strother v. R. R., 123-197; Mitchell v. Mitchell, 122-332; Mfg. Co. v. R. R., 117-579; Mining Co. v. Smelting Co., 122-542; Rittenhouse v. R. R., 120-544; Nathan v. R. R., 118-1066; Pickett v. R. R., 117-616; Blackburn v. Ins. Co., 116-821; Tillett v. R. R., 115-662; Jones v. Swepson, 94-700; Boing v. R. R., 91-199;

Jones v. Mial, 89-89; Lindley v. R. R., 88-547; Crawford v. Mfg. Co., 88-554; Roberts v. R. R., 88-560; Burton v. R. R., 84-192; Meroney v. McIntyre, 82-103; Holmes v. Godwin, 71-306; Barnes v. Brown, 69-439; Key v. Allen, 7-523. The court may set aside a finding upon an immaterial issue and render judgment upon the others: Chadwick v. Kirkman, 159-259.

A motion for new trial on the ground that the verdict is against the weight of the evidence is addressed entirely to the discretion of the court below and not reviewable unless it is shown that the judge was influenced by an erroneous view of the law: Cates v. Tel. Co., 151-497; Bank v. Ins. Co., 150-770; Clothing Co. v. Bagley, 147-37; Davenport v. Terrell, 103-53; McCord v. R. R., 134-53; State v. Rose, 129-575; Whitted v. Fuquay, 127-68; Jordan v. Farthing, 117-181; Ferrell v. Thompson, 107-420; Fertilizer Co. v. Reams, 105-283; McKinnon v. Morrison, 104-354; Spruill v. Ins. Co., 120-141; State v. Maultsby, 130-664; State v. Ellsworth, 131-773; Whitehurst v. Pettipher, 105-40; Redmond v. Stepp, 100-212; Goodson v. Mullin, 92-211; Thomas v. Myers, 87-31; Brink v. Black, 74-329; Watts v. Bell, 71-405; Vest v. Cooper, 68-131.

Motion for new trial for newly discovered evidence: State v. Lilliston, 141-857; Wilkie v. R. R., 127-203; Faison v. Williams, 121-152; Clark v. Riddle, 118-692; Nathan v. R. R., 118-1066; Sledge v. Elliott, 116-716; State v. DeGraff, 113-688; Ferrell v. Thompson, 107-420; Brown v. Mitchell, 102-347; Redmond v. Stepp, 100-212; Carson v. Dellinger, 90-226; State v. Starnes, 97-423; Dupree v. Ins. Co., 93-237; Munden v. Casey, 93-97; Henry v. Smith, 78-27; Shehan v. Malone, 72-59; Holmes v. Godwin, 69-467; Bledsoe v. Nixon, 69-81. **The motion must be made in superior court at the trial term, or in supreme court on appeal, or in lower court at next term after decision handed down:** Allen v. Gooding, 174-271; Smith v. Moore, 150-158; Lancaster v. Bland, 168-377; Stilley v. Planing Mills, 161-517. **What must be shown on application:** Alexander v. Cedar Works, 177-536; Steeley v. Lumber Co., 165-27; Johnson v. R. R., 163-431; Warwick v. Taylor, 163-68. **The court may retain the finding on one issue and submit a new issue upon newly discovered evidence:** Sanford v. Junior Order, 176-443.

The court may set aside the verdict for excessive or inadequate damages, and this action is not reviewable: Decker v. R. R., 167-26; Billings v. Observer, 150-540; Boney v. R. R., 145-248; Isley v. Bridge Co., 143-53; Benton v. Collins, 125-83; Phillips v. Tel. Co., 130-513; Burns v. R. R., 125-304; see, also, Norton v. R. R., 122-910. **The remedy for contradictory and inconsistent findings is to set aside the verdict:** Hardy v. Mitchell, 156-76; Temple v. Ins. Co., 124-66; Allen v. Sallinger, 105-339; Smith v. Fite, 98-517; Porter v. R. R., 97-66; Morrison v. Watson, 95-479; Turrentine v. R. R., 92-638—if it is too late to have it reformed by the jury, Brown v. Lumber Co., 117-296; Allen v. Sallinger, 105-339. **Setting aside the verdict for defect or misconduct of juror:** Miller v. Bank, 176-152; State v. Little, 174-793; Lewis v. Fountain, 168-277; State v. McKenzie, 166-290; State v. Drakeford, 162-667; Murdock v. R. R., 159-131; State v. Watkins, 159-480; Urquhart v. R. R., 156-582.

The judge has unquestioned power to set aside verdict, when there is no evidence to support it: Brown v. Power Co., 140-333. An agreement empowering judge to sign judgment out of term gave him no power after adjournment of term to consider motion to set aside verdict: Knowles v. Savage, 140-372. The reason of the judge for setting aside a verdict, if insufficient, is immaterial where there appears a valid reason in the record for sustaining his rulings: Metal Co. v. Railroad, 145-293. Appellant should except to refusal of new trial, if refusal is not discretionary, in order to have his decision reviewed: Grant v. Grant, 109-710. Irregularities occurring on trial below for which judge might set aside verdict, not sufficient ground to support a motion in supreme court for a new trial: Daniels v. Fowler, 123-35. Where defendant introduces no evidence and excepts to nothing, he cannot move for new trial on the ground that the testimony did not justify the verdict: State v. Leach, 119-828. Only the errors pointed out in the motion for new trial will be considered by the supreme court, all others being waived: Leak v. Covington, 99-559; but see Lowe v. Elliott, 107-718.

When judgment non obstante veredicto may be granted: Fleming v. Sexton, 172-250; Fowler v. Murdock, 172-349; Todd v. Mackie, 160-352; Baxter v. Irvin, 158-277; Nall v. McMath, 177-183; Sutton v. Walters, 118-495; Harrison v. Ray, 108-215; Walker v. Scott, 106-57; Ward v. Phillips, 89-215; Rowlands v. Windley, 82-131; Moye v. Petway, 76-327.

SUBCHAPTER VIII. JUDGMENT

ART. 23. JUDGMENT

592. **Defined.** A judgment is either interlocutory or the final determination of the rights of the parties in the action.

Rev., s. 555; Code, s. 384; C. C. P., s. 216.

FINAL JUDGMENTS. A judgment is final which decides the case upon its merits, without reservation for other and future directions, so that it is not necessary to bring the matter again before the court: Sanders v. May, 173-47; Johnson v. Roberson, 171-194; Bunker v. Bunker, 140-18; Flemming v. Roberts, 84-532.

A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them, and does not include matters which might have been brought in but which were not joined or embraced in the pleadings: Mann v. Mann, 176-353; Northeott v. Northeott, 175-148; Stelges v. Simmons, 170-42; Hobgood v. Hobgood, 169-485; McMillan v. Teachey, 167-88; Ferebee v. Sawyer, 167-199; Leroy v. Steamboat Co., 165-109; Clothing Co. v. Hay, 163-495; Coltrane v. Laughlin, 157-282; Shakespeare v. Land Co., 144-516; Tyler v. Capeheart, 125-64; Wagon Co. v. Byrd, 119-460. **When parol evidence may be used to show what was adjudicated:** Cropsey v. Markham, 171-43. **A judgment for bailee which does not include bailor's rights is not an estoppel:** McLaughlin v. R. R., 174-182.

A judgment as a final determination of the rights involved in the controversy is an estoppel against the parties and their privies: Holloway v. Durham, 176-550; Bank v. Dew, 175-79; Pinnell v. Burroughs, 168-315; s. c., 172-182; Buchanan v. Hedden, 169-222; Mutual Assn. v. Edwards, 168-378; Owen v. Needham, 160-381; Southerland v. R. R., 148-442; Shakespeare v. Land Co., 144-516; Bunker v. Bunker, 140-18; Scott v. Life Assn., 137-515; Parker v. Taylor, 133-103; Trust Co. v. Benbow, 131-413; Willoughby v. Stevens, 132-254; Aiken v. Lyon, 127-176; Weeks v. McPhail, 128-130; Hinton v. Pritchard, 126-8; Stancill v. James, 126-190; Tyler v. Capeheart, 125-64; Land Co. v. Guthrie, 123-185; Bear v. Comrs., 122-434; State v. Joyce, 121-610; Hussey v. Hill, 120-312; Person v. Montgomery, 120-111; Chamblee v. Broughton, 120-170; Morrison v. Craven, 120-327; Wagon Co. v. Byrd, 119-460; Steam Works v. Dunn, 119-79; Fleming v. Strohecker, 117-366; Jordan v. Farthing, 117-181; Jones v. Beaman, 117-259; Turner v. Rosenthal, 116-437; Baugert v. Blades, 117-221; Miller v. Asheville, 112-759; Garrison v. Finley, 112-652; Edwards v. Jones, 113-453; Ladd v. Byrd, 113-466; Wilson v. Craige, 113-463; Donnelly v. Wilcox, 113-408; Bryan v. Alexander, 111-142; Fowler v. Osborne, 111-404; Henning v. Warner, 109-406; Dickens v. Long, 109-172; Moore v. Garner, 109-157; Collins v. Smith, 109-468; Davie v. Davis, 108-501; Stewart v. Register, 108-588; Peck v. Culberson, 104-425; Allen v. Salinger, 103-14; Spivey v. Harrell, 101-48; Rogers v. Kinsey, 101-559; Warden v. McKinnon, 99-251; Jones v. Coffey, 97-347; Ward v. Lowndes, 96-367; Benton v. Benton, 95-559; Williams v. Clouse, 91-322; Grantham v. Kennedy, 91-148; Williams v. Batchelor, 90-364; Vick v. Pope, 81-22; Greene v. Branton, 16-504; Frazier v. Felton, 8-231; Johnson v. Pate, 90-334. **This applies also between parties on the same side, if their rights were adjudicated:** Riddle v. Riddle, 176-485; McKimmon v. Caulk, 170-54; s. c., 167-411; Baugert v. Blades, 117-221; McNeil v. Hodges, 105-55; Hulbert v. Douglas, 94-128; Hughes v. Boone, 81-204; Clark v. Williams, 70-679; Parrish v. Graham, 129-230; Banking Co. v. Morehead, 126-282; Proctor v. Ins. Co., 124-268.

A consent judgment is binding upon the parties and may not be set aside by the court without consent: Holloway v. Durham, 176-550; Simmons v. McCullen, 163-409; Bank v. McEwen, 160-414; Lynch v. Loftin, 153-270; **and it may include matters not strictly within the pleadings:** Holloway v. Durham, 176-550. **A judgment against one joint tortfeasor is not an estoppel as to another:** Gadsden v. Crafts, 175-358; s. c., 173-418. **Effect of judgment as to caveat:** In re Will of Lloyd, 161-557. **Effect of judgment in proceeding to establish boundary:** Whitaker v. Garren, 167-658. **Judgment as an estoppel in a claim for personalty:** Ludwick v. Penny, 158-104. **Judgment as an estoppel in partition:** Propst v. Caldwell, 172-594; McKimmon v. Caulk, 170-54; Gillam v. Edmondson, 154-127. **An alternative or conditional judgment is invalid:** Puette v. Mull, 175-535; Lloyd v. Lumber Co., 167-97.

How far a judgment of a court in another state is conclusive: Levin v. Gladstein, 142-482; Roberts v. Pratt, 158-50; s. c., 152-731.

JUDGMENTS NOT FINAL. An order of sale in partition is not a final decree: In re Dickerson, 111-108. An action is not ended by the rendition of a judgment; it remains open for all motions and proceedings for its enforcement: Turner v. Holden, 109-182. An order or decree or unexecuted judgment made during a term of court is in fieri and subject to be vacated or modified during the term: Culbreth v. Smith, 124-289; Gwinn v. Parker, 119-19; State v. Manly, 95-661; Wilson v. Hughes, 94-182; State v. Brittain, 93-587. An interlocutory order or decree is under the control of the court, and, upon good cause shown, can be amended, modified, changed, or rescinded, as the court may think proper: Maxwell v. Blair, 95-317; Alexander v. Alexander, 120-472; Jackson v. McLean, 96-474; Welch v. Kingsland, 89-179; Miller v. Justice, 86-26; Shinn v. Smith, 79-310; Worth v. Gray, 59-4; Ashe v. Moore, 6-383; see, also, Johnson v. Roberson, 171-194. As to whether interlocutory orders in ancillary proceedings can be amended out of term, see Coates v. Wilkes, 94-174.

Construction of a decree or judgment: Lamb v. Major, 146-531. Judgments are not contracts so as to be subject to the restriction of the federal constitution as to impairment of contracts: Mottu v. Davis, 151-237.

593. Default judgment before clerk. In all civil actions upon notes, bills, bonds, stated accounts, balances struck, and other evidences of indebtedness within the jurisdiction of the superior court, the summons may be returnable before the clerk of the superior court issuing the same on the first Monday of the month next succeeding the issue of the summons, if issued more than ten days prior thereto, and, if not, then on the first Monday of the next succeeding month; and if a verified complaint is filed at the time the summons is issued and a copy served on the defendant at the time of the service of the summons, and the defendant fails or neglects to file a verified answer raising issues of fact upon the matters and things alleged in the complaint on or before the second Monday of the month in which the summons is made returnable, then it shall be the duty of the clerk, on the said second Monday, upon satisfactory proof of the cause of action, to enter judgment in favor of the plaintiff and against the defendant upon the demand set out in the complaint, which judgment the clerk shall docket in the same manner as is now provided by law for docketing judgments taken at term. Judgments so taken and docketed shall be and become judgments of the superior court in the same manner and to the same extent and be of same force and effect as now given to judgments of the superior court taken in term before the judge. If before the expiration of the time given herein for filing the answer the defendant shall file a duly verified answer joining issue of fact upon the matters and things alleged in the complaint, the clerk shall transfer the cause to the civil issue docket for trial at term time: Provided, either party may at any time within ten days after the rendition of judgment by the clerk appeal from such judgment to the superior court, to be heard at term.

1919, c. 156.

594. When clerk transfers to term for default judgment. In cases where the clerk has no jurisdiction and the plaintiff shall be entitled to have judgment by default and inquiry or judgment by default final, the clerk shall transfer the same to the court at term time to be determined by the court under existing procedure.

1919, c. 304, s. 9.

595. By default final. Judgment by default final may be had on failure of defendant to answer—

Judgment by default should be drawn to conform strictly to the complaint: Currie v. Mining Co., 157-209; Junge v. MacKnight, 137-286. A failure to take judgment by default as soon as allowable does not work a discontinuance: University v. Lassiter, 83-38. The term

of court at which complaint filed within the first three days thereof is practically the return term at which judgment is allowable: *Brown v. Rhinehart*, 112-772; *Roberts v. Allman*, 106-391. Where plaintiff was entitled to judgment by default final, but judgment by default and inquiry entered, and upon inquiry being executed, judgment was rendered, judgment valid: *Scott v. Life Assn.*, 137-515. No notice is required of a motion for judgment by default for want of an answer: *Reynolds v. Machine Co.*, 153-342. A general order extending time to file pleadings does not affect a judgment by default taken before the order: *Ibid.* When an answer is filed denying the allegations of complaint, a judgment by default is improper: *Harrison v. Dill*, 169-542; *Investment Co. v. Kelly*, 123-388. When a new party is brought in and no complaint is filed as to him: *Vass v. Bldg. Assn.*, 91-55; or when answer is filed within the time limited but after judge has left the court: *Foley v. Blank*, 92-476.

Judgment by default final held proper in the following cases: *Streator v. Streator*, 145-337; *Banking Co. v. Duke*, 121-110; *Cowles v. Cowles*, 121-272; *Williams v. Lumber Co.*, 118-936; *Griffin v. Light Co.*, 111-434; *Hartman v. Farrior*, 95-177; *Alford v. McCormac*, 90-151; *Rogers v. Moore*, 86-86; *Wynne v. Prairie*, 86-73; *Walton v. Walton*, 80-26; *Adrian v. Jackson*, 75-536; *School v. Peirce*, 163-424.

1. Where the complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation. Upon proof of personal service of summons, or of service of summons by publication, on one or more of the defendants, and upon the complaint being verified, judgment shall be entered as provided in the last section for the amount mentioned in the complaint, against the defendant or defendants, or against one or more of several defendants.

If plaintiff's claim for damages is precise and fixed by agreement, or can be rendered certain by computation, failure to answer admits the claim: *Scott v. Life Assn.*, 137-522; *Cowles v. Cowles*, 121-272; *Parker v. Smith*, 64-291; *Hyatt v. Clark*, 169-178; *Miller v. Smith*, 169-210; *Scott v. Life Assn.*, 137-515. Judgment by default final is irregular when in action on contract the amount due cannot be ascertained by computation: *Battle v. Baird*, 118-854; *Skinner v. Terry*, 107-103—when action sounds in damages for an unliquidated money demand, *Moore v. Mitchell*, 61-304; *Hartsfield v. Jones*, 49-309—when action is on bail bond, *Roulhae v. Miller*, 90-174—when action is on implied contract for goods sold and delivered: *Jeffries v. Aaron*, 120-167; *Witt v. Long*, 93-388—when action to recover money collected on collateral notes and embezzled, *Stewart v. Bryan*, 121-46—when complaint fails to set forth a contract to pay a certain sum, or a sum that can be ascertained therefrom, *Faucette v. Ludden*, 117-173; *Hartman v. Farrior*, 95-177. Breach of an official bond is not a "breach of an express or implied contract to pay" hereunder: *Battle v. Baird*, 118-854. The "return term" spoken of in the section before amended was the one at which the complaint must be filed before the third day thereof: *Brown v. Rhinehart*, 112-772; but see *Roberts v. Allman*, 106-391.

The complaint must be verified: *Miller v. Curl*, 162-1; *Cole v. Boyd*, 125-496; *Phifer v. Ins. Co.*, 123-410; *Hammerslaugh v. Farrior*, 95-135; *Witt v. Long*, 93-388. Judge may allow error in verification to be corrected: *Best v. Dunn*, 126-560. When complaint unverified judgment should be by default and inquiry: *Cole v. Boyd*, 125-496; *Best v. Dunn*, 125-561. There must be personal service of summons for a personal judgment: *Currie v. Mining Co.*, 157-209; *Flowers v. King*, 145-234. The trial court can permit answer to be filed after supreme court has decided that judgment by default should have been entered for plaintiff: *Cook v. Bank*, 131-96; *Griffin v. Light Co.*, 111-434.

2. Where the defendant, by his answer in such action, does not deny the plaintiff's claim, but sets up a counterclaim, amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of his claim over the counterclaim, in like manner in any such action, upon the plaintiff's filing with the court a statement admitting the counterclaim, which statement must be annexed to and be a part of the judgment roll. Or the court may in

its discretion, order the pleadings to be so amended and the action severed as to entitle the plaintiff to judgment upon all of the claims admitted over and above the setoff or counterclaim pleaded by the defendant; and, upon application of the plaintiffs, shall enter judgment for the plaintiff for so much of the claim as is admitted. The action shall thereupon be continued as to subsequent proceedings, as if it had been brought for the remainder of the claim, and the counterclaim or setoff as pleaded by the defendant shall apply thereto. Said remainder of the claim shall in any event be sufficient to cover the full amount of the principal and interest set up by the defendant in the counterclaim or setoff, and an amount in excess thereof, if in the discretion of the court the same is necessary, the court being empowered to designate and determine what part of the plaintiff's claim shall be held for the subsequent proceedings herein referred to.

In case where counterclaim set up exceeds plaintiff's claim, defendant not entitled to judgment by default when formal denial entered by leave of court: *Bernhardt v. Dutton*, 146-206; *Tillinghast v. Cotton Mills*, 143-268; but see *Wilmington v. Bryan*, 141-682.

3. In actions where the service of the summons was by publication, the plaintiff may, in like manner, apply for judgment, and the court must thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant is not a resident of the state, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment the court may in its discretion require the plaintiff to cause to be filed satisfactory security to abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under and by virtue of said judgment, in case the defendant or his representatives apply and are admitted to defend the action, and succeed in such defense.

4. In actions for the recovery of real property, or for the possession thereof, upon the failure of the defendant to file the undertaking required by law, or upon failure of his sureties to justify according to law, unless the defendant is excused from giving such undertaking before answering.

There may be judgment by default final for real property in action of ejectment, and default and inquiry as to mesne profits: *Jones v. Best*, 121-154. Where action brought against landlord and tenant and tenant fails to answer, the complaint being verified, judgment against tenant will be entered: *Harkey v. Houston*, 65-137. In action to determine conflicting claims to real property, failure of defendant to answer entitles plaintiff to judgment without inquiry or proof of facts: *Junge v. MacKnight*, 137-285; *Eason v. Dortch*, 136-293.

AS TO THE UNDERTAKING. See section 495. The undertaking specified may be given at the trial in the discretion of the court: *Carraway v. Stanell*, 137-472. Judgment by default for failure of defendant to give bond should not be awarded until notice to defendant be given to file bond: *Becton v. Dunn*, 137-563; *Cooper v. Warlick*, 109-672; *McMillan v. Baker*, 92-110; *Russell v. Saunders*, 48-432; *Brittain v. Howell*, 19-107. Failure to give undertaking when required herein entitles plaintiff to judgment by default: *Credle v. Ayers*, 126-15; *Norton v. McLaurin*, 125-185; *Viek v. Baker*, 122-98; *Jones v. Best*, 121-154. And the complaint need not be verified: *Patrick v. Dunn*, 162-19.

Rev., s. 556; Code, ss. 385, 390; C. C. P., s. 217; 1870-1, c. 42; 1869-70, c. 193, s. 4; 1919, c. 26.

For interest on judgment, see *Interest*, s. 2310.

In Gaston County judgment by default final may be taken at any of the criminal terms of the superior court. 1915, c. 114.

596. By default and inquiry. In all other actions, except those mentioned in the preceding section, when the defendant fails to answer and upon a like proof, judgment by default and inquiry may be had as provided in the last section but one, and inquiry shall be executed at the next succeeding term. If the taking of an intricate or long account is necessary to execute properly the inquiry, the court, at the return term, may order the account to be taken by the clerk of the court or some other fit person, and the referee shall make his report at the next succeeding term; in all other cases the inquiry shall be executed by a jury, unless by consent the court is to try the facts as well as the law.

Rev., s. 557; Code, s. 386.

In Gaston County judgment by default and inquiry may be taken at any of the criminal terms of the superior court. 1915, c. 114.

Differences between judgment by default final and judgment by default and inquiry pointed out: *Junge v. MacKnight*, 137-288; *Eason v. Dortch*, 136-294. A judgment by default and inquiry admits only a cause of action and carries only nominal damages and costs, and the burden of proving damages beyond a penny is still upon the plaintiff: *Armstrong v. Asbury*, 170-160; *Plumbing Co. v. Hotel Co.*, 168-577; *Graves v. Cameron*, 161-549; *Blow v. Joyner*, 156-140; *Stockton v. Mining Co.*, 144-595; *Osborn v. Leach*, 133-427; *Darden v. Blount*, 126-250; *Cowles v. Cowles*, 121-277; *Banks v. Mfg. Co.*, 108-282; *Lee v. Knapp*, 90-171; *Anthony v. Estes*, 101-541; *Rogers v. Moore*, 86-86; *Parker v. Smith*, 64-291; *Parker v. House*, 66-374.

Judgment by default and inquiry for want of an answer and not by default final may be entered when in action on contract the amount due cannot be ascertained by computation: *Battle v. Baird*, 118-854; *Faucette v. Ludden*, 117-173; *Hartman v. Farrior*, 95-177; *Skinner v. Terry*, 107-103—when action is on official bond, *Battle v. Baird*, 118-854—when action is for commissions as consignee, when defendant interposes counterclaim for unliquidated damages, *Faucette v. Ludden*, 117-170—when action sounds in damages for an unliquidated money demand, *Moore v. Mitchell*, 61-304; *Hartsfield v. Jones*, 49-309—when action on implied contract for goods sold and delivered, or for services, *Jeffries v. Aaron*, 120-167; *Witt v. Long*, 93-388; *Hartman v. Farrior*, 95-177; *Rogers v. Moore*, 86-86; *Wynne v. Prairie*, 86-73—in an action for damages for negligence generally, *Manning v. R. R.*, 122-824—in an action for conversion and embezzlement, *McLeod v. Nimocks*, 122-437; *Stewart v. Bryan*, 121-46.

The "return term" spoken of, in the section before amended, is the one at which the complaint must be filed before the third day thereof: *Brown v. Rhinehart*, 112-772—but if complaint filed after return term it stands on the file during the first three days of the next succeeding term, and judgment by default for want of answer at that term may be rendered, *Roberts v. Allman*, 106-391.

597. By default for defendant. If the answer contains a statement of new matter constituting a counterclaim, and the plaintiff fails to reply or demur thereto, the defendant may move for such judgment as he is entitled to upon such statement; and if the case requires it, an order for an inquiry of damages by a jury may be made.

Rev., s. 558; Code, s. 249; C. C. P., s. 106.

This section regarded as not an express provision in favor of a defendant whose counterclaim exceeds plaintiff's claim, and intimation made that there should be separate judgments: *Wilmington v. Bryan*, 141-682. Cases illustrating doctrine of section: *Bank v. Ireland*, 122-576; *Rumbough v. Improvement Co.*, 109-703; *Dempsey v. Rhodes*, 93-120; *Barnhardt v. Smith*, 86-473. A defendant is entitled to judgment upon a counterclaim if no reply or demurrer has been interposed: *Rountree v. Britt*, 94-104. See section 543. When an administrator recovers judgment upon his claim and the defendant upon a counterclaim, the former is to be paid in full, and the latter according to its order among the debts of the estate: *Rountree v. Britt*, 94-104.

598. Rendered in vacation. In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election.

Rev., s. 559; Code, s. 230; 1871-2, c. 3.

Judgments may be taken in vacation by consent: *Westhall v. Hoyle*, 141-337; *Benbow v. Moore*, 114-263; *Bank v. Gilmer*, 118-668; *Coates v. Wilkes*, 94-174; *McDowell v. McDowell*, 92-227; *Shackleford v. Miller*, 91-181; *Hardin v. Ray*, 89-364; *Harrell v. Peebles*, 79-26; *Hervey v. Edmunds*, 68-243. Amendment of judgment by judge after last session of court, without the consent and in the absence of the opposing counsel, is invalid: *Hinton v. Ins. Co.*, 116-22. A judgment rendered in term but signed in vacation is a judgment of the term: *Land Co. v. Chester*, 170-399.

599. On frivolous pleading. If a demurrer, answer or reply is frivolous, the party prejudiced thereby may apply to the court or judge for judgment thereon, which may be given accordingly.

Rev., s. 560; Code, s. 388; C. C. P., s. 218.

For sham and irrelevant defense, see this chapter, s. 510.

For irrelevant, redundant, and indefinite pleadings, see this chapter, s. 537.

When frivolous answer filed judgment can be rendered for plaintiff on a note, complaint being verified: *Bank v. Pearson*, 119-494—so also when a frivolous demurrer interposed plaintiff entitled to judgment, *Joyner v. Roberts*, 112-113; *Cowan v. Baird*, 77-201. This section simply puts the demurrer out of the way and leaves the party prejudiced by it to obtain his judgment as if it had not been filed: *Skinner v. Terry*, 107-108. Judgment will not be rendered in supreme court upon a frivolous demurrer when motion was not made in lower court: *Parker v. R. R.*, 150-433.

600. Mistake, surprise, excusable neglect. The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding.

Rev., s. 513; Code, s. 274; 1893, c. 81; C. C. P., s. 133.

APPLICATION OF SECTION. This applies to mistake of fact and not of law: *Phifer v. Ins. Co.*, 123-405; *Skinner v. Terry*, 107-103. "Surprise" does not mean astonishment at the action of the court: *Ibid.* This applies to judgments rendered at a former term: *Gold v. Maxwell*, 172-149; *McCulloch v. Doak*, 68-267; *Clemmons v. Field*, 99-400; *Beck v. Bellamy*, 93-129; *State v. Bennett*, 93-503; see *Johnson v. Marcom*, 121-83—for the reason that an order or decree made during a term of court is *in fieri* and can be vacated or modified during such term: *Gwinn v. Parker*, 119-19; *Harper v. Sugg*, 111-324. A judgment rendered conformable to a verdict prior to the passage of the act (chap. 81, 1893) cannot be set aside hereunder: *Morrison v. McDonald*, 113-327; *Brown v. Rhinehart*, 112-772. As to setting aside a consent judgment, see *Gardiner v. May*, 172-192; *Harrison v. Dill*, 169-542; *Hairston v. Garwood*, 123-345; *Kerchner v. McEachern*, 93-447; *Vaughan v. Gooch*, 92-524. An application to set aside an irregular judgment does not come under this section: *Becton v. Dunn*, 137-559; *Cowles v. Hayes*, 69-406; *Vick v. Pope*, 81-22; *Monroe v. Whitted*, 79-508; *Mabry v. Erwin*, 78-45; *Estes v. Rash*, 170-341; *Massie v. Hainey*, 165-174; *McLeod v. Gooch*, 162-122; *Hardware Co. v. Buhmann*, 159-511; *Calmes v. Lambert*, 153-248; the remedy in this case is by motion and not by independent action: *Craddock v. Brinkley*, 177-125; *Cox v. Boyden*, 167-320. The judgment will not be set aside when the parties are present and have opportunity to be heard: *Mann v. Mann*, 176-353.

JURISDICTION. The order should be made by the judge and not by the clerk: *Maxwell v. Blair*, 95-317; *Griel v. Vernon*, 65-76. Relief may also be had in the supreme court: *Bernhardt v. Brown*, 118-710; *Summerlin v. Cowles*, 107-459; *State v. Willis*, 106-804; *Cook v.*

Moore, 100-294; Wiley v. Logan, 94-564; Scott v. Queen, 95-340; Williamson v. Boykin, 104-100; Farrar v. Staton, 101-78; Wade v. Newbern, 73-318.

PROCEDURE IN OBTAINING ORDER. For procedure generally, see Norton v. McLaurin, 125-185. Judgment set aside hereunder only on motion and not by an independent action: Ins. Co. v. Scott, 136-157. Notice of motion to set aside must be given adverse party: Johnson v. Marcom, 121-83; Harper v. Sugg, 111-324; Coor v. Smith, 107-430; Allison v. Whittier, 101-490—and may be served upon attorney of record, Branch v. Walker, 92-87. As to rules of evidence in hearing motions to set aside judgments: Stancill v. Gay, 92-455. Motion to set aside for causes mentioned must be made within one year from rendition where summons personally served: Lee v. McCracken, 170-575; Currie v. Mining Co., 157-209; Adams v. Joyner, 147-77; Ins. Co. v. Scott, 136-157; Clement v. Ireland, 129-220; Banking Co. v. Duke, 121-111; Roberts v. Allman, 106-391; Ruffin v. Harrison, 91-398; Young v. Greenlee, 85-593; McLean v. McLean, 84-366; Moore v. Hinnant, 90-163; Askew v. Capehart, 79-17; McDaniel v. Watkins, 76-399—but if not personally served, within one year from actual notice of judgment, McLean v. McLean, 84-366; DePriest v. Patterson, 85-378. The burden of showing mistake, surprise or excusable neglect is on the applicant for relief: Jeffries v. Aaron, 120-167; Mauney v. Gidney, 88-200; Grant v. Edwards, 88-246; Kerchner v. Baker, 82-169; Sluder v. Rollins, 76-271; Weaver v. Jones, 82-440; Clayton v. Johnston, 82-423.

There is no rule that affidavits should be filed before the motion hereunder is heard: Jones v. Swepson, 94-700. Where supreme court reverses decision of lower court upon the motion to set aside judgment and sends it back for a rehearing it is to be heard de novo, and any competent evidence, whether introduced on former hearing or not, can be offered: *Ibid.* Where motion was made in term time and by inadvertence or mistake a party fails to take notice, the court may allow party opportunity to be heard: Hemphill v. Moore, 104-380. The motion should be made in the county where the judgment was rendered: Cahoon v. Brinkley, 176-5.

The application should show not only mistake or excusable neglect, but also a meritorious defense: Land Co. v. Wooten, 177-248; Crumpler v. Hines, 174-283; Cahoon v. Brinkley, 176-5; Lumber Co. v. Cottingham, 173-323; Hyatt v. Clark, 169-178; Minton v. Hughes, 158-587; Stockton v. Mining Co., 144-595; Osborn v. Leach, 133-427; Turner v. Machine Co., 133-381; Pepper v. Clegg, 132-313; Norton v. McLaurin, 125-185.

FINDINGS AND ORDERS OF JUDGE. The facts should be found by the judge, and his findings are not reviewable: Lumber Co. v. Blue, 170-1; Harrison v. Dill, 169-542; Smith v. Holmes, 148-210; Allen v. McPherson, 168-435; Stockton v. Mining Co., 144-595; Osborn v. Leach, 133-427; Pepper v. Clegg, 132-313; Morris v. Ins. Co., 131-212; Koch v. Porter, 129-132; Norton v. McLaurin, 125-185; Marsh v. Griffin, 123-660; Marion v. Tilley, 119-473; Sikes v. Weatherly, 110-131; Albertson v. Terry, 108-75; Taylor v. Pope, 106-267; Weil v. Woodard, 104-94; Winborne v. Johnson, 95-46; Branch v. Walker, 92-87; Jones v. Swepson, 79-510; Johnson v. Duckworth, 72-244; Powell v. Weith, 66-423; Clegg v. Soapstone Co., 66-391; Oldham v. Sneed, 80-15; Smith v. Hahn, 80-240; Bryant v. Fisher, 85-69—and if either mistake, inadvertence, surprise or excusable neglect exists, then the court's discretion in relieving a party is not reviewable unless such discretion is abused, Pepper v. Clegg, 132-313; Morris v. Ins. Co., 131-212; Norton v. McLaurin, 125-185; Wyche v. Ross, 119-174; Marsh v. Griffin, 123-660; Manning v. R. R., 122-824; Cowles v. Cowles, 121-272; Stith v. Jones, 119-428; Wyche v. Ross, 119-174; Sikes v. Weatherly, 110-131; Albertson v. Terry, 108-75; Weil v. Woodard, 104-94; Foley v. Blank, 92-476; Winborne v. Johnson, 95-47; Brown v. Hale, 93-188; Williams v. R. R., 110-471; Beck v. Bellamy, 93-129; Nicholson v. Cox, 83-48; Bank v. Foote, 77-131; Simonton v. Lanier, 71-498—but as to whether the facts found show that either mistake, inadvertence, surprise or excusable neglect exists is a question of law and is reviewable: Bank v. Brock, 174-547; Gaylord v. Berry, 169-733; Stockton v. Mining Co., 144-595; Williams v. R. R., 110-471; Norton v. McLaurin, 125-185; Pepper v. Clegg, 132-313; Weil v. Woodard, 104-94; Winborne v. Johnson, 95-46; Foley v. Blank, 92-476—also where judge refuses to set aside judgment on the ground that he has no power, it is reviewable, Gilchrist v. Kitchin, 86-21; Hudgins v. White, 65-393; State v. Locust, 63-574; Winslow v. Anderson, 20-1. It is presumed that the judge found the facts to support his action: Gardiner v. May, 172-192; but upon his failure to find the facts the party should request it in apt time and except: McLeod v. Gooch, 162-122.

EXCUSABLE NEGLECT. On the part of the party: Guano Co. v. Hearne, 172-398; Walters v. Walters, 171-312; Sirecy v. Rees' Sons, 155-296; Stith v. Jones, 119-428; Sikes v. Weatherly, 110-131; Weil v. Woodard, 104-94; Holden v. Purefoy, 108-163; Warren v. Harvey, 92-137; Branch v. Walker, 92-87; Pickens v. Fox, 90-369; Geer v. Reams, 88-197; Francks v. Sutton, 86-78; Wynne v. Prairie, 86-73; Mebane v. Mebane, 80-34; Blue v. Blue, 79-69; Long v. Cole, 74-267; Griel v. Vernon, 65-76. On the part of the attorney: Grandy v. Products Co., 175-511; Gallins v. Ins. Co., 174-553; Seawell v. Lumber Co., 172-320; Schiele v. Ins. Co., 171-426; Howell v. White, 169-640; Gaylord v. Berry, 169-733; Mann v. Hall, 163-50; Taylor v. Pope, 106-267; Gwathney v. Savage, 101-103; Wiley v. Logan, 94-564; Winborn v. Byrd, 92-7; Boing v. R. R., 88-62; English v. English, 87-497; Ellington v. Wicker, 87-14; Wynne v. Prairie, 86-73; Molyneux v. Huey, 81-106; Moore v. Gidney, 75-34; Griel v. Vernon, 65-76; Francks v. Sutton, 86-78; Geer v. Reams, 88-197.

INEXCUSABLE NEGLECT. On the part of the party: Ollis v. Proffitt, 174-675; Lumber Co. v. Blue, 170-1; Pierce v. Eller, 167-672; School v. Peirce, 163-424; McLeod v. Gooch, 162-122; Stockton v. Mining Co., 144-595; Williamson v. Cocks, 124-585; Vick v. Baker, 122-98; Manning v. R. R., 122-824; Cowles v. Cowles, 121-272; Stith v. Jones, 119-428; Sluder v. Graham, 118-835; Simpson v. Brown, 117-482; Finlayson v. Accident Co., 109-196; Roberts v. Allman, 106-391; Smith v. Smith, 101-461; Brown v. Hale, 93-188; Abrams v. Ins. Co., 93-60; Kivett v. Wynne, 89-39; Churchill v. Ins. Co., 88-205; Norwood v. King, 86-80; DePriest v. Patterson, 85-376; Henry v. Clayton, 85-371; McLean v. McLean, 84-366; Hutchinson v. Rumpfelt, 83-441; University v. Lassiter, 83-38; Kerchner v. Baker, 82-169; Hodgin v. Matthews, 81-289; Cobb v. O'Hagan, 81-293; Hyman v. Capehart, 79-511; Bradford v. Coit, 77-72; Sluder v. Rollins, 76-271; Skinner v. Bryce, 75-287; White v. Snow, 71-232; Clegg v. Soapstone Co., 67-302; Burke v. Stokely, 65-569; Waddell v. Wood, 64-624. In employing an attorney who does not attend the court: Cahoon v. Brinkley, 176-5; Ham v. Person, 173-72; Bank v. Palmer, 153-501. When attorney is sick or dies: Holland v. Benevolent Assn., 176-86; Queen v. Lumber Co., 170-501; Hunter v. R. R., 163-281; White v. Rees, 150-678.

Negligence on the part of attorney: Stallings v. Spruill, 176-121; Hardware Co. v. Buhmann, 159-511; Vivian v. Mitchell, 144-472; Hairston v. Garwood, 123-345; Neal v. Land Co., 112-841; Edwards v. Henderson, 109-83; Norton v. McLaurin, 125-185; Manning v. R. R., 122-824; Vick v. Baker, 122-98; Cowles v. Cowles, 121-272; Chadbourn v. Johnston, 119-282; Boyer v. Garner, 116-125; Finlayson v. Accident Co., 109-196; Griffin v. Nelson, 106-235; Roberts v. Allman, 106-391; Whitson v. R. R., 95-385; Churchill v. Ins. Co., 92-485; Boing v. R. R., 88-62; University v. Lassiter, 83-38; Sluder v. Rollins, 76-271; Hyman v. Capehart, 79-511; Burke v. Stokely, 65-569. On the part of party's agent: Morris v. Ins. Co., 131-212; Heath v. Lane, 176-119.

Cases merely referring to section: Turner v. Davis, 132-188; Hardy v. Hardy, 128-179; Black v. Black, 111-302; Bost v. Lassiter, 105-497; Strickland v. Strickland, 95-471.

601. Stands until reversed. Every judgment given in a court of record having jurisdiction of the subject is, and continues to be, in force until reversed according to law.

Rev., s. 561; Code, s. 935; R. C., c. 31, s. 103; 4 Hen. IV, c. 23.

Hopkins v. Crisp, 166-97; Spivey v. Harrell, 101-48; McIver v. Stephens, 101-255; England v. Garner, 90-197. An action is not ended by the rendition of a judgment; it remains open for all motions and proceedings for its enforcement, including proceedings supplementary to execution: Turner v. Holden, 109-182. Void, erroneous and irregular judgments distinguished: Moore v. Packer, 174-665. An irregular judgment stands until corrected by direct proceeding: Pinnell v. Burroughs, 168-315; s. e., 172-182. Too late to move to set aside a judgment after payment, except for fraud: Pardue v. Absher, 174-676. To set aside a judgment for fraud, the remedy is by independent action: Moody v. Wike, 170-541, and cases cited. A foreign judgment may be attacked for fraud or want of jurisdiction: Williamson v. Jerome, 169-215. See section 592.

602. For and against whom given; failure to prosecute. 1. Judgment may be given for or against one or more of several plaintiffs, and for or against one

or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves.

Judgment as a final determination of the rights of the parties, see section 592. Judgment should be drawn so as to determine all rights: *Fisher v. Water Co.*, 128-379—whether they be legal or equitable, *Hutchinson v. Smith*, 68-354—but cannot exceed sum named in summons and attachment, *Cotton Mills v. Weil*, 129-452—and should be entered on material issues without regard to immaterial issues, *Corporation Commission v. R. R.*, 137-1. Judgment between defendants: *Coulter v. Wilson*, 171-537; *Gregg v. Wilmington*, 155-18. It is not necessary, but the better practice, for the judge to sign the judgment: *Brown v. Harding*, 170-253; *Belcher v. Cobb*, 169-689; *Sledge v. Elliott*, 116-712; *Bond v. Wool*, 113-20; *Range Co. v. Carver*, 118-328; *Spencer v. Credle*, 102-68; *Keener v. Goodson*, 89-273; *Rollins v. Henry*, 78-342; *Matthews v. Joyce*, 85-258—but statute merely directory, *Young v. Jackson*, 92-144; *Keener v. Goodson*, 89-273.

2. It may grant to the defendant any affirmative relief to which he may be entitled.

As to granting judgment for any relief to which pleadings and issues show party entitled, see cases under sections 506, 597, 606.

3. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

As to joint and several debtors, see sections 458, 459, 497-499. Where ejectment brought against landlord and tenant and tenant fails to answer, the complaint being verified, judgment can be taken as to tenant: *Harkey v. Houston*, 65-137.

JUDGMENTS RENDERED IN VARIOUS PROCEEDINGS THAT MAY BE OF INTEREST. In action by one tenant in common to recover his interest in land: *Vick v. Baker*, 122-99. In action on parol contract to sell land, where contract avoided and betterments allowed, *Vann v. Newsome*, 110-122. In action of ejectment, *Credle v. Ayers*, 126-11; *Moore v. Angel*, 116-843; *Arrington v. Arrington*, 114-116; *Pearson v. Carr*, 97-194; *Cowles v. Ferguson*, 90-308; *Wicker v. Jones*, 159-103. In action to recover for labor upon a house, *McMillan v. Williams*, 109-252; *Oakley v. Van Noppen*, 95-60. In action to recover of sureties upon official bonds, *Davenport v. McKee*, 98-500. In action by partnership against individual who has counterclaim against one member of the firm, *Sloan v. McDowell*, 71-356; *Davis v. Mfg. Co.*, 114-321. In action to foreclose for collection of purchase money, *Burnap v. Sideberry*, 108-307. In action for specific performance where statute of frauds pleaded, *Pendleton v. Dalton*, 92-185. In action to set aside fraudulent deed of assignment, *Rouse v. Bowers*, 108-182. In action against executor as manager of the business of deceased under his will, *Froelich v. Trading Co.*, 120-39; *Banking Co. v. Morehead*, 116-410. In action against married woman for her husband's debt, *McLeod v. Williams*, 122-451. In action on note, *Reade v. Street*, 122-301. In action for taxes, *Wilmington v. McDonald*, 133-548—for distribution of trust fund, *Isler v. Brock*, 134-428—for damages for locating right of way of railroad, *Beal v. R. R.*, 136-298—for recovery of specific personal property, see section 610—for trespass on land, *Lumber Co. v. Lumber Co.*, 137-432—where issue of *devisavit vel non*, *Collins v. Collins*, 125-98. Judgment in foreclosure proceeding where the debt is payable in installments: *Walker v. Burrell*, 172-386; effect of a judgment in foreclosure upon other encumbrances: *Jones v. Williams*, 155-179. Judgment in an action for specific performance: *Gallimore v. Grubb*, 156-575; *Bateman v. Hopkins*, 157-470. In an action based upon party-wall agreement: *Reid v. King*, 158-85. Judgment based upon admissions in the pleadings: *Adams v. Beasley*, 174-118. Striking out answer and giving judgment for failure to comply with conditions: *Lumber Co. v. Cottingham*, 168-544; s. c., 173-323.

4. The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served.

The fact that no complaint has been filed will not make judgment void: *Little v. McCarter*, 89-233; *McLean v. Breece*, 113-390; *Robeson v. Hodges*, 105-49; *McNeill v. Hodges*, 105-52; *Stancill v. Gay*, 92-455; *Mebane v. Pope*, 81-22; *Leach v. R. R.*, 65-486.

Rev., s. 563; Code, s. 424; C. C. P., s. 248.

603. Against married women. In an action brought by or against a married woman, judgment may be given against her for costs or damages or both, in the same manner as against other persons, to be levied and collected solely out of her separate estate.

Rev., 563.

Judgments against married women: *Harvey v. Johnson*, 133-355; *McLeod v. Williams*, 122-451 (see dissenting opinion of Clark, J.); *Moore v. Wolfe*, 122-711; *Green v. Ballard*, 116-144; *Dougherty v. Sprinkle*, 88-300; *Pippen v. Wesson*, 74-437—are as binding as against any one sui juris, *Craddock v. Brinkley*, 177-125; *Harvey v. Johnson*, 133-356; *Neville v. Pope*, 95-351; *Grantham v. Kennedy*, 91-148; *Vick v. Pope*, 81-22—except when judgment by consent, *McLeod v. Williams*, 122-451 (Clark and Montgomery, JJ., dissenting); see, also, *Vanderbilt v. Brown*, 128-498.

604. Nonsuit not allowed after verdict. In actions where a verdict passes against the plaintiff, judgment shall be entered against him.

Rev., s. 1520; Code, s. 936; R. C., c. 31, s. 110; 2 Hen. IV, c. 7.

Nonsuit, retraxit, and judgment of dismissal explained: *Grimes v. Andrews*, 170-515. The plaintiff may take a nonsuit at any time before verdict, and what is meant by "before verdict": *Oil Co. v. Shore*, 171-51; *Cahoon v. Brinkley*, 168-257; *Strause v. Sawyer*, 133-64; *Everett v. Williams*, 152-117; *Sharpe v. Sovers*, 152-379. Plaintiff will not be allowed to take nonsuit after verdict: *Strause v. Sawyer*, 133-64—or after judgment, *Mauney v. Long*, 91-170; *Mfg. Co. v. Buxton*, 105-74—and the court's refusal to grant a nonsuit after verdict and judgment is not reviewable, *Brown v. King*, 107-313. Plaintiff may elect to be nonsuited in every case where no judgment, other than for costs, can be recovered against him: *McKesson v. Mendenhall*, 64-502. And this he may do even before a referee: *McNeill v. Lawton*, 97-16.

Plaintiff cannot take a nonsuit when defendant sets up a counterclaim entitling him to affirmative relief: *McLean v. McDonald*, 173-429; *Wilkins v. Suttles*, 114-550; *Pass v. Pass*, 109-484; *Brown v. King*, 107-315; *McNeill v. Lawton*, 97-16; *Bynum v. Powe*, 97-374; *Whedbee v. Leggett*, 92-469; *Purnell v. Vaughan*, 80-46; *Francis v. Edwards*, 77-271; *Tate v. Phillips*, 77-126; *McKesson v. Mendenhall*, 64-502—but when no such counterclaim pleaded, plaintiff has right to take nonsuit at any time before verdict, *Strause v. Sawyer*, 133-64; *Mfg. Co. v. Buxton*, 105-74; *Gatewood v. Leak*, 99-363; *McNeill v. Lawton*, 97-16; *Peoples Bank v. Stewart*, 93-402; *Tate v. Phillips*, 77-126; *Graham v. Tate*, 77-120—unless in action of equitable nature the adverse party has acquired some right which he is entitled to have determined, *Gatewood v. Leak*, 99-363; *Bynum v. Powe*, 97-374; *Haddock v. Stocks*, 167-70; *Yellowday v. Perkinson*, 167-144; *R. R. v. R. R.*, 148-59. If the counterclaim is not a proper one the plaintiff may take a nonsuit: *Carpenter v. Hanes*, 167-551; *Pass v. Pass*, 109-484; or in a proper case plaintiff may take a nonsuit and allow defendant to proceed with his counterclaim: *Gatewood v. Leak*, 99-363; *McNeill v. Lawton*, 97-16; *Whedbee v. Leggett*, 92-469. See section 521.

An interlocutory order will not deprive plaintiff of his right to nonsuit: *Mfg. Co. v. Buxton*, 105-74. But plaintiff cannot dispossess defendant by legal process and then take a nonsuit: *Lane v. Morton*, 81-38.

On issue of *devisavit vel non* no nonsuit can be taken: *Collins v. Collins*, 125-104; *Young's Will*, 123-358; *Hutson v. Sawyer*, 104-1; *Syme v. Broughton*, 85-369; *Whitfield v. Hurst*, 31-170; *St. John's Lodge v. Callender*, 26-335.

For involuntary nonsuit under demurrer to the evidence, see section 567.

605. Party dying after verdict. In no action shall the death of either party between the verdict and the judgment be alleged for error, if the judgment is entered within two terms after the verdict.

Rev., s. 564; Code, s. 938; R. C., c. 31, s. 112; 17 Charles II, c. 8.

As to judgments in favor of or against dead persons: *Wood v. Watson*, 107-52; *Knott v. Taylor*, 99-511; *Lynn v. Lowe*, 88-478.

606. When limited by demand in complaint. The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

Rev., s. 565; Code, s. 425; C. C. P., s. 249.

For demand for relief in complaint, see section 506. A plaintiff, if there be an answer, is entitled to such relief as the facts stated in the complaint and the proof will admit, although he misconceives the manner in which it may be afforded: *Bryan v. Canady*, 169-579; *Silk Co. v. Spinning Co.*, 154-422; *Councill v. Bailey*, 154-54; *Wright v. Ins. Co.*, 138-488; *Reade v. Street*, 122-301; *Gillam v. Ins. Co.*, 121-369; *Adams v. Hayes*, 120-383; *Simmons v. Allison*, 118-763; *Scarlett v. Norwood*, 115-284; *Johnson v. Loftin*, 111-319; *Barnes v. Barnes*, 104-613; *Moore v. Nowell*, 94-265; *Harris v. Sneed*, 104-369; *McNeill v. Hodges*, 105-52; *Patrick v. R. R.*, 93-422; *Moore v. Cameron*, 93-51; *Lumber Co. v. Wallace*, 93-22; *Kiff v. Weaver*, 94-278; *Knight v. Houghtalling*, 85-17; *Jones v. Mial*, 82-252—but if there is no answer judgment cannot be entered for more than complaint demands, *Jones v. Mial*, 82-257—though he cannot recover upon a state of facts other than those set out in complaint, *Cox v. Ward*, 107-507; *Browning v. Berry*, 107-231; *Willis v. Branch*, 94-142; *Johnson v. Finch*, 92-205; *Shelton v. Davis*, 69-324. Where defendant tendered more than the amount found to be due, plaintiff cannot recover the amount so tendered: *DeBruhl v. Hood*, 156-52. Relief that may be granted in action for price of services rendered: *Fulps v. Mock*, 108-601; *Stokes v. Taylor*, 104-394; *Lewis v. R. R.*, 95-179—in action on a special contract, *Jones v. Mial*, 82-252; *Sams v. Price*, 119-572—in action for claim and delivery of personalty, *Webb v. Taylor*, 80-305; *Haughton v. Newberry*, 69-456—in action by guardian for recovery of money loaned to partnership of which he was member, *Gudger v. Baird*, 66-438.

607. When passes legal title. In any action wherein the court declares a party entitled to the possession of real or personal property, the legal title of which is in another party to the suit, and the court orders a conveyance of such legal title to him so declared to be entitled, or where, for any cause, the court orders that one of the parties holding property in trust shall convey the legal title to be held in trust to another person although not a party, the court, after declaring the right and ordering the conveyance, has power also, to be used in its discretion, to declare in the order then made, or in any made in the progress of the cause, that the effect thereof is to transfer to the party to whom the conveyance is directed to be made the legal title of the said property, to be held in the same plight, condition and estate as though the conveyance ordered were in fact executed; and shall bind and entitle the parties ordered to execute or to take benefit of the conveyance, in and to all such provisions, conditions and covenants as are adjudged to attend the conveyance, in the same manner and to the same extent as the conveyance would if the same were executed according to the order. A party taking benefit under the judgment has the same redress at law on account of the matter adjudged as he might on the conveyance, if the same had been executed.

Rev., s. 566; Code, s. 426; R. C., c. 32, s. 24; 1850, c. 107; 1874-5, c. 17.

The decree does not operate as a conveyance unless it so declares in the decree: *Evans v. Brendle*, 173-149; *Davis v. Rogers*, 84-412; *Morris v. White*, 96-91; *Rollins v. Henry*, 78-352; *Thaxton v. Williamson*, 72-125; see, also, *Smith v. King*, 107-273—but it is not necessary that a decree for specific performance should declare that it should operate as a conveyance in order to constitute a complete adjudication on the rights of the holder of the naked legal title, *Skinner v. Terry*, 134-305. See dissenting opinion of Clark, C. J., in *Allred v. Smith*,

135-455; also see *North v. Bunn*, 122-769. Whether this section can apply to one not a party to the action: *Evans v. Brendle*, 173-149.

608. Regarded as a deed and registered. Every judgment, in which the transfer of title is so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey, and shall be registered in the proper county, under the rules and regulations prescribed for conveyances of similar property executed by the party. The party desiring registration of such judgment must produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate. All laws which are passed for extending the time for registration of deeds include such judgments, provided the conveyance, if actually executed, would be so included.

Rev., ss. 567-8; Code, ss. 427, 429; R. C., c. 32, ss. 25, 27; 1850, c. 107, ss. 2, 4; 1874-5, c. 17, ss. 2, 4.

As to the effect of the judgment as a conveyance, and the requirement for registration, see *Evans v. Brendle*, 173-149; *Bell v. McJones*, 151-85; *Skinner v. Terry*, 134-305; *Smith v. King*, 107-277; *Morris v. White*, 96-91.

609. Certified registered copy evidence. In all legal proceedings, touching the right of parties derived under such judgment, a certified copy from the register's books is evidence of its existence and of the matters therein contained, as fully as if proved by a perfect transcript of the whole case.

Rev., s. 569; Code, s. 428; R. C., c. 32, s. 26; 1850, c. 107, s. 3; 1874-5, c. 17, s. 3.

610. In action for recovery of personal property. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof in case a return cannot be had, and damages for taking and withholding the same.

Rev., s. 570; Code, s. 431; C. C. P., s. 251.

See sections 833, 836, 840. Judgment rendered for plaintiff: *Cooper v. Evans*, 174-412; *Hendricks v. Ireland*, 162-523; *Oil Co. v. Grocery Co.*, 136-354; *Griffith v. Richmond*, 126-379; *Grubbs v. Stephenson*, 117-66; *Spencer v. Bell*, 109-43; *Taylor v. Hodges*, 105-344; *Asher v. Reizenstein*, 105-215; *Hall v. Tillman*, 103-280; *Smithdeal v. Wilkerson*, 100-55; *Horton v. Horne*, 99-219; *Jarman v. Ward*, 67-32—for defendant, *Ludwick v. Penny*, 158-104; *Penny v. Ludwick*, 152-375; *Mfg. Co. v. Rhodes*, 152-636; *Rawlings v. Neal*, 126-271; *Asher v. Reizenstein*, 105-215; *Horton v. Horne*, 99-219; *Council v. Averett*, 90-168. Judgment where there is no property in specie, as, for instance, where it has been sold by order of court: *Hall v. Tillman*, 110-220, 115-500—where plaintiff and defendant each entitled to part sued for, *Horton v. Horne*, 99-219. Assessment of damages in another action: *Bowen v. King*, 146-385.

611. What judge approves judgments. In all cases where a judgment, decree or order of the superior court is required to be approved by a judge, it shall be approved by the judge having jurisdiction of receivers and injunctions.

Rev., s. 571; Code, s. 432; 1876-7, c. 223, s. 3; 1879, c. 63; 1881, c. 51.

For judge approving when infants are petitioners, see this chapter, s. 761.

See sections 851, 852.

612. Judgment roll. Unless the party or his attorney furnishes a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers which constitute the judgment roll:

1. In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment.

Rev., s. 572; Code, s. 434; C. C. P., s. 253.

Section cited in *Dewey v. Sugg*, 109-335. Attaching the papers together is directory: *Brown v. Harding*, 171-686; s. c., 170-253.

613. Docketed and indexed; held as of first day of term. Every judgment of the superior court, affecting the right to real property, or requiring in whole or in part the payment of money, shall be entered by the clerk of said superior court on the judgment docket of the court. The entry must contain the names of the parties, and the relief granted, date of judgment and date of docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. In all cases affecting the title to real property the clerk shall enter upon the judgment docket the number and page of the minute docket where the judgment is recorded, and if the judgment does not contain particular description of the lands, but refers to a description contained in the pleadings, the clerk shall enter upon the minute docket, immediately following the judgment, the description so referred to.

All judgments rendered in any county by the superior court, during a term of the court, and docketed during the same term, or within ten days thereafter, are held and deemed to have been rendered and docketed on the first day of said term.

Rev., s. 573; Code, s. 433; C. C. P., s. 252; Supr. Ct. Rule VIII; 1909, c. 709.

For lien of docketed judgment, see section 614. To facilitate the search for encumbrances, the record must contain an index and a cross-index of the names of the parties to the judgment: *Dewey v. Sugg*, 109-328; *Darden v. Blount*, 126-247; *Redmond v. Staton*, 116-140; *Holman v. Miller*, 103-118—each of several judgment debtors must be specifically mentioned, but the name of only one of several plaintiffs need be mentioned, *Hahn v. Moseley*, 119-73. Clerk liable on his bond for failure to docket and index promptly: *Shackleford v. Staton*, 117-73; *Redmond v. Staton*, 116-140; *Young v. Connelly*, 112-646; *Holman v. Miller*, 103-118; see, also, sections 927 and 928. Using initials of defendant instead of Christian name valid: *Valentine v. Britton*, 127-57. One cross-index insufficient for two judgments, though appearing on same page and including same parties: *Valentine v. Britton*, 127-57. Judgments docketed during term in which rendered, or within ten days, deemed rendered and docketed first day of term: *Ferrell v. Hales*, 119-212; *Moore v. Jordan*, 117-90; *Fleming v. Graham*, 110-375; *Holman v. Miller*, 103-120. This does not apply to judgments rendered out of term or nunc pro tunc: *Hardware Co. v. Holt*, 173-308. The doctrine of relation back to the first day of the term does not affect the rights of bona fide purchasers attaching in the meantime: *Hardware Co. v. Holt*, 173-308; *Fowle v. McLean*, 168-537; *McKinney v. Street*, 165-515. Duty of judgment creditor to see that judgment is properly docketed, and if clerk fails to properly docket it is no encumbrance or lien affecting third parties: *Holman v. Miller*, 103-118.

614. Where and how docketed; lien. Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part

the payment of money, it shall be docketed on the judgment docket of the superior court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the superior court of any other county upon the filing with the clerk thereof a transcript of the original docket, and is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for ten years from the date of the rendition of the judgment. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith.

Rev., s. 574; Code, s. 435; C. C. P., s. 254.

Statute of limitation does not run against judgment when homestead allotted, see this chapter, s. 728.

DOCKETING JUDGMENT CREATES LIEN. As to lien of justice's judgment docketed in superior court, see sections 1517-1519. The docketing of a judgment is not essential to its efficacy nor a precedent requisite to enforcement by final process: *Lytle v. Lytle*, 94-686; *Bernhardt v. Brown*, 122-587. The judgment is no lien unless it is docketed: *Alsop v. Moseley*, 104-60; *Holman v. Miller*, 103-118; *Sawyers v. Sawyers*, 93-321; *Williams v. Weaver*, 94-134; nor unless it is cross-indexed: *Wilkes v. Miller*, 156-428. Failure to include on docket all of the recovery is not cured by reference to minute docket: *Wilson v. Lumber Co.*, 131-166. Docketed after suit, but before appointment of receiver; effect: *Bank v. Bank*, 127-432. Tax list has the force of a docketed judgment: *Shelby v. Tiddy*, 118-792. Docketed judgment as a lien on remainders: *Stern v. Lee*, 115-426. The judgment must be docketed in another county to become a lien there: *Bernhardt v. Brown*, 122-587; *Lowdermilk v. Corpening*, 92-333. Sufficient transcript for docketing in another county: *Wilson v. Patton*, 87-318. The lien is created by the docketing of the judgment, not the issuing of the execution: *Williams v. Weaver*, 94-134; *Gambrill v. Wilcox*, 111-44; *Dewey v. Sugg*, 109-328; *Holman v. Miller*, 103-118; *Sawyers v. Sawyers*, 93-321. Where execution issued before lien expired, but sale takes place after expiration, see *Pipkin v. Adams*, 114-201; *Spicer v. Gambill*, 93-378; *Lytle v. Lytle*, 94-683.

PRIORITY OF LIEN. The time from which the lien dates is the moment of the docketing: *Harris v. Ricks*, 63-653; *Hoppock v. Shober*, 69-153—unless docketed during the term at which taken, or within ten days after, and then it refers back to the first day of the term, *Ferrell v. Hales*, 119-199; *Moore v. Jordan*, 117-90; *Fleming v. Graham*, 110-375; *Holman v. Miller*, 103-120. See section 613. Junior and senior docketed judgments, question of priority of lien discussed: *Bernhardt v. Brown*, 118-700; *Dysart v. Brandreth*, 118-968; *Gulley v. Thurston*, 112-192; *Gambrill v. Wilcox*, 111-42; *Worsley v. Bryan*, 86-343; *Cannon v. Parker*, 81-320; *Isler v. Colgrove*, 75-334; *Halyburton v. Greenlee*, 72-316; *Hoppock v. Shober*, 69-153. A purchaser under a junior docketed judgment acquires the estate subject to the lien of prior docketed judgments, he buying merely an equity of redemption, *Dysart v. Brandreth*, 118-968; *Gambrill v. Wilcox*, 111-42; *Sharpe v. Williams*, 76-87; *Cannon v. Parker*, 81-322; *Isler v. Colgrove*, 75-334; *Halyburton v. Greenlee*, 72-316. Order of liability where land subject to judgment lien is conveyed to different persons: *Brown v. Harding*, 170-253; s. c., 171-686. Priorities between judgments and mortgages: *Bostie v. Young*, 116-766; *Gulley v. Thurston*, 112-192; *Cowen v. Withrow*, 112-736; *Vanstory v. Thornton*, 112-196; *Fleming v. Graham*, 110-374; *Johnston v. Lemond*, 109-643. The lien of a judgment against a corporation for labor done or for tort has priority over a mortgage made before judgment rendered: *R. R. v. Burnett*, 123-210. See section 1140. But as to judgment on contract, see *Clement v. King*, 152-456. Creditors of a corporation must discharge judgment lien on its property attaching prior

to title of corporation before they can subject it to payment of corporate debts: *Pelletier v. Lumber Co.*, 123-596. Effect of taking a judgment on a judgment upon the priority of lien: *Springs v. Pharr*, 131-193.

NATURE OF LIEN. It is a lien upon the lands of the judgment debtor in the county where docketed: *Bryan v. Dunn*, 120-36; *Shelby v. Tiddy*, 118-794; *Gardner v. Batts*, 114-503; *Long v. Walker*, 105-90; *Johnston v. Lemond*, 109-643; *Adams v. Guy*, 106-278; *Shepard v. Bland*, 87-163; *King v. Portis*, 81-382—but not on any particular parcel, *Bryan v. Dunn*, 120-36; and it is a lien on the debtor's whole interest, equitable as well as legal, but the equitable lien acquired cannot be enforced by execution: *Mayo v. Staton*, 137-680; *Tuck v. Walker*, 106-285; *Trimble v. Hunter*, 104-129; *Hardin v. Ray*, 94-456; *Mannix v. Ihrie*, 76-299; *McKeithan v. Walker*, 66-95; *Sprinkle v. Martin*, 66-55. The lien attaches to a timber interest: *Fowle v. McLean*, 168-537; *Williams v. Parsons*, 167-529. The lien attaches to after-acquired land in the same county at the moment that the title vests in the judgment debtor, and all judgments share pro rata in the proceeds of a sale: *Moore v. Jordan*, 117-86. It is not a lien on land purchased and paid for by a debtor when title is taken in the name of a third party: *Dixon v. Dixon*, 81-323; *Wall v. Fairley*, 77-105. A judgment for purchase money has no higher lien than any other, except the homestead cannot be claimed against a debt for its purchase: *Draper v. Allen*, 114-50; *Peck v. Culberson*, 104-425; *Moore v. Ingram*, 91-376.

The lien does not vest any estate in the judgment creditor, but only secures to creditor the right to have it applied to the satisfaction of his judgment: *Brown v. Harding*, 170-253; s. c., 171-686; *Bruce v. Nicholson*, 109-202; *Baruch v. Long*, 117-509; *Bryan v. Dunn*, 120-36; *Dail v. Freeman*, 92-351; *Murchison v. Williams*, 71-135—nor is the land primarily liable for the debt, *Murchison v. Williams*, 71-135. When land of homesteader worth only \$1,000, but homesteader sells the timber trees, purchaser restrained from cutting: *Jones v. Britton*, 102-166. A docketed judgment appealed from ceases to be a lien on land when supersedeas filed: *Green v. Griffin*, 95-54. Docketed judgment has the effect of a statutory mortgage: *James v. Markham*, 128-380; *Gammon v. Johnson*, 126-66; *Gambrell v. Wilcox*, 111-42; *Perry v. Morris*, 65-223. As to judgment lien on land of intestate; duty of administrator: *Holden v. Strickland*, 116-185; *Pate v. Oliver*, 104-458; *Lee v. Eure*, 93-9; *Sawyers v. Sawyers*, 93-321.

EXPIRATION OF LIEN. The lien expires at the end of ten years, unless it is extended as provided in this section: *Hicks v. Wooten*, 175-597; *Kirkwood v. Peden*, 173-460; *Barnes v. Fort*, 169-431; *Blow v. Harding*, 161-375; *McCaskill v. McKinnon*, 121-192; *Eller v. Church*, 121-270; *Pipkin v. Adams*, 114-201; *Brittain v. Dickson*, 104-547; *Lilly v. West*, 97-276; *Cook v. Moore*, 95-1; *Lytle v. Lytle*, 94-683; *Fox v. Kline*, 85-173; *McDonald v. Dickson*, 85-248; *Pasour v. Rhyne*, 82-149. When one buys property subject to a judgment lien his title is free upon the expiration of ten years from the docketing: *McCaskill v. Graham*, 121-190. The lien of the judgment is not extended by part payment: *Hughes v. Boone*, 114-54.

After ten years, there is no lien until an actual levy has been made, and this lien dates from the levy: *Wilson v. Lumber Co.*, 131-167; *Pipkin v. Adams*, 114-201; *Spicer v. Gambill*, 93-378; *Sawyers v. Sawyers*, 93-321; *Barnes v. Fort*, 169-431. As to the effect of the death of the judgment debtor, see *Tarboro v. Pender*, 153-427; *Matthews v. Peterson*, 150-134; *Barnes v. Fort*, 169-431.

615. Of supreme court docketed in superior court; lien. It is the duty of the clerk of the supreme court, on application of the party obtaining judgment in that court, directing in whole or in part the payment of money, or affecting the title to real estate, or on the like application of the attorney of record of said party, to certify under his hand and the seal of said court a transcript of the judgment, setting forth the title of the court, the names of the parties thereto, the relief granted, that the judgment was so rendered by said court, the amount and date of the judgment, what part thereof bears interest and from what time; and said clerk shall send such certificate and transcript to the clerk of the superior court of such counties as he is directed; and the clerk of the superior court receiving the certificate and transcript shall docket them in like manner as

judgment rolls of the superior court are docketed. And when so docketed, the lien of said judgment is the same in all respects, subject to the same restrictions and qualifications, and the time shall be reckoned as is provided and prescribed in the preceding sections for judgments of the superior court, so far as the same are applicable. The party desiring the certificate and transcript provided for in this section may obtain them at any time after such judgment has been rendered, unless the supreme court otherwise directs.

Rev., s. 575; Code, s. 436; 1881, c. 75, ss. 1, 4.

Judgment of supreme court is no lien unless docketed: *Alsop v. Moseley*, 104-60; *Bernhardt v. Brown*, 122-593.

616. Of federal court docketed; lien. Judgments and decrees rendered in the circuit and district courts of the United States within this state may be docketed on the judgment dockets of the superior courts in the several counties of this state for the purpose of creating liens of such judgments and decrees upon property within the county where the same are so docketed in like manner as judgments of superior courts for the purpose of creating liens upon property, but in no other manner, extent or order than as contemplated, provided and intended by the act of Congress entitled "An act to regulate the liens of judgments and decrees of the courts of the United States," approved August first, one thousand eight hundred and eighty-eight. And it is the duty of the clerk of the superior court, when a judgment roll of said circuit and district courts is filed with him, to docket it as judgments of the said superior courts are required to be docketed.

Rev., s. 576; 1889, c. 439.

See *Alsop v. Moseley*, 104-60; *Riley v. Carter*, 165-334.

617. Paid to clerk; docket credited; transcript to other counties. The party against whom a judgment for the payment of money is rendered, by any court of record, may pay the whole, or any part thereof, to the clerk of the court in which the same was rendered, at any time thereafter, although no execution has issued on such judgment; and this payment of money is good and available to the party making it, and the clerk shall enter the payment on the judgment docket of the court, and immediately forward a certificate thereof to the clerk of the superior court of each county to whom a transcript of said judgment has been sent, and the clerk of such superior court shall enter the same on the judgment docket of such court and file the original with the judgment roll in the action. Entries of payment or satisfaction on the judgment dockets in the office of the clerk of the superior court, by any person other than the clerk, shall be made in the presence of the clerk or his deputy, who shall witness the same, and when entries of full payment or satisfaction have been made, the clerk or his deputy shall enter upon the judgment index kept by him, opposite and on a line with the names of the parties to the judgment, the words "Paid" or "Satisfied."

Rev., s. 577; Code, s. 438; R. C., c. 31, s. 127; 1823, c. 1212; 1911, c. 76.

Sugg v. Bernard, 122-156; *Purvis v. Jackson*, 69-474. **Debtor may make payment on judgment to clerk except while execution in sheriff's hands: *Bynum v. Barefoot*, 75-576.**

618. Payment by one of several; transfer to trustee for payor. In all cases in the courts of this state wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable

for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof, if one of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the amount due on said judgment, and shall, at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same; and a transfer of such judgment as herein contemplated shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his proportionate part thereof to the extent of his liability thereunder in law and in equity.

If the judgment debtors do not agree as to their proportionate liability, and it be alleged in such action by petition that any judgment debtor is insolvent or is a nonresident of the state and cannot be forced under the execution of the court to contribute to the payment of the judgment, the court shall, in the action in which the judgment was rendered, after notice to the defendants or such of them as may be within the jurisdiction of the court, submit proper issues to a jury to find the facts arising on such petition and any answer that may be filed thereto, and shall, upon such verdict and any admissions in the petition and answer, enter judgment declaring the proportionate part each judgment debtor shall pay.

Any judgment creditor who refuses to transfer a judgment in his favor to a trustee for the benefit of a judgment debtor who shall tender payment and demand in writing a transfer thereof to a trustee to preserve his rights in the same action, as contemplated by this section, shall not thereafter be entitled to an execution against the judgment debtor so tendering payment.

1919, c. 194, ss. 1, 2.

The surety or joint debtor who pays the debt should have it assigned to a third person as trustee for him to keep it in force: *Rice v. Hearn*, 109-150; *Liles v. Rogers*, 113-197; *Peebles v. Gay*, 115-38; *Tripp v. Harris*, 154-296; *Fowle v. McLean*, 168-537. The cases of *Jones v. McKinnon*, 87-294; *Towe v. Felton*, 52-216, and others, which restrict this right of the surety to a judgment against the principal, are overruled: *Fowle v. McLean*, 168-537. The right of contribution among the sureties is in proportion to the number of solvent sureties: *Powell v. Mathis*, 26-83; *Fowle v. McLean*, 168-537. See, also, sections 3963, 3965.

619. Clerk to pay money to party entitled. The clerk, to whom money is paid as aforesaid, shall pay it to the party entitled to receive it, under the same rules and penalties as if the money had been paid into his office by virtue of an execution.

Rev., s. 578; Code, s. 439; R. C., c. 31, s. 128; 1823, c. 1212, s. 2.

See *Purvis v. Jackson*, 69-474.

620. Credits upon judgments. Where a payment has been made on a judgment docketed in the office of the clerk of the superior court, and no entry made on the judgment docket, or where any docketed judgment appealed from has been reversed or modified on appeal and no entry made on such docket, any person interested therein may move in the cause before the clerk, upon affidavit after notice to all persons interested, to have such credit, reversal or modification entered; and upon the hearing before the clerk he may hear affidavits, oral testimony, depositions and any other competent evidence, and shall render

his judgment, from which any party may appeal in the same manner as in appeals in special proceedings. On the trial of any issue of fact on the appeal either party may demand a jury trial, which shall be had upon the evidence before the clerk, which he shall reduce to writing. On a final judgment ordering any such credit, reversal or modification, transcript thereof shall be sent by the clerk of the superior court to each county in which the original judgment has been docketed, and the clerk of such county shall enter the same on the judgment docket of his county opposite such judgment and file the transcript. No final process shall issue on any such judgment after affidavit filed in the cause until the motion for credit, reversal or modification has been finally disposed of.

Rev., s. 579; 1903, c. 558.

For form of judgment for purchase money of land, see this chapter, s. 675 (5).

For estoppel of judgment after amendment of pleadings, see this chapter, s. 548.

This section does not apply in case of a parol agreement to sell land, in which a certain judgment was to be marked satisfied as a part of the price: *Brown v. Hobbs*, 154-544.

621. For money due on judicial sale. The supreme and other courts ordering a judicial sale, or having possession of bonds taken on such sale, may, on motion, after ten days notice thereof in writing, enter judgment as soon as the money becomes due against the debtors or any of them, unless for good cause shown the court directs some other mode of collection.

Rev., s. 1524; Code, s. 941; R. C., c. 31, s. 129.

This section is constitutional, and substitutes notice and execution for proceeding by attachment in equity: *Cotten, ex parte*, 62-79. Motion in the cause is the proper remedy to enforce payment of the purchase money in judicial sale; but an independent action may be sustained unless objection is made in apt time: *Lackey v. Pearson*, 101-651. An independent action is proper for the commissioner to enforce an individual right against the purchaser: *Ibid.* And this would seem to be the proper remedy for the parties entitled to compel the commissioner to account for money collected: *Smith v. Moore*, 79-82.

Different courses to be pursued where purchaser at judicial sale fails to comply with his bid: *Hudson v. Coble*, 97-260. The court may order payment of the money after ten days notice: *Cotten, ex parte*, 62-79; *Mauney v. Pemberton*, 75-219; or may order a resale of the land: *Davis v. Pierce*, 167-135. The payment of the purchase money in an administrator's sale of land for assets may be enforced under this section by the court ordering the sale: *Mauney v. Pemberton*, 75-219; *Chambers v. Penland*, 78-53.

622. Applicable to justices' courts. This article applies, wherever appropriate, to proceedings in courts of justices of the peace.

Rev., s. 562; Code, s. 389.

Durham v. Wilson, 104-598.

ART. 24. CONFESSION OF JUDGMENT

623. When and for what. A judgment by confession may be entered without action either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this article.

Rev., s. 580; Code, s. 570; C. C. P., s. 325.

The confession of judgment by a corporation: *Howard v. Warehouse Co.*, 123-91; *Hill v. Lumber Co.*, 113-173; *Nimocks v. Shingle Co.*, 110-20; *Sharp v. R. R.*, 106-308. Judgment confessed by executor binds him individually: *Hall v. Craige*, 65-51, 68-305. Guardian of lunatic may confess for ward: *McAden v. Hooker*, 74-24. The court must have jurisdiction of the subject-matter: *Slocumb v. Shingle Co.*, 110-24.

624. Debtor to make verified statement. A statement in writing must be made, signed, and verified by the defendant, to the following effect:

The requirements of this section must be strictly complied with: *Smith v. Smith*, 117-348; *Sharp v. R. R.*, 106-308; *Hill v. Lumber Co.*, 113-180; *Davidson v. Alexander*, 84-621. **Statement verified by guardian of lunatic not irregular in absence of fraud:** *McAden v. Hooker*, 74-24.

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

See generally: *Smith v. Smith*, 117-348; *Martin v. Briscoe*, 143-353. **The filing is sufficient as an authority for its entry and conforms to the statute:** *Bank v. Cotton Mills*, 115-507.

2. If it is for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed is justly due, or to become due.

Where affidavit stated that he was justly indebted in a certain amount, but did not embrace the account, which was filed, it was insufficient: *Davenport v. Leary*, 95-203. **Certain confessions as to facts out of which indebtedness arose held sufficient under circumstances related:** *Martin v. Briscoe*, 143-353; *Bank v. Cotton Mills*, 115-507; *Uzzle v. Vinson*, 111-138; *Sharp v. R. R.*, 106-308—held insufficient, *Davenport v. Leary*, 95-203; *Davidson v. Alexander*, 84-621; *Smith v. Smith*, 117-348.

3. If it is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed does not exceed the same.

A judgment confessed to provide security against contingent liability must be a lien for the full amount named until the actual loss is determined: *Darden v. Blount*, 126-250. **The filing of confession equivalent to an express authority for its entry and fully conforms to the statute:** *Bank v. Cotton Mills*, 115-507. **Cases where judgment confessed under agreement between plaintiff and defendant as to certain matters not appearing in judgment:** *Wood v. Bagley*, 34-83; *Molyneux v. Huey*, 81-107.

Rev., s. 581; Code, s. 571; C. C. P., s., 326.

625. Judgment; execution; installment debt. The statement may be filed with the clerk of the superior court of the county in which the defendant resides, or if he does not reside in the state, of some county in which he has property. The clerk shall indorse upon it and enter on his judgment docket a judgment of the court for the amount confessed, with three dollars costs, together with disbursements. The statement and affidavit, with the judgment indorsed, thenceforth become the judgment roll. Executions may be issued and enforced thereon in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in installments, and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form; but must have indorsed thereon, by the attorney or person issuing it, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment remains as security for the installments thereafter to become due; and whenever any further installment becomes due, execution may, in like manner, be issued for its collection and enforcement.

Rev., s. 582; Code, s. 572; C. C. P., s. 327.

Setting aside the judgment for cause appearing in record: *Nimocks v. Shingle Co.*, 110-20. Amending irregularities, etc.: *Bank v. Cotton Mills*, 115-507. Confession of judgment is not vitiated because the evidence of indebtedness not filed, when confession sufficiently describes: *Bank v. Cotton Mills*, 115-507—or because confession stipulates that execution will not issue within a specified time, *Ibid.*—or because confession is for a greater rate of interest than contract stipulates, when no fraud, *Ibid.*—or that the judgment was entered by the clerk at night, *Sharp v. R. R.*, 106-308. Judgment is void when court has no jurisdiction: *Smith v. Smith*, 117-348; *Slocumb v. Shingle Co.*, 110-24.

ART. 25. SUBMISSION OF CONTROVERSY WITHOUT ACTION

626. **Submission, affidavit, and judgment.** Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The judge shall hear and determine the case, and render judgment thereon as if an action were pending.

Rev., s. 803; Code, s. 567; C. C. P., s. 315.

This section does not contemplate a jury trial: *Moore v. Hinnant*, 90-163. This section does not apply to proceedings before justices of the peace: *Wilmington v. Atkinson*, 88-54—nor where parties differ and seek to propound interrogatories as to their rights: *Kistler v. R. R.*, 164-365; *McKethan v. Ray*, 71-165; see *Board of Ed. v. Kenan*, 112-566; *Bates v. Lilly*, 65-232—nor to contests over title to office, *Davis v. Moss*, 81-303—nor to criminal actions, *State v. Alphin*, 81-566.

The affidavit must appear in the record: *Grandy v. Gulley*, 120-177—must show that controversy is real and proceeding in good faith, *Grandy v. Gulley*, 120-176; *Arnold v. Porter*, 119-123; *Ruffin v. Ruffin*, 112-102; *Jones v. Comrs.*, 88-56; *Wilmington v. Atkinson*, 88-55; *Grant v. Newsom*, 81-36; *Hervey v. Edmunds*, 68-243. It must appear that the court would have had jurisdiction if proceeding was by summons: *Drug Co. v. Lenoir*, 160-571; *Grandy v. Gulley*, 120-176; *Jones v. Comrs.*, 88-56. No affidavit accompanying the case agreed, action dismissed: *Arnold v. Porter*, 119-123. Where no affidavit, defendant being present and not objecting, plaintiff may on motion be allowed to file affidavit: *Grandy v. Gulley*, 120-176, citing *Bank v. Loan & Trust Co.*, 119-553. Even after issues are joined, parties may submit an agreed case: *Hervey v. Edmunds*, 68-247.

As to how the facts agreed should be stated, see *Farthing v. Carrington*, 116-315; *Railroad v. Reidsville*, 101-404; *Overman v. Sims*, 96-451; *Jones v. Comrs.*, 88-56; *Moore v. Hinnant*, 87-505. No prayer for judgment is necessary: *Williams v. Comrs.*, 132-300.

Applied to construction of a will: *Elkins v. Seigler*, 154-374; *Williams v. Biggs*, 176-48; to determine title to land: *Wooten v. Hobbs*, 170-211; *Williams v. Blizzard*, 176-146; construction of road law: *Patterson v. Comrs.*, 170-503; under drainage law: *Drainage Comrs. v. Farm Assn.*, 165-697; to test validity of municipal bonds: *Hotel Co. v. Red Springs*, 157-137; *Warsaw v. Malone*, 159-573; *Wagstaff v. Highway Com.*, 174-377.

Section merely referred to in *McClure v. Fellows*, 131-510; *Pender v. Pender*, 129-58; *Smathers v. Comrs.*, 125-480; *Bank v. Gilmer*, 118-670; *Jones v. Hoggard*, 107-350.

627. **Judgment roll.** Judgment shall be entered on the judgment docket, as in other cases, but without costs for any proceeding prior to trial. The case, the submission, and a copy of the judgment, constitute the judgment roll.

Rev., s. 804; Code, s. 568; C. C. P., s. 316.

Judgment can be rendered hereunder in vacation, by consent: *Harrell v. Peebles*, 79-26; *Hervey v. Edmunds*, 68-243.

628. Judgment enforced; appeal. The judgment may be enforced in the same manner as if it had been rendered in an action, and is subject to appeal in like manner.

Rev., s. 805; Code, s. 569; C. C. P., s. 317.

No particular assignment of error necessary on appeal: *Davenport v. Leary*, 95-203. See *Moore v. Hinnant*, 87-505.

SUBCHAPTER IX. APPEAL

ART. 26. APPEAL

629. Writs of error abolished. Writs of error in civil actions are abolished, and the only mode of reviewing a judgment, or order, in a civil action, is that prescribed by this chapter.

Rev., s. 583; Code, s. 544; C. C. P., s. 296.

Appeals by this section are substituted for writs of error: *Lynn v. Lowe*, 88-478; *White v. Morris*, 107-100. Appeals from inferior courts shall be to the superior court and thence only to the supreme court: *Rhyne v. Lipsecombe*, 122-650. Statutory requisites as to appeals cannot be dispensed with except with assent of counsel: *Sondley v. Asheville*, 112-694.

630. Certiorari, recordari, and supersedeas. Writs of certiorari, recordari, and supersedeas are authorized as heretofore in use. The writs of certiorari and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the supersedeas, to suspend execution, shall not issue until an undertaking is filed or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where execution is stayed.

Rev., s. 584; Code, s. 545; 1874-5, c. 109.

For supersedeas bond, see section 650. For bond for costs, see section 646.

CERTIORARI. The writ of certiorari is an extraordinary remedial writ to be granted or not in the sound discretion of the court where the petitioner has lost his only remedy without fault or neglect on his own part: *Ice Mfg. Co. v. R. R.*, 125-17. Appellant is entitled to writ of certiorari where he has lost appeal by no neglect of his own or his agent, but by neglect or error of the court or its officers: *Winborn v. Byrd*, 92-7; *Johnson v. Andrews*, 132-380; *Norwood v. Pratt*, 124-745; *McMillan v. McMillan*, 122-410; *Russell v. Hill*, 122-772; *Nichols v. Dunning*, 99-82; *Comrs. v. Steamship Co.*, 98-165; *Sparks v. Sparks*, 92-359; *Hodges v. Lassiter*, 94-294; *Pittman v. Kimberly*, 92-562; *Seay v. Yarborough*, 94-291; *Roulhae v. Miller*, 89-190; *Stell v. Barham*, 86-727; *Skinner v. Maxwell*, 67-257; *McConnell v. Caldwell*, 51-469; *Reade v. Hamlin*, 62-128—or by contrivance of appellee or his agent, *Winborn v. Byrd*, 92-7; *Briggs v. Jervis*, 98-454; *Wiley v. Lineberry*, 88-68; *Bledsoe v. Snow*, 48-99; *Lunceford v. McPherson*, 48-174—or by their acts or declarations reasonably calculated to mislead, *Winborn v. Byrd*, 92-7; *Willis v. R. R.*, 119-718; *Graves v. Hines*, 106-323; *Williamson v. Boykin*, 99-238; *Comrs. v. Steamship Co.*, 98-163; *Parker v. R. R.*, 84-118; *Mott v. Ramsay*, 91-249—or by neglect of the appellee, *Comrs. v. Steamship Co.*, 98-165; *Briggs v. Jervis*, 98-454; *Collins v. Faribault*, 92-310; *Mott v. Ramsay*, 91-249; *Syme v. Broughton*, 84-114—or where from some insurmountable obstacle appellant is prevented from perfecting his appeal, *Ice Co. v. R. R.*, 125-17; *Mott v. Ramsay*, 90-372; *Howerton v. Henderson*, 86-718; *Sharpe v. McElwee*, 53-115; *Dyer v. Rich*, 4-413—or where there is an oral agreement, not denied, to waive time, and it is broken by appellee, *Brown v. Taylor*, 173-700; *Walton v. Pearson*, 82-464—or where the judge below by letter makes known his desire or willingness to correct an error or omission which it appears was made through mistake or inadvertence, *Barber v. Justice*, 138-20; *Cameron v. Power Co.*, 137-104; *Sherrill v. Tel. Co.*, 116-654; *Riggan v. Sledge*, 116-87; *Bank v. Bridges*, 114-107; *Allen v. McLendon*, 113-319; *Broadwell v. Ray*, 111-457; *Boyer v. Teague*, 106-571; *Lowe v. Elliott*, 107-718; *Porter v. R. R.*, 97-63; *State v. Sloan*, 97-499; *Mayo v.*

Leggett, 96-237; *State v. Gay*, 94-821; *State v. Gooch*, 94-982; *Cheek v. Watson*, 90-302; *Ware v. Nesbit*, 92-202; *Currie v. Clark*, 90-17. As to negligence of counsel imputed to client, see *Vivian v. Mitchell*, 144-476; *Cozart v. Assurance Co.*, 142-522; *Ice Mfg. Co. v. R. R.*, 125-17; *Boyer v. Garner*, 116-125; *Boing v. R. R.*, 88-64; *Bradford v. Coit*, 77-72. The writ can be used as a writ of error or false judgment: *Hartsfield v. Jones*, 49-309; *Young v. Rollins*, 90-131; *Barton, ex parte*, 70-134; *Biggs, ex parte*, 64-202; *Walton v. Gatlin*, 60-310; see, also, *Williams v. Williams*, 71-427; *State v. Jefferson*, 66-309. The remedy to review a refusal of the judge to discharge a prisoner upon a mistrial is by certiorari: *State v. Locke*, 86-647. Certiorari not allowed in forma pauperis unless an order allowing appeal in forma pauperis was made by judge below: *Lindsay v. Moore*, 83-444; *Brittain v. Mull*, 93-490; *State v. Warren*, 100-489; *Britt v. Patterson*, 31-197—but where through no laches of his own he is prevented from applying in time, his application may yet be heard, *Sanders v. Norris*, 82-4; *Simmons v. Dowd*, 77-155; *Skinner v. Maxwell*, 67-257. Where a criminal case is decided on a record afterwards found to be false, it will be restored to the docket and a certiorari issued to correct the record: *State v. Marsh*, 134-184.

Practice as to applying for certiorari when case on appeal not settled in time to bring case up: *Fisher v. Fisher*, 164-105; *Chauncey v. Chauncey*, 153-12; *State v. Telfair*, 139-555; *Norwood v. Pratt*, 124-745; *Parker v. Ry. Co.*, 121-501; *Burrell v. Hughes*, 120-277; *Guano Co. v. Hicks*, 120-29; *Brown v. House*, 119-622; *Shober v. Wheeler*, 119-471; *Haynes v. Coward*, 116-841; *Causey v. Snow*, 116-497; *Heath v. Lancaster*, 116-70; *State v. Freeman*, 114-872; *Paine v. Cureton*, 114-606; *Graham v. Edwards*, 114-228; *Pipkin v. Green*, 112-355; *Porter v. R. R.*, 106-478; *Stephens v. Koonce*, 106-255; *Pittman v. Kimberly*, 92-562; *Owens v. Phelps*, 91-253—and when by loss of papers or other good cause the transcript of no part of the record could be docketed in time, *Peebles v. Braswell*, 107-68; *Nichols v. Dunning*, 91-4—and when case on appeal not sent up because trial judge died pending making up the case, *Taylor v. Simmons*, 116-70; *Parker v. Coggins*, 116-71.

Certiorari is the remedy by which matters adjudged, decreed, or ordered by inferior tribunals may be brought up for revision where no appeal provided: *State v. Tripp*, 168-150; *In re Hinson*, 156-250; *State v. Webb*, 155-426; *Hillsboro v. Smith*, 110-417; *Smith v. Cheek*, 50-213; *Thompson v. Floyd*, 47-313; *Brooks v. Morgan*, 27-481; *Collins v. Houghton*, 26-420; *Matthews v. Matthews*, 26-155; *Dougan v. Arnold*, 15-99; *Allen v. Williams*, 2-17. Intimated that where there is a more appropriate remedy than certiorari it should be resorted to: *Watson v. Shields*, 67-235; *Ex parte Daughtry*, 28-155; *Petty v. Jones*, 23-408; *Swain v. Fentress*, 15-601; *Street v. Clark*, 1-109; but see *McLeran v. Melvin*, 56-198. Certiorari to perfect record will lie as often as necessary until record is perfect: *Clark v. Machine Works*, 150-88; *State v. Reid*, 18-382; *Russell v. Hill*, 122-773; *Burrell v. Hughes*, 120-277; *State v. Beal*, 119-809; *State v. Preston*, 104-733; *State v. Randall*, 87-571; *State v. Munroe*, 30-258; *State v. Craton*, 28-164; *Smith v. Kelly*, 7-507. Effect of issuing writ of certiorari upon execution: *State v. Walters*, 97-489. Certiorari may be granted on facts apparent on the records or papers before the court that are uncontroverted: *Cherry v. Slade*, 9-400. One superior court can issue writ of certiorari to another to send over more perfect transcript: *State v. Reid*, 18-377; *State v. Collins*, 14-117. Writ issues only to the court that rendered judgment: *Williams v. Williams*, 71-427. Certiorari may issue from superior court to recorder's court: *Taylor v. Johnson*, 171-84; but an appeal taken and properly docketed will be sustained unless objection is raised promptly: *Drug Co. v. R. R.*, 173-87.

CASES IN WHICH HELD THAT CERTIORARI WILL NOT LIE. Laches, or ignorance of requirements on part of applicant, or of some one on whom he depended: *Todd v. Mackie*, 160-352; *Smith v. Miller*, 155-247; *Walsh v. Burleson*, 154-174; *Murphy v. Electric Co.*, 174-782; *Cressler v. Asheville*, 138-487; *Barber v. Justice*, 138-20; *Cozart v. Assur. Co.*, 142-522; *Wood v. Watson*, 107-57; *Stroud v. Tel. Co.*, 133-253; *Haynes v. Coward*, 116-840; *Rothchild v. McNichol*, 121-284; *Finlayson v. Acc. Co.*, 109-196; *Peebles v. Braswell*, 107-68; *Williamson v. Boykin*, 99-238; *Churchill v. Ins. Co.*, 92-485; *Winborn v. Byrd*, 92-7; *Boing v. R. R.*, 88-62; *Baker v. Halstead*, 44-41; *Cotten v. Clark*, 23-353; *Davis v. Marshall*, 9-59; but see *Ice Mfg. Co. v. R. R.*, 125-17. Where application failed to assign error in judgment sought to be brought up for review, nor disclosed meritorious ground: *Short v. Sparrow*, 96-348; *In re Brittain*, 93-587; *March v. Thomas*, 63-249; *Lewis v. Foard*, 112-402. Where cost not paid for appeal upon demand: *Sanders v. Thompson*, 114-282; *Critz v. Sparger*, 121-283; *Brown v. House*, 119-622; *Broadwell v. Ray*, 112-191; *Fisher v. Mining Co.*, 105-125; *Bailey v.*

Brown, 105-127; **Smith v. Lynn**, 84-837; **Andrews v. Whisnant**, 83-446—**or where undertaking for cost insufficient**: **Bowen v. Fox**, 99-127; **Churchill v. Brooklyn Ins. Co.**, 92-485; **Turner v. Quinn**, 92-501; **State v. Roper**, 94-859; **Chastain v. Chastain**, 87-283; **but see sections 646, 647. Where ignorance of requirements in perfecting an appeal bond**: **Griffin v. Nelson**, 106-235; **Turner v. Powell**, 93-341; **Smith v. Abrams**, 90-21; **Elliott v. Holliday**, 14-377. **Appellant depending upon liberal practice among members of the bar in preparing and serving case**: **Wilson v. Hutchinson**, 74-432; **Smith v. Smith**, 119-313; **Willis v. R. R.**, 119-719; **Cozart v. Assur. Co.**, 142-522. **Where originally there was no right of appeal**: **Guilford v. Georgia Co.**, 109-310; **Badger v. Daniel**, 82-468; **Smith v. Miller**, 155-247. **Where agreements to waive the Code rule is oral, and terms of agreement not admitted nor can be ascertained from appellee's affidavits**: **Scroggs v. Alexander**, 88-64; **Smith v. Smith**, 119-311; **Roberts v. Partridge**, 118-355; **Leduc v. Moore**, 113-275; **Graham v. Edwards**, 114-228; **Sondley v. Asheville**, 112-694; **Hemphill v. Morrison**, 112-756; **Graves v. Hines**, 106-323; **Holmes v. Holmes**, 84-833; **Rouse v. Quinn**, 75-354. **Where matter of which affiant wished to take advantage occurred subsequent to trial**: **Betts v. Franklin**, 20-602. **Where appeal was not taken**: **Howell v. Jones**, 109-102. **Where it appears that matter which would be certified up in obedience to the writ is already substantially before the court**: **Wood v. R. R.**, 118-1056—**or where if certified up would not be relevant to the exception presented**: **Bank v. Bridgers**, 114-107; **Porter v. R. R.**, 97-63; **Riggan v. Sledge**, 116-87.

THE APPLICATION FOR CERTIORARI. Cases of interest and use in drawing it up: **Critz v. Sparger**, 121-283; **Brown v. House**, 119-622; **Sanders v. Thompson**, 114-282; **State v. Warren**, 100-489; **Short v. Sparrow**, 96-348; **In re Brittain**, 93-588; **Howerton v. Henderson**, 86-718; **Weaver v. Mining Co.**, 89-198; **McDaniel v. Pollock**, 87-503; **Williams v. Williams**, 74-2; **Ex parte Barton**, 70-134; **Bledsoe v. Snow**, 48-99; **Lunceford v. McPherson**, 48-174; **March v. Thomas**, 63-249; **Brigman v. Jervis**, 30-451; **McMillan v. Smith**, 4-173. **Ten days notice of application required to be given adverse party**: **Keerans v. Keerans**, 109-101. **Application for certiorari must be made to the next term of the appellate court**: **Burrell v. Hughes**, 120-277; **Causey v. Snow**, 116-497; **Graham v. Edwards**, 114-228; **Norman v. Snow**, 94-431; **Suiter v. Brittle**, 92-53, 90-19; **Cross v. Cross**, 90-15; **Andrews v. Whisnant**, 83-446; **Staples v. Mooring**, 26-215; **Brown v. Williams**, 84-116; **Erwin v. Erwin**, 14-528—**and motion for its issuance must be at the call of the district**: **Mitchell v. Baker**, 129-63—**and before argument begun**, **State v. Marsh**, 134-195; **State v. Harris**, 114-830—**but sometimes may be made after argument but before case considered in conference**: **Boyer v. Teague**, 106-571. **Practice set out in application for certiorari in Weaver v. Mining Co.**, 89-198. **The record should be docketed**: **Murphy v. Electric Co.**, 174-782; **and if asked for by both sides, both should docket the record**: **Caudle v. Morris**, 158-594. **Upon making the application and giving bond a supersedeas may issue to stay execution of the judgment**: **Page v. Page**, 166-90. **For certiorari and supersedeas for review of state decision by United States supreme court, see R. R. v. Horton**, 176-115.

RECORDARI. This writ is a substitute for an appeal from a judgment of a justice of the peace in order to have a new trial on the merits, and as a writ of false judgment to obtain a reversal of an erroneous decision: **Marler Co. v. Clothing Co.**, 150-519; **King v. R. R.**, 112-318; **Clark v. Mfg. Co.**, 110-111; **Swain v. Smith**, 65-211; **Caldwell v. Beatty**, 69-365. **Recordari and not certiorari the proper remedy as a substitute for an appeal from a justice**: **Ledbetter v. Osborne**, 66-379. **Difference between recordari and certiorari**: see 2-469. **Superior court judge should find the facts when application made for writ**: **Collins v. Gilbert**, 65-135; **and one fact should be that the applicant has a meritorious claim**: **Hunter v. R. R.**, 161-503. **The practice as to writs of recordari discussed**: **Weaver v. Mining Co.**, 89-198; **King v. R. R.**, 112-318. **A void judgment can be examined into by recordari**: **McKee v. Angel**, 90-60. **As to whether recordari can be had when notice of appeal not given in time**: **Marsh v. Cohen**, 68-283; **State v. Johnson**, 109-852; **Tedder v. Deaton**, 167-479. **Even a delay of three months, if sufficiently accounted for, will not bar a recordari**: **Koonce v. Pelletier**, 82-236. **After the return of the writ it is too late to object that it was not addressed to him**: **Carmer v. Evers**, 80-55.

Recordari will lie when defendant is deprived of his appeal by irregularity in justice's proceedings or error of justice: **Critch v. McCadden**, 64-262; **Marsh v. Cohen**, 68-283; **State v. Warren**, 100-489—**when justice reasonably misled defendant as to time of trial**: **Navassa Guano Co. v. Bridgers**, 93-439—**when judgment by default taken after insufficient or no service**

of process: *Clark v. Mfg. Co.*, 110-111; *Merrell v. McHone*, 126-528—when irregular and voidable judgments taken: *King v. R. R.*, 112-318; *Gallop v. Allen*, 113-24.

Where recordari ordered but not docketed, appellee can docket and have case dismissed at any succeeding term: *Johnson v. Reformers*, 135-385. Where defendant asks for recordari he waives a lack of service of summons: *Johnson v. Reformers*, 135-385. Nonresident, learning of justice's judgment rendered against him, appealed, but justice refused to grant it, whereupon recordari issued, *Merrell v. McHone*, 126-528.

APPLICATION FOR RECORDARI. Must be made at first term of superior court which shall begin more than ten days after trial below: *Davenport v. Grissom*, 113-38; *Pittman v. Kimberly*, 92-562; *Suiter v. Brittle*, 92-53; *Howerton v. Henderson*, 86-720; *Boing v. R. R.*, 88-62; *Wilson v. Seagle*, 84-110. Undertaking must accompany application: *Steadman v. Jones*, 65-388—but writ may be granted in forma pauperis: *State v. Warren*, 100-489.

Application must state that applicant took an appeal: *Howell v. Jones*, 109-102—that he paid or offered to pay the justice's fees, though no one can take advantage of this except the justice, *Steadman v. Jones*, 65-388; *Carmer v. Evers*, 80-55—and applicant must show that he has been diligent, *Boing v. R. R.*, 88-62; *Davenport v. Grissom*, 113-40; *Ballard v. Gay*, 108-544. Application must be accompanied by supersedeas bond: *Steadman v. Jones*, 65-388. Amendment to application is discretionary with judge: *Pritchard v. Sanderson*, 92-41. Application need not contain an averment of merits when appeal was lost by misconduct or neglect of justice: *State v. Warren*, 100-489. The decision of the judge upon a petition for recordari can only be reviewed by appeal or by application to vacate it for mistake, surprise or excusable neglect: *Barnes v. Easton*, 98-116.

631. Appeal to supreme court; security on appeal; stay. Cases shall be taken to the supreme court by appeal, as provided by law. All provisions in this article as to the security to be given upon appeals and as to the stay of proceedings apply to appeals taken to the supreme court.

Rev., ss. 595, 1540; Code, ss. 561, 946; C. C. P., s. 312.

632. Who may appeal. Any party aggrieved may appeal in the cases prescribed in this chapter.

Rev., s. 585; Code, s. 547; C. C. P., s. 298.

For cases in which appeal lies, see under section 638. Parties to actions can appeal: *Houston v. Lumber Co.*, 136-328—but a party appearing by counsel specially cannot appeal, *Houston v. Lumber Co.*, 136-328; *Clark v. Mfg. Co.*, 110-111—though one not a party and taxed with the costs can appear specially and appeal, *Loven v. Parson*, 127-301. It seems that one who offers an advanced bid at a judicial sale cannot appeal from its refusal: *Sutton v. Craddock*, 174-274; *Thompson v. Rospigliosi*, 162-146. A commissioner to sell land at a judicial sale is not a party so as to appeal from an order correcting the deed: *Summerlin v. Morrissey*, 168-409. Surety on prosecution bond can appeal when he is made a party to a motion to retax costs: *Smith v. Arthur*, 116-871—but as to surety on stay bond to secure justice's judgment, *quere*, *Simmons v. Andrews*, 106-201. The state may appeal, when, see *State v. R. R.*, 126-1073; *State v. Robinson*, 116-1046, and section 4649. One not interested in the verdict and judgment cannot appeal: *Faison v. Hardy*, 118-142. Interveners can appeal, when: *Jones v. Asheville*, 116-817; *Rollins v. Rollins*, 76-264; *Clemmons v. Hampton*, 70-534. An applicant to be made a party can appeal from the court's refusal: *Jones v. Asheville*, 116-820. Where cases tried together for convenience, but not consolidated so as to become one action, and the verdict is substantially different as to each party, separate appeals should be taken: *Williams v. R. R.*, 144-498.

633. Appeal from clerk to judge. Appeals lie to the judge of the superior court having jurisdiction, either in term time or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference. In case of such transfer or appeal neither party need give an undertaking for costs; and the clerk shall transmit, on the transfer or appeal, to the superior court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or

of law arise. An appeal must be taken within ten days after the entry of the order or judgment of the clerk. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof.

Rev., ss. 586, 610-11; Code, ss. 116, 252-3; C. C. P., ss. 109, 492.

It is only from clerk's decision on question of law or legal inference that appeal may be taken: *Little v. Duncan*, 149-84; *Powell v. Morisey*, 98-426; see, also, *Bank v. Burns*, 107-467. Questions of fact decided by clerk are reviewable by the judge hereunder: *Taylor v. Carrow*, 156-6; *Beckwith, ex parte*, 124-111; *Ledbetter v. Pinner*, 120-455; *McMillan v. McMillan*, 123-577; *Edwards v. Cobb*, 95-10; see cases under section 636. The appeal may be without undertaking: *Adams v. Guy*, 106-278. And it should be carried up promptly as provided in this section: *Hicks v. Wooten*, 175-597.

An appeal will lie to the judge in allotment of dower: *Welfare v. Welfare*, 108-272—in proceedings to remove administrators, etc., *Edwards v. Cobb*, 95-10—in the setting aside of a sale and ordering resale, *Loviniar v. Pearce*, 70-167—upon clerk's refusal to issue execution against the person of a judgment debtor, *Huntley v. Hasty*, 132-279—in the denial to ward of a demand that guardian be made to file an annual statement of the manner and nature of his investments, *Moore v. Askew*, 85-199—in attachment, where clerk refuses to allow amendment of affidavit and discharges attachment, *Cushing v. Styron*, 104-339; *Palmer v. Boshier*, 71-291—in special proceedings, when, *Brittain v. Mull*, 91-501—in a proceeding to restore probate of a deed, *Mills v. McDaniel*, 161-113.

No appeal in proceedings to condemn land for railroad until clerk passes upon exceptions to report; and then appeal is to court in term time: *Railroad v. Newton*, 133-136—and not to judge at chambers, *Railroad v. Stewart*, 132-248. See section 1723.

634. Clerk to transfer issues of fact to civil issue docket. If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the superior court.

Rev., s. 588; Code, s. 256; C. C. P., s. 115.

See section 758. In a proceeding to remove an administrator, issues of fact are not raised to require a transmission by the clerk: *In re Battle*, 158-388.

635. Duty of clerk on appeal. On such appeal the clerk, within three days thereafter, shall prepare and sign a statement of the case, of his decision and of the appeal, and exhibit such statement to the parties or their attorneys on request. If the statement is satisfactory, the parties or their attorneys must sign it. If either party objects to the statement as partial or erroneous, he may put his objections in writing, and the clerk shall attach the writing to his statement, and within two days thereafter he shall send such statement, together with the objections, and copies of all necessary papers, by mail or otherwise, to the judge residing in the district, or in his absence to the judge holding the courts of the district, for his decision.

Rev., s. 612; Code, s. 254; C. C. P., s. 110.

On appeal from clerk to the judge this section must be complied with: *Hicks v. Wooten*, 175-597; *Little v. Duncan*, 149-84. Practice in making the statement and sending up the papers on appeal explained in *Cushing v. Styron*, 104-339. In cases in which the clerk acts in his capacity as clerk, as in auditing accounts, etc., it is not necessary to make the statement on appeal: *Spencer, ex parte*, 95-271. Clerk has no power to allow or disallow appeal; if he refuses to send up statement, the judge may order him to do so: *Bank v. Burns*, 107-467.

When demurrer filed in proceeding to sell real estate of decedent, issue of law raised should be certified to the judge at chambers: *Jones v. Hemphill*, 77-42. If issues of both law and fact raised, he should transfer both to the civil issue docket for trial: *Spencer v. Credle*, 102-

68; *Jones v. Hemphill*, 77-42. Such issues of law appealed must be sent to the judge of the district or judge who has exchanged with him and is riding the district for the term: *Henry v. Hilliard*, 120-479; *Benbow v. Moore*, 114-263; *Myers v. Hamilton*, 65-567. Such appeals can be heard outside of the county where proceeding pending: *Ledbetter v. Pinner*, 120-455; *McCaskill v. McKinnon*, 121-192. For the statement of the case which clerk must send up, see *Brooks v. Austin*, 94-222.

636. Duty of judge on appeal. It is the duty of the judge on receiving a statement of appeal from the clerk, or the copy of the record of an issue of law, to decide the questions presented within ten days. But if he has been informed in writing, by the attorney of either party, that he desires to be heard on the questions, the judge shall fix a time and place for the hearing, and give the attorneys of both parties reasonable notice. He must transmit his decision in writing, endorsed on or attached to the record, to the clerk of the court, who shall immediately acknowledge its receipt, and within three days after notify the attorneys of the parties of the decision and, on request and the payment of his legal fees, give them a copy thereof, and the parties receiving such notice may proceed thereafter according to law.

Rev., s. 613; Code, s. 255; C. C. P., s. 113.

See section 637. The judge should review the findings of law and of fact made by the clerk: *Mills v. McDaniel*, 161-113; *Spencer, ex parte*, 95-271; *Beckwith, ex parte*, 124-111; *Turner v. Holden*, 109-186; *McAden v. Banister*, 63-479; and if the evidence sent up is not satisfactory he may require other evidence: *Spencer, ex parte*, 95-271. He may also allow amendments: *Sudderth v. McCombs*, 67-353. He may hear the appeal at term time or in vacation: *Rowland v. Thompson*, 64-714. He should transmit his decision to the clerk, who will then proceed without any formal order: *Jones v. Desern*, 94-32; *Patterson v. Wadsworth*, 94-538; *Tillett v. Aydlett*, 93-15; *Brittain v. Mull*, 91-498; *Jones v. Hemphill*, 77-42. Judge's interlocutory orders made on appeal to him in condemnation proceedings not appealable: *Railroad v. Newton*, 133-137. Where in record in supreme court there is nothing to indicate that an attorney demanded a hearing before the judge as allowed by law, it will be presumed that the proceeding was regularly conducted: *Ledbetter v. Pinner*, 120-455. Judge cannot demand of clerk who has gone out of office that he file, in writing, the evidence offered and admissions made in a proceeding pending before him while he was clerk: *Spencer, ex parte*, 95-271. Section merely cited: *Allred v. Smith*, 135-554. Duty of appellant in seeing to prompt transmission of case: *Hicks v. Wooten*, 175-597.

637. Judge determines entire controversy; may recommit. Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so.

Rev., s. 614; 1887, c. 276.

This section was enacted to cure the inconveniences caused by *Brittain v. Mull*, 91-498; *Roseman v. Roseman*, 127-497. It applies only to cases commenced before the clerk: *Baker v. Carter*, 127-92. Procedure before and since enactment of this section distinguished: *Foreman v. Hough*, 98-386.

Under this section, the judge to whom a cause is sent by appeal or otherwise from the clerk has the full jurisdiction to hear and fully determine the cause, or to make orders therein and send it back to the clerk to be proceeded with by him: *In re Stone*, 176-336; *Ryder v. Oates*, 173-569; *Wooten v. Cunningham*, 171-123; *Thompson v. Rospigliosi*, 162-146; *Mills v. McDaniel*, 161-113; s. c., 155-249; *York v. McCall*, 160-277; *Gregory v. Pinnix*, 158-147; *Williams v. Dunn*, 153-399; *Coltrane v. Laughlin*, 157-282; *Little v. Duncan*, 149-84; *Oldham v. Rieger*, 145-254; *In re Wittkowsky's Land*, 143-248; *Martin v. Briscoe*, 143-353; *Settle v.*

Settle, 141-569; Faison v. Williams, 121-152; Smith v. Gudger, 133-627; Robinson v. McDowell, 133-186; In re Anderson, 132-243; Railroad v. Stroud, 132-416; Harrington v. Hatton, 129-146; Ury v. Brown, 129-270; Howland v. Marshall, 127-430; Roseman v. Roseman, 127-494; Ledbetter v. Pinner, 120-455; Elliott v. Tyson, 117-114; Godwin v. Early, 114-11; Lietie v. Chappell, 111-347; Ashby v. Page, 108-6; Cushing v. Styron, 104-338; McMillan v. Reeves, 102-550; but see In re Hybart's estate, 129-131—and this is so even though proceeding originally before clerk is a nullity, In re Anderson, 132-243. When proceeding gets before judge it is as much before him as if originally returned before him: Railroad v. Stroud, 132-416—the judge may make amendments, and may even make them to give effectual jurisdiction: Batts v. Pridgen, 147-133; Ewbank v. Turner, 134-81; Springs v. Scott, 132-551; Piercy v. Watson, 118-976; Elliott v. Tyson, 117-116, and cases cited; McLean v. Breece, 113-390; but see Robeson v. Hodges, 105-49. In a later appeal the judge may modify an order made in a former appeal: Taylor v. Carrow, 156-6; but he cannot set aside a consent judgment without consent: Rogers v. Sluder, 148-43.

638. Appeal from superior court judge. An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

Rev., s. 587; Code, s. 548; C. C. P., s. 299; 1818, c. 962, s. 4.

For appeal in creditors' proceeding against personal representative, see chapter Administration, s. 125.

APPEAL LIES WHEN. The appeal can only be taken from the judgment, and it must first be entered: Chambers v. R. R., 172-555; Gilbert v. Shingle Co., 167-286; Taylor v. Bostic, 93-415; Thornton v. Lambeth, 103-86; Rosenthal v. Roberson, 114-594; Milling Co. v. Finlay, 110-411; Baum v. Shooting Club, 94-217; State v. Hazell, 95-623; State v. Lockyear, 95-641; State v. Smith, 95-680; Logan v. Harris, 90-7; but see Carter v. Elmore, 119-296. An appeal lies from a nonsuit submitted to upon judge intimating an opinion or making a ruling that would materially affect the result: Collins v. Swanson, 121-67; Asbury v. Fair, 111-251; Bain v. Bain, 106-239; Tiddy v. Harris, 101-589; Davis v. Ely, 100-283; Mobley v. Watts, 98-284; Springs v. Schenck, 99-551; Gibbs v. Lyon, 95-146; Gregory v. Forbes, 94-220; Hedrick v. Pratt, 94-101; Warner v. R. R., 94-250; Harper v. Dail, 92-394; Abernathy v. Stowe, 92-213; but see Midgett v. Mfg. Co., 140-361. An appeal lies from an order setting aside the allotment of a homestead: Beavans v. Goodrich, 98-217—from the granting or refusal of an injunction, Warlick v. Reynolds, 151-606; Bank v. Jenkins, 64-719; but see French v. Wilmington, 75-387; Wallace v. Wilkesboro, 151-614—from judgment in bastardy proceeding, State v. Edwards, 110-511; State v. Crouse, 86-617; State v. Wilkie, 85-513—from denial of a motion on the ground of want of power, Horner v. Water Co., 156-494; Martin v. Bank, 131-121; Lassiter v. R. R., 136-89; Welch v. Kingsland, 89-180; State v. Fuller, 114-885; In re Smith, 105-167; Jarrett v. Gibbs, 107-303; Henderson v. Graham, 84-496—from an order in a drainage proceeding directing matters which are properly for the determination of the commissioners to be referred to a jury, Porter v. Armstrong, 134-447—from an order granting alimony pendente lite, Barker v. Barker, 136-316; Garsed v. Garsed, 170-672—from an order overruling or sustaining a demurrer, Pender v. Mallett, 122-163; Frisby v. Marshall, 119-570; Ramsay v. R. R., 91-419; Comrs. v. Magnin, 78-181; but see Burrell v. Hughes, 116-430; Joyner v. Roberts, 112-111; Sprague v. Bond, 111-425—from a judgment alleged to be erroneous, Becton v. Dunn, 142-172; Henderson v. Moore, 125-383—from an order requiring a person to allow an inspection of paper-writings, Sheek v. Sain, 127-266—from the refusal of the court to correct or amend its judgment, Beam v. Bridgers, 111-269; Brooks v. Stephens, 100-297—from findings of fact by referee adopted by the judge, see section 579.

Appeal from judgment in contempt proceedings, when: Ex parte McCown, 139-95; Childs v. Wiseman, 119-497; Fertilizer Co. v. Taylor, 112-141; Murray v. Berry, 113-46; Bristol v. Pearson, 109-718; In re Deaton, 105-59; Young v. Rollins, 90-125; Cromartie v. Comrs., 85-211; Bond v. Bond, 69-97; In re Walker, 82-95; In re Davis, 81-72; Robbins, ex parte, 63-309; but see Shooting Club v. Thomas, 120-334; Scott v. Fishplate, 117-265; In re Robin-

son, 117-533; *Thompson v. Onley*, 96-9; *State v. Mott*, 49-449; see sections 978 to 980—from order setting aside judgment for mistake, inadvertence or excusable neglect, when the facts do not constitute such in law, *Norton v. McLaurin*, 125-185; *Weil v. Woodard*, 104-94; *Beck v. Bellamy*, 93-129; see, also, cases under section 600—from the refusal of judgment by default, *Timber Co. v. Butler*, 134-50; *Hall v. Hall*, 131-185; *Kruger v. Bank*, 123-16; *Griffin v. Light Co.*, 111-434—from refusal of judgment by default and inquiry, *Investment Co. v. Kelly*, 123-388; *Kruger v. Bank*, 123-16—from refusal to dismiss or the dismissal of an attachment or order of arrest, *Finch v. Slater*, 152-155; *Judd v. Mining Co.*, 120-397; *Fertilizer Co. v. Grubbs*, 114-470; *Sheldon v. Kivett*, 110-408; *White v. Underwood*, 125-28; *Roulhae v. Brown*, 87-4—from an order retaxing costs and construing former judgment, *Mills Co. v. Lytle*, 118-837—from a judgment as to costs when the question is as to whether item properly chargeable, *State v. Horne*, 119-853; *Blount v. Simmons*, 120-19; *Guilford v. Comrs.*, 120-23—from an order taxing one who is not a party with costs, *Loven v. Parson*, 127-301—from an order taxing prosecutor with costs, without finding preliminary facts, *State v. Roberts*, 106-662; *State v. Jones*, 117-768; *State v. Morgan*, 120-563—from the refusal of a judgment upon a verdict, *Oil Co. v. Grocery Co.*, 136-354—from an order of a board of county commissioners that a courthouse be built, *Vaughn v. Comrs.*, 117-429.

Appeal lies from an order granting or refusing a new trial as a matter of law, and the judge should state the reasons for the order: *Powers v. City of Wilmington*, 177-361; *Oil Co. v. Grocery Co.*, 136-354; *Johnson v. Reformers*, 135-385; *Braid v. Lukins*, 95-123; *Winburne v. Bryan*, 73-47; *Johnson v. Bell*, 74-355; *Bryan v. Heck*, 67-322; *Clegg v. Soapstone Co.*, 67-302—from findings of fact by the judge, in equity cases, *Baker v. Belvin*, 122-190; *Roberts v. Lewald*, 107-305; *Evans v. R. R.*, 96-45; *Coates v. Wilkes*, 92-376; *Jones v. Boyd*, 80-258—from a refusal of a motion in the cause to amerce sheriff, *Swain v. Phelps*, 125-44—from removal of a cause or refusal to remove a cause when wrong venue suggested on motion, *Brown v. Cogdell*, 136-32; *Roberts v. Connor*, 125-45; *Connor v. Dillard*, 129-50; *Piano Co. v. Newell*, 177-533; *Perry v. R. R.*, 153-117—from judgment as to location or discontinuance of public road, cartway or ferry, *Cook v. Vickers*, 141-101; *Robinson v. Lamb*, 126-492; *Warlick v. Lowman*, 103-122, 101-548; *McDowell v. Insane Asylum*, 101-656; *King v. Blackwell*, 96-322; *Ashcraft v. Lee*, 81-135—from order striking out a consent reference, after report in, *Stevenson v. Felton*, 99-58; *Smith v. Hicks*, 108-248; *Deaver v. Jones*, 114-649—from an order of reference when plea in bar has not been tried, *Duckworth v. Duckworth*, 144-620; *Kerr v. Hicks*, 129-141; *Bank v. Fidelity Co.*, 126-320; *Clements v. Rogers*, 95-248; but see *Leak v. Covington*, 87-501; *Sloan v. McMahon*, 85-296—from the overruling or sustaining of a plea in bar by the trial judge as a matter of law where reference contemplated, *Jones v. Wooten*, 137-421; *Hahn v. Heath*, 127-27; *Royster v. Wright*, 118-152—from an order setting aside a report of commissioners in partition, *Skinner v. Carter*, 108-106—from the refusal to allow certain important testimony, *Comrs. v. Lemly*, 85-341—from an order confirming report of commissioners to lay out a right of way, *R. R. v. R. R.*, 83-449—from an interlocutory order affecting a substantial right which will work injury if not corrected before appeal from final judgment, *Lane v. Richardson*, 101-181; *Martin v. Flippin*, 101-452; *Leak v. Covington*, 95-193; *Spencer, ex parte*, 95-271; *Merrill v. Merrill*, 92-657—from an order allowing commissions, *Bank v. Bank*, 126-531—from a judgment rendered upon the pleadings when issues of fact are raised, *Newsome v. Bank*, 165-91.

APPEAL DOES NOT LIE. From a judgment which adjudges nothing: *Carter v. Elmore*, 119-296—which affects neither the actual nor legal merits of the controversy, *Lutz v. Cline*, 89-186; *Childs v. Martin*, 68-307—which is only pro forma, *Overman v. Lanier*, 156-537; *Hines v. Hines*, 84-122—from a consent judgment, *Hartsoe v. R. R.*, 161-215—from a confession of judgment, *State v. Griffis*, 117-709; *Rush v. Steamboat Co.*, 67-47—from the decision of a hypothetical proposition of law depending on a fact not yet decided, *McGehee v. Tucker*, 122-186—nor from a refusal to allow nonsuit after verdict and judgment, *Brown v. King*, 107-313; *Kingsbury v. Hughes*, 61-328—from a refusal to hold demurrer frivolous or strike out answer as frivolous, *Morgan v. Harris*, 141-358; *Walters v. Starnes*, 118-842; *Abbott v. Hancock*, 123-89—from a refusal of judgment upon the pleadings, *Barbee v. Penny*, 174-571; *Blount v. Blount*, 158-312; *Duffy v. Meadows*, 131-31—from a voluntary nonsuit, *Blount v. Blount*, 158-312; *McKinney v. Patterson*, 174-483—from a judgment in habeas corpus proceedings, *State v. Herndon*, 107-934; *State v. Miller*, 97-451; *Walton v. Gatlin*, 60-310—from a judgment in contempt proceedings, when, *Ex parte McCown*, 139-95; *In re Parker*, 177-463; see sections 978 to 980—from a judgment for costs of a case only, *Comrs. v. Gill*,

126-86; Taylor v. Vann, 127-243; State v. Railroad, 74-287; State v. Horne, 119-853; Futrell v. Deans, 116-38; Elliott v. Tyson, 116-184; Russell v. Campbell, 112-404; Pritchard v. Baxter, 108-129; State v. Byrd, 93-624; Hasty v. Funderburk, 89-93; State v. R. R., 74-287; Martin v. Sloan, 69-128; Osborne v. Henry, 66-354; but see Blount v. Simmons, 120-19; Mills Co. v. Lytle, 118-837; Hobson v. Buchanan, 96-444; May v. Darden, 83-237; except as to whether they are properly adjudged, Waldo v. Wilson, 177-461; Van Dyke v. Ins. Co., 174-78.

No appeal lies from order allowing or refusing amendments to pleadings, Parker v. Harden, 122-111; Goodwin v. Fertilizer Works, 121-91; Allen v. R. R., 120-548; Elliott v. Tyson, 117-114; Sheldon v. Kivett, 110-408; Brendle v. Reese, 115-552; Conley v. R. R., 109-692; Moore v. Garner, 109-157; McMillan v. Baker, 92-110; Warden v. McKinnon, 99-251; Roulhac v. Brown, 87-1; Wiggins v. McCoy, 87-499; Henry v. Cannon, 86-24; Smith v. Summerfield, 108-284; Best v. Clyde, 86-4; Turlington v. Williams, 84-125; Boddie v. Woodard, 83-2; Reese v. Jones, 84-597; Dobson v. Chambers, 78-334; Lippard v. Roseman, 72-427—from an order substituting parties, R. R. v. Tel. Co., 113-213; Maggett v. Roberts, 108-174; Reynolds v. Smathers, 87-24—from an order making or refusing to make unnecessary but proper parties, Gammon v. Johnson, 126-64; Aiken v. Mfg. Co., 141-339—from order making additional parties, where no substantial right denied, Gammon v. Johnson, 126-64; Bennett v. Shelton, 117-103; Emry v. Parker, 111-261; Jarrett v. Gibbs, 107-303; Lane v. Richardson, 101-181; Lee v. Eure, 92-283; Merrill v. Merrill, 92-657—from order correcting records so as to speak the truth, State v. Warren, 95-674—from refusal to amend a record, State v. Griffis, 117-713; State v. Swepson, 83-584; Perry v. Adams, 83-266—from order allowing lost pleadings to be substituted: Bray v. Creekmore, 109-49—from an order permitting correction of sheriff's return, Mfg. Co. v. Buxton, 105-74.

No appeal lies from an order extending time in which to file defense bond, Dunn v. Marks, 141-232—from a refusal of judge to require a prosecution bond, Christian v. R. R., 136-321—from refusal of judge to accept bond tendered as security for prosecution, Futrell v. Spivey, 63-526—from decision as to sufficiency of indemnity bond executed in compliance with his order, Sternberger v. Hawley, 85-141—from decision as to sufficiency of undertakings, Bynum v. Comrs., 101-412; Futrell v. Spivey, 63-526—from an order increasing plaintiff's undertaking in arrest and bail, Power Co. v. Lessem Co., 174-358—from granting or refusing a continuance, State v. Burney, 162-613; State v. Sultan, 142-569; Lanier v. Ins. Co., 142-14; State v. Dewey, 139-556; Wagon Co. v. Bostic, 118-758; Bank v. Mfg. Co., 108-282; Dupree v. Ins. Co., 92-417; Jaffray v. Bear, 98-58; State v. Vann, 84-722; Isler v. Dewey, 79-1; Johnson v. Maxwell, 87-18; State v. Scott, 80-365; State v. Lindsey, 78-499; but see McQueen v. Bank, 111-509; Armstrong v. Wright, 8-93; Stratford v. Stratford, 92-297; McCurry v. McCurry, 82-296; Austin v. Clarke, 70-458; Bank v. Tiddy, 67-169—from refusal to require a bond from a party suing in forma pauperis, Modlin v. Ins. Co., 151-35.

No appeal lies from an order submitting issues, Goode v. Rogers, 126-62—from a preliminary order settling issues, School Com. v. Kesler, 66-323—from failure to frame an issue not tendered, Curtis v. Cash, 84-41; Kidder v. McIlhenny, 81-123—from refusal to pass upon competency of evidence before trial, Wallington v. Montgomery, 74-372—for allowing or refusing a leading question to be asked by a party of his own witness, Christmas v. Haywood, 119-130; Johnson v. Allen, 100-131; Bank v. Pinkers, 83-377; Bank v. Wysong & Miles Co., 177-284—from refusal to allow a witness to be recalled, McDonald v. McLendon, 173-172; State v. Fogleman, 164-458; In re Abee, 146-273—for a departure from the ordinary practice in the introduction of evidence, Woodall v. Highway Com., 176-377—from a ruling as to the mental capacity of a witness, State v. Tate, 169-373—for excluding a question which is afterward answered by the same witness, State v. Martin, 173-808—from a ruling as to opening and conclusion of the argument, Kernodle v. Kernodle, 174-441—for failure to have witnesses sworn, if not objected to in apt time, State v. Peterson, 149-533—for standing a juror aside, *Ibid.*—for admitting evidence competent for any purpose when not asked to have it restricted to a particular purpose, Perry v. Mfg. Co., 176-68; Rule 27, 164-438.

No appeal lies from setting aside or refusal to set aside a verdict for inadequate or excessive damages: Phillips v. Tel. Co., 130-513; Norton v. R. R., 122-910; Benton v. R. R., 122-1007; Benton v. Collins, 125-83; Burns v. R. R., 125-304—from refusal of judge to grant a new trial for newly discovered evidence, Faison v. Williams, 121-152; Black v. Black, 111-301; Flowers v. Alford, 111-248; State v. DeGraff, 113-688; State v. Starnes, 97-423; Munden v. Casey, 93-97; Carson v. Dellinger, 90-226; Vest v. Cooper, 68-131—from the granting or refusing of new trial, when it is in court's discretion, Dowdy v. Dowdy, 154-556; Slocumb v.

Construction Co., 142-349; McCord v. R. R., 134-53; Bird v. Bradburn, 131-488; Edwards v. Phifer, 120-405; Spruill v. Ins. Co., 120-149; Jordan v. Farthing, 117-181; Whitehurst v. Pettipher, 105-40; McKinnon v. Morrison, 104-354; State v. Kiger, 115-746; Alpha Mills v. Engine Co., 116-797; Davenport v. Terrell, 103-53; Redmond v. Stepp, 100-212; Stanton v. Hughes, 97-318; Goodson v. Mullin, 92-211; Thomas v. Myers, 87-31; Dalton v. Webster, 82-279; Gay v. Nash, 84-333; Watts v. Bell, 71-405; Vest v. Cooper, 68-131; Jenkins v. Ore Co., 65-563; Boykin v. Perry, 49-325; McRae v. Lilly, 23-118; Brown v. Morris, 20-565; Long v. Gantley, 20-457; Armstrong v. Wright, 8-93; Alley v. Hampton, 13-11—from findings of fact by the referee adopted by the judge, see section 579—from findings of fact by the judge, if there is any evidence to sustain them, Henry v. Hilliard, 170-578; State v. Bailey, 162-583; Lumber Co. v. Buhmann, 160-385; Lodge v. Gibbs, 159-66; Mills v. McDaniel, 155-249; Thornton v. McNeely, 144-622; Davison v. Land Co., 126-704; Baker v. Belvin, 122-190; State v. Morgan, 120-563; Crabtree v. Scheelky, 119-56; State v. Taylor, 118-1262; Blue v. R. R., 117-644; Smith v. Whitten, 117-389; Hinsdale v. Underwood, 116-593; Cureton v. Garrison, 115-550; Long v. Ins. Co., 114-465; Parker v. McPhail, 112-502; McAden v. Nutt, 113-439; State v. Fuller, 114-885; Johnson v. Loftin, 111-319; State v. Best, 111-643; State v. Crane, 110-537; Gillis v. R. R., 108-441; Davie v. Davis, 108-501; State v. Brady, 107-822; Travers v. Deaton, 107-500; Bonds v. Smith, 106-553; Springs v. Schenck, 106-153; Nissen v. Mining Co., 104-309; Avent v. Arrington, 105-377; Millhiser v. Balsley, 106-433; Hammond v. Schiff, 100-161; State v. Potts, 100-457; Leak v. Covington, 99-559; Foote v. Gooch, 96-271; Smith v. Kron, 96-392; State v. Cole, 94-958; Branton v. O'Briant, 93-99; Jones v. Call, 93-170; Trull v. Rice, 92-572; Barbee v. Green, 92-471; State v. Burgwyn, 87-572; State v. Efler, 85-585; State v. Sanders, 84-728; Hilton v. McDowell, 87-364; McPeters v. Ray, 85-462; Carroll v. Haywood, 64-481; Barrett v. Henry, 85-321; Cardwell v. Cardwell, 64-621; Burke v. Turner, 85-500; but see Baker v. Belvin, 122-190; Delozier v. Bird, 125-493; Pearce v. Elwell, 116-595; Roberts v. Lewald, 107-305; Gillis v. R. R., 108-441; Holden v. Purefoy, 108-163; Gatewood v. Burns, 99-357; Seoggins v. Turner, 98-135; Evans v. R. R., 96-45; Coates v. Wilkes, 92-376—but the findings of fact in an application for injunction may be reviewed if the evidence is sent up, Seip v. Wright, 173-14.

No appeal lies from the removal or refusal to remove a cause for local prejudice or convenience of witnesses: State v. Turner, 143-641; Garrett v. Bear, 144-23; Lassiter v. R. R., 126-507; Albertson v. Terry, 109-8; State v. Johnson, 104-780; State v. Hall, 73-134; State v. Hill, 72-345; State v. Hildreth, 31-429; State v. Duncan, 28-98—from a refusal to dismiss an action: Piano Co. v. Newell, 177-533; Bradshaw v. Bank, 172-632; Taylor v. Johnson, 171-84; Comrs. v. Scales, 171-523; Griffin v. Cupp, 167-96; Spruill v. Bank, 163-43; Johnson v. Reformers, 135-385; Meekins v. R. R., 131-1; Jester v. Steam Packet Co., 131-54; Clinard v. White, 129-250; Jones v. R. R., 127-188; Cooper v. Wyman, 122-784; Kellogg v. Mfg. Co., 112-191; Whitaker v. Dunn, 122-103; Burrell v. Hughes, 116-430; Joyner v. Roberts, 112-111; Sprague v. Bond, 111-425; Fertilizer Co. v. Marshburn, 122-411; Farris v. R. R., 115-600; Lowe v. Acc. Assn., 115-18; Luttrell v. Martin, 111-528; 112-593; Mullen v. Canal Co., 112-109; Sheldon v. Kivett, 110-408; Lambe v. Love, 109-305; Guilford v. Georgia, 109-310; Plemmons v. Imp. Co., 108-614; Allen v. Royster, 107-278; Spaugh v. Boner, 85-208; Wilson v. Lineberger, 82-412; Railroad v. Richardson, 82-343; Gay v. Brookshire, 82-409; Long v. Bank, 81-41; Capel v. Peebles, 80-90; McBryde v. Patterson, 78-412; Crawley v. Woodfin, 78-4; Foster v. Penry, 77-160; Perry v. Whitaker, 77-102; Mitchell v. Kilburn, 74-483; Mastin v. Marlow, 65-696; Garrett v. Trotter, 65-435; Smith v. Mitchell, 63-620.

No appeal lies from setting aside a judgment where facts show inadvertence, excusable neglect, etc.: Norton v. McLaurin, 125-185; see, also, cases under section 600—from the refusal of or granting leave to file exceptions at a term of court subsequent to the one to which the report is submitted, Johnson v. Loftin, 111-319; McNeill v. Hodges, 105-52; Levenson v. Elson, 88-182; Long v. Gooch, 86-709; Wittkowsky v. Logan, 86-540; Long v. Logan, 86-535—from order allowing additional exceptions filed to referee's report, R. R. v. King, 125-454—from an order making an allowance to referee, Worthy v. Brower, 93-492—from the refusal or intimation of a refusal to allow counterclaim to be pleaded, Milling Co. v. Finlay, 110-411—from an order striking out an irregular judgment at the term rendered, Halyburton v. Carson, 80-16; Dick v. Dickson, 63-488—from an order of judge to show cause why receiver should not be appointed, Gray v. Gaither, 71-55—from an order setting aside a compulsory reference, Bushee v. Surles, 79-51; see, also, section 573—from refusal of judge to reopen a case for additional evidence, Pain v. Pain, 80-322—from refusal to hear affidavits upon a

motion to confirm a report of commissioners, *Worthington v. Coward*, 114-289; *Hanes v. R. R.*, 109-490; *Skinner v. Carter*, 108-106—from refusal to open bidding on an advance of ten per cent before sale confirmed, *Thompson v. Rospigliosi*, 162-146; *Taylor v. Carrow*, 156-6; *Copping v. Mfg. Co.*, 153-329; *Uzzle v. Weil*, 151-131; *Crabtree v. Scheelky*, 119-56; *Trull v. Rice*, 92-572—from an order appointing commissioners in condemnation proceedings, *Hendrick v. R. R.*, 98-431; *R. R. v. Warren*, 96-620; *Tel. Co. v. R. R.*, 83-420—from an order refusing to dismiss supplementary proceedings, *Turner v. Holden*, 109-182—from an order striking out counterclaim, *Bazemore v. Bridgers*, 105-191; *Knott v. Burwell*, 96-272—from an order for the docketing of a case brought up from a justice's court by recordari, *State v. Warren*, 100-489—from a judgment overruling exceptions to the report of proceSSIONERS, *Martin v. Flippin*, 101-452—from an overruling of defendant's demurrer to indictment, *State v. McDowell*, 84-798.

No appeal lies from interlocutory orders, when appellant is not seriously prejudiced by delay and deprived of no substantial right: *Navigation Co. v. Worrell*, 133-93; *Brown v. Nimocks*, 126-808; *Benton v. Collins*, 121-66; *Harding v. Hart*, 118-839; *Bruce v. Crabtree*, 116-528; *Sinclair v. R. R.*, 111-507; *Hilliard v. Oram*, 106-467; *Warren v. Stancill*, 117-112; *Clement v. Foster*, 99-255; *Blackwell v. McCaine*, 105-460; *Hailey v. Gray*, 93-195; *Welch v. Kinsland*, 93-281; *Loftin v. Rouse*, 94-508; *Sneeden v. Harris*, 107-311; *Williams v. Walker*, 107-334; *Railroad v. Warren*, 92-620; *Leak v. Covington*, 87-501; *Comrs. v. Cook*, 86-18; *Hines v. Hines*, 84-122; *Telegraph Co. v. R. R.*, 83-420; *Sutton v. Schonwald*, 80-20—court will not entertain fragmentary appeals, *Headman v. Comrs.*, 177-261; *Joyner v. Reflector Co.*, 176-274; *Chambers v. R. R.*, 172-555; *Walker v. Reeves*, 165-35; *Chadwick v. R. R.*, 161-209; *Smith v. Miller*, 155-242; *Shields v. Freeman*, 158-123; *Moore v. Lumber Co.*, 150-261; *Shelby v. R. R.*, 147-537; *Hinton v. Life Ins. Co.*, 116-22; *McGehee v. Tucker*, 122-186; *Rodman v. Calloway*, 117-13; *Hicks v. Gooch*, 93-112; *Arrington v. Arrington*, 91-301; *Comrs. v. Satchwell*, 88-1; *Hines v. Hines*, 84-122; *White v. Utley*, 94-511; an appeal involving an injunction to prevent levying a tax is not fragmentary, *Gill v. Comrs.*, 160-177.

No appeal lies from order recommitting referee's report for correction: *Kerr v. Hicks*, 122-409; *Alexander v. Alexander*, 120-472; *Wallace v. Douglas*, 105-42; *Leak v. Covington*, 95-193; *Grant v. Reese*, 90-3; *Torrence v. Davidson*, 90-2; *Jones v. Call*, 89-188; *Lutz v. Cline*, 89-186; *Comrs. v. Magnin*, 85-114—from order for examination in supplementary proceedings, *Bruce v. Crabtree*, 116-528—from order to clerk directing him to send up to next term a transcript of proceedings supplemental to execution, *Bank v. Burns*, 107-465; *Turner v. Holden*, 109-182—from order of state court to its clerk to certify record to federal court, after the latter court has ordered its removal, *Mayo v. Dockery*, 127-1—from an order instructing receivers to sue individual stockholders of a corporation for amount of stock unpaid, appeal by corporation, *Black v. Copper Co.*, 115-382—from an order setting aside verdict as to one issue and ordering new trial upon that alone, *Jarrett v. Trunk Co.*, 144-299—from a refusal to grant motion for bill of particulars in embezzlement case, *State v. Dewey*, 139-556.

No appeal lies from order for mistrial except in capital case: *State v. Andrews*, 166-349. Whether an order consolidating cases is reviewable, see *Wilder v. Greene*, 172-94; *Sumner v. Staton*, 151-198; *Hartman v. Spiers*, 87-28; *Morrison v. Baker*, 81-76; *Glenn v. Bank*, 70-192. Error which does not appear to have prejudiced the party will be disregarded: *Brewer v. Ring and Valk*, 177-476; *State v. Heavener*, 168-156; *State v. Smith*, 164-475; *State v. Vann*, 162-534; *Kornegay v. R. R.*, 154-389; *Bernhardt v. Dutton*, 146-206; *State v. Harrison*, 145-408. Excluding a question when it does not appear what the answer would have been is not reviewable: *Bank v. Wysong & Miles Co.*, 177-284; *Smith v. Comrs.*, 176-466; *Rawls v. R. R.*, 172-211; *Jenkins v. Long*, 170-269. Matters decided upon a former appeal are not reviewable by a second appeal: *Carson v. Ins. Co.*, 165-135; *Riley v. Sears*, 156-267; *Carson v. Bunting*, 156-29; *Roberts v. Baldwin*, 155-276; *Green v. Green*, 143-406; *Harris v. Quarry Co.*, 137-204; *Setzer v. Setzer*, 129-296; *Howe v. Hall*, 128-167; *Pretzfelder v. Ins. Co.*, 123-164. A decision of one judge of superior court is not reviewable by another judge: *Dockery v. Fairbanks*, 172-529. See cases cited under section 1412.

639. Appeal from judge in special proceedings. Any party, within ten days after notice of such judgment, may appeal to the supreme court of the state, upon any matter of law or legal inference therein, under the regulations provided for appeals in other cases.

Rev., s. 588; Code, s. 256; C. C. P., s. 115.

See sections 634 and 636.

640. **Interlocutory orders reviewed on appeal from judgment.** Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.

Rev., s. 589; Code, s. 562; C. C. P., s. 313.

As to appeals from interlocutory orders, see section 638. Appeals from interlocutory or subsidiary orders, judgments and decrees made in a cause carry up for review only the ruling of the court upon that special point; the order or judgment appealed from is not vacated, but further proceedings under it are suspended until its validity is determined: *Green v. Griffin*, 95-50; *Combes v. Adams*, 150-64; *Bonner v. Rodman*, 163-1.

641. **When appeal taken.** The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered in term within ten days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required.

Rev., s. 590; Code, s. 549; 1889, c. 161; C. C. P., s. 300.

For undertaking to stay execution pending appeal, see section 650. For appeals taken from justices' courts, see sections 1528-1534. Appeals from judgments rendered in term must be taken within ten days of rendition: *Howe v. Hall*, 128-169; *Mecke v. Mineral Co.*, 122-796; *Marion v. Tilley*, 119-474; *Tucker v. Life Assn.*, 112-796; *Simmons v. Allison*, 119-556; *Brantley v. Jordan*, 90-26; *Applewhite v. Fort*, 85-596; *Bryan v. Hubbs*, 69-423—and no intimation of intention to appeal need be made at the time of the trial where notice given as required, *Russell v. Hearne*, 113-361. The ten days dates from the last day of the term, which means when the judge leaves the bench; not from the constructive expiration of the term: *Delafield v. Construction Co.*, 115-21; *Davison v. Land Co.*, 120-259; *Zell Guano Co. v. Hicks*, 120-29. When judgment is rendered out of term the time is counted from the filing with the clerk: *Fisher v. Fisher*, 164-105. When judgment appealed from states that appeal was taken, it must necessarily mean that it was taken in time: *Delozier v. Bird*, 123-689; *Atkinson v. R. R.*, 113-689. Order to transfer custody of a child is suspended on appeal and giving the bonds required: *Page v. Page*, 166-90.

642. **Entry and notice of appeal.** Within the time prescribed in the preceding section, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party unless the record shows an appeal taken or prayed at the trial, which is sufficient.

Rev., s. 591; Code, s. 550; C. C. P., s. 301.

See cases cited under section 641. No intimation of intention to appeal is necessary at the time of trial if the statute is complied with: *Russell v. Hearne*, 113-361. No notice is required when appeal is taken in open court: *Investment Co. v. Kelly*, 123-388. The record must show that an appeal was duly taken: *Howell v. Jones*, 109-102; *Mfg. Co. v. Simmons*, 97-89; *Moore v. Vanderburg*, 90-10; *Walton v. McKesson*, 101-428. See, also, cases cited under section 643, as to perfecting appeals.

643. **Case on appeal; statement, service, and return.** The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; within ten days after such service the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved

by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved.

Rev., s. 591; Code, s. 550; C. C. P., s. 301; 1905, c. 448.

As to time and manner of taking exceptions, see section 590.

GENERALLY. The statute respecting the preparation of appeals must be strictly complied with: *State v. Neville*, 175-731; *Jenkins v. Carson*, 173-725; *Lindsey v. Knights of Honor*, 172-818; *Cozart v. Assur. Co.*, 142-522; *Davis v. Wall*, 142-450; *Cook v. Vickers*, 141-101; *Sigman v. R. R.*, 135-181; *Brinkley v. Smith*, 130-226; *Baker v. Hobgood*, 126-152; *Pretzfelder v. Ins. Co.*, 123-164; *Lucas v. R. R.*, 121-508; *Alexander v. Alexander*, 120-472; *Griffin v. Nelson*, 106-235; *Smith v. Abrams*, 90-21; *Hemphill v. Blackwelder*, 90-14; *Gregory v. Hobbs*, 92-39. The parties may waive matter of time in the perfecting of appeals, but such waiver must appear of record or by the affidavits of appellee or by agreement in writing: *Wade v. Newbern*, 72-498; *Pipkin v. McArtan*, 122-194; *Sondley v. Asheville*, 112-694; *Hemphill v. Morrison*, 112-756; *Graves v. Hines*, 106-323; *Mfg. Co. v. Simmons*, 97-89; *Short v. Sparrow*, 96-348; *McCannless v. Reynolds*, 91-244; *Officers v. Bland*, 91-1; *Scroggs v. Alexander*, 88-64; *Holmes v. Holmes*, 84-833; *Hutchinson v. Rumpfelt*, 83-441; *Pennington v. Pennington*, 75-355; *Walton v. Pearson*, 82-464; *Sever v. McLaughlin*, 82-332; *Taylor v. Brower*, 78-8; *Rouse v. Quinn*, 75-354; *Adams v. Reeves*, 74-106; *Gupton v. Sledge*, 161-214; *Mirror Co. v. Casualty Co.*, 157-29; *Comrs. v. Chapman*, 151-327. **Method of perfecting appeal touched upon in the following cases:** *Lee v. Baird*, 146-361; *Vivian v. Mitchell*, 144-472; *Laney v. Mackey*, 144-630; *Craddock v. Barnes*, 140-427; *Love v. Love*, 139-363; *Brown v. Plott*, 129-272; *Blair v. Coakley*, 136-405; *Atkinson v. R. R.*, 113-586; *Baden v. Pugh*, 129-60; *Packing Co. v. Williams*, 122-406; *Brafford v. Reed*, 124-345; *State v. Frizell*, 111-724; *State v. Telfair*, 139-555; *Avery v. Pritchard*, 93-266; *Coates v. Wilkes*, 94-178; *Wilson v. Seagle*, 84-110. In cases where both parties appeal: *Mills v. Guaranty Co.*, 136-255; *State v. Bost*, 125-707; *State v. Mallett*, 125-718; *Jones v. Hoggard*, 107-349; *Perry v. Adams*, 96-347; *Morrison v. Cornelius*, 63-346—the appeal of one will not bring up that of another: *Bank v. Bobbitt*, 108-525.

STATEMENT OF CASE ON APPEAL. The case on appeal is no part of the record proper, but a part of transcript: *State v. Matthews*, 142-621. A case on appeal embraces the exceptions taken and such of the evidence, charge, prayers and other matters occurring at the trial as are necessary to present the matters excepted to for review: *Cressler v. Asheville*, 138-482. **Suggestions as to making up case on appeal:** *Jones v. R. R.*, 153-419; *McDowell v. Kent*, 153-555; *Thompson v. Williams*, 175-696; *Gaither v. Carpenter*, 143-240; *Davis v. Wall*, 142-450; *Marable v. R. R.*, 142-564; *Hicks v. Kenan*, 139-337; *Cressler v. Asheville*, 138-482; *Cameron v. Power Co.*, 137-101; *Sigman v. R. R.*, 135-181; *Hart v. Cannon*, 133-10; *Gwaltney v. Assur. Society*, 132-925; *Vanderbilt v. Pickelsimer*, 128-556; *State v. Kinsauls*, 126-1095; *Bradley v. R. R.*, 126-736; *State v. Ridge*, 125-657; *Lucas v. R. R.*, 121-508; *James v. R. R.*, 121-530; *Bennett v. Tel. Co.*, 128-103; *Mining Co. v. Smelting Co.*, 119-415; *Watkins v. R. R.*, 116-961; *State v. Cox*, 110-503; *McKinnon v. Morrison*, 104-354; *Anthony v. Estes*, 99-598; *State v. Sloan*, 97-499; *McGowan v. R. R.*, 95-417; *State v. Alston*, 94-930; *Gregory v. Forbes*, 94-220; *Strickland v. Draughan*, 88-315; *Surratt v. Crawford*, 87-372; *Turner v. Foard*, 83-683; *McNeill v. Chadbourn*, 79-149; *Sampson v. R. R.*, 70-404. The case on appeal must be made up by appellant, and not a direction to the clerk to fill certain blanks by copying the record: *Sloan v. Assurance Society*, 169-257. The case must contain assignments of error based upon exceptions duly taken: *Borden v. Power Co.*, 174-72; *Harrison v. Dill*, 169-542; *Bank v. McArthur*, 168-48; *Jones v. R. R.*, 153-419; *McDowell v. Kent*, 153-555; *Worley v. Logging Co.*, 157-490; *Allred v. Kirkman*, 160-392; *Gaither v. Carpenter*, 143-240; *State v. Matthews*, 142-621; *Cressler v. Asheville*, 138-482; *Arnold v. Hardy*, 131-113; *Coley v. Statesville*, 121-317; *Falkner v. Thompson*, 112-455; *Everett v. Williamson*, 107-204; *Ferrell v. Thompson*, 107-420; *Boyer v. Teague*, 106-571; *Taylor v. Plummer*, 105-56; *Lindsey v. Sanderlin*, 104-331; *Rodman v. Harvey*, 102-1; *Calvert v. Miller*, 94-600; *Phipps v. Pierce*, 94-514—and such assignments of error must be specific and distinct: *Haddock v. Stocks*, 167-70; *Steeley v. Lumber Co.*, 165-27; *Wheeler v. Cole*, 164-378; *Thompson v. R. R.*, 147-412; *Lee v. Baird*, 146-361; *Brumble v. Brown*, 71-513; *In re Murray's Will*, 141-588; *Carson v. R. R.*, 128-95; *Pierce v. R. R.*, 124-99; *Falkner v. Thompson*, 112-455; *Greensboro v. McAdoo*, 110-430; *Watts v. Warren*, 108-517; *Clements v. Rogers*, 95-248; *Wiley v. Logan*, 95-358; *Arrington v. Goodrich*, 95-462; *Baum v. Shooting Club*, 94-217;

Summer v. Candler, 92-684; State v. Keath, 83-626; Straus v. Beardsley, 79-59; Williamson v. Canal Co., 78-161; Bridgers v. Bridgers, 69-451; Bland v. O'Hagan, 64-471; Stout v. Woody, 63-37; Whitesides v. Twitty, 30-431; Sutliff v. Lunsford, 30-318—and must be briefly and clearly stated and numbered: Smith v. Mfg. Co., 151-260; Sigman v. R. R., 135-181; Jones v. R. R., 153-419; Hobbs v. Cashwell, 158-597; Rules 19, 21, 27—yet sometimes, as in this case, they must be presented with such fullness of statement as will enable court to determine the real merits: Boyer v. Teague, 106-571—and if there is no "case settled," or if case does not assign error specifically enough to be definite and understood by the court, the judgment below will be affirmed or, under some circumstances, case will be remanded, unless error apparent upon the record: Meadows v. Wharton, 147-178; Wheeler v. Cole, 164-378; State v. Lewis, 145-585; Gaither v. Carpenter, 143-241; Cressler v. Asheville, 138-482; Trimmer v. Gorman, 129-161; Felmet v. Exp. Co., 123-499; Hicks v. Westbrook, 121-131; Barrus v. R. R., 121-504; Cunningham v. Cunningham, 121-413; Smith v. Smith, 119-311; Roberts v. Partridge, 118-355; Collins v. Young, 118-265; McCrimmen v. Parish, 116-614; Delafield v. Const. Co., 115-21; Fertilizer Co. v. Black, 114-591; Rosenthal v. Roberson, 114-594; Maggett v. Roberts, 114-227; Forte v. Boone, 114-176; State v. Carter, 113-639; Cummings v. Hoffman, 113-267; Marshall v. Stine, 112-697; State v. Whitmire, 112-895; Hamilton v. Icard, 112-589; State v. Green, 111-646; State v. Foster, 110-510; Lovie v. Ins. Co., 109-302; Howell v. Jones, 109-102; Peebles v. Braswell, 107-68; State v. Brown, 106-645; Taylor v. Plummer, 105-56; State v. Henry, 104-914; State v. Bell, 103-438; Currie v. Clark, 101-329; Thornton v. Brady, 100-38; Patton v. Gash, 99-280; Brendle v. Herren, 98-539; Wilson v. Shepherd, 98-154; Carroll v. Barden, 97-191; Dupree v. Tuten, 97-94; Justice v. R. R., 96-412; Pleasants v. R. R., 95-195; Denning v. Gaine, 95-528; Rencher v. Anderson, 95-208; Baum v. Shooting Club, 94-217; State v. Gardner, 94-953; Williams v. Johnston, 94-633; State v. Powell, 94-920; State v. Freeman, 93-558; Green v. Dawson, 92-61; McDaniel v. Pollock, 87-503; Mott v. Ramsay, 90-29; Royster v. Burwell, 90-25; Neal v. Mace, 89-171; State v. Sheppard, 87-574; Swepson v. Summey, 74-551; King v. Page, 86-725. But no assignment of error is necessary where the record presents the exceptions: Comrs. v. Scales, 171-523; Bessemer Co. v. Hdw. Co., 171-728; Cressler v. Asheville, 138-482; Railroad v. Stewart, 132-248; Clark v. Peebles, 120-31; Wilson v. Lumber Co., 131-163; Brooks v. Austin, 94-222; State v. Byrd, 93-624; State v. Crook, 91-536—nor where case tried in court below upon a case agreed: Greensboro v. McAdoo, 112-359; Chamblee v. Baker, 95-98; Davenport v. Leary, 95-203—nor where case tried on demurrer: Chamblee v. Baker, 95-98—nor when exception only taken to judgment and an appeal is itself an exception thereto: Wallace v. Salisbury, 147-58; Mershon v. Morris, 148-48; Ullery v. Guthrie, 148-417; Wilson v. Lumber Co., 131-163; Railroad v. Stewart, 132-248; Robeson v. Hodges, 105-49; Murray v. Southerland, 125-175; Delozier v. Bird, 123-689; Reade v. Street, 122-301. On appeal from a judgment of nonsuit no assignment of error is necessary: Queen v. R. R., 161-217. It is not sufficient to file stenographer's notes of evidence, but a concise statement in narrative form should be prepared: Brewer v. Mfg. Co., 161-211; Skipper v. Lumber Co., 158-322; Bucken v. R. R., 157-443; Cressler v. Asheville, 138-482; Durham v. R. R., 108-399.

Exceptions to the charge may for the first time be set out by appellant in his case on appeal: Bank v. Sumner, 119-591; Lowe v. Elliott, 107-718; also see under section 590 (2). Where counsel agreed that all papers should form the case on appeal, case remanded for assignment of error: Holly v. Holly, 94-639. On appeal from order setting aside a verdict for error of law, appellant should assign as error the refusal of judgment and setting aside verdict and that there was no error against appellee: Powers v. City of Wilmington, 177-361. Exceptions taken on trial and not in the assignments of error, or being in the record are not set out in the brief or on argument, are considered abandoned: Gray v. Cartwright, 174-49; Britt v. R. R., 148-37; R. R. v. R. R., 148-59. Rule 34.

Where the record proper differs from case on appeal, the former controls: Ladd v. Teague, 126-544; State v. Truesdale, 125-696; Sutton v. Phillips, 117-230; Threadgill v. Comrs., 116-616; McDaniel v. Scurlock, 115-295; State v. Ramsour, 113-642; State v. Carlton, 107-956; Bowen v. Fox, 99-127; McCannless v. Flinehum, 98-358; McNeill v. Lawton, 97-16; Adrian v. Shaw, 84-832; State v. Keeter, 80-472; Farmer v. Williard, 75-401; but see Walton v. McKesson, 101-428. Case on appeal cannot be varied or amended by affidavit to supreme court: Covington v. Newberger, 99-523.

SERVICE OF CASE ON APPEAL. A dispute as to whether service was made in time should be settled by court below: Barrus v. R. R., 121-505; Westbrook v. Hicks, 121-132;

Cummings v. Hoffman, 113-267; McDaniel v. Scurlock, 115-297; Walker v. Scott, 102-487. An agreement for extension of time should be in writing: Mirror Co. v. Casualty Co., 157-29. Rule 39. Where nothing to show service on appellee in time and case sent up signed only by appellant, it will not be considered: Mfg. Co. v. Simmons, 97-89; McNeill v. R. R., 117-642; State v. Perry, 122-1019; Hicks v. Westbrook, 121-131; Guano Co. v. Hicks, 120-30; Smith v. Smith, 119-311; Rosenthal v. Roberson, 114-594; Cummings v. Hoffman, 113-268; Hamilton v. Teard, 112-592; Peebles v. Braswell, 107-68. When not served in time, judge strikes appellant's case from the files: Hicks v. Westbrook, 121-131. Service must be made by an officer, unless service accepted: Smith v. Smith, 119-314; Herbin v. Wagoner, 118-656; Allen v. Strickland, 100-225; State v. Johnson, 109-852. Certificate of service by sheriff will be accepted against affidavit of party: Burlingham v. Canady, 156-177. Service by town constable not sufficient: Forte v. Boone, 114-176—nor by counsel: Roberts v. Partridge, 118-355—and should be made by copy: Watkins v. R. R., 116-961; State v. Price, 110-599—but if original served instead of copy, appellee cannot complain: McDaniel v. Scurlock, 115-295. Time of service should be computed; how: Murphy v. Electric Co., 174-782; Land Co. v. Chester, 170-399; Fisher v. Fisher, 164-105; Bd. of Education v. Orr, 161-218; Hardee v. Timberlake, 159-552; Lumber Co. v. Rowe, 151-130; Houston v. Lumber Co., 136-328; Mecke v. Mineral Co., 122-796; Davison v. Land Co., 120-259; Guano Co. v. Hicks, 120-29; Simmons v. Allison, 119-556; Rosenthal v. Roberson, 114-594; Delafield v. Construction Co., 115-21; Walker v. Scott, 104-481; Chamblee v. Baker, 95-98; Turrentine v. R. R., 92-642; Worthy v. Brady, 91-265—unless appellant takes the ten days allowed from adjournment in which to appeal, when he has ten days more in which to serve case on appeal: Mecke v. Mineral Co., 122-796. Settlement of case by judge does not cure failure to serve in time: Barber v. Justice, 138-22; Barrus v. R. R., 121-504; McNeill v. R. R., 117-642; Forte v. Boone, 114-176. Legal mode of service not waived by appellee's agreeing that appellant is "to serve case" by certain time: Smith v. Smith, 119-311. Defective service cured by appellee's acceptance and his filing exceptions without objecting to service: Woodworking Co. v. Southwick, 119-611. Statutory time cannot be extended without consent of parties: Cozart v. Assur. Co., 142-522; Barber v. Justice, 138-20; Pipkin v. McArtan, 122-194; Hemphill v. Morrison, 112-756; Sondley v. Asheville, 112-694—but consent presumed if order is of record: Woodworking Co. v. Southwick, 119-611; Henry v. Hilliard, 120-479. The court cannot extend the time fixed by consent: Gupton v. Sledge, 161-214; Cox v. Lumber Co., 177-227. Where several parties on same side, how case served: Shober v. Wheeler, 119-471. In a criminal case service must be made upon the solicitor: State v. Stevens, 152-840. Where appellant mailed case and fees to sheriff in ample time, but sheriff did not receive them: Arrington v. Arrington, 114-113. Statute regulating manner of service of notices is applicable to service of case on appeal and exception thereto: State v. Price, 110-599. As to whether, upon counsel tendering case to opposing counsel, who treated it as a service and began preparing counter case, it is sufficient service, see Ice Mfg. Co. v. R. R., 125-21; see, also, Roberts v. Partridge, 118-355.

APPELLEE'S RETURN TO APPELLANT'S CASE. Appellee may file specific exceptions or may put them in the form of a counter case: State v. King, 119-910; McDaniel v. Scurlock, 115-295; Harris v. Carrington, 115-187; Horne v. Smith, 105-322.

TIME WITHIN WHICH APPELLEE MUST MAKE RETURN. Where exceptions not served in time because sheriff did not get his mail containing them: Arrington v. Arrington, 114-115. Where appellant wired that he would accept service of exceptions upon his return, and does so, he is estopped to insist that it was filed too late: Watkins v. R. R., 116-961. Where agreement that appellant may have thirty days to file his case and appellee thirty days thereafter, appellee has thirty days from service of appellant's case: Mitchell v. Haggard, 105-173. Appellant cannot complain that his case was not returned in time when appellee's exceptions thereto were filed in time: McDaniel v. Scurlock, 115-295. Counter case served by whom: Herbin v. Wagoner, 118-656; and see cases supra under "service of case on appeal."

If appellee does not return with exceptions or counter case, appellant's case becomes case on appeal: Barber v. Justice, 138-20; State v. Freeman, 127-544; State v. Price, 110-599; State v. Carlton, 107-956; Booth v. Ratcliffe, 107-6; Russell v. Davis, 99-115; Isler v. Hadcock, 72-119.

644. Settlement of case on appeal. If the case on appeal is returned by the respondent with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him. If the appel-

lant delays longer than fifteen days after the respondent serves his counterclaim, or exceptions, to request the judge to settle the case on appeal, and delays for such period to mail the case and counterclaim or exceptions to the judge, then the exceptions filed by the respondent shall be allowed, or the counterclaim served by him shall constitute the case on appeal; but the time may be extended by agreement.

The judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial district, which time shall not be more than twenty days from the receipt of the request. At the time and place stated, the judge shall settle and sign the case, and deliver a copy to the attorney of each party, or, if the attorneys are not present, file a copy in the office of the clerk of the court. If the judge has left the district before the notice of disagreement, he may settle the case without returning to the district.

In settling the case, the written instructions signed by the judge, and the written request for instructions signed by the counsel, and the written exceptions, are deemed conclusive as to what these instructions, requests, and exceptions were. If a copy of the case settled was delivered to the appellant, he shall within five days thereafter file it with the clerk, and if he fails to do so, the respondent may file his copy.

The judge shall settle the case on appeal within sixty days after the termination of a special term or after the courts of the districts have ended, and if the judge in the meantime has gone out of office, he shall settle the case as if he were still in office. Any judge failing to comply with this section is liable to a penalty of five hundred dollars, for the use of any person who sues for it.

Rev., s. 591; Code, s. 550; C. C. P., s. 301; 1889, c. 161; 1907, c. 312.

APPLICATION TO JUDGE TO SETTLE CASE. The appellant must apply to judge to settle the case, and send the papers for that purpose: *McNeill v. R. R.*, 173-729; *Holloman v. Holloman*, 172-835; *Turner v. Gas Co.*, 171-750; *Transportation Co. v. Lumber Co.*, 168-60; *Burlingham v. Canady*, 156-177; *Chauncey v. Chauncey*, 153-12; *Comrs. v. Chapman*, 151-327; *Stroud v. Tel. Co.*, 133-253; *Stevens v. Smathers*, 123-497; *Simmons v. Andrews*, 106-201; *Kirkman v. Dixon*, 66-406—and if he sends papers to judge without requesting a day for settlement, etc., the judge need not give notice required: *State v. Williams*, 109-846; *Walker v. Scott*, 106-56. Judge sets time and place and gives notice: *Slocumb v. Const. Co.*, 142-353.

SETTLEMENT OF THE CASE. In settling a case on appeal the judge does not merely adjust the differences between the two cases, but may disregard both cases, and should do so if he finds that the facts of the trial were different: *Slocumb v. Const. Co.*, 142-353; *State v. Gooch*, 94-985. Where judge sustains appellee's exceptions and orders case redrafted and presented for his signature, but appellant sends up the papers; effect: *Gaither v. Carpenter*, 143-240; *Mitchell v. Tedder*, 107-358; *Hinton v. Greenleaf*, 115-5. Where appellant sends up his case and appellee's exceptions, without judge settling case, appellant is deemed to have accepted exceptions: *Stevens v. Smathers*, 123-497; *Roberts v. Partridge*, 118-357; *Lyman v. Ramseur*, 113-503; *Jones v. Call*, 93-170; *Owens v. Phelps*, 92-231. Appellant sending to judge appellee's exceptions drawn in irregular manner thereby waives their irregularity: *Byrd v. Bazemore*, 122-115. Where judge fails to settle case, and makes return that his notes are lost and his recollection not clear, new trial will be granted only when appellant guilty of no laches: *State v. Huggins*, 126-1055; *McGowan v. Harris*, 120-139; *Ritter v. Grimm*, 114-373; *Clemmons v. Archbell*, 107-653; *Owens v. Paxton*, 106-480; *Comrs. v. Steamship Co.*, 98-163; *Burton v. Greene*, 94-215; *Sanders v. Norris*, 82-243; *Isler v. Haddock*, 72-119; *State v. Powers*, 10-376. Judge may settle the case even after subjecting himself to penalty for delay: *State v. Williams*, 109-846. Where judge added to the case on appeal that he didn't remember distinctly what occurred, remanded that he may settle case again: *Simmons v. Andrews*, 104-127. Counsel can agree on case without judge: *Slocumb v. Construction Co.*, 142-349; *State v. Chaffin*, 125-660; *State v. Gooch*, 94-982.

The statement of the case on appeal imports absolute verity, and certiorari will not issue to force judge to make up new case and insert matters alleged to have been omitted: *State v. Gay*, 94-821; *Cameron v. Power Co.*, 137-101; *State v. Journigan*, 120-568; *Paper Co. v. Chronicle*, 115-147; *State v. Hart*, 116-977; *Allen v. McLendon*, 113-319; *State v. Debnam*, 98-712; *State v. Gooch*, 94-982; *State v. Miller*, 94-902. The practice of interpolating "Here clerk will copy judge's notes": *Wood v. R. R.*, 118-1056. The case as "settled" by the judge, counsel not agreeing, is the only case that should come up or which can be considered: *Thompson v. Williams*, 175-696; *Gaither v. Carpenter*, 143-240; *State v. Dewey*, 139-563. Admonition to counsel as to their duty when judge settles case on appeal: *Cameron v. Power Co.*, 137-102. Where case returned to judge for a settlement, counsel should be present: *Ibid.* Remedy of appellant when judge does not send up case setting forth the exceptions properly is by certiorari, provided judge makes known his willingness to correct them: *Allen v. McLendon*, 113-319; *Broadwell v. Ray*, 111-457; *McDaniel v. King*, 89-29; see cases under section 630. Where no case on appeal appears to have been served by appellant, the case sent up as settled by the judge is presumed to have been by consent: *State v. Crook*, 91-536. Where in judge's statement of case it says counsel agreed that judge should make out statement, it will be taken as true, even though appellee makes affidavit otherwise: *McCoy v. Lassiter*, 94-131.

Instances of where, for various inadvertent acts or where parties misled, case was remanded for judge to settle again: *Arrington v. Arrington*, 114-113; *Mitchell v. Haggard*, 105-173; *Walker v. Scott*, 104-481; *Simmons v. Andrews*, 104-127; *Russell v. Koonce*, 102-485; *Ware v. Nesbit*, 92-202; see, also, cases under section 630, "Certiorari." Having "settled" case at time and place appointed, the judge is *functus officio*, unless by agreement of parties or by certiorari he resets it: *Slocumb v. Const. Co.*, 142-349—the court having no power to order him to change it: *Ibid.*

WHERE JUDGE DIES OR IS OUT OF DISTRICT. Where judge dies before settling case and appellant guiltless of laches, new trial awarded: *State v. Parks*, 107-821; *Brendle v. Reese*, 115-552; *Heath v. Lancaster*, 116-70; *Parker v. Coggins*, 116-71; *Taylor v. Simmons*, 116-70—but if appellant guilty of inexcusable laches, judgment affirmed: *Heath v. Lancaster*, 116-69; *Simmons v. Andrews*, 106-201. Where judge dies before case settled the appellant can withdraw his case and have appeal heard on counter case: *Ridley v. R. R.*, 116-923—or appellee can withdraw his case and have it heard upon appellant's case: *Drake v. Connelly*, 107-463. It was formerly (before enactment of present provision in above section) held that new trial would be granted where judge's term expired before settling the case: *State v. Robinson*, 143-625. The judge should settle the case in the district where tried, except as provided in this section: *Cameron v. Power Co.*, 137-99; *Whitesides v. Williams*, 66-143.

645. Clerk to prepare transcript. The clerk on receiving a copy of the case settled, as required in the preceding sections, shall make a copy of the judgment roll and of the case, and within twenty days transmit the same, duly certified, to the clerk of the supreme court. The clerk, except in cases where parties are allowed to appeal without giving an undertaking on appeal, shall not be required to make the copy of the record in the case for the supreme court until the appellant has given the undertaking on appeal or made the deposit required.

Rev., s. 592; Code, s. 551; 1889, c. 135; C. C. P., s. 302.

PREPARING AND SENDING UP TRANSCRIPT. It is the duty of appellant to see that the transcript is prepared, docketed and printed in proper time: *Truelove v. Norris*, 152-755; *Vivian v. Mitchell*, 144-477; *Sigman v. R. R.*, 135-183; *State v. Freeman*, 114-872; *State v. Frizell*, 111-724—and he has the right to have so much of record sent up as he thinks proper: *Smith v. Fite*, 98-517; *Sudderth v. McCombs*, 67-353. The rules of the supreme court as to preparing, docketing and printing transcript must be complied with, or the appeal may be dismissed: *Jenkins v. Carson*, 173-725; *Kearnes v. Gray*, 173-717; *Land Co. v. McKay*, 168-83; *Hawkins v. Tel. Co.*, 166-213; *Davis v. Wall*, 142-450; *Sigman v. R. R.*, 135-182; *Brinkley v. Smith*, 130-226; *Baker v. Hobgood*, 126-152; *Pretzfelder v. Ins. Co.*, 123-168; *Lucas v. R. R.*, 121-508; *Alexander v. Alexander*, 120-472. See Rules 5, 16, 17, 18, 19, 20, 21, 23, 29, 30. Clerk's duties under this section are ministerial and he has no authority to pass upon the question whether the appeal has been perfected: *Russell v. Davis*, 99-115. He is to be guided

by order of the judge as to the papers to be sent up: *Clark v. Machine Works*, 150-88. Where trial judge orders clerk to put certain thing in the record and same is omitted by direction of appellant, appeal dismissed: *Finch v. Strickland*, 130-44. Tendering fees to clerk and his promise to send up record is insufficient excuse for delay: *Truelove v. Norris*, 152-755—nor is the fact that clerk was too busy to prepare transcript: *Hewitt v. Beck*, 152-757.

WHAT TRANSCRIPT SHOULD CONTAIN. The transcript must show that a court was held at proper time and place and by proper judge: *Jones v. Hoggard*, 107-349; *Sneeden v. Harris*, 107-311; *State v. Farrar*, 103-411; *High v. R. R.*, 112-385; *State v. Daniel*, 121-574; *State v. Preston*, 104-733; *State v. Johnston*, 93-559; *Bethea v. Byrd*, 93-141; *State v. Butts*, 91-525; *State v. McDowell*, 93-541; *Broadfoot v. McKeithan*, 92-561—that case was properly constituted, jurisdiction of parties being properly obtained: *Sigman v. R. R.*, 135-181; *Wyatt v. R. R.*, 109-306; *Markham v. Hicks*, 90-1; *Jones v. Hoggard*, 107-350; *Daniel v. Rogers*, 95-134; *Rowland v. Mitchell*, 90-649—that issues were proposed and submitted: *Tiddy v. Harris*, 101-589—that appeal was duly taken: *Mfg. Co. v. Simmons*, 97-89—that (in criminal appeal) a grand jury was drawn, sworn and charged and presented the indictment: *State v. Cameron*, 122-1074; *State v. Daniel*, 121-574; *State v. Weaver*, 104-758; *State v. Farrar*, 103-411; *State v. Johnston*, 93-559; *State v. McDowell*, 93-541; but see *State v. Jimmerson*, 118-1173. The transcript in civil cases should contain the summons, pleadings, judgment and case on appeal: *Cressler v. Asheville*, 138-482; *Rice v. Guthrie*, 114-589; *Allen v. Hammond*, 122-754; see Supreme Court Rules 19, 20, 27, 140-660, 661, 662—the order in an arbitration, the award, exceptions thereto, the action of the court thereupon, and the appeal: *Wyatt v. R. R.*, 109-306; see, also, *Murray v. Barden*, 132-136—exhibits that are made part of pleadings: *Hicks v. Royal*, 122-405—plats referred to, in same number as are required in case of briefs, etc.: *Stephens v. McDonald*, 132-135; *Whichard v. R. R.*, 117-614—facts which induced judge to grant or refuse a new trial: *Braid v. Lukins*, 95-123—undertaking for the prosecution of the appeal: *Office v. Huffsteller*, 67-449; *Whitehead v. Smith*, 53-351—and the transcript should not require reference to the record of another case: *Branch v. R. R.*, 88-573. There should be an index of the entire record on the front page: *Davis v. Wall*, 142-450; *Sigman v. R. R.*, 135-181; *Pretzfelder v. Ins. Co.*, 123-167; *Alexander v. Alexander*, 120-472—marginal references: *Sigman v. R. R.*, 135-181; *Brinkley v. Smith*, 130-224; *Alexander v. Alexander*, 120-472—a grouping of exceptions relied upon, briefly and clearly stated and numbered at the end of the case on appeal: *Davis v. Wall*, 142-450; *Hicks v. Kenan*, 139-337; *Sigman v. R. R.*, 135-181; *Brinkley v. Smith*, 130-224. Rule 19.

Notice of appeal, though in the record, is no part of it: *Ferrell v. Thompson*, 107-420. Where clerk copied prayers for instructions in the wrong place and then in the right place referred to them, read as if at right place: *Drake v. Connelly*, 107-463. Indorsement on back of indictment no part of record: *State v. Sheppard*, 97-401. Where both parties appeal, two complete transcripts must be sent up; and counsel cannot waive this requirement: *Pope v. Lumber Co.*, 162-208; *Mills v. Guaranty Co.*, 136-255; *Bank v. Bobbitt*, 108-525; *Jones v. Hoggard*, 107-349; *Perry v. Adams*, 96-347; *Morrison v. Cornelius*, 63-346. When record is already in supreme court, so much of proceedings since former appeal should be sent up as is necessary to present appellant's contention: *Smith v. Mills*, 155-247.

Appellant's statement of the case must not be sent up to contradict "case settled": *State v. Dewey*, 139-556; see *Gaither v. Carpenter*, 143-240—and if case sent up that should not be, party objecting should apply to court below to have it stricken out: *Walker v. Scott*, 102-487.

Stenographic notes of trial are no part of the record on appeal: *Skipper v. Lumber Co.*, 158-322; *Cressler v. Asheville*, 138-482—nor is the evidence: *Ibid.*; also *State v. Godwin*, 27-403. Irrelevant matter should not be included: *Sigman v. R. R.*, 135-182; *Hancock v. R. R.*, 124-228; *Mining Co. v. Smelting Co.*, 119-415; *Durham v. R. R.*, 108-399; *Hilton v. McDowell*, 87-364. Conflict between record and case on appeal, record prevails: *McNeill v. Lawton*, 97-16; see under section 643. For certiorari to perfect the record, see under section 630. Where record defective, certiorari may be granted to perfect it: *State v. Reid*, 18-382; *State v. Jackson*, 112-849—or it may in some cases be remanded: *State v. Farrar*, 103-411. *Eaton's Forms* recommended to clerks as a guide: *State v. Butts*, 91-526; approved in *State v. Daniel*, 121-574. The transcript should not be a set of loose, disconnected papers: *State v. Jones*, 82-691; *Goff v. Pope*, 82-696; *State v. Guilford*, 49-83—and imperfect: *State v. May*, 118-1204; *State v. Farrar*, 103-411; *Spence v. Tapscott*, 92-576; *Weil v. Everett*, 83-685.

If no case on appeal is settled, the transcript should still be docketed, and if appellant is not guilty of laches, he is entitled to a certiorari: *Russell v. Davis*, 99-115; *Haynes v. Coward*,

116-841; Hawkins v. Tel. Co., 166-213; Transportation Co. v. Lumber Co., 168-60; State v. Trull, 169-363; Cox v. Lumber Co., 177-227. See section 630.

UNDERTAKING FOR COSTS OR A DEPOSIT IN CIVIL CASES: Caldwell v. Wilson, 121-424; Brown v. House, 119-622; Sanders v. Thompson, 114-282; Broadwell v. Ray, 112-191; Bailey v. Brown, 105-127; Morris v. Morris, 92-142; Andrews v. Whisnant, 83-446; but see State v. Cameron, 122-1074; Jacobs v. Burgwyn, 63-197.

PRINTING THE RECORD AND PRINTING AND FILING OF BRIEFS: State v. Charles, 161-287; Vivian v. Mitchell, 144-475; Brinkley v. Smith, 130-224; Mills v. Guaranty Co., 136-255; Stroud v. Tel. Co., 133-253; Baker v. Hobgood, 126-152; Hicks v. Royal, 122-405; Packing Co. v. Williams, 122-406; Poston v. Jones, 122-541; Rawlings v. Neal, 122-173; Fleming v. McPhail, 121-183; Alexander v. Alexander, 120-472; Lucas v. R. R., 121-506; Barbee v. Scoggins, 121-135; Smith v. Montague, 121-92; Barnes v. Crawford, 119-127; Thurber v. Loan Assn., 118-129; Wiley v. Mining Co., 117-489; Stainback v. Harris, 119-107; Dunn v. Underwood, 116-525; Parker v. Coggins, 116-71; Edwards v. Henderson, 109-83; Durham v. R. R., 108-399; Hunt v. R. R., 107-447; Walker v. Scott, 102-489; see Supreme Court Rules, 28-32, 174-835; 140-663. As to costs of record, where unnecessary matter sent up: Land Co. v. Jennett, 128-3; Gray v. Little, 127-304; Baker v. Hobgood, 126-152; Hancock v. R. R., 124-222.

TRANSMITTED TO SUPREME COURT AND DOCKETED. Clerk's duty to transmit the transcript in twenty days: Fain v. R. R., 130-30; Caldwell v. Wilson, 121-423; State v. Deyton, 119-880; State v. Nash, 109-822; Walker v. Scott, 104-482; Bryan v. Moring, 99-16—and if he fail, semble he is liable to indictment: State v. Deyton, 119-880; Hewitt v. Beck, 152-757—still in this case where mail delayed transcript, appellant held without laches: Walker v. Scott, 104-482. Appeal deemed docketed when transcript received by clerk; it then becomes a record of the court, not subject to control of parties or counsel: Brafford v. Reed, 124-345; see, also, Caldwell v. Wilson, 121-423. Time in which appeals must be docketed: Laney v. Mackey, 144-630; Clegg v. R. R., 132-292; Norwood v. Pratt, 124-745; Rothchild v. McNichol, 121-284; Parker v. R. R., 121-501; Burrell v. Hughes, 120-277; Haynes v. Coward, 116-840; Graham v. Edwards, 114-228; State v. Freeman, 114-872; Avery v. Pritchard, 106-347; Bailey v. Brown, 105-127; Collins v. Faribault, 92-310; Pittman v. Kimberly, 92-562; Cox v. Lumber Co., 177-227; Hawkins v. Tel. Co., 166-213; Truelove v. Norris, 152-755; Mirror Co. v. Casualty Co., 157-29. Rules 5 and 17 (174-828, 831).

646. Undertaking on appeal; filing; waiver. To render an appeal effectual for any purpose in a civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in such sum as may be ordered by the court, not exceeding two hundred and fifty dollars, to the effect that the appellant will pay all costs awarded against him on the appeal, and this undertaking must be filed with the clerk by whom the judgment or order was entered; or such sum as is ordered by the court must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal. The undertaking or deposit may be waived by a written consent on the part of the respondent. No appeal shall be dismissed in the supreme court on the ground that the undertaking on appeal was not filed, or deposit made, earlier, if the undertaking is filed or the deposit made before the record of the case is transmitted by the clerk of the superior court to the supreme court. When no undertaking on appeal has been filed, or deposit made before the record of the case is transmitted to the supreme court, the supreme court shall, upon good cause shown, on such terms as may be just, allow the appellant to file an undertaking or make the deposit.

Rev., ss. 593, 595; Code, ss. 552, 561; C. C. P., ss. 303, 312; 1889, c. 135, s. 2; 1871-2, c. 31.

THE UNDERTAKING. Sufficiency of contents discussed: Allison v. Whittier, 101-490; Lackey v. Pearson, 101-651; Chamblee v. Baker, 95-98; Dorsey v. R. R., 91-201; Walker v. Williams, 88-7. The undertaking is to secure the payment of appellee's cost, and the surety

is not liable for appellant's cost if judgment reversed: *Morris v. Morris*, 92-142; *Office v. Huffstetter*, 67-449; *Dunn v. Clerk's Office*, 176-50. When insufficient, supreme court can allow another to be substituted: *Robeson v. Lewis*, 64-734. Giving the undertaking is not the duty of the attorney so as to excuse appellant's failure: *Boyer v. Garner*, 116-125; *Griffin v. Nelson*, 106-238; *Winborn v. Byrd*, 92-7; *Churchill v. Ins. Co.*, 92-485—or in giving defective bond: *Turner v. Powell*, 93-341. The same causes that would entitle one to certiorari for failing to perfect appeal will apply to a failure to file undertaking: *Graves v. Hines*, 106-327; *State v. Parish*, 151-659. Where case remanded to court below, that court can order appeal bond filed to perfect appeal: *Spence v. Tapscott*, 93-250.

TIME OF FILING. It must be filed within ten days after adjournment of court: *Walker v. Scott*, 104-481; *Chamblee v. Baker*, 95-98; *Boyden v. Williams*, 92-546; *Worthy v. Brady*, 91-265—but no appeal dismissed if filed before transcript sent up: *In re Snow's Will*, 128-102; *Howerton v. Sexton*, 104-75—and undertaking may be filed in the supreme court, but only where a reasonable excuse for not filing in time prescribed is shown: *Vivian v. Mitchell*, 144-474; *Jones v. Asheville*, 114-620; *Harrison v. Hoff*, 102-25; *Jones v. Wilson*, 103-13; *Churchill v. Ins. Co.*, 92-485; *Winborn v. Byrd*, 92-7. The undertaking presumed to have been filed when justification made: *Harmon v. Herndon*, 99-477; *Boyden v. Williams*, 92-546.

DEPOSIT IN LIEU OF UNDERTAKING. It is the only thing a clerk can accept: *Eshon v. Comrs.*, 95-75; see, also, *Graves v. Hines*, 106-323.

WAIVER OF UNDERTAKING. This section mandatory and can only be dispensed with by written waiver on the part of appellee: *State v. Wagner*, 91-521; *Harshaw v. McDowell*, 89-181. Failure to justify appeal bond waived by appellee when, after bond filed, he signs appellant's case on appeal: *Howerton v. Henderson*, 86-720.

SECTION MERELY CITED. *Harrison v. Hoff*, 102-26; *Allison v. Whittier*, 101-492; *Warren v. Harvey*, 92-140.

647. **Justification of sureties.** The undertaking on appeal must be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. The respondent may except to the sufficiency of the sureties within ten days after the notice of appeal; and unless they or other sureties justify within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification must be upon a notice of not less than five days.

Rev., s. 594; *Code*, s. 560; *C. C. P.*, s. 310; 1887, c. 121.

This section must be strictly observed: *Hemphill v. Blackwelder*, 90-14; *Lytle v. Lytle*, 90-647; *Smith v. Abrams*, 90-21; *Harshaw v. McDowell*, 89-181; *Chastain v. Chastain*, 87-283. Clerk simply endorsing undertaking "the within bond is good" is not a compliance with this section: *Bryson v. Lucas*, 85-397.

One of the sureties must justify; yet a failure to justify can be waived: *Beeton v. Dunn*, 137-563; *Harshaw v. McDowell*, 89-181—and he must do so personally: *Morphew v. Tatem*, 89-183—for, if he does not, appeal will be dismissed: *State v. Wagner*, 91-521; *Bailey v. Rutjes*, 91-420; *Harshaw v. McDowell*, 89-181—but not until after twenty days notice: *Jones v. Slaughter*, 96-541; *McGee v. Fox*, 107-766; *Rollins v. Love*, 97-210. Bond in application for certiorari must likewise be justified: *Chastain v. Chastain*, 87-283. Sufficient when surety makes his mark and then justifies: *State v. Byrd*, 93-624. The requirement that "he is worth double the amount specified" does not mean above his homestead and exemptions and liabilities: *Witt v. Long*, 93-388. Appeal dismissed when surety only justifies in the amount and not double the amount: *State v. Roper*, 94-859; *Turner v. Quinn*, 92-501; *McCanless v. Reynolds*, 91-244; *Anthony v. Carter*, 91-229; *State v. Wagner*, 91-521. Summary judgment may be entered upon undertaking in supreme court: *Office v. Huffstetter*, 67-449. Waiver of justification by appellee: *Moring v. Little*, 95-87; *Mfg. Co. v. Barrett*, 94-219; *Gruber v. R. R.*, 92-1; *Greenlee v. McCelvey*, 92-530; *McCanless v. Reynolds*, 91-244; *Lytle v. Lytle*, 90-647; *McMillan v. Nye*, 90-11; *Jones v. Potter*, 89-220; *Harshaw v. McDowell*, 89-181; *Hancock v. Bramlett*, 85-393.

648. **Notice of motion to dismiss; new bond or deposit.** Before the appellee is permitted to move to dismiss an appeal, either for any irregularity in the

undertaking on appeal or for failure of sureties to justify, he must give written notice to the appellant of such motion at least twenty days before the district from which the cause is sent up is called, and this notice must state the grounds upon which the motion is based. At least five days before the district from which the cause is sent up is called, the appellant may file with the clerk of the supreme court a new bond justified according to law and containing a penalty the same in amount as the penalty in the original bond, or he may deposit with the said clerk a sum of money equal to the penalty in the original bond. When a new bond has been thus filed or deposit made the cause stands as if the bond had been duly given or deposit duly made in the court below.

Rev., s. 596; 1887, c. 121.

This section only applies where appeal bonds are filed, but are irregular or not justified: *Jones v. Asheville*, 114-620; see, also, *Harmon v. Herndon*, 99-477; *Bowen v. Fox*, 98-396. Twenty days notice of motion hereunder required: *Lackey v. Pearson*, 101-653; *Jones v. Slaughter*, 96-541; *McGee v. Fox*, 107-766; *Rollins v. Love*, 97-210.

649. Appeals in forma pauperis; clerk's fees. When any party to a civil action tried and determined in the superior court at the time of trial desires an appeal from the judgment rendered in the action to the supreme court, and is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said superior court to make an order allowing said party to appeal from the judgment to the supreme court as in other cases of appeal, without giving security therefor. The party desiring to appeal from said judgment shall within five days make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by counsel learned in the law that there is error in matter of law in the decision of the superior court in said action. The affidavit must be accompanied by a written statement from a practicing attorney of said superior court that he has examined the affiant's case, and is of opinion that the decision of the superior court, in said action, is contrary to law. The appeal when passed upon and granted by the clerk shall be within ten days from the expiration by law of said term of court. The clerk of the superior court cannot demand his fees for the transcript of the record for the supreme court of a party appealing in forma pauperis, in case such appellant furnishes to the clerk two true and correctly typewritten copies of such records on appeal. Nothing contained in this section deprives the clerk of the superior court of his right to demand his fees for his certificate and seal as now allowed by law in such cases.

Rev., s. 597; Code, s. 553; 1889, c. 161; 1873-4, c. 60; 1907, c. 878.

The order to appeal in forma pauperis does not stay proceedings upon the judgment appealed from: *Leach v. Jones*, 86-404. Affidavit to secure order to appeal in forma pauperis in a criminal action must state that it is made in good faith: *State v. Bramble*, 121-603; *State v. Harris*, 114-830; *State v. Jackson*, 112-849; *State v. Rhodes*, 112-856; *State v. Wylde*, 110-500; *State v. Payne*, 93-612; *State v. Morgan*, 77-510; *State v. Tow*, 103-350. Application may be made after term of court: *Russell v. Hearne*, 113-363. The appellant's affidavit must state that he is advised by counsel learned in the law that there is error in matter of law: *Honeycutt v. Watkins*, 151-652. This right to appeal in forma pauperis is given administrators, parties to the record, prosecuting or defending: *Christian v. R. R.*, 136-322; *Hamlin v. Neighbors*, 75-66; *Mason v. Osgood*, 71-212. Supreme court clerk can claim his fees: *Speller v. Speller*, 119-356; *Bailey v. Brown*, 105-127; *Martin v. Chasteen*, 75-96. The order may be made by the clerk only in civil cases: *State v. Parish*, 151-659. For criminal cases, see section 4652.

650. Undertaking to stay execution on money judgment. If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it is satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a party to an action or proceeding to give a bond or an undertaking with surety or sureties, he may, in lieu thereof, deposit with the officer into court money to the amount of the bond or undertaking to be given. The court in which the action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In a case where, by this section, the money is to be deposited with an officer, a judge of the court, upon the application of either party, may, at any time before the deposit is made, order the money deposited in court instead of with the officer; and a deposit made pursuant to such order is of the same effect as if made with the officer. The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

Rev., s. 598; Code, s. 554; C. C. P., ss. 304, 311.

As to whether bond sent up is a bond for costs or supersedeas bond, supreme court will send down issue to be passed upon: *Burnett v. Nicholson*, 86-728. No special form for supersedeas bond: *Oakley v. Van Noppen*, 100-287. An instance of a bond held sufficient: *McMinn v. Patton*, 92-371. Where bond for costs and for supersedeas both in one instrument, with insolvent surety, appeal dismissed: *Alderman v. Rivenbark*, 96-134—but where two separate bonds sent up, insolvency of supersedeas bond does not subject appeal to dismissal, cost bond being good: *Ibid.* A supersedeas bond, being the act of a party, is not allowable to continue a dissolved injunction: *James v. Markham*, 125-145. Citing section: *Adams v. Guy*, 106-278. Supersedeas bond in appeal from order as to custody of child: *Page v. Page*, 166-90. Execution on judgment will be stayed only by giving undertaking: *Howie v. Spittle*, 156-180.

651. How judgment for personal property stayed. If the judgment appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment is not stayed by appeal, unless the things required to be assigned or delivered are brought into court, or placed in the custody of such officer or receiver as the court appoints, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court or a judge thereof directs, to the effect that the appellant will obey the order of the appellate court upon the appeal.

Rev., s. 599; Code, s. 555; C. C. P., s. 305.

Section merely cited in *Adams v. Guy*, 106-278; *Hannon v. Comrs.*, 89-124; *Hancock v. Bramlett*, 85-394.

652. How judgment directing conveyance stayed. If the judgment appealed from directs the execution of a conveyance or other instrument, the execution of the judgment is not stayed by the appeal until the instrument has been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

Rev., s. 600; Code, s. 556; C. C. P., s. 306.

Merely cited in *Hannon v. Comrs.*, 89-124; *Hancock v. Bramlett*, 85-394; *Bryan v. Hubbs*, 69-431; *Tate v. Powe*, 64-647.

653. How judgment for real property stayed. If the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of this deficiency.

Rev., s. 601; Code, s. 557; C. C. P., s. 307.

Merely cited in *Hancock v. Bramlett*, 85-394; *Bryan v. Hubbs*, 69-431; *Cox v. Hamilton*, 69-31; *Tate v. Powe*, 64-647.

654. Docket entry of stay. When an appeal from a judgment is pending, and the undertaking requisite to stay execution on the judgment has been given, and the appeal perfected, the court in which the judgment was recovered may, on special motion, after notice to the person owning the judgment, on such terms as it sees fit, direct an entry to be made by the clerk on the docket of such judgment, that the same is secured on appeal, and no execution can issue upon such judgment during the pendency of the appeal.

Rev., s. 621; Code, s. 435; 1887, c. 192; C. C. P., s. 254.

This section contemplates a bond upon which summary judgment may be rendered in the supreme court upon affirmation of judgment below: *Alderman v. Rivenbark*, 96-134.

655. Scope of stay; security limited for fiduciaries. When an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. The court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in a fiduciary capacity. It may also limit such security to an amount not more than fifty thousand dollars, where it would otherwise exceed that sum.

Rev., s. 602; Code, s. 558; C. C. P., s. 308.

Court below has no further jurisdiction of matters involved when appeal is perfected: *Green v. Griffin*, 95-50; *Pasour v. Lineberger*, 90-159; *McRae v. Comrs.*, 74-415; *Isler v. Brown*, 69-125—but may make orders to provide for safe-keeping of funds pending appeal, *Hinson v. Adrian*, 91-372—and may proceed on any other matter included in the action, and may hear motions and grant orders, *Herring v. Pugh*, 126-852; *Guilford v. Georgia*, 109-310;

Penniman v. Daniel, 91-431; *Carleton v. Byers*, 71-335. Clerk's duty to notify sheriff when supersedeas bond perfected: *Bryan v. Hubbs*, 69-423. Cases merely referring to section: *Herring v. Pugh*, 125-439; *Hancock v. Bramlett*, 85-394. When a motion for removal to federal court is denied and defendant appeals, the lower court can take no further action: *Pruett v. Power Co.*, 167-598; s. c., 165-416.

656. Undertaking in one or more instruments; served on appellee. The undertakings may be in one instrument or several, at the option of the appellant; and a copy, including the names and residences of the sureties, must be served on the adverse party, with the notice of appeal, unless the required deposit is made and notice thereof given.

Rev., s. 603; Code, s. 559; C. C. P., s. 309.

Where undertaking for costs and supersedeas are both in one instrument, if surety insolvent, appeal is dismissed: *Alderman v. Rivenbark*, 96-134. Copy of undertaking, with names and residences of sureties, should be served on appellee: *Roberson v. Lewis*, 64-736.

657. Judgment not vacated by stay. The stay of proceedings provided for in this article shall not be construed to vacate the judgment appealed from, but in all cases such judgment remains in full force and effect, and its lien remains unimpaired, notwithstanding the giving of the undertaking or making the deposit required in this chapter, until such judgment is reversed or modified by the supreme court.

Rev., s. 604; 1887, c. 192.

See *Bernhardt v. Brown*, 118-710; *Black v. Black*, 111-300; *Stephens v. Koonce*, 106-222; *In re Griffin*, 98-227; *Allen v. Gooding*, 174-271. This section applies to ordinary judgments in civil cases: *State v. Davis*, 159-455.

658. Judgment on appeal and on undertakings; restitution. Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment. Undertakings for the prosecution of appeals and on writs of certiorari shall make a part of the record sent up to the supreme court on which judgment may be entered against the appellant or person prosecuting the writ of certiorari and his sureties, in all cases where judgment is rendered against the appellant or person prosecuting the writ.

Rev., s. 605; Code, s. 563; C. C. P., s. 314; R. C., c. 4, s. 10; 1785, c. 233, s. 2; 1810, c. 793; 1831, c. 46, s. 2.

For jurisdiction of supreme court in connection with appeals, see Courts, Art. 2.

See, also, sections 589, 630, 644, 645; and for order of restitution in summary ejectment, see section 2374.

The supreme court may grant a new trial upon some of the issues and leave the others unchanged: *Benton v. Collins*, 125-83, and cases cited; *Hawk v. Lumber Co.*, 149-16; *Jones v. Ins. Co.*, 153-388; *Lumber Co. v. Branch*, 158-251.

Where judgment affirmed, appellant entitled to judgment, upon motion, on stay bond: *Oakley v. Van Noppen*, 100-287. Prosecution bonds and undertakings on appeal are part of the record: *Office v. Huffsteller*, 67-449—and cannot be questioned by plea and proof at the instance of sureties, *Whitehead v. Smith*, 53-351—and summary judgment can be taken upon them as before the adoption of the code of civil procedure, *Office v. Huffsteller*, 67-449. When a judgment is reversed or party put out of possession by a process of law declared void, the appellant should be restored to all that he has lost: *Railroad v. Railroad*, 108-304; *Powell v. Allen*, 103-46; *Lytle v. Lytle*, 94-522; *Noville v. Dew*, 94-43; *Boyett v. Vaughan*, 86-725;

Rollins v. Henry, 77-467; *Perry v. Tupper*, 71-385, 70-538—but he cannot be given possession when he has not been turned out of possession, *Robinson v. McDowell*, 125-344—and the order for restitution should be part of the judgment: *Meroney v. Wright*, 84-336; *Perry v. Tupper*, 70-538; see, also, *Caudle v. Moran*, 119-432. One cannot claim, after judgment for plaintiff, that he is landlord of plaintiff so as to be allowed a writ of restitution; he must bring ejectment: *Edwards v. Phillips*, 91-355. The writ of restitution will never be employed to put one in possession where he has not been ousted by the court, nor to take possession from one who has acquired it pending litigation and not by virtue of any process or judgment therein: *Railroad v. Railroad*, 108-304; see *Robinson v. McDowell*, 125-344. Section cited in *Kenney v. R. R.*, 166-566. See, also, section 1227.

659. Procedure after determination of appeal. In civil cases, at the first term of the superior court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first term after the receipt of the certificate from the supreme court.

Rev., s. 1526; 1887, c. 192, s. 2.

See section 1412. When new trial awarded by supreme court on appeal, case goes back to superior court for new trial on whole merits: *Lumber Co. v. Branch*, 158-251; *McMillan v. Baker*, 92-110. When the lower court may grant a new trial for newly discovered evidence: *Lancaster v. Bland*, 168-377; *Smith v. Moore*, 150-158.

660. Appeal from justice heard de novo; judgment by default; appeal dismissed. When an appeal is taken from the judgment of a justice of the peace to a superior court, it shall be therein reheard, on the original papers, and no copy thereof need be furnished for the use of the appellate court. An issue shall be made up and tried by a jury at the first term to which the case is returned, unless continued, and judgment shall be given against the party cast and his sureties. When the defendant defaults, the plaintiff in actions instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, shall have judgment, and in other cases may have his inquiry of damages executed forthwith by a jury. If the appellant fails to have his appeal docketed as required by law, the appellee may, at the term of court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed and judgment rendered against the appellant, and for the costs of appeal and against his sureties upon the undertaking, if there are any, according to the conditions thereof. Nothing herein prevents the granting the writ of recordari in cases now allowed by law.

Rev., ss. 607, 609; Code, ss. 565, 881; C. C. P., s. 540; 1889, c. 443; R. C., c. 31, s. 105; 1777, c. 115, s. 63; 1794, c. 414.

See, as to taking and perfecting appeal, sections 1528-1533; as to docketing, section 661; as to recordari as a substitute, section 630.

DOCKETING APPEAL. If appeal not docketed at the ensuing term, the appellee may have it docketed at the next term thereafter and justice's judgment may, upon his motion, be affirmed: *Sneeden v. Darby*, 173-274; *Pants Co. v. Smith*, 125-588; *Davenport v. Grissom*, 113-38; *State v. Johnson*, 109-852; see *Ballard v. Gay*, 108-545—but this is a personal privilege of appellee, and appellant can draw no argument from his failure to use it, *Davenport v. Grissom*, 113-38. Appeal docketed, but not in proper time, may be dismissed: *Barnes v. Saleeby*, 177-256; *Abell v. Power Co.*, 159-348; *Peltz v. Bailey*, 157-166; *MacKenzie v. Development Co.*, 151-276; *McClintock v. Ins. Co.*, 149-35, and cases cited supra. But the motion

to dismiss comes too late after the trial has begun: *Love v. Huffines*, 151-378. The court can only dismiss an appeal when there is some irregularity in the method of taking or docketing it: *Barnes v. Rwy.*, 133-131.

TRIAL IN SUPERIOR COURT. *De novo*: *White v. Peanut Co.*, 165-132; *Barnes v. R. R.*, 133-130; *Ballard v. Gay*, 108-544; *Navassa Guano Co. v. Bridgers*, 93-441; *Wells v. Sluder*, 68-156. Where return to notice of appeal does not contain the pleas, the court may allow any pleas to which parties may be entitled: *Moore v. Garner*, 109-157. Leave to plead at trial term discretionary with court: *Forbes v. McGuire*, 116-449. Where judge refused to allow plea as to the jurisdiction to be entered in superior court, not being entered in court of justice, and nothing in the record to show lack of jurisdiction, no error: *Forbes v. McGuire*, 116-449; see *Fertilizer Co. v. Marshburn*, 122-411. Summary judgment on appeal bond: *McMinn v. Patton*, 92-371; *Walker v. Williams*, 88-7; *Brown v. Brittain*, 84-552. As to issues submitted by court, where two causes of action set out in warrant before justice (treated as complaint), judge, on appeal, properly submitted issue upon cause of action sustained by evidence: *Smith v. Newberry*, 140-385.

AMENDMENTS OF PROCESS AND PLEADINGS. See sections 547, 545, and 552. Pleadings may be amended in the superior court in the discretion of the judge, upon such terms as he may deem just, and he may allow new plea upon payment of accrued cost: *Moore v. Garner*, 109-157; *Starke v. Cotten*, 115-81; *Beville v. Cox*, 109-267; *Johnson v. Rowland*, 80-1; *Thomas v. Simpson*, 80-4; *Faison v. Johnson*, 78-78; *Hinton v. Deans*, 75-18—and this is so even though justice refused to allow such, *Lane v. Morton*, 78-7; *Heyer v. Beatty*, 76-32. The power to amend pleadings, process, etc., in cases originating in justices' courts is unrestricted: *State v. Norman*, 110-484. In criminal cases both the warrant and affidavit may be amended in the court's discretion: *State v. Davis*, 111-732, and cases there cited—and warrant may be amended after verdict, *State v. Baker*, 106-759; *State v. Werwag*, 116-1063; *State v. Gillikin*, 114-834; *State v. Norman*, 110-487. A defect in affidavit in attachment may be cured in the superior court: *Cook v. Mining Co.*, 114-617; *Sheldon v. Kivett*, 110-408—also a defect in affidavit in claim and delivery, *Cox v. Grisham*, 113-279—also defect in summons, *Whitaker v. Dunn*, 122-103. As to interpleaders and new parties made and amendment of pleadings and process accordingly, see *Finch v. Gregg*, 126-176. Leave to plead the statute of limitations where not pleaded below is in court's discretion: *Poston v. Rose*, 87-279. Leave to plead at trial term of superior court is discretionary: *Forbes v. McGuire*, 116-449. The court may allow written pleadings to be filed: *Teal v. Templeton*, 149-32.

The jurisdiction of superior court in appeals from a justice is entirely derivative, and if the justice had no jurisdiction in the action as it was before him, the superior court can derive none by amendment: *Ijames v. McClamrock*, 92-362; *Robeson v. Hodges*, 105-51; *Allen v. Jackson*, 86-321; *Boyett v. Vaughan*, 85-363; *Love v. Huffines*, 151-378. If amount involved is doubtful, the court may allow a remitter of a sufficient amount to confer jurisdiction: *Teal v. Templeton*, 149-32. The defense that cause of action is not of such a kind as to be "split up" so as to bring it within the jurisdiction of a justice, must be made before the justice, otherwise it cannot be made in the superior court on appeal, unless defendant is permitted to amend: *Cotton Mills v. Cotton Mills*, 115-475; *Blackwell v. Dibrell*, 103-270; *Jarrett v. Self*, 90-478.

EFFECT OF PARTIES FAILING TO APPEAR. Plaintiff, failing to appear, can be called out and nonsuited: *Barnes v. R. R.*, 133-131—but not so with defendant, for no judgment can be entered against him if he has answered and raised a material issue, without a trial, *Barnes v. R. R.*, 133-130—for in such a case there must be a verdict before there can be a judgment, *Barnes v. R. R.*, 133-131—yet there are cases in which judgment by default can be taken and in others by default and inquiry, *Ballard v. Gay*, 108-545; but see *Hartsfield v. Jones*, 49-309; *Williams v. Beasley*, 35-112; *Ramsour v. Harshaw*, 30-480.

661. Appeal from justice docketed for trial de novo. When the return is made from the justice's court the clerk of the appellate court shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of said court.

Rev., s. 608; Code, s. 880; C. C. P., s. 539; 1876-7, c. 251, s. 8.

Appellant should docket at the next term: *Abell v. Power Co.*, 159-348; *Peltz v. Bailey*, 157-166; *Barnes v. R. R.*, 133-131; *Sondley v. Asheville*, 110-89; *Ballard v. Gay*, 108-544.

The "next term" means that term beginning next after the expiration of the ten days allowed for service of notice of appeal: *Sondley v. Asheville*, 110-84; *Pants Co. v. Smith*, 125-588; *Davenport v. Grissom*, 113-38—and in counting the ten days exclude the first and include the last, *Barcroft v. Roberts*, 92-249; also *Walker v. Scott*, 104-483; *Sondley v. Asheville*, 110-89. As to whether "ensuing term" means a criminal term or civil term or either: *Barnes v. Saleeby*, 177-256; *Love v. Huffines*, 151-378; *Lentz v. Hinson*, 146-31; *Blair v. Coakley*, 136-408; *Johnson v. Andrews*, 132-376. Effect of failure of defendant to appear after having answered in court below and raised material issue: *Barnes v. R. R.*, 133-130. Where an appellant pays the fees for the return and docketing of an appeal it will not be dismissed because clerk fails to docket: *Johnson v. Andrews*, 132-376—and clerk must demand fees, otherwise no laches can be imputed to appellant for failure to tender same, *West v. Reynolds*, 94-333. Court has no power to permit docketing at a term subsequent to the one to which it should have been returned: *Davenport v. Grissom*, 113-38; *Helsabeek v. Grubbs*, 171-337. Attorneys can waive time by agreement: *Jerman v. Gullidge*, 129-242. As to judgment when appeal not docketed in time, see section 660. It is no excuse for delay that appellant paid the fees to the justice and he failed to docket the case: *MacKenzie v. Development Co.*, 151-276. If appeal is not docketed in proper time, it will be dismissed: *Jones v. Fowler*, 161-354. The refusal of the judge to allow the appeal to be docketed after the proper term is not reviewable: *MacKenzie v. Ins. Co.*, 151-276.

662. Plaintiff's cost bond on appeal from justice. When a defendant appeals from the judgment of a justice of the peace to the superior court, or when the judgment of the justice is removed by the defendant, by recordari or otherwise, to a superior court, the court having cognizance of the appeal or recordari may, upon sufficient cause shown by affidavit, compel the plaintiff to give an undertaking, with sufficient surety, for payment of the costs of the suit, in the event of his failing to prosecute the same with effect.

Rev., s. 606; Code, s. 564; R. C., c. 31, s. 104; 1831, c. 29.

For annotations on writ of recordari, see section 630. As to whether bond will be required is discretionary with presiding judge: *Smith v. R. R.*, 72-62; *Lea v. Brooks*, 49-424.

SUBCHAPTER X. EXECUTION

ART. 27. EXECUTION

663. Judgment enforced by execution. Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt.

Rev., s. 615; Code, s. 441; C. C. P., s. 257.

The creditor may have execution from time to time while judgment continues in force until it is discharged: *Vegeahn v. Smith*, 95-255—but not so in the case of the death of the debtor, for creditor must then collect his debt in the regular course of administration: *Barnes v. Fort*, 169-431; *Holden v. Strickland*, 116-185; *Tuck v. Walker*, 106-285; *Sawyers v. Sawyers*, 93-321—and if personal assets insufficient, can have his judgment satisfied out of proceeds of land to which the lien adheres: *Lilly v. West*, 97-278; *Murchison v. Williams*, 71-135; *Mauney v. Holmes*, 87-430; *Sawyers v. Sawyers*, 93-325; see, also, section 110. Remedy where clerk refuses to issue: *Electric Co. v. Engineering Co.*, 128-201; *Gooch v. Gregory*, 65-142. Necessity of purchaser under execution being able to show judgment and execution: *King v. Featherston*, 20-259; *Person v. Roberts*, 159-168—and that judgment under which he purchases was docketed in county where land lies, *Rollins v. Henry*, 78-342; *King v. Portis*, 77-25; but see *Bernhardt v. Brown*, 122-593, and cases cited. Certain judgments where sales under

execution do not give purchaser title: *Halso v. Cole*, 82-161; *Dudley v. Cole*, 21-429; *Barrow v. Arrenton*, 23-223. Order taxing costs is a judgment upon which execution can issue: *Sheppard v. Bland*, 87-163.

Execution issued upon an erroneous or irregular judgment not reversed is valid: *Carter v. Spencer*, 29-14. Execution issued upon dormant judgment held voidable, not void: *Ripley v. Arledge*, 94-467; *Jacobs v. Burgwyn*, 63-193; *Brown v. Long*, 36-190; *Dawson v. Shepherd*, 15-497; but see *Williams v. Williams*, 85-386. Justice's judgments duly docketed are the subject of execution upon same property and within same limitation as superior court judgments: *Broyles v. Young*, 81-315. Execution for owelty of partition cannot be issued until report of commissioners confirmed: *In re Ausborn*, 122-42. Where execution regular on its face, sheriff not liable for seizure and sale of judgment debtor's property, although judgment invalid: *O'Briant v. Wilkerson*, 122-304. Execution does not issue against a county; remedy is by mandamus: *Hughes v. Comrs.*, 107-598; *Gooch v. Gregory*, 65-142.

664. Kinds of; signed by clerk; when sealed. There are three kinds of execution: one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, and shall be subscribed by the clerk, and when to run out of his county, must be sealed with the seal of his court.

Rev., s. 616; Code, s. 442; C. C. P., s. 258.

See for forms of the different kinds of execution, section 675. For execution against the person, see sections 673 and 675. The clerk and not the judge is the proper officer to issue execution: *McKethan v. McNeill*, 74-663—and deputy clerk can issue in the name of clerk, *Miller v. Miller*, 89-402. As of what date execution should bear teste: *Williams v. Weaver*, 94-134; *Bryan v. Hubbs*, 69-423; *Bernhardt v. Brown*, 122-594. When execution runs out of county it should bear seal of the court: *Taylor v. Taylor*, 83-116. Section merely cited: *Burgwyn v. Hall*, 108-492; *Patton v. Gash*, 99-284; *Kinney v. Laughenour*, 97-325.

665. Against married woman. An execution may issue against a married woman, and it must direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise.

Rev., s. 617; Code, s. 443; C. C. P., s. 259.

See generally: *Dougherty v. Sprinkle*, 88-300; *Vann v. Edwards*, 128-425. Section partially construed: *Harvey v. Johnson*, 133-356; *McLeod v. Williams*, 122-462—and referred to in dissenting opinion of Clark, J., in *Moore v. Wolfe*, 122-716. Duty of sheriff on receiving execution: *Harvey v. Johnson*, 133-356; *Bank v. Ireland*, 127-238; *Bailey v. Barron*, 112-54. For liability since *Martin Act* of 1911, see *Thrash v. Ould*, 172-728; *Grocery Co. v. Bails*, 177-298; *Everett v. Ballard*, 174-16.

666. Clerk to issue, in six weeks; penalty. The clerks of the superior court shall issue executions on all judgments rendered in their respective courts, unless otherwise directed by the plaintiff, within six weeks of the rendition of the judgment, and must endorse upon the record the date of such issue. If the executions issued are not returned satisfied to the courts to which they are made returnable, the clerks must issue alias executions, within six weeks thereafter, unless otherwise instructed as aforesaid. Every clerk who fails to comply with the requirements of this section is liable to be amerced in the sum of one hundred dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and is further liable to the party injured by suit upon his bond.

Rev., s. 618; Code, s. 470; R. C., c. 45, s. 29; 1850, c. 17, ss. 1, 2, 3.

Execution is not issued until the clerk hands it to the sheriff, or to the party, or to his agent: *McKeithen v. Blue*, 149-95; *State v. McLeod*, 50-321. Fees of clerk must be paid or

tendered him, else a failure on his part to issue execution hereunder will not subject him to amercement: *Bank v. Bobbitt*, 111-194. Clerk must endorse date of issuance upon the record; endorsing it upon the execution is not sufficient: *Bank v. Stafford*, 47-98. Deputy clerk can issue: *Miller v. Miller*, 89-402; *Jackson v. Buchanan*, 89-74; see, also, *Shepherd v. Lane*, 13-148; *Coltrain v. McCain*, 14-308; *Suddereth v. Smyth*, 35-452. Execution not allowable to enforce owelty of partition until commissioner's report confirmed: *In re Ausborn*, 122-42. Remedy against clerk for refusing to issue is by a rule of the court or action on his bond: *Gooch v. Gregory*, 65-142, approved by *Electric Co. v. Engineering Co.*, 128-201—or by amercement under this section by party aggrieved: *Williamson v. Kerr*, 88-10; *Simpson v. Simpson*, 63-534. As to executions issued after death of judgment debtor: *Sawyers v. Sawyers*, 93-321; *Williams v. Weaver*, 94-134; *Cowles v. Hall*, 113-359. Where entry of judgment states that execution shall not issue until a certain time, but is issued before that time, stranger cannot avoid, but party might: *Cody v. Quinn*, 28-191; *Wood v. Bagley*, 34-83; *Shelton v. Fels*, 61-178. As to counting Sundays in the time allotted: *Davis & Hooks v. R. R.*, 145-207. The jurisdiction to recall an execution before sale is with the clerk, after sale with the judge: *Williams v. Dunn*, 158-399.

667. Within three years as of course. The party in whose favor judgment is given, and in case of his death, his personal representatives duly appointed, may at any time within three years after the entry of judgment proceed to enforce it by execution, as provided in this article.

Rev., s. 619; Code, s. 437; C. C. P., s. 255.

For leave to issue execution after three years, see section 668. Execution to enforce payment of owelty of partition not to issue against minors until their coming of age: *Turpin v. Kelly*, 85-399. No execution against an estate of deceased debtor: *Sawyers v. Sawyers*, 93-321; *Williams v. Weaver*, 94-134; see, also, section 663. Where execution issued within three years, the judgment does not become dormant: *Perkins v. Berry*, 103-131; *Williams v. Mullis*, 87-159; see, also, *Heyer v. Rivenbark*, 128-272. But a judgment is not affected by an execution made out but not issued to officer: *McKeithen v. Blue*, 149-95. This section applies to judgments existing at the time of its adoption: *Harris v. Ricks*, 63-653. No execution against a county: *Gooch v. Gregory*, 65-142—*mandamus*, or in some cases, a bill in equity, being the remedy, *Hughes v. Comrs.*, 107-598; *Lutterloh v. Comrs.*, 65-403; *Pegram v. Comrs.*, 64-557; *Winslow v. Comrs.*, 64-218; see, also, *Martin v. Clark*, 135-170, and cases cited.

668. After three years by leave. After the lapse of three years from the entry of judgment on the judgment docket, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he is absent or nonresident, or cannot be found to make such service, in which case service may be made by publication, or in such other manner as the court directs. This leave shall not be granted unless it is established by the oath of the party, or by other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. But the leave is not necessary when execution has been issued on the judgment within the three years next preceding the suing for execution, and return thereof unsatisfied in whole or in part.

Rev., s. 620; Code, s. 440; C. C. P., s. 256.

When execution regularly issued within less interval than three years the judgment does not become dormant: *Heyer v. Rivenbark*, 128-272; *Perkins v. Berry*, 103-131; *Williams v. Mullis*, 87-159; *McCaskill v. McKinnon*, 121-195; *Barnes v. Fort*, 169-431; but it does not stop the statute of limitations: *Barnes v. Fort*, 169-431. Execution may issue after ten years if the application is made within three years from the last issuance: *Williams v. Mullis*, 87-159; *Heyer v. Rivenbark*, 128-272; *McCaskill v. McKinnon*, 121-195; *Pipkin v. Adams*, 114-201; *Harrington v. Hatton*, 130-89; *Lytle v. Lytle*, 94-683; *Adams v. Guy*, 106-275; but see *Berry v. Corpening*, 90-395—but judgment is only a lien from the time of levy, *Wilson v. Lumber Co.*, 131-167; *Heyer v. Rivenbark*, 128-272, and cases cited.

This section applies to justice's judgments docketed in superior court: *Pants Co. v. Mewborn*, 172-332; *Broyles v. Young*, 81-315—and leave to issue execution on such can be granted after the lapse of ten years, if the judgment is kept alive, but lien only continues ten years: *Heyer v. Rivenbark*, 128-272; *Adams v. Guy*, 106-275; *Lilly v. West*, 97-279; *Lytle v. Lytle*, 94-683; *Broyles v. Young*, 81-315; see *Pipkin v. Adams*, 114-202; and a justice's judgment does not become dormant for the failure to issue execution thereon pending an appeal from the judgment when bond has been given to stay execution, *Dysart v. Brandreth*, 118-968—nor does it become dormant, when docketed, where motion for leave to issue execution was made within ten years from the docketing, but appeal on clerk's decision not adjudicated until after ten years, *Adams v. Guy*, 106-275.

Execution can issue after the lapse of three years since the issuance of the last execution by complying with this section: *Williams v. Williams*, 85-385. After dormant judgment has been revived, execution may issue within three years without notice: *Pants Co. v. Mewborn*, 172-332. Where several judgment debtors, plaintiff may select as to which of the defendants he will revive it: *Patterson v. Walton*, 119-500. Leave to issue execution may be granted when judgment not fully satisfied and it is not barred by the statute: *Johnston v. Jones*, 87-393.

While notice to defendant is required, it may be waived as to regularity: *McKeithen v. Blue*, 149-95. An innocent purchaser at a sale of land under execution issued on a dormant judgment is protected: *Cowen v. Withrow*, 114-559; *Lytle v. Lytle*, 94-683; *Barnes v. Hyatt*, 87-315; *Sheppard v. Bland*, 87-163; *McKeithen v. Blue*, 149-95.

The clerk and not the judge the proper person to whom to make application: *Adams v. Guy*, 106-278; *McKethan v. McNeill*, 74-663. Requisites of the affidavit of applicant: *Hinton v. Roach*, 95-106. Giving notice of application: *Surratt v. Crawford*, 87-372; *Rush v. Steamboat Co.*, 84-702; *Isler v. Murphy*, 71-436. Affidavit of applicant sufficient evidence, when: *Hinton v. Roach*, 95-106. Assignee of a judgment may make application: *Pants Co. v. Mewborn*, 172-332.

Issues of fact arising, clerk transfers to superior court for trial: *Goode v. Rogers*, 126-62. Where judgment debtor dead, his heirs should be made parties defendant if such judgment is a lien upon lands: *Isler v. Murphy*, 71-436; but see *Cowles v. Hall*, 113-359. Plaintiff is competent witness against personal representative of deceased debtor in motion hereunder: *Latham v. Dixon*, 82-55—and judgment debtor is likewise competent as against personal representative of deceased creditor, *Pate v. Oliver*, 104-458.

Defense to the motion to issue execution: *Balk v. Harris*, 130-384, and cases cited; *Bank v. Swink*, 129-255; *McLeod v. Williams*, 122-451; *Pate v. Oliver*, 104-458; *Lytle v. Lytle*, 94-683—a discharge in bankruptcy sufficient, *Spicer v. Gambill*, 93-382, and cases cited; *Dawson v. Hartsfield*, 79-334; *Withers v. Stinson*, 79-341; but see *Sanderson v. Daily*, 83-67; *Bell v. Cunningham*, 81-83—the statute of limitations, *Ex parte Smith*, 134-495; *Heyer v. Rivenbark*, 128-272; *Farrar v. Harper*, 133-74; *Lilly v. West*, 97-276; *Williams v. Mullis*, 87-159; *McDonald v. Dickson*, 85-248; *Barnes v. Fort*, 169-431; *Hicks v. Wooten*, 175-597—that the surety has paid the judgment without having it assigned: *Bank v. Hotel Co.*, 147-594. That another judgment has been rendered for the same debt is no defense to a motion to revive: *McLean v. McLean*, 90-530. Upon motion to revive judgment defendant cannot show aliunde that no service of process had been originally made upon him; the presumption that he was properly a party is conclusive until removed by a correction of the record itself in a direct proceeding for that purpose: *Smathers v. Sprouse*, 144-637. An appeal from the clerk for refusal to issue execution may be heard by the resident or presiding judge at chambers in another county: *McCaskill v. McKinnon*, 121-192—and he may remand case to clerk with directions or may himself grant leave to issue, *Martin v. Briscoe*, 143-353. Where motion made and refused, and no appeal taken, it cannot be renewed: *Sanderson v. Dailey*, 83-67. Duty of clerk and appellant on appeal: *Hicks v. Wooten*, 175-597. Section cited in *Coward v. Chastain*, 99-444.

669. Issued from and returned to court of rendition. Executions and other process for the enforcement of judgments can issue only from the court in which the judgment for the enforcement of the execution or other final process was

rendered; and the returns of executions or other final process shall be made to the court of the county from which it issued.

Rev., s. 623; Code, s. 444; 1871-2, c. 74; 1881, c. 75.

For amercement of sheriff for failing to make proper return, see section 3936. Seal of clerk of court must be attached to executions to other counties: *Taylor v. Taylor*, 83-116. The sheriff must make return to the superior court of the county in which judgment was obtained: *Watson v. Mitchell*, 108-364. Sheriff bound to make return and, if he has not obeyed the process, must show some lawful excuse for not doing so: *Smith v. McMillan*, 84-593; *Bryan v. Hubbs*, 69-423—and if he make an erroneous return through honest mistake, the court may allow him to amend it, *Swain v. Burden*, 124-16; *Steelman v. Greenwood*, 113-355; *Luttrell v. Martin*, 112-593; *Williams v. Weaver*, 101-1; *Walters v. Moore*, 90-41; *Williams v. Sharpe*, 70-582; *Peebles v. Newsom*, 74-475.

670. To what counties issued. When the execution is against the property of the judgment debtor it may be issued to the sheriff of any county where the judgment is docketed. No execution may issue from the superior court of any county upon a judgment until it is docketed in that county. When it requires the delivery of real or personal property it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties.

Rev., s. 622; Code, s. 443; C. C. P., s. 259; 1871-2, c. 74; 1881, c. 75; 1905, c. 412.

See section 669. That no execution shall issue to another county until the judgment is docketed there does not apply to executions issued before the act of 1905, c. 412: *Cox v. Boyden*, 153-522; and where a homestead allotted under such execution has been acquiesced in for thirty years it will exclude objection: *Ibid.* Sale under execution of land in county where judgment not docketed void as against purchaser for value from defendant: *Rollins v. Henry*, 78-342. Seal of the clerk of county from which execution issues must be attached thereto: *Taylor v. Taylor*, 83-116. Justice's execution should be addressed to "any constable or other lawful officer": *McGloughan v. Mitchell*, 126-681. Levy on land in another county may be made without docketing transcript: *Evans v. Alridge*, 133-378, and cases cited. Executions may be issued at the same time to different counties: *Vegeahn v. Smith*, 95-256.

671. Sale of land under execution. Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold.

Rev., s. 622; Code, s. 443; C. C. P., s. 259.

This section does not apply to foreclosure sales: *Kidder v. McIlhenny*, 81-123; *Mebane v. Mebane*, 80-34.

THE PURCHASER'S TITLE. Purchaser of land at execution sale has prima facie title: *Allison v. Snider*, 118-952. The recital of execution and sale in sheriff's deed is prima facie evidence thereof: *Wainwright v. Bobbitt*, 127-274; *Miller v. Miller*, 89-402; *Wilson v. Taylor*, 98-280; *Rollins v. Henry*, 78-342; *Curlee v. Smith*, 91-172—and this is so notwithstanding the return upon the execution may be imperfect, *Miller v. Miller*, 89-402—but there must be some preliminary proof of loss of execution before the recital is prima facie evidence of its issue: *Person v. Roberts*, 159-168; *Thompson v. Lumber Co.*, 168-226.

The plaintiff in the judgment purchasing at execution sale must show judgment and execution; a stranger, only execution: *Person v. Roberts*, 159-168, and cases cited; *King v. Featherston*, 20-259. Purchaser at sale made after death of debtor under execution issued before his death acquires good title: *Benners v. Rhinehart*, 107-705. A sale under execution issued upon a judgment which is a lien on all the debtor's property vests in the purchaser only the debtor's interest at time lien attaches: *Bristol v. Hallyburton*, 93-384; *Dail v. Freeman*, 92-351; see, also, *Electric Co. v. Engineering Co.*, 128-199; but see *Gentry v. Callahan*, 98-448. The sheriff's deed to purchaser operates from day of sale and not from date of deed: *Cowles v.*

Coffey, 88-340. Certain judgments where sales under execution do not give purchaser title: McCauley v. Williams, 122-295; Halso v. Cole, 82-161; Cowen v. Withrow, 114-558; Dudley v. Cole, 21-429; Barrow v. Arrenton, 23-223. Purchaser acquires no title if court does not have jurisdiction: McCauley v. Williams, 122-295. Where sheriff has execution on senior judgment in hand and sale is under junior judgment, purchaser's title good: Bernhardt v. Brown, 118-702; Dysart v. Brandreth, 118-969. Sale under execution levied upon realty carries good title, even though judgment not docketed or lien of docketing expired: Bernhardt v. Brown, 122-593; Sawyers v. Sawyers, 93-324.

Possession of judgment debtor, after sale and deed made to purchaser, is adverse, and his original deed is not color: Wilson v. Brown, 134-400. A purchaser of land at execution sale has a prima facie title, and a defendant in an action of ejectment who seeks to avoid such title on the ground of homestead rights must specifically plead the facts upon which such rights depend: Marshburn v. Lashlie, 122-240; Allison v. Snider, 118-952; Fulton v. Roberts, 113-421; Dickens v. Long, 109-165.

Where execution issued on irregular judgment, a stranger purchasing gets a good title: Hinton v. Roach, 95-106—also he gets good title even if sheriff fail to advertise and give notice of sale as required, if he does not know it, Burton v. Spiers, 95-503; Dula v. Seagle, 98-458. Deed made to purchaser at void sale conveys no title: Pemberton v. McRae, 75-500; Owen v. Barksdale, 30-81; McCauley v. Williams, 122-293. Where sheriff's deed recites a sale prior to acquisition of title by judgment debtor, purchaser acquires no title: Gentry v. Callahan, 98-448; Dail v. Freeman, 92-351; Frey v. Ransom, 66-466; Badham v. Cox, 33-456; Flynn v. Williams, 23-509. A fraudulent deed by judgment debtor is color of title as against purchaser at a subsequent execution sale: Hoke v. Henderson, 14-12. Sheriff's deed under execution against vendee of mortgagee conveys no title: Johnston v. Case, 131-491. Sale under junior judgment passes title encumbered with prior liens: Gambrell v. Wilcox, 111-42—but passes clear title when executions under prior liens are in hands of sheriff, Bernhardt v. Brown, 118-700; Dysart v. Brandreth, 118-969.

672. When attested and returnable. Executions shall be attested as of the term next before the day on which they were issued, and are returnable to the next term of the court beginning not less than forty days after the issuing thereof, and no execution against property shall issue until the end of the term during which the judgment was rendered.

Rev., s. 624; Code, s. 449; 1903, c. 544; 1870-1, c. 42, s. 7; 1873-4, c. 7.

Executions shall be tested as of the term next before the day on which they are issued: Williams v. Weaver, 94-134—but this requirement is only directory and its omission does not vitiate the process: Bernhardt v. Brown, 122-594; Bryan v. Hubbs, 69-423. Execution issued before death of judgment debtor and sale made thereunder after his death passes good title: Benners v. Rhinehart, 107-705—but if issued after his death, the sale is void, even though the execution tested before death, Williams v. Weaver, 94-134; Sawyers v. Sawyers, 93-321. Executions are returnable to the term next after that from which they bear teste: Turner v. Page, 111-292—but unless ruled to do so earlier, sheriff has entire term in which to make return, Ledbetter v. Arledge, 53-475; Turner v. Page, 111-291; Boyd v. Teague, 111-246; Person v. Newsom, 87-142—and if he fails to make such return or makes improper return he is liable to amercement, Boyd v. Teague, 111-246; Turner v. Page, 111-291; see, also, section 3936. For irregularities affecting the validity of an execution, the remedy is by notice and motion to recall, but not to affect the rights of innocent purchasers: Williams v. Dunn, 158-399; s. c., 163-206. Before sale the motion is made before the clerk; after sale and return, before the judge: *Ibid.*

673. Against the person. If the action is one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the state, after the return of an execution against his property wholly or partly unsatisfied. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as provided in the article Arrest and Bail, or unless the complaint contains a state-

ment of facts showing one or more of the causes of arrest required by law, whether such statement of facts is necessary to the cause of action or not.

Rev., s. 625; Code, s. 447; 1891, c. 541, s. 2; C. C. P., s. 260.

See section 768.

WHEN EXECUTION CAN ISSUE. When the defendant has been taken in arrest and bail, or when the complaint alleges facts constituting a cause for arrest, and these facts have been found by the jury and enter into the judgment: *McKinney v. Patterson*, 174-483; *Oakley v. Lasater*, 172-96; *Doyle v. Bush*, 171-10; *Turlington v. Aman*, 163-555; *Ledford v. Emerson*, 143-527; *Huntley v. Hasty*, 132-279; *Carroll v. Montgomery*, 128-278; *Kinney v. Laughenour*, 97-325; *Peebles v. Foote*, 83-102; *Houston v. Walsh*, 79-37. The judgment may direct that execution may issue against the person in a proper case, but this is not necessary: *Oakley v. Lasater*, 172-96; *Michael v. Leach*, 166-223. Cannot issue simply on a judgment for debt on a note, no fraud being found: *Stewart v. Bryan*, 121-46; *Priess v. Cohen*, 117-54; *Houston v. Walsh*, 79-36; *Clafin v. Underwood*, 75-485; *McAden v. Banister*, 63-479. Difference between arrest hereunder and arrest under ancillary order pointed out: *Ledford v. Emerson*, 143-530. To justify an execution against the person for injury to property growing out of negligence, the injury must be intentional and not merely accidental: *Oakley v. Lasater*, 172-96.

THE EXECUTION. It must be warranted by the judgment and not exceed it, otherwise it is invalid: *Ledford v. Emerson*, 143-531—and the judgment as docketed must be the guide, *McAden v. Banister*, 63-479. It must command the sheriff to arrest the defendant and commit him to the jail of the county from which it is issued until he shall pay the judgment or be discharged according to law: *Kinney v. Laughenour*, 97-325. Clerk's duty to issue the order upon application in proper cases: *Patton v. Gash*, 99-284; *Kinney v. Laughenour*, 97-325; see, also, *McAden v. Banister*, 63-479—and his refusal to do so is appealable to resident judge, *Huntley v. Hasty*, 132-279.

How person arrested can be discharged: *Fertilizer Co. v. Grubbs*, 114-470; *Burgwyn v. Hall*, 108-489; *Howie v. Spittle*, 156-180; see, also, sections 1637-1646.

674. Defendant dying in execution; new execution against property. Parties at whose suit the body of a person is taken in execution for a judgment recovered, their executors or administrators, may, after the death of the person so taken and dying in execution, have new execution against the property of the person deceased, as they might have had if that person had never been in execution.

Rev., s. 626; Code, s. 469; R. C., c. 45, s. 28; 21 James I, s. 24.

675. Form of execution. The execution must be directed to the sheriff, or coroner when the sheriff is a party or interested, subscribed by the clerk of the court, and must intelligibly refer to the judgment, stating the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

Sheriff not liable to judgment debtor for seizure and sale of property when he acts upon execution regular in form and issued from proper court: *O'Briant v. Wilkerson*, 122-304. Execution must conform to the judgment: *Cureton v. Garrison*, 115-550. Variances between execution and judgment that are not deemed fatal: *Marshburn v. Lashlie*, 122-237; *Hinton v. Roach*, 95-106. Executions must bear teste as of the term next before day issued, but this is only directory: *Bryan v. Hubbs*, 69-423; see, also, section 672.

1. Against property—no lien on personal property until levy. If it is against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of his personal property; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter; but no execution

against the property of a judgment debtor is a lien on his personal property, as against any bona fide purchaser from him for value, or as against any other execution, except from the levy thereof.

Execution is a lien on personalty only from the moment of levy: *Weisenfeld v. McLean*, 96-248; see, also, *Shelby v. Tiddy*, 118-792—but it is a lien on realty without levy, the lien attaching upon the docketing of the judgment, *Harris v. Ricks*, 63-653; see, also, section 614—unless issued after ten years, and then it is a lien on both personalty and realty from levy only: *Wilson v. Lumber Co.*, 131-167; *Heyer v. Rivenbark*, 128-272; *Bernhardt v. Brown*, 122-593; *Lytle v. Lytle*, 94-683; *Sawyers v. Sawyers*, 93-321; *Spicer v. Gambill*, 93-378. Levy upon personal property must be made by seizing it; but if the property is of such a nature as makes actual seizure impossible, some act as nearly equivalent to seizure must be substituted for it: *Clifton v. Owens*, 170-607; *Sawyer v. Bray*, 102-79; *Perry v. Hardison*, 99-21; *Long v. Hall*, 97-286. Constructive levy on personalty discussed: *Penland v. Leatherwood*, 101-509, and cases cited. Where levy made, but sheriff either allows property to remain with debtor or debtor recaptures it against sheriff's will; held no satisfaction of execution: *Aldridge v. Loftin*, 104-122; *Binford v. Alston*, 15-351. Where sheriff makes levy by taking goods into his possession and refusing to sell them, it is a constructive payment: *Aldridge v. Loftin*, 104-126; *In re King*, 13-341. Sale of real estate under execution issued on a judgment which is a lien thereon is valid without a levy: *Farrior v. Houston*, 100-369. This subsection does not alter former law as to what is and what is not a levy; it only relates to period when lien attaches: *Sawyer v. Bray*, 102-79.

2. *Against property in hands of personal representative.* If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees it shall require the officer to satisfy the judgment out of such property.

Execution issued before death of judgment debtor, and sale made thereunder after death, passes good title: *Benness v. Rhinehart*, 107-705; *Aycock v. Harrison*, 65-8; but see *Halso v. Cole*, 82-161—but if issued after his death, the sale is void even though execution tested before death, *Williams v. Weaver*, 94-134; *Sawyers v. Sawyers*, 93-321. For old practice to reach land of decedent, see *Weston v. Lumber Co.*, 169-398.

3. *Against the person.* If it is against the person of the judgment debtor, it shall require the officer to arrest him, and commit him to the jail of the county until he pays the judgment or is discharged according to law.

See sections 673, 674.

4. *For delivery of specific property.* If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and in that respect is deemed an execution against property.

How writs of possession of land are executed: *Ferguson v. Wright*, 115-568; *Davis v. Higgins*, 87-298; *Johnson v. Nevill*, 65-677. Cases as to writs of assistance to put persons in possession of land who have bought same at a sale under decree of court and party in possession refuses to yield: *Lee v. Thornton*, 176-208; *Clarke v. Aldridge*, 162-326; *Exum v. Baker*, 115-242; *Marcom v. Wyatt*, 117-129; *Coor v. Smith*, 107-430; *Knight v. Houghtalling*, 94-408. For judgment and execution in claim and delivery of personal property, see section 610.

5. *For purchase money of land.* If the answer in an action for recovery of a debt contracted for the purchase of land does not deny, or if the jury finds,

that the debt was so contracted, it is the duty of the court to have embodied in the judgment that the debt sued on was contracted for the purchase money of the land, describing it briefly; and it is also the duty of the clerk to set forth in the execution that the said debt was contracted for the purchase of the land, the description of which must be set out briefly as in the complaint.

A judgment reciting that the debt was contracted for the purchase of land is conclusive: *Durham v. Wilson*, 104-595. This subsection does not apply where a deed has not been made to the vendee: *Lewis v. McDowell*, 88-261. Sale by a sheriff of the homestead, even though execution does not specify that the debt is for the purchase money of land, will be valid: *Durham v. Bostick*, 72-353. Sale of land under execution for purchase money is valid without allotment of homestead: *Durham v. Wilson*, 104-595. Homestead cannot be claimed as against judgment for purchase money: *Toms v. Fite*, 93-274; *Billings v. Joines*, 151-363; also see under section 728.

Rev., s. 627; Code, ss. 234-236, 448; C. C. P., s. 261; 1868-9, c. 148; 1879, c. 217.

676. Variance between judgment and execution. When property has been sold by an officer by virtue of an execution or other process commanding sale, no variance between the execution and the judgment whereon it was issued, in the sum due, in the manner in which it is due, or in the time when it is due, invalidates or affects the title of the purchaser of such property.

Rev., s. 628; Code, s. 1347; R. C., c. 44, s. 13; 1848, c. 53.

Section directly supported by *Hinton v. Roach*, 95-106. A variance merely technical will be disregarded: *Marshburn v. Lashlie*, 122-237. This section liberally construed: *Wilson v. Taylor*, 98-280, and cases cited.

677. Property liable to sale under execution. The property of the judgment debtor, not exempted from sale under the constitution and laws of this state, may be levied on and sold under execution as hereinafter prescribed:

1. Goods, chattels, and real property belonging to him.

For statute forbidding sale of tenant's crop under execution, see section 2361.

PROPERTY SUBJECT TO LEVY AND SALE. Matured crops; but when land is purchased at execution sale the growing crops go to tenant in possession: *Kesler v. Cornelison*, 98-383; *Dail v. Freeman*, 92-351; *Walton v. Jordan*, 65-172; *Walston v. Bryan*, 64-764. Vested remainders: *Bristol v. Hallyburton*, 93-384; *Bruce v. Nicholson*, 109-206; *Stern v. Lee*, 115-426. Land, the deed for which is unrecorded: *Ray v. Wilcoxon*, 107-514. The interest of a tenant by the curtesy consummate: *McCaskill v. McCormack*, 99-548. The interest of grantee in a deed for timber: *Fowle v. McLean*, 168-537; *Williams v. Parsons*, 167-529.

PROPERTY NOT SUBJECT TO LEVY AND SALE. Contingent remainders: *Bristol v. Hallyburton*, 93-384; *Bruce v. Nicholson*, 109-202. Land held by husband and wife by entireties: *Harris v. Distributing Co.*, 172-14; *Hood v. Mercer*, 150-699. Property owned by county: *Vaughn v. Comrs.*, 118-639; *Hughes v. Comrs.*, 107-598; *Gooch v. Gregory*, 65-142. A purely mental conception, such as a formula for the manufacture of cigarettes: *Markham v. Whitehurst*, 109-307. Property in custodia legis: *Pelletier v. Lumber Co.*, 123-596—though leave may be granted by the court in some cases that it be sold, *Pelletier v. Lumber Co.*, 123-596; *Skinner v. Maxwell*, 68-404. Property already sold under this section cannot be resold under subsequent execution on same judgment: *Peebles v. Pate*, 86-438. Where land is devised to be sold and the proceeds distributed among certain persons, it is not subject to levy either as land or personalty: *Clifton v. Owens*, 170-607.

2. All leasehold estates of three years duration or more, owned by him.

3. Equitable and legal rights of redemption in personal and real property pledged or mortgaged by him. But when the equity of redemption in personal property is sold under execution, notice of the time and place of said sale shall be given the mortgagee.

PROPERTY SUBJECT TO LEVY AND SALE. Equity of redemption in an express mortgage and also equitable interest under securities given in the nature of a mortgage: *Davis v. Evans*, 27-525. An interest in Cherokee boundary land, purchaser being entitled to grant upon payment of fees: *Wilson v. Deweese*, 114-653. Equity of redemption, whether created by mortgage deed made to creditor or to a third person, with or without power of sale: *Mayo v. Staton*, 137-670. This section applied only to equity of redemption in land, and not in personality (before change made by act of 1919, c. 30): *Hardware Co. v. Lewis*, 173-290.

PROPERTY NOT SUBJECT TO LEVY AND SALE. Equity of redemption, when judgment upon which execution issues is for the mortgage debt: *Simpson v. Simpson*, 93-373. Vendor's interest in land contracted to be conveyed on receipt of purchase money: *Tally v. Reid*, 72-336; *Mayo v. Staton*, 137-681, and cases cited. Vendee's interest under contract of purchase of land where he has not paid the purchase money in full: *McPeters v. English*, 141-491; *Gorrell v. Alspaugh*, 120-362, and cases therein cited; *Rollins v. Henry*, 86-714; *Tally v. Reed*, 74-463; *Hinsdale v. Thornton*, 75-381, 74-167; *Jennings v. Hardin*, 45-275; *Frost v. Reynolds*, 39-494; *Badham v. Cox*, 33-456. Mortgagee's interest in property under chattel mortgage: *Bowen v. King*, 146-385.

See generally, *Hutchison v. Symons*, 67-156; *Mayo v. Staton*, 137-670.

4. Real property or goods and chattels of which any person is seized or possessed in trust for him.

PROPERTY SUBJECT TO LEVY AND SALE. Trusts which are simple and unmixed, or passive, and which entitle the cestui que trust to call for the legal title: *Evans v. Brendle*, 173-149; *Hardware Co. v. Lewis*, 173-290; *Mayo v. Staton*, 137-670; *Gorrell v. Alspaugh*, 120-362; *Hinsdale v. Thornton*, 75-381; *Page v. Goodman*, 43-16. Equitable estates as distinguished from equitable rights: *Evans v. Brendle*, 173-149; *Mayo v. Staton*, 137-670; *Nelson v. Hughes*, 55-33. Only trust estates held for defendant solely: *Harrison v. Battle*, 16-537; but see section 3217.

PROPERTY NOT SUBJECT TO LEVY AND SALE. Fraudulent trusts: *Page v. Goodman*, 43-16; see *Sherrod v. Dixon*, 120-60; *Guthrie v. Bacon*, 107-337; *Everett v. Raby*, 104-479; *Jimmerson v. Duncan*, 48-537. Active, or mixed trusts, where the cestui que trust cannot call for the legal title: *Battle v. Petway*, 27-576; *Williams v. Williams*, 41-20; *Gorrell v. Alspaugh*, 120-367; *Mayo v. Staton*, 137-670; *Lummers v. Davidson*, 160-484; *Evans v. Brendle*, 173-149; *Rouse v. Rouse*, 167-208. Trust estate for several tenants in common, where one is judgment debtor: *McLeran v. McKethan*, 42-70. Equitable rights as distinguished from equitable estates: *Nelson v. Hughes*, 55-33; *Mayo v. Staton*, 137-670; *Evans v. Brendle*, 173-149. A resulting trust in a deed of trust for creditors: *Sprinkle v. Martin*, 66-56; see, also, *Hardin v. Ray*, 94-456; *McRary v. Fries*, 57-234; *Thompson v. Ford*, 29-418; *Battle v. Petway*, 27-576; *Barham v. Massey*, 27-192; *Burgin v. Burgin*, 23-160; *Harrison v. Battle*, 16-541; *Mordecai v. Parker*, 14-425; *Brown v. Graves*, 11-342—but may be reached in manner pointed out in *McKeithan v. Walker*, 66-95; *Hutchison v. Symons*, 67-156. In case of equitable conversion of land into money for distribution the remedy is by an action to subject it to payment of debts: *Clifton v. Owens*, 170-607.

But no execution shall be levied on growing crops until they are matured.

Growing crops at common law were subject to levy and sale: *Smith v. Tritt*, 18-241—but under the statute they are not, and cannot be until they are matured, *Kesler v. Cornelison*, 98-382, and cases there cited; *Dail v. Freeman*, 92-351; *Shannon v. Jones*, 34-206.

Rev., ss. 629, 632; Code, ss. 450, 453; R. C., c. 45, ss. 1-5, 11; 5 Geo. II, c. 7, s. 4; 1777, c. 115, s. 29; 1812, c. 830, ss. 1, 2; 1822, c. 1172; 1844, c. 35; 1919, c. 30.

678. Sale of trust estates; purchaser's title. Upon the sale under execution of trust estates whereof the judgment debtor is beneficiary the sheriff shall execute a deed to the purchaser, and the purchaser thereof shall hold and enjoy the same freed and discharged from all encumbrances of the trustee.

Rev., s. 630; Code, s. 452; R. C., c. 45, s. 4; 1812, c. 830.

See *Mayo v. Staton*, 137-670; *Evans v. Brendle*, 173-149; *Hardware Co. v. Lewis*, 173-290.

679. Sheriff's deed on sale of equity of redemption. The sheriff selling equitable and legal rights of redemption shall set forth in the deed to the purchaser thereof that the said estates were under mortgage at the time of judgment, or levy in the case of personal property and sale.

Rev., s. 631; Code, s. 451; R. C., c. 45, s. 5; 1812, c. 830, s. 2; 1822, c. 1172.

The provisions of this section are not mandatory: *Mayo v. Staton*, 137-687; citing *Thorpe v. Ricks*, 21-619. The purchaser of equity of redemption may recover possession from mortgagor: *Parrott v. Hardesty*, 169-667. A mortgagee, purchasing land at execution sale under a judgment to which he is a stranger, acquires the equity of redemption and the proceeds are applied to the execution: *Woodruff v. Trust Co.*, 173-546.

680. Forthcoming bond for personal property. If a sheriff or other officer who has levied an execution or other process upon personal property permits it to remain with the possessor, the officer may take a bond, attested by a credible witness, for the forthcoming thereof to answer the execution or process; but the officer remains, nevertheless, in all respects liable as heretofore to the plaintiff's claim.

Rev., 633; Code, 463; R. C., c. 45, s. 21; 1807, c. 731, s. 3; 1828, c. 12, s. 2.

The bond is simply to secure the redelivery of the property to the officer—not to secure the debt: *Gray v. Bows*, 18-437; *Grady v. Threadgill*, 35-228—and the property must be peaceably and quietly redelivered in strict accordance therewith or bond is forfeited: *Poteet v. Bryson*, 29-337. As to form of bond, see *Grady v. Threadgill*, 35-228.

681. Summary remedy on forthcoming bond. If the condition of such bond be broken, the sheriff or other officer, on giving ten days previous notice in writing to any obligor therein, may on motion have judgment against him in a summary manner, before the superior court or before a justice of the peace, as the case may be, of the county in which the officer resides, for all damages which the officer has sustained, or may be adjudged liable to sustain, not exceeding the penalty of the bond, to be ascertained by a jury, under the direction of the court or justice.

Rev., 635; Code, s. 465; R. C., c. 45, s. 23; 1822, c. 1141.

682. Requirement of bond; possession and sale of property. When the forthcoming bond is taken the officer must specify therein the property levied upon and furnish to the surety a list of the property in writing under his hand, attested by at least one credible witness, and stating therein the day of sale. The property levied upon is deemed in the custody of the surety, as the bailee of the officer. All other executions thereafter levied on this property create a lien on the same from and after the respective levies, and shall be satisfied accordingly out of the proceeds of the sale of the property; but the officer thereafter levying shall not take the property out of the custody of the surety. But in all such cases sales of chattels shall take place within thirty days after the first levy; and if sale is not made within that time any other officer who has levied upon the property may seize and sell it.

Rev., 634; Code, s. 464; R. C., c. 45, s. 22; 1844, c. 34; 1846, c. 50.

683. Entry of returns on judgment docket; penalty. When an execution is returned, the return of the sheriff or other officer must be noted by the clerk on the judgment docket; and when it is returned wholly or partially satisfied, it is the duty of the clerk of the court to which it is returned to send a copy of such last mentioned return, under his hand, to the clerk of the superior court of each

county in which such judgment is docketed, who must note such copy in his judgment docket, opposite the judgment, and file the copy with the transcript of the docket of the judgment in his office. A clerk failing to send a copy of the payments on the execution or judgment to the clerks of the superior court of the counties wherein a transcript of the judgment has been docketed, and a clerk failing to note said payment on the judgment docket of his court, shall, on motion, be fined one hundred dollars nisi, and the judgment shall be made absolute upon notice to show cause at the succeeding term of the superior court of his county.

Rev., s. 636; Code, s. 445; 1871-2, c. 74, s. 2; 1881, c. 75.

The return as evidence, establishing its truthfulness, *prima facie* merely: *Perry v. Hardison*, 99-21; *Peebles v. Pate*, 90-348—and where execution lost, the entry of the execution and its return on the minute docket is admissible as secondary evidence, *Curlee v. Smith*, 91-172. The word “executed” as a return of process *ex vi termini* means full performance: *Isley v. Boon*, 113-249; *McDonald v. Carson*, 94-497. Where judgment debtor turns over collateral to judgment creditor and he collects same, it is the same as a payment on judgment, and should be entered: *Moore v. Garner*, 101-374. As to application of surplus of proceeds of execution sale under senior judgment to the payment of junior judgments, see *Gambrill v. Wilcox*, 111-42. An execution returned into court with an entry of satisfaction indorsed, in whole or in part, extinguishes so much of the debt and becomes a part of the record in the case: *Walters v. Moore*, 90-41.

684. Cost of keeping livestock; officer’s account. The court or justice shall make a reasonable allowance to officers for keeping and maintaining horses, cattle, hogs, or sheep, and all other property taken into their custody under legal process, the keeping of which is chargeable to them; and this allowance may be retained by the officers out of the sales of the property, in preference to the satisfaction of the process under which the property was seized or sold. The officer must make out his account and, if required, give the debtor or his agent a copy of it, signed by his own hand, and must return the account with the execution or other process, under which the property has been seized or sold, to the justice or court to whom the execution or process is returnable, and shall swear to the correctness of the several items set forth; otherwise he shall not be permitted to retain the allowance.

Rev., ss. 637-8; Code, ss. 466-7; R. C., c. 45, ss. 25-6; 1807, c. 731.

Section referred to in *R. R. v. Main*, 132-459; *Hendricks v. Ireland*, 162-523.

685. Purchaser of defective title; remedy against defendant. Where real or personal property is sold on any execution or decree, by any officer authorized to make the sale, and the sale is made legally and in good faith, and the property did not belong to the person against whose estate the execution or decree was issued, by reason of which the purchaser has been deprived of the property, or been compelled to pay damages in lieu thereof to the owner, the purchaser, his executors or administrators, may sue the person against whom such execution or decree was issued, or the person legally representing him, in a civil action, and recover such sum as he may have paid for the property, with interest from the time of payment; but the property, if personal, must be present at the sale and actually delivered to the purchaser.

Rev., s. 639; Code, s. 468; R. C., c. 45, s. 27; 1807, c. 723.

Cases directly sustaining this section: *Johnson v. Gooch*, 114-62; *Wall v. Fairley*, 77-105. Cases referring to section: *Brown v. Smith*, 53-332; *McDougald v. McLean*, 60-120. As to whether purchaser of defective title is subrogated to rights of execution creditor, see *Pember-ton v. McRae*, 75-497; *Laws v. Thompson*, 49-104. Where at a sale of land not belonging to

execution debtor, plaintiff purchased for enough to pay off the judgment, it is satisfied; then plaintiff's remedy is under this section: *Halcombe v. Loudermilk*, 48-491.

686. Costs on execution paid to clerk; penalty. The sheriff or other officer must pay the costs on all executions which are satisfied in whole or in part, to the clerk of the court from which the execution issued, and to no other person, on the second day of the term of the court; and any such officer making default herein shall forfeit and pay forty dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs.

Rev., s. 640; Code, s. 472; R. S., c. 76, s. 5; 1822, c. 1149.

For execution against corporation property and stock, see Corporations, Art. 9.

ART. 28. EXECUTION AND JUDICIAL SALES

687. How advertised; cost of newspaper publication. No real property shall be sold under execution, deed of trust, mortgage, or other contract, except as provided in the following section, until notice of the sale has been posted at the courthouse door and three other public places in the county for thirty days immediately preceding the sale, and also published once a week for four weeks in some newspaper published in the county, if a paper is published in the county. The cost of such newspaper publication shall not exceed three dollars, to be taxed as costs in the action, special proceeding or proceeding to sell.

Rev., s. 641; Code, s. 456; 1885, c. 38; 1905, c. 147; 1868-9, c. 237, s. 10; R. C., c. 45, s. 16; 1881, c. 278; 1909, c. 705.

For further provisions as to mortgage sales, see Mortgages and Deeds of Trust, Art. 3.

In *Edgecombe and Nash* the advertisement must be published "in some newspaper published in any city or town nearest the property advertised." P. L. 1913, c. 723.

This section applies to sales under execution and to foreclosure proceedings in court: *Hogan v. Utter*, 175-332; *Palmer v. Latham*, 173-60. Duty of sheriff in selling property under execution explained: *Williams v. Dunn*, 163-206. The requirements as to advertising execution sales are directory, and will not render the sale void as to a stranger without notice: *Williams v. Dunn*, 163-206; *Shaffer v. Bledsoe*, 118-279; *Dula v. Seagle*, 98-458; *Burton v. Spiers*, 92-503; *Hays v. Hunt*, 85-303; *Skinner v. Warren*, 81-377; but requirements as to time and place are mandatory: *Wortham v. Basket*, 99-70; *Palmer v. Latham*, 173-60.

The real object of advertising set forth in *Burton v. Spiers*, 92-508. It is presumed that proper advertising was done: *Cawfield v. Owen*, 129-288. As to advertising sale of land for taxes, see *Hays v. Hunt*, 85-303; also section 8014. Case where sheriff was sued for penalty for insufficiently advertising, in which question was raised whether property was real or personal: *Freeman v. Leonard*, 99-274. Case where advertisement proper, but date changed by request of defendant in execution and with knowledge of purchaser; held purchaser could not call for conveyance: *Skinner v. Warren*, 81-373. Sheriff's duty to advertise and sell to best advantage of creditors: *Ibid.* For penalty on sheriff for selling without advertising properly, see section 696. In the absence of fraud, selling without due advertisement does not vitiate the sale: *Williams v. Dunn*, 163-206; *Woodley v. Gilliam*, 67-239, and cases cited; *Dula v. Seagle*, 98-458; *Shaffer v. Bledsoe*, 118-279, and cases cited—the true test being whether or not purchaser had knowledge of the defects, *Dula v. Seagle*, 98-458; *Hays v. Hunt*, 85-303; *Skinner v. Warren*, 81-377; *Avery v. Rose*, 15-554.

The power of sale in a mortgage is contractual and must be strictly complied with: *Jenkins v. Griffin*, 175-184; *Hogan v. Utter*, 175-332 (modifying a statement in *Palmer v. Latham*, 173-60, that it is directory); *Banking Co. v. Leach*, 169-706; *Eubanks v. Becton*, 158-231; *McLver v. Smith*, 118-75; *Hinton v. Hall*, 166-477; *Ferebee v. Sawyer*, 167-199; *Brett v. Davenport*, 151-56. What is sufficient advertisement of mortgage sale: *Jenkins v. Griffin*, 175-184. In the absence of agreement to the contrary, the expense of advertising cannot exceed three dollars: *Banking Co. v. Leach*, 169-706. See further as to advertising sales, section 2585.

688. Advertisement of resale. In all cases where a sheriff, commissioner, executor or administrator resells any real estate at public auction because of an insufficient bid, want of bidders, the placing of an additional or ten per cent bid on the price bid at a prior sale, or other cause, public notice of the resale, where ordered by the court, is sufficient notice if it recites the cause of resale and is posted at the courthouse door and at least three other public places in the county for at least fifteen days, and published at least once a week for two successive weeks in some newspaper, if a paper is published in the county where the resale is made.

1913, c. 19.

For reopening sales for advanced bids, see Mortgages and Deeds of Trust, s. 2591.

689. Notice served on defendant; when on governor. In addition to the advertisement above required, the sheriff shall in every case, at least ten days before a sale of real property under execution, serve a copy of so much of the advertisement as relates to the real property of any defendant on him personally if he is found in the county, or on his agent if he has a known agent therein, or if he cannot be found within the county and has no known agent therein, but his address is known, by mail to such address; and the date of service shall be ascertained by the usual course of the mail from the place where sent to the place of its address. In case of the sale under execution, or under the order of any court, of any real or personal property in which the state is interested as a stockholder or otherwise, notice in writing must be served upon the governor and attorney general, at least thirty days before the sale, of the time and place of sale, and under what process it is made, otherwise the sale is invalid.

Rev., s. 642; Code, s. 457; 1868-9, c. 237, s. 11; 1876-7, c. 224.

The requirement of serving notice upon a person, defendant in execution, is directory only, an innocent purchaser getting a good title: *Shaffer v. Bledsoe*, 118-279; *Cowles v. Hardin*, 101-388; *Burton v. Spiers*, 92-503; *Williams v. Dunn*, 163-206. Section referred to in *Freeman v. Leonard*, 99-279.

690. Sale days. All real property sold under execution, or by order of court, shall be sold at the courthouse door of the county in which all or a part of the property is situated, on the first Monday in any month, or during the first three days of any term of the superior court of said county, unless in the order directing the sale some other place and time is designated, and then it shall be sold as directed in such order, on any day except Sunday or holidays, after advertising as required by law.

Rev., s. 643; Code, s. 454; 1876-7, c. 216, ss. 2, 3; 1883, c. 94, ss. 1, 2.

Sale at improper time and place is void: *Lowdermilk v. Corpening*, 101-649; *Wortham v. Basket*, 99-70; *Dula v. Seagle*, 98-458; *Mayers v. Carter*, 87-146 (see *Mordecai v. Speight*, 14-429)—unless sale assented to by defendant in execution, who waives a compliance with statutory requirements, *Wortham v. Basket*, 99-70; *Biggs v. Brickell*, 68-239. Sales made on Tuesday or Wednesday valid: *Mayers v. Carter*, 87-148; *Brooks v. Ratcliff*, 33-321—on Friday valid, *Wade v. Saunders*, 70-270—unless there is an irregularity known to the purchaser, *Hays v. Hunt*, 85-303.

691. Sale hours. No sale under an execution or decree shall commence before ten o'clock in the morning, or continue after four o'clock in the afternoon, of the day on which the sale is to be made, except that in towns or cities of more than five thousand inhabitants public sales of goods, wares and merchandise may be continued until ten o'clock p. m.

Rev., s. 644; Code, s. 459; R. C., c. 45, s. 17; 1794, c. 41.

692. Postponement. The sheriff or other person making the sale, for the absence of bidders or any other just cause, may postpone the sale from day to day, but not for more than six days in all, and upon postponement he must post a notice thereof on the courthouse door of his county.

Rev., s. 645; Code, s. 455; 1868-9, c. 237, s. 9.

Sale advertised to take place Monday, but postponed from day to day, can take place on Friday: *Wade v. Saunders*, 70-270. Effect of sale on day other than statute requires discussed: *Mordecai v. Speight*, 14-428; see, also, *Hays v. Hunt*, 85-303. This section held to apply to sales by sheriff or under court decrees, and not to mortgage sales: *Ferebee v. Sawyer*, 167-199. But mortgage sales may be postponed by giving reasonable notice: *Ibid*.

693. Certain sales validated. All sales of realty made under executions issued prior to March the fifteenth, one thousand nine hundred and one, on judgments regularly obtained in courts of competent jurisdiction, are hereby validated, whether such sales were continued from day to day or for a longer period, not exceeding ten days: Provided, that such executions and sales are in all other respects regular: Provided further, that purchasers and their assigns shall have held continuous and adverse possession under a sheriff's deed for three years: Provided further, that the rights of minors and married women shall in nowise be prejudiced hereby.

Rev., s. 646; 1901, c. 742.

694. Certain private acts repealed. All private acts, by which lands in particular counties are required or allowed to be sold at places, or at times, other than those hereinbefore prescribed, are hereby repealed.

Rev., s. 647; Code, s. 458; 1868-9, c. 237, s. 12.

695. Advertisement as to personal property. No sale of personal property under execution may be made until it has been advertised for ten days at the door of the courthouse of the county in which it is to be sold, and at three other public places in the county, and the advertisement must designate the place and the time of sale.

Rev., s. 648; Code, s. 460; R. C., c. 45, s. 16; 1808, c. 753; 1820, c. 1066.

A sale without notice duly published is invalid as to one having knowledge of such irregularity: *Phillips v. Hyatt*, 167-570.

696. Penalty for selling contrary to law. A sheriff or other officer who makes any sale contrary to the true intent and meaning of this article shall forfeit two hundred dollars to any person suing for it, one-half for his own use and the other half to the use of the county where the offense is committed.

Rev., s. 649; Code, s. 461; R. C., c. 45, s. 18; 1820, c. 1066, s. 2; 1822, c. 1153, s. 3.

For liability of sheriff's bond, see sections 3930, 3941. Sheriff is liable for failure to advertise sale properly: *Mayers v. Carter*, 87-148; *Burton v. Spiers*, 92-507; *Freeman v. Leonard*, 99-274.

697. Officer's return of no sale for want of bidders; penalty. When a sheriff or other officer returns upon an execution that he has made no sale for want of bidders, he must state in his return the several places he has advertised and offered for sale the property levied on; and an officer failing to make such statement is on motion subject to a fine of forty dollars; and every constable, for a like omission of duty, is subject to a fine of ten dollars, for the use and benefit of

the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which, or by justice to whom, the execution shall be returned. Nothing in, nor any recovery under, this section is a bar to any action for a false return against the sheriff or other officer.

Rev., s. 650; Code, s. 462; R. C., c. 45, s. 19; 1815, c. 887.

For penalty for false return, see section 3936.

698. Officer to prepare deed for property sold. Sheriffs or other officers selling lands by authority of any execution or process shall, upon payment of the price, prepare, execute and deliver to the purchaser a deed for the property purchased. The purchaser of land must furnish the officer with a description of it.

Rev., s. 651; Code, s. 471; R. C., c. 45, s. 30; 1848, c. 39.

As to title of purchaser, see cases under section 671. A motion in the cause is the proper means of compelling sheriff to execute deed: *Fox v. Kline*, 85-173; *Skinner v. Warren*, 81-376, and cases cited; *Patrick v. Carr*, 60-633. Purchaser not paying, sheriff can tender deed and sue: *Skinner v. Warren*, 81-376; *McKee v. Lineberger*, 69-217; but see *Maynard v. Moore*, 76-161. Sheriff can give purchaser time in which to pay purchase money if neither party objects: *Maynard v. Moore*, 76-158. Purchaser implicated in sheriff's dereliction in selling cannot call for deed: *Skinner v. Warren*, 81-373. The deed must bear the seal of the sheriff: *Fisher v. Owens*, 132-686; *Strain v. Fitzgerald*, 128-396; *Patterson v. Galliher*, 122-511. Where copy of the registration of a sheriff's deed says "Given under my hand and seal," no presumption that original bore a seal: *Strain v. Fitzgerald*, 128-396. The deed is presumptive evidence of the facts stated therein: *Neal v. Nelson*, 117-401—of the execution, levy and sale, and all the acts of the sheriff recited, *Wainwright v. Bobbitt*, 127-274; *Wilson v. Taylor*, 98-275; *Farrior v. Houston*, 100-369; *Curlee v. Smith*, 91-172; *Miller v. Miller*, 89-402; *McKee v. Lineberger*, 87-181; *Rollins v. Henry*, 78-342; *Hardin v. Cheek*, 48-135—and this is so even though the return is imperfect, *Miller v. Miller*, 89-402; but there must be some preliminary proof of loss of execution before the recital is prima facie evidence of its issue: *Person v. Roberts*, 159-168; *Thompson v. Lumber Co.*, 168-226.

ART. 29. BETTERMENTS

699. Petition by claimant; execution suspended; issues found. A defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the premises under a color of title believed to be good, have made permanent improvements thereon, and praying that he may be allowed for the improvements, over and above the value of the use and occupation of the land. The court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for the improvements. In any such action this inquiry and assessment may be made upon the trial of the cause.

Rev., s. 652; Code, s. 473; 1871-2, c. 147.

GENERAL OBSERVATIONS. This section is constitutional: *Barker v. Owen*, 93-193. Some history of the section: *Condry v. Cheshire*, 88-378. Purpose of betterment statutes explained: *Whitfield v. Boyd*, 158-451. Effect of Connor act upon claims for betterments pointed out: *Wood v. Tinsley*, 138-507. This section is confined to cases where persons are in bona fide possession under color of title: *Bryan v. Alexander*, 111-142; for color of title, see annotations under section 428. This section has nothing to do with claims of tenant against landlord for improvements: *Dunn v. Bagby*, 88-91—nor with claims for betterments as between tenants in common, *Holt v. Couch*, 125-456; but see *Daniel v. Dixon*, 163-137; s. c., 161-377. It does not apply to tenant for life making improvements: *Northeott v. Northeott*, 175-148—nor to improvements placed by husband on wife's land: *Nelson v. Nelson*, 176-191—nor where a

person enters on land under a contract for improvements: *Ferrell v. Mining Co.*, 176-475. Defendant entitled to compensation for improvements whether plaintiff's claim be legal or equitable: *Barker v. Owen*, 93-198.

PLEADINGS AND PROCEDURE. As to when and where to set up the claim for betterments, see *Wood v. Tinsley*, 138-507; *Fortescue v. Crawford*, 105-29; *Casey v. Cooper*, 99-395. Petition must be filed before the judgment is executed: *Boyer v. Garner*, 116-125—and judgment is deemed executed within this section, when, *Ibid.* The court must find probable truth in the allegations of petition before impaneling jury: *Hallyburton v. Slagle*, 132-957. A claim for betterments set up in answer is no counterclaim such as to prevent plaintiff taking nonsuit: *Rumbough v. Young*, 119-567. Claim for betterments under this statute cannot be set up on trial to defeat plaintiff's recovery, but by petition after judgment declaring plaintiff owner of land: *Wood v. Tinsley*, 138-507; but see *Casey v. Cooper*, 99-395. When claim for betterments set up in pleadings it must be found as an issue on trial or it is lost: *Casey v. Cooper*, 99-395. In ejection a writ of ouster should not issue until judgment for betterments paid: *Bond v. Wilson*, 129-325.

AS TO DEFENDANT'S GOOD FAITH. No betterments allowed unless defendant shows his good faith in holding the land: *Hallyburton v. Slagle*, 132-957; see, also, *Johnston v. Pate*, 95-68; *Merritt v. Scott*, 81-385—and this means not only his belief but reasonable grounds for his belief in his title: *Pritchard v. Williams*, 176-108; *Faison v. Kelly*, 149-282; *Alston v. Connell*, 145-1; *R. R. v. McCaskill*, 98-526. Reasonableness of belief is a fact to be found by the jury; and defendant may testify: *R. R. v. McCaskill*, 98-526—proper issues to be submitted: *Pritchard v. Williams*, 176-108. The notice which bars one's right to betterments is the existence of such facts and circumstances as might reasonably suggest to the ordinary citizen serious defects in his own title: *R. R. v. McCaskill*, 98-526. Cases where held petitioner had no reasonable ground of belief: *Wood v. Tinsley*, 138-507; *Finch v. Strickland*, 132-103; *Bird v. Gilliam*, 125-76; *Browne v. Davis*, 109-23; *Gudger v. R. R.*, 106-481; *Scott v. Battle*, 85-184; *Wharton v. Moore*, 84-479. Cases where held petitioner had reasonable ground: *Justice v. Baxter*, 93-405; but see *Wood v. Tinsley*, 138-507; *Railroad v. McCaskill*, 98-526; *Pritchard v. Williams*, 176-108.

Cases where parties have entered into possession and made improvements under void or voidable contracts to convey, or under void deeds or on account of promises to give the land in which equity would not allow vendor to recover without repaying purchase money and paying for betterments: *Ballard v. Boyette*, 171-24; *Gann v. Spencer*, 167-429; *Daniel v. Dixon*, 163-137; *Kelly v. Johnson*, 135-647; *Taylor v. Brinkley*, 131-8; *Bond v. Wilson*, 129-325; *Luton v. Badham*, 127-96; *Pass v. Brooks*, 125-129; *Andrews v. Andrews*, 122-352; *Field v. Moody*, 111-353; *Vann v. Newsom*, 110-122; *Rumbough v. Young*, 119-567; *Pitt v. Moore*, 99-85; *Hedgpepeth v. Rose*, 95-41; *Casey v. Cooper*, 99-395; *Tucker v. Markland*, 101-422; *Reed v. Exum*, 84-430; *Scott v. Battle*, 85-184; *Smith v. Stewart*, 83-406; *Daniel v. Crumpler*, 75-184; *Love v. Neilson*, 54-339; *Thomas v. Kyles*, 54-302; *Chambers v. Massey*, 42-286; *Albea v. Griffin*, 22-9—but since equity follows the law, as to such contracts subsequent to passage of Connor act it is held betterments not allowed under this statute against purchaser from vendor who has registered his deed, *Wood v. Tinsley*, 138-507. Other cases of minor importance: *Harrington v. Rawls*, 136-66; *Smith v. Ingram*, 132-959.

700. Annual value of land and waste charged against defendant. The jury, in assessing the damages, shall estimate against the defendant the clear annual value of the premises during the time he was in possession, exclusive of the use of the improvements thereon made by himself or those under whom he claims, and also the damages for waste or other injury to the premises committed by the defendant. The defendant is not liable for the annual value or for damages for waste or other injury for any longer time than three years before the suit, unless he claims for improvements.

Rev., ss. 653-4; Code, ss. 474-5; 1871-2, c. 147, ss. 2-3.

Cases directly upholding section: *Jones v. Coffey*, 109-515; *Sherrill v. Connor*, 107-630; *Barker v. Owen*, 93-198; *Johnson v. Armfield*, 130-575; *Bond v. Wilson*, 129-325; *Pass v. Brooks*, 125-129; *Wetherell v. Gorman*, 74-603; *Reed v. Exum*, 84-430; *Smith v. Stewart*, 83-

406. The defendant is not liable for rents, etc., for more than three years unless he claims betterments, and in that case the rents, etc., beyond three years are to be set off against betterments: *King v. Bynum*, 137-491; *Whitfield v. Boyd*, 158-451; *Pritchard v. Williams*, 176-108. Other cases of interest: *Browne v. Davis*, 112-227; *Morisey v. Swinson*, 104-555.

701. Value of improvements estimated. If the jury is satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good under which he or they were holding the premises, permanent and valuable improvements, they shall estimate in his favor the value of the improvements made before notice, in writing, of the title under which the plaintiff claims, not exceeding the amount actually expended in making them and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment.

Rev., s. 655; Code, s. 476; 1871-2, c. 147, s. 4.

For annotations as to bona fide belief as to title, see section 699. The valuation should be based, not upon the cost of improvement, but upon the enhancement of the value of the land thereby: *Whitfield v. Boyd*, 158-451; *Johnson v. Armfield*, 130-576; *Railroad v. McCaskill*, 98-526; *Reed v. Exum*, 84-430; *White v. Jones*, 88-181; *Smith v. Stewart*, 83-406; *Hill v. Brower*, 76-126—and this without reference to whether betterments are of any value to true owner, *Railroad v. McCaskill*, 98-526. The notice prescribed by the statute as a bar to compensation for improvements is defined in *Railroad v. McCaskill*, 98-526.

702. Improvements to balance rents. If the sum estimated for the improvements exceeds the damages estimated against the defendant as aforesaid, the jury shall then estimate against him for any time before the said three years the rents and profits accrued against or damages for waste or other injury done by him, or those under whom he claims, so far as is necessary to balance his claim for improvements; but the defendant in such case shall not be liable for the excess, if any, of such rents, profits, or damages beyond the value of improvements.

Rev., s. 656; Code, s. 477; 1871-2, c. 147, s. 5.

This section directly supported by *Barker v. Owen*, 93-198; *Sherrill v. Connor*, 107-630; *Whitfield v. Boyd*, 158-451.

703. Verdict, judgment, and lien. After offsetting the damages assessed for the plaintiff, and the allowances to the defendant for any improvements, the jury shall find a verdict for the balance for the plaintiff or defendant, as the case may be, and judgment shall be entered therefor according to the verdict. Any such balance due to the defendant is a lien upon the land recovered by the plaintiff until it is paid.

Rev., ss. 657-8; Code, ss. 478-9; 1871-2, c. 147, ss. 67.

The sum adjudged to the defendant for the improvements as a lien on the land: *Barker v. Owen*, 93-198. Whether judgment can be a lien on the right of way of a railroad, discussed in *Railroad v. McCaskill*, 98-538. As to improvements being an equitable lien, see *Vann v. Newsum*, 110-129, and cases cited under section 699.

704. Life tenant recovers from remainderman. If the plaintiff claims only an estate for life in the land recovered and pays any sum allowed to the defendant for improvements, he or his personal representative may recover at the determination of his estate from the remainderman or reversioner, the value of the said improvements as they then exist, not exceeding the amount as paid by him, and he has a lien therefor on the premises as if they had been mortgaged for the payment thereof, and may keep possession of said premises until it is paid.

Rev., s. 659; Code, s. 480; 1871-2, c. 147, s. 8.

705. Value of premises without improvements. When the defendant claims allowance for improvements, the plaintiff may by entry on the record require that the value of his estate in the premises without the improvements shall also be ascertained. The value of the premises in such cases shall be estimated as it would have been at the time of the inquiry, if no such improvements had been made by the tenant or any person under whom he claims, and shall be ascertained in the manner hereinbefore provided for estimating the value of improvements.

Rev., ss. 661-2; Code, ss. 482-3; 1871-2, c. 147, ss. 10-11.

706. Plaintiff's election that defendant take premises. The plaintiff in such case, if judgment is rendered for him, may, at any time during the same term, or before judgment is rendered on the assessment of the value of the improvements, in person or by his attorney in the cause, enter on the record his election to relinquish his estate in the premises to the defendant at the value as ascertained, and the defendant shall thenceforth hold all the estate that the plaintiff had therein at the commencement of the suit, if he pays therefor the said value with interest in the manner ordered by the court.

Rev., s. 663; Code, s. 484; 1871-2, c. 147, s. 12.

Plaintiff can elect to take value of his interest unimproved by defendant: *Barker v. Owen*, 93-198. Section referred to in *Carter v. Long*, 114-187.

707. Payment made to court; land sold on default. The payment must be made to the plaintiff, or into court for his use, and the land is bound therefor, and if the defendant fails to make the payment within or at the times limited therefor, the court may order the land sold and the proceeds applied to the payment of said value and interest, and any surplus to be paid to the defendant; but if the net proceeds are insufficient to satisfy the said value and interest, the defendant is not bound for the deficiency.

Rev., s. 664; Code, s. 485; 1871-2, c. 147, s. 13.

Section referred to in *Barker v. Owen*, 93-202.

708. If plaintiff is a married woman, minor or insane. If the party by or for whom the land is claimed in the suit is a married woman, minor, or insane person, such value is deemed to be real estate, and shall be disposed of as the court considers proper for the benefit of the persons interested therein.

Rev., s. 665; Code, s. 486; 1871-2, c. 147, s. 14.

709. Defendant evicted, may recover from plaintiff. If the defendant, his heirs or assigns, after the premises are so relinquished to him, is evicted by force of a better title than that of the original plaintiff, the person so evicted may recover from the plaintiff or his representatives the amount paid for the premises, as so much money had and received by the plaintiff in his lifetime for the use of such person, with lawful interest thereon from the time of the payment.

Rev., s. 666; Code, s. 487; 1871-2, c. 147, s. 15.

710. Not applicable to suit by mortgagee. Nothing in this article applies to any suit brought by a mortgagee or his heirs or assigns against a mortgagor or his heirs or assigns for the recovery of the mortgaged premises.

Rev., s. 660; Code, s. 481; 1871-2, c. 147, s. 9.

Improvements placed upon land by mortgagor become additional security for the debt, and he can set up no claim for betterments: *Wharton v. Moore*, 84-479.

ART. 30. SUPPLEMENTAL PROCEEDINGS

711. Execution unsatisfied, debtor ordered to answer. When an execution against property of a judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the state, to the sheriff of the county where a judgment roll or a transcript of a justice's judgment is filed, is returned wholly or partially unsatisfied, the judgment creditor at any time after the return, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned or from the judge thereof, requiring such debtor to appear and answer concerning his property before such court or judge, at a time and place specified in the order, within the county to which the execution was issued.

Rev., s. 667; Code, s. 488, subsec. 1; C. C. P., s. 264; 1868-9, c. 95, s. 2.

GENERAL NATURE OF PROCEEDINGS. Proceedings supplemental to execution are in the nature of an equitable execution: *Vegetahn v. Smith*, 95-254; see, also, *Coates v. Wilkes*, 92-376—and may also be regarded in the nature of a creditor's bill, *Munds v. Cassidey*, 98-558; *Bronson v. Ins. Co.*, 85-413; *Rand v. Rand*, 78-12; *Carson v. Oates*, 64-115. Such proceedings cannot be had in the supreme court: *Phillips v. Trezevant*, 70-176. Where, pending proceedings, judgment becomes barred by the statute, no bar to proceeding: *Coates v. Wilkes*, 94-174. Effect of death of judgment debtor upon supplementary proceedings: *Rankin v. Minor*, 72-424; *Carson v. Oates*, 64-115. A judgment, whether just or unjust, can be enforced by execution and supplementary proceedings: *Heggie v. B. and L. Assn.*, 107-581—and not collaterally attacked, *Ibid.*

This section confers upon the clerk authority to hear and allow or disallow the motion of the plaintiff for an order requiring defendants to "appear and answer": *Bank v. Burns*, 107-466. The fact that sheriff has alias executions in his hands unreturned issued on same judgment is no bar to supplementary proceedings thereon: *Vegetahn v. Smith*, 95-254. When clerk informed that similar proceedings pending before judge, he should refuse to proceed, and, failing to do so, the judge has power to order that he desist: *Ledford v. Emerson*, 143-527.

Supplementary proceedings lie against private corporations: *LaFountain v. Underwriters*, 79-514—against a lunatic where debt contracted prior to his lunacy, *Blake v. Respass*, 77-193—but whether against municipalities, *quere*, *Winslow v. Comrs.*, 64-218. Only the judgment creditors instituting the proceedings are entitled to the order: *Righton v. Pruden*, 73-61; *LaFountain v. Underwriters*, 79-514—and they get priority of lien, *Parks v. Sprinkle*, 64-637. Joint debtors can be examined hereunder: *Weiller v. Lawrence*, 81-65; see section 713—also assignees, *Bruce v. Crabtree*, 116-528.

PROCEDURE. No demand necessary before making application for order: *Weiller v. Lawrence*, 81-65. Proceedings should be brought where judgment rendered: *Hutchison v. Symons*, 67-156; *Hasty v. Simpson*, 77-69—but place designated where defendant shall appear shall be within defendant's county, *Ibid.* Notice must be given debtor: *Hinsdale v. Underwood*, 116-593; *Wright v. R. R.*, 141-168; *Turner v. Holden*, 109-182. Notice may be served, *how*: *Turner v. Holden*, 109-182. As to time given by notice to appear, see *Weiller v. Lawrence*, 81-65. General appearance waives notice: *Hinsdale v. Underwood*, 116-593. The evidence should be taken down in writing: *Coates v. Wilkes*, 92-376. No appeal lies to supreme court from order requiring debtor to appear made hereunder: *Bruce v. Crabtree*, 116-528; but see *Ledford v. Emerson*, 143-537—but does lie to the judge of superior court from the clerk, *Bank v. Burns*, 107-465.

See generally: *Rand v. Rand*, 78-12; *Hinsdale v. Sinclair*, 83-338; *Magruder v. Shelton*, 98-545; *Munds v. Cassidey*, 98-558; *Coates v. Wilkes*, 92-376.

THE AFFIDAVIT HEREUNDER. Question of whether affidavit necessary discussed in *Hinsdale v. Sinclair*, 83-341. The affidavit should state that the execution is returned unsatisfied and that the defendant has property and choses in action which ought to be subjected to the payment of the judgment: *Hutchison v. Symons*, 67-156; *Hinsdale v. Sinclair*, 83-338. Section merely referred to in *Walston v. Bryan*, 64-764.

712. Property withheld from execution; proceedings. After the issuing of an execution against property, and upon proof by affidavit of a party, his agent or attorney, to the satisfaction of the court or a judge thereof, that any judgment debtor residing in the judicial district where such judge or sheriff resides has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as provided upon the return of an execution, and the judgment creditor is entitled to the order of examination under this and the preceding section, although the judgment debtor has an equitable estate in land subject to the lien of the judgment, or chases in action, or other things of value unaffected by the lien of the judgment and incapable of levy.

Rev., s. 668; Code, s. 488, subsec. 2; C. C. P., s. 264; 1868-9, c. 95, s. 2.

As to procedure hereunder, see under section 711. The purpose of supplemental proceedings is to give the creditor a remedy only in case debtor has no known property liable to execution or to what is in the nature of an execution, proceedings to enforce its sale: *Hutchison v. Symons*, 67-156—and to give him a substitute for the method of granting relief in equity when remedy by execution exhausted: *Coates v. Wilkes*, 92-376; see, also, *Munds v. Cassidey*, 98-558; *Hinsdale v. Sinclair*, 83-338; *McKeithan v. Walker*, 66-95. Supplementary proceedings may be commenced before sale of the property levied on: *McKeithan v. Walker*, 66-95.

THE AFFIDAVIT HEREUNDER. Must state that debtor has no known property liable to execution, and that he has property or chases in action which he unjustly refuses to apply to the satisfaction of the judgment: *Hutchison v. Symons*, 67-156; *Bank v. Burns*, 109-105; *Hackney v. Arrington*, 99-110; *Hinsdale v. Sinclair*, 83-338—and need not state or aver the nonexistence of an equitable estate within the lien of the judgment or the existence of property, chases in action and things of value unaffected by any lien and incapable of levy: *Hackney v. Arrington*, 99-110; *Bank v. Burns*, 109-105; rendering obsolete, as to these points, *Magruder v. Shelton*, 98-545; *Hinsdale v. Sinclair*, 83-338; *Weiller v. Lawrence*, 81-65. For affidavits that are approved, see *Bank v. Burns*, 109-105. As to verification of affidavit, see *Young v. Rollins*, 85-485.

713. Proceedings against joint debtors. Proceedings supplemental to execution may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which the action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in like manner and to the like effect. These provisions apply to all proceedings and actions pending and to those terminated by final decree or judgment.

Rev., s. 669; Code, s. 490; C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245.

For procedure hereunder, see under section 711. Section merely referred to in *Wright v. R. R.*, 141-168; *Mayo v. Staton*, 137-679; *Coates v. Wilkes*, 94-180.

714. Debtor leaving state, or concealing himself, arrested; bond. Instead of the order requiring the attendance of the judgment debtor, the court or judge may, upon proof by affidavit or otherwise to his satisfaction that there is danger of the debtor leaving the state or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the judgment, issue a warrant requiring the sheriff of any county where such debtor is to arrest him and bring him before the court or judge. Upon being brought

before the court or judge, the debtor may be examined on oath, and, if it appears that there is danger of his leaving the state, and that he has property which he has unjustly refused to apply to the judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the court or judge as directed, and that he will not, during the pendency of the proceedings, dispose of any property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the court or judge, as for contempt.

Rev., s. 671; Code, s. 488, subsec. 4; 1868-9, c. 148, s. 4; 1868-9, c. 277, s. 8.

715. Examination of parties and witnesses. On examination under this article either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness; and the party or witnesses may be required to appear before the court or judge, or a referee appointed by either, and testify on any proceedings under this article in the same manner as upon the trial of an issue. If before a referee, the examination shall be taken by the referee, and certified to the court or judge. All examinations and answers before a court or judge or referee under this article must be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof.

Rev., ss. 670, 676; Code, s. 488 (subsec. 2), 491, 492; C. C. P., ss. 264, 267, 268; 1868-9, c. 95, s. 2; 1871-2, c. 245.

Where judgment debtor is examined, the creditor does not make him his witness, but may cross-examine and contradict him: *Coates v. Wilkes*, 92-376. The party and witness must appear before referee when so required: *Hasty v. Simpson*, 77-69. The evidence should be taken down in writing: *Coates v. Wilkes*, 92-376. Where party or witness refuses to answer questions the court, and not the referee acting alone, should punish for contempt: *Fertilizer Co. v. Taylor*, 112-141; *LaFountain v. Underwriters*, 83-132; see section 727.

716. Incriminating answers not privileged; not used in criminal proceedings. No person, on examination pursuant to this article, is excused from answering any question on the ground that it will tend to convict him of the commission of a crime or that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

Rev., s. 672; Code, s. 488, subsec. 5; C. C. P., s. 264; 1868-9, c. 95, s. 2.

Witness cannot excuse himself from answering on the ground that his answer may incriminate him: *LaFountain v. Underwriters*, 83-132; referred to in concurring opinion of Walker, J., in *In re Briggs*, 135-144. Facts developed on examination in supplementary proceedings are forbidden to be used in evidence in criminal prosecution: *State v. Mallett*, 125-718. Section merely referred to: *Harper v. Pinkston*, 112-302.

717. Disposition of property forbidden. The court or judge may, by order, forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution.

Rev., s. 673; Code, ss. 488 (subsec. 6), 494; C. C. P., s. 264; 1868-9, c. 95, s. 2.

See generally: *Coates Bros. v. Wilkes*, 92-376; *Rose v. Baker*, 99-323; *Ross v. Ross*, 119-109; *Phillips v. Trezevant*, 70-176; *Hogan v. Kirkland*, 64-250.

718. Debtors of judgment debtor may satisfy execution. After the issuing of an execution against property, all persons indebted to the judgment debtor, or to any one of several debtors in the same judgment, may pay to the sheriff the

amount of their debt, or as much thereof as is necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount paid.

Rev., s. 674; Code, s. 489; C. C. P., s. 265.

The sheriff is not hereby invested with power to apply the proceeds of one execution in satisfaction of another: *Smith v. McMillan*, 84-593. As to applying funds to payment of costs, see *Clerk's Office v. Bank*, 66-214. Section referred to in *Parks v. Adams*, 113-477.

719. Debtors of judgment debtor, summoned. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon affidavit that any person or corporation has property of said judgment debtor, or is indebted to him in an amount exceeding ten dollars, the court or judge may, by order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same. The court or judge may also, in its or his discretion, require notice of the proceeding to be given to any party to the action, in such manner as seems proper.

Rev., s. 675; Code, s. 490; C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245.

The issuance of notice to judgment debtor hereunder is in court's discretion: *Wilmington v. Sprunt*, 114-310. Procedure under this section partially outlined in *Rice v. Jones*, 103-226. Assignee of judgment debtor can be examined hereunder: *Bruce v. Crabtree*, 116-528—also joint debtors, *Weiller v. Lawrence*, 81-65. From an order for the examination of a person hereunder there is no appeal: *Bruce v. Crabtree*, 116-528. Persons summoned hereunder who claim an interest in the property themselves may so suggest: *Bank v. Burns*, 109-109. Nature of indebtedness to defendant that can be subjected to satisfaction of execution: *In re Davis*, 81-72; *Sutton v. Askew*, 66-178; *Rice v. Jones*, 103-226. Creditors cannot compel parties for whom debtor has rendered gratuitous services to pay for such services: *Osborne v. Wilkes*, 108-651; approved in *Markham v. Whitehurst*, 109-309; *Guano Co. v. Colwell*, 177-218. Section referred to in *Mayo v. Staton*, 137-679; *Bank v. Burns*, 109-109.

720. Where proceedings instituted and defendant examined. Proceedings supplemental to execution must be instituted in the county in which the judgment was rendered; but the place designated where the defendant must appear and answer must be within the county where he resides.

Rev., s. 677.

This section enacted in accordance with *Hasty v. Simpson*, 77-69. See, also, *Hutchison v. Symons*, 67-156.

721. Debtor's property ordered sold. The court or judge may order any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor.

Rev., s. 678; Code, s. 493; C. C. P., s. 269; 1870-1, c. 245.

The exemption of earnings for sixty days does not apply to enforcement of payment of taxes: *Wilmington v. Sprunt*, 114-310. The earnings of a nonresident for personal services for the sixty days next preceding are exempt from seizure: *Goodwin v. Claytor*, 137-224; *Wierse v. Thomas*, 145-261. As to allowing interpleader as to the real ownership of funds: *Wilson v. Chichester*, 107-386—and as to the ownership of debts, *Williams v. Green*, 68-183.

Section merely referred to: *Wright v. R. R.*, 141-168; *Rice v. Jones*, 103-231.

722. Receiver appointed. The court or judge having jurisdiction over the appointment of receivers may also by order in like manner, and with like authority, appoint a receiver in proceedings under this article of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions. But before the appointment of the receiver, the court or judge shall ascertain if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if so, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to the receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The title of the receiver relates back to the service of the restraining order, herein provided for.

Rev., s. 679; Code, s. 494; C. C. P., s. 270; 1870-1, c. 245; 1876-7, c. 223; 1879, c. 63; 1881, c. 51.

For statutes regulating receivers, see this chapter, Art. 37, and Corporations, Art. 10.

Motion for receiver may be made before the judge while appeal from clerk on other questions pending: Coates v. Wilkes, 92-376. **Receiver appointed by whom:** Corbin v. Berry, 83-27; Parks v. Sprinkle, 64-637 (but notice effect of amendment adding words "court or"); see, also, Bank v. Burns, 107-465, and cases cited under section 859—appointed, when, Rodman v. Harvey, 102-1, citing Coates v. Wilkes, 92-376. **Only one receiver appointed:** Corbin v. Berry, 83-31.

Where upon examination clerk finds a specific fund in defendant's hands which belongs to plaintiff, and his finding is approved by the judge, no receiver should be appointed: Ross v. Ross, 119-109. As between several receivers hereunder, *semble*, the one who was first applied for takes precedence: Parks v. Sprinkle, 64-637. Where it is ascertained that there are several proceedings pending against the debtor to subject his property to the payment of debts, the court should, in proper cases, consolidate them, preserving the priorities acquired: Monroe v. Lewald, 107-655. **Duty of receiver hereunder the same as receivers under the general law:** Weill v. Bank, 106-10; Coates v. Wilkes, 92-376; see sections 859-862 and 1208-1217. **Legal effect upon the property of the debtor when receiver appointed:** Wilson v. Chichester, 107-386; Rose v. Baker, 99-323; Turner v. Holden, 94-70; Rankin v. Minor, 72-424. Where fund was adjudged in supplementary proceedings to be the plaintiff's and it was paid into court, when another claimed it, the clerk should not have appointed a receiver, but allowed other claimant to interplead in the proceeding: Wilson v. Chichester, 107-386. **Failure of judge to ascertain as to whether other proceedings pending does not require reversal of his appointment:** Corbin v. Berry, 83-27.

723. Filing and record of appointment; property vests in receiver. When the court or a judge grants an order for the appointment of a receiver of the property of the judgment debtor, it shall be filed in the office of the clerk of the superior court of the county where the judgment roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the clerk shall record the order in a book to be kept for that purpose in his office, to be called Book of Orders Appointing Receivers of Judgment Debtors, and shall note the time of its filing therein. A certified copy of the order shall be delivered to the receiver named therein, and he is vested with the property and effects of the judgment debtor from the time of the service of the restraining order, if such restraining order has been made, and if not, from the time of the filing and recording of the order for the appointment of a receiver. The receiver of the judgment debtor is subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded.

Rev., s. 680; Code, s. 495; C. C. P., s. 270; 1870-1, c. 245.

For appointment, and duties and powers of receivers generally, see sections 722, 859-862 and 1208-1217.

The effect of granting a restraining order or appointing a receiver is to vest the receiver with the property and effects of debtor from time of the filing of the order: *Rose v. Baker*, 99-323; *Turner v. Holden*, 94-70; *Wilson v. Chichester*, 107-386. Effect of death of judgment debtor before appointment of receiver or the filing of appointment according to this section: *Rankin v. Minor*, 72-424. Effect of payment of plaintiff creditor before receiver files bond: *Righton v. Pruden*, 73-61.

724. Where order of appointment recorded. Before the receiver is vested with any real property of the judgment debtor, a certified copy of the order of appointment must be filed and recorded on the execution docket, in the office of the clerk of the superior court of the county in which any real estate of the judgment debtor is situated, and also in the office of the clerk of the superior court of the county in which the debtor resides.

Rev., s. 681; Code, s. 496; C. C. P., s. 270.

Effect of death of judgment debtor before the filing hereunder: *Rankin v. Minor*, 72-424.

725. Receiver to sue debtors of judgment debtor. If it appears that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt is recoverable only in an action against such person or corporation by the receiver; but the court or judge may, by order, forbid a transfer or other disposition of such property or interest till a sufficient opportunity is given to the receiver to commence and prosecute the action to judgment and execution, but such order may at any time be modified or dissolved by the court or judge having jurisdiction, on such security as he directs.

Rev., s. 682; Code, s. 497; C. C. P., s. 271; 1870-1, c. 245.

Receiver can bring action without special leave of court: *Weill v. Bank*, 106-1. Under this section when a third party claims an interest in the property or denies the debt which is sought by plaintiff to be applied to his judgment, the court may restrain the transfer of such property till receiver can bring action to recover it: *Ross v. Ross*, 119-112; *Bank v. Burns*, 109-109—but such action is brought by receiver as agent for the court, and is a different matter from restraining a conveyance until plaintiff can bring independent action: *Ross v. Ross*, 119-112. Where the property or money has been turned over to the clerk, after having been adjudged to belong to plaintiff, a third party claiming it should interplead, and no receiver should be appointed: *Wilson v. Chichester*, 107-386; *Munds v. Cassidey*, 98-558. Restraining order hereunder cannot be issued unless person restrained has been made a party in some way: *Coates v. Wilkes*, 94-174.

726. Reference. The court or judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts. The appointment of the referee may be made in the first order or at any time.

Rev., s. 683; Code, s. 498; C. C. P., s. 272.

See sections 574-579 as to referees generally; also section 715.

727. Disobedience of orders punished as for contempt. Any person, party or witness, who disobeys an order of the court or judge or referee, duly served, may be punished by the judge as for a contempt. In all cases of commitment under this article the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprison-

ment by the judge committing him, or the judge having jurisdiction, on such terms as are just.

Rev., s. 684; Code, s. 500; C. C. P., s. 274; 1869-70, c. 79, s. 3.

See, also, sections 978-985. Cases where contempt hereunder is discussed: *LaFountain v. Underwriters*, 83-132; *Fertilizer Co. v. Taylor*, 112-141; *Ross v. Ross*, 119-109; *In re Davis*, 81-72; *Bond v. Bond*, 69-97. Party offering affidavits to show his inability to comply with court's order and asking discharge from liability for contempt, judge should have heard and passed upon the affidavits: *Childs v. Wiseman*, 119-497.

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS

ART. 31. PROPERTY EXEMPT FROM EXECUTION

728. Property exempted. The homestead and personal property exemptions as defined and declared by the article of the state constitution entitled *Homesteads and Exemptions* are exempt from sale under execution and other final process, as provided in the state constitution: Provided, the allotment of the homestead shall, as to all property therein embraced, suspend the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead: Provided, further, the owners of judgments docketed since March eleventh, one thousand eight hundred and eighty-five, have two years from the first day of April, one thousand nine hundred and one, within which to assign and set apart their homesteads under such judgments.

Rev., s. 685; Code, s. 501; 1885, c. 359; 1887, c. 17; 1895, c. 397; 1901, c. 612; 1879, c. 256; R. C., c. 45, s. 7; 1848, c. 38; R. C., c. 45, s. 8; 1844, c. 32; 1846, c. 53; 1848, c. 38, s. 2; 1866-7, c. 61, s. 7; 1876-7, c. 263.

GENERAL OBSERVATIONS. Exemptions relate only to the remedy, and the right to an exemption is subject to the law of the forum: *Goodwin v. Claytor*, 137-224. Exemption laws of this state cannot protect judgment debtor's property in another state against the operation of its laws; have no extra-territorial effect, *Sexton v. Ins. Co.*, 132-3; *Balk v. Harris*, 122-64. Presumption is in favor of an exemption, and creditor relying on his debt being excepted from those against which exemption can be allotted must bring himself within the exception by proper averment and proof: *Mebane v. Layton*, 89-396. A resident may be enjoined from prosecuting action in another state for the purpose of evading the exemption laws of this state: *Wierse v. Thomas*, 145-261—and where debtor ceased to be resident before property belonging to him became applicable to a creditor's claim, the general exemption laws of the state do not operate in his favor, *Ibid*.

The general assembly can neither enlarge nor reduce the homestead or personal property exemption: *Rogers v. Kimsey*, 101-564; *Wharton v. Taylor*, 88-230; overruling *Martin v. Hughes*, 67-293. As to effect of passage of chapter 359 of the Laws of 1885, restoring the lien of a judgment upon a homestead, see *Rankin v. Shaw*, 94-405; *Leak v. Gay*, 107-482; *Bevan v. Ellis*, 121-224; *Jones v. Britton*, 102-166; *Rogers v. Kimsey*, 101-559.

As to the legal status of the homestead: *Joyner v. Sugg*, 132-580; *Thomas v. Fulford*, 117-671; *Vanstory v. Thornton*, 112-196; *Gheen v. Summey*, 80-187; *Littlejohn v. Egerton*, 77-384; *Bank v. Green*, 78-247, overruling *Poe v. Hardie*, 65-447; *Kirkwood v. Peden*, 173-460.

Defendant in action cannot be precluded from setting up counterclaim because plaintiff does not own \$500 in personalty, including debt sued on: *Lynn v. Cotton Mills*, 130-621. The acquirement by the defendant of an additional interest in land after execution levied in order to entitle him to a homestead, is not a fraud, and homestead should be allotted: *Wright v. Bond*, 127-39. The reservation of homestead in a conveyance is neither conclusive nor presumptive evidence of fraud: *Davis v. Smith*, 113-94; *Banking Co. v. Whitaker*, 110-345. The arrest of a debtor to compel payment of a debt out of property exempt from execution is an abuse of legal process: *Lockhart v. Bear*, 117-298. The homestead right cannot be destroyed by any irregularity in the proceedings for allotment: *Formeyduval v. Rockwell*, 117-320. A

sale of land without laying off homestead is void: *Ferguson v. Wright*, 113-537; *Fulton v. Roberts*, 113-421; see, also, under sections 671, 675, 677.

The reversionary interest in a homestead can be conveyed without grantor's wife joining in the conveyance: *Joyner v. Sugg*, 132-580, and many cases there cited. A person to whom homestead has not been allotted, and against whom are no liens under which homestead may be allotted, may alien his land, no matter when title acquired, and pass the entire interest and estate therein, including the homestead right (except the right of dower) without the wife joining in conveyance: *Scott v. Lane*, 109-154; *Hughes v. Hodges*, 102-236; also see *Cawfield v. Owens*, 130-641; *Dalrymple v. Cole*, 170-102; *Hall v. Dixon*, 174-319; *Simmons v. McCullin*, 163-409; see, also, cases cited under section 729.

In an action to recover land, if defendant desires to claim homestead, he should make proper averment: *Wilson v. Taylor*, 98-275. Mortgagor's rights to homestead exonerated: *Leak v. Gay*, 107-468; *Weil v. Uzzell*, 92-515; *Hinson v. Adrian*, 92-121.

WHAT IS A HOMESTEAD. The homestead is an estate: *Adrian v. Shaw*, 82-474; *Stern v. Lee*, 115-426—a determinable fee, *Poe v. Hardie*, 65-447—a stay of execution, *Jones v. Britton*, 102-168—a determinable exemption from the payment of debts, *Bank v. Green*, 78-247—a determinable exemption, *Fleming v. Graham*, 110-374; *Sash Co. v. Parker*, 153-130; *Fulp v. Brown*, 153-531; *Davenport v. Fleming*, 154-291; *Caudle v. Morris*, 160-168; *Kirkwood v. Peden*, 173-460—a quality annexed to land, *Littlejohn v. Egerton*, 77-384; see, also, *Hughes v. Hodges*, 102-236—a homestead privilege, *Simpson v. Wallace*, 83-481—the measure of the privilege secured to the debtor, *Campbell v. White*, 95-345.

WHO ENTITLED TO HOMESTEAD AND PERSONAL PROPERTY EXEMPTIONS. The right of a debtor to a homestead is superior to that of all creditors, except so far as it may be impaired by the voluntary act of claimant: *Pope v. Harris*, 94-62. A homestead allotted to one not entitled is void and can be attacked collaterally: *Williams v. Whitaker*, 110-393; *Formeyduval v. Rockwell*, 117-320.

Party entitled to a homestead where even though in a conveyance reserving the homestead wife did not join: *Joyner v. Sugg*, 132-580; *Jordan v. Newsome*, 126-553; *Dixon v. Robbins*, 114-102—and where at a sale under execution announcement was made that land was sold subject to homestead, *Wyche v. Wyche*, 85-96; *Barrett v. Richardson*, 76-429; *Lowdermilk v. Corpening*, 92-333—but where "what interest defendant has" was sold, and judgment was on a debt contracted prior to 1868, defendant not entitled, *Grant v. Edwards*, 86-513.

A married woman is entitled to her exemptions in her separate estate: *Grocery Co. v. Bails*, 177-298; *Harvey v. Johnson*, 133-352; *Bank v. Ireland*, 127-238; *Rawlings v. Neal*, 126-271; *Bailey v. Barron*, 112-54; *Flaum v. Wallace*, 103-296—though where conveyance of land to her by her husband is in fraud of creditors of her husband and invalid, she cannot claim, *Ritch v. Oates*, 122-631.

A party is estopped from claiming homestead who has waived it or properly conveyed the property; and as to what does or does not constitute such waiver or conveyance: *Simmons v. McCullin*, 163-409; *Dixon v. Robbins*, 114-102; *Ritch v. Oates*, 122-631; *Wittkowsky v. Gidney*, 124-437; *Mitchell v. Eure*, 126-77; *Morrisett v. Ferebee*, 120-6; *Fleming v. Graham*, 110-374; *Dickens v. Long*, 109-165; *Scott v. Lane*, 109-154; *Hughes v. Hodges*, 102-236; *Simpson v. Houston*, 97-344; *Adrian v. Shaw*, 82-474; *Abbott v. Cromartie*, 72-292; *Jenkins v. Bobbitt*, 77-385; *Beavan v. Speed*, 74-544; *Lambert v. Kinnery*, 74-348; *Mayho v. Cotton*, 69-289.

The widow is entitled to the extension of the homestead right of the husband, if he dies leaving debts: *Thomas v. Bunch*, 158-175; *Fulp v. Brown*, 153-531; *Finley v. Saunders*, 98-463; *Smith v. McDonald*, 95-163; *Hager v. Nixon*, 69-108; *Watts v. Leggett*, 66-197; see section 748—provided there are no children of said husband, *Simmons v. Respass*, 151-5; *Campbell v. Potts*, 119-530; *Formeyduval v. Rockwell*, 117-320; *Williams v. Whitaker*, 110-393; *Saylor v. Powell*, 90-202; *Simpson v. Wallace*, 83-477; *Wharton v. Leggett*, 80-169—and if he is the owner at the time of his death, *Thomas v. Bunch*, 158-175—and even if husband during his life had a homestead allotted, *Smith v. McDonald*, 95-163. The homestead, whether laid off to husband or to his widow, cannot be divested in favor of heir by extinguishment of deceased husband's debts: *Tucker v. Tucker*, 103-170. Wife and children succeed to the homestead when father dies a resident of the state: *Finley v. Saunders*, 98-462—but when father dies a nonresident, wife and children not entitled, even though they remain resident, *Ibid.* The widow is not entitled to the personal property exemption: *Smith v. McDonald*, 95-163.

Minor children are entitled to homestead: *Welch v. Macy*, 78-240; but see *Dickens v. Long*, 112-311—but not to personal property exemptions, *Welch v. Macy*, 78-240; *Bruton v. McRae*, 125-210—and the former is so regardless of their pecuniary circumstances, *Spence v. Goodwin*, 128-273; *Allen v. Shields*, 72-504—and if there are children of age and one minor the homestead vests in the minor, *Simpson v. Wallace*, 83-477; *Saylor v. Powell*, 90-202; *Bruton v. McRae*, 125-206—and if there is a widow who has had dower assigned, the minor children are entitled to a homestead sub modo in the same land, *Watts v. Leggett*, 66-197; *Graves v. Hines*, 108-262; *Morrisett v. Ferebee*, 120-8—and a guardian ad litem cannot waive infant's right thereto, *Spence v. Goodwin*, 128-273. Where infant heirs allowed judgment that ancestor's land be sold for assets, without claiming homestead, they are estopped from claiming it: *Morrisett v. Ferebee*, 120-6.

A bankrupt is entitled: *Murray v. Hazell*, 99-172; *Lamb v. Chamness*, 84-379; *Windley v. Tankard*, 88-223. A purchaser of land under an executory contract who has paid part of price is entitled, subject to lien for unpaid purchase money: *Dortch v. Benton*, 98-190. A fraudulent grantor of land is entitled as against creditors: *Rose v. Bryan*, 157-173; *McGowan v. McGowan*, 122-168; *Cowan v. Phillips*, 122-70; *Whitehead v. Spivey*, 103-66; *Hughes v. Hodges*, 102-236; *Benton v. Collins*, 125-83; *Dortch v. Benton*, 98-190; *Rankin v. Shaw*, 94-405; *Arnold v. Estis*, 92-162; *Burton v. Spiers*, 87-87; *Duval v. Rollins*, 71-218; *Gaster v. Hardie*, 75-460; *Crummen v. Bennett*, 68-494.

An unmarried man is entitled: *Gardner v. Batts*, 114-496. An assignee of an unallotted exemption in personalty from an assignor who becomes a nonresident before allotment is not entitled: *Latta v. Bell*, 122-639. A tenant is not entitled to his personalty exemption out of crops till landlord's lien paid: *Hamer v. McCall*, 121-196. The burden is upon the one claiming exemption in lands sold under execution to show that no homestead has been allotted to him: *Marshburn v. Lashlie*, 122-237; *Fulton v. Roberts*, 113-421; *Dickens v. Long*, 109-165; *Mobley v. Griffin*, 104-112. One who alleges title to property in another is entitled to his exemptions in that property if jury negatives the averment: *Etheridge v. Davis*, 111-293.

A partner is entitled to his personal property exemption out of partnership property before debt due by him to copartner can be deducted: *Evans v. Bryan*, 95-174; see *Scott v. Kenan*, 94-296. The consent of partners is necessary before one can claim exemption: *Grocery Co. v. Bails*, 177-298; *Richardson v. Redd*, 118-677; *Scott v. Kenan*, 94-296; *Stout v. McNeill*, 98-1; *Burns v. Harris*, 66-509, 67-140—but this consent can be withdrawn before allotment made, *Stout v. McNeill*, 98-1. A surviving partner is not entitled out of partnership assets: *Commission Co. v. Porter*, 122-692. Where one partner purchases from another with the agreement to pay the firm debts out of the firm property, the purchaser cannot claim exemptions in such property: *Farmer v. Head*, 175-273.

RESIDENCE THE PREREQUISITE. The prime requisite of a homesteader is residence in the state: *Jones v. Alsbrook*, 115-46; *Baker v. Leggett*, 98-304; *Finley v. Saunders*, 98-462; *Burgwyn v. Hall*, 108-489—and the words "a resident of this state" mean that one must be an actual and not a constructive resident, *Lee v. Moseley*, 101-311; *Munds v. Cassidey*, 98-558; *Jones v. Alsbrook*, 115-46—yet actual absence from the state, when he has the animus revertendi throughout his absence, does not bar his right, *Chitty v. Chitty*, 118-647; *Jones v. Alsbrook*, 115-46; but see *Lee v. Moseley*, 101-311; *Munds v. Cassidey*, 98-558—and where residence once shown, the burden is on adverse party to show a change: *Ferguson v. Wright*, 113-537. When residence ceases pointed out in *Fulton v. Roberts*, 113-422. A fugitive from justice is not a resident of the state so as to entitle him to his exemptions: *Cromer v. Self*, 149-164 (distinguishing *Chitty v. Chitty*, 118-647). Effect of party returning to state after property seized by attachment: *Baker v. Leggett*, 98-304; *Watkins v. Overby*, 83-165; but see *Gamble v. Rhyne*, 80-183; also see *Abrams v. Pender*, 44-260.

AGAINST JUDGMENTS FOR WHAT DEBTS. No homestead can be allotted as against a judgment founded upon a contract made prior to adoption of constitution of 1868: *Campbell v. Potts*, 119-530; *Buie v. Scott*, 112-375; *Long v. Walker*, 105-90; *Edwards v. Kearsey*, 79-664; *Mebane v. Layton*, 89-396; *Keener v. Goodson*, 89-273; *Leach v. Jones*, 86-404; *Dail v. Sugg*, 85-104; *Carlton v. Watts*, 82-212; *Earle v. Hardie*, 80-177; *Gheen v. Summey*, 80-188; but see *Lowdermilk v. Corpening*, 92-333; *Gamble v. Rhyne*, 80-182; *Cobb v. Hallyburton*, 92-652—but where debt created before 1868 and closed by note subsequent thereto, or where part of debt created both prior and subsequent thereto, it is otherwise, *Arnold v. Estis*, 92-162; *Wilson v. Patton*, 87-318; *Long v. Walker*, 105-90; see concurring opinion of *Clark, J.*, in *Gooch v. Faucett*, 122-275.

None can be allotted as against a judgment for the purchase money of the premises: Billings v. Joines, 151-363; Durham v. Wilson, 104-595; Lawson v. Pringle, 98-450; Toms v. Fite, 93-274; Markham v. Hicks, 90-204; Mebane v. Layton, 89-396; Miller v. Miller, 89-402; Smith v. High, 85-93; Durham v. Bostic, 72-353; Whitaker v. Elliott, 73-186; see, also, Brodie v. Batchelor, 75-51; Fox v. Brooks, 88-234; but see Moore v. Ingram, 91-376; Hoskins v. Wall, 77-249—or for taxes, Wilmington v. Sprunt, 114-310; Mebane v. Layton, 89-396—or for mechanics' and laborers' wages, Isler v. Dixon, 140-529; Broyhill v. Gaither, 119-443; Mebane v. Layton, 89-396—or for improvements put upon the land by defendant, Barker v. Owen, 93-198—or for allowances to mother for support of bastard child, State v. Parsons, 115-730—or for a fine and costs, State v. Williams, 97-415—or for costs in partition, Wilson v. Lumber Co., 131-163.

Exemptions can be allotted against judgments for tort: Oakley v. Lasater, 172-96; Gill v. Edwards, 87-76; Dellinger v. Tweed, 66-206—for devastavit, Leach v. Jones, 86-404—on contract of married woman against her separate personal estate where no conveyance to secure, Harvey v. Johnson, 133-352; Bank v. Ireland, 127-238; Grocery Co. v. Bails, 177-298.

WHAT PROPERTY EXEMPT. The amount and character of property allowed by this section at the time the debt was contracted; see Long v. Walker, 105-90; Dail v. Sugg, 85-104; Carlton v. Watts, 82-212; Earle v. Hardie, 80-177—and the date of the judgment will be taken as the date of the debt, unless record shows otherwise, Mebane v. Layton, 89-396; Buie v. Scott, 107-181—but the income from such is not exempt, Bank v. Green, 78-247.

IN WHAT PROPERTY HOMESTEAD ALLOTTED. The land must be owned and occupied by the debtor: Sash Co. v. Parker, 153-130. May be allotted in an equity of redemption: Cheatham v. Jones, 68-153; Montague v. Bank, 118-283; Thurber v. LaRoque, 105-301; Hinson v. Adrian, 92-121—but cannot be allotted in a remainder dependent upon a life estate, Thomas v. Bunch, 158-175; Murchison v. Plyler, 87-79; Stern v. Lee, 115-426—nor in lands against a judgment for its improvement by defendant, Barker v. Owen, 93-198—nor in newly acquired land where already allotted in one tract, to which allotment there has been no exception, Marshburn v. Lashlie, 122-237—nor in a thousand dollars of the proceeds of a sale of land, Oakley v. Van Noppen, 96-247; Campbell v. White, 95-491; but where homestead sold to satisfy debt created before 1868, a thousand dollars of the proceeds, if that sum is left after paying the old debt, will be treated as the homestead, Leak v. Gay, 107-468. Homestead may be allotted in land held by debtor as tenant in common: Kelly v. McLeod, 165-382. Vendee of judgment debtor cannot claim homestead in the land as against the judgment creditor: Sash Co. v. Parker, 153-130.

IN WHAT PROPERTY PERSONAL PROPERTY EXEMPTION ALLOTTED. May be allotted in choses in action: Frost v. Naylor, 68-325—in property upon which there is no lien, if possible, Cowan v. Phillips, 122-70—in property already under attachment, Chemical Co. v. Sloan, 136-122; Gamble v. Rhyne, 80-183; Comrs. v. Riley, 75-144.

Tenant cannot have exemption allotted in crops until landlord's lien discharged: Hamer v. McCall, 121-196.

SUSPENSION OF STATUTE OF LIMITATIONS WHEN HOMESTEAD ALLOTTED. The statute of limitations is suspended by allotment of homestead: Watters v. Hedgpeh, 172-310; Brown v. Harding, 171-686; s. c., 170-253; but only as to the lien upon the homestead land, and if debtor does not own reversion the statute continues to run: Kirkwood v. Peden, 173-460. The amendment of 1885 repealing the clause exempting homesteads from lien of judgments construed: Rankin v. Shaw, 94-405; Leak v. Gay, 107-468.

The suspension does not take place until homestead allotted: Farrar v. Harper, 133-71; McDonald v. Dickson, 85-248. The statute does not run against a judgment, homestead having been allotted, until death of judgment debtor and the coming of age of his youngest child, and the lien continues: Bevan v. Ellis, 121-224; Formeyduval v. Rockwell, 117-320; Jones v. Britton, 102-201—but the homestead must be allotted before expiration of ten years from the docketing; otherwise statute does run, Wilson v. Lumber Co., 131-163; see, also, Farrar v. Harper, 133-71. Where one judgment taken upon another under which the homestead was laid off; effect: Springs v. Pharr, 131-191. A conveyance of homestead now exposes it to sale by judgment creditor, see section 729. In an assignment for the benefit of creditors reserving homestead, if a judgment is afterward taken and docketed and homestead allotted, the statute is not suspended: Hicks v. Wooten, 175-597; Kirkwood v. Peden, 173-460. Since the homestead is not valid against a debt contracted before 1868, the allotment does not

suspend the statute: *Blow v. Harding*, 161-375. A discharge in bankruptcy does not discharge the lien of a judgment upon debtor's homestead: *Watters v. Hedgpeth*, 172-310.

729. Conveyed homestead not exempt. The allotted homestead is exempt from levy so long as owned and occupied by the homesteader or by any one for him, but when conveyed by him in the mode authorized by the constitution, article ten, section eight, the exemption ceases as to liens attaching prior to the conveyance. The homesteader who has conveyed his allotted homestead may have another allotted, and as often as is necessary. This section shall not have any retroactive effect.

Rev., s. 686; 1905, c. 111.

This section expresses the proper construction of the constitution, art. 10, s. 2: *Sash Co. v. Parker*, 153-130. This section is not retroactive, and does not apply to homesteads allotted before February 6, 1905: *Watters v. Hedgpeth*, 172-310; *Brown v. Harding*, 170-253; s. c., 171-686; *Crouch v. Crouch*, 160-447; *Davenport v. Fleming*, 154-291. Upon conveyance by the homesteader the exemption ceases: *Caudle v. Morris*, 160-168; *Crouch v. Crouch*, 160-447; *Cavanaugh v. Jarman*, 164-372. Section cited in *Rose v. Bryan*, 157-173.

The following decisions touch upon the legislature's power to shorten the duration of the homestead: *Kimsey v. Rogers*, 101-559; *Wharton v. Taylor*, 88-230. This section is not retroactive, and the following cases holding that the right of exemption passes with a conveyance of the homestead to the grantee will still be of interest: *Bevan v. Ellis*, 121-224; *Gardner v. Batts*, 114-496; *Stern v. Lee*, 115-426; *Vanstory v. Thornton*, 112-196; *Lane v. Richardson*, 101-181; *Simpson v. Houston*, 97-344; *Adrian v. Shaw*, 82-474, 84-832; *Littlejohn v. Egerton*, 77-379; but see *Thomas v. Fulford*, 117-667; *Allen v. Bolen*, 114-560; *Fleming v. Graham*, 110-374. The allotted homestead cannot be conveyed except with the joinder and private examination of the wife: *Hall v. Dixon*, 174-319; *Dalrymple v. Cole*, 170-102; s. c., 156-353; *Simmons v. McCullin*, 163-409; *Davenport v. Fleming*, 154-291; *Joyner v. Sugg*, 132-589; *Wittkowsky v. Gidney*, 124-437; *Thomas v. Fulford*, 117-667; *Fleming v. Graham*, 110-374; *Hughes v. Hodges*, 102-236; *Castlebury v. Maynard*, 95-281; *Lambert v. Kinnery*, 74-348; *Jenkins v. Bobbitt*, 77-385; *Mayho v. Cotton*, 69-289.

730. Sheriff to summon and swear appraisers. Before levying upon the real estate of any resident of this state who is entitled to a homestead under this article, and the constitution of this state, the sheriff or other officer charged with the levy shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath: "I, A. B., do solemnly swear (or affirm) that I have no interest in the homestead exemption of C. D., and that I will faithfully perform the duties of appraiser (or assessor, as the case may be), in valuing and laying off the same. So help me, God." In cases where he deems it necessary he may summon the county surveyor or some other competent surveyor to assist in laying off the homestead by metes and bounds.

Rev., s. 687; Code, s. 502; 1893, c. 58; 1868-9, c. 137, s. 2.

For allotment where land is held in cotenancy, see *Partition*, s. 3217.

For form of certificate of qualification to be indorsed on the return, see section 751 (4). As to who is a resident within the meaning of this section, see under section 728. Where allotted under execution, execution creditor must pay fees or sheriff may refuse to act: *Lute v. Reilly*, 65-20; *Vannoy v. Haymore*, 71-128; *Taylor v. Rhyne*, 65-530—but if creditor is required to pay the costs, and proceeds of sale of residue do not pay his debt; effect: *Long v. Walker*, 105-90. Where a debtor has been allotted homestead of less than \$1,000 in value in one county and an execution goes into a sheriff's hands in another county, the homesteader is entitled to have the remainder of his homestead allotted in the other county: *Springer v. Colwell*, 116-520. Difference in allotment of homestead and of personal property exemption: *Gardner v. McConnaughey*, 157-481.

THE JURORS OR APPRAISERS. In executions from justice's courts, the constable may summon and swear them: *McAuley v. Morris*, 101-369. In superior court in equitable pro-

ceeding the court may appoint them: *Benton v. Collins*, 125-83; *Formeyduval v. Rockwell*, 117-325; *Littlejohn v. Egerton*, 77-379. Need not be freeholders: *Hale v. Whitehead*, 115-28. Must be sworn, and same must so appear in record: *Smith v. Hunt*, 68-482; *Coble v. Thom*, 72-123. If sworn by a deputy sheriff it is only an irregularity and cannot be attacked collaterally, if exception not taken in apt time: *Oates v. Munday*, 127-439. Exception to the appraisers, how and when made: *Chambers v. Penland*, 74-340; see, also, *Burton v. Spiers*, 87-87—must be in apt time or exception waived, *Chambers v. Penland*, 74-340.

731. Duty of appraisers; proceedings on return. The appraisers shall value the homestead with its dwelling and buildings thereon, and lay off to the owner or to any agent or attorney, in his behalf, such portion as he selects not exceeding in value one thousand dollars, and must fix and describe the same by metes and bounds. They must then make and sign in the presence of the officer a return of their proceedings, setting forth the property exempted, which shall be returned by the officer to the clerk of the court for the county in which the homestead is situated and filed with the judgment roll in the action, and a minute of the same entered on the judgment docket, and a certified copy thereof under the hand of the clerk shall be registered in the office of the register of deeds for the county. The officer must likewise make a transcript of the return over his hand and return it without delay to the clerk of the court of the county from whence the execution issued, and said clerk must likewise file and make minute of the same as above directed. In all judicial proceedings the original return or a certified copy may be read in evidence.

Rev., ss. 688, 689; Code, ss. 503-4; 1868-9, c. 137, ss. 3-4; 1877, c. 272.

When allotment in one tract of land is not excepted to, debtor cannot claim a homestead in another tract after a conveyance thereof by him has been set aside as fraudulent: *Marshall v. Lashlie*, 122-237. An allotment to one not entitled is void: *Formeyduval v. Rockwell*, 117-320—but the fact that allotment was made to “the widow and minor children” does not make it void, *Ibid*. Irregularity in allotting does not destroy homestead right: *Ibid*.

The duties of the appraisers extended no farther than the valuation and allotment of the homestead: *Aiken v. Gardner*, 107-236. As to equitable action for allotment, see *McCaskill v. McKinnon*, 125-179; *Gulley v. Cole*, 96-447, 102-333; *Thornton v. Vanstory*, 107-331; *Vanstory v. Thornton*, 110-10. As to reallocation for increase in value, see section 733.

Debtor must be given opportunity to be present and make selection, or allotment illegal: *McKeithen v. Blue*, 142-360; *McGowan v. McGowan*, 122-164—and he is not restricted to residence tract or tract contiguous, *Mayho v. Cotton*, 69-289; *Fulton v. Roberts*, 113-421; *McCracken v. Adler*, 98-403; *Flora v. Robbins*, 93-38. A homestead irregularly allotted by a trustee will be reallocated under the direction of the court: *Jordan v. Newsome*, 126-553. Where allotment made, return of appraisers registered, and time for filing objections passed, a second allotment, though under a judgment docketed since first allotment, will be treated as void: *Thornton v. Vanstory*, 107-331; but see section 733. The homesteader should make his selection at the time of the appraisal and assignment, and give notice of any exception to the action of the appraisers then or in a reasonable time thereafter and before sale: *Flora v. Robbins*, 93-38. Judgment creditors cannot complain of the homesteader's election to take the present value of his homestead: *Leak v. Gay*, 107-482.

MAKING THE ALLOTMENT. Manner of making, suggested by *Burton v. Spiers*, 87-87. Must be made in severalty and no community of interest allowed: *Campbell v. White*, 95-491; but see *Kelly v. McLeod*, 165-382. The allotment must not be vague and indefinite: *Coble v. Thom*, 72-121; *Smith v. Hunt*, 68-482—yet it is not necessary for appraisers to run it off by course and distance, and any description by which land can be located will do, *Ray v. Thornton*, 95-571. The allotment must be in land only: *Oakley v. Van Noppen*, 96-247; *Campbell v. White*, 95-491—but the buildings thereon are part of the land and must be taken into account, for homesteader only allowed \$1,000 worth of land and buildings, *Ray v. Thornton*, 95-571. Where land is indivisible but worth over \$1,000 homesteader not entitled to have it all allotted: *Campbell v. White*, 95-491. Where the jury value the tract at \$2,000 the land should be equally divided and homesteader allowed to take choice: *Shoaf v. Frost*, 123-343.

The valuation by the jury is conclusive: *Ibid.* In bankruptcy proceedings the allotment is under control of bankruptcy court: *Pennell v. Robinson*, 164-257.

RETURN. For form of return of appraisers, see section 751. As to form of return, see *Gudger v. Penland*, 118-832; *Ray v. Thornton*, 95-571; *Coble v. Thom*, 72-121. The omission to insert in their report the date of allotment is not sufficient ground for vacating it: *Beavans v. Goodrich*, 98-217. Appraisers may amend return before filing: *Gudger v. Penland*, 118-832; *Pate v. Harper*, 94-23. Return need not be registered in county where homestead situated if it is filed in the judgment roll of the action: *Bevan v. Ellis*, 121-224. The filing of the return in the judgment roll is constructive notice: *Ibid.* Clerk must make entry in regard to the homestead allotment when it is returned to him: *Wilson v. Brown*, 134-409. Registration of allotment is not necessary except when made on petition of homesteader: *Crouch v. Crouch*, 160-447. Effect of irregularity, not excepted to, upon judgments against which statute has been suspended by reason of the allotment: *Formeyduval v. Rockwell*, 117-320. The unregistered allotment of a homestead is competent evidence unless objected to in apt time: *Gudger v. Penland*, 118-832. Section merely referred to: *Welch v. Welch*, 101-569. Failure to sign the report in the presence of the sheriff is an irregularity which may make the report voidable on motion to set aside, but not subject to collateral attack: *Hughes v. Pritchard*, 153-23.

732. Reallotment for increase of value. A judgment creditor of a debtor whose homestead has been allotted may apply in writing to the clerk of the superior court of the county in which the homestead lies for an order for its reallotment, if there is in the hands of the sheriff of that county an execution issued from the proper court against said debtor. The application must be accompanied by the affidavits of three disinterested freeholders of the county in which the homestead lies, setting forth that, in their opinion, it has increased in value fifty per centum or more since the last allotment. Upon the filing of the application and affidavits the clerk shall issue notice to the judgment debtor to appear before him on a day not more than five days from the day of its service and show cause why his homestead should not be reallotted. The notice must state upon whose application it is issued. Upon the return day of the notice the clerk shall consider the affidavits filed, as heretofore required, and any additional affidavits filed by either party, and if he is of opinion that the homestead has probably appreciated in value fifty per centum or more since the last allotment, he shall command the sheriff to reallot to the judgment debtor his homestead, in the same manner as if no homestead had been allotted. If upon the reallotment any excess is found, it shall be disposed of by the sheriff as in ordinary cases of execution and levy. This section does not prevent the judgment creditor from resorting to the equity jurisdiction of the courts for a reallotment of the homestead of his judgment debtor in any case.

Rev., s. 691; 1893, c. 149.

For costs, see section 1244. If the increase in value is 50 per cent or more the above section enables the creditor to have a reallotment in a proceeding before the clerk, in aid of an execution in the sheriff's hands. If the increase is less than 50 per cent, the judgment creditor can proceed by a suit in the nature of an equitable action to subject the excess to his debt: *McCaskill v. McKinnon*, 125-179; *Vanstony v. Thornton*, 110-10. Section cited, *Gardner v. McConnaughey*, 157-481.

733. Appeal as to reallotment. From the order of the clerk commanding or refusing a reallotment, either party may appeal to the judge resident in or holding the courts of the district, who shall hear the matter in chambers in any county of the judicial district to which belongs the county in which the pro-

ceedings were instituted. In other respects the proceedings upon such appeal are as now provided for appeals from the clerk on issues of law.

Rev., s. 691; 1893, c. 149.

734. Levy on excess; return of officer. The levy may be made upon the excess of the homestead, not laid off according to this chapter, and the officer shall make substantially the following return upon the execution: "A. B., C. D., and E. F., summoned and qualified as appraisers or assessors (as the case may be), who set off to X. Y. the homestead exempt by law. Levy made upon the excess."

Rev., s. 692; Code, s. 505; 1868-9, c. 137, s. 5.

See articles 27, 28, Execution and Execution Sales, for cases on the sale of the excess.

735. When appraisers select. If no selection is made by the owner, or any one acting in his behalf, of the homestead to be laid off as exempt, the appraisers shall make selection for him, including always the dwelling and buildings used therewith.

Rev., s. 693; Code, s. 506; 1868-9, c. 137, s. 6.

Party entitled even though he has no dwellings or other buildings on the land, for he may build them himself: McCracken v. Adler, 98-403; Flora v. Robbins, 93-38; Murchison v. Plyler, 87-79; Spoon v. Reid, 78-244.

736. Homestead in tracts not contiguous. Different tracts of land not contiguous may be included in the same homestead, when a homestead of contiguous land is not of the value of one thousand dollars.

Rev., s. 694; Code, s. 509; 1868-9, c. 137, s. 15.

A homestead may be laid off in two tracts of land not contiguous: Martin v. Hughes, 67-293. Homesteader has the right to have homestead allotted from scattered unencumbered lands, whether they embrace his dwelling and other buildings or not: Flora v. Robbins, 93-38—or whether they are contiguous thereto, Fulton v. Roberts, 113-421.

737. Personal property appraised on demand. When the personal property of any resident of this state is levied upon by virtue of an execution or other final process issued for the collection of a debt, and the owner or an agent, or attorney in his behalf, demands that the same, or any part thereof, be exempt from sale under such execution, the sheriff or other officer making the levy shall summon three appraisers, as heretofore provided, who, having been first duly sworn, shall appraise and lay off to the judgment debtor such articles of personal property as he or another in his behalf selects and to which he is entitled under this article and the constitution of the state, in no case to exceed in value five hundred dollars, which articles are exempt from said levy, and return thereof shall be made by the appraisers, as upon the laying off of a homestead exemption.

Rev., s. 695; Code, s. 507; 1868-9, c. 137, ss. 12, 13.

Exemptions relate only to the remedy, and the right to an exemption is subject to the law of the forum: Goodwin v. Claytor, 137-224. The personal property exemption, as fixed in the constitution, can neither be increased nor diminished by the legislature: Wharton v. Taylor, 88-230; see, also, Saylor v. Powell, 90-203. The exemption should be such as was allowed debtor at the time of the making of the contract: Long v. Walker, 105-90; Carlton v. Watts, 82-212.

Only a resident of this state is entitled to have his personal property to the value of \$500 exempted: Jones v. Alsbrook, 115-46—and where one reserves his exemption and assigns it to another before allotment, and then leaves the state, the exemption becomes vested in the

trustee: *Latta v. Bell*, 122-639. See, as to who is a resident, annotations under section 728. Debtor wishing to claim the personal property exemption must make demand of the sheriff before sale that it be assigned: *Shepherd v. Murrill*, 90-208. Minor children of deceased debtor are not entitled to personal property exemptions: *Bruton v. McRae*, 125-206; *Welch v. Macy*, 78-240—nor is the widow, *Smith v. McDonald*, 95-163—for it passes to the administrator, *Johnson v. Cross*, 66-167.

Where, in an assignment by partnership, partners reserve their exemptions, but afterwards compromise with certain creditors and make a new assignment without the reservation stating that the trustee should sell property according to first assignment, partners not entitled to exemptions: *Shoe Co. v. Hughes*, 122-296. As to setting apart exemptions to partners, see *Grocery Co. v. Bails*, 177-298; *Commission Co. v. Porter*, 122-692; *Richardson v. Redd*, 118-677; *McMillan v. Williams*, 109-252; *Stout v. McNeill*, 98-1; *Evans v. Bryan*, 95-174; *Scott v. Kenan*, 94-296; *Bruff v. Stern*, 81-183; *Burns v. Harris*, 67-140.

The exemption may be allotted from time to time so as to keep in debtor's possession \$500 worth of personalty: *Campbell v. White*, 95-344; *Frost v. Naylor*, 68-325. Where the will authorizes the executor to wind up his business and give beneficiaries the net proceeds, no exemptions allowed beneficiaries: *Froelich v. Trading Co.*, 120-39. The exemption can be claimed as against a judgment rendered in actions for tort: *Gill v. Edwards*, 87-76; *Dellinger v. Tweed*, 66-206. Practice as to exemptions when parties have judgments against each other: *Curlee v. Thomas*, 74-51; *Comrs. v. Riley*, 75-144; *Duval v. Rollins*, 71-218.

The exemption can be claimed in attached property: *Chemical Co. v. Sloan*, 136-123; *Comrs. v. Riley*, 75-144; *Shepherd v. Murrill*, 90-208; *Gamble v. Rhyne*, 80-183. The right of exemption is personal to the debtor, and it loses its quality of exemption as soon as transferred: *Lane v. Richardson*, 104-642. Defendant not estopped by his answer alleging property in another from claiming his exemption when jury negatives the averment: *Etheridge v. Davis*, 111-293.

Exemption cannot be claimed as against the landlord's lien upon the crops for his rent: *Hamer v. McCall*, 121-196—nor as against fines and costs in criminal actions, *State v. Williams*, 97-414—nor as against judgment in arrest and bail, *Fertilizer Co. v. Grubbs*, 114-472; *Oakley v. Lasater*, 172-96.

ALLOTMENT OF EXEMPTION. The sheriff's refusal to lay off the personal property exemption to a debtor is a breach of his official bond: *Scott v. Kenan*, 94-296. Appraisers must be freeholders: *Smith v. Hunt*, 68-482—and they must be sworn, *Ibid.*

The property upon which there is no lien must first be exempted: *Cowan v. Phillips*, 122-70. The exemption should be ascertained up to and just before the process is executed by a sale: *Gardner v. McConaughy*, 157-481; *Jones v. Alsbrook*, 115-46; *Pate v. Harper*, 94-23. A descriptive list must be made, such as will enable creditors to ascertain which property is exempt: *Smith v. Hunt*, 68-482; but see *Ray v. Thornton*, 95-571. A chose in action may be allotted if owner selects it: *Frost v. Naylor*, 68-325. The personal property exemption does not protect property in another state: *Balk v. Harris*, 122-64. One cannot plead the \$500 exemption as a counterclaim: *Lynn v. Cotton Mills*, 130-621.

Suggestions as to what return of appraisers should contain: *Ray v. Thornton*, 95-571; *Smith v. Hunt*, 68-482. The failure to insert in the appraisers' report the date of allotment is not sufficient ground for vacating it: *Beavans v. Goodrich*, 98-217. The return should be made to the clerk, but if otherwise returned it does not vitiate the allotment: *McAuley v. Morris*, 101-369—for the court has power to direct that the return be made to the proper officer, *Ibid.* Appraisers have the power to correct the allotment if they have omitted property: *Pate v. Harper*, 94-23—for until the return is made it is *in fieri*, *Ibid.*; *Jones v. Alsbrook*, 115-46; *Gudger v. Penland*, 118-832. Exceptions to the allotment must be filed in the office of the clerk of superior court where the allotment is made, together with a transcript of the allotment: *McAuley v. Morris*, 101-369. Where there is no levy by the sheriff, an attempted allotment by appraisers, which does not set apart specific articles, is void: *Gardner v. McConaughy*, 157-481.

738. Appraiser's oath and fees. The persons summoned to appraise the personal property exemption must take the same oath and are entitled to the same fees as the appraisers of the homestead, and when both exemptions are claimed

by the judgment debtor, at the same time, one board of appraisers must lay off both, and are entitled to but one fee.

Rev., s. 696; Code, s. 508; 1868-9, c. 137, s. 14.

Appraisers must be sworn and it must appear that they were sworn: *Smith v. Hunt*, 68-482; *Coble v. Thom*, 72-121. **Merely referring to section:** *McAuley v. Morris*, 101-372; *Walker v. Long*, 105-100.

739. Returns registered. It is the duty of the register of deeds to indorse on each of said returns the date when received for registration, and to cause the same to be registered without unnecessary delay. He shall receive for registering the returns the same fees allowed him by law for other similar or equivalent services, which fees shall be paid by said resident applicant, his agent or attorney, upon the reception of the returns by the register.

Rev., s. 698; Code, s. 513; 1868-9, c. 137, s. 9.

740. Exceptions to valuation and allotment; procedure. If the judgment creditor for whom levy is made, or judgment debtor or other person entitled to homestead and personal property exemption, is dissatisfied with the valuation and allotment of the appraisers or assessors, he, within ten days thereafter, or any other creditor within six months and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and file with the clerk of the superior court of the county where the allotment is made a transcript of the return of the appraisers or assessors which they or the sheriff shall allow to be made upon demand, together with his objections in writing to said return. Thereupon the said clerk shall put the same on the civil issue docket of the superior court for trial at the next term thereof as other civil actions, and such issue joined has precedence over all other issues at that term. The sheriff shall not sell the excess until after the determination of said action. The ten days and six months respectively begin to run from the date of the filing of the return of the valuation and allotment of the appraisers or assessors by the officer with the clerk of the superior court of the county from whence the execution issued.

Rev., s. 699; Code, s. 519; 1887, c. 272, s. 2; 1883, c. 357.

Allotment cannot be collaterally attacked by debtor or any one claiming under him, the remedy being hereunder: *Gudger v. Penland*, 118-832; *Formeyduval v. Rockwell*, 117-320; *Welch v. Welch*, 101-565. **Application for reassessment must be made before sale of excess:** *Hartman v. Spiers*, 94-150; *Heptinstall v. Perry*, 76-190. **From an order setting aside the allotment an appeal can be taken:** *Beavans v. Goodrich*, 98-217. **Questions of fact arising in the allotment of exemption are not such issues of fact as entitle parties to trial by jury:** *Ibid.* **Notices to adverse party written and served, how:** *Allen v. Strickland*, 100-225. **Exceptions filed and report set aside for irregularity:** *Gardner v. McConnaughey*, 157-481. **An action by a creditor to declare void a homestead allotted under execution does not come under this section:** *Sash Co. v. Parker*, 153-130.

Where homesteader acquiesces in allotment of homestead for many years, grantee of homesteader will not be permitted to defeat judgment creditors by proof of purchase in good faith for a full price: *Oates v. Munday*, 127-439. **Estoppel by acquiescence in irregularities and by failure to except and appeal:** *Ibid.*; *Marshburn v. Lashlie*, 122-237; *Whitehead v. Spivey*, 103-66; *Spoon v. Reid*, 78-244. **Where party had land in two counties and was allotted less than \$1,000 worth in one county, it is not necessary for him to except to allotment before proceeding to have the deficit made up in another county:** *Springer v. Colwell*, 116-520 (*Whitehead v. Spivey*, 103-66, cited and distinguished).

741. Increase demanded; jury verdict; commissioners; report. When an increase of the exemption or an allotment in property other than that set apart is demanded, the party demanding must in his exceptions specify the property from which the increase or reallocation is to be had. If the appraisal or assessment is reduced, the jury shall assess the value of the property embraced therein; if increased, the value of the property specified in the objections from which the increase is demanded shall also be assessed; but if the allotment is made in property other than that first set apart, the jury shall assess the value of the property so allotted. The court shall appoint three disinterested commissioners to lay off and set apart the homestead and personal property exemption in accordance with the verdict of the jury and the judgment of the court, and in the manner prescribed by law. The commissioners, who shall be summoned by the sheriff, must meet upon the premises and, after being sworn by the sheriff or a justice of the peace to faithfully perform the duties of appraisers or assessors in allotting and laying off the homestead or personal property exemption, or both, in accordance with the verdict and judgment aforesaid, must allot and lay off the same and file their report to the next term of the court, when it shall be heard by the court upon exceptions thereto.

Rev., s. 700; 1885, c. 347.

Practice when jury returns verdict valuing the first allotment and reallocation had to which exception made: *Shoaf v. Frost*, 121-257, 116-675. Where debtor designated the particular land which he desired to have allotted him as an increase of exemption and the creditors assented thereto neither party can demand that the jury value it: *Beavans v. Goodrich*, 98-217.

742. Undertaking of objector. The creditor, debtor, or claimant objecting to the allotment made by the appraisers or assessors under execution or petition must file with the clerk of the superior court an undertaking in the sum of one hundred dollars for the payment to the adverse party of such costs as are adjudged against him.

Rev., s. 701; Code, s. 522.

743. Set aside for fraud, or irregularity. An appraisal or allotment by appraisers or assessors may be set aside for fraud, complicity, or other irregularity; but after an allotment or assessment is made or confirmed by the superior court at term time, as hereinbefore provided, the homestead shall not thereafter be set aside or again laid off by any other creditor except for increase in value.

Rev., s. 702; Code, s. 523.

An allotment will not be set aside because it might have been assigned in a manner more convenient to the homesteader: *Ray v. Thornton*, 95-571—or because report of appraisers did not show the date, *Beavans v. Goodrich*, 98-217—or because the appraisers were sworn by a deputy sheriff, *Oates v. Munday*, 127-439. See case of *Gully v. Cole*, 96-447, which was rendered before sections 732, 733 enacted.

744. Return registered; original or copy evidence. When the homestead and personal property exemption is decided by the court at term time the clerk of the superior court shall immediately file with the register of deeds of the county a copy of the same, which shall be registered as deeds are registered; and in all judicial proceedings the original or a certified copy of the return may be introduced in evidence.

Rev., s. 703; Code, s. 524.

745. Allotted on petition of owner. When any resident of this state desires to take the benefit of the homestead and personal property exemption as guaranteed by article ten of the state constitution, or by this article, such resident, his agent or attorney, must apply to a justice of the peace of the county in which he resides, who shall appoint as assessors three disinterested persons, qualified to act as jurors, residing in said county. The jurors, on notice by the order of the justice, shall meet at the applicant's residence, and, after taking the oath prescribed for appraisers before some officer authorized to administer an oath, lay off and allot to the applicant a homestead with metes and bounds, according to the applicant's direction, not to exceed one thousand dollars in value, and make and sign a descriptive account of the same and return it to the office of the register of deeds.

Said assessors shall set apart of the personal property of said applicant, to be by him selected, articles of personalty to which he is entitled under this chapter, not exceeding in value the sum of five hundred dollars, and make, sign and return a descriptive list thereof to the register of deeds.

Rev., ss. 697, 704; Code, ss. 511, 512; 1868-9, c. 137, ss. 7, 8.

For form of petition hereunder, see section 751 (2). As to who is a "resident" hereunder, see annotations under section 728.

A person can apply for homestead to be allotted, whether in debt or not: *Hughes v. Hodges*, 102-254 (dictum from dissenting opinion of Merrimon, J.). **Costs must be paid by petitioner, and sheriff not bound to act unless paid in advance:** *Lute v. Reilly*, 65-20; *Taylor v. Rhyne*, 65-530. **Procedure in allotment:** *Burton v. Spiers*, 87-87; see, also, cases cited under sections 728-731. **It is a proceeding quasi in rem:** *Williams v. Whitaker*, 110-395.

Where land is allotted to a person as a homestead hereunder, it is a dedication of it by him to all the privileges, uses and restrictions of a homestead, no matter at what time the title was acquired: *Castlebury v. Maynard*, 95-281—and he cannot convey it without his wife joining in deed, *Ibid.*; also *Dixon v. Robbins*, 114-102; *Bruce v. Strickland*, 81-267; also see *Hughes v. Hodges*, 102-236, and cases cited under section 729. **Section merely referred to in** *Montague v. Bank*, 118-286; *Formeyduval v. Rockwell*, 117-324; *Gardner v. McConnaughey*, 157-481. See annotations under section 737; also see *Smith v. Hunt*, 68-483. For form of return, see section 751 (3).

746. Advertisement of petition; time of hearing. When a person entitled to a homestead and personal property exemption files the petition before a justice of the peace to have the same laid off and set apart under the preceding sections, the justice shall make advertisement in some newspaper published in the county, for six successive weeks, and if there is no newspaper in the county, then at the courthouse door of the county in which the petition is filed, notifying all creditors of the applicant of the time and place for hearing the petition. The petition shall not be heard nor any decree made in the cause in less than six nor more than twelve months from the day of making advertisement as above required.

Rev., s. 705; Code, s. 515; 1868-9, c. 137, s. 11.

Only persons having actual or constructive notice are bound by the allotment: *Williams v. Whitaker*, 110-393. **Section merely referred to in** *Montague v. Bank*, 118-286.

747. Exceptions, when allotted on petition. When the homestead or personal property exemption is allotted on the petition of the person entitled thereto, any creditor may, within six months from the time of the assessment or appraisal, and upon ten days notice to the petitioner, file his objections with the register of deeds of the county in which the premises are situated, and the register of

deeds shall return the same to the clerk of the superior court of that county, who shall place them on the civil issue docket, and they shall be tried as provided for homestead and personal property exemptions set off under execution.

Rev., s. 706; Code, s. 520.

748. Allotted after death of homesteader. If a person entitled to a homestead exemption dies without the homestead having been set apart, his widow, if he leaves no children, or his child or children under the age of twenty-one years, if he leaves such, may proceed to have the homestead exemption laid off by petition. If the widow or children have failed to have the exemption set apart in the manner provided, then in an action brought by his personal representatives to subject the realty of the decedent to the payment of debts and charges of administration, it is the duty of the court to appoint three disinterested freeholders to set apart to such widow, child or children a homestead exemption under metes and bounds in the lands of the decedent. The freeholders shall under their hands and seals make return of the same to the court, which shall be registered in the same manner as homestead exemptions.

Rev., s. 707; Code, s. 514; 1893, c. 332; 1868-9, c. 137, s. 10.

As to widow and minor children being entitled, see under section 728 annotations headed "Who entitled to homestead and personal property exemptions."

Administrator must lay off homestead to widow or children before proceeding to sell land for assets: *Gregory v. Ellis*, 86-579; see *Watts v. Leggett*, 66-197; *Morrisett v. Ferebee*, 120-6; *Fulp v. Brown*, 153-531.

749. Liability of officer as to allotment, return and levy. Any officer making a levy, who refuses or neglects to summon and qualify appraisers as heretofore provided, or fails to make due return of his proceedings, or levies upon the homestead set off by appraisers or assessors except as herein provided, is guilty of a misdemeanor, and he and his sureties are liable to the owner of the homestead for all costs and damages in a civil action.

Rev., ss. 708, 3584; Code, s. 516; 1868-9, c. 137, s. 17.

An unlawful sale of property exempt is a breach of sheriff's bond: *Hobbs v. Barefoot*, 104-224; *Scott v. Kenan*, 94-296—but a debtor can only maintain suit for costs and damages—not for value of homestead: *McCracken v. Adler*, 98-400. As to the measure of damages, see *Jones v. Alsbroom*, 115-46; *McCracken v. Adler*, 98-400. Sufficiency of complaint in action hereunder: *Scott v. Kenan*, 94-296.

Section merely referred to in *Welch v. Welch*, 101-569; *Mebane v. Layton*, 89-400; *Richardson v. Wicker*, 80-172; *Lambert v. Kinnery*, 74-348.

750. Liability of officer, appraiser, or assessor, for conspiracy or fraud. Any officer, appraiser, or assessor who willfully or corruptly conspires with a judgment debtor, judgment creditor, or other person, to undervalue or to overvalue the homestead or personal property exemption of a debtor, or applicant, or assigns false metes and bounds, or makes or procures to be made a false and fraudulent return thereof, is guilty of a misdemeanor and is liable to the party injured thereby for all costs and damages in a civil action.

Rev., ss. 690, 3585, 3586; Code, ss. 517, 518; 1868-9, c. 137, ss. 18, 19.

See *Andrews v. Pritchett*, 72-135.

751. Forms. The following forms must be substantially followed in proceedings under this article:

[No. 1]

APPRAISER'S RETURN

When the homestead is valued at less than one thousand dollars, and personal property also appraised.

The undersigned having been duly summoned and sworn to act as appraisers of the homestead and personal property exemption of A. B., of ----- Township, ----- County, by C. D., sheriff (or constable or deputy) of said county, do hereby make the following return: We have viewed and appraised the homestead of the said A. B., and the dwellings and buildings thereon, owned and occupied by said A. B. as a homestead, to be one thousand dollars (or any less sum) and that the entire tract, bounded by the lands of ----- and ----- is therefore exempted from sale under execution according to law. At the same time and place we viewed and appraised at the values annexed the following articles of personal property, selected by said A. B. (here specify the articles and their value, to be selected by the debtor or his agent), which we declare to be a fair valuation, and that the said articles are exempt under said execution. We hereby certify that we are not related by blood or marriage to the judgment debtor or the judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this-----day of-----, 19-----

O. K. ----- [L. s.]

L. M. ----- [L. s.]

R. S. ----- [L. s.]

The above return was made and subscribed in my presence, day and date above given.

C. D. -----, (Sheriff or Constable.)

[No. 2]

PETITION FOR HOMESTEAD BEFORE A JUSTICE OF THE PEACE

Before-----, J. P.

-----County.

In the Matter of A. B.

A. B. respectfully shows that he (she or they, as the case may be) is (or are) entitled to a homestead exempt from execution in certain real estate in said county, and bounded and described as follows: (Here describe the property). The true value of which he (she or they, as the case may be) believes to be one thousand dollars, including the dwelling, and buildings thereon. He (she or they) further shows that he (she or they, as the case may be) is (or are) entitled to a personal property exemption from execution, to the value of (here state the value), consisting of the following property: (Here specify.) He (she or they, as the case may be) therefore prays your worship to appoint three disinterested persons qualified to act as jurors, as assessors, to view the premises, allot and set apart to your petitioner his homestead and personal property exemption, and report according to law.

[No. 3]

FORM FOR APPRAISAL OF PERSONAL PROPERTY EXEMPTION

The undersigned having been duly summoned and sworn to act as appraisers of the personal property of A. B., of-----Township, -----County, and to lay off the exemption given by law thereto, by C. D., sheriff (or other officer) of said county, do hereby make and subscribe the following return:

We viewed and appraised at the values annexed, the following articles of personal property selected by the said A. B., to wit:-----which we declare to be a fair valuation, and that said articles are exempt under said execution.

We hereby certify, each for himself, that we are not related by blood or marriage to the judgment debtor or judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this-----day of-----, 19-----

O. K. ----- [L. s.]

L. M. ----- [L. s.]

R. S. ----- [L. s.]

The above return was made and subscribed in my presence, day and date above given.

C. D. -----, (Sheriff or Constable.)

[No. 4]

CERTIFICATE OF QUALIFICATION TO BE ENDORSED ON RETURN BY SHERIFF

The within named B. F., G. H., and J. R. were summoned and qualified according to law, as appraisers of the-----exemption of the said A. B., under an execution in favor of X. Y., this-----day of-----, 19-----

C. D. ----- (Sheriff).

[No. 5]

MINUTE ON EXECUTION DOCKET

X-----Y-----
vs.
A-----B-----

Execution issued-----, 19-----

Homestead appraised and set off and return made-----, 19-----

Rev., s. 709; Code, s. 524.

SUBCHAPTER XII. SPECIAL PROCEEDINGS

ART. 32. SPECIAL PROCEEDINGS

752. Chapter applicable to special proceedings. The provisions of this chapter on civil procedure are applicable to special proceedings, except as otherwise provided.

Rev., s. 710; Code, s. 278.

See section 393. Section 456, that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff," applies to special proceedings: *Welfare v. Welfare*, 108-274—as does also the provision that one cannot unite distinct causes of action in the same complaint, *Garrison v. Cox*, 99-481. There are no terms of court in proceedings before the clerk: *Hartsfield v. Bryan*, 177-166. This section merely referred to in *Railway Co. v. Lumber Co.*, 132-644; *Gregory v. Pinnix*, 158-147.

753. Contested special proceedings; commencement; summons. Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. The summons shall command the officer to summon the defendant to appear at the office of the clerk of the superior court on a day named in the summons, to answer the complaint or petition of the plaintiff. The number of days within which the defendant is summoned to appear shall in no case be less than ten exclusive of the day of service.

Rev., ss. 711, 712; Code, ss. 279, 287; 1868-9, c. 93, s. 4.

Ex parte proceedings are begun by petition. See this chapter, s. 759.

With the exceptions referred to, jurisdiction is acquired by the issuing and service of a summons upon or accepted by the defendant: *Railway Co. v. Lumber Co.*, 132-650. Special proceedings to condemn land for railroad purposes must be begun by summons: *Railway Co. v. Lumber Co.*, 132-644—as also proceeding by creditor against personal representative for an account, *Isler v. Murphy*, 76-52.

No judgment can be rendered without some form of action or special proceeding which in this state must be commenced by summons or attachment: *Morris v. House*, 125-560. See *Guion v. Melvin*, 69-242. Certain irregularities in summons held not to make proceeding void: *Piercy v. Watson*, 118-976. If summons in a special proceeding is made returnable to "term time" instead of before the clerk, the judge may remand it so as to make it properly returnable: *Simmons v. Steamboat Co.*, 113-147; *Epps v. Flowers*, 101-158. Where proper time not given defendant the action should not be dismissed, but further time allowed defendant to answer: *Strayhorn v. Blalock*, 92-292. Less than ten days notice renders judgment irregular and not void: *Stafford v. Gallops*, 123-19. As to amendment of summons, etc., see section 547.

754. Return of summons. The officer to whom the summons is addressed shall note on it the day of its delivery to him, and, if required by the plaintiff, shall execute it immediately. When executed, he shall immediately return the summons with the date and manner of its execution, by mail or otherwise, to the clerk of the court issuing it.

Rev., s. 713; Code, s. 280; C. C. P., s. 75.

Failure of sheriff to note on summons the day received is irregular, but does not render summons void: *Strayhorn v. Blalock*, 92-292. Summons is returnable before the clerk: *Tate v. Powe*, 64-644—and when sheriff returns that he has “served” the summons this is prima facie sufficient, *Strayhorn v. Blalock*, 92-292. As to service of summons and return of same, see also sections 479 and 482-485 relating to civil actions.

As to liability of sheriff for failure to serve and return process or for false return, see sections 3930, 3936 and 3941.

755. When complaint filed. The plaintiff must file his complaint or petition with the clerk of the court to which the summons is returnable, at the time of issuing the summons or within ten days thereafter.

Rev., s. 714; Code, s. 281; C. C. P., s. 76; 1876-7, c. 241, s. 4.

756. Nonsuit for failure to file. If the plaintiff fails to file his complaint or petition within the time limited by the summons for the appearance and answer of the defendant, the defendant may demand judgment of nonsuit against the plaintiff.

Rev., s. 715; Code, s. 282; C. C. P., s. 78.

For nonsuit for failure to file complaint in time in civil actions, see section 466 (same principle applies). As to nonsuit in trial of issue *devisavit vel non*, see *Collins v. Collins*, 125-98; *Hutson v. Sawyer*, 104-1. Entry of nonsuit not a retraxit: *Wharton v. Currituck*, 82-11; see *Grimes v. Andrews*, 170-515.

757. Filing time enlarged. The time for filing the complaint, petition, or any pleading may be enlarged by the court for good cause shown by affidavit, but may not be enlarged by more than ten additional days, nor more than once, unless the default was occasioned by accident over which the party applying had no control, or by the fraud of the opposing party.

Rev., s. 716; Code, s. 283; C. C. P., s. 79.

See cases cited under section 547, same principle being involved.

Upon application filed to remove an administrator, and no answer filed, clerk refused the motion; upon appeal the judge reversed the order; when case remanded to clerk he had power to allow answer to be filed: *Patterson v. Wadsworth*, 94-538.

758. Defenses pleaded; transferred to civil issue docket; amendments. In special proceedings a defendant or other party thereto may plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed the clerk shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings. The trial judge may, with a view to substantial justice between the parties, allow amendments to the pleadings and interpleas in behalf of any person claiming an interest in the property.

Rev., s. 717; 1903, c. 566.

Equitable defenses may be set up in the answer in such proceedings by way of avoidance, and they should be pleaded, but when pleaded they amount to no more than an equitable defense and cannot be affirmatively administered: *Vance v. Vance*, 118-864. But whether under

this section equitable relief may be obtained: *Webster v. Williams*, 153-309; *Coltrane v. Laughlin*, 157-282.

Upon issues of fact, or both of fact and law, being joined on the pleadings in proceedings before the clerk, it is his duty to transfer same to the civil issue docket for trial: *Hilliard v. Abernethy*, 171-644; *Whitaker v. Garren*, 167-658; *Haddock v. Stocks*, 167-70; *Little v. Duncan*, 149-84; *Woody v. Fountain*, 143-66; *Smith v. Johnson*, 137-43; *Hardee v. Weathington*, 130-91; *Railroad Co. v. Newton*, 133-138; *Brittain v. Dickson*, 111-529; *Powell v. Morisey*, 98-426; *Spencer, ex parte*, 95-274; *Brittain v. Mull*, 94-595; *Jones v. Desern*, 94-32; *Loftin v. Rouse*, 94-508; *Edwards v. Cobb*, 95-8; *Wharton v. Wilkerson*, 92-407; *Harper v. Harper*, 92-300; *Jones v. Hemphill*, 77-42; but see *McMillan v. McMillan*, 123-577—and parties have the right to insist upon it, and where they fail to insist, before an order appointing commissioners is made, they waive the right of trial by jury, even if it be conceded that the statute gives them the right of jury trial: *Railroad v. Parker*, 105-246; see, also, *Spencer v. Credle*, 102-68. In a special proceeding before the judge for alimony without divorce, if issues of fact are raised, the parties are entitled to a jury trial: *Crews v. Crews*, 175-168. In a proceeding before the clerk to establish the probate of a deed, if issues of fact arise, the case should be transferred: *Mills v. McDaniel*, 161-113.

Questions of fact, as distinguished from issues of fact and issues of law, are decided by the clerk subject to review by the judge on appeal: *Vanderbilt v. Roberts*, 162-273; *R. R. v. Gahagan*, 161-191; *Taylor v. Carrow*, 156-6; as to what are issues of fact hereunder, see *Beckwith, ex parte*, 124-114; *McMillan v. McMillan*, 123-577; *Ledbetter v. Pinner*, 120-455; *Vanderbilt v. Roberts*, 162-273.

The judge has the same power to grant amendments and make orders that he has when the action is begun in the superior court: *Sudderth v. McCombs*, 67-353; *Coltrane v. Laughlin*, 157-282; *Little v. Duncan*, 149-84; *Webster v. Williams*, 153-309; see, also, section 547. After the transfer of the cause to the civil issue docket, an agreement that the judge may find the facts, or, facts being agreed, may pronounce judgment, cures all defects: *Foreman v. Hough*, 98-386. The amendment of a complaint in correcting a mistake in the description of land is not a nonsuit, and may exclude the consideration of a defense based upon such mistake: *Webster v. Williams*, 153-309. A judgment in a proceeding to establish boundary, transferred upon issues to the court at term, may operate as an estoppel as to title: *Hilliard v. Abernethy*, 171-644; *Whitaker v. Garren*, 167-658. Section cited in *Hanes v. R. R.*, 109-492.

759. Ex parte; commenced by petition. If all the parties in interest join in the proceeding and ask the same relief, the commencement of the proceedings shall be by petition, setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded.

Rev., s. 718; Code, s. 284; 1868-9, c. 93.

760. Clerk acts summarily; authority from nonresident. In cases under the preceding section, if all persons to be affected by the decree, or their attorney, have signed the petition and are of full age, the clerk of the superior court has power to hear and decide the petition summarily. If any of the petitioners reside out of the state, an authority from them, to the attorney, in writing, must be filed with the clerk before he may make any order or decree to prejudice their rights.

Rev., s. 719; Code, s. 285; 1868-9, c. 93, s. 2.

Persons interested in the subject-matter of a special proceeding are not bound by a judgment rendered unless they are made parties or have waived their rights: *Moore v. Lumber Co.*, 150-261.

761. Judge approves when petitioner is infant. If any petitioner is an infant, or the guardian of an infant, acting for him, no final order or judgment of the clerk, affecting the merits of the case and capable of being prejudicial to the

infant, is valid, unless submitted to and approved by the judge resident or holding court in the district.

Rev., s. 720; Code, s. 286; 1887, c. 61; C. C. P., s. 420; 1868-9, c. 93, s. 3.
For the judge who is to approve, see this chapter, s. 611.

The cases required by this section to be approved by the judge are those cases in which there are infants and the proceedings *ex parte*: *Stafford v. Harris*, 72-198, approved in *Mauney v. Pemberton*, 75-221; *Harris v. Brown*, 123-423.

One who joins an infant in a petition for partition is bound by the judgment, though it is not approved by the judge of the court: *Lindsay v. Beaman*, 128-189. Where infants' lands are sold under *ex parte* proceeding in which they appeared by next friend, presumed that court protected them: *Tyson v. Belcher*, 102-112.

762. Orders signed by judge. Every order or judgment in a special proceeding required to be made by a judge of the superior court, in or out of term, must be authenticated by his signature.

Rev., s. 722; Code, s. 288; 1868-9, c. 93, s. 5; 1872-3, c. 100.

The court has held this statute, apparently mandatory, should always be observed; still it is held to be only directory, and judgment passed in open court and filed with the papers as a part of the judgment roll is a valid judgment, though not signed by the judge: *Range Co. v. Carver*, 118-338; *Bond v. Wool*, 113-20; *Spencer v. Credle*, 102-68; *Keener v. Goodson*, 89-273; *Matthews v. Joyce*, 85-258; *Rollins v. Henry*, 78-342.

763. Reports of commissioners and jurors. Every order or judgment in a special proceeding imposing a duty on commissioners or jurors must prescribe the time within which the duty must be performed, except in cases where the time is prescribed by statute. The commissioners or jurors shall within twenty days after the performance of the duty file their report with the clerk of the superior court, and if no exception is filed to it within twenty days, the court may proceed to confirm the same on motion of any party and without special notice to the other parties.

Rev., s. 723; 1893, c. 209.

See the statutes concerning the appointment of commissioners in the several proceedings. For report of sale in partition, see sections 3242, 3243. Except in partition proceedings, if no exception is filed to a report within twenty days the court may confirm it; in partition confirmation is obligatory: *Ex parte Garrett*, 174-343; *Upchurch v. Upchurch*, 173-88; *Thompson v. Rospigliosi*, 162-146.

764. No report set aside for trivial defect. No report or return made by any commissioners may be set aside and sent back to them or others for a new report because of any defect or omission not affecting the substantial rights of the parties, but the defect or omission may be amended by the court, or by the commissioners with permission of the court.

Rev., s. 724; Code, s. 289; 1868-9, c. 93, s. 7.

In report of commissioners to condemn land for right of way, certain irregularities do not invalidate: *Hanes v. R. R.*, 109-490. The report is, like the verdict of a jury, conclusive of the facts therein ascertained until set aside: *Railroad v. Ely*, 101-8. Substantial defects in report of commissioners in partition: *Skinner v. Carter*, 108-106.

765. Commissioner of sale to account in sixty days. In all actions or special proceedings when a person is appointed commissioner to sell real or personal property, he shall, within sixty days after the maturity of the note or bond for the balance of the purchase money of said property, or the payment of the amount of the bid when the sale is for cash, file with the clerk of the superior

court a final account of his receipts and disbursements on account of the sale; and the clerk must audit the account and record it in the book in which the final settlements of executors and administrators are recorded.

Rev., s. 725; 1901, c. 614, ss. 1, 2.

766. Commissioners selling land for reinvestment, etc., to give bond. Whenever in any cause or special proceeding there is a sale of real estate for the purpose of a reinvestment of the money arising from such sale or for any other purpose, and the proceeds from such sale are held by a commissioner or other officer designated by the court to receive such money, for purposes of reinvestment or otherwise, the commissioner or officer so receiving same shall execute a good and sufficient bond, to be approved by the court, in an amount at least equal to the corpus of the fund, and payable to the state of North Carolina for the protection of the fund and the parties interested therein, and conditioned that such custodian of the money shall faithfully comply with all the orders of the court made or to be thereafter made concerning the handling of reinvestment of said funds and for the faithful and final accounting of the same to the parties interested; but the court in its discretion may dispense with such bond in cases in which under the law it shall not be contemplated that the money will be ultimately reinvested under the direction of the court. The premium for any such bond shall be paid from the corpus of the fund intended to be thereby protected.

1919, c. 259.

SUBCHAPTER XIII. PROVISIONAL REMEDIES

ART. 33. ARREST AND BAIL

767. Arrest only as herein prescribed. No person may be arrested in a civil action except as prescribed by this article, but this provision shall not apply to proceedings for contempt.

Rev., s. 726; Code, s. 290; C. C. P., s. 148.

For arrest and bail by *capias* in a civil action under the old practice, see *Rhodes v. Vaughn*, 9-167; *Mann v. Hunter*, 47-11; *Holmes v. Sackett*, 63-58. Arrest and bail as herein provided is the remedy to carry out the constitutional provisions as to imprisonment for debt: *Preiss v. Cohen*, 117-54. The exemption from imprisonment for debt applies only to debts *ex contractu*: *Moore v. Green*, 73-394; *Long v. McLean*, 88-3; *Kinney v. Laughenour*, 97-328; *Burgwyn v. Hall*, 108-489. As to execution against the person, see section 673; *Peebles v. Foote*, 83-102; *Huntley v. Hasty*, 132-279. Arrest and bail, being an ancillary remedy, presupposes an original action: *Jarman v. Ward*, 67-33; and to entitle a party to this remedy, he must show that he is entitled to the main relief demanded in his complaint: *Witz v. Gray*, 116-48. What is an arrest: *Lawrence v. Buxton*, 102-129; *Powell v. Fiber Co.*, 150-12.

768. In what cases arrest allowed. The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of damages on a cause of action not arising out of contract, where the defendant is not a resident of the state, or is about to remove therefrom, or where the action is for injury to person or character, or for injuring, or for wrongfully taking, detaining or converting real or personal property.

Arrest and bail where defendant has committed an act *ex delicto* and is nonresident: *Tucker v. Wilkins*, 105-272; *Powers v. Davenport*, 101-286. In an action for assault and battery: *Huntley v. Hasty*, 132-279; for injury to person or character, *Oakley v. Lasater*,

172-96; *Howie v. Spittle*, 156-180; *Michael v. Leach*, 166-223. For injury to property: *Oakley v. Lasater*, 172-96; conversion of personalty by cotenant, *Doyle v. Bush*, 171-10. As to arrest for slander of title, see *Sneeden v. Harris*, 109-354.

2. In an action for a fine or penalty, for seduction, for money received, for property embezzled or fraudulently misapplied by a public officer, attorney, solicitor, or officer or agent of a corporation or banking association in the course of his employment, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

As to penalty, see *State v. Earnhardt*, 107-789. For seduction: *Hood v. Sudderth*, 111-215; *Kinney v. Laughenour*, 97-325; *Hoover v. Palmer*, 80-313—where breach of promise of marriage alleged, *Moore v. Mullen*, 77-327—alienating affection of wife, *Edwards v. Sorrell*, 150-712. Embezzlement of funds by public officer: *Turlington v. Aman*, 163-555. Fraudulent conveyance by trustee: *Fertilizer Co. v. Little*, 118-808—where conversion or misappropriation of money or other personal property by trustee or otherwise, *Powers v. Davenport*, 101-286; *Grocery Co. v. Davis*, 132-96, and cases therein cited; *Carroll v. Montgomery*, 128-278; *Gossler v. Wood*, 120-69; *Guano Co. v. Bryan*, 118-576; *Boykin v. Maddrey*, 114-89; *Travers v. Deaton*, 107-500; *Guano Co. v. Malloy*, 104-674; *Chemical Co. v. Johnson*, 98-123; *Guano Co. v. Southerland*, 175-228.

3. In an action to recover the possession of personal property, unjustly detained, where all or any part of the property has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

Fraudulent assignment of goods by owner: *Preiss v. Cohen*, 117-54—where fraud in contracting debt, *Bahnsen v. Chesbro*, 77-325—where one partner obtains credit for partnership by false representation, *McNeely v. Haynes*, 76-122; *Boykin v. Maddrey*, 114-90—where one partner makes fraudulent settlement with copartner, *Ledford v. Emerson*, 140-288. Where jury finds that shortage of consigned goods was not due to conversion, order should be vacated and a civil judgment given for the shortage: *Grocery Co. v. Davis*, 132-96. Where debt on note set out and charge of fraud likewise, and judgment given by default on note, no arrest allowable hereunder: *Stewart v. Bryan*, 121-46; see, also, annotations under section 673. In an action on contract, alleging fraud as a cause for arrest does not change the nature of the action: *Copeland v. Fowler*, 151-353; *Turlington v. Aman*, 163-555.

5. When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

Fertilizer Co. v. Little, 118-809.

No woman shall be arrested in any action except for a willful injury to person, character or property, and no person shall be arrested on Sunday.

No arrest shall be made on Sunday: *Rodman v. Robinson*, 134-507; *White v. Morris*, 107-92; *Devries v. Summit*, 86-126.

Rev., s. 277; Code, s. 291; C. C. P., s. 149; 1869-70, c. 79; R. C., c. 31, s. 54; 1777, c. 118, s. 6; 1891, c. 541.

For arrest and bail of defendant usurping an office, see this chapter, s. 874.

769. Order and affidavit. An order for the arrest of the defendant must be obtained from the court in which the action is brought or a judge thereof, and may be made where it appears to the court or judge, by affidavit of the plaintiff

or of any other person, that a sufficient cause of action exists and that the case is one of those provided for in this article.

Rev., ss. 728, 729; Code, ss. 292, 293; C. C. P., ss. 150, 151.

THE ORDER. An order of arrest is a judicial and not a ministerial proceeding, in the issuance of which the judge and the clerk have concurrent jurisdiction: *Bryan v. Stewart*, 123-92—and must proceed from the court in which the action is brought or from a judge thereof, *Houston v. Walsh*, 79-35. Effect where order issued upon insufficient affidavit: *Bryan v. Stewart*, 123-93; *Tucker v. Davis*, 77-330. Order can be made out of county: *Ledbetter v. Pinner*, 120-455; *Parker v. McPhail*, 112-502.

THE AFFIDAVIT. The practice is to set forth the cause for arrest in an affidavit, and not to set it out in the complaint: *Roulhac v. Brown*, 87-3—but if set out in the complaint it must be done with the same explicitness as when set forth in an affidavit, *Peebles v. Foote*, 83-102.

It can be sworn to before a notary public of another state: *Hinton v. Ins. Co.*, 116-22. Affidavit that "defendant is about to leave the state" held insufficient because it does not state that it was with intent to defraud creditors and also state grounds of affiant's belief: *Wilson v. Barnhill*, 64-121. Affidavit that defendant is "about to leave the state," etc., must state the grounds of belief, so it can be seen that the grounds are reasonable: *Judd v. Mining Co.*, 120-399; *Wood v. Harrell*, 74-338; *Hughes v. Person*, 63-548; *Harriss v. Sneed*, 101-273—but when plaintiff relies upon a fact already accomplished, it is only necessary to state the fact in words of the statute, *Hughes v. Person*, 63-548—yet if he goes on and attempts to state grounds of belief that are unreasonable, the affidavit will not suffice, *Smith v. Gibson*, 74-684. Mere general rumor will not do: *Tucker v. Wilkins*, 105-272. Affidavit that defendant sold plaintiff a patent right and told him it was no infringement on other patents, which was false, and that defendant was a nonresident; held sufficient: *Bahnsen v. Chesbro*, 77-325. Affidavit must show how funds have been misapplied: *Melvin v. Melvin*, 72-384.

Findings of fact upon which order of arrest made are conclusive: *Harriss v. Sneed*, 101-273; *Parker v. McPhail*, 112-502.

As to amending affidavit, see *Wilson v. Barnhill*, 64-121—and curing first affidavit by reply to counter affidavit, see *Clark v. Clark*, 64-150. Order of arrest must be predicated upon facts alleged in the original affidavit and existing at time: *Devries v. Summit*, 86-126.

770. Undertaking before order. Before making the order the court or judge shall require a written undertaking on the part of the plaintiff of at least one hundred dollars, with sufficient surety, payable to the defendant, to the effect that if the defendant recovers judgment the plaintiff will pay all damages which he sustains by reason of the arrest, not exceeding the sum specified in the undertaking.

Rev., s. 730; Code, s. 294; C. C. P., s. 152; 1868-9, c. 277, s. 7.

For surety companies as surety, see sections 338-345. Liability of sheriff for taking insufficient bail bond: *Howell v. Jones*, 113-429.

A plaintiff allowed to sue in forma pauperis has no right to an order of arrest without filing undertaking: *Rowark v. Homesley*, 68-91. Undertaking should show on its face that sureties are residents: *Howell v. Jones*, 113-429. The judge may increase the plaintiff's bond as fixed by the clerk: *Power Co. v. Lessem Co.*, 174-358.

771. Issuance and form of order. The order may be made to accompany the summons, or to issue at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a place and time therein mentioned to the clerk of the court in which the action is brought. Notice of the return must be served on the plaintiff or his attorney as prescribed by law for the service of other notices.

Rev., s. 731; Code, s. 295; C. C. P., s. 153.

Construction of the words "before judgment," see *Preiss v. Cohen*, 117-54; *Houston v. Walsh*, 79-35. As to when and where returnable, see *Powers v. Davenport*, 101-286. Service of the order can be made on party in jail for criminal offense: *White v. Underwood*, 125-25. Alias orders can be issued at any time before judgment: *White v. Underwood*, 125-25. For execution against the person after judgment, and return of execution not satisfied, see section 673.

772. Copies of affidavit and order to defendant. The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy thereof.

Rev., s. 732; Code, s. 296; C. C. P., s. 154.

773. Execution of order. The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law. The sheriff may call the power of the county to his aid in the execution of the arrest.

Rev., s. 733; Code, s. 297; C. C. P., s. 155.

For what constitutes an arrest, see *Lawrence v. Buxton*, 102-129; *Powell v. Fiber Co.*, 150-12; *Hadley v. Tinnin*, 170-84. Sheriff may arrest person already in jail on a criminal charge: *White v. Underwood*, 125-25. Cannot arrest on Sunday: *Rodman v. Robinson*, 134-507; *White v. Morris*, 107-92; *Devries v. Summit*, 86-126.

774. Vacation of order for failure to serve. The order of arrest is of no avail, and shall be vacated or set aside on motion, unless it is served upon the defendant, as provided by law, before the docketing of any judgment in the action.

Rev., s. 734; Code, s. 295; C. C. P., s. 153.

Order must be served twenty days before judgment is docketed or it may be vacated: *Houston v. Walsh*, 79-38.

775. Motion to vacate order; jury trial. A defendant arrested may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. He may deny upon oath the facts alleged in the affidavit of the plaintiff on which the order of arrest was granted, and demand that the issue so raised by the plaintiff's affidavit and the defendant's denial be submitted to the jury and tried in the same manner as other issues. If the issues are found by the jury in favor of the defendant, judgment shall be rendered discharging him from arrest and vacating the order of arrest, and he shall recover of the plaintiff all costs of the proceeding in such arrest incurred by him in defending the action.

Rev., s. 735; Code, s. 316; 1889, c. 497; C. C. P., s. 174.

Motion to vacate may be heard by judge out of court and within the district to which he is assigned: *Ledbetter v. Pinner*, 120-455, citing *Parker v. McPhail*, 112-502. Motion to vacate must be made before judgment: *Roulhae v. Brown*, 87-1. Motion to discharge defendant denied cannot be renewed unless upon a new state of facts: *Eaker v. Garriss*, 108-226, and cases cited. Defendant moving to vacate must fully and clearly meet the facts alleged in affidavit by a counter affidavit: *Powers v. Davenport*, 101-286. If plaintiff, even though suing as pauper, fail to give undertaking for arrest, order may be vacated on motion: *Rowark v. Homesley*, 68-91. For the test of the validity of the order of arrest, see *Devries v. Summit*, 86-126. Effect where justice discharges defendant and there is an appeal by plaintiff: *Patton v. Gash*, 99-280. An appeal lies from order vacating an order of arrest: *Fertilizer Co. v. Grubbs*, 114-470. As to issues submitted to the jury, see *Boykin v. Maddrey*, 114-99.

A finding of fact by the judge in considering motion to vacate where there is evidence to support it is final: *Parker v. McPhail*, 112-502; *Harriss v. Sneed*, 101-273; *Travers v. Deaton*, 107-500. Where order of arrest appears irregular or issued for insufficient cause, it can be vacated without requiring defendant to give bond: *Devries v. Summit*, 86-131, citing

Bear v. Cohen, 65-511. No ground for vacating that defendant has been indicted, tried and acquitted by courts of another state for same charge: *Powers v. Davenport*, 101-286. Procedure on the hearing of motion to vacate order: *Harriss v. Sneed*, 101-273; *Roulhae v. Brown*, 87-1; *Boykin v. Maddrey*, 114-99; *Powers v. Davenport*, 101-286; *Bear v. Cohen*, 65-511; *Devries v. Summit*, 86-126; *Clark v. Clark*, 64-150. Section cited: *Pickelsimer v. Glazener*, 173-630; *Edwards v. Sorrell*, 150-712.

776. Counter affidavits by plaintiff. If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proof, in addition to those on which the order of arrest was made.

Rev., s. 736; Code, s. 317; C. C. P., s. 175.

The counter affidavit upon which motion to vacate is based must fully and clearly meet all the facts alleged in the affidavit of plaintiff: *Powers v. Davenport*, 101-286; *Harriss v. Sneed*, 101-273—for a simple denial will not do, *Ibid*.

Plaintiff can only produce further evidence where defendant moves to vacate upon counter affidavits: *Harriss v. Sneed*, 101-273. Where, instead of moving to vacate for an apparent insufficiency of affidavit, defendant files counter affidavit, plaintiff may cure the insufficiency by filing other affidavits: *Devries v. Summit*, 86-130.

777. How defendant discharged. The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this article.

Rev., s. 737; Code, s. 298; C. C. P., s. 156.

See *Fertilizer Co. v. Grubbs*, 114-470; *Howell v. Jones*, 113-431. Nonresident defendants entitled to benefit of statute relating to insolvent debtors: *Burgwyn v. Hall*, 108-489. As to insolvent debtors being discharged, see sections 1637-1650. See, also, *Preiss v. Cohen*, 117-54; *Edwards v. Sorrell*, 150-712; *Pickelsimer v. Glazener*, 173-630.

778. Defendant's undertaking. The defendant may give bail by causing a written undertaking, payable to the plaintiff, to be executed by sufficient surety to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he is arrested in an action to recover the possession of personal property unjustly claimed, an undertaking to the same effect as that provided by law to be given by defendant for the retention of property, under the article entitled *Claim and Delivery*.

Rev., s. 738; Code, s. 299; C. C. P., s. 157.

See sections 768, 792. If defendant already in jail under criminal charge, he need not give bail until he is released: *White v. Underwood*, 125-28.

Liability of sheriff for taking insufficient bail: *Howell v. Jones*, 113-429; see *Winborne v. Mitchell*, 111-13; also see sections 3930, 3941—and the measure of damages therefor, *Roulhae v. Miller*, 90-174; but see section 783.

Summary judgment entered against sureties, when: *Patton v. Gash*, 99-283; see, also, *Robbins v. Killebrew*, 95-19; *Councill v. Averett*, 90-168. Purpose of bail explained: *Pickelsimer v. Glazener*, 173-630.

779. Defendant's undertaking delivered to clerk; exception. Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the clerk of the court in which the suit is brought, with his return endorsed, and a certified copy of the undertaking of the bail, and notify the plaintiff or his attorney thereof. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted it and the sheriff is exonerated from the liability.

Rev., s. 739; Code, s. 304; C. C. P., s. 162.

780. Notice of justification; new bail. On the receipt of notice of exception to the bail, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or his attorney notice of the justification of the same or other bondsmen (specifying the places of residence and occupation of the latter) before the court, justice of the peace, or judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bondsmen given, there must be a new bond, in the form hereinbefore prescribed.

Rev., s. 741; Code, s. 305; C. C. P., s. 163.

See section 778. Sheriff failing to give notice is liable as special bail: *Howell v. Jones*, 113-429.

781. Qualifications of bail. The qualifications of bail must be as follows:

1. Each of them must be a resident and freeholder within the state.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification is equivalent to that of two sufficient bail.

Rev., s. 740; Code, s. 306; C. C. P., s. 164.

The bail bond should show on its face that the surety is a resident and freeholder within the state: *Howell v. Jones*, 113-429.

782. Justification of bail. For the purpose of justification, each of the bail shall attend before the court or judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the court, judge or justice of the peace, in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff.

Rev., s. 742; Code, s. 307; C. C. P., s. 165.

If party offering to become bail is not a resident and freeholder he is not sufficient: *Howell v. Jones*, 113-429.

783. Allowance of bail. If the court, judge or justice of the peace finds the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is then exonerated from liability.

Rev., s. 743; Code, s. 308; C. C. P., s. 166.

784. Deposit in lieu of bail. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall then give a certificate of the deposit to the defendant, who shall be discharged from custody.

Rev., s. 744; Code, s. 309; C. C. P., s. 167.

785. Deposit paid into court; liability on sheriff's bond. Within four days after the deposit the sheriff must pay it into court, and take from the officer receiving it two certificates of such payment, one of which he must deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

Rev., s. 745; Code, s. 310; C. C. P., s. 168.

As to sheriff's liability upon his bond, see sections 3930, 3941.

786. Bail substituted for deposit. If money is deposited, as provided in the two preceding sections, bail may be given and justified upon notice according to law at any time before judgment. Thereupon the judge, court or justice of the peace shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly.

Rev., s. 746; Code, s. 311; C. C. P., s. 169.

787. Deposit applied to plaintiff's judgment. When money has been deposited, and remains on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk or other officer shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment shall refund any surplus to the defendant. If the judgment is in favor of the defendant the clerk or other officer shall refund to him the whole sum deposited and remaining unapplied.

Rev., s. 747; Code, s. 312; C. C. P., s. 170.

788. Defendant in jail, sheriff may take bail. If a person for want of bail is lawfully committed to jail, at any time before final judgment, the sheriff, or other officer having him in custody, may take bail and discharge him; and the bail bond shall be regarded in every respect as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken.

Rev., s. 748; Code, s. 318; R. C., c. 11, s. 8.

789. When sheriff liable as bail. If, after arrest, the defendant escapes, or is rescued, or bail is not given or justified, or a deposit is not made instead thereof, the sheriff is himself liable as bail. But he may discharge himself from such liability by the giving and justification of bail at any time before process against the person of the defendant to enforce an order or judgment in the action.

Rev., s. 749; Code, s. 313; C. C. P., s. 171.

As to sheriff's liability, see *Howell v. Jones*, 113-429; *Winborne v. Mitchell*, 111-13; see, also, sections 3930, 3941.

790. Action on sheriff's bond. If a judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency.

Rev., s. 750; Code, s. 314; C. C. P., s. 172.

791. Bail exonerated. At any time before final judgment against them, the bail may be exonerated, either by the death of the defendant or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution of the judgment.

Rev., s. 751; Code, s. 303; C. C. P., s. 161.

Imprisonment in state's prison expiring before judgment against principal in original action or against bail upon his undertaking does not exonerate bail: *Sedberry v. Carver*, 77-319; *Adrian v. Scanlin*, 77-317. "State prison" as used means either penitentiary or county jail: *Sedberry v. Carver*, 77-319. Exoneration by surrender of principal: *Pickelsimer v. Glazener*, 173-630. Section cited, *Patton v. Gash*, 99-283.

792. Surrender of defendant. At any time before final judgment against them, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and acknowledge the surrender by a certificate in writing.

2. Upon the production of a copy of the undertaking and sheriff's certificate, the court or judge may, upon a notice to the plaintiff of ten days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and papers used on said application they shall be exonerated accordingly. But this section does not apply to an arrest in an action to recover the possession of personal property unjustly detained, so as to discharge the bail from an undertaking given to the effect provided by law to be given by defendant for the retention of property, under the article entitled Claim and Delivery.

Rev., s. 752; Code, s. 300; C. C. P., s. 158.

See section 768 et seq. **How the surrender may be made:** *Pickelsimer v. Glazener*, 173-630.

793. Bail may arrest defendant. For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority endorsed on a certified copy of the undertaking may empower any person over twenty-one years of age to do so.

Rev., s. 753; Code, s. 301; C. C. P., s. 159.

Right of bail to arrest principal explained: *Pickelsimer v. Glazener*, 173-630. Section referred to, *Sedberry v. Carver*, 77-321.

794. Proceedings against bail by motion. In case of failure to comply with the undertaking the bail may be proceeded against by motion in the cause on ten days notice to them.

Rev., s. 754; Code, s. 302; C. C. P., s. 160.

Manner of proceeding against bail: *Pickelsimer v. Glazener*, 173-630. See *Patton v. Gash*, 99-284. As to measure of damages, see *Roulhac v. Miller*, 90-174. Section merely referred to in *Mahoney v. Tyler*, 136-43.

795. Liability of bail to sheriff. The bail taken upon the arrest are, unless they justify, or other bail are given or justified, liable to the sheriff by action for damages which he may sustain by reason of such omission.

Rev., s. 755; Code, s. 315; C. C. P., s. 173.

796. When bail to pay costs. When a notice issues against a person, as the bail of another, and the bail, at or before the term of the court at which he is bound to appear, or ought to plead, is not discharged from his liability by the death or surrender of his principal or otherwise, he is liable for all costs which accrue on said notice, notwithstanding he may be afterwards discharged, by the death or surrender of the principal, or otherwise.

Rev., s. 756; Code, s. 319; R. C., c. 11, s. 10.

The costs allowed against bail, notwithstanding a surrender, etc., do not include such as are incurred on account of an improper and ineffectual appeal: *Clark v. Latham*, 53-1.

797. Bail not discharged by amendment. No amendment of process or pleading discharges the bail of the party arrested thereon, unless it enlarges the sum demanded beyond the sum expressed in the bail bond.

Rev., s. 757; Code, s. 320; R. C., c. 11, s. 11.

ART. 34. ATTACHMENT

798. In what actions attachment granted. A warrant of attachment against the property of one or more defendants in an action may be granted upon the application of the plaintiff, as specified in this article, when the action is to recover a sum of money only, or damages for one or more of the following causes:

1. Breach of contract, express or implied.
2. Wrongful conversion of personal property.
3. Any other injury to real or personal property, in consequence of negligence, fraud, or other wrongful act.
4. Any injury to the person, caused by negligence or wrongful act.

Rev., s. 758; Code, s. 347; 1893, c. 77; 1901, c. 740; C. C. P., s. 197.

GENERAL OBSERVATIONS. Original attachment under former practice and attachment under Code practice distinguished: *Holmes v. Sackett*, 63-58; *Penniman v. Daniel*, 91-431; *Grocery Co. v. Bag Co.*, 142-174. It is in the nature of a preliminary execution to secure property of the defendant for the satisfaction of such judgment as the plaintiff may recover: *Branch v. Frank*, 81-180; *Mfg. Co. v. Lumber Co.*, 177-404. Attachment is an auxiliary remedy: *Toms v. Warson*, 66-417; *Mixer v. Guano Co.*, 65-552; *Marsh v. Williams*, 63-371—and the statutes relating thereto must be strictly construed, *Carson v. Woodrow*, 160-144; *Wheeler v. Cobb*, 75-21; *Leak v. Moorman*, 61-168; *Parker v. Scott*, 64-120—but if it appears from the whole record that the statute has been substantially complied with, the action will not be dismissed, or attachment dissolved, *Grant v. Burgwyn*, 79-513; *Best v. British and American Co.*, 128-351; *Page v. McDonald*, 159-38.

Plaintiff must first show that he is entitled to the main relief demanded in the complaint: *Witz v. Gray*, 116-48—and if he fail, the attachment should be vacated, *Knight v. Hatfield*, 129-191. Attachment is not, strictly speaking, a proceeding in rem, and a judgment therein is only conclusive upon the parties to it and those in privity with them: *Hornthal v. Burwell*, 109-10; *Bernhardt v. Brown*, 118-700. Attachment and injunction distinguished: *Armstrong v. Kinsell*, 164-125.

The situs of a debt for attachment purposes is where either the debtor or creditor resides: *Sexton v. Ins. Co.*, 132-1; *Warlick v. Reynolds*, 151-606; *Strause v. Ins. Co.*, 126-223; *Balk v. Harris*, 124-467; *Cooper v. Security Co.*, 122-463; *Winfree v. Bagley*, 102-515; see *Currie v. Mining Co.*, 157-209—and the location of an agent in a state other than the place of residence of debtor will not make the latter state the situs of debts owing by such debtor and subject to garnishment there, *Strause v. Ins. Co.*, 126-223; but see *Balk v. Harris*, 124-467. See section 819.

ATTACHMENT LIES IN WHAT CASES. For unliquidated damages arising out of breach of contract: *Foushee v. Owen*, 122-360; *Judd v. Mining Co.*, 120-397; *Long v. Ins. Co.*, 114-470; *Mullen v. Canal Co.*, 114-8, overruling former cases—for injury to gas pipes embedded in the earth, causing gas to escape, *Gas Light Co. v. Construction Co.*, 113-549—where one domiciled elsewhere resides here, *Howland v. Marshall*, 127-430; see *Wheeler v. Cobb*, 75-25—where one voluntarily moves to another state to discharge duties of an office of indefinite duration, *Carden v. Carden*, 107-214. Attachment lies against unpaid subscription by resident of this state to the stock of a foreign corporation: *Cooper v. Security Co.*, 122-463—against debt under garnishment in same action, *Baker v. Belvin*, 122-190—against property of dissolved foreign corporation, *Kruger v. Bank*, 123-16—against property of assignee of draft on purchaser with bill of lading attached, *Finch v. Gregg*, 126-176; but this is overruled as to liability of assignee, in *Mason v. Cotton Co.*, 148-492—against claim for loss under insurance policy, *Sexton v. Ins. Co.*, 132-1—against money from sale of ward's land in hands of clerk, after confirmation of sale, *LeRoy v. Jacobosky*, 136-443—against property of non-resident married woman, *Bank v. Granite Co.*, 155-43. Changes made in application of statute: *Worth v. Trust Co.*, 151-191. Attachment for conspiracy to injure plaintiff as holder of stock: *Ibid.* "Property" defined: *Webb v. Bowler*, 50-362; *Winfree v. Bagley*, 102-515; *Worth v. Trust Co.*, 151-191.

ATTACHMENT DOES NOT LIE IN WHAT CASES. Does not lie against a national bank: *Mfg. Co. v. Bank*, 130-609; but see *Markham-Stephens Co. v. Richmond Co.*, 177-364—

nor against the sheriff's tax books, *Davie v. Blackburn*, 117-383; *Powell v. Wall*, 117-386—nor against property taken by sheriff under claim and delivery to be delivered by him to a third party, *Williamson v. Nealy*, 119-339, and cases there cited—nor against property of a foreign corporation rechartered in this state, except in cases stated in *Bernhardt v. Brown*, 119-506. Nor does it lie when a person leaves the state for the purpose of joining his country's army, *Abrams v. Pender*, 44-260—nor leaves state to seek work with a view of locating, *Mahoney v. Tyler*, 136-40—nor where plaintiff cannot recover, *Knight v. Hatfield*, 129-191—nor where property sought to be attached is in custodia legis, *Lemly v. Ellis*, 143-211; *Williamson v. Nealy*, 119-339; but see *Bank v. Johnston*, 161-506—nor against funds in hands of a collector of a foreign fraternal order, *Brenizer v. Royal Arcanum*, 141-409—nor against personal exemptions reserved by trustor in deed of trust who leaves state before allotment, *Latta v. Bell*, 122-639.

799. Affidavit must show what. To entitle the plaintiff to a warrant of attachment he must show by affidavit to the satisfaction of the court as follows:

1. That one of the causes of action specified in the preceding section exists against the defendant. If the action is to recover damages for breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

See *Witz v. Gray*, 116-48; *Knight v. Hatfield*, 129-191.

2. That the defendant is either a foreign corporation or a nonresident of the state, or a domestic corporation none of whose officers can be found in the state after due diligence; or, if he is a natural person and a resident of the state, that he has departed therefrom, or keeps himself concealed therein, with intent to defraud his creditors or to avoid service of summons; or, if the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property with like intent.

Rev. s. 759; Code, s. 349; 1897, c. 476; C. C. P., s. 201.

The warrant can be issued only upon affidavit of facts existing at the time when the proceedings were commenced: *Devries v. Summit*, 86-126. An insufficient affidavit does not make the whole proceeding void; it merely makes it irregular: *Spillman v. Williams*, 91-483. The statute must be strictly followed in drawing the affidavit: *Wheeler v. Cobb*, 75-24; *Spiers v. Halstead*, 71-209; *Love v. Young*, 69-65; *Leak v. Moorman*, 61-168; *Parker v. Scott*, 64-119; *Marsh v. Williams*, 63-371. The court has power to allow amendments to the substance or form of affidavit: *Howland v. Marshall*, 127-429; *Cook v. Mining Co.*, 114-617; *Sheldon v. Kivett*, 110-408; *Cushing v. Styron*, 104-338; *Penniman v. Daniel*, 93-332; *Palmer v. Boshier*, 71-291; *Brown v. Hawkins*, 65-645—and from the court's order there is no appeal, *Cook v. Mining Co.*, 114-617; also see under section 547. An attachment wrongfully issued from justice's court against a citizen of the state transiently absent, is remedied by recordari: *Merrell v. McHone*, 126-528. Affidavit made by an agent need not state why it is not made by the principal: *Sheldon v. Kivett*, 110-408. A corporation is a necessary party to an attachment proceeding to subject amounts due it from unpaid subscriptions to its stock to the payment of debts: *Cooper v. Security Co.*, 122-463.

As to what constitutes "residence" and "nonresidence," see *Mahoney v. Tyler*, 136-40; s. c., 166-509; *Fulton v. Roberts*, 113-428; *Carden v. Carden*, 107-214; *Howland v. Marshall*, 127-431; *Bernhardt v. Brown*, 119-506; *Wheeler v. Cobb*, 75-25; *Abrams v. Pender*, 44-260; also see *Chitty v. Chitty*, 118-648, and cases cited; *Cromer v. Self*, 149-164.

CONTENTS OF AFFIDAVIT. Affidavit stating that defendant is "about to remove property," etc., or "about to assign," etc., should state the grounds of affiant's belief: *Finch v. Slater*, 152-155; *Judd v. Mining Co.*, 120-397; *Harriss v. Sneeden*, 101-273; *Penniman v.*

Daniel, 90-154; Wood v. Harrell, 74-338; Brown v. Hawkins, 65-645; Gashine v. Baer, 64-108; Hughes v. Person, 63-548—but where it states a fact as accomplished, the reason need not be given, Hess v. Brower, 76-428; see, also, Hughes v. Person, 63-548. Sufficient affidavit as to fraudulent disposition of property: Mfg. Co. v. Lumber Co., 177-404—as to nonresidence and cause of action, Page v. McDonald, 159-38—for conspiracy to injure, Worth v. Trust Co., 151-191.

The grounds for issuing an attachment are in the alternative, and affidavit may state them all, and the plaintiff succeeds if he establishes either: Penniman v. Daniel, 90-154. Affidavit need not state that defendant has property in the state: Foushee v. Owen, 122-360; Parks v. Adams, 113-473; Branch v. Frank, 81-180, overruling Spiers v. Halstead, 71-209; Windley v. Broadway, 77-333—nor that defendant “cannot, after due diligence, be found within this state,” Luttrell v. Martin, 112-593, correcting syllabus in Sheldon v. Kivett, 110-408. (This might be different as to a domestic corporation whose officers cannot be found, see subsection 2.)

A warrant of attachment cannot be supported by an allegation that defendant is about to remove from the state to defraud his creditors: Hale v. Richardson, 89-62.

Section merely referred to in Evans v. Etheridge, 96-43.

800. Affidavit to be filed. It is the duty of the plaintiff procuring a warrant of attachment, within ten days from its issuance, to file the affidavit on which it was granted in the office of the clerk of the superior court to which, or with the justice of the peace before whom, the process is returnable.

Rev., s. 760; Code, s. 355; C. C. P., s. 201.

801. By whom granted. If the action is not founded on a contract, or if founded on a contract and the sum demanded exceeds two hundred dollars, a warrant of attachment may be obtained from the judge of the district embracing the county in which the action was begun, or from the clerk of the superior court from which the summons in the action issued; and it may be issued to any county in the state where the defendant has property, money, effects, choses in action or debts due him, and shall be made returnable in term time to the court from which the summons issued.

Rev., s. 761; Code, s. 351; C. C. P., s. 199; 1869-70, c. 147; 1870-1, c. 166, ss. 1, 3; 1874-5, c. 111; 1876-7, c. 251.

The clerk, acting as and for the court, has authority out of term time to grant the warrant of attachment and to allow amendments: Howland v. Marshall, 127-429, citing Cushing v. Styron, 104-338. The clerk acts ministerially, and, therefore, upon his affidavit taken before another who is empowered to administer oaths, he can issue the warrant in case in which he is plaintiff: Evans v. Etheridge, 96-42. Ministerial and judicial acts distinguished: Jackson v. Buchanan, 89-74. Warrant returnable to term: Page v. McDonald, 159-38. The warrant which does not state when or where returnable is irregular: Backalan v. Littlefield, 64-233. Blank forms signed by clerk and filled out by attorney for plaintiff, not sufficient issuing: Carson v. Woodrow, 160-143.

802. Time of issuance; service of summons. The warrant of attachment may be granted to accompany the summons, or at any time thereafter. Personal service of the summons must be made upon the defendant against whose property the attachment is granted, within thirty days after its granting, or else upon the expiration of the same time service of summons by publication must be commenced pursuant to an order obtained therefor, and if publication has been or is thereafter commenced, the service must be made complete by the continuance thereof.

Rev., s. 762; Code, s. 348; C. C. P., s. 197.

For affidavit and service of summons by publication, see sections 484-486 and 805. No summons need be issued where it appears that defendant is not in reach of the process of the

court and cannot be personally served; in such case the action should be commenced by the filing of affidavit to be followed by publication: *Grocery Co. v. Bag Co.*, 142-174, approving *Best v. British and American Co.*, 128-351, and overruling *McClure v. Fellows*, 131-509. Publication is not irregular because commenced within thirty days after issuing summons: *Currie v. Mining Co.*, 157-209; *Mills v. Hansel*, 168-651. A general appearance by defendant waives all antecedent irregularities in the process: *Wheeler v. Cobb*, 75-21. When summons not properly served, motion to vacate attachment allowed: *Finch v. Slater*, 152-155—but the court may extend the time for service of summons, *Ibid.*

803. Undertaking. The officer, before issuing the warrant, must require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recovers judgment, or the attachment is set aside by order of the court, the plaintiff will pay all costs that are awarded to the defendant, and all damages which he sustains by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least two hundred dollars.

Rev., s. 763; Code, s. 356; C. C. P., s. 202.

Where surety signs the justification instead of the undertaking, it is sufficient, or may be corrected: *Boger v. Lumber Co.*, 165-557. The successful defendant in attachment must seek relief for damages in a separate action on the undertaking: *Mahoney v. Tyler*, 136-40; s. c., 166-509, and 168-237. The injured party may sue plaintiff as well as upon the undertaking: *Martin v. Rexford*, 170-540. The cause of action accrues from the judgment in favor of defendant, and not from the release of the property: *Smith v. Bonding Co.*, 160-574—if not over \$200, must be begun before a justice of the peace, *Railroad v. Hardware Co.*, 135-73. As to pleading, proof, and measure of damages due defendant when attachment vacated: *Tyler v. Mahoney*, 168-236; s. c., 166-509, 136-40; *Smith v. Bonding Co.*, 160-574; *Wright v. Harris*, 160-543; *Bowen v. King*, 146-385; *Railroad v. Hardware Co.*, 138-174; see, also, *Crawford v. Pearson*, 116-718; *Kirkman v. Coe*, 46-423; *Williams v. Hunter*, 10-545. Attaching creditor not liable for failure of sheriff to perform his duty relative to attached property: *Mahoney v. Tyler*, 136-40. Cause of action of wrongful attachment and one against surety on the bond cannot be joined: *Railroad v. Hardware Co.*, 135-73; s. c., 143-54; *Smith v. Bonding Co.*, 160-574.

804. Validity of undertaking. It is not a defense to an action upon an undertaking, given upon granting a warrant of attachment, that the warrant was granted improperly, for want of jurisdiction, or for any other cause.

Rev., s. 764; Code, s. 358.

805. To whom warrant directed; duty of officer. The warrant shall be directed to the sheriff of any county in which the property of the defendant is located, or, in case it is issued by a justice of the peace, to the sheriff or any constable of such county, and shall require the sheriff or constable to attach and safely keep all the property of the defendant within his county, or so much thereof as is sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, together with costs and expenses; it must also state when and where it shall be returned. Several warrants may be issued at the same time to the sheriffs of different counties, but where the warrant is issued by a justice of the peace to another county than his own, the clerk of the superior court of his county must certify that he is a justice of the peace and that the signature to the warrant is in the handwriting of the justice.

Rev., s. 765; Code, s. 357; 1895, c. 435, s. 1; C. C. P., s. 203.

Warrant issued out of superior court should be addressed to the sheriff: *Carson v. Woodrow*, 160-143. Failure to specify in warrant the date and the place of return renders warrant voidable; but such defect is waived if the defendant appears and gives an undertaking for the redelivery of the property seized: *Backalan v. Littlefield*, 64-233.

Case merely referring to section: *Davie v. Blackburn*, 117-385.

806. Notice; service and content. When the warrant of attachment is taken out at the time of issuing the summons, and the summons is to be served by publication, the order shall direct that notice be given in the publication to the defendant of the issuing of the attachment. When the warrant of attachment is obtained after the issuing of the summons, the defendant must be notified by publication of the fact for four successive weeks in some newspaper published in the county to which it is returnable, or if none, then in one published in the judicial district including said county. The publication shall state the names of the parties, the amount of the claims, and in a brief way the nature of the demand and the time and place to which the warrant is returnable. In proceedings by attachment begun before justices of the peace, advertisement in a newspaper is not necessary, but advertisement at the courthouse door and four other public places in the county for four successive weeks is sufficient publication, both as to the summons and warrant of attachment.

Rev., s. 766; Code, s. 352; 1893, c. 363; 1870-1, c. 166, s. 3; 1874-5, c. 111, s. 2.

For service of summons by publication generally, see sections 484-486. No summons need be issued when party is beyond the reach of the process of the court, and cannot be personally served; the action is commenced by affidavit for publication: *Grocery Co. v. Bag Co.*, 142-174, approving *Best v. British-American Co.*, 128-351, and overruling *McClure v. Fellows*, 131-509; *Mills v. Hansel*, 168-651.

Personal service of summons or publication of same for time required necessary to make judgment valid: *Ditmore v. Goins*, 128-327. Service by publication must be made strictly in accordance with the statute: *Bacon v. Johnson*, 110-116. Where a publication begun July 11, 1900, was defective in not containing notice also of the warrant of attachment, an alias order of publication, duly made prior to the November term, cured the defect: *Best v. British-American Co.*, 128-351. Where publication of warrant made, but summons not served, a judgment thereon is void: *Ditmore v. Goins*, 128-325. A service by publication on a nonresident in an action affecting property is invalid without attachment: *Graham v. O'Brian*, 120-463. As to amending order of publication after publication made, see *Bank v. Blossom*, 92-695. It seems affidavit may be filed after order of publication in certain cases, see *Bank v. Blossom*, 92-695. Publication of summons without attachment cured by subsequent publication: *Best v. British-American Co.*, 128-351. Where service by publication defective, it may be remedied by order and republication: *Page v. McDonald*, 159-38; *Bank v. Blossom*, 92-695; *Penniman v. Daniel*, 90-154; *Price v. Cox*, 83-261—and where affidavit defective it may be amended and an alias order of publication made without dismissing the action: *Mullen v. Canal Co.*, 112-109; *Branch v. Frank*, 81-180.

If there has been no seizure of property nor personal service of summons, publication is not effectual: *Everitt v. Austin*, 169-622; *Currie v. Mining Co.*, 157-209; *Lemly v. Ellis*, 143-213; *Winfree v. Bagley*, 102-515—but when the court has acquired jurisdiction by seizure of property, the time for publication may be extended: *Mills v. Hansel*, 168-651. If defendant has not been served with summons either personally or by publication, the warrant of attachment should be vacated: *Finch v. Slater*, 152-155; *Bowman v. Ward*, 152-602. The defendant, by making application to discharge the property and giving the undertaking required, enters a voluntary appearance: *Mitchell v. Lumber Co.*, 169-397.

Difference between affidavit for attachment and for publication: *Luttrell v. Martin*, 112-593; *Branch v. Frank*, 81-180.

807. Execution, levy, and lien. The officer to whom the warrant of attachment is directed and delivered shall seize and take into his possession the tangible personal property of the defendant or so much as is necessary, and he is liable for the care and custody of such property, as if it had been seized under execution. He shall levy on the real estate of the defendant as prescribed for executions; he shall make and return with the warrant an inventory of the property seized or levied on, and, subject to the direction of the court, shall collect all

debts owing to the defendant, and take such legal proceedings in his own name or in that of the defendant as are necessary for that purpose. Where the sheriff or other officer levies an attachment upon real estate, he must certify the levy to the clerk of the superior court of the county where the land lies, with the names of the parties, and the clerk must note the same on his judgment docket and index it on the index to judgments, and the levy is a lien only from the date of entry by the clerk, except that if it is so docketed and indexed within five days after being made it is a lien from the time it was made.

Rev., s. 767; Code, s. 359; 1895, c. 435, s. 2; C. C. P., s. 204.

See cases cited under section 798. Attachment can be levied only on such property as can be taken under execution: *Johnson v. Whilden*, 166-104; s. e., 171-153. As to levy on tangible personalty: *Ins. Co. v. Davis*, 68-17—on funds in hands of agent, *Bank v. Johnston*, 161-506; *Blair v. Puryear*, 87-101—on debts due defendant, *Bowen v. King*, 146-385; *Cooper v. Security Co.*, 122-463—but where debtor and creditor are both nonresident, the debt is not subject to attachment as the property of the creditor, *Currie v. Mining Co.*, 157-209—interest of mortgagee in personalty held by mortgagor not subject to levy, *Bowen v. King*, 146-385—property in custodia legis does not subject to attachment, unless held simply for the defendant, *Williamson v. Nealy*, 119-339; *Bank v. Johnston*, 161-506. Stock in a corporation, see section 816. Property of lunatic first to be applied to support of himself and family: *Lemly v. Ellis*, 146-221.

Levy on land: *Morrison v. Mining Co.*, 143-250; *Atkinson v. Ricks*, 140-418; *Evans v. Alridge*, 133-378; *Grier v. Rhyne*, 67-338. A levy on land located in another county than that in which judgment obtained may be made without docketing transcript in county where land lies: *Evans v. Alridge*, 133-378, and cases cited. Failure to certify levy to clerk of county where land lies does not invalidate levy: *Ibid.* Homestead and personal property exemptions not subject to levy and sale, if defendant entitled to claim them: *Taylor v. Hayes*, 172-663. Priority between mortgagee and attaching creditor: *Sloan Bros. v. Sawyer-Felder Co.*, 175-657.

Case of seizure by sheriff when indemnifying bond given: *Stein v. Cozart*, 122-230. Officer cannot break open the door of a house to levy attachment: *State v. Whitaker*, 107-802.

808. Return of warrant by sheriff. The sheriff shall return the warrant of attachment, and the undertakings provided for in this article, with a statement of his proceedings thereon, at the time and place at which it is on its face returnable, and upon, or at any time after, the return, he may obtain from the court to which the warrant was returnable a certified copy thereof, which, for the purpose of giving him authority, is the same as the original, and when the warrant has been fully executed or discharged, the sheriff shall return it, with his proceedings, to said court.

Rev., s. 768; Code, s. 376; C. C. P., s. 214.

809. When granted by justice of peace. If the action is not founded on contract and the value of the property in controversy does not exceed the sum of fifty dollars, the warrant of attachment may, or if the action is founded on contract and the sum demanded does not exceed two hundred dollars, the warrant of attachment must be obtained from and made returnable before a justice of the peace of a county to the superior court of which it would have been returnable had the sum demanded exceeded two hundred dollars, or had the action not been founded on contract.

Rev., s. 769; Code, s. 353; C. C. P., s. 200; 1876-7, c. 251.

810. Publication in justice's court. The plaintiff, within thirty days after obtaining a warrant of attachment from a justice of the peace, must cause publi-

cation thereof to be made for four successive weeks at the courthouse door and four other public places in the county where the warrant is returnable.

Rev., s. 770; Code, s. 350; C. C. P., s. 198; 1868-9, c. 95, s. 3; 1870-1, c. 166, s. 4; 1874-5, c. 111.

For computation of time, see section 922. For publication of summons, see sections 484-487, 806. Where justice issued a summons and warrant of attachment, and publication of warrant was made, but summons not served, judgment rendered thereon is void: *Ditmore v. Goins*, 128-325.

As to computing time of publication, see *Guilford v. Georgia*, 109-310.

811. Justice's attachment against land. If the attachment is levied on real property, the justice shall proceed to try the action, but may not issue execution to sell the real property, and shall return the papers in the case to the office of the clerk of the superior court of his county, where the judgment shall be docketed. The levy of the attachment, however, is a lien on the real estate, when the provisions of the section as to execution and levy of attachment are complied with.

Rev., s. 771; Code, s. 354; 1868-9, c. 95, s. 4.

Attachment issued by justice creates a lien from its levy and not merely from the docketing of the judgment in superior court: *Morefield v. Harris*, 126-626. As to regularity of proceedings to sell land attached, see *Grier v. Rhyne*, 67-338.

Case merely referring to section: *Merrell v. McHone*, 126-529.

812. Sale of attached property pending litigation. If any property seized under attachment is perishable, or of a character to materially deteriorate in value pending litigation, or of such character that the expense of keeping it until the determination of the suit would be likely to exceed one-fifth of its value, or if any part of it consists of a vessel, or of any share or interest therein, and the person to whom it belongs, or his agent, does not within ten days after the serving of the attachment reclaim the same, the sheriff or other officer having possession shall apply to the court for authority to sell the property, stating the circumstances. The property shall then be sold, under the order and direction of the court, and the proceeds are liable to the judgment obtained upon the attachment, and shall be retained by the sheriff or other officer to await the judgment.

Rev., s. 772; Code, s. 360; R. C., c. 7, s. 6; 1777, c. 115, s. 28; C. C. P., s. 205.

For sale of corporate property by receiver during litigation, see *Corporations*, s. 1214.

Where goods of a third party sold hereunder and third party interpleads and recovers judgment, the costs and expenses of attachment cannot be taken out of fund: *Haywood v. Hardie*, 76-384. As to recovery of damages where perishable property wrongfully seized and sold, see *Mahoney v. Tyler*, 136-40; s. e., 166-509, 168-236.

813. Replevy by defendant; undertaking. The person owning the property advertised to be sold according to the provisions of this article, or his agent or attorney, may, at any time before sale, replevy the same, by giving an undertaking in double the amount of the value of the property, with sufficient surety, to the effect that he will return the property to the sheriff or other officer, if its return is adjudged by the court, and pay all costs that are awarded against him; and if return of the property cannot be had, then that he will pay plaintiff its value, and all costs and damages that are awarded against him. Upon the execution of

this undertaking, the sheriff, or other officer, shall deliver the property to the person owning it.

Rev., s. 773; Code, s. 361; R. C., c. 7, s. 5; 1777, c. 115, s. 28.

Recitals in undertaking as to sheriff's seizure of and levy on goods estops defendant to attack sufficiency and validity of seizure and levy: *Pearre v. Folb*, 123-239.

814. Defendant may apply for discharge and delivery of property. When the defendant has appeared in such action, he may apply to the court in which it is pending, or to the judge thereof, for an order to discharge the attachment; and if the order is granted, all the proceeds of sale, and moneys collected in the action, and all property attached remaining in the hands of any officer of the court, under any process or order in the action, shall be delivered or paid to the defendant or his agent, and released from the attachment. Where there is more than one defendant, and the several property of one of them has been seized by virtue of the order of attachment, the defendant whose several property was seized may apply in like manner for relief.

Rev., s. 774; Code, s. 373; C. C. P., s. 212.

Effect of this and the following section, and practice in vacating attachment explained: *Lumber Co. v. Buhmann*, 160-385. The court may refuse to vacate the attachment, and allow defendant to replevy the property: *Page v. McDonald*, 159-38. An application to discharge the property upon giving the required undertaking amounts to a voluntary appearance: *Mitchell v. Lumber Co.*, 169-397.

The clerk has jurisdiction to vacate an attachment: *Palmer v. Boshier*, 71-291. Motion to vacate may be made before return term of summons: *Wilson v. Mfg. Co.*, 88-5. In considering motion to vacate court need not pass on matters irrelevant: *Knight v. Hatfield*, 129-191. Improper refusal to vacate will not affect validity of judgment on the merits: *Luttrell v. Martin*, 112-594. An appeal lies from a refusal to vacate: *Judd v. Mining Co.*, 120-397; *Mitchell v. Lumber Co.*, 169-397; *Finch v. Slater*, 152-155. In vacating an attachment the judge is not required to state his findings of fact, unless requested to do so: *Lumber Co. v. Buhmann*, 160-385; *Milhisser v. Balsley*, 106-433—if the facts are not set out in the record, it is presumed that the court found facts sufficient to sustain the order: *Ibid.*; *Mfg. Co. v. Lumber Co.*, 177-404. The supreme court will not review the findings of fact: *Ibid.*

Sheriff has no right, after attachment vacated, to sell property seized, as it becomes his duty to deliver it immediately to defendant: *Mahoney v. Tyler*, 136-44; see *Devries v. Summit*, 86-126. The provision as to sheriff returning property does not apply to cases where there has been a sale or transfer of property by defendant to plaintiff after levy: *Jackson v. Burnett*, 119-195—and issue as to ownership must be submitted and upon it being answered must return property to true owner: *Ibid.* On motion to vacate for insufficiency of affidavit, a counter affidavit in answer to the one filed by defendant may cure the insufficiency: *Brown v. Hawkins*, 65-645.

When pleadings show that plaintiff's action must fail, it may be vacated without defendant being required to give bond: *Knight v. Hatfield*, 129-191; *Devries v. Summit*, 86-131; *Bear v. Cohen*, 65-511. Attachment vacated for failure to serve summons: *Finch v. Slater*, 152-155; *Bowman v. Ward*, 152-602. Trustee in bankruptcy may vacate an attachment issued after adjudication: *Ward v. Hargett*, 151-365.

Attachment will not be vacated when grounds assigned involve finding of facts and such as defendant has no interest in: *Foushee v. Owen*, 122-360—or where defendant denies ownership of the property, *Ibid.*—or where it appears reasonably necessary to hold the property to protect plaintiff's rights till the trial, *Bruff v. Sterns*, 81-183—or where the statute has been substantially complied with, *Best v. British-American Co.*, 128-351—or where clerk has already transmitted issue of fact to superior court for trial, *Howland v. Marshall*, 127-431—or where defendant has made a general appearance rendering the matter of vacating immaterial, *Rocky Mount Mills v. R. R.*, 119-693.

815. Defendant's undertaking. Upon the application provided for in the preceding section the defendant must deliver to the court an undertaking in at least double the amount claimed by the plaintiff in his complaint, executed by two

sureties residing in this state, approved by the court, to the effect that the surety will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking. If it appears by affidavit that the property attached is of less value than the amount claimed by the plaintiff, the court or judge may order it to be appraised, and the amount of the undertaking shall then be double the amount so appraised. Where there is more than one defendant, and the several property of one of them has been seized by virtue of the order of attachment, the defendant whose several property was seized may deliver to the court an undertaking, in accordance with this section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against him, and all of this section, applicable to such an undertaking, shall be applied thereto.

Rev., s. 775; Code, s. 374; C. C. P., s. 213.

This section does not apply when attachment is vacated for defect in issuing: *Lumber Co. v. Buhmann*, 160-385. Section cited, *Page v. McDonald*, 159-38.

816. All property liable to attachment. The rights or shares of the defendant in the stock of any association or corporation, with the interest and profits thereon, and all other property in this state of the defendant, are liable to be attached, levied on, and sold to satisfy the judgment and execution.

Rev., s. 776; Code, s. 362; C. C. P., s. 206.

For execution against shares of stock, see *Corporations*, s. 1203.

Unpaid subscription of resident stockholder to the capital stock of foreign corporation is subject to attachment: *Cooper v. Security Co.*, 122-463. **The lien of the attachment upon stock of a corporation dates from its levy, not from the final judgment:** *Morehead v. R. R.*, 96-362. **Pledgee of shares of stock does not lose priority as against an attaching creditor by failure to have transfer on the books of the corporation:** *Bleakley v. Candler*, 169-16. Section cited, *Simmons v. Steamboat Co.*, 113-152.

817. Levy on intangible property. The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or with the debtor or individual holding such property, with a notice showing the property levied on. This certified copy must be furnished to the sheriff by the plaintiff, and the certification must be by the clerk of the court from which the warrant was issued, or by the justice of the peace who issued it. A person receiving or collecting moneys within this state on behalf of any corporation of this or any other state or government is deemed a local agent for the purpose of this section. Such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose or the plaintiff resides in the state, or when the service can be made within the state personally upon the president, treasurer or secretary thereof.

Rev., s. 777; Code, s. 363; C. C. P., s. 207; 1905, c. 294.

See *Corporations*, Art. 9, Execution.

See *Cooper v. Security Co.*, 122-463; *Morehead v. R. R.*, 96-362. **Amounts on tax books which sheriff may collect after settlement not subject to attachment:** *Davie v. Blackburn*, 117-383. **Federal court judgment in favor of defendant not subject to attachment in state court:** *Mfg. Co. v. Freeman*, 175-212. Section cited, *Armstrong v. Kinsell*, 164-125.

818. Certificate of defendant's interest to be furnished to sheriff. When the sheriff or other officer, with a warrant of attachment or execution, applies to a president or other head or director, secretary, cashier or managing agent of any

association or corporation, or to any debtor or individual, for the purpose of attaching or levying on the property of the defendant in such warrant, such officer, debtor or individual must furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the association or corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of, or debt owing to, the defendant. If the officer, debtor or individual refuses to do so, he may be required by the court or judge to appear before him, and be examined on oath concerning the matter, and obedience to this order may be enforced by attachment.

Rev., s. 778; Code, s. 369; C. C. P., s. 208.

See Corporations, s. 1203.

819. Proceedings against garnishee. When the sheriff or other officer serves an attachment on any person supposed to be indebted to, or to have any property of the defendant in the attachment, he shall at the same time summon in writing such person as a garnishee. The summons and notice shall be issued by the clerk of the superior court, or justice of the peace, at the request of the plaintiff, to appear at the court to which the attachment is returnable, or if issued by a justice of the peace, at a place and time named in the notice, not exceeding twenty days from date of notice, to answer upon oath what he owes to the defendant and what property of the defendant he has in his hand and had at the time of serving the attachment, and to his knowledge and belief what effects or debts of the defendant there are in the hands of any other, and what person. When an attachment is served on a garnishee in the above manner, upon his appearance and examination, judgment may be entered up and execution awarded for the plaintiff against the garnishee, for all sums of money due the defendant from him, and for all property of any kind belonging to the defendant, in his possession or custody, for the use of the plaintiff, or so much thereof as will satisfy the debt and costs and all charges incident to levying the same. All property whatsoever in the hands of any garnishee belonging to the defendant is liable to satisfy the plaintiff's judgment, and must be delivered to the sheriff or other officer serving the attachment.

Rev., s. 779; Code, s. 364; R. C., c. 7, s. 7; 1777, c. 115, s. 28.

Garnishment is a proceeding in the original action and not an independent suit: *Baker v. Belvin*, 122-190. The court entertaining garnishment must have some jurisdiction over the thing garnished: *Balk v. Harris*, 124-467. Courts here can proceed against a foreign corporation in garnishment proceedings in an action brought in this state against its salesman, the cause of action having arisen here and subject of action being situated here: *Goodwin v. Claytor*, 137-224.

In a foreign attachment, the situs of the debt for the purpose of garnishment is where the debtor is found and served with summons, if the defendant could sue him there: *Balk v. Harris*, 122-64; s. c., 124-467; s. c., 130-381; s. c., 132-10; s. c., 198 U. S., 215; *Wright v. R. R.*, 141-164; *Wierse v. Thomas*, 145-261.

Property in custodia legis is subject to garnishment, if not required to be held longer by reason of some order or decree: *Bank v. Johnston*, 161-506; *LeRoy v. Jacobosky*, 136-443. A fund in the hands of the town to be applied to payment for work when completed is not subject of garnishment: *Gastonia v. Engineering Co.*, 131-359. As to funds in hands of national bank, see *Markham-Stephens Co. v. Richmond Co.*, 177-364; *Mfg. Co. v. Bank*, 130-609.

Plaintiff can enforce no greater claim against garnishee than could defendant have done: *Goodwin v. Claytor*, 137-224. Money due by garnishee, or goods in his hands at the time of appearance and answer, are applicable to the debt, though not earned and due when he was

summoned to answer: *Ibid.* Where summons on nonresident served by publication and debt due defendant was garnished, plaintiff lost no lien on debt by taking judgment against defendant and garnishee: *Ibid.* Assignee of chose in action has priority over lien of garnishment proceedings: *Granite Co. v. Bank*, 172-354.

The defendant is entitled to his exemptions, and to his earnings for sixty days: *Wierse v. Thomas*, 145-261; *Goodwin v. Claytor*, 137-224. Where foreign corporation having its property and principal place of business here was garnished here in action between two citizens of Virginia, exemption law of Virginia not applicable: *Goodwin v. Claytor*, 137-224.

Where judgment given against garnishee in action against debtor, it is proper to make an order applying collections made on such judgment to the judgment obtained or to be obtained against the debtor: *Baker v. Belvin*, 122-190. But no personal judgment against defendant when summons served by publication: *Goodwin v. Claytor*, 137-224; *Lemly v. Ellis*, 143-213; *Currie v. Mining Co.*, 157-209; *Johnson v. Whilden*, 166-104.

Maker of negotiable note payable to defendant or order can demand indemnity against third persons where he is garnished in action against defendant: *Shuler v. Bryson*, 65-201—but not after he has admitted owing the note to the defendant, *Rice v. Jones*, 103-226; *Shuler v. Bryson*, 65-201.

820. Failure of garnishee to appear. When a garnishee is summoned and fails to appear and discover on oath as directed, the court, after solemnly calling the garnishee, shall enter a conditional judgment against him, and thereupon a notice shall issue against him returnable to the court having jurisdiction, to show cause why final judgment should not be entered against him. Upon due execution of the notice, if the garnishee fails to appear at the time and place named, and discover on oath in the manner aforesaid, the court shall confirm the judgment and award execution for the plaintiff's whole judgment and costs. Upon examination of the garnishee, if it appears to the court that there is any of the defendant's property in the hands of a person who has not been summoned, the court, upon motion of the plaintiff, shall grant a judicial attachment, to be levied in the hands of every such person having any of the property of the defendant in his custody or possession, who must appear and answer and be liable as other garnishees.

Rev., s. 780; Code, s. 365; R. C., c. 7, s. 8; 1777, c. 115, s. 28; 1838, c. 2.

821. Garnishee denying debt; issue tried. When a garnishee denies that he owes to, or has in his possession any property of, the defendant, and the plaintiff on oath suggests to the court the contrary, or when a garnishee makes such a statement of facts that the court cannot proceed to give judgment thereon, the court shall order an issue to be made up, which must be tried by a jury, and on their verdict judgment shall be rendered. In a court of a justice of the peace, he may try such issue, unless a jury is demanded, and then proceedings are to be conducted, in all respects, as in jury trials before justices of the peace.

Rev., s. 781; Code, s. 366; R. C., c. 7, s. 9; 1793, c. 389, s. 2.

The garnishee is entitled to any defense which he might make against the defendant: *Cannon v. Marlott*, 163-549; *Goodwin v. Claytor*, 137-224. The plaintiff, upon the suggestion that he wishes to traverse the return of the garnishee, is entitled, without any formal or verified statement, to have the issue tried by jury: *Brenizer v. Royal Arcanum*, 141-409.

Where it is denied by defendant that ownership of property attached is in him, no issue submitted: *Foushee v. Owen*, 122-360; *Cowles v. Oaks*, 14-96.

822. Property with garnishee valued; garnishee exonerated. When a garnishee on oath confesses that he has in his hands any property of the defendant of a specific nature, or is indebted to him by any security or promise for the

delivery of any specific article, except as hereinafter excepted, the court shall immediately order a jury to be impaneled and sworn to inquire into the value of such specific property, and the verdict of the jury subjects the garnishee to the payment of the valuation, or as much of it as is sufficient to satisfy the debt or damages and costs of the plaintiff. In a court of a justice of the peace, he may try such issue, unless a jury is demanded, and then proceedings are to be conducted in all respects as in jury trials before justices of the peace. If the garnishee states in his answer that the specific property was left with him by the defendant as a bailment, or that he has tendered said specific articles according to contract, and that they were refused by the defendant, and that he then was and always had been ready to deliver the same; or that he had such specific articles at the time and place specified in such covenant or agreement ready to be delivered, and is still ready to deliver them; and such statement is admitted by the plaintiff or found by a jury or the court, then in any such case the garnishee shall be exonerated by the delivery of such specific articles to the sheriff, who shall proceed as if the attachment had been originally levied on the property.

Rev., s. 782; Code, s. 367; R. C., c. 7, s. 11; 1793, c. 389; 1794, c. 424.

Where one contracted with a dentist for a set of artificial teeth for his wife, and paid him the consideration and then absconded; held that dentist was not liable as garnishee: *Cherry v. Hooper*, 52-82.

One transiently within the state served with garnishment papers, if he have in his possession within the state money or property of defendant or has contracted to pay money or deliver property within such jurisdiction, may be charged: *Balk v. Harris*, 124-467.

823. Conditional judgment against garnishee. When a garnishee declares in his answer that the money or specific article due by him will become payable or deliverable at a future day, and this is admitted by the plaintiff or found by a jury or the court, a conditional judgment shall be entered against the garnishee, and the plaintiff may obtain judgment against the defendant for his demand, but may not take final judgment against the garnishee without notice to show cause.

Rev., s. 783; Code, s. 368; R. C., c. 7, s. 12; 1794, c. 424, s. 2.

824. Satisfaction of judgment. If judgment is entered for the plaintiff in the action, the sheriff shall satisfy the same out of the property attached by him, if it is sufficient for that purpose—

1. By paying over to the plaintiff the proceeds of all property sold and debts or credits collected by him, or so much as is necessary to satisfy the judgment.

2. If any balance remains due, and an execution has been issued on the judgment, he shall sell under the execution as much of the attached real or personal property, except as provided in subdivision four of this section, as is necessary to satisfy the balance, if enough for that purpose remains in his hands. In case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale, and the purchaser has all the rights and privileges in respect thereto which were had by the defendant.

3. If any of the attached property belonging to the defendant has passed out of the hands of the sheriff without having been sold or converted into money, he shall repossess himself of the same, and for that purpose has all the authority which he had to seize it under the attachment. A person who willfully conceals

or withholds such property from the sheriff is liable to double damages at the suit of the party injured.

4. Until the judgment against the defendant is paid, the sheriff may collect the notes and other evidences of debt, and the debts that were seized or attached, under the warrant of attachment, and prosecute any bond he has taken in the course of such proceedings, and apply the proceeds to the payment of the judgment.

At the expiration of six months from the docketing of the judgment the court has power, upon petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff since the service of the attachment, the property attached, and the disposition thereof, also the affidavit of the sheriff that he has used due diligence, and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same any part or portion thereof, to order the sheriff to sell the same upon such terms and in such manner as is deemed proper. Notice of this application must be given to the defendant or to his attorney, if the defendant has appeared in the action. If the summons has not been personally served on the defendant, the court shall make such rule or order, as to service of notice and time of service, as is deemed just. When the judgment and all costs of the proceedings have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property or the proceeds thereof.

Rev., s. 784; Code, s. 370; C. C. P., s. 209.

When service of summons is by publication, no personal judgment can be rendered, and the judgment is valid only so far as property is seized: *Johnson v. Whilden*, 166-104; *Currie v. Mining Co.*, 157-209; *Lemly v. Ellis*, 143-213; *Goodwin v. Claytor*, 137-224; *Winfree v. Bagley*, 102-515.

The lien of a judgment relates to the time of levy and not the docketing of the judgment: *Morefield v. Harris*, 126-626; *Glass Plate Co. v. Furniture Co.*, 126-893. Lien of judgment cannot be divested by dissolution of foreign corporation, the defendant, in the home state: *Gruger v. Bank*, 123-16.

Attachment is simply a levy before judgment, and upon execution issuing on the judgment it is the duty of the sheriff to sell the attached property: *Mfg. Co. v. Steinmetz*, 133-194, citing *Gamble v. Rhyne*, 80-183; *Mfg. Co. v. Lumber Co.*, 177-404; *Johnson v. Whilden*, 166-104. Under this section the sheriff, upon receiving execution, is directed to sell the property previously attached and is invested with as much power and authority to act in the premises as if an execution, in the form of a *venditioni exponas*, had been issued to him specially commanding him to sell the particular property: *May v. Getty*, 140-310. Sale under attachment only passes right of defendant in attachment: *Electric Co. v. Eng. Co.*, 128-199; see *Davis v. Garrett*, 25-459; *Kochs Co. v. Jackson*, 156-326.

Where the court has the custody of property it will be retained to await result of the action and satisfy any judgment that may be recovered: *Lemly v. Ellis*, 143-200. Plaintiff in attachment cannot recover an amount in excess of that stated in summons: *Cotton Mills v. Weil*, 129-452.

Land of a decedent, against whose executor judgment obtained, cannot be sold through a commissioner by an order in the cause, even though land may be subject to lien of an attachment levied during decedent's life: *Atkinson v. Ricks*, 140-418.

Where a person in possession of property is not a party to attachment suit, the plaintiff can only get judgment for his debt, and must proceed under this section to subject the property attached: *Electric Co. v. Eng. Co.*, 128-199. A sheriff, who in attachment proceedings wrongfully seizes and sells property which is subsequently adjudged to belong to an intervener, cannot retain the costs and expenses of the seizure and sale: *Stein v. Cozart*, 122-280.

As to one's exemptions in attached property, see *Chemical Co. v. Sloan*, 136-123; *Gamble v. Rhyne*, 80-193; *Comrs. v. Riley*, 75-144; *Goodwin v. Claytor*, 137-224; *Wierse v. Thomas*, 145-261.

825. Plaintiff may sue on defendant's bond. The actions herein authorized to be brought by the sheriff may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. The sureties must in all cases, when required by the sheriff, justify by making an affidavit that each is a freeholder, and worth double the amount of the penalty of the bond, over and above all demands, liabilities and exemptions.

Rev., s. 785; Code, s. 371; C. C. P., s. 210.

See *Baker v. Belvin*, 122-190; *Shuler v. Bryson*, 65-201.

826. On defendant's recovery, bonds and property delivered to him. If the foreign corporation, or the absent, absconding, or concealed defendant, recovers judgment against the plaintiff in such action, any bond taken upon the issuing of the warrant of attachment, and any bond taken by the sheriff, except such as are mentioned in the preceding section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant or to his agent, on request, and the warrant shall be discharged and the property released.

Rev., s. 786; Code, s. 372; C. C. P., s. 211.

Section cited, *Smith v. Bonding Co.*, 160-574.

827. Motion to vacate or increase security. The defendant, or person who has acquired a lien upon, or interest in, his property before or after it was attached, may at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to the court having jurisdiction to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative, as in cases of other provisional remedies.

Rev., s. 787; Code, s. 377.

See annotations under section 814.

828. Exceptions to and justification of sureties. The sureties to all undertakings in all proceedings for attachment may be excepted to, and justified as prescribed in respect to bail upon an order of arrest.

Rev., s. 788; Code, s. 378.

829. Interpleader. When the property attached is claimed by any other person, the claimant may interplead, as provided for interpleader in claim and delivery.

Rev., s. 789; Code, s. 375; R. C., c. 7, s. 10; 1793, c. 389, s. 3.

The subject of "interpleader" is annotated under section 840, the decisions treating this section also.

ART. 35. CLAIM AND DELIVERY

830. Claim for delivery of personal property. The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons or at any time before answer, claim the immediate delivery of the property as provided in this article.

Rev., s. 790; Code, s. 321; C. C. P., s. 176.

NATURE OF REMEDY. Strictly speaking, there is no such action now as claim and delivery. The action is for the recovery of a specific chattel and the delivery thereof is a provisional remedy ancillary but not essential to such action. If the plaintiff see fit, the delivery may be waived and action prosecuted to recover possession as in the old action of detinue or to recover the value as in trover or trespass: *Wilson v. Hughes*, 94-182; *Hargrove v. Harris*, 116-418; *Hopper v. Miller*, 76-402; *Randolph v. McGowans*, 174-203.

JURISDICTION. This is determined by the value of the property in controversy; of the value of \$50 or under, concurrent jurisdiction in superior court and justice's court; over \$50, only in superior court: *McGehee v. Breedlove*, 122-277; *Kiser v. Blanton*, 123-402; *Whitaker v. Dunn*, 122-103; *Elliott v. Tyson*, 117-116; *Hargrove v. Harris*, 116-418; *Leathers v. Morris*, 101-184; *Mfg. Co. v. Barrett*, 95-36; *Morris v. O'Briant*, 94-72; *Deloatch v. Coman*, 90-186; *Asher v. Reizenstein*, 105-213; see, also, under sections 1436, 1473, 1474.

BY AND AGAINST WHOM MAINTAINED. The plaintiff must have the right to immediate possession of the property, either as owner or by reason of special property therein: see section 831. To entitle a party to an ancillary remedy he must show that he is entitled to the main relief demanded in the complaint: *Witz v. Gray*, 116-48. Plaintiff can claim the delivery of the property only against one in possession at time suit brought: *Bowen v. King*, 146-385; *Moore v. Brady*, 125-35; *Webb v. Taylor*, 80-305; *Haughton v. Newberry*, 69-456.

For recovery by bailor or bailee: *Hopper v. Miller*, 76-402. For recovery by lessor of tenant's crop: *Boone v. Darden*, 109-74; see, also, *Rich v. Hobson*, 112-79; *Smith v. Tindall*, 107-88; *Jordan v. Bryan*, 103-59; *Livingston v. Farish*, 89-140; *Patapsco v. Magee*, 86-350; see section 2356. For recovery of personal property by one tenant in common as against another in certain cases: *Doyle v. Bush*, 171-10; *Waller v. Bowling*, 108-289; *Strauss v. Crawford*, 89-149; *Grim v. Wicker*, 80-343. For recovery by mortgagee of tenant's crop when matured: *Cotten v. Willoughby*, 83-75; but see *Loftin v. Hines*, 107-360. For recovery of property in hands of officer, under execution: *Mitchell v. Sims*, 124-411; *Jones v. Ward*, 77-337; *Churchill v. Lee*, 77-341. For recovery, by assignee of chattel mortgage, of the possession of property before mortgage becomes due: *Johnson v. Bray*, 174-176; *Satterthwaite v. Ellis*, 129-67. For recovery by vendor of property, the sale of which was induced by vendee's fraud: *Troxler v. Building Co.*, 137-62; *Wallace v. Cohen*, 111-103; *Blake v. Blackley*, 109-257; *Wilson v. White*, 80-280. For recovery by lessee of his portion of the crop: *Wilson v. Respass*, 86-112; see sections 2357, 2358. For recovery of property seized by a sheriff for taxes after expiration of time limited by law for their collection: *Ray v. Horton*, 77-334.

WHAT MAY OR MAY NOT BE TAKEN. For recovery of a title deed: *Pasterfield v. Sawyer*, 132-258, 133-42—but not for a deed held in escrow, *Bridgers v. Ormond*, 148-375. For recovery of a note which has been paid: *Walter v. Earnhardt*, 171-731.

Will not lie for recovery of chattel of which defendant has not present possession: *Moore v. Brady*, 125-37, and cases cited. Will not lie for recovery of crops produced on wife's land under crop lien given by husband without her consent: *Rawlings v. Neal*, 126-271—nor for recovery by landlord of the growing crop of his tenant, *Jordan v. Bryan*, 103-59; but see *Patapsco v. Magee*, 86-350—nor for recovery of logs severed from plaintiff's land while defendant in possession claiming title, *Harrison v. Hoff*, 102-126; see, also, *White v. Fox*, 125-544—nor for recovery of a cow sold and delivered to vendee upon agreement that vendee pay for it in services, and vendee dies before fully performing, *McCraw v. Gilmer*, 83-162—nor for recovery of personal property by one tenant in common against another, *Shearin v. Riggsbee*, 97-216; *Powell v. Hill*, 64-169; but see *Doyle v. Bush*, 171-10; *Walker v. Bowling*, 108-289; *Strauss v. Crawford*, 89-149; *Grim v. Wicker*, 80-343—nor for recovery, by owner of the grain, of whiskey distilled from it, *Potter v. Mardre*, 74-36—nor for recovery of planks made from owner's timber, *Gaskins v. Davis*, 115-85—nor for recovery of a bale of cotton out of a whole crop, *Moore v. Brady*, 125-35.

Cases of general interest hereunder: *Gulley v. Copeland*, 102-327; *Timberlake v. Powell*, 99-233; *Queen v. Wernwag*, 97-383; *Howland v. Forlaw*, 108-567; *Hargrove v. Harris*, 116-418; *Phipps v. Wilson*, 125-106; *Manix v. Howard*, 82-125; *Alsbrook v. Shields*, 67-333; *Bank v. Johnston*, 161-506.

VENUE. The action must be brought in the county where the property is situated: *Brown v. Cogdell*, 136-32; *Elderton v. Games*, 142-223; *Clow v. McNeill*, 167-212; see section 463.

SUMMONS. Summons must be issued in order to give clerk jurisdiction to make order: *Potter v. Mardre*, 74-36. Not necessary to issue summons if defendant not in reach of the

process of the court; action can be begun by affidavit for publication: *Grocery Co. v. Bag Co.*, 142-174, overruling *McClure v. Fellows*, 131-509.

For verdict, see section 587; judgment, section 610; execution, section 675.

831. Affidavit and requisites. Where a delivery is claimed, an affidavit must be made before the clerk of the court in which the action is required to be tried or before some person competent to administer oaths, by the plaintiff, or some one in his behalf, showing—

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to its possession by virtue of a special property therein, the facts in respect to which must be set forth.

2. That the property is wrongfully detained by the defendant.

3. The alleged cause of the detention, according to his best knowledge, information and belief.

4. That the property has not been taken for tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,

5. The actual value of the property.

Rev., s. 791; Code, s. 322; C. C. P., s. 177; 1881, c. 134.

For statute forbidding seizure of property taken for a tax, see this chapter, s. 858.

Affidavit required only when actual seizure and delivery of property asked: *Jarman v. Ward*, 67-32. This affidavit is indispensable to maintain claim and delivery: *Griffith v. Richmond*, 126-377. Affidavit must conform strictly to all the requirements of the statute: *Hirsh v. Whitehead*, 65-516—must state that the property has not been taken under execution, *Ibid.*—and must give value of property, *Ibid.* The affidavit made by plaintiff, “per” another, sufficient: *Spencer v. Bell*, 109-39. The actual value of the property should be stated: *Leathers v. Morris*, 101-184; *Noville v. Dew*, 94-43. Not necessary to allege a demand when plaintiff’s right is denied: *Heath v. Morgan*, 117-504; *Rich v. Hobson*, 112-79. Plaintiff should state his special interest in the property: *Cooper v. Evans*, 174-412. Under this section there is no limitation or restriction put upon a plaintiff who seeks to recover personal property and have the same immediately delivered to him, except that the same has not been taken for tax, assessment or fines pursuant to a statute or seized under execution or attachment against property of plaintiff, or if so seized it is by statute exempt from seizure: *Mitchell v. Sims*, 124-411.

As to amendment of affidavit: *Joyner v. Earley*, 139-49; *Singer Mfg. Co. v. Barrett*, 95-36; *McPhail v. Johnson*, 115-298; *Planing Mills v. McNinch*, 99-517; see, also, under section 547.

Affidavit filed preliminary to obtaining requisition for seizure and delivery of property will not be treated as a complaint, and its averments cannot cure defect in summons or complaint: *Singer Mfg. Co. v. Barrett*, 95-36.

Section merely referred to in *Kiser v. Blanton*, 123-400; *Hargrove v. Harris*, 116-420; *Timberlake v. Powell*, 99-234; *Evans v. Etheridge*, 96-43.

832. Order of seizure and delivery to plaintiff. The clerk of the court shall, thereupon, and upon the giving by the plaintiff of the undertaking prescribed in the succeeding section, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed is located, to take it from the defendant and deliver it to the plaintiff.

Rev., s. 792; Code, s. 323; C. C. P., s. 178.

An order without a summons having been issued is no justification to the sheriff or defendant for any action in the premises: *Potter v. Mardre*, 74-36. No amendment of requisition allowed after third parties have acquired rights which may be prejudiced by the amendment: *Phillips v. Holland*, 78-31; see under section 547. Deputy clerk can make order: *Jackson v. Buchanan*, 89-74; see *Evans v. Etheridge*, 96-42; *Miller v. Miller*, 89-402; *Bryan v. Stewart*, 123-92.

Section merely referred to in *Thompson v. Onley*, 96-10.

833. Plaintiff's undertaking. The plaintiff must give a written undertaking payable to the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, with damages for its deterioration and detention if return can be had, and if for any cause return cannot be had, for the payment to him of such sum as may be recovered against the plaintiff for the value of the property at the time of the seizure, with interest thereon as damages for such seizure and detention.

Rev., s. 793; Code, s. 324; 1885, c. 50; C. C. P., s. 179.

See section 610. For extent of sureties' liability, see *Hendley v. McIntyre*, 132-276; *Hall v. Tillman*, 110-220; *Taylor v. Hodges*, 105-349; see *Randolph v. McGowans*, 174-203. Objection that what purports to be plaintiff's undertaking was not properly executed comes too late when made at trial term: *Spencer v. Bell*, 109-39.

Section merely referred to in *Grubbs v. Stephenson*, 117-72.

834. Sheriff's duties. Upon the receipt of the order from the clerk with the plaintiff's undertaking, the sheriff shall forthwith take the property described in the affidavit, if it is in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

Rev., s. 793; Code, s. 324; C. C. P., s. 179; 1885, c. 50.

835. Exceptions to undertaking; liability of sheriff. The defendant may, within three days after the service of a copy of the affidavit and undertaking, notify the sheriff personally, or by leaving a copy at his office in the county-seat of the county, that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice, in like manner as upon bail on arrest. The sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they justify, or until new sureties are substituted and justify. If the defendant excepts to the sureties, he cannot reclaim the property as provided in the succeeding section.

Rev., s. 794; Code, s. 325; C. C. P., s. 180.

Exception to undertaking made at trial term comes too late: *Spencer v. Bell*, 109-39.

836. Defendant's undertaking for replevy. At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages for its deterioration and detention, and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention, together with the costs of the action. If a return of the property is not so required, within three days after the taking and service of

notice to the defendant, it must be delivered to the plaintiff, unless it is claimed by an interpleader.

The defendant's undertaking shall include liability for costs, as provided in this section, only where the undertaking is given in actions instituted in the superior court.

Rev., s. 795; Code, s. 326; 1885, c. 50, s. 2; C. C. P., s. 181; 1911, c. 17.

See section 610. Sheriff liable if, instead of taking this bond, he takes a bond from defendant to indemnify him: *Hughes v. Newsom*, 86-424. As to liability of sureties on bond, see *Hendley v. McIntyre*, 132-276; *Griffith v. Richmond*, 126-377; *Hall v. Tillman*, 110-220, 103-276. Liability of defendant on undertaking when property is lost or destroyed: *Randolph v. McGowans*, 174-203. Where defendant gives an insufficient bond and then a sufficient bond, how sureties charged: *Smith v. Whitten*, 117-390. Sureties make defendant their agent to compromise and agree on amount of damages in action on undertaking: *Nimocks v. Pope*, 117-315. Sheriff liable for taking insufficient bond hereunder: *Wells v. Bourne*, 113-82; *Hughes v. Newsom*, 86-424; see sections 3930, 3941.

Summary judgment hereunder against sureties on undertaking: *Hall v. Tillman*, 103-276; *Robbins v. Killebrew*, 95-19; *Council v. Averett*, 90-168; *Harker v. Arendell*, 74-85; *Ins. Co. v. Davis*, 74-78.

837. Qualification and justification of defendant's sureties. The qualification of the defendant's sureties, and their justification, is as prescribed in respect to bail upon an order of arrest. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than six days, shall justify before the court, a judge or justice of the peace, and upon this justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until justification is completed or expressly waived, and he may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff.

Rev., ss. 796, 797; Code, ss. 327, 328; C. C. P., ss. 182, 183.

See sections 781-782.

838. Property concealed in buildings. If the property, or any part of it, is concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it is not delivered he must cause the building or enclosure to be broken open, and take the property into his possession. If necessary, he may call to his aid the power of his county, and if the property is upon the person the sheriff or other officer may seize the person, and search for and take it.

Rev., s. 798; Code, s. 329; C. C. P., s. 184.

See *Worth, Treas., v. Comrs.*, 118-124; *State v. Whitaker*, 107-802; *Hall v. Tillman*, 110-220.

839. Care and delivery of seized property. When the sheriff has taken property, as provided in this article, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping it.

Rev., s. 799; Code, s. 330; C. C. P., s. 185.

Expense of seizing and caring for property included in the costs: *Hendricks v. Ireland*, 162-523.

840. Property claimed by third person; proceedings. When the property taken by the sheriff is claimed by any person other than the plaintiff or defendant the claimant may interplead upon filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title; and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in plaintiff's affidavit, for the delivery of the property

to the person entitled to it, and for the payment of all such costs and damages as may be awarded against him; this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property. A copy of this undertaking and accompanying affidavit shall be served by the sheriff on the plaintiff and defendant at least ten days before the return day of the summons in the action, when the court trying it shall order a jury to be impaneled to inquire in whom is the right to the property specified in plaintiff's complaint. The finding of the jury is conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal. In a court of a justice of the peace he may try such issue unless a jury is demanded, and then proceedings are to be conducted in all respects as in jury trials before justices of the peace. In a court of a justice of the peace an interpleader shall not be required to serve on the plaintiff and defendant the affidavits and bonds required by this section, ten days before return day; but if said bond and affidavit are filed by any person owning the property when such case is called for trial, he shall be allowed to interplead.

Rev., s. 800; Code, s. 331; C. C. P., s. 186; 1793, c. 389, s. 3; R. C., c. 7, s. 10; 1913, c. 188.

An outsider claiming the property can intervene and ask for a collateral issue as to the title and right to possession: *Mfg. Co. v. Tierney*, 133-630; *Foushee v. Owen*, 122-360; *Grambling v. Dickey*, 118-986; *Blair v. Puryear*, 87-101; *Sims v. Goettle*, 82-268; *Toms v. Warson*, 66-417. The burden of showing title is on the intervener: *Roberts v. Hudson*, 158-210; *Mfg. Co. v. Tierney*, 133-630; *Cotton Mills v. Weil*, 129-452; *Redman v. Ray*, 123-502; *Wallace v. Robeson*, 100-206. When intervener introduces a bill of lading with draft attached, properly indorsed, the presumption is that he is a purchaser for value and without notice: *Mfg. Co. v. Tierney*, 133-630; but see *Bank v. Burgwyn*, 108-62; *Pugh v. Grant*, 86-39. The intervener cannot interfere in the action between the original parties, being interested only in the title: *Cotton Mills v. Weil*, 129-452; *Dawson v. Thigpen*, 137-462; *Foushee v. Owen*, 122-360; *Bank v. Furniture Co.*, 120-475—therefore he cannot object to the irregularity of the attachment, *Forbis v. Lumber Co.*, 165-403; *Cook v. Mining Co.*, 114-617; *Blair v. Puryear*, 87-101. A separate trial for the intervener is in the discretion of the judge: *Cotton Mills v. Weil*, 129-452. A justice of the peace can try the interplea as to title, even though property is worth over \$50: *Grambling v. Dickey*, 118-986. Where plaintiff takes a nonsuit, action goes on for the intervener: *Dawson v. Thigpen*, 137-462. In superior court on appeal from the justice one already made a party defendant can be allowed to become an intervener ab initio: *Finch v. Gregg*, 126-176.

As to rights of intervener against a sheriff who in attachment proceedings wrongfully seizes and sells his property, see *Stein v. Cozart*, 122-280.

Delivery of property to intervener must not be made until security given: *Bear v. Cohen*, 65-511.

841. Delivery of property to intervener. Upon the filing by the claimant of the undertaking set forth in the preceding section, the sheriff is not bound to keep the property, or to deliver it to the plaintiff; but may deliver it to the claimant, unless the plaintiff executes and delivers to him a similar undertaking to that required of claimant; and notwithstanding such claim, when so made, the sheriff may retain the property a reasonable time to demand such indemnity.

Rev., s. 801; Code, s. 332; R. C., c. 7, s. 10; 1793, c. 389, s. 3.

842. Sheriff to return papers in ten days. The sheriff must return the undertaking, notice and affidavit, with his proceedings thereon, to the court in which the action is pending within ten days after taking the property mentioned therein.

Rev., s. 802; Code, s. 133; C. C. P., s. 187.

ART. 36. INJUNCTION

843. When temporary injunction issued. A temporary injunction may be issued by order in accordance with the provisions of this article. The order may be made by any judge of the superior court in the following cases, and shall be issued by the clerk of the court in which the action is required to be tried:

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

2. When, during the litigation, it appears by affidavit that a party thereto is doing, or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,

3. When, during the pendency of an action, it appears by affidavit of any person that the defendant threatens or is about to remove or dispose of his property, with intent to defraud the plaintiff.

Rev., s. 806; Code, ss. 334, 338; C. C. P., ss. 188, 189.

GENERAL NATURE AND APPLICATION. Common and special injunctions, as under former practice, explained: *Armstrong v. Kinsell*, 164-125; *Person v. Person*, 154-453; *Cobb v. Clegg*, 137-153; *Ross v. Ross*, 119-109; *Blackwell v. McElwee*, 94-425; *Jarman v. Saunders*, 64-367; *Heilig v. Stokes*, 63-612. **Mandatory injunction and mandamus distinguished:** *Telephone Co. v. Telephone Co.*, 159-8. **Temporary restraining orders, temporary injunctions, and permanent injunctions distinguished:** *Hamilton v. Icard*, 112-589; *Royal v. Thornton*, 150-293.

The powers of the court as to injunctions enlarged: *Lumber Co. v. Wallace*, 93-22. Injunction is still an extraordinary and provisional remedy, and will not be granted before plaintiff has exhausted ordinary remedies, unless it appears that damage irreparable: *Frink v. Stewart*, 94-484; *Newton v. Brown*, 134-445; *Hocutt v. R. R.*, 124-214; *Porter v. Armstrong*, 132-66; *Cooper v. Cooper*, 127-490; *Lumber Co. v. Hines Bros.*, 127-130; but see *Davis v. Lumber Co.*, 132-233. Injunction will not be granted when a motion in the original cause would suffice: *Faison v. McIlwaine*, 72-313, and cases there cited—or where relief desired can be had in another action pending between same parties, *Grant v. Moore*, 88-77.

If a threatened injury can be compensated in damages, injunctive relief will not be granted: *Porter v. Armstrong*, 132-66; *Newton v. Brown*, 134-445; *Land Co. v. Webb*, 117-478; *Sharpe v. Loane*, 124-1; *Wilson v. Featherstone*, 120-449; *McNamee v. Alexander*, 109-242; *Lewis v. Lumber Co.*, 99-11; *Walton v. Mills*, 86-280; *Hettrick v. Page*, 82-65—and it will never be granted where no injury will result to plaintiff by a refusal, *Railway Co. v. Mining Co.*, 112-669, citing *R. R. v. R. R.*, 88-79—nor be continued where it may work a greater injury to defendant than is reasonably necessary for protection of the plaintiff, *Blackwell v. McElwee*, 94-425; *Heilig v. Stokes*, 63-612. Where refusal will result in damages to plaintiff and granting will result in no injury to defendant, it will be granted till the hearing: *McCorkle v. Brem*, 76-407.

The granting or refusing of injunction is not strictly discretionary, and either party may appeal: *Jones v. Thorne*, 80-72; *Mayo v. Comrs.*, 122-5—and a second motion for injunction upon same grounds as the first, which was refused, will not be heard: *Henry v. Hilliard*, 120-487; *Jones v. Thorne*, 80-72; *Combes v. Adams*, 150-64; *Bonner v. Rodman*, 163-1—but denial of first motion no obstacle to second when based upon new material averment and evidence supporting, *Halcombe v. Comrs.*, 89-346.

Court will require party seeking injunction to make full discovery of facts and use perfect candor in alleging them: *Phifer v. Barnhart*, 88-333. It must appear that the action was prompted by good faith, reasonable diligence, and a substantial cause of action: *Jones v. Comrs.*, 107-248. To entitle plaintiff to the order, he must allege a cause of action: *Moore v. Mining Co.*, 104-534; *Jones v. Comrs.*, 107-265, and cases cited—and state facts so court can see necessity for intervention, *Porter v. Armstrong*, 132-66; *Lewis v. Lumber Co.*, 99-11—and not merely allege “irreparable injury,” *Ibid.*; also, *Bond v. Wool*, 107-153; *Frink v. Stewart*, 94-484—and must allege insolvency of defendant, when, *Stewart v. Munger*, 174-402;

Yount v. Setzer, 155-213; Kistler v. Weaver, 135-388; Porter v. Armstrong, 132-66; James v. Markham, 125-145; McKay v. Chapin, 120-159; R. R. v. Mining Co., 112-661; Land Co. v. Webb, 117-478; Ousby v. Neal, 99-146; Albright v. Albright, 91-220; McCormick v. Nixon, 83-113; but see section 844.

A perpetual injunction can be granted only in county where cause pending and by judge who tries cause at final hearing: *Hamilton v. Teard*, 112-589. A temporary restraining order can be issued by any judge of the superior court anywhere in the state, and must be made returnable within twenty days to a judge of the district where action pending or judge riding the district: *Ibid.* A temporary injunction to continue until the hearing may be granted by the resident judge of the district, or the judge holding the courts of the district: *Ibid.*; see sections 851-853.

No injunction lies to prevent a fact accomplished: *Huet v. Lumber Co.*, 138-443; *Harrison v. Bryan*, 148-315; *Little v. Lenoir*, 151-415; *Moore v. Monument Co.*, 166-211; *Kilpatrick v. Harvey*, 170-668. Title to public office cannot be tried by injunction: *Cozart v. Fleming*, 123-547; *Jones v. Comrs.*, 77-280; *Patterson v. Hubbs*, 65-119—nor can title to personal property be thus determined, *Kistler v. Weaver*, 135-388; *Baxter v. Baxter*, 77-118. Injunction is not the proper remedy to test the validity of an ordinance or statute: *Archer v. Joyner*, 173-75; *Express Co. v. High Point*, 167-103; *Hargett v. Bell*, 134-394; *Paul v. Washington*, 134-363; *Scott v. Smith*, 121-94; *Rosenbaum v. Newbern*, 118-83; *Wardens v. Washington*, 109-21; *Cohen v. Comrs.*, 77-2—nor for testing the constitutionality of a statute, *Smallwood v. Newbern*, 90-36; *State v. R. R.*, 145-495—nor for staying execution pending appeal, *Bryan v. Hubbs*, 69-433—nor to prevent the enforcement of a justice's judgment rendered upon defective service of summons, *Ballard v. Lowry*, 163-487; *Lowman v. Ballard*, 168-16. The court will not ordinarily restrain the prosecution of works of general public benefit: *Jones v. Lassiter*, 169-750; *Rope Co. v. Aluminum Co.*, 165-572; *Waste Co. v. R. R.*, 167-340; *Griffin v. R. R.*, 150-312; *Staton v. R. R.*, 147-428. Injunction is inapplicable in processioning proceeding: *Wilson v. Alleghany*, 124-7; but see *Sprinkle v. Hutchinson*, 66-450. And since the title may be settled by such proceeding, under section 758, it would seem that an injunction would issue, see *Whitaker v. Garren*, 167-658.

An injunction can operate only in personam, and the proceeding is a nullity unless personal service can be had: *Warlick v. Reynolds*, 151-606. An injunction will not issue to restrain a nonresident holder from negotiating a note: *Ibid.*; *Armstrong v. Kinsell*, 164-125. When both parties are resident here the court may restrain them from proceeding in the court of another state, but not when the party to be restrained is nonresident: *Carpenter v. Hanes*, 162-46; *Wierse v. Thomas*, 145-261.

Quantum of proof, etc., necessary to obtain an interlocutory injunction as compared with quantum necessary to obtain permanent injunction, discussed in *Faison v. Hardy*, 114-58; *Person v. Leary*, 127-117. Cases where bond given as against damages that might accrue to plaintiff, so defendant's business may not be stopped by injunction: *Comrs. v. Lumber Co.*, 114-505; *Lumber Co. v. Wallace*, 93-22. For injunction to suspend business of corporation or appoint receiver, see section 1196.

AS TO WHETHER INJUNCTIVE RELIEF CAN BE HAD IN CASES STATED: When it is sought to prevent building of stock-law fence: *Smalley v. Comrs.*, 122-607; *McNair v. Comrs.*, 93-370—to prevent an entry upon land under force of color of legal process, *German v. Clark*, 71-417—to prevent trespass upon land, *Cobb v. R. R.*, 172-58; *Foster v. Carrier*, 161-472; *Sutton v. Sutton*, 161-665; *Lumber Co. v. Cedar Works*, 158-162; *Combes v. Adams*, 150-64; *Lumber Co. v. Cedar Co.*, 142-411; *Bynum v. Wicker*, 141-95; *Alleghany Co. v. Lumber Co.*, 131-6; *Johnson v. Duvall*, 135-642; *Puryear v. Sanford*, 124-276; *Sharpe v. Loane*, 124-1; *Wilson v. Featherstone*, 120-449; *Bond v. Wool*, 107-153; *Frink v. Stewart*, 94-484; *German v. Clark*, 71-417—to prevent exercise of official powers and duties, *Cobb v. R. R.*, 172-58; *Newton v. School Com.*, 158-186; *Wallace v. Salisbury*, 147-58; *Rosenthal v. Goldsboro*, 149-128; *Merrimon v. Paving Co.*, 142-539; *Glenn v. Comrs.*, 139-412; *Graves v. Comrs.*, 135-49; *Edgerton v. Water Co.*, 126-93; *Stratford v. Greensboro*, 124-127; *McPeeters v. Blankenship*, 123-651; *Herring v. Dixon*, 122-420; *Comrs. v. Thorn*, 117-211; *Burwell v. Comrs.*, 93-73; *Busbee v. Comrs.*, 93-143; *Campbell v. Wolfenden*, 74-103—to prevent erection or maintenance of mills, dams, gins, and other things likely to injure any one or become a nuisance, *Quickel v. Gastonia*, 171-404; *Berger v. Smith*, 160-205; s. c., 156-323; *Hanes v. Carolina Cadillac Co.*, 176-350; *Durham v. Cotton Mills*, 144-705; *Pedrick v. R. R.*, 143-485; *Hickory v. R. R.*, 143-451; 141-716; 138-311; *Hull v. Roxboro*, 142-453; *Reyburn v. Sawyer*,

135-328; *Vickers v. Durham*, 132-880; *Roanoke Nav. Co. v. Emry*, 108-130; *Evans v. R. R.*, 96-45; *Daughtry v. Warren*, 85-136; *Dorsey v. Allen*, 85-358; *Walton v. Mills*, 86-280; *Ellison v. Comrs.*, 58-57; *Barnes v. Calhoun*, 37-199—to prevent waste, *Latham v. Lumber Co.*, 139-9; *Peterson v. Ferrell*, 127-169; *Morrison v. Morrison*, 122-598; *Godwin v. Watford*, 107-168—to prevent enforcement of judgment by execution, *Seip v. Wright*, 173-14; *Barker v. Barker*, 136-316; *Henderson v. Moore*, 125-383; *McLean v. Shaw*, 125-492; *Bostic v. Young*, 116-766; *Powell v. Allen*, 103-46; *Gatewood v. Burns*, 99-357; *Springs v. Schenck*, 99-556; *Knott v. Taylor*, 99-511; *Neville v. Pope*, 95-346; *Bristol v. Hallyburton*, 93-384; *Banks v. Parker*, 80-157; *Walker v. Gurley*, 83-429; *Parker v. Bledsoe*, 87-221; *Chambers v. Penland*, 78-53; *Faison v. McIlwaine*, 72-312; *Wilder v. Lee*, 64-50; *Smith v. Dewey*, 64-463; *Foard v. Alexander*, 64-69—to prevent sale of land under execution where it would create a cloud upon title: *Harris v. Distributing Co.*, 172-14; *Bowman v. Ward*, 152-602; *Crockett v. Bray*, 151-615.

Injunction to prevent waste or wrongful disposition of the property of a dissolved corporation, *Atty.-General v. Roanoke Nav. Co.*, 84-705—to prevent county commissioners from making tax levy to pay interest on railroad bonds, *Graves v. Comrs.*, 135-49—or from applying taxes levied for a special purpose to another purpose, *R. R. v. Comrs.*, 148-220—but not to prevent the collection of a tax if the part alleged to be invalid can be separated from the valid part, *Ibid.*—to prevent multiplicity of actions, *Featherstone v. Carr*, 132-800—to prevent resident creditor from maintaining suit in another state against corporation of which plaintiff is receiver, *Davis v. Lumber Co.*, 132-233—to prevent location of a right of way after one already granted but not located on same land, *Lumber Co. v. Hines Bros.*, 127-130—to prevent removal of gates across highway, *Edwards v. Supervisors*, 127-62—to prevent payment of county orders for building bridge by one county over boundary stream, *McPeeters v. Blankenship*, 123-651—to prevent administrator from selling land for assets, *McCorkle v. Brem*, 76-407; *Johnson v. Jones*, 75-206—to prevent personal representative from wasting estate of deceased, *Coleman v. Howell*, 131-125; *Mahoney v. Stewart*, 123-106; *Godwin v. Watford*, 107-168—to prevent sale of one's personal property exemption already allotted, *Baxter v. Baxter*, 77-118—to prevent disposition of trust funds pending litigation as to the rights of parties, *Roberts v. Lewald*, 107-305; *Frank v. Robinson*, 96-28—to prevent removal of fixtures by mortgagors in possession who default and holders under bonds for title who default, etc., *Moore v. Valentine*, 77-188—to prevent lessor from selling tenant's part of crop, *Wilson v. Respass*, 86-112.

Injunction to prevent discrimination in rates by public utility companies: *Woodley v. Telephone Co.*, 163-284; *Telephone Co. v. Telephone Co.*, 159-9; *Horner v. Electric Co.*, 153-535; *Griffin v. Water Co.*, 122-206—to prevent diversion or cutting off of water, *Power Co. v. Navigation Co.*, 152-472; *Wilson v. Featherstone*, 120-449; *Walton v. Mills*, 86-280—to prevent the issuing of a grant upon ground of irregularity of entry, *Brem v. Houck*, 101-627—to prevent the collection of taxes, *R. R. v. Reidsville*, 109-494; *Railroad v. Lewis*, 99-62; *Mace v. Comrs.*, 99-65; *Matthews v. Comrs.*, 99-69; see section 858—to prevent the disposition and transfer of bonds while litigation pending with reference to them, *Yount v. Setzer*, 155-213; *Caldwell v. Stirewalt*, 100-201—to prevent sale under a collusive judgment, *Bost v. Lassiter*, 105-490—to prevent sale or conveyance of land while action pending with reference to it, *Jones v. Buxton*, 121-285; *Faison v. Hardy*, 118-142; *Bostic v. Young*, 116-766; *Mortgage Co. v. Long*, 113-123; *Hutaff v. Adrian*, 112-259; *Browning v. Lavender*, 104-69; *Brower v. Buxton*, 101-419; *Frank v. Robinson*, 96-28; *Tillery v. Wrenn*, 86-217; *Fox v. Kline*, 85-173; *Galbreath v. Everett*, 84-546; *Pritchard v. Sanderson*, 84-299; *Cunningham v. Bell*, 83-328; *Southerland v. Harper*, 83-200; *Dockery v. French*, 69-308; *Sprinkle v. Hutchinson*, 66-450—to prevent the use of the name "The Bingham School," *Bingham v. Gray*, 122-699—to prevent disbursement of taxes illegally collected, *Edgerton v. Water Co.*, 126-93—to prevent city from opening street for one's private benefit, *Stratford v. Greensboro*, 124-127—to prevent private use of park dedicated to public, *Conrad v. Land Co.*, 126-776—to prevent mismanagement by silent partner, *Hodgin v. Bank*, 128-111—to prevent trustee's executor from selling under trust deed in absence of request from cestui que trust, *Eason v. Dortch*, 136-291—to prevent construction of street railway to the injury of abutting owner, *Merrick v. Street R. R.*, 118-1081—to prevent railroad company from moving the location of a depot, *Dewey v. R. R.*, 142-392—to prevent sale of property by assignee for creditors pending action to set aside deed, *Preiss v. Cohen*, 112-278—to prevent one from violating contract of sale, *Hauser v. Harding*, 126-295; *Kramer v. Old*, 119-1; *Reeves v. Sprague*, 114-647; *Cowan v. Fairbrother*, 118-406; *Anders v. Gardner*, 151-604; *Bradshaw v. Millikin*, 173-432—to prevent a breach of

restrictive covenants as to the use of land, *Guilford v. Porter*, 167-366; s. e., 170-310; s. e., 171-356—to enforce building restriction as to stairway, *Ring v. Mayberry*, 168-563.

Injunction to prevent sewerage company from disconnecting residences from main sewer pipe, *Solomon v. Sewerage Co.*, 142-439—to prevent one suing on or enforcing a judgment rendered in another state, *Levin v. Gladstein*, 142-482—to prevent city from annulling arbitrarily its license already granted, *Railway v. Asheville*, 109-688—to prevent stockholders and officers of a corporation taking action ultra vires that will cause injury to other stockholders, *Moore v. Mining Co.*, 104-534—to prevent ultra vires acts of public officials, *Merrimon v. Paving Co.*, 142-539; *Vaughan v. Comrs.*, 118-636; *Glenn v. Comrs.*, 139-421; *Stratford v. Greensboro*, 124-127—to prevent commissioners appointed by legislature from surveying and determining the lines between two counties, *Comrs. v. Thorn*, 117-211—to prevent, during action of divorce, defendant's husband from interfering with her separate property or collecting her rents, *Robinson v. Robinson*, 123-136—to prevent city from contributing to a dispensary, *Garsed v. Greensboro*, 126-159—to prevent the foreclosure of a mortgage or deed of trust, *Hayes v. Pace*, 162-288; *Eason v. Dortch*, 136-296; *Smith v. Parker*, 131-470; *Harrington v. Rawls*, 131-39; *Williams v. Brown*, 127-51; *Churchill v. Turnage*, 122-426; *Jones v. Buxton*, 121-285; *Montague v. Bank*, 118-283; *Scott v. Ballard*, 117-195; *Basket v. Moss*, 115-448; *Faison v. Hardy*, 114-58; *Meroney v. Loan Assn.*, 112-842; *Hutaff v. Adrian*, 112-259; *Davis v. Lassiter*, 112-128; *Carver v. Brady*, 104-219; *Cook v. Patterson*, 103-127; *Gooch v. Vaughan*, 92-610; *Manning v. Elliott*, 92-48; *Harrison v. Bray*, 92-488; *Bridgers v. Morris*, 90-32; *Pender v. Pittman*, 84-372; *Pritchard v. Sanders*, 84-299; *Capelhart v. Biggs*, 77-261; *Purnell v. Vaughan*, 77-268; *Gold Co. v. Ore Co.*, 73-468; *Howes v. Mauney*, 66-218—to prevent mortgagor after forfeiture from disposing of crops, *Jones v. Hill*, 64-198—in restraining a sale under a deed of trust the court may require the applicant to pay into court the amount admitted to be due, *Bonner v. Rodman*, 163-1—or in restraining the sale under mortgage to secure a debt tainted with usury the court may require the payment of legal interest, *Owens v. Wright*, 161-127; *Corey v. Hooker*, 171-229; *Cheek v. B. and L. Assn.*, 127-122; *Churchill v. Turnage*, 122-426.

Injunction to prevent sale under mechanic's lien, *Huntsman v. Lumber Co.*, 122-583—to prevent disposition by defendant of the rents and profits of land, *Baldwin v. York*, 71-463; but see *Horton v. White*, 84-297—to prevent the cutting of timber trees, *Lumber Co. v. Cedar Co.*, 142-411; *Latham v. Lumber Co.*, 139-9; see sections 844-846—to prevent a right of way from being condemned by private corporation, *Cozard v. Hardwood Co.*, 139-283—to prevent the disposing of shares of stock of a corporation, *Currie v. Jones*, 138-189—to prevent the violation of an alleged covenant in a lease, *Cobb v. Clegg*, 137-153—to prevent execution upon husband's property pending his appeal from a judgment for alimony, *Barker v. Barker*, 136-316—to prevent the maintenance of fish nets in a channel, *Reyburn v. Sawyer*, 135-328—to prevent the transfer of ward's land sold by guardian contrary to provisions of order of sale, *In re Propst*, 144-562—to prevent the destruction or removal of personal property held in common, *Thompson v. Silverthorne*, 142-12—to prevent the payment of a fund in bank to an endorsee of one insolvent and against whom party asking injunction has recovered judgment for the fund, *Mfg. Co. v. Summers*, 143-102—to prevent sale by insolvent partner of partnership land under a mortgage which such partner bought in after dissolution, *Taylor v. Russell*, 119-30—to prevent the working of a gold mine, *Parker v. Parker*, 82-165—to prevent one railroad from using the right of way of another, *Fayetteville Rwy. v. R. R.*, 142-423; *R. R. v. Mining Co.*, 112-661—to prevent a railroad from building on right of way after condemnation proceedings instituted, but before appraisal and payment of damages, *R. R. v. Newton*, 133-132; *R. R. v. Lumber Co.*, 116-924; but see *Fayetteville Rwy. v. R. R.*, 142-423—to prevent parties from interfering with railroad construction upon its right of way, *Railroad v. Olive*, 142-257—to prevent life tenant from wasting timber in which there is contingent remainder, *Latham v. Lumber Co.*, 139-9; *Peterson v. Ferrell*, 127-169—to prevent funds of a foreign fraternal order collected by assessment from being used to satisfy debt in this state, *Brenizer v. Royal Arcanum*, 141-409. Injunction to prevent the improper use of or interference with an easement, *Hales v. R. R.*, 172-104; *R. R. v. Thompson*, 173-258; *Butler v. Tobacco Co.*, 152-416.

Injunction to prevent a nuisance that is injuring the health and destroying the comfort of one's home: *Hull v. Roxboro*, 142-453; *Redd v. Cotton Mills*, 136-342; *Duffy v. Meadows*, 131-31; *Vickers v. Durham*, 132-880; *Simpson v. Justice*, 43-115—to prevent the pollution of a water supply, *Durham v. Cotton Mills*, 141-615, 144-705; *Board of Health v. Comrs.*, 173-

250—to prevent private nuisance that is possible or contingent, *Durham v. Cotton Mills*, 141-615, 144-705, and cases cited; *Simpson v. Justice*, 43-115; see, also, *Hickory v. R. R.*, 143-451; *Hull v. Roxboro*, 142-453; *Redd v. Cotton Mills*, 136-342, and cases there cited; *Vickers v. Durham*, 132-880; *Little v. Lenoir*, 151-415—to prevent the construction and maintenance of a drawbridge likely to become a nuisance, *Pedrick v. R. R.*, 143-485—to prevent a railroad from enlarging its depot on the ground that it will be a public nuisance, *Hickory v. R. R.*, 138-311, 141-716, 143-451—to prevent the location of hospital for contagious or infectious diseases so as to be a menace to the health of adjacent property owners, *Cherry v. Williams*, 147-452.

844. When solvent defendant restrained. In an application for an injunction to enjoin a trespass on land it is not necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees.

Rev., s. 807; 1885, c. 401.

Cases directly supporting section: *Lumber Co. v. Cedar Works*, 158-162; *Lumber Co. v. Cedar Co.*, 142-411; *McKay v. Chapin*, 120-159; *Roper v. Wallace*, 93-22. Injunction will lie to protect contingent remainderman against waste of life tenant: *Latham v. Lumber Co.*, 139-9. This section does not deprive court of the discretion to require bond to be given by defendant to secure plaintiff's damages: *Kistler v. Weaver*, 135-388; *Stewart v. Munger*, 174-402. A continuing trespass may be restrained without an allegation of insolvency: *Cobb v. R. R.*, 172-58. Cases merely referring to section: *Newton v. Brown*, 134-445; *Carteret Lodge v. Ijames*, 156-159; *Kelly v. Lumber Co.*, 157-175. See cases cited under section 845.

845. Timber lands, trial of title to. In all actions to try title to timber lands and for trespass thereon for cutting timber trees, when the court finds as a fact that there is a bona fide contention on both sides based upon evidence constituting a prima facie title, no order shall be made pending such action, permitting either party to cut said timber trees, except by consent, until the title to said land or timber trees is finally determined in the action. In all cases where the title to any timber or trees, or the right to cut and remove the same during a term of years, is claimed by any party to such action, and the fee of the soil or other estate in the land by another, whether party to the action or not, the time within which such timber or trees may be cut or removed by the party claiming the same, and all other rights acquired in connection therewith, shall not be affected or abridged, but the running of the term is suspended during the pendency of the action.

Rev., s. 808; 1901, c. 666, s. 1; 1903, c. 642.

Legal effect of section and purpose of its enactment: *Moore v. Fowle*, 139-51. As to what constitutes prima facie title sufficient to make up a bona fide claim, see *Lumber Co. v. Cedar Co.*, 142-411; *Bynum v. Wicker*, 141-95; *Johnson v. Duvall*, 135-642; *Alleghany Co. v. Lumber Co.*, 131-6; *Davis v. Fiber Co.*, 150-84. When plaintiff satisfies judge that claim is bona fide and that he can show an apparent title to the timber, judge should not dissolve injunction, but continue till final determination of title: *Moore v. Fowle*, 139-51; *Carteret Lodge v. Ijames*, 156-159; *Riley v. Carter*, 165-334; *Sherrod v. Battle*, 147-10. Cutting timber restrained to protect rights of mortgagee: *Stewart v. Munger*, 174-402. Deeds and contracts for growing timber are for interests in land and are governed by the law as to land: *Pitts v. Curtis*, 152-615; *Woodbury v. King*, 152-676. In a case involving the right to possession of a deed as evidence of title the cutting of timber on the land may be restrained: *Sutton v. Sutton*, 161-665. Where the plaintiff does not claim title to the timber lands, but some interest in the profits arising from cutting the timber, cutting of the timber will not be restrained: *Taylor v. Riley*, 153-195. The court will consider the interests to be affected in determining whether a restraining order shall issue: *Ibid.*

Section referred to in *Lumber Co. v. Cedar Co.*, 142-411; *Kistler v. Weaver*, 135-390; *Newton v. Brown*, 134-443; *Kelly v. Lumber Co.*, 157-175.

846. When timber may be cut. In any action specified in the preceding section, when the judge finds as a fact that the contention of either party is not in good faith and is not based upon evidence constituting a prima facie title, upon motion of the other party, who may satisfy the court of the bona fides of his contention and who may produce evidence showing a prima facie title, the court may allow such party to cut the timber trees by giving bond as required by law. Nothing in this section affects the right of appeal, and when any party to such action has been enjoined, a sufficient bond must be required to cover all damages that may accrue to the party enjoined by reason of the injunction as now required by law.

Rev., s. 809; 1901, c. 666, ss. 2, 3.

See section 845. For decisions treating of same subject-matter prior to enactment of this section, see *Ousby v. Neal*, 99-146; *McKay v. Chapin*, 120-159.

Where injunction dissolved, defendants entitled to value of timber cut by them before injunction was served and converted by plaintiff: *Timber Co. v. Rountree*, 122-45.

Before an order allowing a person to cut timber can be made in an action to quiet title, the court must find as a fact, and incorporate it in the order, that the party allowed to cut claims land in good faith and has a prima facie title thereto, and that claim of adverse party is not made in good faith: *Johnson v. Duvall*, 135-642. This section does not apply where the court fails to find that there is not a bona fide contention, but injunction should be granted under sections 844, 845: *Kelly v. Lumber Co.*, 157-175.

847. Time of issuing. The injunction may be granted when or at any time after commencing the action, before judgment, upon its appearing satisfactorily to the judge, by affidavit of the plaintiff or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

Rev., s. 810; Code, s. 339; C. C. P., s. 190.

An injunction cannot issue unless a summons has been issued returnable to the superior court of the county in which action brought: *Horne v. Comrs.*, 122-466—and if injunction issue before summons it is premature and irregular and will be vacated upon motion, *Armstrong v. Kinsell*, 164-125; *Hirsh v. Whitehead*, 65-516; *Grant v. Edward*, 90-31; *Troxler v. Newsom*, 88-13; *McArthur v. McEachin*, 64-72; *Patrick v. Joyner*, 63-573—but if defendant answers complaint and objection be not taken until trial, irregularity is waived, *Heilig v. Stokes*, 63-612. Summons need not be returned before injunction issues: *Fleming v. Patterson*, 99-404. The injunction may be dissolved for failure to serve a copy of the affidavit, unless it is waived or the court allows the service later: *Taylor v. Boone*, 172-93—but an agreement to fix the time for a hearing is not a waiver, *Ibid.*

848. Not issued for longer than twenty days without notice. No restraining order, or order to stay proceedings, for a longer time than twenty days shall be granted by a judge out of court, except upon due notice to the adverse party; but the order shall continue and remain in force until vacated after notice, to be fixed by the court, of not less than two nor more than ten days.

Rev., s. 811; Code, s. 346; C. C. P., s. 345; 1905, c. 26.

When issued for more than twenty days without notice it may be dissolved on motion: *Foard v. Alexander*, 64-69. See *Hamilton v. Icard*, 112-589. As to notice, see section 856.

849. Issued after answer, only on notice. An injunction shall not be allowed after the defendant has answered, except upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the judge granting or refusing the injunction.

Rev., s. 812; Code, s. 340; C. C. P., s. 191.

For statute regulating notice, see sections 911, 912. Where the motion for injunction is made in term and the defendant is present resisting the motion, no further notice is required: *Hemphill v. Moore*, 104-379.

850. Order to show cause. If the judge deems it proper that the defendant, or any of several defendants, should be heard before granting an injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

Rev., s. 813; Code, s. 342; C. C. P., s. 193.

851. What judges have jurisdiction. The judges of the superior court have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings. A judge holding a special term in any county may grant an injunction, or issue a restraining order, returnable before himself, in any case which he has jurisdiction to hear and determine under the commission issued to him, and the same is returnable as directed in the order.

Rev., s. 814; Code, s. 335; 1876-7, c. 223, ss. 1, 2; 1879, c. 63, ss. 1, 3.

All superior court judges have jurisdiction anywhere in the state to issue restraining orders for twenty days returnable to the resident judge or judge riding the courts of the district: *Hamilton v. Icard*, 112-589—but jurisdiction to issue injunctions until the hearing of cause is restricted to the resident judge or judge assigned to courts of the district or holding such courts by exchange, *Ibid.*; see *Worth v. Bank*, 121-347. A perpetual injunction must be granted in the county in which cause pending and by judge presiding at trial: *Hamilton v. Icard*, 112-589.

A judge holding a special term cannot make a restraining order returnable before himself where the summons is returnable to a term of court beginning after the special term: *Royal v. Thornton*, 150-293—when this is set aside the plaintiff may still make application to the proper judge, *Ibid.* A motion in supreme court to restrain a party from proceeding in a federal court will not be allowed; relief should be sought in the lower court: *Worth v. Trust Co.*, 152-242.

852. Before what judge returnable. All restraining orders and injunctions granted by any of the judges of the superior court, except one holding a special term in any county, shall be made returnable before the resident judge of the district, or the judge assigned to the district, or holding by exchange the courts of the district where the civil action or special proceeding is pending, within twenty days from date of order. If the judge before whom the matter is returned fails, for any reason, to hear the motion and application, or to continue them to some other time and place, any judge resident in, or assigned to hold the courts of, some adjoining district may hear and determine the said motion and application, after giving ten days notice to the parties interested in the application or motion, upon its being satisfactorily shown to him by affidavit or otherwise that the judge before whom the matter was returnable failed to act upon or to continue the same to some other time and place. This removal continues in force the motion and application theretofore granted, till they can be heard and determined by the judge having jurisdiction.

Rev., s. 815; Code, s. 336; 1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51.

For cases as to whether injunction should be dismissed or continued to hearing, see under section 856.

The restraining order for twenty days can be made returnable anywhere in the state: *Hamilton v. Icard*, 112-589, notwithstanding *Galbreath v. Everett*, 84-546—but must be returnable before the resident judge or judge riding the courts of the district in which action

is pending, *Hamilton v. Icard*, 112-589—and though the courts of the district for his term are over, he can still grant it if it is during the six months of the year in which he has been assigned to the district, *Ibid.*; also *Stith v. Jones*, 101-360. If judge before whom returnable fail to hear it, judge of adjoining district can hear it upon ten days notice to parties: *Hamilton v. Icard*, 112-589. On hearings, the title to land is not required to be proved with that strictness and certainty of proof as upon trial: *Moore v. Fowle*, 139-51.

Section merely referred to in *Moore v. Moore*, 131-372; *Ledbetter v. Pinner*, 120-457; *Wilson v. Rankin*, 129-450.

853. Stipulation as to judge to hear. By a stipulation in writing, signed by all the parties to an application for an injunction order, or their attorneys, to the effect that the matter may be heard before a judge designated in the stipulation, the judge before whom the restraining order is returnable by law, or who is by law the judge to hear the motion for an injunction order, shall, upon receipt of the stipulation forward it and all the papers to the judge designated, whose duty it then is to hear and decide the matter, and return all the papers to the court out of which they issued, the necessary postage or expressage money to be furnished to the judge.

Rev., s. 816; Code, s. 337; 1883, c. 33.

Parties can agree in writing to have hearing before any judge of superior court: *Hamilton v. Icard*, 112-589.

854. Undertaking. Upon granting a restraining order or an order for an injunction, the judge shall require as a condition precedent to the issuing thereof that the clerk shall take from the plaintiff a written undertaking, with sufficient sureties, to be justified before, and approved by, the clerk or judge, in an amount to be fixed by the judge, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he sustains by reason of the injunction, if the court finally decides that the plaintiff was not entitled to it.

Rev., s. 817; Code, s. 341; C. C. P., s. 192.

Amount of undertaking must be fixed by judge: *Bynum v. Comrs.*, 101-412. The requirement that undertaking be given is mandatory: *James v. Withers*, 114-474; *McKay v. Chapin*, 120-159—and an injunction issued without it is irregular, but not void, *McKay v. Chapin*, 120-159; *Young v. Rollins*, 90-125; *Sledge v. Blum*, 63-374—and such injunction can be vacated on motion, *Sledge v. Blum*, 63-374; *Wilson v. Featherstone*, 120-449; *Miller v. Parker*, 73-58; *Faison v. McIlwaine*, 72-312; *Hirsh v. Whitehead*, 65-516—but plaintiff may be allowed to file bond even in supreme court, *McKay v. Chapin*, 120-159.

A second undertaking, upon the continuance of injunction to the hearing, cannot be ordered unless the first one insufficient: *Preiss v. Cohen*, 112-278. As to approval of bond by judge, see *Sternberger v. Hawley*, 85-141; also *Bynum v. Comrs.*, 101-412. As to depositing money in lieu of undertaking, see *Richards v. Baurman*, 65-162. Recovery of damages by one who has been injured by injunction is limited to penalty of undertaking: *Timber Co. v. Rountree*, 122-45. As to damages on injunction bond generally and how assessed, see *McCall v. Webb*, 135-365, and cases cited; *Midgett v. Vann*, 158-128.

Section merely referred to in *Mahoney v. Tyler*, 136-43.

855. Damages on dissolution. A judgment dissolving an injunction carries with it judgment for damages against the party procuring it and the sureties on his undertaking without the requirement of malice or want of probable cause in procuring the injunction, which damages may be ascertained by a reference or otherwise, as the judge directs, and the decision of the court is conclusive as to the amount of damages upon all the persons who have an interest in the undertaking.

Rev., s. 818; Code, s. 341; 1893, c. 251.

As to procedure for recovery of damages upon undertaking, see *R. R. v. Mining Co.*, 117-191; *Timber Co. v. Rountree*, 122-45; *Crawford v. Pearson*, 116-718; *Gold Co. v. Ore Co.*, 79-48; *McKesson v. Hennessee*, 66-473; *Hyman v. Devereux*, 65-588; *Thompson v. McNair*, 64-448. What damages may be recovered: *Davis v. Fiber Co.*, 175-25; *Midgett v. Vann*, 158-128; *Kerr v. Hicks*, 154-608.

856. Issued without notice; application to vacate. If the injunction is granted without notice, the defendant, at any time before the trial, may apply, upon notice to be fixed by the court of not less than two nor more than ten days, to the judge having jurisdiction, to vacate or modify the same, if he is within the district or in an adjoining district, but if out of the district and not in an adjoining district, then before any judge who is at the time in the district, and if there is no judge in the district, before any judge in an adjoining district. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon the affidavits on the part of the defendant, with or without answer. If no such application is made, the injunction continues in force until such application is made and determined by the judge, and a verified answer has the effect only of an affidavit.

Rev., s. 819; Code, s. 344; C. C. P., s. 195; 1905, c. 26.

Amended by act of 1905 as to the judge who can vacate an injunction.

An injunction issued without notice will be vacated: *Armstrong v. Kinsell*, 164-125. If the judge in granting injunction founded his action solely upon affidavits of plaintiff, he can modify same without notice: *Sledge v. Blum*, 63-374. In an action for injunction, if plaintiff's whole equity is denied and it appears from answer and affidavits that his case is fully met, injunction should not be continued till final hearing: *Riggsbee v. Durham*, 98-81; *Cooper v. Cooper*, 127-490; *Walker v. Gurley*, 83-429; *Perry v. Michaux*, 79-94; *Mitchell v. Comrs.*, 74-487; *Faison v. McIlwaine*, 72-312; *Woodfin v. Beach*, 70-455; *Bell v. Chadwick*, 71-329—nor should it be continued where it appears that there is not probable cause from which it may be reasonably inferred that plaintiff will make out his case at final hearing, *Craycroft v. Morehead*, 67-422; see *Woody v. Timber Co.*, 141-471; *Hyatt v. DeHart*, 140-270; *Lumber Co. v. Smith*, 146-158—nor where it will interfere with the prosecuting of enterprises which tend to develop resources of the country, *Hyatt v. DeHart*, 140-270; *Griffin v. R. R.*, 150-312; *Waste Co. v. R. R.*, 167-340; *Rope Co. v. Aluminum Co.*, 165-572; *Jones v. Lassiter*, 169-750. On the other hand, if it appears from the pleadings and affidavits that there is probable cause from which it may be reasonably inferred that plaintiff will be able to make out his case on final hearing, the injunction will not be dissolved: *Seip v. Wright*, 173-14; *Little v. Efrd*, 170-187; *Sutton v. Sutton*, 161-665; *Herndon v. R. R.*, 161-650; *Craycroft v. Morehead*, 67-422; *Bynum v. Wicker*, 141-95; *Moore v. Fowle*, 139-51; *Currie v. Jones*, 138-189; *Erwin v. Morris*, 137-48; *Cobb v. Clegg*, 137-153; *Griffin v. Water Co.*, 122-206; *Cozart v. Fleming*, 123-560; *Tobacco Co. v. McElwee*, 94-425—nor will it be where a reasonable doubt exists as to whether the equity set up in the complaint is sufficiently negated by answer, *Lowe v. Comrs.*, 70-532; *Atkinson v. Everett*, 114-670; *Nimoeks v. Shingle Co.*, 110-230; *Frank v. Robinson*, 96-28; *Durham v. R. R.*, 104-261; *Turner v. Cuthrell*, 94-239; *Morris v. Willard*, 84-293; *Ponton v. McAdoo*, 71-101—nor where it would be difficult and impracticable to ascertain actual damages, *Jolly v. Brady*, 127-142—nor where the injunctive relief may be the real relief demanded, and not simply auxiliary, and the evidence raises serious question as to existence of facts making for plaintiff's right and sufficient to establish it, *Seip v. Wright*, 173-14; *Little v. Efrd*, 170-187; *Guano Co. v. Lumber Co.*, 168-337; *Stancill v. Joyner*, 159-617; *Yount v. Setzer*, 155-213; *Person v. Person*, 154-453; *Tise v. Whitaker-Harvey Co.*, 144-507; *Hyatt v. DeHart*, 140-270; *Vickers v. Durham*, 132-880; *Harrington v. Rawls*, 131-39; *Whitaker v. Hill*, 96-2; *Marshall v. Comrs.*, 89-103—nor will it be dissolved when it encourages and facilitates public convenience except in clear cases, *Rwy. v. Asheville*, 109-688—nor where serious questions are raised as indicated in *Harrington v. Rawls*, 131-40—nor where reasonably necessary to protect plaintiff's rights until trial, *Heilig v. Stokes*, 63-612.

For injunction with conditions attached, the fulfillment of which will vacate the order, see *Hickory v. R. R.*, 143-455, 141-716, 138-311. When a restraining order has been vacated and

appeal is taken, and pending appeal the work is completed, the parties will be left to the final determination of the action: *Yates v. Ins. Co.*, 166-134; *Moore v. Monument Co.*, 166-211. When the time allowed under a former restraining order has expired the court may extend it: *Poster v. Carrier*, 161-472.

The vacating or refusal to vacate an injunction is appealable: *French v. Wilmington*, 75-387—but the order vacating or continuing the injunction is not vacated by the appeal, *Green v. Griffin*, 95-50; *Reyburn v. Sawyer*, 128-8; *James v. Markham*, 125-145. The decision of an appeal is neither an estoppel nor the "law of the case": *Soloman v. Sewerage Co.*, 142-439. The supreme court, on appeal, can review the findings of fact: *Burns v. McFarland*, 146-382; *Hooker v. Greenville*, 130-472; *Mayo v. Comrs.*, 122-5; *Roberts v. Lewald*, 107-305; *Jones v. Boyd*, 80-258. On appeal, the findings of fact by the judge below are not conclusive, but there is a presumption in favor of proceedings below: *Hyatt v. DeHart*, 140-270.

857. When opposing affidavits admitted. If the application is made upon affidavits on the part of the defendant, the plaintiff may oppose the same by affidavits or other proof, in addition to those on which the injunction was granted.

Rev., s. 820; Code, s. 345; C. C. P., s. 196.

Verified answer is an affidavit hereunder: *Tobacco Co. v. McElwee*, 94-425—and when so used, plaintiff may file counter affidavits, *Ibid.*; also *King v. Winants*, 68-63; *Howerton v. Sprague*, 64-451—and may also file counter affidavits to affidavits filed by defendants, *Young v. Rollins*, 85-485.

858. To restrain collection of taxes. No injunction may be granted by any court or judge to restrain the collection of any tax or any part thereof, or to restrain the sale of any property for the nonpayment of any tax, unless such tax or the part thereof enjoined is levied or assessed for an illegal or unauthorized purpose, or the tax assessment is illegal or invalid.

Rev., s. 821; 1901, c. 558, s. 30; 1899, c. 15, s. 78; 1887, c. 137, s. 84.

For action to recover illegal taxes paid, see section 7979.

The above section constitutional: *R. R. v. Reidsville*, 109-494, and cases there cited; *Matthews v. Comrs.*, 99-69. As to how facts as to the illegality and invalidity of the tax should be set out, see *Mace v. Comrs.*, 99-55. A taxpayer may maintain an injunction to prevent sale of his property under an illegal tax or he may pay tax under protest and sue to recover it: *Purnell v. Page*, 133-125. Injunctive relief may be invoked by taxpayer when tax is invalid or illegal: *Armstrong v. Stedman*, 130-217; *Range Co. v. Carver*, 118-331; *Sherrod v. Dawson*, 154-525.

This section does not apply when the right to collect taxes in arrears has been revived containing no restrictions applicable to a particular case arising thereunder: *Moore v. Sugg*, 112-233. In cases where restraining order not allowed, plaintiff should pay the tax and pursue the remedy provided for its recovery: *Hall v. Fayetteville*, 115-281.

Under this section the following cases are held not to be within the exception, and therefore no restraining order can be granted: *McDonald v. Teague*, 119-604; *Hall v. Fayetteville*, 115-281; *Mace v. Comrs.*, 99-67. The exceptive words of the section apply not to the levy or illegal levy of the taxes, but to the "illegal or unauthorized" purpose of the levy: *Mace v. Comrs.*, 99-67.

Where an act authorizing a tax levy is void as to part, collection of the whole should be enjoined, *Williams v. Comrs.*, 119-520. As to who are parties defendant to action for injunction to prevent collection of taxes on unlisted property, see *Land and Lumber Co. v. Smith*, 146-199.

ART. 37. RECEIVERS

859. What judge appoints. Any judge of the superior court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions.

Rev., s. 846; Code, s. 379; C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51.

As to receivers of orphans' estates, see sections 2198-2202—of state banks, see *Worth v. Bank*, 121-343; also section 253—of corporations, see sections 1208-1217—in supplementary proceedings, see sections 722-725.

The clerk cannot appoint: *York v. McCall*, 160-277; *Parks v. Sprinkle*, 64-637. As to question of priority of application and conflict of court's jurisdiction, see *Worth v. Bank*, 121-343; *Young v. Rollins*, 85-485. Before receiver can be appointed it must be shown that plaintiff is entitled to the relief demanded: *Witz v. Gray*, 116-48. As to who should or should not be appointed, see *Fisher v. Trust Co.*, 138-90; *Young v. Rollins*, 85-485. Court should not appoint more receivers than necessary: *Bank v. Bank*, 126-531. The order appointing receiver not void for lack of security: *Nesbitt v. Turrentine*, 83-535. The practice of appointing receiver upon unverified complaint and without notice to creditors and others interested is not commended: *Fisher v. Trust Co.*, 138-90. Foreign receiver proves his appointment by a certified copy of the order appointing: *Person v. Leary*, 126-504, 127-114. Appointment of receivers is matter of record and should be shown by the record: *Person v. Leary*, 126-504.

In the matter of appointment of receivers the powers of the courts have been enlarged by the Code: *Lumber Co. v. Wallace*, 93-22. Appointment of a receiver is not a matter of positive right, but rests in sound legal discretion of the judge: *Whitehead v. Hale*, 118-602.

Motion for the appointment of a receiver may be made before any judge, and temporary receiver be appointed: *Worth v. Bank*, 121-343—and order made returnable before resident judge, or judge holding courts of district, *Ibid.*—and the hearing may be outside of the county where action brought, *Parker v. McPhail*, 112-504. Where appointments are made by two courts, each having jurisdiction, the first made will control: *Worth v. Bank*, 121-343.

860. In what cases appointed. A receiver may be appointed—

1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

2. After judgment, to carry the judgment into effect.

3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

4. In cases provided in chapter entitled Corporations in the article Receivers; and in like cases, of the property within this state of foreign corporations.

The article Receivers, in the chapter entitled Corporations, is applicable, as near as may be, to receivers appointed hereunder.

Rev., s. 847; Code, s. 379; C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51.

For appointment of receivers in supplemental proceedings, see this chapter, s. 722.

A receiver will be appointed before judgment where plaintiff shows imminent danger of loss by defendant's insolvency: *Mahoney v. Stewart*, 123-106; *Taylor v. Russell*, 119-33; *Whitehead v. Hale*, 118-601; *Bank v. Bridgers*, 114-381; *Lovett v. Slocomb*, 109-110; *Stith v. Jones*, 101-360; *Venable v. Smith*, 98-523; *Durant v. Crowell*, 97-367; *McNair v. Pope*, 96-502; *Albright v. Albright*, 91-220; *Oldham v. Bank*, 84-304; *Parker v. Parker*, 82-165; *Nesbitt v. Turrentine*, 83-535; *Railroad v. Wilson*, 81-223; *Kerchner v. Fairley*, 80-24; *Rollins v. Henry*, 77-467; *Gause v. Perkins*, 56-177; *Deep River Co. v. Fox*, 39-61—or where there is reason to apprehend that the subject of the controversy will be destroyed or removed, or otherwise disposed of by defendants pending action, *Ellett v. Newman*, 92-519; *Thompson v. Silverthorne*, 142-12—or where defendant is insolvent and all property must be sold to pay debts, *Machine Co. v. Lumber Co.*, 109-576—or where it is alleged that defendant is trying to defraud plaintiff, *Stern v. Austern*, 120-107; *Commission Co. v. Porter*, 122-692; *Pearce v. Elwell*, 116-595.

A receiver may be appointed to carry out the purposes of a trust: *Rousseau v. Call*, 169-173. The court may appoint a receiver for an insolvent foreign corporation: *Silk Co. v. Spinning*

Co., 154-422; *Holshouser v. Copper Co.*, 138-248. The receiver may sue in his own name or in that of the corporation: *Millinery Co. v. Ins. Co.*, 160-130. Right of foreign receiver to sue: *Person v. Leary*, 127-114. Where no exception is taken and no appeal, the receivership continues in force: *Talbot v. Tyson*, 147-273.

No receiver will be appointed where it does not appear that property is in danger of being lost or materially injured: *Venable v. Smith*, 98-523; *Bryan v. Moring*, 94-694; *Levenson v. Elson*, 88-182; *Twitty v. Logan*, 80-69; *Rollins v. Henry*, 77-467—nor will one be appointed *pendente lite* upon a mere allegation that party “has reason to believe” that property in dispute will be wasted or destroyed, without stating the reasons of such belief, *Hanna v. Hanna*, 89-68—nor where foreign insurance company has no assets or property other than assessments to become due, within this state, which can be taken into possession, *Blackwell v. Life Assn.*, 141-117.

Where receiver should be appointed to carry judgment into effect: *Pipe and Foundry Co. v. Howland*, 111-625; *Richards v. Baurman*, 65-162; *Gobble v. Orrell*, 163-489.

861. Appointment refused on bond being given. In all cases where there is an application for the appointment of a receiver, upon the ground that the property or its rents and profits are in danger of being lost, or materially injured or impaired, or that a corporation defendant is insolvent or in imminent danger of insolvency, and the subject of the action is the recovery of a money demand, the judge before whom the application is made or pending shall have the discretionary power to refuse the appointment of a receiver if the party against whom such relief is asked, whether a person, partnership or corporation, tenders to the court an undertaking payable to the adverse party in an amount double the sum demanded by the plaintiff, with at least two sufficient and duly justified sureties, conditioned for the payment of such amount as may be recovered in the action, and summary judgment may be taken upon the undertaking. In the progress of the action the court may in its discretion require additional sureties on such undertaking.

Rev., s. 848; 1885, c. 94.

Where there is danger of loss, instead of appointing a receiver, defendant may be allowed to give bond to secure plaintiff: *Durant v. Crowell*, 97-367—and it is error to appoint without giving defendant this opportunity, *Stith v. Jones*, 101-360. But the fact that defendant has given bond under section 495 will not prevent the appointment of a receiver: *Arey v. Williams*, 154-610.

Cases merely referring to section: *Moore v. Moore*, 131-372; *Wilson v. Rankin*, 129-450; *Bank v. Cotton Mills*, 115-513.

862. Receiver's bond. A receiver appointed in an action or special proceeding must, before entering upon his duties, execute and file with the clerk of the court in which the action is pending an undertaking payable to the adverse party with at least two sufficient sureties in a penalty fixed by the judge making the appointment, conditioned for the faithful discharge of his duties as receiver. And the judge having jurisdiction thereof may at any time remove the receiver, or direct him to give a new undertaking, with new sureties, and on the like condition. This section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver.

Rev., s. 849; Code, s. 383.

For giving bond in surety companies, see sections 338, 339. Liability of receiver: *Alston v. Massenburg*, 125-582; *Collins v. Gooch*, 97-186. Clerk's bond liable as receiver's bond, when: *Alston v. Massenburg*, 125-582; *Waters v. Melson*, 112-89; *Boothe v. Upchurch*, 110-62; *Presson v. Boone*, 108-78; *Syme v. Bunting*, 91-48; *Rogers v. Odum*, 86-432. Practice in

bringing action on bond: *Boothe v. Upchurch*, 110-62; *Black v. Gentry*, 119-502; *Atkinson v. Smith*, 89-72; *Bank v. Creditors*, 86-323.

ART. 38. DEPOSIT OR DELIVERY OF MONEY OR OTHER PROPERTY

863. Ordered paid into court. When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the judge may order it deposited in court, or delivered to such party with or without security, subject to the further direction of the judge.

Rev., s. 850; Code, s. 380; C. C. P., s. 215.

864. Ordered seized by sheriff. When, in the exercise of his authority, a judge has ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the judge, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the judge.

Rev., s. 851; Code, s. 381; C. C. P., s. 215.

For punishment as for contempt, see section 985; also *Worth v. Bank*, 121-344.

865. Defendant ordered to satisfy admitted sum. When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the judge, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy.

Rev., s. 852; Code, s. 382; C. C. P., s. 215.

Cases supporting section: *Curran v. Kerehner*, 117-264; *Parker v. Bledsoe*, 87-222.

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES

ART. 39. MANDAMUS

866. Begun by summons and verified complaint. All applications for writs of mandamus must be made by summons and complaint, which must be duly verified.

Rev., s. 822; Code, s. 622; 1871-2, c. 75.

GENERAL NATURE OF REMEDY. Nature and use of mandamus: *Edgerton v. Kirby*, 156-347; *Bear v. Comrs.*, 124-204; *Burton v. Furman*, 115-166; *Lyon v. Comrs.*, 120-237; *Haymore v. Comrs.*, 85-268; *Belmont v. Reilly*, 71-260; *Brown v. Turner*, 70-93. Distinguished from mandatory injunction: *Telephone Co. v. Telephone Co.*, 159-9. Superior court has jurisdiction to issue writ: *Tate v. Comrs.*, 122-661—but a justice of the peace has not, *Robinson v. Howard*, 84-151; *Wright v. Kinney*, 123-618. As to contents of complaint to compel levying of tax to pay debt, see *Blanton v. Comrs.*, 101-532. If on the hearing at chambers material issues of fact are raised, the judge should transfer the case to the civil issue docket: *Coleman v. Coleman*, 148-299; *Edgerton v. Kirby*, 156-347.

IN WHAT CASES MANDAMUS WILL LIE. Mandamus lies in favor of one who wishes to be restored to an unoccupied office: *McCullers v. Comrs.*, 158-75; *Rhodes v. Love*, 153-468; *Lyon v. Comrs.*, 120-237—of a treasurer to compel county commissioners to consider and pass on claim for commissions, *Bennett v. Comrs.*, 125-468, cited in *Martin v. Clark*, 135-178; *Koonce v. Comrs.*, 106-192—to compel city aldermen to call election when proper number of voters petition, *Pace v. Raleigh*, 140-65—to compel school authorities to maintain school term

up to constitutional limit, *Lowery v. School Trustees*, 140-33—to compel city officer to issue permit for property owner to connect property with sewer, *Slaughter v. O'Berry*, 126-181—to compel issue of corporate stock where proper tender of payment made, *Wilson v. Telephone Co.*, 139-395—to compel county commissioners to issue bonds, *Jones v. Comrs.*, 135-218, 137-579; see *Railroad v. Jenkins*, 65-173—to compel county treasurer to pay claims, *Audit Co. v. McKenzie*, 147-461; *Martin v. Clark*, 135-178; *Wright v. Kinney*, 123-618; *Comrs. v. Comrs.*, 73-298—to compel corporation commission to assess railroad for taxation, *Jackson v. Commission*, 130-386—to compel proper city and county authorities to levy and collect taxes with which to pay claims, *Broadfoot v. Fayetteville*, 124-478; *Bear v. Comrs.*, 124-204; *Hughes v. Comrs.*, 107-528; *Leach v. Comrs.*, 84-829; *Gooch v. Gregory*, 65-142; *Lutterloh v. Comrs.*, 65-403; *Pegram v. Comrs.*, 64-557; *Winslow v. Comrs.*, 64-218—to compel county commissioners to pay a debt out of any money in hand, *Drainage Dist. v. Comrs.*, 174-738—to compel commissioners to levy proper poll tax, *R. R. v. Comrs.*, 148-220—to compel county commissioners to pay expense of post-mortem examination, *Withers v. Comrs.*, 163-341—to compel county commissioners to levy tax in excess of constitutional limitation for road improvements without vote of people, *Tate v. Comrs.*, 122-812—to compel county commissioners to grant petition for stock law, *Perry v. Comrs.*, 130-558—to compel proper authorities to issue license, *State v. Snipes*, 161-243—to compel public officers to discharge mere ministerial duties, *Russell v. Ayer*, 120-180; *Wool v. Edenton*, 115-10; *County Bd. v. State Bd.*, 106-81—to compel officer to perform specific duty required by law, *Kitchin v. Wood*, 154-565; *Coleman v. Coleman*, 148-299; *Johnston v. Board of Elections*, 172-162; *Bickett v. Tax Commission*, 177-433; *Bennett v. Comrs.*, 125-468; *Russell v. Ayer*, 120-180; *Harrington v. King*, 117-117; *Railroad v. Jenkins*, 68-502; *Tate v. Comrs.*, 122-812; *Wool v. Edenton*, 115-10; *State v. Justices*, 24-430—to compel a municipal corporation which has already occupied land for public purposes to proceed to have damages assessed, *McDowell v. Asheville*, 112-747—to compel payment of a salary to an officeholder, *White v. Auditor*, 126-570; but see *Cotten v. Ellis*, 52-545; *Bayne v. Jenkins*, 66-356; *Boner v. Adams*, 65-639—to compel public officer to deposit public funds in proper depository, *Bearden v. Fullam*, 129-477—to compel commissioners to draw a grand jury, *Mott v. Comrs.*, 126-866—to compel school committeemen to issue warrant for the salary of teacher, *Robinson v. Howard*, 84-151—to compel county superintendent of schools to sign school order, *Ducker v. Venable*, 126-447—to compel county auditor to audit a claim, *Wilson v. Holding*, 170-352—to compel county officers to deliver tax books to sheriff, *Graded School v. McDowell*, 157-316—to compel the lower court to obey the mandate of supreme court as to disposition of case, *Tussey v. Owen*, 147-335—to compel aldermen to elect recorder for recorder's court, *Battle v. Rocky Mount*, 156-329—to compel installation of telephones without discrimination, *Godwin v. Telephone Co.*, 136-259; *Walls v. Strickland*, 174-298; see, also, *Telephone Co. v. Telephone Co.*, 159-9.

IN WHAT CASES MANDAMUS WILL NOT LIE. Mandamus does not lie to compel an unlawful or prohibited act: *Betts v. Raleigh*, 142-229—nor to compel state board of education to apportion money to schools under circumstances recited in *Bd. of Ed. v. State Board*, 114-313—nor to regulate or control affairs of a foreign fraternal insurance company, *Brenizer v. Royal Arceanum*, 141-409—nor to compel county commissioners to levy tax beyond constitutional limit, *Cromartie v. Comrs.*, 87-134; but see *Tate v. Comrs.*, 122-812—nor to compel county commissioners to keep in repair a bridge which a former board contracted so to keep, *Glenn v. Comrs.*, 139-412—nor to compel the county commissioners to provide a sufficient courthouse, *State v. Leeper*, 146-655; *Ward v. Comrs.*, 146-534—nor to compel judge below to send up a correct statement of the case upon affidavit that case is incorrect, *McDaniel v. King*, 89-29—nor to compel telephone company to install telephone in bawdy house, *Godwin v. Telephone Co.*, 136-258—nor to control the discretion of county commissioners in the granting of liquor license, *Barnes v. Comrs.*, 135-27; *Bridgers v. Comrs.*, 135-25; *Loughran v. Hickory*, 129-281; *Burton v. Furman*, 115-166; *Comrs. v. Comrs.*, 107-335; *Jones v. Comrs.*, 106-436; *Muller v. Comrs.*, 89-171—nor to compel performance of an official act involving the exercise of judgment and discretion, *Dula v. School Trustees*, 177-426; *Britt v. Bd. of Canvassers*, 172-797; *Key v. Bd. of Education*, 170-123; *Edgerton v. Kirby*, 156-347; *Battle v. Rocky Mount*, 156-329; *Vineberg v. Day*, 152-355; *Bd. of Education v. Comrs.*, 150-116; *Burke v. Comrs.*, 148-46; *Ewbank v. Turner*, 134-77; *Harrington v. King*, 117-117—nor to compel register of deeds to allow copies of records to be taken, *Newton v. Fisher*, 98-20—nor to compel sheriff to sell land liable to execution where there is adequate remedy at law,

Wright v. Bond, 127-39—nor to compel state treasurer to pay warrant improperly drawn, Arendell v. Worth, 125-111—nor to compel state treasurer to pay claims which he claims are not due or are fraudulent, Garner v. Worth, 122-250—nor to try title to office, Brown v. Turner, 70-93; Ellison v. Raleigh, 89-125; Burke v. Comrs., 148-46; Rhodes v. Love, 153-468; Rogers v. Powell, 174-388—nor to direct state treasurer to pay claims against state, however just and unquestioned, when no appropriation made for it, Garner v. Worth, 122-250—nor to compel state treasurer to pay claim when no warrant is issued for it, Burton v. Furman, 115-166—nor to annul a contract, Printing Co. v. Hoey, 124-794—nor to compel auditor to issue a warrant, Burton v. Furman, 115-166; see Cotten v. Ellis, 52-545—nor to compel presiding officers of two houses of legislature to sign act passed by that body, Scarborough v. Robinson, 81-409—nor to compel county commissioners to induct ineligible persons into office, McNeill v. Somers, 96-467—nor to compel county commissioners to pay salary of county superintendent of health, unless they approve the amount, Halford v. Senter, 169-546; but see section 7067.

867. For money demand returnable at term. In applications for a writ of mandamus when the plaintiff seeks to enforce a money demand, the summons, pleadings and practice are the same as prescribed for civil actions.

Rev., s. 823; Code, s. 623; 1871-2, c. 75, s. 2.

Summons returnable in term time: Ducker v. Venable, 126-447; Rogers v. Jenkins, 98-129; Steele v. Comrs., 70-137. If improperly returned to chambers, should not be dismissed, but transferred to proper docket: Martin v. Clark, 135-178; Jones v. Comrs., 135-218—but transfer waived if not moved for, *Ibid.* As to what is a money demand, see Ducker v. Venable, 126-447; Coleman v. Coleman, 148-299.

868. For other relief returnable in vacation; issues of fact. When the plaintiff seeks relief other than the enforcement of a money demand, the summons must be made returnable before a judge of the superior court at chambers, or in term at a day specified in the summons, not less than ten days after the service of the summons and complaint upon the defendant; at which time the court, except for good cause shown, shall hear and determine the action, both as to law and fact. However, when an issue of fact is raised by the pleading, it is the duty of the court, upon the motion of either party, to continue the action until the issue of fact can be decided by a jury at the next regular term of the court.

Rev., s. 824; Code, s. 623; 1871-2, c. 75, s. 3.

Summons may be made returnable at chambers: Ducker v. Venable, 126-447; Horne v. Comrs., 122-466; Rogers v. Jenkins, 98-129; Steele v. Comrs., 70-137; Coleman v. Coleman, 148-299. **An alternative mandamus is generally issued in the first instance, to be followed by a peremptory mandamus:** Battle v. Rocky Mount, 156-329; Hughes v. Comrs., 107-598; Fry v. Comrs., 82-304. **A mandamus to compel the performance of an act involving discretion requires the officer to proceed to exercise his discretion:** Dula v. School Trustees, 177-426; Battle v. Rocky Mount, 156-329; Burke v. Comrs., 148-46.

ART. 40. QUO WARRANTO

869. Writs of sci. fa. and quo warranto abolished. The writs of scire facias and of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this article.

Rev., s. 826; Code, s. 603; C. C. P., s. 362; R. C., c. 26, ss. 5, 25.

Power of state to change remedies and effect of statute abolishing writ of scire facias and quo warranto reviewed: McCall v. Webb, 135-356; McDowell v. Asbury, 66-444; Kingsbury v. Hughes, 61-328; Riddick v. Hinton, 61-291; Bingham v. Richardson, 61-315; Mardre v. Felton, 61-279; Parker v. Shannonhouse, 61-209. **An action in the nature of a quo warranto the proper remedy to try title to public office:** Markham v. Simpson, 175-135; Rogers v.

Powell, 174-388; Rhodes v. Love, 153-468; Burke v. Jenkins, 148-25; Burke v. Comrs., 148-46; Cozart v. Fleming, 123-547; Lyon v. Comrs., 120-237; State v. Norman, 82-687; Davis v. Moss, 81-303; Saunders v. Gatling, 81-298; Swain v. McRae, 80-111; Cloud v. Wilson, 72-155; Brown v. Turner, 70-93—but does not lie against one not in office, Cozart v. Fleming, 123-559; but see same case, page 560; see Cunningham v. Sprinkle, 124-640. Whether a liquor dealer has violated the law under which license granted, cannot be tested by quo warranto: Hargett v. Bell, 134-396.

In what sense a writ of scire facias is abolished: McDowell v. Asbury, 66-444.

870. Action by attorney-general. An action may be brought by the attorney-general in the name of the state, upon his own information or upon the complaint of a private party, against the parties offending, in the following cases:

1. When a person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state; or,

2. When a public officer, civil or military, has done or suffered an act which, by law, makes a forfeiture of his office.

3. When any person, natural or corporate, has or claims to have or hold any rights or franchises by reason of a grant or otherwise, in violation of the provisions of the section of article one of the chapter entitled State Lands which declares entries and grants not authorized by that chapter to be void and not to constitute color of title.

Rev., s. 827; Code, s. 607; C. C. P., s. 366; 1911, cc. 195, 201.

For actions in nature of quo warranto against corporations, see Corporations, Art. 8, Dissolution.

For actions by state to forfeit grants, see State Lands, s. 7596.

What is a public office: State v. Knight, 169-333; Groves v. Barden, 169-8; Salisbury v. Croom, 167-223; Midgett v. Gray, 159-443; State ex rel. Wooten v. Smith, 145-476; State Prison v. Day, 124-362; Wood v. Bellamy, 120-212; McNeill v. Somers, 96-467; Doyle v. Raleigh, 89-133; Eliason v. Coleman, 86-236; Brown v. Turner, 70-93; Nichols v. McKee, 68-429; Welker v. Bledsoe, 68-457; Clark v. Stanley, 66-59; Hoke v. Henderson, 15-1.

Contested election cases (excluding the "office-holding cases" which, see below): Johnston v. Board of Elections, 172-162; Britt v. Board of Canvassers, 172-797; Whitehead v. Pittman, 165-89; Echerd v. Viele, 164-122; State ex rel. Spruill v. Bateman, 162-588; State ex rel. Barnett v. Midgett, 151-1; Mitchell v. Alley, 126-84; Cozart v. Fleming, 123-547; Houghtalling v. Taylor, 122-141; Shennonhouse v. Withers, 121-377; Lyon v. Comrs., 120-237; Stanford v. Ellington, 117-158; Hines v. Vann, 118-3; Foard v. Hall, 111-369; Van Amringe v. Taylor, 108-196; Hampton v. Waldrop, 104-453; Deberry v. Nicholson, 102-465; Gatling v. Boone, 98-573, 101-61; Roberts v. Calvert, 98-580; Hannon v. Grizzard, 96-293; Kilburn v. Patterson, 98-593; Hahn v. Stinson, 98-591; Hancock v. Hubbs, 98-589; Ellison v. Raleigh, 89-125; Hannon v. Comrs., 89-123; Deloatch v. Rogers, 86-358; State v. Norman, 82-687; Davis v. Moss, 81-303; Saunders v. Gatling, 81-298; People v. Wilson, 72-155; People v. Hilliard, 72-169; Norfleet v. Staton, 73-546; Jones v. Comrs., 77-280; State v. Tate, 66-231; Patterson v. Hubbs, 65-119; Clark v. Stanly, 66-59.

Cases known as the "officeholding cases," being contests for office based principally upon the legislative right to abolish an office and recreate it, and thereby oust the incumbent, and defended principally upon the doctrine that an officeholder has a property right in the office: Mial v. Ellington, 134-131 (overruling Hoke v. Henderson, 15-1, on the point that one has property in an office, and all other cases based thereon); Taylor v. Vann, 127-243; White v. Murray, 126-153; Wilson v. Neal, 126-781; Mott v. Griffith, 126-775; Baker v. Hobgood, 126-149; Dalby v. Hancock, 125-325; White v. Hill, 125-194; Gattis v. Griffin, 125-333; McCall v. Zachary, 125-249, 131-466; McCall v. Webb, 125-243; McCall v. Gardner, 125-238; Abbott v. Beddingfield, 125-256; Greene v. Owen, 125-212; Bryan v. Patrick, 124-651; State Prison v. Day, 124-362; Wilson v. Jordan, 124-683; Cunningham v. Sprinkle, 124-640; R. R. v. Dortch, 124-663; Ward v. Elizabeth City, 121-1; Caldwell v. Wilson, 121-468; Wood v. Bellamy, 120-212; Lusk v. Sawyer, 120-225; Miller v. Alexander, 122-721; McDonald v. Mor-

row, 119-676; Trotter v. Mitchell, 115-193; State v. Womble, 112-867; Bd. of Ed. v. Kenan, 112-568; McNamee v. Alexander, 109-246; State v. Cutshall, 110-545; Lyon v. Akin, 78-258; Prairie v. Worth, 78-169; Vann v. Pipkin, 77-408; Bunting v. Gales, 77-383; Brown v. Turner, 70-93; Clark v. Stanly, 66-59; King v. Hunter, 65-603; State v. Smith, 65-369; Galloway v. Jenkins, 63-147; Barnes v. Barnes, 53-366; Cotten v. Ellis, 52-545; State v. Glen, 52-321; Thompson v. Floyd, 47-313; State v. Moss, 47-66; Houston v. Bogle, 32-496; Hoke v. Henderson, 15-1.

In whose name and what form action brought, see *Atty.-General v. R. R.*, 134-481; *State v. Norman*, 82-687; *Saunders v. Gatling*, 81-298; *People v. Heaton*, 77-18; *Tuck v. Hunt*, 73-24; *People v. Hilliard*, 72-169; *Patterson v. Hubbs*, 65-119; *Loftin v. Sowers*, 65-251. Plaintiff's right to recover in a contested election case depends upon his own right to the office and not upon defects in defendant's title: *Stanford v. Ellington*, 117-158.

Cases where forfeiture of public office claimed: *Caldwell v. Wilson*, 121-425; *Vann v. Pipkin*, 77-408.

Action brought by citizen and taxpayer to try right of one person to hold two offices: *Barnhill v. Thompson*, 122-493; *Foard v. Hall*, 111-369; *Hines v. Vann*, 118-3; *Midgett v. Gray*, 158-133; s. c., 159-443. What is a usurpation of or intrusion into office hereunder, discussed in *Brown v. Turner*, 70-93.

Attorney-general cannot of his own motion bring action to vacate charter: *Attorney-General v. R. R.*, 134-481. Proper remedy to determine right of foreign corporation to do business in the state: *Mining Co. v. Lumber Co.*, 173-593—to restrain a corporation from exercising unwarranted powers, *Power Co. v. Power Co.*, 171-248; *Land Co. v. Traction Co.*, 162-314—to vacate franchise: *Attorney-General v. R. R.*, 134-481—to vacate oyster entry, *Blount v. Simmons*, 120-19.

871. Action by private person with leave. When application is made to the attorney-general by a private relator to bring such an action, he shall grant leave that it may be brought in the name of the state, upon the relation of such applicant, upon the applicant tendering to the attorney-general satisfactory security to indemnify the state against all costs and expenses which may accrue in consequence of the action.

Rev., s. 828; Code, s. 608; 1874-5, c. 76; 1881, c. 330.

For costs in such action, see *Costs*, s. 13.

For involuntary dissolution of corporations at the instance of private persons, see *Corporations*, s. 1185.

The above section allowing prosecution of an action in the name of the state to assert the right of a citizen to a public office is not for that reason unconstitutional: *McCall v. Webb*, 135-356. The action is brought by the relator as the real party in interest: *Jones v. Riggs*, 154-281. The fact that the person receiving the highest number of votes is ineligible does not entitle the next highest to the office: *State v. Bateman*, 162-588.

As to relator in contested election cases, and in other cases where right of office involved, see *Houghtalling v. Taylor*, 122-141; *Barnhill v. Thompson*, 122-493; *Shennonhouse v. Withers*, 121-376; *Hines v. Vann*, 118-3; *Foard v. Hall*, 111-369; *Saunders v. Gatling*, 81-298, and cases cited; *Tuck v. Hunt*, 73-24; *Tate v. Morehead*, 65-681; *Loftin v. Sowers*, 65-251—in action to try title of person holding two offices at one time, *Barnhill v. Thompson*, 122-493; *Midgett v. Gray*, 158-133; s. c., 159-443—in action to vacate a charter, *Attorney-General v. R. R.*, 134-481—in action to vacate an oyster entry, *Blount v. Simmons*, 120-19.

Leave of attorney-general is a necessary requisite for relator to sue: *Midgett v. Gray*, 158-133; s. c., 159-443. How such leave may be shown: *Echerd v. Viele*, 164-122. As to when indemnifying bond may be filed and consent to bring action secured: *Shennonhouse v. Withers*, 121-376. Effect of judgment for relator: *Burke v. Jenkins*, 148-25.

Case merely referring to section: *Blount v. Simmons*, 120-20.

872. Solvent sureties required. The attorney-general, before granting leave to a private relator to bring a suit to try the title to an office, may require two sureties to the bond required by law to be filed to indemnify the state against

costs and expenses, and require such sureties to justify, and may require such proof and evidence of the solvency of the sureties as is satisfactory to him.

Rev., s. 829; 1901, c. 595, s. 2.

See *Midgett v. Gray*, 158-133; s. e., 159-443.

873. Leave withdrawn and action dismissed for insufficient bond. When the attorney-general has granted leave to a private relator to bring an action in the name of the state to try the title to an office, and it afterwards is shown to the satisfaction of the attorney-general that the bond filed by the private relator is insufficient, or that the sureties are insolvent, the attorney-general may recall and revoke such leave, and upon a certificate of the withdrawal and revocation by the attorney-general to the clerk of the court of the county where the action is pending, it is the duty of the presiding judge, upon motion of the defendant, to dismiss the action.

Rev., s. 830; 1891, c. 595.

See *Midgett v. Gray*, 158-133; s. e., 159-443.

874. Arrest and bail of defendant usurping office. When action is brought against a person for usurping an office, the attorney-general, in addition to the statement of the cause of action, may set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to and by means of his usurpation of the office, an order shall be granted by a judge of the superior court for the arrest of the defendant, and holding him to bail; and thereupon he shall be arrested and held to bail in the manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

Rev., s. 831; Code, s. 609; C. C. P., s. 369; 1883, c. 102.

As to complaint hereunder: *Houghtalling v. Taylor*, 122-141; *Hancock v. Hubbs*, 98-589; *Hahn v. Stinson*, 98-591; *Oden v. Bates*, 98-594; *Kilburn v. Patterson*, 98-593; *Patterson v. Hubbs*, 65-119.

875. Several claims tried in one action. Where several persons claim to be entitled to the same office or franchise, one action may be brought against all of them, in order to try their respective rights to the office or franchise.

Rev., s. 832; Code, s. 614; C. C. P., s. 374.

Objection of misjoinder sustained in *Cromartie v. Parker*, 121-198.

876. Trials expedited. All actions to try the title or right to any state, county or municipal office stand for trial at the return term of the summons, if a copy of the complaint was served with the summons at least thirty days before the return day thereof; and it is the duty of the judges to expedite the trial of these actions, and to give them precedence over all others, civil or criminal. It is unlawful to appropriate any public funds to the payment of counsel fees in any such action.

Rev., s. 833; Code, s. 616; 1901, c. 42; 1874-5, c. 173.

Section cited in *Graded School v. McDowell*, 157-316.

877. Time for bringing action. All actions brought by a private relator, upon the leave of the attorney-general, to try the title to an office must be brought,

and a copy of the complaint served on the defendant, within ninety days after his induction into the office to which the title is to be tried; and when it appears from the papers in the cause, or is otherwise shown to the satisfaction of the court, that the summons and complaint have not been served within ninety days, it is the duty of the judge upon motion of defendant to dismiss the action at any time before the trial, at the cost of the plaintiff.

Rev., s. 834; 1901, c. 519; 1903, c. 556.

This remedy does not apply where defendant has held the office more than ninety days before plaintiff's cause of action accrued, or where notice cannot be given: *Rhodes v. Love*, 153-468.

878. Defendant's undertaking before answer. Before the defendant may answer or demur to the complaint he must execute and file in the superior court clerk's office of the county wherein the suit is pending, an undertaking, with good and sufficient surety, in the sum of two hundred dollars, which may be increased from time to time in the discretion of the judge, to be void upon condition that the defendant pays to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments as may or ought to have come into the hands of the defendant, as the plaintiff may recover.

Rev., s. 835; 1895, c. 105.

Section cited in *Graded School v. McDowell*, 157-316.

879. Possession of office not disturbed pending trial. In any civil action pending in any of the courts of this state in which the title to an office is involved, the defendant being in the possession of the office and discharging the duties thereof shall continue therein pending the action, and no judge shall make a restraining order interfering with or enjoining such officer in the premises. The officer shall, notwithstanding any such order, continue to exercise the duties of the office pending the litigation, and receive the emoluments thereof.

Rev., s. 836; 1899, c. 33.

Section cited in *Rogers v. Powell*, 174-388.

880. Judgment by default and inquiry on failure of defendant to give bond. At any time after a duly verified complaint is filed alleging facts sufficient to entitle plaintiff to the office, whether this complaint is filed at the beginning of the action or later, the plaintiff may, upon ten days notice to the defendant or his attorney of record, move before the judge resident in or riding the district, at chambers, to require the defendant to give the undertaking specified in second section preceding. It is the duty of the judge to require the defendant to give the undertaking within ten days, and if it is not so given, the judge shall render judgment in favor of plaintiff and against defendant for the recovery of the office and the costs, and a judgment by default and inquiry to be executed at a term for damages, including loss of fees and salary. Upon the filing of the judgment for the recovery of such office with the clerk, it is his duty to issue and the sheriff's duty to serve the necessary process to put the plaintiff into possession of the office. If the defendant shall give the undertaking, the court, if judgment is rendered for plaintiff, shall render judgment against the defendant and his sureties for costs and damages, including loss of fees and salary. Nothing herein prevents the judge's extending, for cause, the time in which to give the undertaking.

Rev., s. 837; 1899, c. 49; 1895, c. 105, s. 2.

881. Service of summons and complaint. The service of the summons and complaint as hereinbefore provided may be made by leaving a copy at the last residence or business office of the defendant or defendants, and service so made shall be deemed a legal service.

Rev., s. 838; 1899, c. 126.

882. Judgment in such actions. In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party alleged to be entitled, or only upon the right of the defendant, as justice requires. When the defendant, whether a natural person or a corporation, against whom the action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that the defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against him. The court may also, in its discretion, fine the defendant a sum not exceeding two thousand dollars.

Rev., ss. 839, 840; Code, ss. 610, 615; R. C., c. 95; C. C. P., ss., 370, 375; Const., Art IX, s. 5.

Judgment rendered, how, when action brought by attorney-general on his own information and not on behalf of contestant: *Saunders v. Gatling*, 81-298; *People v. Hilliard*, 72-169. A judgment for relator compels his admission to the office, and if he fails to give the official bond he may be ousted by application to revoke the judgment: *Burke v. Comrs.*, 148-46.

Section referred to in *State v. Ballard*, 122-1028.

883. Mandamus to aid relator. In any civil action brought to try the title or right to hold any office, when the judgment of the court is in favor of the relator in the action, it is the duty of the court to issue a writ of mandamus or such other process as is necessary and proper to carry the judgment into effect, and to induct the party entitled into office.

Rev., s. 841; 1885, c. 406, s. 1.

See decision rendered prior to this enactment in *Hannon v. Comrs.*, 89-125. After judgment in favor of relator a mandamus will issue to induct him into the office: *Rhodes v. Love*, 153-468.

884. Appeal; bonds of parties. No appeal by the defendant to the supreme court from the judgment of the superior court in such action shall stay the execution of the judgment, unless a justified undertaking is executed on the part of the appellant by one or more sureties, in a sum to be fixed by the court, conditioned that the appellant will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellant by virtue or under color of the office. In no event shall the judgment be executed pending appeal, unless a justified undertaking is executed on the part of the appellee by one or more persons in a sum to be fixed by the court, conditioned that the appellee will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellee by virtue or under color of office during his occupancy thereof.

Rev., s. 842; 1885, c. 406, s. 2.

See decision prior to this enactment in *Hannon v. Comrs.*, 89-125.

885. Relator inducted into office; duty and damages. If the judgment is rendered in favor of the person alleged to be entitled, he shall be entitled, after taking the oath of office and executing such official bond as may be required by

law, to take upon himself the execution of the office. It is his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he has been excluded. He may then recover by action the damages which he has sustained by reason of the usurpation by the defendant of the office.

Rev., ss. 843, 844; Code, ss. 611, 613; C. C. P., ss. 371, 373.

Where relator had been appointed and qualified, supreme court decision in his favor, upon being filed, *ex proprio vigore* places him in possession: *Caldwell v. Wilson*, 121-480.

The judgment in a proceeding to recover possession of an usurped office is self-executing, and operates itself as ouster of defendant, requiring no further and final process to render it effectual: *Hannon v. Comrs.*, 89-124. Section cited in *Rhodes v. Love*, 153-468.

Judgment in favor of one claiming office lays foundation for action for damages for time office has been wrongfully withheld: *McCall v. Webb*, 126-760, 135-361; *Swain v. McRae*, 80-113; *Jones v. Jones*, 80-127; *Howerton v. Tate*, 70-161—and failure to get judgment in *quo warranto* for fees and salary is a bar to a new and independent action for such fees and salary, *McCall v. Webb*, 135-356; *Graded School v. McDowell*, 157-316.

886. Refusal to surrender official papers misdemeanor. If a person against whom a judgment has been rendered in an action brought to recover a public office shall fail or refuse to turn over, on demand, to the person adjudged to be entitled to such office, all papers, documents and books belonging to such office, he shall be guilty of a misdemeanor.

Rev., s. 3601; Code, s. 612; C. C. P., 372.

887. Action to recover property forfeited for state. When any property, real or personal, is forfeited to the state, or to any officer for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in any superior court.

Rev., s. 845; Code, s. 621; C. C. P., s. 381.

ART. 41. WASTE

888. Remedy and judgment. Wrongs, remediable by the old action of waste, are subjects of action as other wrongs; and the judgment may be for damages, forfeiture of the estate of the party offending, and eviction from the premises.

Rev., s. 853; Code, s. 624; C. C. P., s. 383.

Waste defined: *Norris v. Laws*, 150-599; *Fleming v. Sexton*, 172-250; *Sherrill v. Connor*, 107-630; *King v. Miller*, 99-583; *Dills v. Hampton*, 92-565; *Ballentine v. Poyner*, 3-110; *Ward v. Sheppard*, 3-283. Instances of what is and what is held not to be waste: *Cherry v. Canal Co.*, 140-422; *Starnes v. Hill*, 112-9; *Sherrill v. Connor*, 107-630; *Dorsey v. Moore*, 100-41; *King v. Miller*, 99-583; *Sledge v. Blum*, 63-374; *Dodd v. Watson*, 57-48; *Lambeth v. Warner*, 55-165; *Davis v. Williams*, 40-308; *Shine v. Wilcox*, 21-631; *Carr v. Carr*, 20-317; *Parkins v. Coxe*, 3-339; *Ballentine v. Poyner*, 3-268; *Ward v. Sheppard*, 3-283. Statute must be followed: *Hybart v. Jones*, 130-227. In action by widow against heirs to recover payments allotted to her as dower and made a charge on land, heirs cannot set up her waste as counterclaim, but must proceed hereunder: *Hybart v. Jones*, 130-227. Rights and liabilities of life tenant in cutting timber: *Fleming v. Sexton*, 172-250; *Thomas v. Thomas*, 166-627; *Norris v. Laws*, 150-599.

889. For and against whom action lies. In all cases of waste, an action lies in the superior court at the instance of him in whom the right is, against all persons

committing the waste, as well tenant for term of life as tenant for term of years and guardians.

Rev., s. 854; Code, s. 625; R. C., c. 116, s. 1; 52 Hen. III, c. 23; 6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5.

Action for waste lies in favor of him who hath the estate of inheritance, the remainderman or reversioner: *Cherry v. Canal Co.*, 140-422; *Dorsey v. Moore*, 100-41; *Wall v. Williams*, 91-477; *Burnett v. Thompson*, 51-210; *Browne v. Blick*, 7-511—but not in favor of a contingent remainderman, who must be protected by injunction, *Richardson v. Richardson*, 152-705; *Latham v. Lumber Co.*, 139-9; *Cowand v. Meyers*, 99-198; *Gordon v. Lowther*, 75-193; *Douthett v. Bodenhamer*, 57-444; *Braswell v. Morehead*, 45-26. Action may be brought by reversioner, though he may have purchased particular estate after waste committed: *Dupree v. Dupree*, 49-387. Action for waste lies against tenant in dower, when: *Carr v. Carr*, 20-317—but not against husband of such tenant, *Davis v. Gilliam*, 40-308—unless such husband attempts to remove a house therefrom, even though he built it himself, *Dozier v. Gregory*, 46-100. Action for permissive waste can be brought against life tenant: *Sherrill v. Connor*, 107-630; *Norris v. Laws*, 150-599. Creditor cannot bring action hereunder: *Jones v. Britton*, 102-174. The right to sue for waste includes the right to restrain its commission: *Morrison v. Morrison*, 122-598; *Person v. Person*, 154-453.

890. Tenant in possession liable. Where a tenant for life or years grants his estate to another, and still continues in the possession of the lands, tenements, or hereditaments, an action lies against the said tenant for life or years.

Rev., s. 855; Code, s. 626; R. C., c. 116, s. 2; 11 Hen. VI, c. 5.

891. Action by tenant against cotenant. Where a joint tenant or a tenant in common commits waste, an action lies against him at the instance of his cotenant or joint tenant.

Rev., s. 856; Code, s. 627; R. C., c. 116, s. 4; 13 Edw. I, c. 22.

Under this section one tenant in common may sue his cotenant for cutting crossties and hauling them away: *Hinson v. Hinson*, 120-400—and since right to sue carries with it right to restrain, one tenant can restrain his cotenant, *Morrison v. Morrison*, 122-598. As to what is waste as between tenants in common for which action can be brought, see *Darden v. Cowper*, 52-210; *Smith v. Sharpe*, 44-91; *Walling v. Burroughs*, 43-60; *Vick v. Tripp*, 153-90.

892. Action by heirs. Every heir may bring action for waste committed on lands, tenements, or hereditaments of his own inheritance, as well in the time of his ancestor as in his own.

Rev., s. 857; Code, s. 628; R. C., c. 116, s. 5; 6 Edw. I, c. 5; 11 Hen. VI, c. 5; 20 Edw. I, st. 2.

In a suit by widow against heirs to recover payments allotted to her as dower and made charge on land, heirs cannot set up by way of counterclaim damages for waste committed by widow, but must proceed under statute: *Hybart v. Jones*, 130-227.

893. Judgment for treble damages and possession. In all cases of waste, when judgment is against the defendant, the court may give judgment for treble the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted, if the damages are not paid on or before a day to be named in the judgment.

Rev., s. 858; Code, s. 629; R. C., c. 116, s. 3; 6 Edw. I, c. 5; 20 Edw. I, st. 2.

Judgments according to this section: *Hybart v. Jones*, 130-227; *Sherrill v. Connor*, 107-543. Not error to render judgment for damages merely, and not also for place wasted: *Bright v. Wilson*, 1-251. As to waste by plaintiff set up as counterclaim, see *Hybart v. Jones*, 130-227.

ART. 42. NUISANCE

894. **Remedy for nuisance.** Injuries remediable by the old writ of nuisance are subjects of action as other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or both.

Rev., s. 825; Code, s. 630; C. C. P., s. 387.

For injunctions against nuisances, public and private, see annotations under section 843. Remedy for nuisance is by injunction, not mandamus: *Horne v. Comrs.*, 122-470. Judgments with conditions attached: *Hickory v. R. R.*, 143-451; *Hyatt v. Myers*, 71-271. To abate a public nuisance by civil action the plaintiff must show special damage: *Pruitt v. Bethell*, 174-454; *McManus v. R. R.*, 150-655. When permanent damages may be recovered and when temporary damages for nuisance: *Rhodes v. Durham*, 165-679; *Webb v. Chemical Co.*, 170-662; *Donnell v. Greensboro*, 164-331; *Moser v. Burlington*, 162-141; *Hines v. Rocky Mount*, 162-409; *Little v. Lenoir*, 151-415; *Taylor v. R. R.*, 145-400. Manner of estimating damages: *Brown v. Chemical Co.*, 162-84; s. c., 165-421. When the parties have presented the case with a view to permanent damages, the court will not change it: *Ibid.*

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS

ART. 43. COMPROMISE

895. **By agreement receipt of less sum is discharge.** In all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same.

Rev., s. 859; Code, s. 574; 1874-5, c. 178.

This section constitutional: *Koonce v. Russell*, 103-179. A compromise made since this enactment is presumed to have been made with reference thereto: *Ibid.* The payment of a less amount in accordance with agreement in compromise of whole is a full discharge: *York v. Westall*, 143-276; *Wittkowsky v. Baruch*, 127-313; *Kerr v. Sanders*, 122-635; *Pruden v. R. R.*, 121-509; *Petit v. Woodlief*, 115-120; *Jones v. Mizell*, 104-16; *Koonce v. Russell*, 103-179; *Tiddy v. Harris*, 101-593—and a contract to compromise at certain figures is enforceable, *Boykin v. Buie*, 109-501. As to certain agreements of compromise being within statute of frauds, see *York v. Westall*, 143-276. Where agreement of compromise contains condition to be performed by plaintiff before payment, failure of defendant to pay does not invalidate compromise, plaintiff having failed to comply with condition: *Ramsey v. Browder*, 136-251. Agreement of compromise by telegram cannot be altered by creditor: *Pruden v. R. R.*, 121-509. Where plaintiff agreed to accept \$50 in compromise of what he figured was a \$54 debt, but afterward found debt was larger, held no compromise except of \$54: *Holden v. Warren*, 118-327. Where claim for damages compromised by defendant primarily liable it enures to benefit of one secondarily liable: *Brown v. Louisburg*, 126-701. Where there was an agreement to compromise a charge upon land, but defendant failed to comply, the debt did not become a personal one, but still remained a charge: *Hunt v. Wheeler*, 116-422. As to compromise of municipal debt, see *Bank v. Comrs.*, 116-339. Where debtor pays a sum supposed by him to be a balance due on a bond, but creditor simply says he will credit on bond, it is no compromise: *King v. Phillips*, 94-555. Where check for less amount than due was marked "in full for services," when cashed it is a settlement in full: *Kerr v. Sanders*, 122-635; *Cline v. Rudisill*, 126-523; *Petit v. Woodlief*, 115-120—and creditor cannot alter the matter by writing on check "accepted for one month's services," *Ibid.*; also *Pruden v. R. R.*, 121-509; *Long v. Miller*, 93-233.

The amount paid must be accepted as offered; it is not conclusive, but the intention of the parties is a question for the jury: *Mercer v. Lumber Co.*, 173-49; *Aydlett v. Brown*, 153-334; *Armstrong v. Lonon*, 149-434; *Supply Co. v. Dowd*, 146-191; *Drewry-Hughes Co. v. Davis*, 151-295. There must be a disputed claim: *Rosser v. Bynum*, 168-340. When the amount

paid was the only amount due at the time, it will not apply to subsequent liability: *Moore v. Casualty Co.*, 150-153. When interest is payable on the debt, payment of the principal will not discharge: *Grocery Co. v. Taylor*, 175-37. Giving a new note will discharge the old obligation if so intended by the parties: *Bank v. Walsler*, 162-54. When the debtor admits one amount to be due and asks to be discharged from another, sending a check "for account in full" does not discharge the other obligation: *Bogert v. Mfg. Co.*, 172-248. The plea of accord and satisfaction should be determined before a trial upon the merits: *McAuley v. Sloan*, 173-80.

896. Tender of judgment. The defendant, at any time before the trial or verdict, may serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer, and gives notice thereof in writing within ten days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance is not given, the offer is deemed withdrawn, and cannot be given in evidence; and if the plaintiff fails to obtain a more favorable judgment he cannot recover costs, but must pay the defendant's costs from the time of the offer. If the defendant sets up a counterclaim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow the counterclaim to the amount specified, with costs. If the defendant accepts the offer, and gives notice thereof in writing within ten days, he may enter judgment as above for the amount specified, if the offer entitles him to judgment, or if the amount specified in the offer is allowed him in the trial of the action. If the notice of acceptance is not given, the offer is deemed withdrawn, and cannot be given in evidence; and if the defendant fails to recover a more favorable judgment, or to establish his counterclaim for a greater amount than is specified in the offer, he cannot recover costs, but must pay the plaintiff's costs from the time of the offer.

Rev., s. 860; Code, s. 573; C. C. P., s. 328.

Money paid into court as a tender, if taken out by plaintiff, is a settlement of the debt, he having accepted same upon conditions and terms annexed: *Cline v. Rudisill*, 126-523. Tender by tenant of rent accrued after termination of lease does not preclude landlord from recovering possession: *Vanderford v. Foreman*, 129-217. Where plaintiff recovers no more than the tender, he should be taxed with costs: *Cowles v. Assurance Society*, 170-368; *Phillips v. Little*, 147-282; *Pollock v. Warwick*, 104-638; see *Smith v. B. and L. Assn.*, 119-256, and cases cited; *Russ v. Brown*, 113-227. As to tender in action for conversion of personal property, see *Stephens v. Koonce*, 103-266. Offer of compromise not accepted cannot be given in evidence: *Grocery Co. v. Taylor*, 162-307; *Hughes v. Boone*, 102-137. A tender hereunder must be made by all the defendants or by their common attorney: *Williamson v. Canal Co.*, 84-629. The tender must be in writing and signed by the party: *Medicine Co. v. Davenport*, 163-294. For tender of judgment in justice's court, see section 1500, Rule 15. Where judgment was rendered against two defendants in justice's court and one appealed, and in superior court tendered judgment for less than justice's judgment but more than was recovered in superior court, plaintiff is entitled to costs: *Wyatt v. Wilson*, 152-276.

897. Conditional tender of judgment for damages. In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fails in his defense, the damages be assessed at a specified sum; and if the plaintiff signifies his acceptance thereof in writing, ten days before the trial, and on the trial has a verdict, the damages shall be assessed

accordingly. If the plaintiff does not accept the offer, he must prove his damages, as if it had not been made, and may not introduce it in evidence. If the damages assessed in his favor do not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defense in respect to the question of damages. This expense shall be ascertained at the trial.

Rev., ss. 861, 862; Code, ss. 575, 576; C. C. P., ss. 329, 330.

A tender will not aid a defective demurrer; tender may accompany an answer or reply to counterclaim: *Hall v. Tel. Co.*, 139-373.

In an action for damages, an agreement that damages be placed at a certain amount if plaintiff recover, was not a compromise hereunder: *Garrett v. Pegram*, 120-288. As to costs, see section 896.

898. Disclaimer of title in trespass; tender of judgment. In actions of trespass upon real estate, the defendant in his answer may disclaim any title or claim to the lands on which the trespass is alleged by the complaint to be done, may allege that the trespass was by negligence or involuntary, and may make a tender or offer of sufficient amends for the trespass. If the plaintiff controverts such answer or a part thereof, and at the trial verdict is found for the defendant, or if the plaintiff is nonsuited, he is barred from the said action and all other suits concerning the same.

Rev., s. 863; Code, s. 577; Rev. Code, c. 31, s. 79; 1715, c. 2, s. 7.

Disclaimer should be filed in the beginning, and not as an admission in the progress of the trial: *Swain v. Clemmons*, 175-240. Case of involuntary trespass on account of ignorance of boundary: *Blackburn v. Bowman*, 46-441.

ART. 44. EXAMINATION OF PARTIES

899. Action for discovery abolished. No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this article.

Rev., s. 864; Code, s. 579; C. C. P., s. 332.

This and the following sections of this article take the place of the old bill of discovery: *Phillips v. Land Co.*, 174-542; *Helms v. Green*, 105-251; *Tobacco Co. v. Tobacco Co.*, 144-369; *Holt v. Warehouse Co.*, 116-490; *Dunn v. Johnson*, 115-258; *Fertilizer Co. v. Taylor*, 112-141; *Hudson v. Jordan*, 108-13; *Coates v. Wilkes*, 92-376. Section only authorizes examination of parties or those interested in action: *Strudwick v. Broadnax*, 83-401; but as to corporations, see next section. Where venue changed, pending removal, these proceedings can be had in either county: *Comrs. v. Lemly*, 85-341. For inspection of documents, see section 1823.

900. Adverse party examined. A party to an action may be examined as a witness at the instance of any adverse party, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify, either at the trial or conditionally or upon commission. Where a corporation is a party to the action, this examination may be made of any of its officers or agents.

Rev., s. 865; Code, s. 580; C. C. P., s. 333; 1907, c. 799.

As to examining officers and employees of corporations, see *Tobacco Co. v. Tobacco Co.*, 144-369 (notice the amendment of 1907, c. 799); *Holt v. Warehouse Co.*, 116-480—and examining books of corporations, see *Holt v. Warehouse Co.*, 116-480. See cases cited under section 901.

901. Before trial in his own county. The examination, instead of being had at the trial, as provided in the preceding section, may be had at any time before the trial, at the option of the party claiming it, before a judge, commissioner duly appointed to take depositions, or clerk of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown the judge or court orders otherwise.

Rev., s. 866; Code, s. 581; 1893, c. 114; C. C. P., s. 334; 1899, c. 65, s. 1.

The facts which make it necessary to resort to the preliminary examination should be set forth by affidavit unless they appear of record: *Bailey v. Matthews*, 156-78. Preliminary examination may be had before complaint filed, if it appears to be necessary to enable the plaintiff to file his complaint: *Smith v. Wooding*, 177-546; *Fields v. Coleman*, 160-11; *Holt v. Warehouse Co.*, 116-480. The examination cannot be had until the action is commenced, and the motion must be before the court in which the action is pending: *Vyne v. Fogle Bros.*, 176-351.

No leave of court necessary to entitle plaintiff to examine defendant or party in interest: *Vann v. Lawrence*, 111-32. The right to examine the adverse party before trial is conferred by this section, and there is an appeal from its denial: *Cartwright v. R. R.*, 176-36. Appeal does not lie from an order made for examination or a refusal to discharge order: *Clark v. Peebles*, 122-163; *Holt v. Warehouse Co.*, 116-480—but see *Ward v. Martin*, 175-287—or from order directing examination to proceed, *Vann v. Lawrence*, 111-32. Examination of defendant filed in record cannot be taken as a part of answer for purpose of passing upon demurrer: *Whitaker v. Jenkins*, 138-476. Plaintiff does not make defendant his witness by examining him hereunder: *Coates v. Wilkes*, 92-376; *Shober v. Wheeler*, 113-370.

902. Compelling attendance of party for examination before trial. The party to be examined, as provided in the preceding section, may be compelled to attend in the same manner as a witness who is to be examined conditionally; but he shall not be compelled to attend in any county other than that of his residence or where he may be served with a summons for his attendance. The examination shall be taken and filed by the judge, clerk or commissioner, as in case of witnesses examined conditionally, and may be read by either party on the trial.

Rev., ss. 866, 867; Code, ss. 581, 582; C. C. P., ss. 334, 335; 1899, c. 65, s. 2.

Notice of motion made at a regular term is not required, since parties are fixed with notice of proceedings in term: *Jones v. Jones*, 173-279; *Hardware Co. v. Banking Co.*, 169-744; *Patrick v. Dunn*, 162-19. The party is subject to examination in the county of his residence: *Bailey v. Matthews*, 156-78. Where, by assent of defendant, order was made for examination outside of county, he cannot withdraw his assent and refuse to answer; his refusal puts him in contempt: *Fertilizer Co. v. Taylor*, 112-141; *Ledbetter v. Pinner*, 120-457.

To claim privilege against self-crimination the party examined must show that the evidence would necessarily tend to criminate him, or claim the privilege during examination: *Ward v. Martin*, 175-287; *Bailey v. Matthews*, 156-78. The claim of privilege must be by the party and on oath: *Ward v. Martin*, 175-287.

The examination may be read in evidence by either party: *Phillips v. Land Co.*, 174-542; *Walker v. Cooper*, 159-536. The death of the other party will not exclude this as evidence: *Phillips v. Land Co.*, 174-542. Plaintiff not compelled to use testimony of adversary at trial: *Shober v. Wheeler*, 113-370. Testimony of defendant cannot be taken as part of answer for purpose of passing upon demurrer: *Whitaker v. Jenkins*, 138-476.

903. Party's refusal to testify; penalty. If a party refuses to attend and testify, as provided in the preceding sections, he may be punished as for a contempt, and his pleadings may be stricken out.

Rev., s. 869; Code, s. 584; C. C. P., s. 337.

See *Fertilizer Co. v. Taylor*, 112-141; *Ledbetter v. Pinner*, 120-457.

904. Rebuttal of party's testimony. The examination of the party thus taken may be rebutted by adverse testimony.

Rev., s. 868; Code, s. 583; C. C. P., s. 336.

Plaintiff can rebut defendant's deposition on trial: *Hudson v. Jordan*, 108-13; *Helms v. Green*, 105-261. As to cross-examination and impeachment of adversary, see *Coates v. Wilkes*, 92-376.

905. Irresponsive answers may be met by party's own testimony. A party examined by an adverse party, as provided in this article, may be examined in his own behalf, subject to the same rules of examination as other witnesses. But if he testifies to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto or to discharge himself when his answers would charge himself, the adverse party may offer himself and must be received as a witness in his own behalf in respect to the new matter, subject to the same rules of examination as other witnesses.

Rev., s. 870; Code, ss. 583, 585; C. C. P., ss. 336, 338.

906. Real party in interest examined. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he was named as a party.

Rev., s. 871; Code, s. 586; C. C. P., s. 339.

Section authorizes examination of parties only or of those interested in the action: *Strudwick v. Brodnax*, 83-401; as to agent, etc., of corporations, see section 900.

907. Examination of coplaintiff or codefendant. A party may be examined on behalf of his coplaintiff or codefendant as to any matter in which he is not jointly interested or liable with such coplaintiff or codefendant, and as to which a separate and not joint verdict or judgment can be rendered. He may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken cannot be used in behalf of the party examined. When one of several plaintiffs or defendants who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself, and must be received, as a witness to the same cause of action or defense.

Rev., s. 872; Code, s. 587; C. C. P., s. 340.

For production of writings, see section 1823 et seq. See *Penny v. Brink*, 75-68.

ART. 45. MOTIONS AND ORDERS

908. Definition of order. Every direction of a court or judge, made or entered in writing, and not included in a judgment, is an order.

Rev., s. 873; Code, s. 594; C. C. P., ss. 344, 345.

909. Motions; when and where made. An application for an order is a motion. Motions may be made to a clerk of a superior court, or to a judge out of court, except for a new trial on the merits. Motions must be made within the district in which the action is triable. A motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, have preference over all other motions.

Rev., s. 874; Code, s. 594; C. C. P., ss. 344, 345.

Motions which do not involve a substantial right, and the decision of which is not subject to appeal, may be renewed as subsequent events require: *Allison v. Whittier*, 101-490; *Sanderson v. Daily*, 83-67—but decision on motions from which appeals might have been taken, but which were not taken, are res judicata, and motion cannot be renewed, *Sanderson v. Daily*, 83-67; *Henry v. Hilliard*, 120-479; *Allison v. Whittier*, 101-490; *Moore v. Grant*, 92-316; *Roulhae v. Brown*, 87-1; *Mabry v. Henry*, 83-298; *Jones v. Thorne*, 80-72; but see *Moore v. Moore*, 131-371—but can be renewed before proper judge where first made before improper judge, *Bank v. Wilson*, 80-200. Party consenting to hearing of motion at chambers cannot in supreme court object that it was not heard at term: *Gatewood v. Leak*, 99-363. Except by consent, a motion other than a motion for an ancillary order or provisional remedy cannot be heard out of the county: *Parker v. McPhail*, 112-502; *Moore v. Moore*, 131-372, 130-334; *Henry v. Hilliard*, 112-479; *Skinner v. Terry*, 107-103; *McNeill v. Hodges*, 99-248—and the consent necessary to hear outside must affirmatively appear of record, *Godwin v. Monds*, 101-354. A motion in supreme court must be made in writing: *Brafford v. Reed*, 124-346—and notice of ten days must be given the adverse party, *Herndon v. R. R.*, 121-498. The judge has the power to vacate or modify orders made in a cause at any time before final judgment: *Welch v. Kingsland*, 89-179. A motion to set aside a verdict cannot be granted at the succeeding term unless the parties have consented to its continuance: *Clothing Co. v. Bagley*, 147-37. Form in which a written motion should be made: *Hartsfield v. Bryan*, 177-166. The judge cannot hear motions or other matters outside of the court-room except such as are cognizable at chambers: *May v. Ins. Co.*, 172-795.

910. Affidavit for or against, compelled. When a party intends to make or oppose a motion in a court of record, and it is necessary for him to have the affidavit of any person who has refused to make it, the court may, by order, appoint a referee to take the affidavit or deposition of such person. The person may be subpoenaed and compelled to attend and make an affidavit before such referee, as before a referee to whom an issue is referred for trial.

Rev., s. 875; Code, s. 594; C. C. P., ss. 344, 345.

The reference under this section is within the discretion of the court: *In re Brown*, 168-417.

911. Motions determined in ten days. When a motion is made in a cause or proceeding in any of the courts to obtain an injunction order, order of arrest, or warrant of attachment, granted in any such case or proceeding, or to vacate or modify the same, it is the duty of the judge before whom the motion is made to render his decision within ten days after the day on which the motion was submitted to him for decision.

Rev., s. 876; Code, s. 594; C. C. P., ss. 344, 345.

912. Notice of motion. When notice of a motion is necessary, it must be served ten days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

Rev., s. 877; Code, s. 595; C. C. P., s. 346.

Notice is necessary in all proceedings had before clerk: *Blue v. Blue*, 79-69—in appeals taken from justice's court when not taken at trial, *State v. Johnson*, 109-852—to subject administrator personally, when in an accounting assets are found and there is a return of nulla bona thereon, *McDowell v. Asbury*, 66-444—before granting injunction staying execution on judgment, *Faison v. McIlwaine*, 72-312—before hearing motion to set aside judgment or order, *Fisher v. Mining Co.*, 105-123.

A person made a party to an action and upon whom service of summons has been made is fixed with notice of all motions, orders and decrees and all that transpires in the conduct of the case of which record is made: *Spencer v. Credle*, 102-68; *Sparrow v. Davidson College*, 77-35; *Hemphill v. Moore*, 104-379; *Stith v. Jones*, 119-428; *Ferrell v. Hales*, 119-199; *Zimmerman v. Zimmerman*, 113-432; *Coor v. Smith*, 107-430; *Wilson v. Pearson*, 102-290; *Williams v. Whiting*, 94-481; *Staneill v. Gay*, 92-455; *University v. Lassiter*, 83-38—but not of

motions and orders made out of term, of which notice must be given, *Harper v. Sugg*, 111-324; *Coor v. Smith*, 107-431; *Allison v. Whittier*, 101-490; *Branch v. Walker*, 92-87.

Ten days is the time fixed by statute for notice, but if no time is fixed a reasonable time is allowed: *Bank v. Hotel Co.*, 147-594. A party is fixed with notice of motions made in term; if made out of term, ten days notice is required, but the judge may shorten the time: *Jones v. Jones*, 173-279.

913. Orders without notice, vacated. An order made out of court, without notice to the adverse party, may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made.

Rev., s. 514; Code, s. 546; C. C. P., s. 297.

State v. Johnson, 109-855; *Clayton v. Jones*, 68-497; *Blue v. Blue*, 79-69; *Sledge v. Blum*, 63-374. Where orders made by consent: *Henry v. Hilliard*, 120-479. A judge of superior court has the power to vacate or modify orders made in a cause at any time before final judgment: *Welch v. Kingsland*, 89-179.

ART. 46. NOTICES

914. Form and service. All notices must be in writing, and notices and other papers may be served on the party or his attorney personally, where not otherwise provided in this chapter.

Rev., ss. 878, 879; Code, s. 597; C. C. P., ss. 349, 353.

For statute against service on Sunday, see *Sundays and Holidays*, s. 3958.

Contents of notices generally: *Allen v. Strickland*, 100-225. **Must be in writing:** *Marion v. Tilley*, 119-473; *Allen v. Strickland*, 100-225—but this seems to have reference only to notices in judicial proceedings, *State v. Telfair*, 130-645; *Martin v. Buffaloe*, 128-305. **Notice to surety on indemnity bond of sheriff that sheriff has been sued need not be in writing:** *Martin v. Buffaloe*, 128-305—nor need overseer's notice to hands to work public roads, *State v. Telfair*, 130-645.

Service of notices and papers hereunder must be made by an officer authorized to serve process of the court: *Cullen v. Absher*, 119-441—but any one not a party to an action may serve a subpoena and prove such service on his oath, *State v. Johnson*, 109-853. **Service of case on appeal must be made by officer of the court:** *Herbin v. Wagoner*, 118-656; *McNeill v. R. R.*, 117-643; *Forte v. Boone*, 114-176; *Cummings v. Hoffman*, 113-267; *Lyman v. Ramseur*, 113-503; *State v. Price*, 110-599; *Sondley v. Asheville*, 112-694—and so must notice of appeal, *State v. Johnson*, 109-852—and in neither case can attorney make valid service, *Roberts v. Partridge*, 118-355; *Cummings v. Hoffman*, 113-267; *State v. Price*, 110-599; *State v. Johnson*, 109-852—nor can a constable serve a case on appeal to supreme court, *Forte v. Boone*, 114-176. **A chief of police can serve notices where given special powers of sheriff in town charter:** *Lowe v. Harris*, 121-287. **As to powers of city police and town constables in service of papers, see** *Lowe v. Harris*, 121-287; *Baker v. Brem*, 126-367; *Appomattox Co. v. Buffaloe*, 121-37; *Davis v. Sanderlin*, 119-84. **Alias notice can be issued and served where original notice was placed in hands of proper officer, who failed to properly serve:** *Hinsdale v. Underwood*, 116-594; *Allen v. Strickland*, 100-225. **Town constable cannot serve notice of deposition in action pending in superior court:** *Cullen v. Absher*, 119-441; *Brown v. Myers*, 150-441. **Notice of a deposition, signed by a party to the action, is not process:** *Cullen v. Absher*, 119-441. **As to notice required of motions and orders made after term of court, see** *Harper v. Sugg*, 111-324; *Coor v. Smith*, 107-430, and cases cited. **As to service on agent in action against principal, see** *Bank v. School Comrs.*, 118-383.

915. Service upon attorney. Notice upon an attorney may be served during his absence from his office, by leaving a copy of the paper with his clerk, or a person having charge of the office; or, when there is no person in the office, by leaving it, between the hours of six a. m. and nine p. m., in a conspicuous place in the office; or, if it is not open so as to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion.

Rev., s. 880; Code, s. 597; C. C. P., ss. 349, 353.

Notice to attorney is notice to client: Ladd v. Teague, 126-549; Banking Co. v. Walker, 121-115; Hulbert v. Douglas, 94-122—and an attorney is still an attorney until court releases him or until judgment is satisfied, Ladd v. Teague, 126-544; Branch v. Walker, 92-87. **Notice of motion to set aside a judgment may be properly served on attorney of record of opposing party:** Branch v. Walker, 92-87.

916. Service upon a party. Notice upon a party may be served by leaving a copy of the paper at his residence, between the hours of six a. m. and nine p. m., with some person of suitable age and discretion.

Rev., s. 881; Code, s. 597; C. C. P., ss. 349, 353.

Leaving notice with wife sufficient: Turner v. Holden, 109-182. **Case on appeal served as above directed:** State v. Price, 110-599; Watkins v. R. R., 116-961; see sections 642, 643. A return "executed by delivering a copy" implies that he left a copy with each party: McDonald v. Carson, 94-497—the word "executed" ex vi termini carrying with it the idea of full performance, Isley v. Boon, 113-249.

917. Service by publication. Notice upon a person who cannot be found after due diligence, or who is not a resident of this state, may be served by its publication once a week for four successive weeks in a newspaper published in the county from which the notice is issued; and if no newspaper is published therein, then in some newspaper published within the judicial district; and the proof of service is the same as is required by law in the case of service of summons by publication.

Rev., s. 882; Code, s. 597; C. C. P., ss. 349, 353.

In Buncombe County, orders directing publication of notices, orders or proceedings in that county must specify the newspaper in which publication is to be made, and publication in any other paper is not legal and sufficient. See Rev., s. 883; 1905, c. 438.

See sections 484, 486. The time above designated is in lieu of the ten days personal notice: Guilford v. Georgia Co., 109-310.

918. Service by telephone on witnesses and jurors. Sheriffs, constables and other officers charged with the service of such process may serve subpoenas and summonses for jurors by telephone, and such service shall be valid and binding on the person served. When such process is served by telephone, the return of the officer serving it shall state it is served by telephone.

1915, c. 48.

919. Subpœna, service and signature. Service of a subpœna for witnesses may be made by a sheriff, coroner or constable, and proved by the return of such officer, or the service may be made by any person not a party to the action, and proved by his oath. A subpœna for witnesses need not be signed by the clerk of the court, and is sufficient if subscribed by the party or by his attorney.

Rev., s. 884; Code, s. 597; C. C. P., ss. 349, 353.

For issuance of subpoenas by clerk, see Evidence, s. 1803.

A subpœna may be served by one not an officer who is not a party to the action and the service proven on his oath: Smith v. Smith, 119-314; State v. Johnson, 109-853.

920. Application of this article. This article does not apply to the service of a summons, or other process (except summonses for jurors, as provided in the second section preceding), or of any paper to bring a party into contempt.

Rev., s. 885; Code, s. 597; C. C. P., ss. 349, 353.

921. Officer's return evidence of service. When a notice issues to the sheriff, his return thereon that the same has been executed is sufficient evidence of its service.

Rev., ss. 886, 1529; Code, s. 940; R. C., c. 31, s. 123; 1799, c. 537.

The return of an officer is *prima facie* true: *Williamson v. Cocks*, 124-585; *Chadborn v. Johnston*, 119-282; *Miller v. Powers*, 117-218; *Isley v. Boon*, 113-249; *Strayhorn v. Blalock*, 92-292; *Surratt v. Crawford*, 87-372; *Simpson v. Hiatt*, 35-470; *State v. Vick*, 25-491; *Loftin v. Hugins*, 13-10. A return "executed by delivering copy" implies that he left copy with each party: *McDonald v. Carson*, 94-497—the word "executed" *ex vi termini* carrying with it the idea of full performance: *Isley v. Boon*, 113-249. Official returns of sheriff are acted upon without proof of his signature in court in which he is officer: *McDonald v. Carson*, 94-497. The *prima facie* correctness of sheriff's return may be set aside by clear and unequivocal evidence: *Comrs. v. Spencer*, 174-36.

ART. 47. TIME

922. How computed. The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Sunday, it must be excluded.

Rev., s. 887; Code, s. 596; C. C. P., s. 348.

Cases directly supporting section: *Lumber Co. v. Rowe*, 151-130; *Burgess v. Burgess*, 117-447; *Glanton v. Jacobs*, 117-427; *Sondley v. Asheville*, 110-89; *Walker v. Scott*, 104-481; *Barcroft v. Roberts*, 92-249; *Keeter v. R. R.*, 86-346. As to counting time in cases of delay in shipment of freight, see *Davis and Hooks v. R. R.*, 145-207; *Branch v. R. R.*, 88-570, 77-347; *Keeter v. R. R.*, 86-346—in the service of process, *Taylor v. Harris*, 82-25; *Guilford v. Georgia*, 109-310—in the making of a tax deed to land within a year after sale, *Burgess v. Burgess*, 117-447—in the serving of case on appeal, *Board of Education v. Orr*, 161-218; *Mecke v. Mineral Co.*, 122-796; *Guano Co. v. Hicks*, 120-29; *Arrington v. Arrington*, 114-114; *Walker v. Scott*, 104-483; *Turrentine v. R. R.*, 92-642; see sections 642, 643—in filing application for a rehearing in supreme court, *Bird v. Gilliam*, 123-63; *Barcroft v. Roberts*, 92-249—in determining exact time court adjourns by limitation, *Taylor v. Ervin*, 119-274—in cases where act to be done "by" a certain time, or "within" a certain time, *In re Wittkowsky's Land*, 143-247; *Blalock v. Clark*, 133-306; *Cotton Mills v. Dunstan*, 121-12; *Burgess v. Burgess*, 117-447—in making tender to sheriff to redeem land sold for taxes, *Thomas v. Nichols*, 127-319—in the filing of pleadings, *Howard v. R. R.*, 122-944; *County Board v. State Board*, 106-81—in the defense of statute of limitations, *Johnston v. Lumber Co.*, 144-717; *Cook v. Moore*, 95-1; s. c., 100-294; *Jenkins v. Griffin*, 175-184—in the filing of appeal bonds, *Chamblee v. Baker*, 95-98—in filing schedule of preferred debts where debtor has assigned, *Glanton v. Jacobs*, 117-427.

Sunday not excluded in counting number of days delay of freight: *Davis and Hooks v. R. R.*, 145-207; *Branch v. R. R.*, 77-347; 88-570; *Keeter v. R. R.*, 86-336—or in counting time within which application for rehearing must be filed, *Davis and Hooks v. R. R.*, 145-207, citing *Barcroft v. Roberts*, 92-249.

923. Computation in publication. The time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication.

Rev., s. 888; Code, s. 602; C. C. P., s. 359.

See sections 485, 806, 810. See generally: *Guilford v. Georgia*, 109-310.

924. Advertisement of public sales. When a statute or written instrument stipulates that an advertisement of a sale shall be made for any certain number of weeks, a publication once a week for the number of weeks so indicated is a sufficient compliance with the requirement, unless contrary provision is expressly made by the terms of the instrument.

1909, cc. 794, 875.

See sections 485, 687, 2585. *Jenkins v. Griffin*, 175-184; *Banking Co. v. Leach*, 169-706; *Hinton v. Hall*, 166-477.

CHAPTER 13

CLERK OF SUPERIOR COURT

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ART. 1. THE OFFICE

925. Judge of probate abolished; clerk acts as judge. The office of probate judge is abolished, and the duties heretofore pertaining to clerks of the superior court as judges of probate shall be performed by the clerks of the superior court

as clerks of said court, and all matters pending before said judges of probate shall be deemed transferred to the clerks of the superior court.

Rev., s. 889; Code, s. 102.

For jurisdiction and general powers of clerk of superior court, see generally sections 397, 403, 752-765, 938. For special duties and powers with respect to different matters, see the chapters with reference to such matters.

Although the office of probate judge is abolished, the powers and jurisdiction of that office are now exercised by the clerks of superior courts—not as the servant or ministerial officer, or acting as and for superior court, but as an independent tribunal of original jurisdiction: *Edwards v. Cobb*, 95-4.

The duties devolving upon the clerk under the old practice as probate judge are separate and distinct from his duties as clerk of the court: *Brittain v. Mull*, 91-498, referred to in *Helms v. Austin*, 116-753. The exercise of judicial powers by “clerk of court” is the exercise of them by the “court”: *Brittain v. Mull*, 91-498.

Section referred to in *McLaurin v. McLaurin*, 106-333.

926. Election; term of office. A clerk of the superior court for each county shall be elected by the qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the general assembly. Clerks of the superior court shall hold office for four years.

Rev., s. 890; Const., Art. IV, ss. 16, 17.

Appointee to fill vacancy holds till next election for members of general assembly: *Rodwell v. Rowland*, 137-617, overruling *DeLoatch v. Rogers*, 86-358.

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

Rev., s. 295; Code, s. 72; 1899, c. 54, s. 52; 1903, c. 747; 1889, c. 7; 1891, c. 385; 1901, c. 32; C. C. P., s. 137; 1895, cc. 270, 271.

Amounts left with clerk for care of graves under provision of chapter Cemeteries, must be covered by clerk's bond in a surety company. See *Cemeteries*, s. 5028.

How bond proven: *Battle v. Baird*, 118-854; *Short v. Currie*, 53-42. “By virtue or color of his office” construed: *Thomas v. Connelly*, 104-342; *Presson v. Boone*, 108-78; *Sharpe v. Connelly*, 105-87; *Cassidy, ex parte*, 95-225; *Syme v. Bunting*, 91-48; *Brown v. Coble*, 76-391; *Greenlee v. Sudderth*, 65-470; *McNeill v. Morrison*, 63-508; *Broughton v. Haywood*, 61-380. County commissioners may grant indulgences till next meeting for bond to be perfected: *Buckman v. Comrs.*, 80-121. Clerk's bonds are cumulative: *Moore v. Boudinot*, 64-193; *Poole v. Cox*, 31-69; *Hunter v. Routledge*, 51-216; *Oates v. Bryan*, 14-451. Clerical error in reciting term of office does not necessarily invalidate bond: *Battle v. Baird*, 118-855; *Sprinkle v. Martin*, 69-175; *Kello v. Maget*, 18-414. For liability on bond, and actions on same, see sections 928, 354, 356.

928. Clerk's bond; approval, acknowledgment and custody. The approval of said bond by the board of commissioners, or a majority of them, shall be re-

corded by their clerk. The said bond shall be acknowledged by the parties thereto, or proved by a subscribing witness, before the clerk of said board of commissioners, or their presiding officer, registered in the register's office in a separate book to be kept by him for the registration of official bonds; and the original, with the approval thereof endorsed, deposited with the register for safe keeping. The like remedies shall be had upon said bond as are or may be given by law on official bonds.

Rev., s. 296; Code, s. 73; C. C. P., s. 138.

For annotations on official bonds generally, see sections 354 and 356. How bond proven: *Battle v. Baird*, 118-854; *Short v. Currie*, 53-42.

LIABILITY ON BOND. For funds paid him by commissioner in partition: *Smith v. Patton*, 131-396. For failing to issue execution: *McIntyre v. Merritt*, 65-558; *Bank v. Bobbitt*, 111-194; *Williamson v. Kerr*, 88-10. For failure to perform new duty added by statute: *Wilmington v. Nutt*, 80-265. For failure to docket and index judgment: *Darden v. Blount*, 126-249; *Holman v. Miller*, 103-118; *Dewey v. Sugg*, 109-328; *Redmond v. Staton*, 116-140. For failing to take proper guardian bonds: *Topping v. Windley*, 99-4. For preferring one judgment creditor over another in issuing execution: *Bank of Newbern v. Jones*, 17-284. For money coming into his hands as insurer: *Smith v. Patton*, 131-396; *Presson v. Boone*, 108-78; *Bd. Education v. Bateman*, 102-52; *Morgan v. Smith*, 95-396; *Havens v. Lathene*, 75-505; *Bd. Comrs. v. Clarke*, 73-257; *Oats v. Bryan*, 14-451; *Cox v. Blair*, 76-78; *Richardson v. Smith*, 47-8; *State v. Gaines*, 30-168. For breach of duty as receiver of infants' estates: *Waters v. Melson*, 112-89; *Presson v. Boone*, 108-78; *Syme v. Bunting*, 91-48; *Rogers v. Odom*, 86-432. For funds received by him under color of his office: *Hannah v. Hyatt*, 170-634.

ACTIONS ON BOND. None can be maintained unless the damages sustained would give an action on the case for neglect of official duty: *Jones v. Biggs*, 46-364. Proper parties when suing for proceeds of partition sale: *Smith v. Patton*, 131-396. Demand is necessary before bringing action: *Furman v. Timberlake*, 93-66; but see *Little v. Richardson*, 50-305. On trial a clerk's bond found in proper custody presumed properly given and accepted: *Battle v. Baird*, 118-854. How bond put in evidence: *Short v. Currie*, 53-42. Right of action which plaintiff has in a judgment which clerk fails to index is assignable: *Redmond v. Staton*, 116-140—but simple assignment of the judgment does not assign right of action against clerk, *Ibid.* Action for failing to take sufficient administration bond cannot be joined with cause of action against administrator: *Mitchell v. Mitchell*, 96-14. Duly certified copy of bond by proper custodian competent evidence: *Battle v. Baird*, 118-854. Where question arises between different sets of sureties: *Sharpe v. Connelly*, 105-87; *Morgan v. Smith*, 95-396. Judgment against clerk and a surety competent evidence against all sureties: *Morgan v. Smith*, 95-396. Judgment where defendant fails to answer must be by default and inquiry: *Battle v. Baird*, 118-855.

929. Local modifications as to clerk's bond. The bonds of the clerks of the superior court of Carteret and Pamlico counties may be fixed at an amount not less than five thousand dollars, in the discretion of the county commissioners.

The clerk of the superior court of Currituck County shall not be required to give bond in a larger penalty than the sum of five thousand dollars, unless the money or funds coming into his hands by order of the court or otherwise, by virtue of his office as clerk, at any time exceed in the aggregate one-half the penalty of his bond. In that case he shall, within twenty days, file with the clerk of the board of commissioners a good and sufficient bond duly executed and justified as required by law, of like condition as already prescribed, and in a penalty double the amount of said funds, though not exceeding ten thousand dollars. This shall not be construed to modify or repeal any provisions of law whereby the county commissioners are authorized at any time to require said clerk to justify or renew his bond whenever necessary.

Rev., s. 295; 1907, c. 103; 1907, c. 990.

930. Oath of office. The clerks of the superior court, before entering on the duties of their office, shall take and subscribe before some officer authorized by law to administer an oath, the oaths prescribed by law, and file such oaths with the register of deeds for the county.

Rev., s. 891; Code, s. 74; C. C. P., s. 139.

Acting before qualifying a misdemeanor, see section 4383. For liability on bond, see section 928. Deputy takes same oath of office as clerk: Jackson v. Buchanan, 89-76.

931. Vacancy; judge of district fills. 1. *Otherwise than by expiration.* In case the office of clerk of a superior court for a county becomes vacant otherwise than by the expiration of the term, and in case of a failure by the people to elect, the judge of the superior court for the county shall appoint to fill the vacancy until an election can be regularly held.

2. *Failure to qualify.* In case any clerk fails to give bond and qualify as required by law, the presiding officer of the board of commissioners of his county shall immediately inform the resident judge of the judicial district thereof, who shall thereupon declare the office vacant and fill the same, and the appointee shall give bond and qualify.

3. *Resignations.* Any clerk of the superior court may resign his office to the judge of the superior court residing in the district in which is situated the county of which he is clerk, and said judge shall fill the vacancy.

Rev., ss. 892, 893, 895; Const., Art. IV, s. 29; Code, ss. 76, 78; C. C. P., s. 140.

Clerk can give security in lieu of bond, see section 349. See *Norfleet v. Staton*, 73-546. Appointee to fill vacancy holds until next election of members of general assembly: *Rodwell v. Rowland*, 137-617, overruling *Deloatch v. Rogers*, 86-358.

The failure to give bond must be ascertained and declared by commissioners before judge can declare a vacancy: *Buckman v. Comrs.*, 80-121. Court not to interfere with discretion of commissioners in refusing bond tendered: *Ibid.* Where there are two claimants of a vacant clerkship, judge must act upon the prima facie title and admit the one possessing it, leaving the other to his remedy in quo warranto: *Clarke v. Carpenter*, 81-309.

932. Removal for cause. Upon the conviction of any clerk of the superior court of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this state.

Rev., s. 894; Code, s. 123; 1868-9, c. 201, s. 53.

933. Office and equipment furnished. The requisite stationery, records, furniture and filing cases and devices for official use must be furnished to the clerk by the board of commissioners; and to each of such books there must be attached an alphabetical index securely bound in the volume, referring to the entries therein by the page of the book, unless there is a cross-index of such book required by law to be kept. These books must, at all proper times, be open to the inspection of any person.

Rev., s. 896; Code, ss. 82, 84, 113; C. C. P., s. 428.

934. Solicitor to examine and report on office. At every regular term of the superior court for the trial of criminal cases the solicitor for the judicial district shall inspect the office of the clerk and report to the court in writing. If

any solicitor fails or neglects to perform the duty hereby imposed on him, he is liable to a penalty of one hundred dollars to any person who sues for the same.

Rev., s. 897; Code, s. 88; C. C. P., s. 147; 1917, c. 81, s. 1.

ART. 2. DEPUTIES

935. Appointment. Clerks of the superior court may appoint deputies, who shall take and subscribe the oath prescribed for clerks.

Rev., s. 898; Code, s. 75; R. C., c. 19, s. 15; 1777, c. 115, s. 86.

Deputy clerk can be appointed only in the mode here provided: *Shepherd v. Lane*, 13-148. Reason for creating the office stated in *Miller v. Miller*, 89-405. Deputy takes same oath as clerk: *Jackson v. Buchanan*, 89-76. Authority of deputy ceases upon death of clerk: *White v. Hill*, 125-200. Deputy may perform all duties of the office except such as are judicial, or where statute provides otherwise: *Miller v. Miller*, 89-402. He may issue warrant of attachment: *Jackson v. Buchanan*, 89-74—may issue executions, *Miller v. Miller*, 89-402—may probate deeds and other conveyances by force of statute, *Piland v. Taylor*, 113-1; see section 3293. Clerk cannot delegate deputy to discharge judicial functions: *Piland v. Taylor*, 113-1. The probate of a deed by a deputy is not the act of the principal, but of the deputy, he having statutory authority: *Ibid.*, see section 977. The certificate of a probate of a deed by a deputy clerk is of itself prima facie evidence of the deputy's appointment and qualification: *Piland v. Taylor*, 113-1. The acts of a deputy who has not been properly qualified are void: *Sudderth v. Smyth*, 35-452. A woman cannot be appointed deputy clerk: *Bank v. Redwine*, 171-559; see, also, *State v. Knight*, 169-333.

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

Rev., s. 899; 1899, c. 235, s. 3.

937. Responsibility of clerk for deputy's acts. The several clerks of the superior court shall be held responsible for the acts of their deputies. Deputies shall be subject in all respects to all laws which apply to the clerks.

Rev., s. 900; 1899, c. 235, s. 2.

Clerks are liable for the nonfeasance of a deputy, but deputy is not liable: *Coltraine v. McCain*, 14-308 (this may be altered by this section). For an unlawful act of deputy committed under color of the office, both clerk and deputy are liable: *Coltraine v. McCain*, 14-308. Section cited in *Bank v. Redwine*, 171-559.

ART. 3. POWERS AND DUTIES

938. Powers enumerated. Every clerk has power—

1. To issue subpoenas to compel the attendance of any witness residing or being in the state, or to compel the production of any bond or paper, material to any inquiry pending in his court.

2. To administer oaths and take acknowledgments, whenever necessary, in the exercise of the powers and duties of his office.

See section 3293.

3. To issue commissions to take the testimony of any witness within or without this state.

See sections 1813, 1809-1812.

4. To issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties.

See *Edwards v. Cobb*, 95-9.

5. To enforce all lawful orders and decrees, by execution or otherwise, against those who fail to comply therewith or to execute lawful process. Process may be issued by the clerk, to be executed in any county of the state, and to be returned before him.

See sections 664, 666, 669, 675; also sections as to the different forms of process of the court.

6. To exemplify, under seal of his court, all transcripts of deeds, papers or proceedings therein, which shall be received in evidence in all the courts of the state.

See section 1779.

7. To preserve order in his court and to punish contempts.

See *In re Patterson*, 99-418.

8. To adjourn any proceeding pending before him from time to time.

9. To open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court, in the same manner as courts of general jurisdiction.

See *Little v. Duncan*, 149-84; *Wahab v. Smith*, 82-229; *Lovinier v. Pearce*, 70-168.

10. To enter judgment in any suit pending in his court in the following instances: judgment of voluntary nonsuit in any case where judgment is permitted by law; and judgment in any suit by consent of parties.

11. To award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before him.

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

13. To take proof of deeds, bills of sale, official bonds, letters of attorney, or other instruments permitted or required by law to be registered.

See sections 3293, 3305, 3322.

14. To take proof of wills and grant letters testamentary and of administration.

See sections 1, 2, 4143.

15. To revoke letters testamentary and of administration.

See sections 30, 31, 44.

16. To appoint and remove guardians of infants, idiots, inebriates and lunatics.

See sections 2150, 2153, 2154, 2158, 2165, 2166, 2187, 2191, 2285, 2286.

17. To audit the accounts of executors, administrators, collectors, receivers, commissioners and guardians.

As to auditing accounts of executors, administrators, etc., see sections 105, 109, 123, 124—commissioners to sell property, see section 765—guardians, see sections 2186, 2188.

18. To exercise jurisdiction conferred on him in every other case prescribed by law.

As to taking proofs and making orders in cases where clerk himself interested, see *Trenwith v. Smallwood*, 111-134; *Long v. Crews*, 113-256; *Lance v. Tainter*, 137-249; *Joines v. Johnson*, 133-493; *McAllister v. Purcell*, 124-262; *Blanton v. Bostic*, 126-421; *Land Co. v. Jennett*, 128-3; *Freeman v. Person*, 106-251; see sections 3293, 3299, 3343. Clerk has no common-law or equity jurisdiction: *McCauley v. McCauley*, 122-288. For jurisdiction of clerk generally, see sections 397, 403, 752-765. For special duties and powers with respect to different specific matters, see chapters with reference to such matters.

Rev., s. 901; Code, ss. 103, 108; C. C. P., ss. 417, 418, 442; 1901, c. 614, s. 2; 1919, c. 140.

The clerk of the superior court acts as judge of the juvenile court, see *Child Welfare*, Art. 2.

939. Disqualification to act. No clerk can act as such in relation to any estate or proceeding—

1. If he has, or claims to have, an interest by distribution, by will, or as creditor, or otherwise.

If clerk interested in commissions to executors, he is excluded from making allowances: *Barlow v. Norfleet*, 72-535. It has been the practice for clerks to issue process either for or against themselves: *Evans v. Etheridge*, 96-42. No clerk can act as such in relation to any estate or proceeding if he has or claims to have an interest therein: *Land Co. v. Jennett*, 128-3; *Trenwith v. Smallwood*, 111-134; *Gregory v. Ellis*, 82-225.

2. If he is so related to any person having or claiming such interest that he would, by reason of such relationship, be disqualified as a juror; but the disqualification on this ground ceases unless the objection is made at the first hearing of the matter before him.

See *Land Co. v. Jennett*, 128-3; *Trenwith v. Smallwood*, 111-132.

3. If he or his wife is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will; but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to or refused probate by another clerk, or before the judge of the superior court.

See *Trenwith v. Smallwood*, 111-132; also sections 3293, 3299.

4. If he or his wife is named as executor or trustee in any testamentary or other paper; but this disqualification ceases when the will or other paper is finally admitted to or refused probate by another clerk, or before the judge of the superior court.

Action against administrator who was probate judge rightly transferred to district judge: *Wilson v. Abrams*, 70-324. Clerk cannot pass upon petition to sell land for assets filed by himself as executor: *Gregory v. Ellis*, 82-225.

5. If he shall renounce the executorship and endorse the same on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if admitted to probate.

Rev., s. 902; Code, s. 104; C. C. P., s. 419; 1871-2, c. 196.

Clerk cannot appoint himself or deputy as commissioner to sell land, see Partition, s. 3242.

940. Waiver of disqualification. The parties may waive the disqualification specified in subdivisions one, two, three and five of the preceding section, and upon filing in the office such waiver in writing, the clerk shall act as in other cases.

Rev., s. 903; Code, s. 105; C. C. P., s. 420.

Waiver must be shown affirmatively. Questionable whether guardian ad litem can make such waiver: Land Co. v. Jennett, 128-3; White v. Connelly, 105-71.

941. Disqualification unwaived; cause removed or judge acts. When any of the disqualifications specified in this chapter exist, and there is no waiver thereof, or when the disqualification does not permit of waiver, any party in interest may apply to the judge of the district or to the judge holding the courts of such district for an order to remove the proceedings to the clerk of the superior court of an adjoining county in the same district; or may apply to the judge to make and render either in vacation or term time all necessary orders and judgments in any proceeding where the clerk is disqualified, and the judge in such cases is hereby authorized and empowered to make and render any and all necessary orders and judgments as if he had the same original jurisdiction as the clerk over such proceeding.

Rev., s. 904; Code, s. 106; C. C. P., s. 421; 1913, c. 70, s. 1.

942. Disqualification at time of election; judge acts. In all cases where the clerk of the superior court is executor, administrator, collector or guardian of any estate at the time of his election to office, in order to enable him to settle such estate, the judge of the superior court mentioned in the preceding section is empowered to make such orders as may be necessary in the settlement of the estate; may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to either of said judges for his approval, and when the accounts are so approved, it is his duty to order the proper record to be made by the clerk, and the accounts to be filed in court.

Rev., s. 905; Code, s. 107; 1871-2, c. 197.

Should make summons returnable before him and then transfer to district judge: Wilson v. Abrams, 70-324.

943. Custody of records and property of office. *1. Receipt from predecessor.* Immediately after he has given bond and qualified, the clerk shall receive from the late clerk of the superior court all the records, books, papers, moneys and property of his office, and give receipts for the same, and if any clerk refuses or fails within a reasonable time after demand to deliver such records, books, papers, moneys and property, he is liable on his official bond for the value thereof.

Failure to deliver books, records, etc., misdemeanor, see sections 4384, 4385. After delivery of papers, liability ceases: Gregory v. Morisey, 79-559. Successor may sue on official bond for records, money, etc., on ground of statutory requirements: Peebles v. Boone, 116-57. No order for delivery to duly elected clerk necessary: Ibid.

2. Transfer to successor; penalty. Upon going out of office for any reason, any clerk of the superior, inferior, or criminal court shall transfer and deliver to his successor (or to such person, before his successor in office may be appointed, as the court may designate) all records, documents, papers, and money belonging to the office. And the judge appointing any clerk to a vacancy in the clerkship of the superior court may give to such person an order for the delivery to him, by the person having the custody thereof, of the records, documents, papers and moneys belonging to the office, and he shall deliver the same in obedience to such order. In case any clerk going out of office as aforesaid, or other person having the custody of such records, documents, papers, and money as aforesaid, fails to transfer and deliver them as herein directed, he shall forfeit and pay to the state one thousand dollars, which shall be sued for by the prosecuting officer of that court.

Remedy for failure to obey order for delivery of money, etc., to successor is by attachment and by suit for penalty: *O'Leary v. Harrison*, 51-338. Forfeiture only in case of refusal of clerk to do what is required of him in this section: *Peebles v. Boone*, 116-60. No order necessary to compel former clerk to make transfer as directed unless he is in office temporarily by appointment: *Ibid.*

Rev., ss. 906, 907; Code, ss. 81, 124; R. C., c. 19, s. 14; C. C. P., s. 142.

944. Unperformed duties of outgoing clerk. 1. *Performance secured.* When, upon the death or resignation, removal from office, or at the expiration of his term of office, any clerk has failed to discharge any of the duties of his office, the court, if practicable, shall cause the same to be performed by another person, who shall receive for such services, and as a compensation therefor, the fees allowed by law to the clerk.

2. Liability on outgoing clerk's bond. Such portion thereof as may be paid by the county may be recovered by the county, by suit on the official bond of the defaulting clerk, to be brought on the relation of the board of commissioners of the county.

Rev., s. 908; Code, s. 87; R. C., c. 19, s. 19; 1844, c. 5, s. 6.

If retiring clerk failed to record a proceeding, judge may order it done as of proper date: *Foster v. Woodfin*, 65-29.

945. Location of and attendance at office. The clerk shall have an office in the courthouse or other place provided by the board of commissioners, in the county town of his county. He shall give due attendance, in person or by deputy, at his office daily, Sundays and holidays excepted, from nine o'clock a.m. to three o'clock p.m., and longer when necessary for the dispatch of business; and personally every Monday for the transaction of probate business, and on each succeeding day till such matters are disposed of; and upon his failure to do so, unless caused by sickness or other urgent necessity or unless leave of absence is obtained by law, he shall forfeit his office.

Rev., s. 909; Code, ss. 80, 114, 115; C. C. P., s. 141; 1871-2, c. 136.

One failure to keep office open on Monday for probate business is complete cause for forfeiture of office: *People v. Heaton*, 77-18. Quo warranto is proper remedy to enforce for forfeiture of office hereunder: *People v. Heaton*, 77-18; *State v. Norman*, 82-687.

946. Obtaining leave of absence from office. Upon application of any clerk of the superior court to the judge of the superior court residing in the district in

which the clerk resides, showing good and sufficient reason for clerk to absent himself from his office, the judge may issue an order allowing him to absent himself from his office for such time as the judge may deem proper. But he shall at all times leave a competent deputy in charge of his office during his absence. The order of the judge granting leave of absence shall be filed and recorded in the office of the clerk of the county in which the clerk resides.

Rev., s. 910; 1903, c. 467.

Writs signed in blank by clerks and handed to attorneys for their use, if subsequently filled up by the latter, are regular and sufficient writs: *Croom v. Morrisey*, 63-591. See *Webster v. Sharp*, 116-468; *Carson v. Woodrow*, 160-144.

947. To keep fee bill posted. Every clerk shall keep posted in his office in some conspicuous place the fee bill, for public inspection and reference, under a penalty of one hundred dollars for such neglect, to be paid to any person who will sue for same.

Rev., s. 2774; Code, s. 3740.

948. To furnish blank process, bonds and undertakings. Clerks of courts shall furnish to parties printed copies of the formal parts of all process required to be issued by them, with convenient blank spaces for the insertion of written matter; and also the blank forms of such bonds and undertakings as are required to be taken by them.

Rev., s. 911; Code, s. 3761; C. C. P., s. 559; 1868-9, c. 279, s. 558.

949. To file papers in proceedings. The clerk must file and preserve all papers in proceedings before him, or belonging to the court; and shall keep the papers in each action in a separate roll or bundle, and at its termination attach them together, properly labeled, and file them in the order of the date of the final judgment. All such papers and the books kept by him belong to, and appertain to, his office, and must be delivered to his successor.

Rev., s. 912; Code, ss. 86, 111; C. C. P., ss. 146, 426.

See section 943. Fee for "filing papers" is only for filing all papers after final judgment: *Guilford v. Comrs.*, 120-23.

950. To keep records of his office; obtaining originals or copies. He shall keep in bound volumes a complete and faithful record of all his official acts, and give copies thereof to all persons desiring them, on payment of the legal fees. He shall be answerable for all records belonging to his office, and all papers filed in the court, and they shall not be taken from his custody, unless by special order of the court, or on the written consent of the attorneys of record of all the parties; but parties may at all times have copies upon paying the clerk therefor.

Rev., s. 913; Code, s. 82; C. C. P., s. 143; 1868-9, c. 159, s. 4.

951. To endorse date of issuance on process. The clerk shall note on all precepts, process and executions the day on which the same shall be issued; and the sheriff or other officer receiving the same for execution shall in like manner note thereon the day on which he shall have received it, and the day of the execution; and every clerk, sheriff or other officer neglecting so to do shall forfeit and pay one hundred dollars.

Rev., s. 914; Code, s. 100.

952. To keep books; enumeration. Each clerk shall keep the following books, which shall be open to the inspection of the public during regular office hours:

1. *Summons docket*, which shall contain a docket of all writs, summonses or other original process issued by him, or returned to his office, which are made returnable to a regular term of the superior court; this docket shall contain a brief note of every proceeding whatever in each action, up to the final judgment inclusive.

2. *Judgment docket*, which shall contain a note of the substance of every judgment and every proceeding subsequent thereto.

3. *Civil issue docket*, which shall contain a docket of all issues of fact joined upon the pleadings, and of all other matters for hearing before the judge at a regular term of the court, a copy of which shall be furnished to the judge at the commencement of each term.

Civil issue docket must contain the issues joined between parties, and only such notes and memoranda as are pertinent to such issues and their preparation for trial: *Walton v. McKesson*, 101-428—also all other matters for hearing before judge at a regular term, *Brown v. Rhinehardt*, 112-776—but if it conflicts with minute docket, latter prevails, *Walton v. McKesson*, 101-428.

4. *Cross-index to judgments*, which shall contain a direct and reverse alphabetical index of all final judgments in civil actions rendered in the court, with the dates and numbers thereof, and also of all final judgments rendered in other courts and authorized by law to be entered on his judgment docket.

See *Holman v. Miller*, 103-120.

5. *Cross-index of parties to actions*. The clerk shall keep an alphabetical index and cross-index of all parties to all actions and special proceedings. Upon the issuance of summons or commencement of an ex parte proceeding he shall forthwith index and cross-index the names of all parties to such action or proceeding. When an order is made that any new or additional party be brought into an action or proceeding his name shall forthwith be indexed and cross-indexed by the clerk. The index shall be so arranged that beside each name shall appear a reference to the book and page whereon the action or proceeding will be found upon the summons docket, civil issue docket, special proceeding docket, and judgment docket, or such of said dockets as carry reference to said action or proceeding; and immediately upon said action or proceeding being entered upon any of said dockets the clerk shall cause said index to carry reference thereto upon the index and cross-index as to every party.

6. *Record of lis pendens*, which shall contain the names of the parties to the action, place where such notice, whether formal or in the pleadings, is filed, the object of the action, the date of indexing, and a sufficient description of the land to be affected, and which shall be cross-indexed.

1919, c. 31.

7. *Criminal docket*, which shall contain a note of every proceeding in each criminal action.

8. *Minute docket of superior court*, which shall contain a record of all proceedings had in the court during term, in the order in which they occur, and such other entries as the judge may direct to be made therein.

Minute docket is intended to and should contain a record of all proceedings of court in the order of occurrence, and such other entries as judge may direct: *Walton v. McKesson*, 101-

428; *Guilford v. Comrs.*, 120-28—but if it fail to contain certain entries, those made on civil issue docket should not be disregarded; but if they conflict, the minute docket prevails, *Walton v. McKesson*, 101-428.

9. *Special proceedings docket*, which shall contain a docket of all writs, summonses, petitions, or other original process issued by him, or returnable to his office, and not returnable to a regular term; this docket shall contain a brief note of every proceeding, up to the final judgment inclusive.

10. *Minute docket of proceedings before clerk*, which shall contain a record of all proceedings had before the clerk, in actions or proceedings not returnable to a regular term of the court.

See *Brittain v. Mull*, 91-500; *Edwards v. Cobb*, 95-8.

11. *Record of wills*, which shall contain a record of all wills, with the certificates of probate thereof.

12. *Record of appointments*, which shall contain a record of appointments of executors, administrators, guardians, and collectors, with revocations of all such appointments; and on which shall be noted all subsequent proceedings relating thereto.

Record is sufficient evidence of guardian's appointment: *Topping v. Windley*, 99-4.

13. *Record of orders and decrees*, which shall contain a record of all orders and decrees passed in his office, which he is required to make in writing, and not required to be recorded in some other book.

14. *Record of accounts*, which shall contain a record of accounts, in which must be recorded inventories and annual accounts of executors, administrators, collectors, trustees under assignments for creditors, and guardians, as audited by him from time to time.

15. *Record of settlements*, which shall contain a record of settlements, in which must be entered the final settlements of executors, administrators, collectors, commissioners, trustees under assignments for creditors, and guardians.

16. *Record of jurors*, which shall contain a list of all persons who serve as grand, petit, and tales jurors in his court; which shall be properly indexed.

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

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

19. *Cross-index of wills*, which shall contain a general alphabetical cross-index of all wills filed or recorded in the office of the clerk of the superior court, and devising real estate or any interest therein, whether such devise appears on the face of said will or not, showing the full name of each deviser, and all devisees as they are given in the will, together with the date of the probate of such will.

20. *Cross-index of executors and administrators*, which shall contain a general alphabetical cross-index of the appointment of all executors and administrators

made by the courts of their county, showing the name of the appointee, the name of the decedent, and date of appointment.

21. *Cross-index of guardians*, which shall contain a general alphabetical cross-index of the appointment of all guardians made by the courts of their county, showing the name of the guardian, the names of the wards, and date of appointment.

22. *Record of fines and penalties*, which shall contain an itemized and detailed statement of the respective amounts received by him in the way of fines, penalties and forfeitures, and paid over to the county treasurer.

23. *Lien docket*, which shall contain a record of all notices of liens filed in his office, properly indexed, showing the names of the lienor and lienee.

What is necessary to appear on this docket: *Fulp v. Power Co.*, 157-157.

24. *Record of appointment of receivers*, which shall contain a record of all appointments of receivers, and all inventories, reports, and accounts filed by them; which shall be properly indexed.

25. *Record of corporations*, which shall contain a record of the certificate of incorporation of all corporations chartered under general law, with principal office or place of business in his county.

26. *Accounts of indigent orphans*, which shall contain a record of all receipts from persons for money paid for indigent children.

27. *Register of physicians and surgeons*, which shall contain a list of the names and places of residence, with date of registration, of all persons registered by him as physicians and surgeons.

28. *Register of dentists*, which shall contain a registration of certificates of all persons entitled to practice dentistry in his county.

29. *Register of chiropodists*, which shall contain a list of the names and places of residence, with date of certificate, of all persons registered by him as chiropodists.

30. *Register of trained nurses*, which shall contain the name, residence and date of registration of all trained nurses duly licensed in his county.

31. *Permanent roll of registered voters*, which shall contain an alphabetical list by townships of all persons entitled to permanent registration, giving the name and age of each, the name of the person from whom he was descended, unless he himself was a voter on July 1, 1867, or prior thereto, the state in which he was such voter and the date he applied for registration.

32. *Record of payment of poll tax*, which shall contain a list by townships of all persons certified to him by sheriff or tax collector as having paid their poll tax by May first.

33. *Lunacy docket*, which shall contain a record of all the examinations of persons alleged to be insane, a brief summary of the proceedings, and his findings, and a record of all proceedings in lunacy transmitted to him by justices of the peace.

34. *Record of county treasurer's report*, which shall contain an itemized statement of all fines and penalties paid to the county treasurer; which said itemized statement of fines and penalties received by the county treasurer shall be by him reported to the clerk on the first day of January, April, July and October, respectively, of each and every year.

Record prima facie correct and competent evidence against sureties: *Davenport v. McKee*, 98-500.

35. *Nol. pros. with leave record*, which shall contain a record of all cases in which a nolle prosequi with leave is entered in criminal actions, with the term of court at which the order is made, and which shall be cross-indexed.

36. *Record of permits to purchase weapons*, which shall contain the name, date, place of residence, age, former place of residence, etc., of each person, firm or corporation to whom or which a permit is issued to purchase deadly weapons.

Rev., s. 915; Code, ss. 83, 95, 96, 97, 112, 1789; 1893, c. 52; 1899, c. 110; 1903, c. 51; 1901, c. 2, s. 9; 1899, c. 82; 1889, c. 181, s. 4; 1887, c. 178, s. 2; 1903, c. 359, s. 6; 1901, c. 550, s. 3; 1901, c. 89, s. 13; 1899, c. 1, s. 17; 1905, c. 360, s. 2; 1919, cc. 152, 314; 1919, c. 78, s. 7; 1919, c. 197, s. 4.

953. **To notify commissioners of insolvency of surety company in which county officer bonded.** Every clerk of the superior court shall furnish the chairman of the board of county commissioners with all notifications furnished him, in accordance with section 6380 under the article Fidelity Insurance of the chapter Insurance, by the insurance commissioner, that any surety company in which any officer of the county is bonded is insolvent or in imminent danger of insolvency.

Rev., 295.

ART. 4. REPORTS

954. **List of justices to secretary of state.** The clerk of the superior court of each county in which justices of the peace are not elected by the qualified voters thereof on the first Monday in January preceding each regular session of the general assembly shall certify to the secretary of state a correct list of all justices of the peace in office in his county, the township in which each resides, the term of office of each, time of election or appointment, and when the respective terms of office of each expires. He shall also report the names of those elected or appointed justices of the peace, but who have failed to qualify, and when their terms of office began and the length thereof.

Rev., s. 916; Code, s. 89; 1901, c. 37, s. 2; 1881, c. 326.

955. **Criminal statistics to attorney-general.** Within twenty days after the adjournment of any term of the superior court at which criminal causes were triable, the clerk thereof shall transmit to the office of the attorney-general of the state a duly certified statement of the number of indictments finally disposed of at such court, specifying the number for each separate offense, the number on which convictions were had and on which defendants were acquitted, and of indictments against persons who were convicted on confession, and against persons who were discharged without trial, and also the name, age, occupation, sex, race and offense of every person convicted at such court, or pleading guilty of any offense, together with such other items of information in relation to such convicts and their offenses as the attorney-general shall require, on a form prescribed by him. For every neglect of any clerk of said court he shall forfeit the sum of fifty dollars, to be adjudged in the superior court of Wake County on the motion of the attorney-general, whose duty it is hereby made to make such motion at the first term of said court held after such neglect of any clerk.

Rev., s. 917; 1889, c. 341, ss. 1, 2, 3.

ART. 5. MONEY IN HAND

956. Public funds to be reported to county commissioners. On the first Monday in December of each and every year, or oftener, if required by order of the board of commissioners or any other lawful authority, clerks of the superior courts shall make an annual report of all public funds which may be in their hands. The report shall be made to the board of county commissioners and addressed to the chairman thereof. It shall give an itemized statement of said funds so held, the date and source from which they were received, the person to whom due, how invested and where, in whose name deposited, the date of any certificate of deposit, the rate of interest the same is drawing, and other evidence of investment of said fund; and it shall include a statement of all funds in their hands by virtue or color of their office, and which may belong to persons or corporations. The report shall be subscribed and verified by the oath of the party making it before any person allowed to administer oaths.

Rev., s. 918; 1891, c. 580.

Failure to report or swearing falsely to same a misdemeanor, see section 4386.

957. Approval, registration, and publication of report. The board of commissioners shall refer all itemized statements made by the clerks of the superior courts to a special committee of their board, who shall compare the same with the records of the clerk's office from which the report is made and certify the same to the board as correct, and if approved the board shall cause the same to be registered in the office of the register of deeds, in a book to be furnished to said register by the board of county commissioners, which book shall be styled Record of Official Reports, with a proper index of all reports recorded therein, and each original report shall, if approved by the chairman of the board, be endorsed with the word "Approved," the date of approval and the endorsement signed by the chairman, and when recorded by the register of deeds he shall endorse thereon the date of registration, the page of the Record of Official Reports upon which the same is registered, sign the same and file it in his office. The register shall also cause a copy of the report to be published one time in some newspaper of general circulation published in the county of the register and also posted at the courthouse door within twenty days after filing the reports; and if no newspaper is published in the county the posting of the report at the courthouse door shall be a sufficient publication. The cost of publishing the report shall be paid by the county.

Rev., s. 919; Code, s. 90; 1891, c. 580, s. 3; 1893, c. 14, s. 3; 1874-5, c. 151; 1876-7, c. 276.

958. Report compelled by commissioners. If any clerk fails to report, or if after a report has been made the board of county commissioners have reason to believe that any report is incorrect, the board shall take legal steps to compel a proper report to be made by suit on the bond of such clerk, or by reporting the fact to the solicitor of the district to which the county of said board may belong for his action.

Rev., s. 920; Code, s. 92; 1891, c. 580, s. 2; 1874-5, c. 151, s. 3; 1876-7, c. 276.

959. Payment to persons entitled. The said clerks shall, on or before the first day of January in every year after the statements required in the foregoing

sections are made, account with and pay to the persons entitled to receive the same all such balances reported as aforesaid to be in their hands.

Rev., s. 921; Code, s. 1865; R. C., c. 73, s. 2; 1823, c. 1186, s. 2; 1831, c. 3, ss. 1, 3; 1893, c. 14, s. 1.

“Account” means written statement of receipts and payments; when settlement is intended, additional words are used: *State v. Dunn*, 134-668.

960. Unclaimed fees of jurors and witnesses paid to school fund. All moneys due jurors and witnesses which remain in the hands of any clerk of the superior court on the first day of January after the publication of a third annual report of the said clerk showing the same shall be turned over to the county treasurer for the use of the school fund of the county, and it is the duty of said clerk to indicate in his report any moneys so held by him for a period embracing the two annual reports.

Rev., s. 922; 1891, c. 580, s. 4; 1893, c. 14, s. 3.

961. Use by public until claimed. The money aforesaid, while held by the clerks, shall be paid, on application, to the person entitled thereto; and after it ceases to be so held, it may be used as other revenue, subject, however, to the claim of the rightful owner.

Rev., s. 923; Code, s. 1869; R. C., c. 73, s. 6; 1828, c. 41, s. 1.

962. Payment of money for indigent children. When any moneys, in the amount of one hundred dollars or less, are paid into court for indigent or needy children for whom no one will become guardian, upon satisfactory proof of the necessities of such children the clerk may, upon his own motion or order, pay out the same in such sum or sums at such time or times as in his judgment is for the best interests of said children, to the mother or other person who has charge of said children, or to some discreet and solvent neighbor of said minor, to be used and faithfully applied by them for the sole benefit and maintenance of such indigent and needy children. The clerk shall take a receipt from the person to whom any such sum is paid, and may require such person to render an account of the expenditure of the sum or sums so paid, and shall record the receipt and the accounts, if any are rendered by order of the clerk, in a book entitled *Record of Amounts Paid for Indigent Children*, and such receipt shall be a valid acquittance for the clerk. That in all cases where a minor child is now or may hereafter be the beneficiary of any policy of life insurance and the sum due to said minor child by virtue of any such policy does not exceed three hundred dollars, the insurance company which issued said policy may pay the sum due thereunder to the clerk of the Superior Court of the county where said minor child resides, whose duty it shall be to receive it, and said clerk shall issue and deliver to such insurance company his receipt for the sum so paid, which shall be a complete release and discharge of said company from any and all liability to said minor child under and by virtue of any such policy of insurance. Moneys so paid to said clerk shall be held and disbursed in the manner and subject to the limitations now provided by law.

Rev., s. 924; 1899, c. 82; 1911, c. 29, s. 1; 1919, c. 91.

CHAPTER 14

COMMISSIONERS OF AFFIDAVITS AND DEEDS

- 963. Appointment by governor; term; oath.
- 964. Record of appointments; certified copies evidence.
- 965. List of appointments prepared and published by secretary of state.
- 966. Published list conclusive.
- 967. Powers of such commissioners.
- 968. Powers of clerks of courts in other states.
- 969. Clerk and notaries to take affidavits.

963. Appointment by governor; term; oath. The governor is authorized to appoint and commission one or more commissioners in any foreign country, state or republic, and in such of the states of the United States, or in the District of Columbia, or any of the territories, colonies or dependencies as he may deem expedient, who shall continue in office for two years from the date of their appointment, unless sooner removed by the governor. Before such commissioner proceeds to perform any duty by virtue of this chapter, he shall take and subscribe an oath before a justice of the peace in the city or county in which he resides well and faithfully to execute and perform all the duties of such commissioner, according to the laws of North Carolina; which oath shall be filed in the office of the secretary of state.

Rev., ss. 926, 927; Code, ss. 632, 633.

964. Record of appointments; certified copies evidence. It is the duty of the governor to cause to be recorded by the secretary of state the names of the persons who are appointed and qualified as commissioners, and for what state, territory, county, city, or town; and the secretary of state, when the oath of the commissioner is filed in his office, shall forthwith certify the appointment to the several clerks of the superior courts of the state, who shall record the certificate of the secretary at length. All removals of commissioners by the governor, and the names of all commissioners whose commissions have expired by law, and which have not been renewed, shall be recorded and certified in like manner. A certified copy thereof from the clerk, or a certificate of the appointment or removal aforesaid from the secretary of state, shall be sufficient evidence of the appointment or removal of such commissioner.

Rev., s. 928; Code, s. 634.

See *Evans v. Etheridge*, 99-46.

965. List of appointments prepared and published by secretary of state. The secretary of state shall prepare and cause to be printed in each volume of the public laws a list of all persons who since the preceding publication in the public laws have been appointed commissioners of affidavits and to take the probate of deeds in any foreign country and in the several states and territories of the United States and in the District of Columbia, under this chapter, setting forth the state, territory or district or foreign country for which such persons were appointed and the dates of their respective appointments and term of office; and he shall add to each of said lists a list of all those persons whose appointments have been renewed, revoked, or have resigned, removed or died since the date of the list previously published, as far as the same may be known to him, with the dates of such revocation, resignation, removal or death.

Rev., s. 929; Code, ss. 635, 636, 637, 639.

See *Evans v. Etheridge*, 99-46.

966. Published list conclusive. The list of commissioners so published in any volume of the public laws shall be conclusive evidence in all courts of the appointments therein stated, and of the dates thereof.

Rev., s. 930; Code, s. 638.

See *Evans v. Etheridge*, 99-46.

967. Powers of such commissioners. The commissioners have authority to take the acknowledgment or proof of any deed, mortgage, or other conveyance of lands, tenements, or hereditaments lying in this state, and to take the private examination of married women, parties thereto, or any other writings to be used in this state. Such acknowledgment or proof, taken or made in the manner directed by the laws of this state, and certified by the commissioner, shall have the same force and effect for all purposes as if made or taken before any competent authority in this state. The commissioners also have full power and authority to administer an oath or affirmation to any person willing or desirous to make it before him, to take depositions, and to examine the witnesses under any commission emanating from the courts of this state, relating to any cause depending or to be brought in said courts. Every deposition, affidavit, or affirmation made before him is as valid as if taken before any proper officer in this state.

Rev., ss. 926, 927; Code, ss. 632, 633.

General powers of commissioner: *Barcello v. Hapgood*, 118-712; *Buggy Co. v. Pegram*, 102-540; *Maphis v. Pegram*, 107-505.

PROBATE OF DEEDS. Distinction between probate by clerk and by commissioner: *Evans v. Etheridge*, 99-43. Commissioner need not affix seal: *Johnson v. Duvall*, 135-642. A judicial or quasi judicial act: *Long v. Crews*, 113-256. Where commissioner not authorized to take probates, clerk's order to register invalid, when: *Long v. Crews*, 113-256; *Robinson v. Willoughby*, 70-358. Acknowledgment by resident or nonresident allowed before commissioner: *Buggy Co. v. Pegram*, 102-540; *Maphis v. Pegram*, 107-505.

Verification of pleadings before commissioner: *Hinton v. Ins. Co.*, 116-22; *Young v. Rollins*, 85-485. Old cases under former statutes: *Simmons v. Gholson*, 50-401; *Smith v. Castrix*, 27-518.

968. Powers of clerks of courts in other states. Every clerk of a court of record in any other state has full power as a commissioner of affidavits and deeds as is vested in regularly appointed commissioners of affidavits and deeds for this state.

Rev., s. 931; Code, s. 640.

For powers as to probate of deeds, see chapter Probate and Registration, s. 3294.

See *Barcello v. Hapgood*, 118-727; *Hinton v. Ins. Co.*, 116-22.

969. Clerks and notaries to take affidavits. The clerks of the supreme and superior courts and notaries public are authorized to take and certify affidavits to be used before any justice of the peace, judge or court of the state; and the affidavits so taken by a clerk shall be certified under the hands of the said clerk, and if to be used out of the county where taken, also under the seal of the court of which they are respectively clerks, and, if by a notary, under his notarial seal.

Rev., s. 925; Code, s. 631.

Clerks of courts in other states as commissioners: *Barcello v. Hapgood*, 118-712. Courts take judicial notice of their seals: *Ibid.* For probates generally, see sections 3293-3336.

CHAPTER 15

COMMON LAW

970. Common law declared to be in force. All such parts of the common law as were heretofore in force and use within this state, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this state and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this state.

Rev., s. 932; Code, s. 641; R. C., c. 22; 1715, c. 5, ss. 2, 3; 1778, c. 133.

The laws of our state rest for a foundation on the common law of England: *In re Bryan*, 60-38. Presumed that common law of other states the same as of this state: *Lassiter v. R. R.*, 136-89; *Hall v. R. R.*, 146-345; see, also, *Brown v. Pratt*, 56-202; *Griffin v. Carter*, 40-413.

PREVAILS. As to probate of wills, except as statute changes: *Crump v. Morgan*, 38-98—as to no allowance of alimony in divorce a vinculo, *Duffy v. Duffy*, 120-346—as to Jews, infidels, etc., taking oaths, *Shaw v. Moore*, 49-25—presumptively in states that were formerly English colonies, *Woods v. Telegraph Co.*, 148-1; *Gooch v. Faucett*, 122-270; *Cade v. Davis*, 96-139; *Jones v. Reddick*, 79-292; *Brown v. Pratt*, 56-202; *Griffin v. Carter*, 40-213.

DOES NOT PREVAIL. As to rules of practice in deciding issues of fact in probate of wills: *Downey v. Murphey*, 18-92—as to outlawry, *Sherrod v. Davis*, 2-282—as to fines and recoveries, *Barfield v. Combs*, 15-516—as to the demurring of the parol, *Baker v. Long*, 2-1—as to forfeiture of property for crime, *White v. Fort*, 10-264—as to special customs, *Jones v. Allen*, 27-473; *Winder v. Blake*, 49-336; *Morehead v. Brown*, 51-370.

This section cited but not construed in *Greenleaf v. Bank*, 133-295.

CHAPTER 16

CONSTABLES

- 971. Election and term.
- 972. Oaths to be taken.
- 973. Bond; where registered; how fees paid.
- 974. Special constables.
- 975. Vacancies in office.
- 976. Powers and duties.
- 977. To execute notices within justice's jurisdiction.

971. Election and term. In each township there shall be a constable, elected by the voters thereof, who shall hold his office for two years.

Rev., s. 933; Const., Art. IV, s. 24.

As to town constables, see sections 2638, 2639. The constitutional provision that officers shall hold until successors are qualified does not apply to constables: *King v. McLure*, 84-153.

972. Oaths to be taken. All constables, before they shall be qualified to act, shall take before the board of county commissioners the oaths prescribed for public officers, and also an oath of office.

Rev., s. 934; Code, s. 642; R. C., c. 24, s. 8.

973. Bond; where registered; how fees paid. The board of commissioners of each county shall require of each constable, elected or appointed for a township, on entering upon the duties of his office, to give a bond with good surety, payable to the state of North Carolina, in a sum not exceeding one thousand dollars, conditioned as well for the faithful discharge of his duty as constable as for his diligently endeavoring to collect all claims put into his hands for collection, and faithfully paying over all sums thereon received, either with or without suit, unto the persons to whom the same may be due. Said bond shall be duly proved and registered and, after registration, filed in the office of the register of deeds; and certified copies of the same from the register's office shall be received and read in evidence in all actions and proceedings where the original might be. The fees for proving and registering the bond of constable shall be paid by the constable. In Stanly County the fees shall be paid by the county.

Rev., s. 302; Code, s. 647; R. C., c. 24, s. 7; 1818, c. 980; 1820, c. 1045, s. 2; 1833, c. 17; 1869-70, c. 185; 1899, c. 54, s. 52; 1891, c. 229.

THE BOND ITSELF. Void if taken by improper person: *State v. Shirley*, 23-596. Its registration: *Warren v. Boyd*, 120-56. Where four persons signed bond as obligors, but constable's name did not appear in condition, nor did it appear who was constable, condition held void: *Grier v. Hill*, 51-572. Where bond made payable to the governor, and county court records were silent as to appointment and qualifications of constable, held a common-law bond only: *Reid v. Humphreys*, 52-258. Condition for the collection of claims refers only to those within magistrate's jurisdiction: *Brunhild v. Potter*, 107-416; *McLaurin v. Buchanan*, 60-91; *Ellis v. Long*, 30-515; *State v. Long*, 29-379; *Dunton v. Doxey*, 52-222; *State v. Outland*, 33-134; *State v. Stephens*, 25-92.

LIABILITY ON BONDS. See under sections 354, 356, 359. For false imprisonment by constable as such: *Warren v. Boyd*, 120-56. For failing to turn over money collected: *Governor v. Bailey*, 10-463. For failing to collect claims placed in his hands: *State v. Galbraith*, 65-409; *Lipscomb v. Cheek*, 61-332; *Nixon v. Bagby*, 52-4; *State v. Wall*, 31-20; *Chipley v. Albea*, 53-204; *Dunton v. Doxey*, 52-222; *Governor v. Carraway*, 14-436; *Morgan v. Horne*, 44-25; *State v. Stephens*, 25-92; *Wills v. Sugg*, 25-96. For taxes collected: *Greensboro v.*

Scott, 84-184. For money collected on claim and misappropriated: *Kivett v. Massey*, 63-240. For failing to execute process: *Hearn v. Parker*, 52-150. Are constables' bonds cumulative since term extended to two years? see *Moore v. Boudinot*, 64-190; *Goforth v. Mackey*, 25-25. Where took claim as constable, but collected it as deputy sheriff: *Ringold v. McGowan*, 34-44. General scope of his liability as collector of claims: *State v. Holcombe*, 24-211; *Hearn v. Parker*, 52-150; *Morgan v. Horne*, 44-25. Constable accepting claims within magistrates' jurisdiction presumed to accept them as constable: *Dunton v. Doxey*, 52-222. Not liable for releasing prisoner arrested under void process: *Appomattox Co. v. Buffaloe*, 121-37.

ACTIONS ON BOND. See under sections 354, 356, 359. For false imprisonment, held complaint sufficient: *Warren v. Boyd*, 120-56. Surety cannot sue cosureties as relator for default of principal: *Sanders v. Bean*, 44-318. In action for return of note, constable pleads he took judgment on it: *Gregory v. Hooks*, 33-371. Demand necessary before suing for money collected on claim: *Kivett v. Massey*, 63-240; *Potter v. Sturges*, 12-79; *White v. Miller*, 20-50; *Wills v. Sugg*, 25-96. Where negligence extended over period of two bonds, both liable: *State v. Wall*, 31-20.

CASES HAVING SLIGHT BEARING UPON SECTION: *State v. James*, 78-455; *State v. Ferguson*, 76-197; *State v. Outland*, 33-134; *Williams v. Williamson*, 28-281.

974. Special constables. For the better executing any precept or mandate in extraordinary cases, any justice of the peace may direct the same, in the absence of or for want of a constable, to any person not being a party, who shall be obliged to execute the same under like penalty that any constable would be liable to.

Rev., s. 935; Code, s. 645.

Justice can appoint a special constable hereunder: *State v. Wynne*, 118-1206; *State v. Armistead*, 106-639; *State v. Dula*, 100-424—and his decision is conclusive as to when case "extraordinary," *State v. Wynne*, 118-1206; *State v. Armistead*, 106-639; *State v. Dula*, 100-423—yet justice should state in special deputations that it is done for want of regular officer, *State v. Dula*, 100-423. The deputation should be in writing: *State v. Cale*, 150-805. Powers of special constable set forth in *State v. Armistead*, 106-639. Legality of prisoner's custody depends upon validity of deputation and not on sufficiency of mittimus: *Ibid.* Special officer must show warrant if demanded when making arrest: *State v. Dula*, 100-423.

Justice cannot appoint special constable in a civil action: *McKee v. Angel*, 90-60; *Marsh v. Williams*, 63-371; *Garlick v. Jones*, 48-404; but see *Baker v. Brem*, 127-322.

975. Vacancies in office. Upon the death, failure to qualify or removal of any constable out of the township in which he was elected or appointed constable, the board of commissioners may appoint another person to fill the vacancy, who shall be qualified and act until the next election of constables.

Rev., s. 936; Code, s. 646; R. C., c. 24, s. 6.

Vacancy filled by commissioners: *King v. McLure*, 84-153.

976. Powers and duties. Constables are hereby invested with and may execute the same power and authority as they have been by law heretofore vested with, and have executed; and, in discharge of their duties, they shall execute all precepts and processes of whatever nature to them directed by any justice of the peace or other competent authority within their county or upon any bay, river, or creek adjoining thereto; and the said precepts and processes shall be returned to the magistrate, or other proper authority.

Rev., s. 937; Code, s. 643; R. C., c. 24, s. 9.

For powers and duties of town constables, see section 2639. For liability upon official bond, see section 973.

A township constable has power to summon appraisers to lay off exemptions where execution issues from justice's court: *McAuley v. Morris*, 101-369—and to administer to them the

oath, *Ibid.* Process addressed "to any constable" can be served by any constable of the county: *Baker v. Brem*, 127-324 (in dissenting opinion). A special constable, appointed as a "special constable" in writing, has general powers of a regular constable with reference to that case: *State v. Armistead*, 106-639. Judgment not rendered invalid by failure of constable to sign return: *McElrath v. Butler*, 29-398.

Township constable has no power to serve process not directed to him: *McGloughan v. Mitchell*, 126-682—nor to inquire into regularity of criminal process where jurisdiction exists and warrant otherwise valid, *State v. Furguson*, 76-197; *Welch v. Scott*, 27-72—nor to serve case on appeal to supreme court, *Forte v. Boone*, 114-176—nor warrant of attachment issued by superior court, *Carson v. Woodrow*, 160-144.

977. To execute notices within justice's jurisdiction. Constables shall likewise execute, within the places aforesaid, all notices tendered to them which are required by law to be given for the commencement or in the prosecution of any cause before a justice of the peace; and the service thereof shall be made by delivering a copy to the person to be notified or by leaving a copy at his usual place of abode, if in the jurisdiction of the constable, which service, with the time thereof, he shall return on the notice, and such return shall be evidence of its service. On demand they shall deliver the notice to the party at whose instance it was issued.

Rev., s. 938; Code, s. 644; R. C., c. 24, s. 10.

Removal of constables, see Art. 2, under Offices and Public Officers.

See, also, section 482. Constable cannot serve case on appeal to supreme court: *Forte v. Boone*, 114-176—nor a warrant of attachment issued by superior court, *Carson v. Woodrow*, 160-144.

CHAPTER 17

CONTEMPT

- 978. Contempts enumerated; common law repealed.
- 979. Appeal from judgment of guilty.
- 980. Solicitor or attorney-general to appear for the court.
- 981. Punishment.
- 982. Summary punishment for direct contempt.
- 983. Courts and officers empowered to punish.
- 984. Indirect contempt; order to show cause.
- 985. Acts punishable as for contempt.
- 986. Trial of proceedings in contempt.

978. Contempts enumerated; common law repealed. Any person guilty of any of the following acts may be punished for contempt:

Power to commit or fine for contempt is essential to the existence of every court: *State v. Little*, 175-743; *In re Brown*, 168-417; *Ex parte McCown*, 139-104; *Scott v. Fishblate*, 117-265; *In re Deaton*, 105-59; *State v. Woodfin*, 27-199. Contempt itself and the history of punishment for contempt reviewed in *Ex parte McCown*, 139-104. Whenever the law affords any other adequate remedy, proceeding by attachment for contempt is in discretion of the court: *Murray v. Berry*, 113-46. Advice of counsel no excuse for contempt: *Green v. Griffin*, 95-55—except where it is directed to the interpretation of the court's mandate, *Ibid*. Punishment for contempt no bar to indictment: *In re Griffin*, 98-225; *State v. Woodfin*, 27-199. Practice explained and sufficiency of defense considered: *Kane v. Haywood*, 66-1. One prima facie guilty may be required to pay costs, though rule discharged: *Bond v. Bond*, 69-97. Proceeding for contempt cannot be withdrawn in superior court after appeal nor in supreme court by one creditor where there are other creditors with rights to be protected: *Bristol v. Pearson*, 109-718. Where motion to attach for contempt refused it is a bar to further proceedings upon same facts: *Wilson v. Craige*, 113-463. Officer sending person to jail for contempt not civilly liable even though he did it maliciously and erroneously: *Scott v. Fishblate*, 117-265. Receiver not punishable for contempt for refusing to turn over property to appointee of another court until question of priority decided: *Worth v. Bank*, 121-343. Where respondent appeared before judge outside of the district and answered, he will be deemed to have waived venue: *Herring v. Pugh*, 126-852.

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

Judge assaulted while away from courthouse during term of court: *Ex parte McCown*, 139-95. Disorderly behavior in court: *State v. Mott*, 49-449. Fighting in presence of court: *State v. Woodfin*, 27-199. What constitutes "in presence of court" discussed in *Ex parte McCown*, 139-95. Assault upon a witness while attending court: *State v. Little*, 175-743.

2. Behavior of the like character committed in the presence of any referee or referees, while actually engaged in any trial or hearing pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceeding authorized by law.

Contempt before referee punished by court appointing him: *LaFontaine v. Underwriters*, 83-132.

3. Any breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of any court.

Fighting in presence of court: *State v. Woodfin*, 27-199. Disorderly behavior: *State v. Mott*, 49-449.

4. Willful disobedience of any process or order lawfully issued by any court.

Disobedience by party or person other than officer: *In re R. R.*, 151-467; *Davis v. Fiber Co.*, 150-84; *In re Scarborough's Will*, 139-423; *Green v. Green*, 130-578, 140-651, 143-406; *Williamson v. Pender*, 127-481; *Herring v. Pugh*, 126-852; *Delozier v. Bird*, 123-689; *Shooting Club v. Thomas*, 120-334; *Childs v. Wiseman*, 119-497; *Wilson v. Craige*, 113-463; *Zimmerman v. Zimmerman*, 113-432; *Murray v. Berry*, 113-46; *Bristol v. Pearson*, 109-718; *Fleming v. Patterson*, 99-404; *Kron v. Smith*, 96-386; *Thompson v. Onley*, 96-9; *Green v. Griffin*, 95-50; *Young v. Rollins*, 90-128; *Boyett v. Vaughan*, 89-27; *Baker v. Cordon*, 86-116; *In re Walker*, 82-95; *In re Davis*, 81-72; *Pain v. Pain*, 80-322; *Daniel v. Owen*, 72-340; *Phillips v. Trezevant*, 70-176; *Bond v. Bond*, 69-97; *Morris v. Whitehead*, 65-637; *Wood v. Wood*, 61-538; *Pritchard v. Oldham*, 53-439—**by county commissioners**, *Cromartie v. Comrs.*, 87-134—**by officer**, *In re Patterson*, 99-407; *Ex parte Summers*, 27-149—**by public administrator**, *In re Brinson*, 73-278.

Cutting timber on land in violation of the order of court is contempt, though done under advice of counsel: *Weston v. Lumber Co.*, 158-270. **In willful disobedience the intent is not material:** *In re T. J. Parker*, 177-463. **A person may be in contempt for violating an injunction before it is served, if he knows of its being issued:** *Lodge v. Gibbs*, 159-66.

Disobedience of mandamus, *Cromartie v. Comrs.*, 87-134—**of subpoena**, *State v. Aiken*, 113-651. **The act abolishing imprisonment for debt does not embrace cases of attachment for failure to obey order of court:** *Wood v. Wood*, 61-538. **Where language in order is plain, it is no defense to charge of disobedience of same that language was not understood:** *Baker v. Cordon*, 86-116.

5. Resistance willfully offered by any person to the lawful order or process of any court.

6. The contumacious and unlawful refusal of any person to be sworn as a witness, or, when so sworn, the like refusal to answer any legal and proper interrogatory.

Witness refusing to answer questions in superior court: *In re Briggs*, 135-118—**before commissioner to take examination**, *Fertilizer Co. v. Taylor*, 112-145—**before referee**, *LaFontaine v. Underwriters*, 83-132.

7. The publication of grossly inaccurate reports of the proceedings in any court, about any trial, or other matter pending before said court, made with intent to misrepresent or to bring into contempt the said court; but no person can be punished as for a contempt in publishing a true, full and fair report of any trial, argument, decision or proceeding had in court.

Inaccurate report of proceedings of court, or criticism by newspaper: *In re Robinson*, 117-533; *In re Deaton*, 105-59; *Ex parte Biggs*, 64-202. **Libelous matter by attorney about court:** *In re Moore*, 63-398; *Ex parte Biggs*, 64-202. **As to publications made by an attorney in his own newspaper:** *Ibid.* **Sworn answer is conclusive as to intent with which publication made:** *In re Robinson*, 117-533; *Ex parte Biggs*, 64-202; *In re Moore*, 63-397. **But publishing defamatory reports about the judge after adjournment of court cannot be punished summarily:** *In re Brown*, 168-417.

8. Misbehavior of any officer of the court in any official transaction.

Attorney's failure to pay over money collected for client: *Kane v. Haywood*, 66-1. **Negligence of attorney in conduct of case:** *Robins, ex parte*, 63-312. **Where justice of the peace defaces appeal bond and refuses to make return, held misdemeanor, but not contempt:** *Weaver v. Hamilton*, 47-343. **Refusal of clerk superior court to send up record:** *Te-Gan-Tossee v. Rogers*, 9-567.

The several acts, neglects and omissions of duty, malfeasances, misfeasances, and nonfeasances, above specified and described, shall be the only acts, neglects and omissions of duty, malfeasances, misfeasances and nonfeasances which shall be the subject of contempt of court. And if there are any parts of the common

law now in force in this state which recognized other acts, neglects, omissions of duty, malfeasances, misfeasances and nonfeasances besides those specified and described above, the same are hereby repealed and annulled.

Legislature cannot deprive courts of inherent right to punish for contempt committed in presence of court: In re Brown, 168-417; State v. Little, 175-743; Ex parte McCown, 139-95; In re Robinson, 117-533; In re Patterson, 99-418; In re Oldham, 89-26; Ex parte Schenck, 65-366—but constitutional inhibition is not infringed by legislature in specifying what acts shall constitute contempt: In re Oldham, 89-23. Where contempt not committed in presence of court legislature may regulate power of court: In re Robinson, 117-538; In re Oldham, 89-23.

Rev., s. 939; Code, s. 648; 1905, c. 449.

979. Appeal from judgment of guilty. Any person adjudged guilty of contempt under the preceding section has the right to appeal to the supreme court in the same manner as is provided for appeals in criminal actions, except for the contempts described and defined in subsections one, two, three, and six. Nor shall the right of appeal lie under subsections four and five if such contempt is committed in the presence of the court.

Rev., s. 939; Code, s. 648; 1905, c. 449.

Appeal does not lie where offense committed in presence of court: State v. Little, 175-743; Ex parte McCown, 139-95; In re Deaton, 105-59; Scott v. Fishplate, 117-265; Young v. Rollins, 90-131; In re Davis, 81-75; Biggs, ex parte, 64-202; State v. Mott, 49-449; State v. Woodfin, 27-199; Ex parte Summers, 27-153.

Appeal lies where offense not committed in presence of court: In re T. J. Parker, 177-463; In re Brown, 168-417; Ex parte McCown, 139-95; In re Deaton, 105-59; Cromartie v. Comrs., 85-211; In re Davis, 81-74; Ex parte Robins, 63-319.

980. Solicitor or attorney-general to appear for the court. In all cases where a rule for contempt is issued by any court, referee, or other officer, the solicitor shall appear for the court or other officer issuing the rule, and in case of appeal to the supreme court, the attorney-general shall appear for the court or other officer by whom the rule was issued.

Rev., s. 939; Code, s. 648; 1905, c. 449.

981. Punishment. Punishment for contempt for matters set forth in the preceding sections shall be by fine not to exceed two hundred and fifty dollars, or imprisonment not to exceed thirty days, or both, in the discretion of the court.

Rev., s. 940; Code, s. 649.

Punishment according to statute: In re T. J. Parker, 177-463; Ex parte McCown, 139-122; Scott v. Fishplate, 117-265; Zimmerman v. Zimmerman, 113-432; State v. Aiken, 113-651. **Punishment contrary to statute:** In re Deaton, 105-59; In re Patterson, 99-407; In re Walker, 82-95. **Distinction between imprisonment to compel obedience to order of court and punishment for contempt in disobeying order pointed out:** In re Patterson, 99-417; Cromartie v. Comrs., 85-211. **Fine cannot be paid to party aggrieved, but must go to state:** Morris v. Whitehead, 65-637; In re Rhodes, 65-518.

982. Summary punishment for direct contempt. Contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every committal, attachment or process in the nature of an execution founded on such judgment or order.

Rev., s. 941; Code, s. 650.

Right of court to punish summarily: State v. Little, 175-743; In re Brown, 168-417; Ex parte McCown, 139-95; In re Briggs, 135-141 (concurring opinion); Baker v. Cordon, 86-

120; *State v. Mott*, 49-449; *Ex parte Summers*, 27-152; *State v. Yancey*, 4-133—without giving respondent a jury trial, *In re Deaton*, 105-64; *Baker v. Cordon*, 86-120, and cases cited.

Facts found must be set out by judge: *Ex parte McCown*, 139-99; *In re Deaton*, 105-59; *Young v. Rollins*, 90-131; *State v. Mott*, 49-449—and such facts found by superior court judge are conclusive, *In re T. J. Parker*, 177-463; *Ex parte McCown*, 139-99; *In re Deaton*, 105-59; *Young v. Rollins*, 90-125—and are not reviewable except for purpose of passing upon sufficiency to warrant judgment, *Green v. Green*, 130-578—but facts found by inferior court may be reviewed on appeal by superior court, *In re Deaton*, 105-59; *State v. Aiken*, 113-653. Where court finds facts, reviewing tribunal on habeas corpus may say whether they constitute contempt: *Ex parte Summers*, 27-149.

983. Courts and officers empowered to punish. Every justice of the peace, referee, commissioner, clerk of the superior court, inferior court, criminal court, or judge of the superior court, or justice of the supreme court, or board of commissioners of each county, or corporation commissioner, has power to punish for contempt while sitting for the trial of causes or engaged in official duties.

Rev., s. 942; Code, ss. 651, 652.

Cases where punishment was properly within power of supreme court: *In re Moore*, 63-397—of judge of superior court, *In re Brown*, 168-417; *State v. Little*, 175-743; *Ex parte McCown*, 139-95; *In re Briggs*, 135-118; *Williamson v. Pender*, 127-487; *Herring v. Pugh*, 126-852; *Shooting Club v. Thomas*, 120-334; *Childs v. Wiseman*, 119-498; *Murray v. Berry*, 113-46; *In re Patterson*, 99-407; *Thompson v. Onley*, 96-10; *Green v. Griffin*, 95-50; *Cromartie v. Comrs.*, 85-211; *In re Walker*, 82-95; *In re Davis*, 81-72; *Bond v. Bond*, 69-97; *Morris v. Whitehead*, 65-637; *In re Rhodes*, 65-518; *Ex parte Biggs*, 64-202; *Ex parte Robins*, 63-319; *Ex parte Schenck*, 65-353; *State v. Mott*, 49-449; *State v. Woodfin*, 27-199—of clerk superior court, *In re Scarborough*, 139-423; *In re Brinson*, 73-278—of mayor of town, *Scott v. Fishblate*, 117-265; *State v. Aiken*, 113-651; *In re Deaton*, 105-59.

Contempt committed before referee punished by court ordering reference: *LaFontaine v. Underwriters*, 83-132. **Contempt before commissioner punished by court appointing same:** *Fertilizer Co. v. Taylor*, 112-141.

984. Indirect contempt; order to show cause. When the contempt is not committed in the immediate presence of the court, or so near as to interrupt its business, proceedings thereupon shall be by an order directing the offender to appear, within reasonable time, and show cause why he should not be attached for contempt. At the time specified in the order the person charged with the contempt may appear and answer, and, if he fail to appear and show good cause why he should not be attached for the contempt charged, he shall be punished as provided in this chapter.

Rev., s. 943; Code, s. 653.

Procedure under this section: *In re T. J. Parker*, 177-463; *In re Brown*, 168-417; *Ex parte McCown*, 139-122; *Bristol v. Pearson*, 109-718; *In re Deaton*, 105-62; *In re Davis*, 81-72. **Where answer negatives under oath intentional contempt, rule discharged:** *In re Robinson*, 117-533; *Kron v. Smith*, 96-386; *Boyett v. Vaughan*, 89-27; *Baker v. Cordon*, 86-120; *In re Walker*, 82-95; *Ex parte Biggs*, 64-217; *In re Moore*, 63-398—but where it is in the power of party to obey order of court he cannot purge himself of contempt by answer disclaiming intention to commit: *In re T. J. Parker*, 177-463; *Herring v. Pugh*, 126-852; see *Smith v. Smith*, 92-304. **Inability to comply with order of court, when made to appear, discharges rule:** *Boyett v. Vaughan*, 89-27; *Pain v. Pain*, 80-325; *Kane v. Haywood*, 66-1.

Where tax is up to full constitutional limit, county commissioners are not in contempt for failure to pay debt as ordered: *Cromartie v. Comrs.*, 87-134. **Sufficiency of return of respondent to rule in order that it be discharged:** *Smith v. Smith*, 92-304.

985. Acts punishable as for contempt. Every court of record has power to punish as for contempt when the act complained of was such as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court—

Proceedings should be based on affidavits: *In re Odum*, 133-250; *In re Deaton*, 105-59. Failure to base proceedings on affidavits is waived by contemnor being present and making answer to rule: *In re Odum*, 133-250. Judge must find facts and file same: *Ibid.* Disavowal of imputed intent relieves respondent only when intention is gravamen of offense: *In re T. J. Parker*, 177-643; *In re Gorham*, 129-489; *In re Young*, 137-552. Respondent has no right to jury trial: *State v. Little*, 175-743; *In re Gorham*, 129-481—and no right to have findings of fact of judge, there being evidence, reviewed on appeal: *In re T. J. Parker*, 177-743; *In re Young*, 137-552; *In re Gorham*, 129-481. Proceedings as for contempt apply only to civil actions, except subsections 4, 5 and 6: *In re Deaton*, 105-59.

1. Any clerk, sheriff, register, solicitor, attorney, counselor, coroner, constable, referee, or any other person in any manner selected or appointed to perform any ministerial or judicial service, for any neglect or violation of duty or any misconduct by which the rights or remedies of any party in a cause or matter pending in such court may be defeated, impaired, delayed, or prejudiced, for disobedience of any lawful order of any court or judge, or any deceit or abuse of any process or order of any such court or judge.

2. Parties to suits, attorneys, and all other persons for the nonpayment of any sum of money ordered by such court, in cases where execution cannot be awarded for the collection of the same.

3. All persons for assuming to be officers, attorneys or counselors of the court, and acting as such without authority, for receiving any property or person which may be in custody of any officer by virtue of any order or process of the court, for unlawfully detaining any witness or party to any suit, while going to, remaining at, or returning from the court where the same may be set for trial, or for the unlawful interference with the proceedings in any action.

Unlawful interference with proceedings by party: *State v. Little*, 175-743; *State v. Moore*, 146-653; *In re Young*, 137-552; *In re Odum*, 133-250; *In re Oldham*, 89-23—by attorney, *In re Gorham*, 129-481.

4. All persons summoned as witnesses in refusing or neglecting to obey such summons to attend, be sworn, or answer, as such witness.

Witness refusing to answer question before commissioner: *Fertilizer Co. v. Taylor*, 112-141.

5. Parties summoned as jurors for impropriety, conversing with parties or others in relation to an action to be tried at such court or receiving communication therefrom.

Juror conversing with party: *In re Odum*, 133-251; *In re Gorham*, 129-489.

6. All inferior magistrates, officers and tribunals for disobedience of any lawful order of the court, or for proceeding in any matter or cause contrary to law, after the same shall have been removed from their jurisdiction.

7. All other cases where attachments and proceedings as for contempt have been heretofore adopted and practiced in courts of record in this state to enforce the civil remedies or protect the rights of any party to an action.

Right of court to punish under this section: *Cromartie v. Comrs.*, 85-215. Person in jail for contempt cannot be worked on roads: *State v. Moore*, 146-653.

Rev., s. 944; Code, ss. 654, 656.

Disobedience of order of court is punishable as for contempt, see Civil Procedure, s. 727.

986. Trial of proceedings in contempt. Proceedings as for contempt shall be prosecuted and carried on as provided in provisional remedies. In all proceedings for contempt and in proceedings as for contempt, the judge or other judicial officer who issues the rule or notice to the respondent may make the same returnable before some other judge or judicial officer. When the personal conduct of the judge or other judicial officer or his fitness to hold his judicial position is involved, it is his duty to make the rule or notice returnable before some other judge or officer. Nothing herein contained shall apply to any act or conduct committed in the presence of the court and tending to hinder or delay the due administration of the law, nor to proceedings for the disobedience of a judicial order rendered in any pending action.

Rev., s. 945; Code, s. 655; 1915, c. 4.

See *In re Brown*, 168-417. For refusal to produce books of a corporation, see section 1203 et seq.

CHAPTER 18

CONTRACTS REQUIRING WRITING

- 987. Contracts charging representative personally; promise to answer for debt of another.
- 988. Contracts for sale of land; leases.
- 989. Contracts with Cherokee Indians.
- 990. Promise to revive debt of bankrupt.

987. Contracts charging representative personally; promise to answer for debt of another. No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

Rev., s. 974; Code, s. 1552; R. C., c. 50, s. 15; 1826, c. 10; 29 Charles II, c. 3, s. 4.

PROMISES BY PERSONAL REPRESENTATIVES. A promise (not in writing) by an administrator that he would see a debt of his testator paid, or would pay it, is void hereunder: *Smithwick v. Shepherd*, 49-196—for such a promise to bind administrator or executor personally must be in writing and supported by a consideration, *McLean v. McLean*, 88-396—and the consideration must be a benefit to the executor, or an injury to the creditor, one founded on forbearance or the possession of assets, *Williams v. Chaffin*, 13-333; *Sleighter v. Harrington*, 6-332; *McLean v. McLean*, 88-396; *Banking Co. v. Morehead*, 122-318.

A personal representative who executes a note, without qualification or reservation as to personal liability, for a debt of deceased, is personally liable even though signing note as “executor” or “administrator”: *Banking Co. v. Morehead*, 124-622, 122-318, 116-410, 116-413; *McLean v. McLean*, 88-396, and cases cited; see, also, *Leroy v. Jacobosky*, 136-450. Agreement of administrator to pay debt of intestate out of assets of intestate’s estate is not within this section: *Norton v. Edwards*, 66-369.

PROMISES TO ANSWER FOR DEBT OF ANOTHER. As to whether words used amount to a promise to answer for debt, default, or miscarriage of another, or amount to an original obligation on the part of promisor, see *Peele v. Powell*, 156-553; *Jenkins v. Holley*, 140-379; *Sheppard v. Newton*, 139-535; *Garrett-Williams Co. v. Hamill*, 131-57; *White v. Tripp*, 125-523; *Rowland v. Barnes*, 81-234; *Morrison v. Baker*, 81-76; *Neal v. Bellamy*, 73-384; *Smithwick v. Shepherd*, 49-196. **Promise to answer for debt, default, or miscarriage of another must be in writing:** *Sheppard v. Newton*, 139-535; *Garrett-Williams Co. v. Hamill*, 131-57; *Rowland v. Barnes*, 81-234; *Scott v. Bryan*, 73-582; *Britton v. Thraikill*, 50-330.

New parol contract to pay debt of another superadded to original cause of action which remains in force is void: *Handle Co. v. Plumbing Co.*, 171-495; *Holland v. Hartley*, 171-376; *Peele v. Powell*, 156-553; *Haun v. Burrell*, 119-544; *Horne v. Bank*, 108-109; *Combs v. Harshaw*, 63-198; *Stanly v. Hendricks*, 35-86; *Rogers v. Rogers*, 51-300; *Britton v. Thraikill*, 50-330; *Draughan v. Bunting*, 31-10—and this is so even though it be founded upon a consideration, *Combs v. Harshaw*, 63-198; approved in *Haun v. Burrell*, 119-544. Where one had claim against three distributees on account of assets received from intestate’s estate, and they jointly promised verbally to pay debt, such promise being to answer for liability of another is void: *Hill v. Doughty*, 33-195. Oral promise by married woman to answer for debt of husband cannot be enforced against her separate personal estate: *Coffey v. Shuler*, 112-622. Parol promise by husband to pay for lands settled by third persons on his wife and children void under section: *Bagley v. Sasser*, 55-350.

The statute does not apply to a promise to pay the debt of another where the original debtor is discharged and the promisor becomes the sole debtor: *Parker v. Daniels*, 159-518; *Whitehurst v. Padgett*, 157-424; *Peele v. Powell*, 156-553; *Jenkins v. Holley*, 140-379; *Sheppard v. Newton*, 139-533; *White v. Tripp*, 125-523; *Draughan v. Bunting*, 31-10.

The statute does not apply when the promise is based upon some new and original consideration moving between the creditor and the promisor, as to pay his own debt or to protect a right: *Charlotte v. Alexander*, 173-515; *Handle Co. v. Plumbing Co.*, 171-495; *Springs v. Cole*, 171-418; *Holland v. Hartley*, 171-376; *Price v. Harrington*, 171-132; *Whitehurst v. Padgett*, 157-424; *Rogers v. Lumber Co.*, 154-108; *Hospital v. Hobbs*, 153-188; s. c., 157-460; *Deaver v. Deaver*, 137-240; *Whitehurst v. Hyman*, 90-487; *Mason v. Wilson*, 84-51; *Hockaday v. Parker*, 53-16; *Rowland v. Rorke*, 49-339; *Stanly v. Hendricks*, 35-86; *Shaver v. Adams*, 32-14; *Ashford v. Robinson*, 30-114; *Cooper v. Chambers*, 15-261.

The statute does not apply to a promise made to the debtor himself: *Deaver v. Deaver*, 137-240; *Haun v. Burrell*, 119-544; as where A promises B to pay him \$100 if he will buy C's land, *Little v. McCarter*, 89-233; or where the purchaser of land agrees, as a part of the price, to pay the vendor's debt, *Satterfield v. Kindley*, 144-455; *Rice v. Carter*, 33-298.

The statute does not apply to a promise to pay the debt of another out of the debtor's property in the promisor's hands: *Voorhees v. Porter*, 134-591; *Mason v. Wilson*, 84-51; *Threadgill v. McLendon*, 76-24; *Stanly v. Hendricks*, 35-86; *Draughan v. Bunting*, 31-10.

The statute does not apply when credit is given to a promisor alone, or to him jointly with another as principals: *Ford v. Moore*, 175-260; *Whitehurst v. Padgett*, 157-424; *Peele v. Powell*, 156-553.

The statute applies to contracts of guaranty: *Gilmer v. Improvement Co.*, 170-452; *Partin v. Prince*, 159-553; *Supply Co. v. Finch*, 147-106; but not where it is in the nature of an original obligation of the promisor, *Marrow v. White*, 151-96; *Adcock v. Fleming*, 19-225. Indemnity contracts are within the statute: *Draughan v. Bunting*, 31-10; *Martin v. McNeely*, 101-634.

A consideration is necessary; if the promise is made at the time of the original contract, the original consideration is sufficient; if made later, a new consideration is required: *Craig v. Stewart*, 163-531; *Peele v. Powell*, 156-553. The consideration may be proved by parol: *Supply Co. v. Person*, 154-456; *Haun v. Burrell*, 119-544; *Ashford v. Robinson*, 30-116; *Nichols v. Bell*, 46-32.

The defendant may take advantage of the statute by a general denial, by setting up a different contract, or by admitting the contract and specially pleading the statute: *Winders v. Hill*, 144-614; *Jordan v. Furnace Co.*, 126-143; *Haun v. Burrell*, 119-544; *Browning v. Berry*, 107-231; *Morrison v. Baker*, 81-76. For what is sufficient writing to comply with the statute, see cases cited under section 988.

Section merely referred to: *Hemphill v. Annis*, 119-515; *Kelly v. McNeill*, 118-354; *Miller v. Irvine*, 18-105.

988. Contracts for sale of land; leases. All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

Rev., s. 976; Code, ss. 1554, 1743; R. C., c. 50, s. 11; 29 Ch. II, c. 3, ss. 1, 2, 3; 1819, c. 1016; 1844, c. 44; 1868, c. 156, ss. 2, 33.

English statute of frauds is not in force in this state except so far as it has been enacted here: *Odom v. Clark*, 146-544. Legislature has power to modify or repeal the whole of the statute of frauds in so far as it relates to future contracts for sale of land; it has no authority to give repealing statute a retroactive operation so as to affect or destroy vested rights: *Lowe v. Harris*, 112-472.

CONTRACTS WITHIN THE STATUTE. All executory contracts for the sale of land or any interest therein, legal or equitable: *Poe v. Smith*, 172-67; *Kelly v. McNeill*, 118-349; *Dover v. Rhea*, 108-88; *Perkins v. Presnell*, 100-220; *Wilkie v. Womble*, 90-254; *Holmes v. Holmes*, 86-205. Conveyances of real estate or any interest in or concerning same: *Hall v. Misenheimer*, 137-186; *Drake v. Howell*, 133-165; *Presnell v. Garrison*, 121-366; *Buckner v. Anderson*, 111-577; *Cox v. Ward*, 107-511; *Neaves v. Mining Co.*, 90-413; *Young v. Young*,

81-92; Daniel v. Crumpler, 75-184. **The sale of growing trees:** Burwell v. Chapman, 159-209; Midyette v. Grubbs, 145-85; Tremaine v. Williams, 144-114; York v. Westall, 143-281; Lumber Co. v. Corey, 140-462; Hawkins v. Lumber Co., 139-160; Ward v. Gay, 137-399; Drake v. Howell, 133-165; Carpenter v. Medford, 99-499; Dunkart v. Rinehart, 89-354; Green v. R. R., 73-524; Moring v. Ward, 50-272; Mizell v. Burnett, 49-249. **A grant of an easement:** Herndon v. R. R., 161-650; Kivett v. McKeithan, 90-106; McCracken v. McCracken, 88-272. **Contract of sale of expectancy in land:** Vick v. Vick, 126-123, and cases cited; see Boles v. Caudle, 126-352. **Partition of land between tenants in common:** Rhea v. Craig, 141-602; Fort v. Allen, 110-183; Medlin v. Steele, 75-154. **Agreement as to dividing line between two tracts:** Presnell v. Garrison, 121-366; s. c., 122-595; Shaffer v. Hahn, 111-1; Buckner v. Anderson, 111-572; Kirkpatrick v. McCracken, 161-198. **An agreement for arbitration in regard to land:** Cutler v. Cutler, 169-482; Fort v. Allen, 110-183. **Surrender of dower interest to remainderman:** Houston v. Smith, 88-312. **Agreement by husband with wife that proceeds of sale of wife's lands should be invested in other lands:** Cade v. Davis, 96-139. **Agreements made after sale of land that land should be held in trust:** Kelly v. McNeill, 118-349; Hamilton v. Buchanan, 112-463. **Conveyance of an equitable estate in land:** Wilkie v. Womble, 90-254; Holmes v. Holmes, 86-205; Shields v. Whitaker, 82-516; Shelton v. Shelton, 58-295; Maxwell v. Wallace, 45-251; Simms v. Killian, 34-252; Rice v. Carter, 33-298. **Agreement that third person should be substituted for one of the original parties to a contract of sale of land:** Love v. Cobb, 63-324. **Contract for sale of fixtures:** Bond v. Coke, 71-97. **Agreement by parties to covenant for conveyance of land that title to land should be held by covenanter as indemnity against loss as surety for covenantee:** Harper v. Spainhour, 64-629. **Promise by vendee of land as consideration therefor to pay purchase money to another to whom vendor indebted:** Rice v. Carter, 33-298. **Sale of land by trustee under deed of trust made for purpose of satisfying debts secured by deed:** Ingram v. Dowdle, 30-455. **Lease of land for mining purposes:** Lea v. McKenzie, 56-235; Briles v. Pace, 36-279. **Leases of land for more than three years:** Jordan v. Furnace Co., 126-143; Krider v. Ramsey, 79-359; Briles v. Pace, 35-279. **An assignment of a lease which has more than three years to run:** Alexander v. Morris, 145-22.

CONTRACTS NOT WITHIN THE STATUTE. Executed contracts: Rogers v. Lumber Co., 154-108; Brinkley v. Brinkley, 128-503; McManus v. Tarleton, 126-790; Hall v. Fisher, 126-205; Smith v. Arthur, 110-400; Farmer v. Willard, 71-284; Massey v. Holland, 25-197; Bridges v. Purcell, 18-494; Choat v. Wright, 13-289. **Leases of land for three years or less:** Smithdeal v. McAdoo, 172-700; Alexander v. Morris, 145-22; Teal v. Templeton, 149-32. **Contract to cut and deliver wood:** Ives v. R. R., 142-131; Green v. R. R., 73-524. **Contract to cut and haul timber for another:** Sumner v. Lumber Co., 175-654; Midyette v. Grubbs, 145-85; Thomas v. Merrill, 169-623. **Timber cut on land:** Lumber Co. v. Brown, 160-281. **A contract to withdraw claim to cut standing timber, which claim was acquired by parol, in consideration of a release of all damages for trespass alleged:** York v. Westall, 143-276. **Contract to make bricks on land of another, title to bricks to remain in owner of soil until paid for clay and wood used in manufacture:** Brown v. Morris, 83-251. **Contracts concerning growing crops:** Flynt v. Conrad, 61-190; Walton v. Jordan, 65-170; Bond v. Coke, 71-100; Brittain v. McKay, 23-265. **Agreements made at time of execution of deed that vendor would make good any deficiency in acreage:** Stern v. Benbow, 151-460; Currie v. Hawkins, 118-593; McGee v. Craven, 106-351—or would refund pro rata part of purchase money if acreage fell short, Sherrill v. Hagan, 92-345. **Contract to pay one-half of amount for which a mineral interest may be sold:** Michael v. Foil, 100-178; or a part of the proceeds of a resale of the land, Buie v. Kennedy, 164-291; Brown v. Hobbs, 147-73; Bourne v. Sherrill, 143-381; Sprague v. Bond, 108-382. **Contract to pay for improvements on the land:** Ferrell v. Mining Co., 176-475; Houston v. Sledge, 101-640. **A promise to pay a person a specific sum if he will purchase another's land:** Little v. McCarter, 89-233. **An agreement to release a mortgage:** Hemmings v. Doss, 125-400. **An agreement to rescind a contract for land if acted upon by the parties:** Taylor v. Taylor, 112-27; Holden v. Purefoy, 108-163; Miller v. Pierce, 104-389; Faw v. Whittington, 72-321.

Authority to sell land need not be in writing: Smith v. Browne, 132-365; Neaves v. Mining Co., 90-412; Blacknall v. Parish, 59-70. **Contract for compensation for services in selling land:** Lamb v. Baxter, 130-67; Abbott v. Hunt, 129-403; but a contract to receive land as compensation should be in writing, Faireloth v. Kenlaw, 165-228. **The statute does not apply**

to agreements for party walls: *Reid v. King*, 158-85; nor to partnership agreements for trading in land, *Robinson v. Daughtry*, 171-200; *Brogden v. Gibson*, 165-16; *Buie v. Kennedy*, 164-291; *Brown v. Hobbs*, 147-73. A mere license as distinguished from an easement: *Kivett v. McKeithan*, 90-106; *McCracken v. McCracken*, 88-272. A transfer of a judgment which is a lien on land: *Winberry v. Koonce*, 83-351.

As to sale of fixtures, see *State v. Martin*, 141-832; *Overman v. Sasser*, 107-432; *Cowell v. Ins. Co.*, 126-684; *R. R. v. Deal*, 90-110; *Bond v. Coke*, 71-97. That the statute does not apply to judicial sales, see *Hudson v. Coble*, 97-260; nor to sales under execution, *Tate v. Greenlee*, 15-149; but see *Woodruff v. Trust Co.*, 173-546.

Parol trusts declared at or before the transfer of title are valid; so are resulting trusts and constructive trusts, which arise by operation of law: *Rush v. McPherson*, 176-562; *Williams v. Honeycutt*, 176-102; *Wilson v. Jones*, 176-205; *Pritchard v. Williams*, 175-319; *Allen v. Gooding*, 173-93; *Ballard v. Boyette*, 171-24; *Lutz v. Hoyle*, 167-632; *Brogden v. Gibson*, 165-16; *Jones v. Jones*, 164-320; *Anderson v. Harrington*, 163-140; *Taylor v. Wahab*, 154-219; *Russell v. Wade*, 146-116; *Avery v. Stewart*, 136-426; *Owens v. Williams*, 130-165; *Gorrell v. Alspaugh*, 120-367; *Kelly v. McNeill*, 118-349; *Cobb v. Edwards*, 117-244; *Hamilton v. Buchanan*, 112-463; *Blount v. Washington*, 108-231; *Dover v. Rhea*, 108-88; *Pittman v. Pittman*, 107-159; *Cohn v. Chapman*, 62-92; *Riggs v. Swann*, 59-118; *Shelton v. Shelton*, 58-292; *Hanff v. Howard*, 56-440; *Cousins v. Wall*, 56-43; *Cloninger v. Summit*, 55-513. But a parol trust in favor of the grantor is invalid: *Walters v. Walters*, 171-312, 172-328; *Campbell v. Sigmon*, 170-348; *Trust Co. v. Sterchie*, 169-21; *Cavanaugh v. Jarman*, 164-372; *Jones v. Jones*, 164-320; *Ricks v. Wilson*, 154-282; *Gaylord v. Gaylord*, 150-222.

Other parts of section 4 and section 17 of the English statute of frauds have not been adopted in this state. Contracts in consideration of marriage, unless the contract concerns land: *Montgomery v. Henderson*, 56-113. Contracts not to be performed within a year; sales of goods, wares and merchandise on credit: *Hurlburt v. Simpson*, 25-233. Sales of liquor on credit for over \$10 required to be in writing: *Covington v. Threadgill*, 88-186 (Rev., 977, not brought forward).

WHAT IS SUFFICIENT MEMORANDUM. There must be a writing signed by party to be charged therewith or by his agent thereto lawfully authorized, showing the parties and expressly or by implication all material terms of contract: *Hall v. Misenheimer*, 137-186, and cases there cited; *Burriss v. Starr*, 165-657; *Flowe v. Hartwick*, 167-448; *Mayer v. Adrian*, 77-83. The memorandum must be signed by party to be charged, the defendant in an action to enforce the contract: *Lewis v. Murray*, 177-17; *Love v. Harris*, 156-88; *Davis v. Martin*, 146-281; *Lumber Co. v. Corey*, 140-462; *Hall v. Misenheimer*, 137-183; *Love v. Atkinson*, 131-544; *Davidson v. Land Co.*, 126-704; *Hall v. Fisher*, 126-205; *MaGee v. Blankenship*, 95-563; *Green v. R. R.*, 77-95; *Mizell v. Burnett*, 49-249; *Edwards v. Kelly*, 53-69. A memorandum or note of a contract may be signed by one in the name of his principal or by agent in his own name without being thereunto authorized in writing: *Blacknall v. Parish*, 59-70; *Neaves v. Mining Co.*, 90-415; *Washburn v. Washburn*, 39-311; *Oliver v. Dix*, 21-165; *Phillips v. Hooker*, 62-191; *Flowe v. Hartwick*, 167-448; but one party cannot be agent for the other, *Asbury v. Mauney*, 173-454. An auctioneer is agent of both vendor and purchaser to bind them to the contract: *Woodruff v. Trust Co.*, 173-546; *Love v. Harris*, 156-88; *Proctor v. Finley*, 119-536; *Mayer v. Adrian*, 77-83; *Gwathmey v. Cason*, 74-5; *Cherry v. Long*, 61-466. It seems that the auctioneer should sign the writing at the time of the transaction: *Love v. Harris*, 156-88; *Dickerson v. Simmons*, 141-325.

What is sufficient signing: *Burriss v. Starr*, 165-657; *Wellman v. Horn*, 157-170; *Love v. Harris*, 156-88; *Hall v. Misenheimer*, 137-183; *Proctor v. Finley*, 119-536; *Hargrove v. Adcock*, 111-166; *Devereux v. McMahon*, 108-134; *Cherry v. Long*, 61-466; *Plummer v. Owens' Admrs.*, 45-254; *Washburn v. Washburn*, 39-306; *Oliver v. Dix*, 21-165. Signing the minutes of a corporate meeting by the secretary is not sufficient to bind the individual stockholders: *Asbury v. Mauney*, 173-454.

The writing should describe the property sufficiently to be identified, and this does not exclude parol evidence: *Lewis v. Murray*, 177-17; *Stockard v. Warren*, 175-283; *Bateman v. Hopkins*, 157-470; *Improvement Co. v. Guthrie*, 116-381; *Lowe v. Harris*, 112-472; *Fortescue v. Crawford*, 105-29; *Gordon v. Collett*, 102-532; *Thornburg v. Masten*, 88-293; *Capps v. Holt*, 58-153; *Murdock v. Anderson*, 57-77. A valid contract may be on one or more papers, provided they are so connected physically or by internal reference that there can be no uncertainty as to their meaning and effect when taken together: *Mfg. Co. v. Hendricks*, 106-492;

Gordon v. Collett, 102-532; Mayer v. Adrian, 77-83. A letter referring to a deed which is enclosed is sufficient: McLendon v. Ebbs, 173-603. Indorsing and using a check is not sufficient writing for a contract to convey an easement: Leach v. Lumber Co., 159-532. A draft signed by an agent in payment for mineral for which deed was delivered binds the principal, though not named: Neaves v. Mining Co., 90-412. A note or other personal security given for the purchase money by the purchaser is sufficient: *Ibid.*; Hargrove v. Adeock, 111-166. Recitals in a letter where proof could be made without resorting to parol evidence is sufficient: Neaves v. Mining Co., 90-412; Mizell v. Burnett, 49-254. A writing signed and sealed by the owner of land, with name of bargainee blank, and left with agent to complete by filling out the blanks, may be sufficient as a contract to convey: Blacknall v. Parish, 59-70. A receipt by the vendor reciting that the purchaser had paid a part of the price for certain land is sufficient to bind the vendor, but not the purchaser unless it specifies the amount to be paid: Hall v. Misenheimer, 137-183. An assignment written on a lease is sufficient: Alexander v. Morris, 145-22.

A consideration is necessary, but it need not appear in the writing: Lewis v. Murray, 177-17; Bateman v. Hopkins, 157-470; Hall v. Misenheimer, 137-183; Hargrove v. Adeock, 111-166; Tunstall v. Cobb, 109-325; Mfg. Co. v. Hendricks, 106-493; Neaves v. Mining Co., 90-412; Green v. Thornton, 49-230. A seal is not necessary: Stephens v. Midyette, 161-323; Mitchell v. Bridgers, 113-63; Simmons v. Spruill, 56-9. An undelivered deed may be sufficient evidence of the contract: Pope v. McPhail, 173-238; Vinson v. Pugh, 173-189; Flowe v. Hartwick, 167-448; MaGee v. Blankenship, 95-563. Since the writing is evidence of the contract, the writing may be made afterward: MaGee v. Blankenship, 95-563.

EFFECT OF FAILURE TO COMPLY WITH STATUTE. The contract is not void, but voidable: Henry v. Hilliard, 155-372; Williams v. Lumber Co., 118-928; Improvement Co. v. Guthrie, 116-381; Loughran v. Giles, 110-423; Gordon v. Collett, 104-381; Dail v. Freeman, 92-351; Syme v. Smith, 92-338. The contract may be enforced unless the party to be charged takes advantage of the statute: Henry v. Hilliard, 155-372; Cowell v. Ins. Co., 126-684; Hemmings v. Doss, 125-400; Williams v. Lumber Co., 118-928; Hall v. Lewis, 118-510; Loughran v. Giles, 110-423; Pitt v. Moore, 98-85; Thigpen v. Staton, 104-40; Kenner v. Mfg. Co., 91-421; Clancy v. Craine, 17-365. The contract can be proved only by the writing: Williams v. Lumber Co., 118-928; Morrison v. Baker, 81-76.

The defendant in an action to enforce the contract may take advantage of the statute by denying the contract, by setting up another and different contract, or by admitting the contract and specially pleading the statute: Henry v. Hilliard, 155-372; Miller v. Monazite Co., 152-608; Luton v. Badham, 127-96; Jordan v. Furnace Co., 126-143; North v. Bunn, 122-768; Haun v. Burrell, 119-544; Williams v. Lumber Co., 118-928; Hall v. Lewis, 118-509; Vann v. Newsom, 110-122; Browning v. Berry, 107-231; Fortescue v. Crawford, 105-29; Thigpen v. Staton, 104-40; Holler v. Richards, 102-545; Guley v. Macy, 84-434; Young v. Young, 81-91; Bonham v. Craig, 80-224; Barnes v. Brown, 71-507; Allen v. Chambers, 39-125; Dunn v. Moore, 38-364; Ellis v. Ellis, 16-341. The defendant cannot take advantage of the statute by demurrer: Loughran v. Giles, 110-423; Hemmings v. Doss, 125-400. The defendant may be estopped by his conduct to plead the statute: Alston v. Connell, 140-485. Third persons, strangers to the contract, cannot take advantage of the statute: Plaster Co. v. Plaster Co., 156-455; Cowell v. Ins. Co., 126-684; Parker v. Allen, 84-466; Davis v. Insoce, 84-396. If either party is bound in writing he cannot take advantage of the statute as against the other, who may not be bound; the vendor may repudiate the contract when sued or sue for the land; the purchaser may repudiate when sued, but cannot sue to recover his money when the vendor is willing to convey or is bound in writing: Brown v. Hobbs, 154-544; Love v. Atkinson, 131-544; Davis v. Yelton, 127-348; Davison v. Land Co., 126-704; McNeill v. Fuller, 121-209; Syme v. Smith, 92-338; Simms v. Killian, 34-252; Clancy v. Craine, 17-363.

Action for damages for the nonperformance of a parol contract for purchase of land cannot be sustained: McCracken v. McCracken, 88-272; Wade v. Newbern, 77-460. Memorandum must be sufficient under the statute before specific performance can be had: Mayer v. Adrian, 77-86; Lumber Co. v. Corey, 140-462; Hall v. Misenheimer, 137-183; Love v. Atkinson, 131-544; Vick v. Vick, 126-126; Davison v. Land Co., 126-704; Wooten v. Walters, 110-251; Hall v. Fisher, 126-205; Fortescue v. Crawford, 105-29; MaGee v. Blankenship, 95-563; Capps v. Holt, 58-153; Campbell v. Campbell, 55-364; Plummer v. Owens' Admrs., 45-254; Allen v. Chambers, 39-125; Ledford v. Ferrell, 34-285. Contract in writing to sell land signed by vendor is good against him although the correlative obligation of buyer to pay price is not

in writing and cannot be enforced: *Mizell v. Burnett*, 49-249; *Lumber Co. v. Corey*, 140-462; *Imp. Co. v. Guthrie*, 116-381; *Hargrove v. Adeock*, 111-166; *Love v. Welch*, 97-200; *Kelly v. Edwards*, 53-71. A parol waiver of a written contract within statute of frauds amounting to complete abandonment and clearly proven will bar specific performance: *Holden v. Purefoy*, 108-167, and cases cited; *Miller v. Pierce*, 104-389. The court will not correct an executory contract under the statute by enlarging the subject-matter and then grant specific performance as corrected: *Davis v. Ely*, 104-16.

The doctrine of part performance is not in force in this state; but when the vendor repudiates the contract the purchaser may recover the money paid and have the land charged with the value of improvements less rents and profits: *Ballard v. Boyette*, 171-24; *Rhea v. Craig*, 141-602; *Ford v. Stroud*, 150-362; *Hall v. Misenheimer*, 137-183; *Love v. Atkinson*, 131-544; *Luton v. Badham*, 127-96; *Pass v. Brooks*, 125-129; *North v. Bunn*, 122-766; *Rumbough v. Young*, 119-567; *Field v. Moody*, 111-353; *Vann v. Newsom*, 110-122; *Tucker v. Markland*, 101-422; *Pitt v. Moore*, 99-85; *Hedgepeth v. Rose*, 95-41; *Thomas v. Kyles*, 54-302; *Love v. Neilson*, 54-339; *Barnes v. Teague*, 54-277; *Plummer v. Owens' Admr.*, 45-254; *Chambers v. Massey*, 42-286; *Allen v. Chambers*, 39-125; *Dunn v. Moore*, 38-364; *Albea v. Griffin*, 22-9; *Lyon v. Crissman*, 22-268; *Ellis v. Ellis*, 16-345. The measure of compensation is the enhanced value of the property: *North v. Bunn*, 128-196; *Daniel v. Crumpler*, 75-184. The right of the parol vendee is not under the contract nor to have the vendor declared a trustee, but to have compensation: *Wood v. Tinsley*, 138-507; *Kelly v. Johnson*, 135-647. The vendor cannot enforce a parol contract for land by a motion to discharge a judgment as part of the price: *Brown v. Hobbs*, 154-544.

Section merely referred to in *Smith v. Smith*, 60-583; *Higdon v. Rice*, 119-625; *Edwards v. Kelly*, 53-69; *Brown v. Comrs.*, 63-515; *Hinsdale v. Thornton*, 75-382.

989. Contracts with Cherokee Indians. All contracts and agreements of every description made with any Cherokee Indian, or any person of Cherokee Indian blood within the second degree, for an amount equal to ten dollars or more, shall be void, unless some note or memorandum thereof be made in writing and signed by such Indian or person of Indian blood, or some other person by him authorized, in the presence of two witnesses, who shall also subscribe the same: Provided, that this section shall not apply to any person of Cherokee Indian blood or any Cherokee Indian who understands the English language and who can speak and write the same intelligently.

Rev., s. 975; Code, s. 1553; R. C., c. 50, s. 16; 1907, c. 1004, s. 1.

Section applies as well where contract between two Indians as when one of parties white: *State v. Tachanatah*, 64-615; *Lovingood v. Smith*, 52-601. As bearing upon section, see *Rogers v. Kinsey*, 101-561; *Rollins v. Cherokees*, 87-248. For history of legislation as to Cherokee Indians, see *Frazier v. Cherokee Indians*, 146-477.

990. Promise to revive debt of bankrupt. No promise to pay a debt discharged by any decree of a court of competent jurisdiction, in any proceeding in bankruptcy, shall be received in evidence unless such promise is in writing and signed by the party to be charged therewith.

Rev., s. 978; 1899, c. 57.

Contracts in restraint of trade are required to be in writing, see *Monopolies and Trusts*, s. 2562.

Promises to repel the statute of limitations must be in writing, see *Civil Procedure*, s. 416.

Promise to pay debt discharged in bankruptcy does not revive original contract so as to reinvest it with actionable quality, but only recognizes it as consideration to support new promise: *Fraley v. Kelly*, 88-227. As plea of discharge in bankruptcy is personal defense to be set up by debtor or his representative, it may be withdrawn at any time: *Lee v. Eure*, 93-5.

CHAPTER 19
CONVEYANCES

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ART. 1. CONSTRUCTION AND SUFFICIENCY

991. Fee presumed, though word "heirs" omitted. When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heirs" is used or not, unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity.

Rev., s. 946; Code, s. 1280; 1879, c. 148.

Deed and registry of conveyance destroyed, presumed to convey fee simple, see Evidence, s. 1766.

This section, act of 1879, provides same rule of construction for deeds as was provided for devises under act of 1784, now s. 4162: *Vickers v. Leigh*, 104-257. Word "heirs" not necessary to create fee: *Gray v. Hawkins*, 133-5; *Jarvis v. Davis*, 99-40; *Cullens v. Cullens*, 161-344—and conveyances without word "heirs" construed to be in fee, *Fulbright v. Yoder*, 113-457; *Starnes v. Hill*, 112-25—unless contrary intention plainly appears, *Fulbright v. Yoder*, 113-457; *Sprinkle v. Spainhour*, 149-223. Deed to trustee construed to carry fee: *Braddy v. Dail*, 156-30, and see below.

AS TO CONVEYANCES PRIOR TO THIS ENACTMENT. The word "heirs" indispensable to convey fee: *Cedar Works v. Lumber Co.*, 168-391; *Cullens v. Cullens*, 161-344; *Boggan v. Somers*, 152-390; *Smith v. Proctor*, 139-314; *Allen v. Baskerville*, 123-127; *Ray v. Comrs.*, 110-171; *Batchelor v. Whitaker*, 88-350; *Stell v. Barham*, 87-66; *Register v. Rowell*,

48-312; *Snell v. Young*, 25-379; *Wiggs v. Saunders*, 20-618; *Roberts v. Forsythe*, 14-26—except in devises and equitable estates where clear intent to pass fee, *Smith v. Proctor*, 139-314, and cases cited; *Vickers v. Leigh*, 104-248; *Holmes v. Holmes*, 86-205. For cases wherein question arises as to whether word ‘heirs’ is so located in deed as to comply with rule creating fee simple, see *Real Estate Co. v. Bland*, 152-225; *Triplett v. Williams*, 149-394; *Smith v. Proctor*, 139-314; *Mitchell v. Mitchell*, 108-542; *Anderson v. Logan*, 105-266; *Winborne v. Downing*, 105-20; *Staton v. Mullis*, 92-623; *Graybeal v. Davis*, 95-508; *Hicks v. Bullock*, 96-164; *Bunn v. Wells*, 94-67; *Ricks v. Pulliam*, 94-225; *Stell v. Barham*, 87-62; *Phillips v. Thompson*, 73-543; *Phillips v. Davis*, 69-117; *Waugh v. Miller*, 75-127; *Allen v. Bowen*, 74-155; *Armfield v. Walker*, 27-580. Intention of grantor to be considered in interpretation: *Smith v. Proctor*, 139-314; *Fulbright v. Yoder*, 113-456; *Vickers v. Leigh*, 104-248; *Hicks v. Bullock*, 96-164; *Ricks v. Pulliam*, 94-225; *Winborne v. Downing*, 105-20; *Bunn v. Wells*, 94-67.

Intention now gathered from whole deed without dissecting it into technical parts as at common law: *Guilford v. Porter*, 167-366; *Triplett v. Williams*, 149-394.

Section referred to: *Sharpe v. Brown*, 177-294; *Holloway v. Green*, 167-91; *College v. Riddle*, 165-211; *Ruffin v. R. R.*, 151-330; *Griffin v. Thomas*, 128-317; *Jenkins v. Daniels*, 125-170.

992. Vagueness of description not to invalidate. No deed or other writing purporting to convey land or an interest in land shall be declared void for vagueness in the description of the thing intended to be granted by reason of the use of the word “adjoining” instead of the words “bounded by,” or for the reason that the boundaries given do not go entirely around the land described: Provided, it can be made to appear to the satisfaction of the jury that the grantor owned at the time of the execution of such deed or paper-writing no other land which at all corresponded to the description contained in such deed or paper-writing.

Rev., s. 948; 1891, c. 465, s. 2.

For vagueness of description in pleadings, see *Evidence*, s. 1783.

Section does not act retrospectively: *Hemphill v. Annis*, 119-514—but if it did word “description” used therein imports such description as can be aided by parol proof, *Ibid.* A deed failing to describe land is as void as it was prior to this enactment: *Moore v. Fowle*, 139-53. Description sufficient to admit parol evidence when it refers to something extrinsic which can be identified: *Patton v. Sluder*, 167-500 (explaining section).

993. Conveyances to slaves. When it is made to appear that any gift or conveyance has been made to any person, while a slave, of any lands or tenements, whether the same was conveyed by deed or parol, and the bargainee or donee has been placed in actual possession of the same, such gift or conveyance shall have the force and effect of transferring the legal title to the lands and tenements to such bargainee or donee: Provided, such possession shall have continued for the term of ten years prior to the ninth day of March, one thousand eight hundred and seventy: Provided further, that any absence from the premises from the first day of May, one thousand eight hundred and sixty-one, to the first day of January, one thousand eight hundred and sixty-six, shall not be held as an abandonment or discontinuance of the possession: Provided, also, that this section shall not affect the interest of a bona fide purchaser for value from the grantor or bargainor of the lands or tenements in dispute.

Rev., s. 949; Code, s. 1278; 1869-70, c. 77.

Section not applicable to case where person having no title himself made parol conveyance of land to slave and put slave in possession more than ten years prior to passage of section: *Buie v. Carver*, 75-559—but section only applies to cases where alleged donor or vendor had title himself, *Ibid.* See *Jervis v. Lewellyn*, 130-617; *McCanless v. Reynolds*, 74-301.

994. Conveyances by infant trustees. When an infant is seized or possessed of any estate in trust, whether by way of mortgage or otherwise, for another person who may be entitled in law to have a conveyance of such estate, or may be declared to be seized or possessed, in the course of any proceeding in the superior court, the court may decree that the infant shall convey and assure such estate, in such manner as it may direct, to such other person; and every conveyance and assurance made in pursuance of such decree shall be as effectual in law as if made by a person of full age.

Rev., s. 1036; Code, s. 1265; R. C., c. 37, s. 27; 1821, c. 1116, ss. 1, 2.

995. Official deed, when official selling or empowered to sell is not in office. When a sheriff, coroner, constable or tax collector, in virtue of his office, sells any real or personal property and goes out of office before executing a proper deed therefor, he may execute the same after his term of office has expired; and when he dies or removes from the state before executing the deed, his successor in office shall execute it. When a sheriff or tax collector dies having a tax list in his hands for collection, and his personal representative or surety, in collecting the taxes, makes sale according to law, his successor in office shall execute the conveyance for the property to the person entitled.

Rev., ss. 950, 951; Code, s. 1267; R. C., c. 37, s. 30; 1891, c. 242.

Ex-sheriff may execute tax deed hereunder: *Mfg. Co. v. Rosey*, 144-370; *Jones v. Schull*, 153-517; *McNair v. Boyd*, 163-478. **Ex-clerks no power hereunder:** *Shew v. Call*, 119-450. **Recitals in ex-sheriff's deed as prima facie evidence of sale and execution:** *Curlee v. Smith*, 91-172.

Deed made by succeeding sheriff or coroner passes title to what was sold: *Edwards v. Tipton*, 77-222—but it is not evidence of what was sold, as its recitals are hearsay: *Ibid.*; see *McPherson v. Hussey*, 17-323. **Before executing conveyance, officer succeeding can require clear and conclusive evidence that sale was made by predecessor:** *Isler v. Andrews*, 66-552—and that price was paid to him, *Ibid.*; *Harris v. Irwin*, 29-432.

Section merely referred to: *Stewart v. Pergusson*, 133-284; *Millsaps v. McCormick*, 71-533.

996. Revocation of deeds of future interests made to persons not in esse. The grantor in any voluntary conveyance in which some future interest in real estate is conveyed or limited to a person not in esse may, at any time before he comes into being, revoke by deed such interest so conveyed or limited. This deed of revocation shall be registered as other deeds; and the grantor of like interests for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner.

Rev., s. 1045; 1893, c. 498.

Section does not affect deeds executed before its enactment: *Roe v. Journegan*, 175-261.

ART. 2. CONVEYANCES BY HUSBAND AND WIFE

997. Instruments affecting married woman's title; husband to execute; privy examination. Every conveyance, power of attorney or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments must be executed by such married woman and her husband, and due proof or acknowledgment thereof must be made as to the husband and due acknowledgment thereof must be made by the wife, and her private examination, touching her voluntary assent to such instrument, shall be taken separate and

apart from her husband, and such acknowledgment or proof as to the execution by the husband and such acknowledgment by the wife and her private examination shall be taken and certified as provided by law. Any conveyance, power of attorney, contract to convey, mortgage, deed of trust or other instrument executed by any married woman in the manner by this chapter provided, and executed by her husband also, shall be valid in law to pass, bind or charge the estate, right, title and interest of such married woman in and to all such lands, tenements and hereditaments or other estate, real or personal, as shall constitute the subject-matter or be embraced within the terms and conditions of such instrument or purport to be passed, bound, charged or conveyed thereby.

Rev., s. 952; Code, s. 1256; 1899, c. 235, s. 9; C. C. P., s. 429, subsec. 6; 1868-9, c. 277, s. 15.

See "Married Women," section 2506 et seq. Section not in conflict with constitutional guaranty to wife of her separate estate: *Graves v. Johnson*, 172-176; *Southerland v. Hunter*, 93-310; *Ferguson v. Kinsland*, 93-337; and see *Stallings v. Walker*, 176-321, and cases cited. Law of this state governs acknowledgment and proof of married woman's deed to land in state, though deed executed elsewhere: *Smith v. Ingram*, 130-100; *Armstrong v. Best*, 112-59; *Taylor v. Sharp*, 108-377; *Jones v. Gerock*, 59-190.

Married woman cannot bind herself by agreement to arbitrate title to land owned by her: *Smith v. Bruton*, 137-79; nor can she create parol trust in her land, *Ricks v. Wilson*, 154-282. Mechanic's lien attaches to wife's land, although not "expressly charged" upon her estate: *Ball v. Paquin*, 140-83.

MARRIED WOMAN'S DEEDS; REQUISITES. Married woman bound as to her land only by her deed duly executed, with husband's written assent and with her privy examination: *Smith v. Bruton*, 137-79; *Tillery v. Land*, 136-541; *Lineberger v. Tidwell*, 104-506; *Ferguson v. Kinsland*, 93-337; *Towles v. Fisher*, 77-443; *Green v. Branton*, 16-500; see *infra*, paragraph "Private Examination of Wife"—or by judgment of court of competent jurisdiction, *Smith v. Bruton*, 137-79; *Green v. Branton*, 16-500. Deed nullity without husband's joinder and wife's privy examination: *Holmes v. Holmes*, 86-205; *Scott v. Battle*, 85-184—and husband's probate must be present, *Graves v. Johnson*, 172-176, and cases cited. Married woman's deed not executed in mode provided by statute creates no estoppel: *Wallin v. Rice*, 170-417, and cases cited at page 418. Delivery not presumed from husband's acknowledgment and acknowledgment and privy examination of wife: *Tarleton v. Griggs*, 131-216.

HUSBAND'S ASSENT to wife's conveyance is necessary: *Walton v. Bristol*, 125-419; *Loan Assn. v. Black*, 119-323; *Farthing v. Shields*, 106-289; *Wood v. Wheeler*, 106-512; *Harris v. Jenkins*, 72-183—and such assent must be expressed by his signing and acknowledging deed with wife, *Council v. Pridgen*, 153-443; *Jennings v. Hinton*, 126-51; *Brinkley v. Ballance*, 126-397; *Bank v. Ireland*, 122-571; *Green v. Bennett*, 120-394; *Jones v. Craigmiles*, 114-613; *Farthing v. Shields*, 106-289; *Flaum v. Wallace*, 103-296; *Harris v. Jenkins*, 72-186; and see *Newhart v. Peters*, 80-166 (mortgage by husband and wife for wife's debt binds her). What is sufficient written assent of husband: *Stallings v. Walker*, 176-321, and cited cases. Husband's endorsement on wife's deed without his joinder invalid: *Council v. Pridgen*, 153-443. Husband's signature and acknowledgment after wife's death void, *Hensley v. Blankenship*, 174-759. Infant husband's joinder revocable on his coming of age: *Jackson v. Beard*, 162-105.

PRIVATE EXAMINATION OF WIFE. Form of examination, see sections 3324, 3325. Officers authorized to take examination, see section 1000. Requirement is constitutional: *Council v. Pridgen*, 153-443. Necessary to convey her interest in land and to charge her separate real estate with payment of debts: *Sipe v. Herman*, 161-107; *Cook v. Pittman*, 144-530; *Ball v. Paquin*, 140-92; *Smith v. Bruton*, 137-79; *Harvey v. Johnson*, 133-352; *Bank v. Howell*, 118-271; *Bank v. Ireland*, 122-571; *McCaskill v. McKinnon*, 121-214; *Bates v. Sultan*, 117-94; *McMillan v. Gambill*, 106-359; *Thompson v. Smith*, 106-357; *Farthing v. Shields*, 106-289; *Thurber v. LaRoque*, 105-301; *Holmes v. Holmes*, 86-205; *Scott v. Battle*, 85-184; *Newhart v. Peters*, 80-166; see section 2507. Required on deed from wife to husband: *Singleton v. Cherry*, 168-402. So as to her equitable estate in lands vested in her: *Clayton v. Rose*, 87-106—unless in instrument creating trust power is given to her to convey as feme sole, *Ibid.* No privy examination required to bind wife's personality: *Harvey v. Johnson*, 133-352, and see section 3507.

Sufficiency of privity examination tested by legal effect and not by conformity to very words of statute: *Benedict v. Jones*, 129-470; *Robbins v. Harris*, 96-557; and see *Skinner v. Fletcher*, 23-313. Not necessary that husband leave room: *Hall v. Castleberry*, 101-153. As to duty of officer taking examination, see *McCaskill v. McKinnon*, 121-214. Officer's certificate must make fact of separate examination apart from husband appear: *Cook v. Pittman*, 144-531; *Hatcher v. Hatcher*, 127-201; *Wynne v. Small*, 102-133; *Pierce v. Wannett*, 32-446; *Etheridge v. Ashbee*, 31-353; *Jones v. Lewis*, 30-70; *Fenner v. Jasper*, 18-34; *Robinson v. Barfield*, 6-391. As to presumption of truth of recitals in certificate, see *Lumber Co. v. Leonard*, 145-339. Though certificate regular on its face, wife may show that in fact no examination took place: *Davis v. Davis*, 146-163—but she must do so by clear, strong, and convincing proof, *Ibid.*; also *Lumber Co. v. Leonard*, 145-339; *Benedict v. Jones*, 129-470.

Deed without privity examination is color of title, see notes to section 428—is no estoppel to married woman, *Smith v. Ingram*, 130-107, and see *Miller v. Bumgardner*, 109-412—is so entirely void that wife not entitled to enforce specifically provisions incorporated in it for her benefit, *Askew v. Daniel*, 40-321—deed without, signed by husband and wife, will not be specifically enforced, though damages allowed for breach, *Warren v. Dail*, 170-406.

As to setting aside private examination as void, or attacking it collaterally, see *Davis v. Davis*, 146-163; *Lumber Co. v. Leonard*, 145-339; *Benedict v. Jones*, 129-470; *Edwards v. Bowden*, 107-58; *Hall v. Castleberry*, 101-153; *Ware v. Nesbit*, 94-664. As to privity examination under Laws 1868-9, c. 35, see *Spivey v. Rose*, 120-163—under Rev. Stat., c. 37, ss. 9-11, *Malloy v. Bruden*, 88-305; *Woodbourne v. Gorrell*, 66-82. For other cases of interest hereunder, not exactly within scope of section, see *Miller v. Bumgardner*, 109-412; *Hinton v. Ferebee*, 107-154; *McGlennery v. Miller*, 90-215; *Whitehurst v. Hunter*, 3-401.

998. Acknowledgment at different times and places; before different officers; order immaterial. In all cases of deeds or other instruments executed by husband and wife and requiring registration, the probate of such instruments as to the husband and acknowledgment and private examination of the wife may be taken before different officers authorized by law to take probate of deeds, and at different times and places, whether both of said officials reside in this state or only one in this state and the other in another state or country. And in taking the probate of such instruments executed by husband and wife, including the private examination of the wife, it is immaterial whether the execution of the instrument was proven as to or acknowledged by the husband before or after the acknowledgment and private examination of the wife.

Rev., s. 953; 1899, c. 235, s. 9; 1895, c. 136.

For statutes validating certain probates, before this section enacted, where husband and wife signed at different times and before different officers, see sections 3349, 3350. For cases involving validity of such probates before this section, see *Bryan v. Eason*, 147-284; *Barrett v. Barrett*, 120-127; *Lineberger v. Tidwell*, 104-506; *Southerland v. Hunter*, 93-310; *McGlennery v. Miller*, 90-215. Husband's probate to wife's deed still required: *Graves v. Johnson*, 172-176.

999. Absence of wife's examination does not affect deed as to husband. When an instrument purports to be signed by a husband and wife the instrument may be ordered registered, if the acknowledgment of the husband is duly taken, whether the private examination of the wife is properly taken or not, but no such instrument shall be the act or deed of the wife unless her private examination is taken according to law.

Rev., s. 954; 1899, c. 235, s. 8; 1901, c. 637.

As to wife's deed and private examination, see sections 997, 3324, 3325. Where grantor fails to acknowledge, but wife's acknowledgment and private examination are taken, deed not entitled to registration: *Hatcher v. Hatcher*, 127-200. As to right of husband to convey land without wife's joinder in deed, see *Shackleford v. Morrill*, 142-221; *Joyner v. Sugg*, 132-581; *Cawfield v. Owens*, 129-286; *Wittkowsky v. Gidney*, 124-437; *Scott v. Lane*, 109-154; *Hughes v. Hodges*, 102-236; *Simpson v. Houston*, 97-344. As to wife's rights where sale under two mortgages, only one of which binds her dower right, see *Shackleford v. Morrill*, 142-221.

1000. Officers authorized to take privy examination. The officials authorized by law to take proofs and acknowledgments of the execution of any instrument are empowered to take the private examination of any married woman, when her private examination is necessary, touching her free and voluntary assent to the execution of any instrument to which her assent is or may be necessary, and to certify the fact of such private examination.

Rev., s. 955; 1899, c. 235, s. 6.

As to wife's conveyances, see section 997. As to probate and forms of probate and private examination, see "Probate and Registration," section 3293 et seq.

Probate and private examination before officer related to parties valid: *McAlister v. Purcell*, 124-262; so where before employee of corporate grantee, *Bank v. Ireland*, 122-571. See as to effect of officer's interest or connection with proceedings in certain cases, sections 3299-3301, 3305.

Omission by justice of the peace to attach seal to certificate will not invalidate it: *Lineberger v. Tidwell*, 104-506. Justice of the peace cannot correct his certificate after term of office expired: *Cook v. Pittman*, 144-530. Conduct of private examination, see under section 997. Private examination before provost marshal, while Newbern occupied by federal military: *Paul v. Carpenter*, 70-502.

1001. Innocent purchaser not affected by fraud in treaty, if privy examination regular. No deed conveying lands nor any instrument required or allowed by law to be registered, executed by husband and wife since the eleventh of March, one thousand eight hundred and eighty-nine, if the private examination of the wife is thereto certified as prescribed by law, shall be invalid because its execution or acknowledgment was procured by fraud, duress or undue influence, unless it is shown that the grantee or person to whom the instrument was made participated in the fraud, duress or undue influence, or had notice thereof before the delivery of the instrument. Where such participation or notice is shown, an innocent purchaser for value under the grantee or person to whom the instrument was made shall not be affected by such fraud, duress or undue influence.

Rev., s. 956; 1889, c. 389; 1899, c. 235, s. 10.

Fraud in private examination does not vitiate, unless grantee had notice: *Brite v. Penny*, 157-110; *Davis v. Davis*, 146-163; *Lumber Co. v. Leonard*, 145-339; *Marsh v. Griffin*, 136-333; *Butner v. Blevins*, 125-585; *Benedict v. Jones*, 129-472; *Bank v. Ireland*, 122-571; *Riggan v. Sledge*, 116-87—and even if grantee did have notice, an innocent purchaser from him would be protected, *Butner v. Blevins*, 125-585. But wife may show by strong, clear, and convincing proof that there was no private examination or that she refused assent: *Davis v. Davis*, 146-163; *Lumber Co. v. Leonard*, 145-339; *Benedict v. Jones*, 129-470; and see *Belk v. Belk*, 175-69, and cases under section 997. As to effect of probate generally, see section 3308.

For cases prior to enactment of section, see *Edwards v. Bowden*, 107-58; *Ware v. Nesbit*, 94-664.

1002. Power of attorney of married woman. All conveyances which may be made by any person under a power of attorney from any feme covert, freely executed by her with her husband, shall be valid to all intents and purposes to pass the estate, right and title which said feme covert may have in such lands, tenements and hereditaments as are mentioned or included in such power of attorney.

Rev., s. 957; Code, s. 1257; R. C., c. 37, s. 11; 1798, c. 510.

See *Lineberger v. Tidwell*, 104-506.

1003. Wife need not join in purchase-money mortgage. The purchaser of real estate who does not pay the whole of the purchase money at the time when he

takes a deed for title may make a mortgage or deed of trust for securing the payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against his wife as well as himself, without requiring her to join in the execution of such mortgage or deed of trust.

Rev., s. 958; Code, s. 1272; 1868-9, c. 204; 1907, c. 12.

See section 4101. Section cited, Corp. Com. v. Dunn, 174-679.

1004. Wife insane, husband's deed transfers her interest. Every man whose wife is a lunatic or insane and whose homestead has been allotted, may bargain, sell, lease, mortgage, transfer and convey any of his real estate by deed, mortgage deed, deed of trust, or lease, except his homestead, without the signature or private examination of his wife: Provided, that the clerk of the superior court of the county in which the wife was adjudged a lunatic or declared insane, or the superintendent of an insane institution of the state, shall certify under his hand and seal that she has been adjudged a lunatic or declared insane, and that her sanity has not been declared restored as is provided by law, and this certificate must be attached to the husband's deed, mortgage deed, deed of trust, or lease.

Such deed, mortgage deed, deed of trust or lease executed, probated and registered in accordance with law shall convey all the estate and interest as therein intended of the grantor in the land conveyed free and exempt from the dower rights and all other interests of his wife: Provided, this section shall not apply to the homestead of the husband.

Rev., s. 959; 1905, c. 138, ss. 1, 3; 1919, c. 20.

See as to proceedings by widow of insane person to sell his property, section 2294. Section cited, Corp. Com. v. Dunn, 174-679.

ART. 3. FRAUDULENT CONVEYANCES

1005. Conveyance with intent to defraud creditors void. For avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed or defrauded) to be utterly void and of no effect; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding; and in all actions by creditors to set aside gifts, grants, alienations and conveyances of lands and tenements and judgments purporting to be liens on the same on the ground that such gifts, grants, alienations, conveyances and judgments are feigned, covinous and fraudulent hereunder, it shall be no defense to the action to allege and prove that the lands and tenements alleged to be so conveyed or encumbered do not exceed in value the homestead allowed by law as an exemp-

tion: Provided, that nothing in this section shall be construed to authorize the sale under execution or other final process, obtained on any debt during the continuance of the homestead, of any interest in such land as may be exempt as a homestead.

Rev., s. 960; Code, s. 1545; 1893, c. 78; R. C., c. 50, s. 1; 50 Edw. III, c. 6; 13 Eliz., c. 5, s. 2; 1715, c. 7, s. 4.

The law will not aid one party to a fraud as against another: *Shener v. Spear*, 92-151; *Bank v. Adrian*, 116-537, and cases cited; *York v. Merritt*, 80-285; *Jones v. Gorman*, 42-21; *Ellington v. Currie*, 40-21. Fraud is a question of law upon facts and circumstances found and admitted: *Hodges v. Lassiter*, 96-351; *Hardy v. Simpson*, 35-132; *Foster v. Woodfin*, 33-339; *Rea v. Alexander*, 27-644. Where deed fraudulent and void as to one creditor it is void as to all: *Savage v. Knight*, 92-493; *Hoke v. Henderson*, 14-12. Fraudulent conveyance good as against grantor and all others except creditors: *Saunders v. Lee*, 101-3. Bond given as a pretext to enable a person to set up a claim against property of maker, so as to defraud maker's creditors, is void: *Powell v. Inman*, 53-436; see, also, *Hawkins v. Alston*, 39-137. Where deed to secure feigned debts was registered before valid deed prior in date, the older deed prevails and section 3309 (Connor Act) not applicable: *Tyner v. Barnes*, 142-110.

As to badges of fraud, see *Helms v. Green*, 105-251; *Grocery Co. v. Taylor*, 162-307 (mortgagor remaining in possession of goods); *Bank v. Bridgers*, 128-322, 114-333; *Messick v. Fries*, 128-451; *Wittkowsky v. Baruch*, 126-747; *Howard v. Early*, 126-170; *Royster v. Stallings*, 124-55; *Stoneburner v. Jeffreys*, 116-78; *Clement v. Cozart*, 109-173, 112-412; *Booth v. Grant*, 107-405; *Booth v. Carstarphen*, 107-400, and cases cited; *Woodruff v. Bowles*, 104-197; *Phifer v. Erwin*, 100-59; *Norfleet v. Hawkins*, 93-392; *Cannon v. Young*, 89-264; *Boone v. Hardie*, 83-470; *Hillard v. Phillips*, 81-99; *Cheatham v. Hawkins*, 76-335; *Grimsley v. Hooker*, 56-4; *Peebles v. Horton*, 64-373; *Jessup v. Johnston*, 43-335; *Jenkins v. Peace*, 46-413; *Black v. Sanders*, 46-67; *Gilmer v. Earnhardt*, 46-559; *Gibson v. Walker*, 33-327; *Brannock v. Brannock*, 32-428; *Foster v. Woodfin*, 33-339; *Sturdivant v. Davis*, 31-365; *Rea v. Alexander*, 27-644; *Worth v. Northam*, 26-102; *O'Daniel v. Crawford*, 15-197; *Howell v. Elliott*, 12-76.

Summary as to fraudulent character of conveyances, voluntary or on consideration, as depending on amount of property retained, actual fraudulent intent, notice to grantee, etc.: *Aman v. Walker*, 165-224.

Purchaser from trustee under conveyance containing upon its face evidence of fraudulent purpose to defeat creditors takes with notice of such evidence: *Eigenbrun v. Smith*, 98-207—and although purchaser may have paid full price for property, yet if he purchased with intent to aid vendor to defeat his creditors, purchase will be void, *Ibid.*—and conveyance to trustee for use of creditors, if made with intent to defraud any one of vendor's creditors, is void, though trustee be ignorant of such intent, and his conduct is *bona fide*, *Ibid.*; *Hoke v. Henderson*, 14-12.

Party making fraudulent conveyance, if such conveyance set aside, can claim his homestead: *Rose v. Bryan*, 157-173; *Marshburn v. Lashlie*, 122-237; *Younger v. Ritchie*, 116-782; *Dortch v. Benton*, 98-190; *Rankin v. Shaw*, 94-405; *Arnold v. Estis*, 92-162; *Comrs. v. Riley*, 75-146; *Gaster v. Hardie*, 75-460; *Crummen v. Bennet*, 68-494. When sole purpose of maker of deed of trust to secure creditors was to discharge honest debt, deed does not come within operation of section: *Moore v. Hinnant*, 89-455. Conveyance, if made with the intent to hinder creditors, is void, although upon sufficient consideration, if vendee had knowledge of purpose for which made: *Perry v. Hardison*, 99-21; see *Sanford v. Eubanks*, 152-697; *Cox v. Wall*, 132-730, and cases cited. Where deed of trust securing several notes is set aside as fraudulent because holders of some of notes had notice of fraud, holders in due course of others of the notes do not lose their rights: *Smathers v. Hotel Co.*, 167-469. As to the part the "intent" plays in making a conveyance or assignment void, see *Royster v. Stallings*, 124-55; *Wolf v. Arthur*, 118-890; *Clement v. Cozart*, 109-173; *Peeler v. Peeler*, 109-628; *Booth v. Carstarphen*, 107-395, and cases cited; *Phifer v. Erwin*, 100-59; *Savage v. Knight*, 92-493; *Beasley v. Bray*, 98-266; *Worth v. Brady*, 91-265; *Cansler v. Cobb*, 77-30; *Lassiter v. Davis*, 64-498; *Rose v. Coble*, 61-517; *Reiger v. Davis*, 67-185. Fraudulent conveyances are not deemed void as to creditors when only collaterally attacked: *Boyd v. Turpin*, 94-137. If any part of the consideration in a deed be feigned or fraudulent as to creditors, the whole deed is void as to them: *Johnson v. Murchison*, 60-286; *Hafner v. Irwin*, 23-490; but see *Woodruff v. Bowles*, 104-197.

Other cases of interest: Arrington v. Arrington, 102-491; Walton v. Parish, 95-259; Cowles v. Coffey, 88-342; Powell v. Ivey, 88-256; Boyd v. Turpin, 94-137; Southerland v. Harper, 83-200; Cannon v. Young, 89-264; Rencher v. Wynne, 86-269; Cansler v. Cobb, 77-30; Holmes v. Marshall, 78-262; McCannless v. Reynolds, 74-301; Young v. Lathrop, 67-63; McNeill v. Riddle, 66-290; Salms v. Martin, 63-608; Palmer v. Giles, 58-75; Thigpen v. Pitt, 54-49; London v. Parsley, 52-313; Newlin v. Osborne, 51-128; Felton v. White, 49-301; McCorkle v. Hammond, 47-444; Bridges v. Moye, 45-170; McAuley v. Earnhart, 46-502; Flynn v. Williams, 29-32; Buie v. Kelly, 27-169; Patterson v. Bodenhamer, 31-96; Gowing v. Rich, 23-553; Purcell v. McCallum, 18-221.

SPECIFIC CONVEYANCES, TRANSFERS, ETC., ATTACKED FOR FRAUD HEREUNDER. Conveyances, gifts, assignments, transfers, etc., by debtor to child: Webb v. Atkinson, 124-447; Clement v. Cozart, 109-173, 112-412; Helms v. Green, 105-251; McCannless v. Flinchum, 89-373; Tredwell v. Graham, 88-208; Carr v. Fearrington, 63-560; Brown v. Godsey, 55-417; Winchester v. Reid, 53-377; Black v. Caldwell, 49-150; Jenkins v. Peace, 46-413—to wife, Eddleman v. Lentz, 158-65; Howard v. Early, 126-170; Webb v. Atkinson, 124-447; Pender v. Mallett, 123-57; Brisco v. Norris, 112-671; Peeler v. Peeler, 109-628; Woodruff v. Bowles, 104-197; Battle v. Mayo, 102-413; Brown v. Mitchell, 102-347; Walton v. Parish, 95-259; Taylor v. Eatman, 92-601—to parent, Boyd v. Turpin, 94-137; McGill v. Harman, 55-179—to brother or brother-in-law, Bank v. Bridgers, 114-383; Allen v. McLendon, 113-321; Dewey v. Littlejohn, 37-495—to father-in-law, Vick v. Flowers, 5-321—to nephew, Reiger v. Davis, 67-185—to attorney, York v. Merritt, 80-285. Conveyances to debtor's wife where property bought with debtor's money, or his work or skill: Ritch v. Oates, 122-631; Markham v. Whitehurst, 109-307. Deposit in bank in wife's name: Moore v. Bank, 173-180. Husband using his money to make improvements on wife's land: Michael v. Moore, 157-462. Conveyance to debtor's daughters, they buying the property in at execution sale of debtor's land with money furnished by debtor: Sharpe v. Williams, 76-87. Conveyance to one of several creditors: Devries v. Phillips, 63-53. Assignment for benefit of creditors: Fisher v. Bank, 132-769; Bank v. Bridgers, 128-322; Friedenwald v. Sparger, 128-446; Mitchell v. Eure, 126-77; Jordan v. Newsome, 126-553; Commission Co. v. Porter, 122-692; Goldberg v. Cohen, 119-59; Stoneburner v. Jeffreys, 116-78; Davis v. Smith, 113-94; Barber v. Buffaloe, 111-206; Banking Co. v. Whitaker, 110-345; Booth v. Carstarphen, 107-395; Hancock v. Wooten, 107-9; Stephenson v. Felton, 106-114; Bobbitt v. Rodwell, 105-236; Woodruff v. Bowles, 104-197; Eigenbrun v. Smith, 98-207; Savage v. Knight, 92-493; Guggenheimer v. Brookfield, 90-232; Bynum v. Miller, 86-560. Deeds of trust or mortgages to secure debts: Tyner v. Barnes, 142-110; Messick v. Fries, 128-450; Cowan v. Phillips, 122-70; Mining Co. v. Smelting Co., 119-417; Wolf v. Arthur, 118-890; Allen v. McLendon, 113-321; Nadal v. Britton, 112-180; Battle v. Mayo, 102-413; Phifer v. Erwin, 100-59; Morris v. Pearson, 79-253; Cheatham v. Hawkins, 76-335; Johnson v. Murchison, 60-286; Stone v. Marshall, 52-300; Hawkins v. Alston, 39-137. Bills of sale of goods or chattels: Cox v. Wall, 132-730; Kelly v. Fleming, 113-133; Brown v. Mitchell, 102-347; Rea v. Alexander, 27-644; Foster v. Woodfin, 33-339; Newsom v. Roles, 23-179. Conveyance of land on ground of fraud upon marital rights of wife: Brinkley v. Brinkley, 128-503; Tate v. Tate, 21-22—on ground of its having been made to prevent plaintiff from collecting judgment for damages, Helms v. Green, 105-251.

PRACTICE IN SETTING ASIDE SALES AND CONVEYANCES HEREUNDER. See generally: Clement v. Cozart, 109-172, 112-412; Smith v. Summerfield, 108-284; Peeler v. Peeler, 109-628; Booth v. Carstarphen, 107-395; Woodruff v. Bowles, 104-197; Rencher v. Wynne, 86-269; Hardy v. Simpson, 35-132. Trustee in bankruptcy may bring action to set aside fraudulent sales and conveyances if creditor of bankrupt entitled to same: Cox v. Wall, 132-730. Heirs of grantor cannot set aside a fraudulent conveyance: Pierce v. Stallings, 163-107. Burden is on purchaser to show he bought for valuable consideration and without notice: Cox v. Wall, 132-730; Morgan v. Bostie, 132-743; Stephenson v. Felton, 106-114; Odom v. Riddick, 104-521, and cases cited; Brown v. Mitchell, 102-347; Saunders v. Lee, 101-3; Eigenbrun v. Smith, 98-215; Davis v. Council, 92-725; Taylor v. Eatman, 92-601; Tredwell v. Graham, 88-214; Savage v. Knight, 92-493; Cheatham v. Hawkins, 76-335—and where purchaser was the insolvent grantor's wife, she must show valuable consideration passed, Peeler v. Peeler, 109-628; Eddleman v. Lentz, 158-65.

Creditors bringing action to set aside assignment for creditors made by bank have no first lien unless it increases assets of bank: Fisher v. Bank, 132-769. Where it is shown that

insolvent sons assigned, preferring their father, burden upon defendant to show fairness of transaction: *Mitchell v. Eure*, 126-77. Where deed of trust adjudged fraudulent as to creditors, court may order land sold after allotting homestead to defendant: *Benton v. Collins*, 125-83. Party who alleges fraud in execution of deed must prove it: *Saunders v. Lee*, 101-3—and where prima facie evidence is given of bona fides of debts, burden of proof is upon party attacking deed to show fraud, *Hodges v. Lassiter*, 96-357. While creditor can issue execution and sell property disposed of in fraud of creditors, this does not prevent court of equity from restraining donee until question of fraud tried: *Frank v. Robinson*, 96-28. As to proof of fraud in deed by evidence of fraud in one subsequently made, see *Winborne v. Lassiter*, 89-1. A judgment in another action declaring a deed fraudulent and void may be used in evidence: *Bank v. McCaskill*, 174-362. For what is and what is not evidence of fraud in conveyance, see *Eigenbrun v. Smith*, 98-207; *Beasley v. Bray*, 98-266; *Hodges v. Lassiter*, 96-351; *Frank v. Robinson*, 96-28; *Walton v. Parish*, 95-259; *Moore v. Hinnant*, 89-455; *Jessup v. Johnston*, 48-335; *Hardy v. Skinner*, 31-191; see cases "as to badges of fraud" hereunder.

As to when fraudulent purpose in conveyance is question for court and when for jury, see *Woodruff v. Bowles*, 104-197; *Beasley v. Bray*, 98-266; *Hodges v. Lassiter*, 96-351; *Black v. Sanders*, 46-67; *Moore v. Hinnant*, 89-455; *Reiger v. Davis*, 67-185; *Hardy v. Simpson*, 35-132; *Young v. Booe*, 33-347; *O'Daniel v. Crawford*, 15-197. Proof of near relationship between grantor and grantee named in deed does not make a prima facie case of fraud: *Bank v. Bridgers*, 114-383. Several creditors may unite in action against common debtor to obtain judgment for respective claims and set aside alleged fraudulent conveyance of debtor's property, and parties so uniting may acquire preference over other general creditors: *Smith v. Summerfield*, 108-284. Property conveyed to wife in fraud of creditors may be recovered in her hands: *Pender v. Mallett*, 123-57—and if she has sold it and invested proceeds in other property, the fund can be followed, *Ibid.*; also *Edwards v. Culberson*, 111-342; *Brown v. Godsey*, 55-417.

Section merely referred to: *Pennell v. Robinson*, 164-257; *Carpenter v. Duke*, 144-293; *Bank v. Spurling*, 52-403.

1006. Conveyance with intent to defraud purchasers void. Every conveyance, charge, lease or encumbrance of any lands or hereditaments, goods and chattels, if the same be made with the actual intent in fact to defraud such person who has purchased or shall purchase in fee simple or for lives or years the same lands or hereditaments, goods and chattels, or to defraud such as shall purchase any rent or profit out of the same, shall be deemed utterly void against such person and others claiming under him who shall purchase for the full value thereof the same lands or hereditaments, goods and chattels, or rents or profits out of the same, without notice before and at the time of his purchase of the conveyance, charge, lease or encumbrance, by him alleged to have been made with intent to defraud; and possession taken or held by or for the person claiming under such alleged fraudulent conveyance, charge, lease or encumbrance shall be always deemed and taken as notice in law of the same.

Rev., s. 961; Code, s. 1546; R. C., c. 50, s. 2; 27 Eliz., c. 4, s. 2; 1840, c. 28, ss. 1, 2.

Although same facts which made deed fraudulent under 13th Elizabeth (section 1005) as to creditors may, generally speaking, render it fraudulent also under 27th Elizabeth (section 1006) as against purchaser, yet it is clear that deed is not fraudulent as against purchaser merely because it was so as against creditors: *Harris v. DeGraffenreid*, 33-92; *Fullenwider v. Roberts*, 20-420.

This section and sections 3308-3310 (Connor Act) must be construed together with the view of preventing fraud: *Austin v. Staten*, 126-788. Registration is required for purpose of notice: *Austin v. Staten*, 126-788; *Lanier v. Lumber Co.*, 177-200; *Sills v. Ford*, 171-733; *Wood v. Lewey*, 153-401; *Tremaine v. Williams*, 144-114; *Patterson v. Mills*, 121-267; *Hooker v. Nichols*, 116-157; *Barber v. Wadsworth*, 115-29; *Quinnerly v. Quinnerly*, 114-145; *Maddox v. Arp*, 114-585 (rendering obsolete many cases in the reports which treat of constructive notice)—but it only has reference to the notice of a former conveyance, and carries with it no taint or knowledge of actual intent to defraud, which vitiates the deed when it exists and is so found: *Austin v. Staten*, 126-783.

As to who is a purchaser for value, see *Carpenter v. Duke*, 144-293; *Brinkley v. Spruill*, 130-48; *Wallace v. Cohen*, 111-103; *Southerland v. Fremont*, 107-565; *Brem v. Lockhart*, 93-191; *Day v. Day*, 84-408; *Potts v. Blackwell*, 56-449, 57-59; *Harris v. DeGraffenreid*, 33-89; *Freeman v. Lewis*, 27-91; *Fullenwider v. Roberts*, 20-420. A preëxisting debt is a sufficient consideration to sustain a conveyance: *Fowle v. McLean*, 168-537. Second purchaser, in order to avoid prior fraudulent deed, must show now, as before act of 1885, that he is bona fide purchaser for full value: *Austin v. Staten*, 126-788—and this does not mean every dollar it is worth, but a reasonably fair price, *Ibid.* To render deed fraudulent as to subsequent purchaser, such purchaser must have paid full value for land, and must also have purchased without notice of prior voluntary conveyance: *Taylor v. Eatman*, 92-601; *Hiatt v. Wade*, 30-340—but registration of prior voluntary deed is notice to subsequent purchaser, *Ibid.* Bona fide purchaser of personal property without notice acquires good title as against prior fraudulent conveyance of same: *Plummer v. Worley*, 35-423. When bona fide purchaser for valuable consideration without notice has acquired legal title, equity will not deprive him of this advantage: *Crump v. Black*, 41-321. Possession by fraudulent donee cannot operate as notice of conveyance to him of any land except such tract or parcel as may be occupied by him at time of second purchase: *Wade v. Hiatt*, 32-302—and especially it cannot so operate as to any parcel continuing in possession of donor, *Ibid.* One is not a purchaser for full value who gives for land not more than one-half or two-thirds of value: *Harris v. DeGraffenreid*, 33-89; see *Austin v. Staten*, 126-788; *Worthy v. Caddell*, 76-82; *Fullenwider v. Roberts*, 20-420. Deed in trust to sell property and pay creditors is valid as against prior deed of gift as being subsequent sale to purchaser for valuable consideration: *Ward v. Wooten*, 75-413. When one purchases land which he knows to be in possession of person other than vendor, he is affected with legal notice and must inquire into title of possessor: *Bost v. Setzer*, 87-187; see, also, *Webber v. Taylor*, 55-9. Section being intended for benefit of purchaser, first bona fide purchaser, whether from fraudulent vendor or vendee, is within its operation: *Hoke v. Henderson*, 14-12. Though conveyance voluntary, it is not necessarily fraudulent as to subsequent purchasers: *Bell v. Blaney*, 6-171. Word "purchaser" under section defined: *Fullenwider v. Roberts*, 20-420. Purchaser of land with notice at time of former fraudulent conveyance is not protected in purchase, though paid full value therefor: *Triplett v. Witherspoon*, 70-589; *Hiatt v. Wade*, 30-340. As to notice, see sections 3308-3310.

Section cited: *Hobbs v. Cashwell*, 152-183; *Rose v. Bryan*, 157-173. Old cases prior to amendment, which may be of some service: *Bell v. Blaney*, 6-171; *Garrison v. Brice*, 48-85; *Long v. Wright*, 48-290; *Freeman v. Eatman*, 38-81; *Jones v. Hall*, 58-26; *Bynum v. Miller*, 86-560, and cases there cited.

1007. Voluntary conveyance evidence of fraud as to existing creditors. No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper.

Rev., s. 962; Code, s. 1547; R. C., c. 50, s. 3; 1840, c. 28, ss. 3, 4.

Section not retroactive: *Houston v. Bogle*, 32-496. Voluntary conveyance is fraudulent in law as to existing creditors when grantor does not at time of conveyance retain property fully sufficient and available for satisfaction of his then creditors: *Clement v. Cozart*, 112-412; *McCannless v. Flinchum*, 89-376; *Warren v. Makely*, 85-14—and the burden rests on those claiming under the voluntary conveyance to show these facts, *Hobbs v. Cashwell*, 152-183; *Shuford v. Cook*, 169-52; *Garland v. Arrowood*, 177-371. Section requires only that question of fraud be submitted to jury where property fully sufficient, etc., is retained: *Black v. Sanders*, 46-67; *Clement v. Cozart*, 112-418. Evidence that grantor retained \$11,625 to pay debts to amount of \$11,500 not sufficient to show that grantor retained property sufficient

to pay debts: *Williams v. Hughes*, 136-58—neither is evidence that 22 negroes and two small tracts of land valued at \$7,250 retained to pay debts amounting to \$6,848, *Black v. Sanders*, 46-67. Husband can make valid voluntary conveyance to wife if not made with fraudulent intent and he retains property sufficient and available to pay all of his debts: *Shuford v. Cook*, 169-52; *Woodruff v. Bowles*, 104-197; *Walton v. Parish*, 95-259; *Taylor v. Eatman*, 92-601. See *Finch v. Cecil*, 170-114 (deed to husband and wife). Where voluntary conveyance to wife set aside as to creditors, he is entitled to homestead: *Rose v. Bryan*, 157-173. Money of insolvent husband used in improving wife's land reachable by creditors: *Michael v. Moore*, 157-462. Voluntary conveyance to child valid if not made with fraudulent intent and grantor retains property sufficient and available to pay all his debts: *Worthy v. Brady*, 91-265; *McCanless v. Flinchum*, 89-376; *Thacker v. Sanders*, 45-145. Conveyance providing that grantee shall support invalid brothers and comply with conditions imposed is not voluntary under section, but rests upon valuable consideration: *Worthy v. Brady*, 91-265. Evidence of value of tract of land adjoining that retained by donor in deed of gift incompetent to show that donor did not retain property sufficient and available to satisfy existing debts: *Warren v. Makely*, 85-12. Section qualifies maxim that a man must be just before he is generous in cases where donor at the time of gift retains property fully sufficient and available to satisfy his then creditors: *Pullen v. Hutehins*, 67-428—but modification confined to gifts *inter vivos*, *Ibid.* Deed of gift may be fraudulent though donor at time of gift honestly believed that she had property sufficient to satisfy all debts then existing, when in fact she was mistaken: *Black v. Sanders*, 46-67. Voluntary conveyance by insolvent *ipso facto* void as to preëxisting debts: *Morgan v. McLelland*, 14-82. Subsequent creditors cannot complain of voluntary conveyance unless they show fraud or preëxisting debts: *Sutton v. Wells*, 177-524; *Harris v. Distributing Co.*, 172-14.

Statement of law as to voluntary conveyances: *Aman v. Walker*, 165-224.

See as bearing upon section: *Markham v. Whitehurst*, 109-307; *Peeler v. Peeler*, 109-628; *Jones v. Young*, 18-352. Section merely referred to in *Cox v. Wall*, 132-733; *Credle v. Carrawan*, 64-424.

1008. Marriage settlements void as to existing creditors. Every contract and settlement of property made by any man and woman in consideration of a marriage between them, for the benefit of such man or woman, or of their issue, whether the same be made before or after marriage, shall be void as against creditors of the parties making the same respectively, existing at the time of such marriage if the same is antenuptial, or at the time of making such contract or settlement if the same is postnuptial.

Rev., s. 963; Code, ss. 1270, 1820; 1871-2, c. 193, s. 11; R. C., c. 37, s. 25; 1785, c. 238, s. 2.

See "Married Women," especially section 2516; also *Credle v. Carrawan*, 64-422; *Teague v. Downs*, 69-280. Section applies to instruments executed since enactment: *Walton v. Parish*, 95-264. Cited, *Rose v. Bryan*, 157-173.

1009. Purchasers for value and without notice protected. Nothing contained in the preceding sections shall be construed to impeach or make void any conveyance, interest, limitation of use or uses, of or in any lands or tenements, goods or chattels, bona fide made, upon and for good consideration, to any person not having notice of such fraud.

Rev., s. 964; Code, s. 1548; R. C., c. 50, s. 4; 13 Eliz., c. 5, s. 6; 1785, c. 7, s. 6.

This section was intended to act as a proviso to the other sections as to fraudulent conveyances, and one claiming the benefit of it must bring himself within it by competent evidence: *Cox v. Wall*, 132-734, and cases there cited. Purchaser for value and without notice of any fraud gets good title by conveyance or transfer from fraudulent vendor: *Cox v. Wall*, 132-730—or from donee or vendee who has himself taken with knowledge of fraud, *Wallace v. Cohen*, 111-103; *Odum v. Riddick*, 104-515; *Saunders v. Lee*, 101-3; *Davis v. Council*, 92-725; *Wade v. Saunders*, 70-270; *Young v. Lathrop*, 67-63; *King v. Cantrel*, 26-251; *King v. Trice*, 38-568; *Martin v. Cowles*, 18-29—but the burden is on him to show that he is such purchaser for value and without notice, *Pennell v. Robinson*, 164-257; *Crockett v. Bray*, 151-615; *Morgan*

v. Bostic, 132-743; Cox v. Wall, 132-730, and cases there reviewed; Stephenson v. Felton, 106-114; Odum v. Riddick, 104-521, and cases cited; Saunders v. Lee, 101-3; Tredwell v. Graham, 88-208. **When burden discharged and shifts; wife taking conveyance from husband:** Eddleman v. Lentz, 158-65.

As to who is innocent purchaser for value hereunder, see Carpenter v. Duke, 144-293; Cox v. Wall, 132-730; Brinkley v. Spruill, 130-48; Wallace v. Cohen, 111-103; Southerland v. Fremont, 107-565; Brem v. Lockhart, 93-191; Day v. Day, 84-408; Worthy v. Caddell, 76-82; Sharpe v. Williams, 76-87; Potts v. Blackwell, 56-449, 57-59; Harris v. DeGraffenreid, 33-89; Freeman v. Lewis, 27-91; Fullenwider v. Roberts, 20-420. **Bona fide purchaser of land from child to whom father had conveyed land after having promised to convey same land to intended wife in consideration of marriage, acquired good title:** Brinkley v. Spruill, 130-46. **Purchaser of land with notice of prior fraudulent conveyance not protected in purchase, although paid value therefor:** Triplett v. Witherspoon, 70-589; Hiatt v. Wade, 30-340. **Where person made fraudulent deed of trust of property to one to whom he subsequently conveyed the property in good faith and for a fair price, grantee acquired good title:** White v. White, 35-265. **“Good consideration” means “valuable consideration”:** Arrington v. Arrington, 114-167. **As to what is meant by “for value,” see** Austin v. Staten, 126-788; Worthy v. Caddell, 76-82; Harris v. DeGraffenreid, 33-89; Fullenwider v. Roberts, 20-420.

Cases bearing upon subject-matter of section: Newlin v. Osborne, 51-128; Dobson v. Erwin, 20-341; Wall v. White, 14-105.

Cases referring to section: Peeler v. Peeler, 109-633; Glenn v. Bank, 70-205.

1010. Bona fide purchaser of mortgaged property not affected by illegal consideration of note secured. No conveyance or mortgage, made to secure the payment of any debt or the performance of any contract or agreement, shall be deemed void as against any purchaser for valuable or other good consideration of the estate or property conveyed, sold, mortgaged or assigned, by reason that the consideration of such debt, contract or agreement is forbidden by law, if such purchaser, at the time of his purchase, did not have notice of the unlawful consideration of such debt, contract or agreement.

Rev., s. 965; Code, s. 1549; R. C., c. 50, s. 5; 1842, c. 70.

Purchaser for value without notice under deed in trust in which some of debts secured are fictitious or usurious gets good title: McNeill v. Riddle, 66-290; McCorkle v. Earnhardt, 61-300. This section does not purport to protect the innocent holder of a mortgage note which is tainted with usury, but the “purchaser of the estate or property” at sale under mortgage who buys without notice of the usurious taint in debt secured: Ward v. Sugg, 113-494.

1011. Bona fide purchaser of fraudulently conveyed property treated as creditor. Purchasers of estate previously conveyed in fraud of creditors or purchasers shall have like remedy and relief as creditors might have had before the sale and purchase.

Rev., s. 966; Code, s. 1550; R. C., c. 50, s. 6.

Section merely referred to: Kenner v. Mfg. Co., 91-425.

1012. Persons aiding debtor to remove to defraud creditors liable for debts. If any person removes or aids and assists in removing any debtor out of any county in which he has resided for the space of six months, or more, with the intent, by such removing, aiding or assisting, to delay, hinder or defraud the creditors, or any of them, of such debtor, the person so removing, aiding or assisting therein, and his executors or administrators, shall be liable to pay all the debts which the debtor removed may justly owe in the county from which he was so removed; and the same may be recovered by the creditors, their executors or administrators, by a civil action.

Rev., s. 1939; Code, s. 1551; R. C., c. 50, s. 14; 1820, c. 1063.

Where debtor removes out of county, with intent to defraud his creditors, person who, knowing of such intent, helps him by carrying him or his property part of way in order to help him get out of county, becomes bound for his debts: *Godsey v. Bason*, 30-260—though he did not convey debtor or his goods entirely out of one county into another. Where such person is sued by creditor, not necessary to show that he had knowledge of any particular debt due by debtor, but it is sufficient if circumstances of case induce jury to believe that removal made with view to defraud creditors, *Ibid.*—and measure of damages is the amount of the debt due by debtor to plaintiff, *Ibid.*

Bail of person arrested under *capias ad respondendum* may maintain action against one for fraudulently aiding and assisting principal to remove from county, in consequence whereof he had debt sued on to pay: *March v. Wilson*, 44-143.

Surety on constable's bond upon which there has been a breach, but no judgment or payment by him, is not a creditor so as to entitle him to recover against one for fraudulently removing his principal: *Booe v. Wilson*, 46-192.

Simply advising debtor to run away, though advice be given to delay creditor, is not equivalent to aiding and assisting, and will not sustain action under section: *Wiley v. McRee*, 47-349.

Where person persuades debtor, temporarily absent from county of residence, not to go back to that county, but to go to distant parts, promising to send his property to him, which he afterwards does, and aids him with money to abscond from place where he then is, and goes part of way with him for purpose of defrauding creditors, he is liable under section: *Moore v. Rogers*, 48-91.

For one to go with absconding debtor to depot where debtor gets on train, and to take his horse back home, knowing of debtor's fraudulent intention to abscond, is such aiding and assisting as will make party liable: *Moss v. Peoples*, 51-140.

Where agent, who had money of principal, gave it to principal's son to help him abscond from debtors, and principal afterwards allowed it in settlement with agent, this does not make principal liable: *Moore v. Rogers*, 51-297.

Where party carried debtor to railroad station with his own horse and buggy, and there procured money for him to leave the state with intent to assist him to avoid his creditors, he is liable under section: *Moffitt v. Burgess*, 53-342.

Section merely referred to in *Baker v. Harris*, 60-274. For case prior to enactment of section, see *Gardiner v. Sherrod*, 9-173.

1013. Sales in bulk presumed fraudulent. The sale in bulk of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be *prima facie* evidence of fraud, and void as against the creditors of the seller, unless the seller, at least seven days before the sale, make an inventory showing the quantity and, so far as possible, the cost price to the seller of such articles included in the sale, and shall within said time notify the creditors of the proposed sale, and the price, terms and conditions thereof. If the owner of said stock of goods shall at any time before the sale execute a good and sufficient bond, to a trustee therein named, in an amount equal to the actual cash value of the stock of goods, and conditioned that the seller will apply the proceeds of the sale, subject to the right of the owner or owners to retain therefrom the personal property exemption or exemptions as are allowed by law, so far as it will go in payment of debts actually owing by the owner or owners, then the provisions of this section shall not apply. Such sale of merchandise in bulk shall not be presumed to be a fraud as against any creditor or creditors who shall not present his or their claim or make demand upon the purchaser in good faith of such stock of goods and merchandise, or to the trustee named in any bond given as provided herein, within twelve months from the date of maturity of his claim, and any creditor who does not present his claim or make demand either upon the purchaser in good faith or on the trustee named in a bond within twelve

months from the date of its maturity shall be barred from recovering on his claim on such bond, or as against the purchaser, in good faith, of such stock of goods in bulk. Nothing in this section shall prevent voluntary assignments or deeds of trust for the benefit of creditors as now allowed by law, or apply to sales by executors, administrators, receivers or assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any public officers under judicial process.

1907, c. 623; 1913, c. 30, s. 1; Ex. Sess. 1913, c. 66, s. 1.

Section constitutional: *Pender v. Speight*, 159-612. Sale in bulk not in regular course of trade is prima facie fraudulent, even when statute is complied with, and it is void as to creditors when not complied with: *Pennell v. Robinson*, 164-257; *Gallup v. Rozier*, 172-283. Whether compliance with statute is shown is for jury, and burden of establishing fraud upon the whole evidence rests with plaintiff, though even in case statute complied with statute raises presumption of fraud: *Gallup v. Rozier*, 172-283. "Within seven days" in statute does not mean seven days notice, but is limit beyond which notice cannot be given: *Ibid.* Debtor entitled to personal property exemption even if sale set aside: *Whitmore v. Hyatt*, 175-117. Section referred to: *Little v. Fleishman*, 177-21.

CHAPTER 20

CORONERS

- 1014. Election; appointment by clerk in special cases.
- 1015. Oaths to be taken.
- 1016. Coroner's bond.
- 1017. Coroner's bonds registered; certified copies evidence.
- 1018. In case of vacancy, clerk appoints special.
- 1019. Powers, penalties and liabilities of special coroner.
- 1020. To hold inquests; duties thereat.
- 1021. Acts as sheriff in certain cases; special coroner.
- 1022. Compensation of jurors at inquests.

1014. Election; appointment by clerk in special cases. In each county a coroner shall be elected by the qualified voters thereof, as is prescribed for members of the general assembly, and shall hold his office for two years. When there is no coroner in a county, the clerk of the superior court for the county may appoint one for special cases.

Rev., s. 1047; Const., Art. IV, s. 24.

In case of a vacancy county commissioners appoint, see section 1297, subsection 12.

1015. Oaths to be taken. Every coroner, before entering upon the duties of his office, shall take and subscribe to the oaths prescribed for public officers, and an oath of office.

Rev., s. 1048; Code, s. 661.

1016. Coroner's bond. Every coroner shall execute an undertaking for the faithful discharge of the duties of his office with good surety, in the sum of two thousand dollars, payable to the state of North Carolina and approved by the board of county commissioners.

Rev., s. 299; Code, s. 661; R. C., c. 25, s. 2; 1791, c. 342, ss. 1, 2; 1820, c. 1047, ss. 1, 2; 1899, c. 54, s. 52.

Mabry v. Turrentine, 30-201. For actions on official bonds, see sections 354 and 356, and for action on bond of coroner acting as sheriff, see sections 3930, 3941.

1017. Coroners' bonds registered; certified copies evidence. All official bonds of coroners shall be duly proved, certified, registered and filed as sheriffs' bonds are required to be; and certified copies of the same, from the register's office, shall be received and read in evidence in the like cases and in like manner as such copies of sheriffs' bonds are now allowed to be read in evidence.

Rev., s. 300; Code, s. 662; 1860-1, c. 18.

1018. In case of vacancy clerk appoints special. When there is a vacancy existing in the office of coroner in any county, and it is made to appear by the affidavit of some responsible person that a deceased person whose body has been found within the county probably came to his death by the criminal act or default of some person, it is the duty of the clerk of the superior court of such county to appoint some suitable person as special coroner to hold an inquest over the body of the deceased.

Rev., s. 1049; 1903, c. 661.

1019. Powers, penalties and liabilities of special coroner. The special coroner appointed under the provisions of the preceding section shall be invested with all the powers and duties conferred upon the several coroners in respect to holding inquests over deceased bodies, and shall be subject to the penalties and liabilities imposed on the said coroners.

Rev., s. 1050; 1903, c. 661, s. 2.

See *supra*, section 1016, as to coroner's bond.

1020. To hold inquests; duties thereat. It is the duty of the several coroners, when it is made to appear, by the affidavit of some responsible person, that the deceased probably came to his death by the criminal act or default of some person or persons, or at the request of the solicitor, to go to the place where the body of such deceased person is and forthwith to summon a jury of six good and lawful men; whereupon the coroner, upon oath of the jury at the said place, shall make inquiry when, how and by what means such deceased person came to his death, and his name if it was known, together with all the material circumstances attending his death; and if it appears that the deceased was slain, then who was guilty either as principal or accessory, if known, or in any manner the cause of his death. As many persons as are found culpable, by inquisition in manner aforesaid, shall be taken and delivered to the sheriff and committed to jail; and such persons as are found to know anything of the matters aforesaid, and are not culpable themselves, shall be bound in a recognizance with sufficient surety to appear at the next superior court to give evidence; of all which matters and things the coroner must make a record of his inquisition, signed by the jurors, and return the same to the next superior court of his proper county. It is the duty of every coroner, when the jury investigating the case requires it, to summon a physician or surgeon.

Rev., s. 1051; Code, s. 657; 1899, c. 478; 1905, c. 628; 1909, c. 707, s. 1.

In Buncombe County, when the coroner is a physician or surgeon, he shall make the investigation, if requested by one or more of the jurors. Rev., s. 1051; 1903, c. 586.

INQUEST. Time of death of party must be sufficiently stated, inferred from *State v. Morgan*, 86-731, 85-581. The inquest is the court of the coroner: *State v. Knight*, 84-789. Justice of peace cannot administer oaths at: *Ibid.*—but witness must be sworn by coroner, *Ibid.* Proceedings at inquests discussed: *Ibid.*

1021. Acts as sheriff in certain cases; special coroner. If at any time there is no person properly qualified to act as sheriff in any county, the coroner of such county is hereby required to execute all process and in all other things to act as sheriff, until some person is appointed sheriff in said county; and he shall be under the same rules and regulations, and subject to the same forfeitures, fines, and penalties as sheriffs are by law for neglect or disobedience of the same duties. If at any time the sheriff of any county is interested in or a party to any proceeding in any court, and there is no coroner in such county, or if the coroner is interested in any such proceeding, then the clerk of the court from which such process issues shall appoint some suitable person to act as special coroner to execute such process, and such special coroner shall be under the same rules, regulations and penalties as hereinabove provided for.

Rev., s. 1052; Code, s. 658; 1891, c. 173.

The provision for deputizing special officer when sheriff and coroner interested applicable also to courts of justices of the peace: *Baker v. Brem*, 127-322.

WHEN SHERIFF A PARTY OR INTERESTED. Process must be executed by coroner: *Bowen v. Jones*, 35-25; *Battle v. Baird*, 118-862—by deputy of coroner, *Yeargin v. Siler*, 83-348. Where no coroner, clerk appoints one to execute process: *Wittkowsky v. Wasson*, 69-33. Sheriff insane and county commissioners failing to declare office vacant, coroner performs duties of sheriff, except as tax collector: *Somers v. Comrs.*, 123-582. See, also, sections 3929, 3938.

1022. Compensation of jurors at inquest. All persons who may be summoned to act as jurors in any inquest held by a coroner over dead bodies, and who, in obedience thereto, appear and act as such jurors, shall be entitled to the same compensation in per diem and mileage as is allowed by law to jurors acting in the superior courts. The coroners of the respective counties are authorized and empowered to take proof of the number of days of service of each juror so acting and also of the number of miles traveled by such juror in going to and returning from such place of inquest, and shall file with the board of commissioners of the county a correct account of the same, which shall be, by such commissioners, audited and paid in the manner provided for the pay of jurors acting in the superior courts.

Rev., s. 1053; Code, ss. 659, 660.

CHAPTER 21

CORPORATION COMMISSION

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ART. 1. ORGANIZATION

1023. **Court of record.** There shall be a court of record, known as the Corporation Commission. Such court shall adopt a seal and shall have all of the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in this chapter. The members and clerk thereof may administer oaths.

Rev., s. 1054; 1899, c. 164, ss. 1, 31.

See the chapter Railroads, section 3412 et seq., and annotations there for questions which touch the subject-matter of this chapter in some aspects. Corporation commission is not a judicial court, but an administrative agency with certain quasi-judicial and legislative powers: Corp. Com. v. R. R., 170-560; Corp. Com. v. R. R., 151-447. So the railroad commission, which the corporation commission succeeded: Pate v. R. R., 122-877; Caldwell v. Wilson, 121-425. Reasons for making railroad commission a court of record: Caldwell v. Wilson, 121-

425. Establishment of the commission court not interference with interstate commerce: *Ibid.* Act establishing corporation commission (1899, c. 164) and 1899, c. 506, in effect amended and reenacted act of 1891, c. 320, which established railroad commission: *State v. R. R.*, 125-666; *Abbott v. Beddingfield*, 125-256, and cases cited; see, also, *Wilson v. Jordan*, 124-683. Discussion of power of legislature in formation of this court and constitutionality of certain provisions of railroad commission act of 1891 and of act of 1892 in *Efland v. R. R.*, 146-135; *Pate v. R. R.*, 122-877; *Express Co. v. R. R.*, 111-463; *Caldwell v. Wilson*, 121-425; *Industrial Siding Case*, 140-239; *Corporation Com. v. R. R.*, 139-126; *Railroad Connection Case*, 137-14; *Corporation Com. v. R. R.*, 127-288; *Leavell v. Tel. Co.*, 116-220, and cases there cited.

1024. Number of commissioners. The court shall consist of three commissioners, who shall be elected by the qualified voters of the state in the same manner as other state officers are elected. The court shall organize by the election of one of the commissioners as chairman.

Rev., s. 1055; 1899, c. 164, s. 1.

1025. Term of office. The term of office of the commissioners shall begin on the first day of January next after their election, and shall continue for six years and until their successors are elected and qualified. One member of the court shall be elected at each general election.

Rev., s. 1056; 1899, c. 164.

1026. Vacancy. If for any cause there shall be a vacancy in the commission, the governor shall appoint to such vacancy. Such appointee shall hold until the election and qualification of his successor, who shall be elected at the next general election after the vacancy occurred. The person so elected shall hold office for the unexpired term.

Rev., s. 1057; 1899, c. 164; 1901, c. 194.

1027. Qualifications of commissioners. It shall be unlawful for any member or official of said court to jointly, severally, or in any other way, either directly or indirectly, hold any stock or bond, or be the agent, attorney or employee, or have any interest in any way in any steamboat, railroad, canal, navigation, express, telegraph, telephone, or banking company or association. If any member or official of said court shall, during the term of his office, as distributee or legatee, or in any other way, have or become entitled to any stock or bonds or interest therein of any such company, he shall at once dispose of the same, and upon failure to do so shall forfeit his office, and may be suspended by the governor.

Rev., s. 1058; 1899, c. 164.

Power of governor to suspend railroad commissioner under former act discussed: *Caldwell v. Wilson*, 121-425.

1028. Oath of office. The members of the court, in addition to the oath to support the constitution and laws of the United States and the constitution and laws of the state of North Carolina, shall take, to be administered by one of the judges of the supreme court, the following oath of office, which oath shall be signed by such commissioners and attested by said judge and recorded in the office of the secretary of state: "I do solemnly swear (or affirm) that I am not the owner of any steamboat or of any stock or bond of any railroad, navigation or canal company, express, telegraph, telephone, or banking company, or the agent or attorney or employee of any such company or association; that I have no interest in any way in any such company or association, and that I will well

and faithfully execute the duties of my office as a member of the corporation commission and as state tax commissioner to the best of my knowledge and ability, without fear, favor, malice, reward or the hope of reward. So help me, God.”

Rev., s. 1059; 1899, c. 164, s. 1; 1903, c. 251, s. 3.

1029. Place of meeting. The court shall be held in the city of Raleigh. Special sessions may be held at any place in the state, when in the judgment of the commission the convenience of all parties is best subserved and expense is thereby saved.

Rev., s. 1060; 1899, c. 164, ss. 30, 31; 1901, c. 679, s. 4.

1030. Open at all times. The court shall be open at all times for the transaction of business, and each member shall devote his whole time to the discharge of the duties of his office; and it shall be his duty to remain in the office of the commission at least fifteen days in each month, unless detained therefrom on official business.

Rev., s. 1061; 1899, c. 164, s. 30; 1903, c. 251, s. 3.

1031. Quorum. Any two members of the court shall constitute a quorum for the transaction of business. The chairman is hereby authorized and empowered to perform the duties and exercise the powers conferred by law upon the corporation commission as to or over banks and building and loan associations, but this shall not prevent, as to banking and building and loan associations, the other members of the court from acting with the chairman in all of such matters.

Rev., s. 1062; 1899, c. 164, s. 29.

1032. Clerk and assistants. The court shall appoint a clerk, who shall be an expert accountant, experienced in railroad statistics and transportation rates. His term of office shall be two years. He shall take and subscribe to oaths of office similar to those prescribed for the commissioners, but he may nevertheless hold stock in state or national banks.

The commission, by and with the approval of the governor, is authorized to appoint an additional clerk, who shall be an expert accountant, well versed and experienced in railroad and transportation rates; and also such other clerical help as in the opinion of the commission and the governor is necessary for a proper discharge of the duties of the commission in dealing with public-service corporations operating in this state. The amount annually expended for this purpose shall not exceed six thousand dollars.

The commission is authorized to employ such rate experts as it may deem advisable to assist in the preparation and prosecution of the cases it has instituted or may institute before the interstate commerce commission for the reduction of freight rates into and out of North Carolina.

Rev., s. 1063; 1899, c. 164, ss. 9, 31; 1907, c. 999; 1913, c. 22, s. 1; Ex. Sess. 1913, c. 58, s. 1.

1033. Counsel. The commission has authority to employ counsel whenever and for such period of time as in their judgment is necessary, and counsel so employed shall be paid such fee and compensation as shall be agreed upon by them. The governor is authorized and empowered to employ from time to time, at the expense of the state, such special counsel as he and the corporation commission deem wise, to assist the attorney-general in enforcing and making

effective the jurisdiction and promulgations of the commission with reference to freight and other transportation rates, at a cost not exceeding one thousand dollars in any one year.

1907, c. 469, s. 5; Ex. Sess. 1913, c. 58, s. 2.

1034. Expenses. All the expenses of the commission, except as otherwise provided by law, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders in making any investigation, or upon official business, or for any other purposes necessary for carrying out the provisions of this chapter, and necessary furniture, stationery, postage, lights and heat, shall be allowed, and the auditor shall issue his warrant upon presentation of itemized vouchers therefor approved by the chairman of the commission: Provided, that the expenses allowed under this section shall not exceed three thousand six hundred dollars annually.

Rev., s. 1118; 1899, c. 164, s. 32; 1899, c. 68.

ART. 2. CORPORATIONS AND BUSINESSES WITHIN CONTROL OF COMMISSION

1035. Corporations and businesses within control of commission. The corporation commission shall have such general control and supervision as is necessary to carry into effect the provisions of this chapter and the laws regulating the companies, corporations, copartnerships and individuals specified herein, over—

1. Railroad, street railway, steamboat, canal, express and sleeping car companies, and all other companies or corporations engaged in the carrying of freight or passengers, and all copartnerships or individuals engaged in the business of common carriers.

Rev., s. 1066; 1899, c. 164, s. 1; 1901, c. 679.

Legislature has right to supervise, regulate and control rates and conduct of common carriers, whether directly or through commission: *Industrial Siding Case*, 140-239; *Corp. Com. v. R. R.*, 139-26; *Corp. Com. v. R. R.*, 127-288; *Express Co. v. R. R.*, 111-463. General supervision over railroads given to corporation commission: *Tilley v. R. R.*, 162-37. State has right to regulate public-service corporations, to enforce its regulations by appropriate penalties, in fixing which the right of classification is referred largely to legislative discretion: *Morris v. Express Co.*, 146-167; *Efland v. R. R.*, 146-135. See, also, *Telephone Co. v. Telephone Co.*, 159-9.

2. Telegraph and telephone companies and all other companies engaged in the transmission of messages; over persons and individuals owning and operating telegraph or telephone lines in North Carolina and who rent phones and wires to persons generally.

Rev., ss. 1066, 1096; 1899, c. 164, ss. 1, 2; 1907, c. 966.

As to power of commission to regulate telegraph companies: *Leavell v. Tel. Co.*, 116-220; *R. R. Comrs. v. Tel. Co.*, 113-213; *Mayo v. Tel. Co.*, 112-343. Telephones subject to regulation notwithstanding contract as to fixed rate: *Telephone Co. v. Telephone Co.*, 159-9. The power to regulate and control does not take away the power of the courts to determine the rights of the parties under a contract: *Walls v. Strickland*, 174-298.

3. Electric light, power, water and gas companies and corporations, other than such as are municipally owned or conducted, and over all persons, companies and corporations, other than municipal corporations, now or hereafter engaged in furnishing electricity, electric light, current or power and gas.

1913, c. 127, s. 1.

4. All water power, hydro-electric power and water companies now doing business in this state, or which may hereafter engage in doing business in this state, whether organized under the general or private laws of this state, or under the laws of any other state or country. Such companies are deemed to be public-service companies and subject to the laws of this state regulating public-service corporations.

1913, c. 133, s. 1.

Companies enumerated in this subsection subject to control and regulation: Power Co. v. Power Co., 175-668.

5. Flume companies which avail themselves of the power of eminent domain as provided in the chapter Eminent Domain.

1907, c. 39.

6. Corporations, other than municipal corporations, or individuals, owning and operating a public sewerage system in North Carolina.

1917, c. 194.

7. Public and private banks, and all loan and trust companies or corporations.

Rev., s. 1066; 1899, c. 164, s. 1; 1901, c. 679.

The power of control and supervision vested in the corporation commission under this section with respect to the various classes of public-service corporations and individuals engaged in furnishing the public utilities mentioned shall be the same as that vested in it in respect to railroads and other transportation companies.

1913, c. 127, s. 7.

See sections 2783-2785.

ART. 3. POWERS AND DUTIES

1036. **To be Board of State Tax Commissioners.** The corporation commissioners constitute the Board of State Tax Commissioners with the powers and duties prescribed by article four of the chapter entitled Taxation.

Rev., s. 1119.

See section 7881. Shoe Co. v. Travis, 168-599.

1037. **To make and enforce rules for public-service corporations.** The corporation commission has power to make any necessary and proper rules, orders and regulations for the safety, comfort and convenience of passengers, shippers or patrons of any public-service corporation, and to require the observance of and to enforce the same by the company and its employees, such power being the same as that provided in this chapter in respect to railroads and other transportation companies.

1907, c. 469, s. 1a; 1913, c. 127, s. 2.

1038. **To require transportation and transmission companies to maintain facilities.** The corporation commission has power to require all transportation and transmission companies to establish and maintain all such public-service facilities and conveniences as may be reasonable and just. It may require steamboat companies to provide such wharf and warehouse facilities as may be reasonable and just.

1907, c. 469, s. 2; Ex. Sess. 1913, c. 52, s. 1.

1039. **To authorize lumber companies to transport commodities.** The corporation commission has power to authorize lumber companies, having logging roads, to transport all kinds of commodities other than their own and passengers, and to charge therefor reasonable rates to be approved by the commission.

1915, c. 160, s. 1; 1915, c. 6.

1040. **To establish and regulate stations for freight and passengers.** The commission is empowered and directed to require, where the public necessity demands, and it is demonstrated that the revenue received will be sufficient to justify it, the establishment of stations by any company or corporation engaged in the transportation of freight and passengers in this state, and to require the erection of depot accommodations commensurate with such business and revenue, and to require the erection of accommodations for loading and unloading live-stock and for feeding, sheltering and protecting the same in transportation. The commissioners shall not require any company or corporation to establish any station nearer to another station than five miles.

Rev., s. 1097; 1899, c. 164, s. 2, subsec. 12; 1913, c. 155.

Limitation on power to require station within five miles of existing station does not prevent enforcement of railroad's contract for flag station so long as it does not interfere with public interests: *Perralt v. R. R.*, 165-295. "Depot accommodations commensurate with" needs may justify requirement of track scales at proper points, but commission's order for track scales is subject to review by the courts, and court or jury should pass on reasonableness and necessity of order: *Corp. Com. v. R. R.*, 139-126. See, also, as to power to require establishment and changes in depots: *Corp. Com. v. R. R.*, 170-560; also section 1041.

1041. **To require change, repair, and additions to stations.** The commission is empowered and directed to require a change of any station or the repairing, addition to, or change of any station house by any railroad or other transportation company in order to promote the security, convenience and accommodation of the public, and to require the raising or lowering of the track at any crossing when deemed necessary.

Rev., s. 1097; 1899, c. 164, s. 2, subsec. 13.

See cases under section 1040.

1042. **To provide for union depots.** The commission is empowered and directed to require, when practicable, and when the necessities of the case, in their judgment, require, any two or more railroads which now or hereafter may enter any city or town to have one common or union passenger depot for the security, accommodation and convenience of traveling public, and to unite in the joint undertaking and expense of erecting, constructing and maintaining such union passenger depot, commensurate with the business and revenue of such railroad companies or corporations, on such terms, regulations, provisions and conditions as the commission shall prescribe. The railroads so ordered to construct a union depot shall have power to condemn land for such purpose, as in case of locating and constructing a line of railroad: Provided, that nothing in this section shall be construed to authorize the commission to require the construction of such union depot should the railroad companies at the time of application for said order have separate depots, which, in the opinion of the commission, are adequate and convenient and offer suitable accommodations for the traveling public.

Rev., s. 1097; 1903, c. 126.

Subsection is valid exercise of legislative power, and, being remedial, will be liberally construed: *Dewey v. R. R.*, 142-392. See *State v. R. R.*, 161-270. It confers powers necessarily incident to effecting purpose designated, such as changes in route or making depot available to public: *Griffin v. R. R.*, 150-312; *Dewey v. R. R.*, 142-392. Applies to all cities and towns in state, in legal discretion of commission: *Dewey v. R. R.*, 142-392. In superior court on appeal from order requiring union depot, evidence should be limited to conditions at place in question: *State v. R. R.*, 161-270. Subsection applies to changes in route by order of commission; section 3435 to road's voluntary change: *Dewey v. R. R.*, 142-392.

1043. To provide for separate waiting rooms for races. The commission is empowered and directed to require the establishment of separate waiting rooms at all stations for the white and colored races.

Rev., s. 1097; 1899, c. 64, s. 2, subsec. 14.

1044. To require construction of sidetracks. The commission is empowered and directed to require the construction of sidetracks by any railroad company to industries already established or to be established: Provided, it is shown that the proportion of such revenue accruing to such sidetrack is sufficient within five years to pay the expenses of its construction. This shall not be construed to give the commission authority to require railroad companies to construct sidetracks more than five hundred feet in length.

Rev., s. 1097; 1899, c. 164, s. 2, subsec. 15.

Requiring interstate railroad to construct sidetrack, if proper legislative authority for such order exists, is not interference with interstate commerce: *State v. R. R.*, 153-559. Requiring nonresident railroad to build siding, which can only be built by exercising eminent domain, is beyond authority of commission, since such railroads do not possess eminent domain: *Ibid.* Where landowner grants to adjoining owner right to build and use spur track over grantor's land, in connection with grantee's business, railroad cannot under this section acquire this right from grantee and use it for other patrons of railroad: *Hales v. R. R.*, 172-104. Reasonableness and practicability of order under circumstances of case considered: *Industrial Siding Case*, 140-239.

1045. To require trains to be run over railroads and connections at intersections. The commission is empowered and directed to require, when practicable and when the necessities of the traveling public, in the judgment of the corporation commission, demand, that any railroad in this state shall install and operate one or more passenger or freight trains over its road, and also require any two or more railroads having intersecting points to make close connection at such points: Provided, that no order under this section shall be made unless the business of the railroad justifies it.

1907, c. 469, s. 3.

Commission may require railroad to have train arrive at certain station on road at certain schedule time so as to connect with train of another company: *Corp. Com. v. R. R.*, 137-1.

1046. To inspect railroads as to equipment and facilities, and to require repair. The commission is empowered and directed, from time to time, to carefully examine into and inspect the condition of each railroad, its equipment and facilities, in regard to the public's safety and convenience; and if any are found by them to be unsafe, they shall at once notify and require the railroad company to put the same in repair.

1907, c. 469, s. 3.

1047. To require installation and maintenance of block system and safety devices. The commission is empowered and directed to require any railroad

company to install and put in operation and maintain upon the whole or any part of its road a block system of telegraphy or any other reasonable safety device, but no railroad company shall be required to install a block system upon any part of its road upon which is not operated as many as or more than eight trains each way per day.

1907, c. 469, s. 1b.

1048. To regulate crossings and to require grade crossings. The commission is empowered and directed to require the raising or lowering of any tracks or highway at any highway or railroad crossing, and to designate who shall pay for the same; and, when they think proper, partition the cost of abolishing grade crossings and the raising or lowering of said track or highway among the railroads and municipalities interested.

1907, c. 469, s. 1(c) ; 1911, c. 197, s. 1.

Section does not exclude exercise of police power by state or municipal corporation in regulating crossings: *State v. R. R.*, 164-422; *R. R. v. Goldsboro*, 155-356. Power of commission to establish grade crossings recognized: *Tate v. R. R.*, 168-523.

1049. To require installation and maintenance of automatic signals at railroad intersections, etc. The commission is empowered and directed to require, when public safety demands, when and in case two or more railroads now cross or may hereafter cross each other at a common grade, or any railroad crosses any stream or harbor by means of a bridge, to install and maintain such a system of interlocking or automatic signals as will render it safe for engines and trains to pass over such crossings or bridge without stopping, and to apportion the cost of installation and maintenance between said railroads as may be just and proper.

1911, c. 197, s. 2; Ex. Sess. 1913, c. 63, s. 1.

1050. To require railroads to enter towns and maintain depots in certain cases. Where two or more railroads may maintain freight depots and a union passenger depot within one mile of a town of two thousand population for the convenience of the inhabitants thereof, and do not enter the corporate limits of the town, it is the duty of the corporation commission, upon the petition of a majority of the qualified voters of the said town, which petition shall be properly sworn to by the signers thereof, to require and compel, where practicable, the said railroads to run their lines into or through the corporate limits of the said town, and construct, equip, and maintain suitable passenger and freight depots at some convenient place or places therein, and the passenger depot shall be a union station and be built and maintained by the several railroads according to a plan and in such a manner as shall be approved by the commission.

When a petition is filed with the corporation commission as aforesaid, the commission shall set a day for the hearing thereof, which day shall be not more than twenty days from the filing of said petition, and shall immediately cause a notice to issue to the railroads interested in the matter set out in the petition, and after the hearing of the matter on the day named in the notice, the commission, if a majority of its members deem it practicable, shall thereupon cause an order to be made requiring the said railroads to build, equip, and maintain in a suitable manner roadbeds, yards and depots, and any other necessary buildings

or equipment, at convenient places within the limits of said town, as to a majority of them seems proper for the needs and growth of the business and inhabitants of the said town.

The order of the corporation commission to the railroads shall name a time within which all the necessary work of entering the said town and construction of depots and other buildings shall be completed and opened to the public for the transaction of business, and the said railroads, for every day beyond the said time that they shall not be in operation according to the said order, shall pay the sum of fifty dollars for each and every day of such failure and neglect, to the board of commissioners or aldermen of said town, which shall be for the benefit of the said town, this amount to be recovered as in other actions.

This section shall also apply to any railroad that may hereafter enter into or run within one mile of the corporate limits of said town, and the corporation commission shall have the power to require such railroads to unite with the other railroads in maintaining the depots, tracks, and other structures, and also pay such part of the cost thereof as to the said corporation commission may seem proper.

The railroads have the power to condemn such quantity of lands, including gardens, yards, residences and the premises pertaining thereto, as are necessary for the purposes of this section, the condemnation proceedings to be had in the same manner as now provided by law.

1907, c. 465.

1051. To consent to abandonment or relocation of depots. A railroad corporation which has established and maintained for a year a passenger station or freight depot at a point upon its road shall not abandon such station or depot, nor substantially diminish the accommodation furnished by the stopping of trains, except by consent of the commission. Freight or passenger depots may be relocated upon the written approval of the commission.

Rev., s. 1098; 1899, c. 164, ss. 19, 20.

1052. To regulate crossings of telephone, telegraph and electric power lines. Power is conferred on the corporation commission whenever any telephone, telegraph or electric power lines cross, to require such crossings to be constructed and maintained in a safe manner, so that the wires of one line will not fall upon the other; to prescribe the manner in which this shall be done; to discontinue or prohibit such crossings where they are unnecessary and can reasonably be avoided; and to apportion the cost of proper changing and construction of such crossings among the lines interested, as to said commissioners may seem just: Provided, that in all crossings made dangerous by the presence of high tension wire or wires of any power or light company, the cost shall be paid by such power or light company.

1913, c. 130, s. 1.

1053. To regulate delivery of freight, express, and baggage. The corporation commission shall make reasonable and just rules—

1. For the handling of freight and baggage at stations.

2. As to charges by any company or corporation engaged in the carriage of freight or express for the necessary handling and delivery of the same at all stations.

Rev., s. 1094; 1899, c. 164, s. 2, subsecs. 2, 7.

1054. To prevent discriminations. The corporation commission shall make reasonable and just rules and regulations—

1. To prevent discrimination in the transportation of freight or passengers, or in furnishing electricity, electric light, current, power or gas.

“Discrimination” defined: Freight Discrimination Cases, 95-434. Railroad carrying logs to sawmill cannot charge shipper agreeing to ship manufactured product by same line less for same services than charged shipper who makes no such agreement: Railroad Discrimination Case, 136-479. Consult *Express Co. v. R. R.*, 111-463.

2. To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or the misleading or deceiving the public in any manner as to real rates charged for freight, express or passengers, or in furnishing electricity, electric light, current, power or gas.

Rev., s. 1095; 1899, c. 164, s. 2, subsecs. 3, 5; 1913, c. 127, s. 6.
See *State v. R. R.*, 122-1052.

1055. To fix a standard for gas. The corporation commission shall fix, establish and promulgate a standard of quality for gas and prescribe rules and regulations for the enforcement of and obedience to the same.

1919, c. 32.

1056. To regulate shipment of inflammable substances. The corporation commission is authorized and empowered to adopt and promulgate rules for the shipment of inflammable and explosive articles; cotton which has been partially consumed by fire, and such other like articles as in its opinion may be apt to render transportation dangerous. And after the promulgation of such rules, no common carrier shall be required to receive or transport any such articles except when tendered in accordance with the said rules; nor shall such common carrier be liable for any penalty for refusal to receive such article for shipment until all the rules prescribed by the corporation commission in regard to the shipments of the same shall be complied with.

1907, c. 471, s. 1.

1057. To regulate demurrage, storage, placing, and loading of cars. The commission shall make rules, regulations and rates governing demurrage and storage charges by railroad companies and other transportation companies; and shall make rules governing railroad companies in the placing of cars for loading and unloading and in fixing time limit for delivery of freights after the same have been received by the transportation companies for shipment.

Rev., s. 1100; 1903, c. 342.

Section cited: *Hardware Co. v. R. R.*, 147-483.

1058. To fix rate of speed through towns; procedure. If a railroad company is of the opinion that an ordinance of a city or town through which a line of its railroad passes, except in the counties of Cumberland, Rockingham, Union and Wayne, regulating the speed at which trains may run while passing through said city or town, is unreasonable or oppressive, such railroad company may file its petition before the corporation commission, setting forth all the facts, and asking relief against such ordinance, and that the corporation commission prescribe the rate of speed at which trains may run through said municipality. Upon the filing of the petition a copy thereof shall be mailed, in a registered letter, to the mayor or chief officer of the town or municipality, together with a notice from

the corporation commission, setting forth that on a day named in the notice the petition of the railroad company will be heard, and that the city or town named in the petition will be heard at that time in opposition to the prayer of the petition. And upon the return day of the notice the corporation commission shall hear the petition, but any hearing granted by the corporation commission shall be had at the town, city or locality where the conditions complained of are alleged to exist, or some member of the said commission shall take evidence, both for the petition and against it, at such city, town or locality, and report to the full commission before any decision is made by the commission.

Either party, petitioner or respondent, has the right to introduce testimony and to be heard by counsel, and the corporation commission, after hearing the petition, answer, evidence and argument, shall render judgment thereon. If the commission finds that such ordinance is reasonable and just the petition shall be dismissed, and the petitioner shall pay all the costs, to be taxed by the clerk to the corporation commission. If the commission is of the opinion that the ordinance is unreasonable, it shall so adjudge; and in addition thereto it shall prescribe the maximum rates of speed for passing through such town. And thereafter the railroad company may run its trains through such town or city at speeds not greater than those prescribed by the corporation commission, and the ordinance adjudged to be unreasonable shall not be enforced against such railroad company.

If the judgment of the corporation commission is in favor of the petitioner, it shall be lawful for the corporation commission to make such order as to the payment of the costs as shall seem just. It may require either party to pay the same or it may divide the same. The costs in such proceeding shall be the same as are fixed by law for similar services in the superior court.

Rev., ss. 1101, 1102, 1103; 1903, c. 552.

1059. To hear and determine controversies submitted. When a company or corporation embraced in this chapter has a controversy with another corporation or person, and all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrators, the commission shall act as such, and after due notice to all parties interested shall proceed to hear the same, and their award shall be final. Such award in cases where land or an interest in land is concerned shall immediately be certified to the clerk of the superior court of the county in which said land is situated, and shall by such clerk be docketed in the judgment docket for such county, and from such docketing shall be a judgment of the superior court for such county. Parties may appear in person or by attorney before such arbitrators.

Rev., s. 1073; 1899, c. 164, s. 25.

1060. To investigate companies and businesses under its control. The commissioners shall from time to time visit the places of business, and investigate the books and papers of all corporations, firms or individuals engaged in the transportation of freight or passengers, the transmission of messages either by telegraph or telephone, or in the furnishing of other public utilities the supervision and control of which is vested in the corporation commission, all public or private banks, loan and trust companies, to ascertain if all the orders, rules and regulations of the corporation commission have been complied with, and shall have full

power and authority to examine all officers, agents and employees of such companies, individuals, firms or corporations, and all other persons, under oath or otherwise, and to compel the production of papers and the attendance of witnesses to obtain the information necessary for carrying into effect and otherwise enforcing the provisions of this chapter, and the chapter entitled Banks.

Rev., s. 1064; 1913, c. 127, ss. 1, 2, 7; 1917, c. 194; 1899, c. 164, s. 1.

1061. To investigate accidents. The commission may investigate the causes of any accident on a railroad or steamboat which it may deem to require investigation, and any evidence taken upon such investigation shall be reduced to writing, filed in the office of the commission, and be subject to public inspection.

Rev., s. 1065; 1899, c. 164, s. 24.

1062. To notify of violation of rules and institute suit. The commission, whenever in its judgment any corporation has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the attorney-general, who shall take such proceedings thereon as he may deem expedient.

Rev., s. 1113; 1899, c. 164, s. 8.

1063. To keep record of receipts and disbursements. The commission shall keep a record showing in detail all receipts and disbursements.

Rev., s. 1115; 1899, c. 164, s. 34.

1064. To pay fees and money into treasury. All license fees and seal tax and all other fees paid into the office of the corporation commission shall be turned into the state treasury; also all moneys received from fines and penalties.

Rev., s. 1114; 1899, c. 164, ss. 33, 26.

1065. To report annually to governor. It shall be the duty of the commission to make to the governor annual reports of its transactions, and recommend from time to time such legislation as it may deem advisable under the provisions of this chapter, and the governor shall have one thousand copies of such report printed for distribution.

Rev., s. 1117; 1899, c. 164, s. 27; 1911, c. 211, s. 9; 1913, c. 10, s. 1.

Reports of commission are matters of public record of which courts take judicial notice: *Staton v. R. R.*, 144-135.

ART. 4. RATE REGULATION

1066. Commission to fix rates for public utilities. Subject to the provisions as to passenger rates in the chapter, Railroads, and as to railroad freight rates in this chapter, the commission shall make reasonable and just rates and charges, in intrastate traffic, and regulate the same, of and for—

As to passenger rates, see section 3489 et seq.; section 1070 (free carriage). As to railroad freight rates, see section 1078 et seq.

1. Railroads, street railways, steamboats, canal and express companies or corporations, and all other transportation companies or corporations engaged in the carriage of freight, express or passengers.

See under section 1035. Legislative power to select and classify in rate legislation discussed: *Efland v. R. R.*, 146-135. Meaning of "companies" as used herein: *Ibid.* Power

of commission to fix freight rates: *Tilley v. R. R.*, 162-37; *Corp. Com. v. R. R.*, 127-283; *Express Co. v. R. R.*, 111-463—and provide minimum carload for particular commodity, *Corp. Com. v. R. R.*, 127-283. Power to control rates does not extend to all questions as to performing duty to public: *Walls v. Strickland*, 174-298.

2. The transmission and delivery of messages by any telegraph company, and for the rental of telephone and furnishing telephonic communication by any telephone company or corporation.

See section 1035, subdivision 2, and cases cited. Incidental power of commission to ascertain corporation controlling and operating any telegraph line in state: *R. R. Comrs. v. Tel. Co.*, 113-213. Commission may fix rates of messages between points in state, though line traverses another state en route: *Ibid.* As to illegal preferences: *Leavell v. Tel. Co.*, 116-211.

3. Persons, companies and corporations, other than municipal corporations, engaged in furnishing electricity, electric light, current, power or gas, or owning or operating a public sewerage system in North Carolina.

See sections 2783-2785.

4. The through transportation of freight, express or passengers.

As to passenger rates, see section 3489 et seq.

5. The use of railway cars carrying freight or passengers.

6. And shall make rules and regulations as to contracts entered into by any railroad company or corporation to carry over its line or any part thereof the car or cars of any other company or corporation.

7. And shall make, require or approve what is known as "milling-in-transit" rates on grain; or lumber to be dressed or shipped over the line of the railroad company on which such freight originated.

"Milling in transit" defined: *Railroad Discrimination Cases*, 136-486.

8. And, conjointly with such railroad companies, shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and internal improvements in the state.

Nothing in this chapter shall prohibit railroad or steamboat companies from making special passenger rates with excursion or other parties, also rates on such freights as are necessary for the comfort of such parties, subject to the approval of the commission.

The powers vested in the commission by this section over the several subjects enumerated shall be the same as that vested in it in respect to railroads and other transportation companies.

Rev., ss. 1096, 1099; 1899, c. 164, ss. 2, 14; 1903, c. 683; 1907, c. 469, s. 4; 1913, c. 127, s. 2; 1917, c. 194.

1067. Rates established deemed just and reasonable. The rates or charges established by the commission shall be deemed just and reasonable, and any rate or charge made by any corporation, company, copartnership or individual engaged in the businesses enumerated in the preceding section other than those so established shall be deemed unjust and unreasonable.

1913, c. 127, s. 3.

1068. How maximum rates fixed. In fixing any maximum rate or charge, or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this chapter, the commission shall take into consideration if

proved, or may require proof of, the value of the property of such carrier, person or corporation used for the public in the consideration of such rate or charge or the fair value of the service rendered in determining the value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of the construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all its property within the state; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation, and all other facts that will enable them to determine what are reasonable and just rates, charges and tariffs.

Rev., s. 1104; 1899, c. 164, s. 2, subsec. 1.

See section 1066, cases and references.

1069. Commissioners entitled to free carriage. The commissioners and their clerks shall be transported free of charge over all railroads and transportation lines which are under the supervision of the commission; and when traveling on official business, they may take with them experts or other agents whose services they may deem temporarily of public importance.

Rev., s. 1105.

1070. Free carriage. Nothing in this chapter shall prevent or prohibit—

1. The carriage, storage, or handling of property free or at reduced rates for the United States, state or municipal governments, or for charitable or educational purposes; or for any corporation or association incorporated for the preservation and adornment of any historic spot, or to the employees or officers of such company or association while traveling in the performance of their duties, provided they shall not travel further than ten miles one way on any one trip free of charge or to or from fairs or exhibitions for exhibition thereat.

2. The free carriage of destitute or homeless persons transported by charitable societies, and the necessary agents employed in such transportation; or the free transportation of persons traveling in the interest of orphan asylums or homes for the aged or infirm, or any department thereof, or traveling secretaries of Railroad Young Men's Christian Associations, or ex-Confederate soldiers attending annual reunions.

3. The use of passes for journeys wholly within this state which have been or may be issued for interstate journeys under the authority of the United States interstate commerce commission.

4. The issuance of mileage, excursion or commutation passenger tickets.

5. Common carriers from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes.

6. Common carriers from giving free carriage to their own officers and employees and members of their families, or furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of such common carrier, and the remains of a person killed in the employment of a

common carrier, and employees traveling for the purpose of entering the service of such common carrier, and the families of those persons named; also the families of persons killed, and the widows during widowhood, and minor children during minority of persons who died while in the service of such common carrier.

7. The principal officers of any common carrier from exchanging passes, franks or tickets with other common carriers for their officers or employees, and members of their families.

8. Transportation companies from contracting with newspapers for advertising space in exchange for transportation over their lines to such an extent as may be agreed upon between the parties for said consideration.

9. Transportation companies, if they so desire, from furnishing transportation to such agricultural extension and demonstration workers as are engaged in work in the field in efforts to increase production on the farm and to improve the farm home, when such workers are actually engaged in the performance of duties requiring travel.

10. Any common carrier that is operating under lease a railroad in this state, in which the state owns a majority of the capital stock, from giving free carriage, according to the contract of lease, to the officers and their families and the committees of the lessor owning such leased railroad, nor prevent such operating common carrier from issuing annually free transportation to ex-presidents of such lessor owning companies and their families in compliance with the contract of lease entered into by them or according to and for such period of time as may have been prescribed by any by-law of the lessor which was in force at the time such lease was made.

Rev., s. 1105; 1899, c. 164, s. 22; 1899, c. 642; 1901, c. 679, s. 2; 1901, c. 652; 1905, c. 312; 1911, cc. 49, 148; 1913, c. 100; 1915, c. 215; 1917, cc. 56, 160.

Gratuitous passenger not in *pari delicto* with carrier issuing free pass contrary to section: *McNeill v. R. R.*, 135-682. Action for injuries sustained by editor riding on free pass: *McNeill v. R. R.*, 135-682, 132-510. As bearing on section: *State v. R. R.*, 122-1052. See further, *Railroads*, art. 10, sec. 3489 et seq.

1071. Revision of rates. The commission shall from time to time, and as often as circumstances may require, change and revise or cause to be changed and revised any schedules of rates fixed by the commission, or allowed to be charged by any carrier of freight, passengers, or express, or by any telegraph or telephone company. The powers of the commission, under this section, shall be exercised with respect to railroad freight and passenger rates under the limitations prescribed by article 5 of this chapter and article 10 of the chapter entitled *Railroads*.

Rev., s. 1106; 1899, c. 164, s. 7.

1072. Long and short hauls. It shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge and receive as great compensation for a shorter

as for a longer distance: Provided, however, that upon application to the commission, such common carrier may in special cases be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided, that nothing in this chapter contained shall be taken as in any manner abridging or controlling the rates of freight charged by any railroad in this state for conveying freight which comes from or goes beyond the boundaries of the state and on which freight less than local rates on any railroad carrying the same are charged by such railroads.

Rev., s. 1107; 1899, c. 164, s. 14; Ex. Sess. 1913, c. 20, s. 9; 1915, c. 17, s. 1.

1073. Contracts as to rates. All contracts and agreements between railroad companies as to rates of freight and passenger tariffs shall be submitted to the commission for inspection and correction, that it may be seen whether or not they are a violation of law or of the rules and regulations of said commission, and all arrangements and agreements whatever as to the division of earnings of any kind by competing railroad companies shall be submitted to the commission for inspection and approval in so far as they affect the rules and regulations made by the commission to secure to all persons doing business with such companies just and reasonable rates of freight and passenger tariffs, and the commission may make such rules and regulations as to such contracts and agreements as may then be deemed necessary and proper, and any such agreements not approved by the commission, or by virtue of which rates shall be charged exceeding the rates fixed for freight and passengers, shall be deemed, held and taken to be violations of this chapter and shall be illegal and void.

Rev., s. 1108; 1899, c. 164, s. 6.

1074. Rates to be published. All carriers shall, whenever required by the commission, file with it a schedule of their rates of charges for freight and passengers, and the commission is authorized and required to publish the rates, or a summary thereof, in some convenient form for the information of the public, and quarterly thereafter the changes made in such schedules, if they deem it advisable.

Rev., s. 1109; 1899, c. 164, s. 7; 1907, c. 217, s. 5.

1075. Interstate commerce. Upon the complaint of any person or community to the commission of any unjust discrimination or unjust or unreasonable rate in carrying freight which comes from or goes beyond the boundaries of the state by any railroad company, whether organized under the laws of this state or of another state and doing business in this state, the commission shall investigate such complaint, and if the same be sustained it shall be the duty of the commission to bring such complaint before the interstate commerce commission for redress in accordance with the provisions of the act of Congress establishing the interstate commerce commission. They shall receive upon application the services of the attorney-general of the state, and he shall represent them before the interstate commerce commission.

Rev., s. 1110; 1899, c. 164, s. 14; 1907, c. 469, s. 5.

1076. **Duplicate freight receipts; charges stated; freight delivered on payment of charges.** All railroad companies shall on demand issue duplicate freight receipts to shippers in which shall be stated the class or classes of freight shipped, the freight charges over the road giving the receipt, and so far as practicable shall state the freight charges over the roads that carry such freight. When the consignee presents the railroad receipt to the agent of the railroad that delivers such freight such agent shall deliver the articles shipped upon payment of the rate charged for the class of freight mentioned in the receipt.

Rev., s. 1111; 1899, c. 164, s. 17.

Consignee must present bill of lading to compel delivery: *Jeans v. R. R.*, 164-224.

1077. **Schedule of rates to be evidence.** The schedule of rates fixed by statute or under this article shall, in suits brought against any company wherein is involved the charges of any company for the transportation of any passenger or freight or cars or unjust discrimination in relation thereto, be taken in all courts as prima facie evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads. All such schedules shall be received and held in all suits as prima facie evidence the schedules of the commission without further proof than the production of the schedules desired to be used as evidence, with a certificate of the clerk of the commission that the same is a true copy of the schedule prepared or approved by it for the railroad company or corporation therein named.

Rev., s. 1112; 1899, c. 164, s. 7.

For further legislation as to rates, see *Railroads*, Arts. 10, 11.

Section cited: *Tilley v. R. R.*, 162-37.

ART. 5. RAILROAD FREIGHT RATES

1078. **Classification of articles, commodities, and property.** For the purposes of this article all articles, commodities, and property are classified as now provided and specified by law, or by order or orders of the North Carolina corporation commission, in numbered and lettered classes and as commodities, subject to change in classification in the manner which is now or which may be provided by law.

Ex. Sess. 1913, c. 20, s. 1.

For further provisions on freight rates, see *Railroads*, Art. 11.

1079. **Changes in classification.** The corporation commission, or such other commission as may have conferred upon it by law the powers and duties now exercised by the North Carolina corporation commission with reference to public-service companies, has the power to establish a different classification of freight than that referred to in the preceding section if thereby a more systematic or uniform method can be secured, in the opinion of such commission; but shall not, except as provided in this article, increase the rates fixed herein as maxima. Such commission has the power, if in their judgment it seems just to do so, to change the percentage relation of other classes of freight than the first class, to the first class: Provided, it shall not thereby raise the rate on any class, except in the manner and upon the conditions specified in this article.

Ex. Sess. 1913, c. 20, s. 2.

1080. Rates established. Except where the corporation commission shall order or has ordered to the contrary, the following specified rates are declared to be reasonable maximum rates to be charged by railroad companies owning, operating, controlling or maintaining seventy-five or more miles of railroad in North Carolina, it being understood that articles heretofore included in Class E, under the state classification, are here rated under fifth class; articles heretofore included in Class H, under the state classification, are here rated under fourth class; flour in barrels is here rated double Class C per barrel, and flour in barrels same as Class C; articles heretofore included in Class M, under state classification, are here rated two-thirds of Class A:

SCHEDULE OF MAXIMUM REASONABLE RATES OF FREIGHT
NORTH CAROLINA, 1914

	PER HUNDRED POUNDS											PER TON	PER CARLOAD			Lumber, Carload 30,000 Lbs., Per 100 Pounds	Molasses in Hhds. and Bbls. Per 100 Pounds	Rough Logs, Carload 40,000 Pounds	Cotton in Bales, Per 100 Pounds	Ferti- lizer Per Ton, Carload 12 Tons
	1	2	3	4	5	6	A	B	C*	D*	K		L	N	O					
5 miles and under.....	\$.12	\$.10	\$.08	\$.07	\$.06	\$.05	\$.04	\$.05	\$.05	\$.04	\$.03	\$.50	9.00	7.00	5.00	\$.02	\$.04	\$.07	\$.60	
10 miles and over 5.....	.15	.13	.11	.09	.08	.06	.05	.06	.06	.05	.04	.60	10.00	8.00	6.50	.02½	.05	5.00	.09	
15 miles and over 10.....	.18	.15	.13	.11	.09	.07	.06	.07	.07	.06	.04½	.70	11.00	9.00	7.50	.03	.05½	.11	.85	
20 miles and over 15.....	.21	.18	.16	.13	.10	.08	.07	.08	.08	.07	.05	.75	12.00	10.00	8.50	.03½	.06	6.00	.13	
25 miles and over 20.....	.24	.20	.18	.14	.11	.09	.08	.09	.09	.08	.05½	.80	14.00	11.00	9.50	.03½	.06½	.14	1.05	
30 miles and over 25.....	.27	.23	.20	.16	.12	.10	.08	.10	.10	.08	.06	.85	16.00	11.00	10.50	.04	.07	7.00	.15	
35 miles and over 30.....	.29	.25	.21	.17	.13	.10	.09	.11	.10	.09	.06	.90	17.00	12.00	11.50	.04	.07½	.16	1.15	
40 miles and over 35.....	.31	.26	.22	.18	.14	.11	.09	.11	.10	.09	.06½	.95	18.00	12.00	12.00	.04	.08	8.00	.17	
45 miles and over 40.....	.33	.27	.23	.19	.14	.11	.10	.12	.11	.09	.06½	1.00	19.00	13.00	12.00	.04½	.08½	.18	1.25	
50 miles and over 45.....	.35	.28	.24	.20	.15	.12	.10	.12	.11	.09	.06½	1.00	20.00	13.00	12.00	.04½	.09	9.00	.19	
55 miles and over 50.....	.36	.29	.25	.20	.16	.12	.11	.13	.11	.10	.07	1.05	21.00	14.00	13.00	.04½	.09	.20	1.35	
60 miles and over 55.....	.37	.30	.26	.21	.16	.13	.11	.13	.11	.10	.07	1.05	22.00	14.00	13.00	.05	.10	10.00	.21	
65 miles and over 60.....	.38	.31	.27	.21	.17	.13	.12	.14	.12	.10	.07	1.10	23.00	15.00	13.00	.05	.10	.22	1.45	
70 miles and over 65.....	.39	.32	.28	.21	.17	.14	.12	.14	.12	.10	.07½	1.10	24.00	15.00	14.00	.05	.11	11.00	.22	
75 miles and over 70.....	.40	.33	.29	.22	.18	.14	.12	.15	.12	.10	.07½	1.15	25.00	16.00	14.00	.05½	.11	.23	1.55	
80 miles and over 75.....	.41	.34	.30	.22	.18	.15	.13	.15	.13	.11	.07½	1.15	26.00	16.00	14.00	.05½	.12	12.00	.23	
85 miles and over 80.....	.42	.35	.30	.22	.19	.15	.13	.16	.13	.11	.08	1.20	27.00	17.00	15.00	.05½	.12	.24	1.65	
90 miles and over 85.....	.43	.36	.31	.22	.19	.15	.13	.16	.13	.11	.08	1.20	28.00	17.00	15.00	.05½	.13	13.00	.24	
95 miles and over 90.....	.44	.37	.31	.23	.19	.16	.14	.16	.13	.11	.08	1.25	29.00	18.00	15.00	.06	.13	.25	1.75	
100 miles and over 95.....	.45	.38	.32	.24	.20	.16	.14	.17	.14	.12	.08	1.25	29.00	18.00	16.00	.06	.14	14.00	.25	
110 miles and over 100.....	.47	.40	.33	.25	.20	.16	.14	.17	.14	.12	.08½	1.30	30.00	19.00	16.00	.06	.15	15.00	.26	
120 miles and over 110.....	.49	.42	.34	.25	.21	.17	.15	.18	.15	.13	.08½	1.30	31.00	20.00	17.00	.06½	.16	16.00	.27	
130 miles and over 120.....	.51	.44	.35	.26	.21	.17	.15	.18	.15	.13	.09	1.35	32.00	20.00	17.00	.06½	.17	17.00	.28	
140 miles and over 130.....	.53	.45	.36	.26	.22	.18	.16	.19	.16	.14	.09	1.35	33.00	21.00	18.00	.06½	.18	18.00	.29	
150 miles and over 140.....	.55	.47	.37	.27	.22	.18	.16	.19	.17	.14	.09	1.40	34.00	21.00	19.00	.07	.18	19.00	.30	
160 miles and over 150.....	.57	.48	.39	.29	.24	.19	.16	.20	.17	.14	.09½	1.40	34.00	22.00	19.00	.07	.19	20.00	.31	
170 miles and over 160.....	.59	.49	.40	.30	.26	.20	.17	.20	.18	.15	.09½	1.50	35.00	22.00	20.00	.07	.19	21.00	.32	
180 miles and over 170.....	.60	.50	.41	.31	.26	.20	.17	.21	.18	.15	.10	1.50	35.00	23.00	20.00	.07½	.20	21.00	.33	
190 miles and over 180.....	.61	.51	.42	.32	.28	.21	.17	.21	.18	.15	.10	1.55	36.00	23.00	21.00	.07½	.20	22.00	.34	
200 miles and over 190.....	.62	.52	.43	.33	.29	.22	.17	.21	.19	.16	.10½	1.55	37.00	24.00	21.00	.07½	.20	22.00	.35	
210 miles and over 200.....	.63	.53	.44	.34	.29	.22	.17	.22	.19	.16	.10½	1.60	38.00	24.00	22.00	.08	.21	23.00	.36	
220 miles and over 210.....	.64	.54	.45	.35	.30	.23	.18	.23	.20	.17	.11	1.60	39.00	25.00	22.00	.08	.21	23.00	.36	
230 miles and over 220.....	.64	.54	.45	.35	.30	.23	.18	.23	.20	.17	.11	1.65	40.00	25.00	23.00	.08	.21	24.00	.37	
240 miles and over 230.....	.65	.55	.45	.35	.30	.23	.19	.24	.21	.18	.11½	1.65	40.00	26.00	23.00	.08	.22	24.00	.37	

SCHEDULE OF MAXIMUM REASONABLE RATES OF FREIGHT—CONTINUED
NORTH CAROLINA, 1914

	PER HUNDRED POUNDS											PER TON	PER CARLOAD			Lumber, Carload 30,000 Lbs., Per 100 Pounds	Molasses in Hhds. and Bbls. Per 100 Pounds	Rough Logs, Carload 40,000 Pounds	Cotton in Bales, Per 100 Pounds	Fertilizer Per Ton, Carload 12 Tons
	1	2	3	4	5	6	A	B	C*	D*	K		L	N	O					
250 miles and over 240.....	\$.65	\$.55	\$.45	\$.36	\$.30	\$.23	\$.19	\$.24	\$.21	\$.18	\$.11½	1.70	\$ 41.00	\$ 26.00	\$ 23.00	\$.08½	\$.22	\$ 25.00	\$.38	2.65
260 miles and over 250.....	.65	.55	.45	.36	.30	.23	.20	.25	.22	.19	.12	1.70	41.00	27.00	24.00	.08½	.22	25.00	.38	2.70
270 miles and over 260.....	.66	.56	.46	.36	.31	.23	.20	.25	.22	.19	.12	1.75	42.00	27.00	24.00	.08½	.22	26.00	.39	2.75
280 miles and over 270.....	.66	.56	.46	.36	.31	.23	.20	.26	.23	.20	.12½	1.75	42.00	28.00	24.00	.08½	.23	26.00	.39	2.80
300 miles and over 280.....	.67	.57	.47	.37	.31	.24	.21	.26	.23	.20	.13	1.85	43.00	29.00	25.00	.09	.23	27.00	.40	2.90
320 miles and over 300.....	.68	.58	.48	.38	.31	.24	.21	.26	.24	.21	.14	1.95	44.00	30.00	26.00	.09½	.23	27.50	.41	3.00
340 miles and over 320.....	.69	.59	.49	.39	.31	.24	.21	.26	.24	.21	.14	2.05	45.00	31.00	27.00	.10	.24	28.00	.42	3.10
360 miles and over 340.....	.70	.59	.49	.39	.32	.24	.21	.27	.25	.22	.15	2.15	46.00	32.00	28.00	.10½	.24	28.50	.43	3.20
380 miles and over 360.....	.71	.60	.50	.40	.33	.25	.22	.27	.25	.22	.15	2.25	47.00	33.00	29.00	.11	.24	29.00	.43	3.30
400 miles and over 380.....	.72	.61	.50	.40	.33	.25	.22	.27	.25	.22	.16	2.35	48.00	34.00	30.00	.11½	.25	30.00	.44	3.40
420 miles and over 400.....	.73	.62	.51	.41	.34	.26	.22	.27	.25	.22	.16	2.45	49.50	35.00	31.00	.11½	.25	30.50	.44	3.50
440 miles and over 420.....	.74	.62	.51	.41	.34	.26	.22	.27	.26	.23	.17	2.55	50.00	36.00	32.00	.12	.25	31.00	.45	3.50
460 miles and over 440.....	.75	.63	.52	.41	.34	.26	.23	.28	.26	.23	.17	2.65	51.00	37.00	33.00	.12	.25	31.50	.45	3.60
480 miles and over 460.....	.76	.63	.52	.42	.35	.27	.23	.28	.26	.23	.18	2.75	52.00	38.00	34.00	.13	.26	32.00	.45	3.60
500 miles and over 480.....	.77	.64	.53	.42	.35	.27	.24	.29	.27	.24	.18	2.75	52.00	39.00	35.00	.13	.26	32.50	.45	3.70

*NOTE.—Classes C and D, carload shipments, 20% less than rates shown, including hay in straight or mixed carloads with grain or grain products other than flour.

The rates so fixed are for the number of miles indicated in the first column, and for the amount of charge indicated for the respective classes and commodities opposite the number of miles stated in the first column, and the rates so indicated for the respective classes are in cents per hundred pounds except where otherwise indicated at the head of the column.

Ex. Sess. 1913, c. 20.

1081. Rules governing rates. The following rules shall limit and modify the application of the rates in the next preceding section :

1. The rates are subject to southern classification, except where lower ratings are or may be published by the North Carolina Corporation Commission, in which cases the lower ratings shall prevail.

2. Rates which were lower prior to October thirteenth, one thousand nine hundred and thirteen, than contained in the scale of rates are continued in effect, except that, in such isolated cases as may occur where an advance of not more than one cent in a particular class will bring the existing rate up to the rate here prescribed, such advance is allowed in the interest of uniformity.

3. When rates are not shown for the exact distance, the charge shall not exceed the rate for the nearest distance. In cases where the haul is equidistant the charge shall be that for the next higher distance.

4. When one railroad company has two or more routes between two given points the rate shall be based on the shortest route. On joint hauls, the line handling the traffic must base their rates upon the shortest practicable route having physical connection.

5. For joint hauls over two or more independently controlled railroads under the management of companies operating seventy-five or more miles of railroads within the State, add the following to the straight mileage rates for the combined total distance :

Per 100 Pounds										
Class	1	2	3	4	5	6	A	B	C	D
	5	4	3	3	2	2	2	2	2	2
Other classes and commodities, 1c.										

6. In the absence of an agreed basis of division between roads participating in a joint haul, locals shall be used as factors in dividing after first deducting cost of transfer, if any, at interchange point.

7. The minimum charge on small shipments shall be for actual weight at the tariff rate, but not less than 25 cents for a haul over one road, or 30 cents for a joint haul over two roads, or 40 cents for a joint haul over three or more roads.

8. Existing rates on commodities not mentioned in the schedule of rates in the preceding section are continued in effect.

Ex. Sess. 1913, c. 20.

1082. Charging or receiving greater rates forbidden. No railroad company being engaged in the business of common carrier of property within the state of North Carolina shall charge, take, or receive any sum for carrying property entirely within the state of North Carolina between initial and terminal points which are within the state, greater than the amount specified in this article for

the respective classes and commodities, and for the respective distances mentioned in said schedule, except in the manner and to the extent and on the conditions mentioned in this article.

Ex. Sess. 1913, c. 20, s. 5.

1083. Application for investigation of rates; appeal; rates pending appeal. The corporation commission, or such other commission or body upon which jurisdiction and power may be conferred to fix rates for the transportation of property to be charged by the railroads doing business in North Carolina, may, and upon request of any person directly interested in such charge shall, under rules and regulations fixed by law or prescribed and established by such commission, hear evidence as to the reasonableness of the maximum rates fixed by law, or by such commission or body, and establish such rates, in the manner prescribed and allowed by law, as may, in the judgment of said commission, be just, subject to the limitations fixed by this article; and from such an order of such commission any shipper or railroad company directly affected by such order may, under rules and regulations prescribed by law, or under reasonable rules and regulations prescribed by such commission, appeal to the superior court of North Carolina: Provided, that pending the appeal of any railroad company from an order of such commission fixing maximum rates, there shall be no suspension of such order of such commission.

Ex. Sess. 1913, c. 20, s. 7.

1084. Rates lower than maximum prescribed to be maintained. When any commodity or particular kind of property is at the time of the ratification of this article allowed to be shipped at a rate to be charged by any railroad company, which rate is lower than the maximum rate specified in this article for the shipment of such article, or for the class in which such article is assigned, by lawful classification at the time of the ratification of this article, or when such article is not assigned to any class, such rate so charged for the shipment of such commodity or property shall be the maximum rate which shall lawfully be charged, unless the same be raised in the manner and under the circumstances contemplated, provided for and allowed by the provisions of this article for an increase in the maximum rate fixed herein.

Ex. Sess. 1913, c. 20, s. 8.

1085. Rates between points connected by more than one route. When there is more than one railroad route between given points in North Carolina, and freight is routed or directed by the shipper or consignee to be transported over a shorter route, and it is in fact shipped by a longer route between such points, the rate fixed by law or by such commission for the shorter route shall be the maximum rate which may be charged, and it shall be unlawful to charge more for transporting such freight over the longer route than the lawful charge for the shorter route.

Ex. Sess. 1913, c. 20, s. 11.

1086. Action for double of overcharge; penalty. Any railroad company in the state of North Carolina which shall charge a rate for transporting property wholly within the state of North Carolina, between terminals within the state, in excess of that fixed by law or by the lawful order of such commission or board,

and which shall omit to refund the same within thirty days after written notice and demand of the person or corporation overcharged, shall be liable to an action for double the amount of such overcharge, and to a penalty of ten dollars per day for each day's delay after thirty days from such notice, in case of shipments of less than carload lots, and to a penalty of twenty dollars per day in the event of shipments of carload lots.

Ex. Sess. 1913, c. 20, s. 12.

1087. Double penalty. Any such railroad company so doing business in the state of North Carolina that shall knowingly charge a rate in excess of that fixed by law or by such board or commission, for shipments wholly within the state, shall be subject to a penalty and shall pay double the penalty above prescribed.

Ex. Sess. 1913, c. 20, s. 13.

1088. Persons to receive penalties; accounts and receipts kept separate. The penalties herein provided for shall be payable to the person or corporation who pays the freight or against whom the freight is charged, and such person or corporation may sue such railroad company and recover such penalty and the amount of such overcharge. The commission shall require the railroad companies, and may require all other such public-service companies as are mentioned in this chapter, to keep separate the cost of doing interstate and intrastate business in North Carolina, and to keep separate receipts from the respective classes, and to direct the manner of keeping the accounts, and to enforce, by penalties, contempt, or otherwise as the law provides, obedience to its orders.

Ex. Sess. 1913, c. 20, s. 14.

1089. Minimum carload. In no event shall the minimum carload freight of any kind be less than is now allowed by law, unless such commission shall allow it, and it is authorized to fix such minimum weight.

Ex. Sess. 1913, c. 20, s. 15.

ART. 6. POWERS IN RESPECT TO PROCEDURE

1090. Witnesses; production of papers; contempt. The corporation commission shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers, and punish for contempt, as by law is conferred upon the superior courts.

Rev., s. 1067; 1899, c. 164, ss. 1, 9, 10.

1091. Witnesses before corporation commission. If any person duly summoned to appear and testify before the corporation commission shall fail or refuse to testify without lawful excuse, or shall refuse to answer any proper question propounded to him by said commission in the discharge of duty, or shall conduct himself in a rude, disrespectful or disorderly manner before said commission, or any of them deliberating in the discharge of duty, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one thousand dollars.

Rev., s. 3691; 1899, c. 164, s. 10.

1092. Rules of practice. The corporation commission shall prescribe rules of practice and procedure in all matters before it and in all examinations necessary to be made under this chapter.

Rev., s. 1068; 1899, c. 164, s. 2, subsec. 24.

1093. Rules of evidence. In all cases under the provisions of this chapter the rules of evidence shall be the same as in civil actions, except as provided by this chapter.

Rev., s. 1069; 1899, c. 164, s. 26.

1094. Subpœnas; issuance; service. All subpœnas for witnesses to appear before the commission or before any one or more of the commissioners, and notice to persons or corporations, shall be issued by one of the commissioners or its clerk and be directed to any sheriff, constable or to the marshal of any city or town, who shall execute the same and make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court.

Rev., s. 1070; 1899, c. 164, s. 10.

1095. Service of orders. The clerk of the commission may serve any notice issued by it, and his return thereof shall be evidence of said service; and it shall be the duty of the sheriffs and other officers to serve any process, subpœnas and notices issued by the commissioners, and they shall be entitled therefor to the same fees as are prescribed by law for serving similar papers issuing from the superior court.

Rev., s. 1071; 1899, c. 164, s. 9.

1096. Undertakings. All bonds or undertakings required to be given by any of the provisions of this chapter shall be payable to the state of North Carolina, and may be sued on as are other undertakings which are payable to the state.

Rev., s. 1072; 1899, c. 164, s. 7.

1097. Right of appeal; how taken. From all decisions or determinations made by the corporation commission any party affected thereby shall be entitled to an appeal. Before such party shall be allowed to appeal, he shall, within ten days after notice of such decision or determination, file with the commission exceptions to the decision or determination of the commission, which exceptions shall state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled, then such party may appeal from the order overruling the exception, and shall, within ten days after the decision overruling the exception, give notice of his appeal. When an exception is made to the facts as found by the commission, the appeal shall be to the superior court in term time; otherwise to the judge of the superior court at chambers. The party appealing shall, within ten days after the notice of appeal has been served, file with the commission exceptions to the decision or determination overruling the exception, which statement shall assign the errors complained of and the grounds of the appeal. Upon the filing of such statement the commission shall, within ten days, transmit all the papers and evidence considered by it, together with the assignment of errors filed by the appellant, to a judge of the superior court holding court or residing in some district in which such company operates or the

party resides. If there be no exceptions to any facts as found by the commission, it shall be heard by the judge at chambers at some place in the district, of which all parties shall have ten days notice.

Rev., s. 1074; 1899, c. 164, ss. 7, 28; 1903, c. 126; 1907, c. 469, s. 6; 1913, c. 127, s. 4.

Appeal from commission must be to superior court, not directly to supreme: *Pate v. R. R.*, 122-877. When and by whom appeal may be taken: *Corp. Com. v. R. R.*, 170-560. Compliance with section sufficient without notice to complainant: *Corp. Com. v. R. R.*, 151-447. Appeal lies only from decision affecting substantial right of party and determinative of material question: *Hardware Co. v. R. R.*, 147-483. Appeal does not lie by citizens applying to commission for removal of railroad station, because they are not parties: *Corp. Com. v. R. R.*, 170-560; and see *Corp. Com. v. R. R.*, 151-447. No appeal from ruling of commission that one of its rules violated and exacting penalty for the violation: *Hardware Co. v. R. R.*, 147-483.

1098. Appeal docketed; priority of trial; burden. The cause shall be entitled "State of North Carolina on relation of the Corporation Commission against (here insert name of appellant)," and if there are exceptions to any facts found by the commission, it shall be placed on the civil issue docket of such court and shall have precedence of other civil actions, and shall be tried under the same rules and regulations as are prescribed for the trial of other civil causes, except that the rates fixed or the decision or determination made by the commission shall be prima facie just and reasonable.

Rev., s. 1075; 1899, c. 164, s. 7.

See sections 1067, 1077. On appeal, trial is de novo, and other evidence may be introduced in addition to that before commission: *State v. R. R.*, 161-270. Cited and explained: *Corp. Com. v. R. R.*, 170-560; *R. R. v. R. R.*, 173-413.

1099. Appeal heard at chambers by consent. By consent of all parties the appeal may be heard and determined at chambers before any judge of a district through or into which the railroad may extend, or any judge holding court therein, or in which the person or company does business.

Rev., s. 1076; 1899, c. 164, s. 7.

1100. Appeal to supreme court. Either party may appeal to the supreme court from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that the state of North Carolina, if it shall appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal, and such court may advance the cause on its docket so as to give the same a speedy hearing.

Rev., s. 1077; 1899, c. 164, s. 7.

Appeal not taken directly to supreme court from corporation commission: *Pate v. R. R.*, 122-877. Section cited: *Corp. Com. v. R. R.*, 170-560.

1101. Judgment of superior court not vacated by appeal. Any freight or passenger rates fixed by the commission, when approved or confirmed by the judgment of the superior court, shall be and remain the established rates, and shall be so observed and regarded by an appealing corporation until the same shall be changed, revised or modified by the final judgment of the supreme court, if there shall be an appeal thereto, and until changed by the corporation commission.

Rev., s. 1079; 1899, c. 164, s. 7.

1102. Judgment on appeal enforced by mandamus. In all cases in which, upon appeal, a judgment of the corporation commission is affirmed, in whole or

in part, the appellate court shall embrace in its decree a mandamus to the appellant to put said order in force, or so much thereof as shall be affirmed.

Rev., s. 1080; 1905, c. 107, s. 2.

Section referred to: Corp. Com. v. R. R., 151-447. Enforcement of orders of corporation commission by mandamus: Hardware Co. v. R. R., 147-483.

1103. Peremptory mandamus to enforce order, when no appeal. If no appeal is taken from an order or judgment of the corporation commission within the time prescribed by law, but the corporation affected thereby fails to put said order in operation, the corporation commission may apply to the judge riding the superior court district which embraces Wake County, or to the resident judge of said district at chambers, upon ten days notice, for a peremptory mandamus upon said corporation for the putting in force of said judgment or order; and if said judge shall find that the order of said commission was valid and within the scope of its powers, he shall issue such peremptory mandamus. An appeal shall lie to the supreme court in behalf of the corporation commission, or the defendant corporation, from the refusal or the granting of such peremptory mandamus.

Rev., s. 1081; 1905, c. 107.

Section provides for enforcement of obedience to order made: Corp. Com. v. R. R., 170-560. Independent proceeding for mandamus under this section to enforce a valid order from which no appeal taken: Hardware Co. v. R. R., 147-483.

1104. Fiscal year. The fiscal year for which all reports shall be made which may be required of any railroad or transportation company by the commission under this chapter shall end on the thirtieth of June.

Rev., s. 1116; 1899, c. 164, s. 28.

ART. 7. PENALTIES AND ACTIONS

1105. For violating rules. If any railroad company doing business in this state by its agents or employees shall be guilty of a violation of the rules and regulations provided and prescribed by the commission, and if after due notice of such violation given to the principal officer thereof, if residing in the state, or, if not, to the manager or superintendent or secretary or treasurer if residing in the state, or, if not, then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation as may be directed by the commission shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of five hundred dollars.

Rev., s. 1086; 1899, c. 164, s. 15.

Power of state to control public-service corporations, citing this section: Telephone Co. v. Telephone Co., 159-9.

State's right to provide penalties for violation of its regulations and in fixing penalties to use power of classification: Morris v. Express Co., 146-167; Efland v. R. R., 146-135.

See, also, under sections 1035, 1066. Section cited: Hardware Co. v. R. R., 147-483.

1106. Refusing to obey orders of commission. Any railroad or other corporation which violates any of the provisions of this chapter or refuses to conform to or obey any rule, order or regulation of the corporation commission shall, in addition to the other penalties prescribed in this chapter, forfeit and pay the

sum of five hundred dollars for each offense, to be recovered in an action to be instituted in the superior court of Wake County, in the name of the state of North Carolina on the relation of the corporation commission; and each day such company continues to violate any provision of this chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the corporation commission shall be a separate offense.

Rev., s. 1087; 1899, c. 164, s. 23.

As to meaning of "company": *Eiland v. R. R.*, 146-135. *quoted (1899)*

1107. Discrimination between connecting lines. All common carriers subject to the provisions of this chapter shall according to their powers afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freights to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges against such connecting lines, and shall be required to make as close connection as practicable for the convenience of the traveling public. And common carriers shall obey all rules and regulations made by the commission relating to trackage.

Rev., s. 1088; 1899, c. 164, s. 21.

Railroad not compelled to furnish express facilities to another company to conduct express business over its road the same as it provides for itself or affords to other express companies: *Express Co. v. R. R.*, 111-463. Commission may require railroad to have train arrive at certain station on road at certain schedule time, so as to connect with train of another company: *Corp. Com. v. R. R.*, 137-1. **Discriminations in freight rates by railroad companies defined in Freight Discrimination Cases, 95-434.** Construction of former statute against "discrimination": *Ibid.* As to construction of penalty statutes, see *Alexander v. R. R.*, 144-93; *Freight Discrimination Cases, 95-434.*

1108. Failure to make reports. Every officer, agent or employee of any railroad company, express or telegraph company, who shall willfully neglect or refuse to make and furnish any report required by the commission for the purposes of this chapter, or who shall willfully or unlawfully hinder, delay or obstruct the commission in the discharge of the duties hereby imposed upon it, shall forfeit and pay five hundred dollars for each offense, to be recovered in an action in the name of the state. A delay of ten days to make and furnish such report shall raise the presumption that the same was willful.

Rev., s. 1089; 1899, c. 164, s. 18.

For case under similar enactment, see *Hodge v. R. R.*, 108-24.

1109. Offenses by railroads, not otherwise provided for. If any railroad company shall violate the provisions of this chapter not otherwise provided for, such railroad company shall incur a penalty of one hundred dollars for each violation, to be recovered by the party injured.

Rev., s. 1090; 1899, c. 164, s. 17.

As to construction of penalty statute, see *Alexander v. R. R.*, 144-93; *Freight Discrimination Cases, 95-434.* Action for penalty hereunder is an action *ex contractu*: *Carter v. R. R.*, 126-443; *Doughty v. R. R.*, 78-22, and cases under section 3516.

1110. Violation of rules, causing injury; damages; limitation. If any railroad company doing business in this state shall, in violation of any rule or regulation provided by the commission, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury,

in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that in case of willful violation of law such railroad company shall be liable to exemplary damages: Provided, that all suits under this chapter shall be brought within one year after the commission of the alleged wrong or injury.

Rev., s. 1091; 1899, c. 164, s. 16.

1111. Action for penalty; when and how brought. An action for the recovery of any penalty under this chapter shall be instituted in the county in which the penalty has been incurred, and shall be instituted in the name of the state of North Carolina on the relation of the corporation commission against the company incurring such penalty; or whenever such action is upon the complaint of any injured person or corporation, it shall be instituted in the name of the state of North Carolina on the relation of the corporation commission upon the complaint of such injured person or corporation against the company incurring such penalty. Such action shall be instituted and prosecuted by the attorney-general or the solicitor of the judicial district in which such penalty has been incurred, and the judge before whom the same is tried shall determine the amount of compensation to be allowed the attorney-general or such solicitor prosecuting said action for his services, and such compensation so determined shall be taxed as part of the cost. The procedure in such actions, the right of appeal and the rules regulating appeals shall be the same as are now provided by law in other civil actions.

Rev., s. 1092; 1899, c. 164, s. 15.

For cases holding that action for penalty, given by statute to person injured, is action *ex contractu*, see *Carter v. R. R.*, 126-443, and cases cited; *Doughty v. R. R.*, 78-22. As to construction of statutes imposing penalties, see *Alexander v. R. R.*, 144-93; *Freight Discrimination Cases*, 95-434. As bearing upon section, see *Express Co. v. R. R.*, 111-463. As to whether attorney-general's compensation allowed hereunder must be turned into state treasury, see section 3850. Section referred to: *Hardware Co. v. R. R.*, 147-483.

1112. Remedies cumulative. The remedies given by this chapter to persons injured shall be regarded as cumulative to the remedies now given or which may be given by law against railroad corporations, and this chapter shall not be construed as repealing any statute giving such remedies.

Rev., s. 1093; 1899, c. 164, s. 26.

CHAPTER 22

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ART. 1. DEFINITIONS

1113. Definitions. The following words and phrases where used in this chapter, unless differently defined or described, have the meanings and references stated below:

1. "Corporation" refers to a corporation which may be created and organized under this chapter, or under any other general or any special act.

See Const., Art. 8, especially s. 3, for meaning of corporation there; also *R. R. v. Rollins*, 82-524; *Hanstein v. Johnson*, 112-253.

2. "Certificate of incorporation" is the instrument filed by the incorporators and by which the corporation is formed.

3. The words "special act" refer to the act of the legislature enacted for the purpose of creating the corporation.

4. The word "charter" means either "certificate of incorporation" or "special act," together with all appropriate parts of this chapter and its amendments.

As to legislative power over corporate charters, see Const., Art. 8, s. 1, and *infra* s. 1135.

5. "Court," "superior court," or "judge of the superior court" means the judge of the superior court resident in the district or holding the courts of the district in which the corporation affected has its principal place of business.

6. "Receiver" as used in this chapter includes receivers and trustees appointed by the court, as herein provided.

See further as to receivers, see *infra* s. 1208 et seq.

Rev., ss. 1136, 1222, 1247; Code, s. 668; 1901, c. 2, ss. 7, 74, 111.

ART. 2. FORMATION

1114. How created. Three or more persons who desire to engage in any business, or to form any company, society, or association, not unlawful, except railroads, other than street railroads, or banking or insurance, or building and loan associations, may be incorporated in the following manner only (except corporations created for charitable, educational or reformatory purposes that are to be and remain under the patronage and control of the state): Such persons shall, by a certificate of incorporation, under their hands and seals, set forth—

As to the power of the legislature to form corporations under general and special laws, see Const., art. 8, s. 1.

General laws for the formation of the excepted classes of corporations are placed under other headings: Banks, see chapter Banks, s. 216 et seq.; building and loan associations, see chapter Coöperative Organizations, s. 5169 et seq.; insurance companies, see chapter Insurance, s. 6324 et seq.; railroads, see chapter Railroads, s. 3412 et seq. Banking and insurance companies cannot be incorporated hereunder: *Worth v. Bank*, 122-397; *Hanstein v. Johnson*,

112-253; *Bain v. Loan Assn.*, 112-248—nor railroads, *Beasley v. R. R.*, 145-272. But see as to saving banks, *Marshall v. Bank*, 108-639. As to corporations by special act, see *Hanstein v. Johnson*, 112-253, and note change in wording of constitution, art. 8, sec. 1, since decision. See generally: *Hill v. Lumber Co.*, 113-173.

Evidence of acceptance of charter necessary when corporation formed under special act: *R. R. v. Olive*, 142-257; *Benbow v. Cook*, 115-324. Otherwise under general law where signing articles is acceptance and recording the only condition precedent to corporate existence: *Benbow v. Cook*, 115-325; see *Powell v. Lumber Co.*, 153-52.

For discussion of corporations de jure and de facto and by estoppel, see *Wood v. Staton*, 174-245; *College v. Riddle*, 165-211.

1. The name of the corporation. No name can be assumed already in use by another domestic corporation, or so similar as to cause uncertainty or confusion, and the name adopted must end with the word "company," "corporation," or "incorporated."

See *Tobacco Co. v. Tobacco Co.*, 145-367; *Bingham School v. Gray*, 122-699. Name to be displayed, see section 1136.

2. The location of its principal office in the state.

See *Garrett v. Bear*, 144-23; *Roberson v. Lumber Co.*, 153-120.

3. The object or objects for which the corporation is to be formed.

Corporation organized for one purpose has no right to engage in different business: *Wiswall v. Plank Road Co.*, 56-183—though fact that corporation avails itself of only one of several privileges granted by charter does not invalidate act of incorporation, *Cotton Mills v. Burns*, 114-353.

4. The amount of the total authorized capital stock, the number of shares into which it is divided, the par value of each share, the amount of capital stock with which it will commence business, and, if there is more than one class of stock, a description of the different classes, with the terms on which the respective classes of stock are created. The provisions of this subsection shall not apply to religious, charitable, or literary corporations, unless they desire to have a capital stock. If they desire to have no capital stock, that fact and the conditions of membership shall be stated.

5. The names and postoffice addresses of the subscribers for stock and the number of shares subscribed for by each; the aggregate of the subscriptions shall be the amount of capital with which the corporation will commence business. If there is to be no capital stock, the certificate must contain the names and post-office addresses of the incorporators.

See *Cotton Mills v. Cotton Mills*, 115-475.

6. The period, if any, limited for the duration of the corporation.

When term of corporate existence fixed in act which creates it, its life expires with time limited without judicial proceedings to terminate it: *Asheville Div. v. Aston*, 92-578, and see under section 1187.

7. The certificate of incorporation may also contain any provision, consistent with the laws of this state, for the regulation of the affairs of the corporation, or creating, defining, limiting and regulating its powers, directors, and stockholders, or any class or classes of the latter.

Rev., s. 1137; Code, s. 677; 1885, cc. 19, 190; 1889, c. 170; 1891, c. 257; 1893, cc. 244, 318; 1897, c. 204; 1899, c. 618; 1901, c. 2, s. 8, cc. 6, 41, 47; 1903, c. 453; 1911, c. 213, s. 1; 1913, c. 5, s. 1; Const., Art. 8, s. 1.

1115. Requirements as to certificate of incorporation. The certificate of incorporation shall be signed by the original stock subscribers, or a majority of them, and must be acknowledged before an officer duly authorized under the laws of this state to take the proof or acknowledgment of deeds. The certificate shall then be filed in the office of the secretary of state, and there remain of record, and he shall, if it is in accordance with law, cause it to be recorded in his office in a book to be kept for that purpose and known as the Corporation Book. Upon the payment of the organization tax and fees, the secretary of state shall certify under his official seal a copy of the certificate of incorporation and probates, which certified copy shall be forthwith recorded in the office of the clerk of the superior court of the county where the principal office of the corporation in this state is, or is to be, established, in a book to be known as the Record of Incorporations. The certificate, or a copy thereof, duly certified by the secretary of state, or by the clerk of the superior court of the county in which it is recorded, is evidence in all courts and places, and in all judicial proceedings is prima facie evidence of the complete incorporation and organization of the corporation purporting thereby to have been established.

Rev., s. 1139; Code, ss. 678, 679, 682; 1901, c. 2, s. 9; 1903, c. 343.

For taxes for filing, see section 1218. Filing with secretary of state is condition precedent to incorporation: *Powell v. Lumber Co.*, 153-52; *Benbow v. Cook*, 115-324, and see under railroad law, *R. R. v. Stroud*, 132-413. As to former laws requiring registry or filing before clerk of court or with register, see *College v. Riddle*, 165-211; *Marshall v. Bank*, 108-639; *Iron Co. v. Abernathy*, 94-545. Mistake in filing with register instead of clerk under former law resulted in de facto corporation: *College v. Riddle*, 165-211. Certificate or copy is prima facie evidence of incorporation and organization: *Marshall v. Bank*, 108-639; *Iron Co. v. Abernathy*, 94-545.

1116. When incorporators become corporation. From the date the certificate of incorporation is filed in the office of the secretary of state, the stock subscribers, their successors and assigns, are a body corporate by the name specified in the certificate, subject to amendment and dissolution as provided in this chapter.

Rev., s. 1140; 1901, c. 2, s. 10.

Persons associated are corporation from time of filing with secretary of state: *Powell v. Lumber Co.*, 153-52; *Street Ry. v. R. R.*, 142-423; *Benbow v. Cook*, 115-324.

1117. Incorporators act until directors elected. Until directors are elected the signers of the certificate of incorporation shall have the direction of the affairs of the corporation, and may take proper steps to obtain the necessary subscription to stock and to perfect the organization of the corporation.

Rev., s. 1141; 1901, c. 2, s. 11.

Until directors elected, subscribers manage corporation, and with consent of all may discharge one of their number: *Boushall v. Myatt*, 167-328. Section cited: *Street Ry. v. R. R.*, 142-423.

1118. First meeting; notice. The first meeting of every corporation shall be called by a notice, signed by a majority of the incorporators, designating the time, place, and purpose of the meeting, which notice shall be published at least two weeks before the meeting, in a newspaper of the county where the corporation is established; or the meeting may be called without publication, if two days notice is personally served on all the incorporators; or if all the incorporators in

writing waive notice and fix a time and place of meeting, no notice or publication is required.

Rev., s. 1142; Code, s. 665; 1901, c. 2, s. 18.

As to corporation meetings generally and notice required, see *Hill v. R. R.*, 143-539, and cases cited under section 1168. First meeting should be in state, but if elsewhere state only can complain: *Mining Co. v. Goodhue*, 118-981.

1119. Death of incorporators; vacancy filled. When one or more of the incorporators of any corporation die before the corporation has been organized pursuant to law, the survivor or survivors may, in writing, designate others who may take the place and act instead of the deceased, in the organization; and the organization so effected by their aid is as effectual in law as if it had been effected by all the original incorporators.

Rev., s. 1143; 1901, c. 2, s. 36.

1120. Errors or omissions in certificate of incorporation. Whenever in the certificate of incorporation under any general law there is an error or omission in the recital of the act under which the corporation is created or an error or omission of any matter required to be stated therein, it is lawful for the corporation to correct the error or supply the omission in the following manner: The board of directors shall pass a resolution declaring that the error or omission exists and that the corporation desires to correct it, and shall call a meeting of the stockholders to take action upon the resolution. The stockholders' meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days notice, given personally or by mail. If two-thirds in interest of all the stockholders vote in favor of the correction of the error or omission, a certificate of their action shall be made and signed by the president and secretary under the corporate seal; which certificate shall be acknowledged as in the case of deeds of real estate, and, together with the written consent in person or by proxy of two-thirds in interest of all the stockholders of the corporation, shall be filed in the office of the secretary of state. Upon the filing thereof, in conformity with this section, the certificate of incorporation has the same force and effect as if it had been originally drafted in conformity with the amendment so made.

Rev., s. 1144; 1901, c. 2, s. 109.

1121. Street railways. Corporations may be organized under the provisions of this chapter for the purpose of building, maintaining or operating street railways. The term street railways, wherever used in this chapter, includes railways operated either by steam or electricity, or other motive power, used and operated as means of communication between different points in the same municipality, or between points in municipalities lying adjacent or near to each other, or between the municipality in which is the home office of the company and the territory contiguous thereto, and such railways may carry and deliver freights. No such railway may operate a line extending in any direction more than one hundred miles from the municipality in which is located its home office, or in any city or town without the consent of the municipal authorities thereof.

Rev., s. 1138; 1901, cc. 6, 41; 1903, c. 350; Ex. Sess. 1913, c. 70, s. 1.

Street railways may be incorporated hereunder; what is meant by street railway: *Street Ry. v. R. R.*, 142-423; *Land Co. v. Traction Co.*, 162-314. Construction of street railway imposes no additional servitude: *Hester v. Traction Co.*, 138-288; *Merrick v. R. R.*, 118-1081.

1122. Security selling companies. Corporations may be formed under the provisions of this chapter to conduct the business of selling securities and bonds of any kind, including its own bonds and choses in action, on the partial payment, installment, or other plan of payment, and to loan money on mortgage, personal, or other security, and to collect interest in advance on the same, and to charge a fee of \$1 for investigating the loan, but no fee shall be charged for a renewal of the loan. A corporation chartered by another state or by a foreign state, kingdom, or government, having in its charter the power to conduct the business described in this section, may become domesticated in this state in the manner and upon the terms and conditions provided in section 1181 under this chapter; but such company must also file with the secretary of state a statement, verified by its president and secretary, showing that its paid-up cash capital is at least \$100,000 and that it has complied with all the requirements of the laws of the state of its creation. The business of such corporation in this state is restricted to the business described in this section. Such corporation is liable to pay the franchise tax imposed by section 7861 under the chapter entitled Taxation, and also an ad valorem tax on all of its real and personal property situate in this state. No foreign corporation domesticated under this section is required to pay any other taxes or license fees than those named herein.

1909, c. 502; 1915, c. 180.

1123. Public parks and drives. Three or more persons may be incorporated under this chapter for the purpose of creating and maintaining public parks and drives. It is not necessary, however, to set forth in the certificate of incorporation of any corporation created for such purpose the amount of authorized capital stock, the number of shares into which the same is divided, the par value of such stock, or the amount of capital stock with which it will commence business. Any corporation created hereunder shall have full power and authority to lay out, manage, and control parks and drives within the state, under such rules and regulations as the corporation may prescribe, and shall have power to purchase and hold property and take gifts or donations for such purpose. It may hold property and exercise such powers in trust for any town, city, township, or county, in connection with which said parks and drives shall be maintained. Any city, town, township, or county, holding such property, may vest and transfer the same to any such corporation for the purpose of controlling and maintaining the same as public parks and drives under such regulations and subject to such conditions as may be determined upon by such city, town, township, or county. All such lands as the corporation may acquire shall be held in trust as public parks and drives, and shall be held open to the public under such rules, laws, and regulations as the corporation may adopt through its board of directors; and it shall have power and authority to make and adopt all such laws and regulations as it may determine upon for the reasonable management of such parks and drives. All property owned by it and appropriated exclusively for public parks and drives shall not be subject to taxation, and no such corporation shall be liable in damages on account of the construction or maintenance of any such parks or drives.

1911, c. 155, ss. 1, 2, 3, 4.

1124. Word "trust" in corporate name. No corporation may be chartered under the laws of North Carolina with the word "trust" as a part of its name

except those reporting to and under the supervision of the corporation commission; nor may any corporate name be amended to include the word "trust" unless the corporation is under such supervision.

1915, c. 196, s. 2.

1125. Certain religious, etc., associations deemed incorporated. In all cases where a religious, educational or charitable association has been formed prior to January first, one thousand eight hundred and ninety-four, and has since said date been acting as a corporation, exercising the powers and performing the duties of religious, educational or charitable corporations as prescribed by the laws of this state, then such association shall be conclusively presumed to have been duly and regularly organized and existing as a corporation under the laws of this state on January first, one thousand eight hundred and ninety-four, and all of its acts as a corporation from and after said date, if otherwise valid, are hereby declared to be valid corporate acts: Provided, this act shall not apply to any pending litigation.

1919, c. 137.

ART. 3. POWERS AND RESTRICTIONS

1126. Express powers. Every corporation has power—

1. To have succession, by its corporate name, for the period limited in its charter, and when the charter contains no time limit, for a period of sixty years.

Corporation existence limited by charter: *Asheville Div. v. Aston*, 92-578.

2. To sue and be sued in any court.

Corporation must sue and be sued in corporate name: *Young v. Barden*, 90-424; *Mauney v. Motz*, 39-195; *Brittain v. Newland*, 19-363; see, also, *Institute v. Norwood*, 45-73—though, where receiver appointed, he may sue as such or in corporate name, *Smathers v. Bank*, 135-413; *Davis v. Mfg. Co.*, 114-321; *Gray v. Lewis*, 94-392; see section 1195. **Corporation liable to civil and criminal actions as if individual:** *Redditt v. Mfg. Co.*, 124-100. **Liable for slander:** *Cotton v. Fisheries Products Co.*, 177-56. **Summons against "A. H. Bronson, president of Southern Improvement Company,"** is not against the company, but against Bronson: *Plemmons v. Imp. Co.*, 108-614. **As to suing corporation in name not strictly correct,** see *Institute v. Norwood*, 45-73, and cases cited.

3. To make, use, and alter a common seal.

For use of seal, see section 1138.

4. To purchase, acquire by devise or bequest, hold and convey real and personal property in or out of the state, and to mortgage the same and its franchises.

As to priority of corporation mortgages and claims against corporation for torts or for labor, etc., see sections 1138, 1140.

Real or personal property of private corporation may be sold: *Barcello v. Hapgood*, 118-712; *Benbow v. Cook*, 115-324—and may be mortgaged, *Paper Co. v. Chronicle*, 115-143—but such is not the case with quasi-public corporations, *Barcello v. Hapgood*, 118-712; *Logan v. Railroad*, 116-945; *Paper Co. v. Chronicle*, 115-143—for quasi-public corporations cannot sell franchises without assent of legislature, *James v. Railroad*, 121-528, and cases cited.

Corporation may hold land in fee though existence limited to specific number of years: *Wilson v. Leary*, 120-92; *Asheville Div. v. Aston*, 92-578; *Rives v. Dudley*, 56-126—and if forbidden by charter to take or hold real estate, conveyance to it is voidable by state only, *Mallett v. Simpson*, 94-37. **Corporation may acquire land by adverse possession, and if the land is acquired ultra vires, state only can object:** *Cross v. R. R.*, 172-119. **Conveyance to corporation in trust valid, unless the trust is repugnant to purpose for which formed:** *Keith v. Scales*, 124-497. **For early case holding void bequest to college in excess of amount it was authorized by charter to hold,** see *Davidson College v. Chambers*, 56-253.

Foreign corporation chartered with right to sell and acquire land may exercise such right in this state: *Barcello v. Haggood*, 118-712. Deed of right of way, etc., to railroad, made by company formed under this chapter and having only rights for street railway, will not convey railroad franchise: *Beasley v. R. R.*, 145-272.

5. To elect and appoint, in such manner as it determines to be proper, all necessary officers and agents, fix their compensation, and define their duties and obligations. And when there devolves upon an officer or agent of a corporation such duties and responsibilities that a financial loss would result to the corporation from the death and consequent loss of the services of such officer or agent, the corporation has an insurable interest in, and the power to insure the life of, the officer or agent for its benefit.

6. To conduct business in this state, other states, the District of Columbia, the territories, dependencies and colonies of the United States, and in foreign countries, and have offices in or out of the state.

Corporation may transact business anywhere unless prohibited by charter or excluded by local laws: *Garrett v. Bear*, 144-23; *Roberson v. Lumber Co.*, 153-120.

7. To make by-laws and regulations, consistent with its charter and the laws of the state, for its own government, and for the due and orderly conduct of its affairs and management of its property.

8. To wind up and dissolve itself, or be wound up and dissolved, in the manner hereafter mentioned.

Section merely referred to: *Clayton v. Ore Knob Co.*, 109-385.

Rev., s. 1128; Code, ss. 663, 666, 691, 692, 693; 1893, c. 159; 1901, c. 2, s. 1; 1909, c. 507, s. 1.

1127. By-laws. A corporation may, by its by-laws, when consistent with its charter, determine the manner of calling and conducting all meetings; the number of members that constitute a quorum, but in no case shall more than a majority of shares or amount of interest be required to be represented at any meeting in order to constitute a quorum, and if the quorum is not so determined by the corporation, a majority in interest of the stockholders, represented either in person or by proxy, constitutes a quorum; the number of shares that will entitle the members to one or more votes; the mode of voting by proxy; the mode of selling shares for the nonpayment of assessments; the tenure of office of the several officers, and the manner in which vacancies in any of the offices shall be filled till a regular election; and they may annex suitable penalties to such by-laws, not exceeding in any case the sum of twenty dollars for any one offense. The power to make and alter by-laws is in the stockholders, but a corporation may, in the certificate of incorporation, confer that power upon the directors. By-laws made by the directors under power so conferred may be altered or repealed by the stockholders.

Rev., ss. 1145, 1146; Code, s. 664; 1901, c. 2, ss. 12, 13.

Power to enact by-laws, see also section 1126 (7). By-laws of building and loan associations, see section 5170. Requisites and validity in general: *Duffy v. Ins. Co.*, 142-103; *Sherrod v. Ins. Assn.*, 139-167; *Strauss v. Life Assn.*, 128-465. By-law regulating officer's salary: *Abbott v. R. R.*, 90-462. By-law providing for sale of delinquent subscriber's stock on notice held valid: *Cotton Mills v. Dunstan*, 121-12, and see now section 1165—but receipt of notice may be rebutted, *Sherrod v. Ins. Assn.*, 139-167. Affect third persons only when they have notice: *Smith v. R. R.*, 68-107.

1128. Implied powers. In addition to the powers enumerated in the two preceding sections, and the powers specified in its charter, every corporation, its officers, directors and stockholders, possess all the powers and privileges contained in this chapter so far as they are necessary or convenient to the attainment of the objects set forth in such charter, and shall be governed by the provisions and be subject to the restrictions and liabilities in this chapter contained, so far as they are applicable to and not inconsistent with such charter; and no corporation may possess or exercise any other corporate powers, except such incidental powers as are necessary to the exercise of the powers so given. Nothing in this chapter shall authorize or empower corporations organized under this chapter to lease, operate, maintain, manage or control any railroad except street railways.

Rev., s. 1129; Code, s. 701; 1897, c. 204; 1901, c. 2, s. 4; 1901, c. 6.

See, also, under sections 1126, 1135. Corporations in addition to express powers possess such as are fairly implied in or incident to express powers and those whose exercise is necessary to enjoyment of privileges expressly given: *Barcello v. Haggood*, 118-712, and see *Victor v. Mills*, 148-107. Power to incur debts implies power to issue bonds: *Comrs. v. R. R.*, 77-289—and to execute mortgage therefor, *Paper Co. v. Chronicle*, 115-143. For express power to mortgage, see section 1126 (4), and for railroads, section 3444 (10). No implied power to engage in business different from that for which incorporated: *Wiswall v. Plank Road Co.*, 56-183. Seem that corporation authorized to ship own products may carry goods for others and passengers: *Gruber v. R. R.*, 92-1.

ULTRA VIRES contracts, when enforceable: *Sherrill v. Trust Co.*, 176-591; *Victor v. Mills*, 148-107; *Trustees v. Realty Co.*, 134-41; *Hutchins v. Bank*, 128-72. Corporation liable for torts without regard to ultra vires: *Gruber v. R. R.*, 92-1, and see *Ange v. Woodmen*, 173-33, and cases cited—and for crimes, *State v. Ice Co.*, 166-366, and cases cited. Lessor railroad liable for lessee's torts: *Carlton v. R. R.*, 143-43, and cases cited. For ultra vires acquisition of property by corporations, see under section 1126 (4).

Ultra vires exercise of corporate powers may be made ground for direct proceedings in quo warranto by attorney-general for the state, but cannot be availed of collaterally in private suit as ground of forfeiture: *Mining Co. v. Lumber Co.*, 173-593; *Mallett v. Simpson*, 94-37; *Asheville Div. v. Aston*, 92-578. For quo warranto by state, see section 1187. But see section 1185 and cases thereunder.

A dissenting stockholder may enjoin an ultra vires act merely threatened: *Victor v. Mills*, 148-107—as may the state in an appropriate case: *Ibid.*; see section 1143.

1129. Banking powers not conferred by this act. No corporation created under the provisions of this chapter shall have the power to carry on the business of discounting bills, notes or other evidences of debt, of receiving deposits of money, of buying gold or silver bullion or foreign coins, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt, upon loan, or for circulation as money; but in the transaction of its business it may make and take and indorse, when necessary, all such bonds, notes and bills of exchange as the business may require.

Rev., s. 1134; Code, s. 684; 1901, c. 2, s. 5.

Banks cannot organize under this chapter: *Worth v. Bank*, 122-404; *Hanstein v. Johnson*, 112-257; *Bain v. Loan Assn.*, 112-252—and corporation organized hereunder can do no banking business, *Worth v. Bank*, 122-404.

1130. Amendments before payment of stock. The incorporators of a corporation, before the payment of any part of its capital, may file with the secretary of state an amended certificate of incorporation, duly signed and acknowledged by the incorporators named in the original certificate, changing the original certifi-

cate of incorporation, in whole or in part, which amended certificate takes the place of the original one, and when recorded in the proper county is deemed to have been filed and recorded on the date of filing and recording the original certificate. The officers are entitled to the same fees for filing and recording the amended certificate of incorporation as if it were original; but there shall be charged no additional organization tax, except when the certificate is amended by increasing the capital stock, in which event such tax shall be paid upon the increase.

Rev., s. 1174; 1901, c. 2, s. 28.

Any fundamental change in charter of corporation relieves nonassenting subscriber from liability on stock: *Bank v. Charlotte*, 85-433, and cases under section 1160.

1131. Amendments, generally. A corporation, whether organized under a special act or general laws, and which might now be created under the provisions of this chapter, may, in the manner set out below—

1. Change the nature or relinquish one or more branches of its business, or extend its business to such other branches as might have been inserted in its original certificate of incorporation.

2. Change its name.

3. Extend its corporate existence, but if such corporation possesses powers, franchises, privileges or immunities, which could not be obtained under this chapter, such extension does not continue, renew or extend any of the same, but they are waived and abandoned by the filing of the certificate of extension.

4. Increase or decrease its capital stock.

5. Change the par value of the shares of its capital stock.

6. Create one or more classes of preferred stock.

7. Make any other desired amendment. In all cases the certificate of amendment can contain only such provisions as could be lawfully and properly inserted in an original certificate of incorporation filed at the time of making the amendment.

The board of directors shall pass a resolution declaring that the amendment is advisable, and call a meeting of the stockholders to take action thereon; the meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days notice, given personally or by mail; if two-thirds in interest of each class of the stockholders with voting powers vote in favor of the amendment, a certificate thereof shall be signed by the president and secretary, under the corporate seal, acknowledged as in the case of deeds to real estate, and this certificate, together with the written assent, in person or by proxy, of said stockholders, shall be filed and recorded in the office of the secretary of state. Upon such filing the secretary of state shall issue a certified copy thereof, which shall be recorded in the office of the clerk of the superior court of the county in which the original certificate of incorporation is recorded, and thereupon the certificate of incorporation is amended accordingly. The certificate of the secretary of state, under his official seal, that such certificate of amendment and assent have been filed in his office, is evidence of the amendment in all courts and places. A corporation which cannot now be created under the provisions of this chapter may in like manner increase or decrease its capital stock, or change its name.

Rev., ss. 1175, 1178; 1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 29, 30, 37; 1903, c. 516.

1132. Amendments by charitable, educational, penal or reformatory corporations. A charitable, educational, penal, or reformatory corporation not under the patronage or control of the state, whether organized under a special act or general laws, may change its name, extend its corporate existence, change the manner in which its directors, trustees or managers are elected or appointed, abolish its present method of electing such officers and create a different method of election, and generally reorganize the manner of conducting such corporation, and make any other amendment of its charter desired, in the following manner: The board of directors, trustees, or managers shall pass a resolution declaring that the amendment is advisable, and call a meeting of trustees, managers, and directors to take action thereon. The meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days notice given personally or by mail. If two-thirds of the directors, trustees, or managers of the corporation vote in favor of the amendment, a certificate thereof shall be signed by the president and secretary under the corporate seal, acknowledged as provided in the case of deeds to real estate, and such certificate, together with the written assent in person or proxy of two-thirds of the directors, trustees, or managers, shall be filed and recorded in the office of the secretary of state, and upon filing it he shall issue a certified copy thereof, which shall be recorded in the office of the clerk of the superior court of the county in which the original certificate of incorporation is recorded, or in which the corporation is doing business, and thereupon the certificate of incorporation shall be deemed amended accordingly. Such certificate of amendment may contain only such provision as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making the amendment, and the certificate of the secretary of state, under his official seal, that such certificate and assent has been filed in his office shall be taken and accepted as evidence of such amendment in all courts.

1917, c. 62, s. 1.

1133. Change of location of principal office. The board of directors of a corporation organized under the laws of this state may, by resolution adopted at a regular or special meeting by a two-thirds vote of its members, change the location of the principal office of the corporation in the state. A copy of the resolution, signed by the president and secretary of the corporation and sealed with the corporate seal, shall be filed in the office of the secretary of state. No certificate need be filed of the removal of an office from one point to another in the same town, city, or township.

Rev., s. 1176; 1901, c. 2, s. 31.

“Principal office” of this section and of sections 1114, 1168 is synonymous with “principal place of business” of section 466: *Roberson v. Lumber Co.*, 153-120. See cases under other sections referred to.

1134. Curative act; amendments prior to 1901. All amendments to the plan of incorporation of any corporation organized under the provisions of the general laws of North Carolina prior to the passage of the act entitled “An act to revise the corporation law of North Carolina,” being chapter two, public laws of nineteen hundred and one, are declared to be valid in all respects, whether such amendments were made in accordance with the provisions of chapter three hundred and eighty of the public laws of eighteen hundred and ninety-three or

in accordance with the provisions of chapter two of the public laws of nineteen hundred and one; but no amendment shall be validated by this section unless it is an amendment of such nature as is authorized to be made under the provisions of chapter two of the public laws of nineteen hundred and one.

Rev., s. 1248; 1905, c. 316.

For other curative acts, affecting instruments executed by corporations, see sections 3352-3356.

1135. Amendment or repeal of this chapter; a part of all charters. This chapter may be amended or repealed by the legislature, and every corporation is bound thereby; but such amendment or repeal shall not take away or impair any remedy against the corporation, or its officers, for any liability which has been previously incurred. This chapter and all amendments are a part of the charter of every corporation formed hereunder, so far as the same are applicable and appropriate to the objects of the corporation.

Rev., s. 1136; 1901, c. 2, s. 7.

See under section 1113.

1136. Name must be displayed. The name of every corporation must be at all times conspicuously displayed at the entrance of its principal office in this state, and in default thereof for sixty days the corporation is liable to a penalty of one hundred dollars, to be recovered with costs, by the state, in an action to be prosecuted by or under the direction of the attorney-general.

Rev., s. 1242; 1901, c. 2, s. 50.

1137. Resident process agent. Every corporation having property or doing business in this state, whether incorporated under its laws or not, shall have an officer or agent in the state upon whom process in all actions or proceedings against it can be served. A corporation failing to comply with the provisions of this section is liable to a forfeiture of its charter, or to the revocation of its license to do business in this state. In the latter event, process in an action or proceeding against the corporation may be served upon the secretary of state by leaving a true copy thereof with him, and he shall mail the copy to the president, secretary or other officer of the corporation upon whom, if residing in this state, service could be made. For this service to be performed by the secretary, he shall receive a fee of fifty cents, to be paid by the party at whose instance the service was made.

Rev., s. 1243; 1901, c. 5.

Service of process on corporations generally, see section 483; on foreign insurance companies, see section 6414. For control of foreign corporations, generally, see sections 1180, 1181. Section applied in cases of foreign corporations and held constitutional: *Currie v. Mining Co.*, 157-209; *Fisher v. Ins. Co.*, 136-217. To what foreign corporations applicable: *Fisher v. Ins. Co.*, 136-217. Where foreign corporation has process agent in the state, statute of limitations not suspended for nonresidence: *Bennett v. Tel. Co.*, 152-671; *Volivar v. Cedar Works*, 152-656. Section referred to: *Pardue v. Absher*, 174-676; *Anderson v. Fidelity Co.*, 174-417; *Kelly v. Lefaiver*, 144-4; *Green v. Ins. Co.*, 139-309.

1138. Corporate conveyances; when void as to torts. Any corporation may convey lands, and other property which is transferable by deed, by deed sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee, and two other members of the corporation, and attested by a witness, or by deed sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee, and

attested by the secretary or assistant secretary of the company. But any conveyance of its property, whether absolutely or upon condition, executed by a corporation, is void as to torts committed by such corporation prior to the execution of said deed, if persons injured, or their representatives, commence proceedings or actions to enforce their claims against said corporation within sixty days after the registration of said deed as required by law.

Rev., s. 1130; Code, s. 685; 1891, c. 118; 1893, c. 95, s. 2; 1899, c. 235, s. 17; 1901, c. 2, s. 2; 1903, c. 660, s. 1; 1905, c. 114.

As to probate of conveyances by corporations, see section 3326; where corporation has ceased to exist, section 3307; before stockholders in building and loan association, section 3301; statutes curing defective corporation probates, sections 3352-3356.

Section applies to corporations generally: *Bank v. Mfg. Co.*, 96-298. Methods of conveyance described not exclusive of common-law modes of conveyance, as by authorized agent: *Barcello v. Hapgood*, 118-712—as to what constitutes valid common-law conveyance: *Power Co. v. Power Co.*, 168-219; *Caldwell v. Mfg. Co.*, 121-339; *Heath v. Cotton Mills*, 115-202; *Bason v. Mining Co.*, 90-417. Corporation seal essential: *Caldwell v. Mfg. Co.*, 121-339; see, also, *Withrell v. Murphy*, 154-82—but sembl individual officer's seal may be adopted, *Taylor v. Heggie*, 83-244. Mortgage executed in accordance with section is act of corporation, not of its officers: *Bank v. Mfg. Co.*, 100-345. Corporation seal on conveyance prima facie evidence of execution by authority: *Edwards v. Supply Co.*, 150-173. But when mortgage executed to officers of corporation, presumption overcome: *Edwards v. Supply Co.*, 150-171.

CORPORATE CONVEYANCES: ILLUSTRATIONS. Conveyance held sufficient signed by president, vice-president, secretary and treasurer, who constitute all the stockholders and officers, and corporate seal affixed: *Heath v. Cotton Mills*, 115-202—where properly executed, but in body of instrument it states it is made by “the president and directors of the A Bank,” *Shaffer v. Hahn*, 111-1.

Conveyances held insufficient where no corporate seal, though executed in name of corporation by president, with “seal” written after signature: *Caldwell v. Mfg. Co.*, 121-339. So where no corporate seal, though probate recites acknowledgment by secretary and execution by president and two stockholders: *Duke v. Markham*, 105-131. So where executed by “president” and “trustee” and signed by “A, president of X. Co.,” with private seal: *Clayton v. Cagle*, 97-300. So instrument reading “I do convey” and “witness my hand and seal,” signed by “president” with private seal, and by “treasurer” and “stockholder” with corporate seal: *Clark v. Hodge*, 116-761. So acknowledged by individual instead of corporation officers: *Bernhardt v. Brown*, 122-587.

PREFERENCE PROVIDED IN LAST SENTENCE OF SECTION in favor of persons injured by corporation torts can be claimed by those only who begin action in sixty days: *Joyner v. Reflector Co.*, 176-274, and see *Williams v. R. R.*, 126-918; *James v. Lumber Co.*, 122-157. Conversely, conveyance good except as against injured persons so beginning action: *Bank v. Cotton Mills*, 115-507, see *Blalock v. Mfg. Co.*, 110-99.

Statute in force before enactment of 1901, c. 2, s. 2, extended the preference of last clause of section to “creditors” existing at execution of deed. For cases construing provisions as to creditors, see *Fisher v. Bank*, 132-769 (setting out statute); *Bank v. Bank*, 127-432; *Williams v. R. R.*, 126-918; *Bernhardt v. Brown*, 122-591; *James v. Lumber Co.*, 122-160; *Langston v. Imp. Co.*, 120-132; *Bank v. Cotton Mills*, 115-515; *Cotton Mills v. Cotton Mills*, 115-475; *Hill v. Lumber Co.*, 113-180; *Blalock v. Mfg. Co.*, 110-99; *Duke v. Markham*, 105-138.

Lesser railroad liable for torts of lessee road: *Carlton v. R. R.*, 143-43, and cases cited.

1139. Conditional sale contracts. Contracts, in writing, for the purchase of personal property by corporations, providing for a lien on the property or the retention of the title thereto by the vendor as a security for the purchase price, or any part thereof, are sufficiently executed if signed in the name of the corporation by the president, secretary or treasurer in his official capacity, and may be acknowledged and ordered to registration as is provided by law for the execution, acknowledgment and registration of deeds by natural persons.

1909, c. 335, s. 1.

Public services

1140. Mortgaged property subject to execution for labor, clerical services, and torts. Mortgages of corporations upon their property or earnings cannot exempt said property or earnings from execution for the satisfaction of any judgment obtained in courts of the state against such corporations for labor and clerical services performed, or torts committed whereby any person is killed or any person or property injured.

Rev., s. 1131; Code, s. 1255; 1897, c. 334; 1901, c. 2, s. 3; 1915, c. 201, s. 1.

As to corporation's power to mortgage, see section 1126 (4). Corporate conveyances void as to torts, section 1138. Wages prior lien on insolvency of corporation, section 1197.

Changes in the statute to be kept in mind in weighing cases under this section. Before 1897, claims "for material furnished" were included, but phrase then struck out: See Cheesborough v. Sanatorium, 134-245; Cox v. Light, etc., Co., 152-164. By Laws 1915, c. 201, inserted for "clerical services," and see Moore v. Industrial Co., 138-304.

"Labor," as used herein, held "manual labor": Moore v. Industrial Co., 138-304—so claims of superintendent and bookkeeper were not included, *Ibid.* Otherwise as to foreman: Cox v. Light, etc., Co., 152-164. Section refers to labor performed or torts committed after execution of mortgage: Coal Co. v. Elec. Co., 118-232; Belvin v. Paper Co., 123-138.

Section confers no lien in favor of claims enumerated: Joyner v. Reflector Co., 176-274; Norfleet v. Cotton Factory, 172-833; Coal Co. v. Elec. Co., 118-232. Simply allows judgment creditor to enforce judgment as if there were no mortgage: Joyner v. Reflector Co., 176-274— or gives right to satisfy judgment in preference to mortgage, Belvin v. Raleigh Paper Co., 123-148; Langston v. Imp. Co., 120-134, as explained in Railroad v. Burnett, 123-216; Coal Co. v. Electric Light Co., 118-234; Bank v. Mfg. Co., 96-308. Mortgage conveys nothing as against subsequent judgment for tort: Clement v. King, 152-456; Howe v. Harper, 127-356; Williams v. R. R., 126-918; R. R. v. Burnett, 123-210, and see Trust Co. v. Fisher, 200 U. S., 57. Judgment for labor performed enforceable before prior mortgage, though no mechanics' lien filed: Dunavant v. R. R., 122-999. Immaterial whether mortgaged property sold before or after judgment, where purchaser takes with notice: R. R. v. Burnett, 123-210.

Mortgages postponed under section are those only made upon its property by corporation for which labor was done or by which tort committed: Roberts v. Mfg. Co., 169-27; Walker v. Lumber Co., 170-460. Mortgages upon the property when acquired by the corporation or subject to which its rights acquired, as purchase-money mortgages, not affected: Humphrey v. Lumber Co., 174-514. See Walker v. Lumber Co., 170-460. Where mortgaged corporate property sold under the mortgage more than four months before petition in bankruptcy filed, judgment rendered within the four months has priority over purchasers under the mortgage or creditors: Clement v. King, 152-456.

Cases bearing on clause of former section preferring claims "for material furnished" (see *supra* this note): Belvin v. Raleigh Paper Co., 123-147; Electric Co. v. Power Co., 122-599; James v. Lumber Co., 122-157; Coal Co. v. Electric Light Co., 118-232; Heath v. Cotton Mills, 115-202; Paper Co. v. Chronicle, 115-143; Bank v. Mfg. Co., 96-298.

1141. Gas and electric power companies. Gas and electric light and power companies have power to lay, extend, construct, erect, maintain, repair and remove all necessary or convenient towers, poles, cable wires, conductors, lamps, fixtures, appliances, and appurtenances upon, through and over any roads, streets, avenues, lanes, alleys and bridges within and near any city, town or village where said company is located; and all such roads, streets, lanes, alleys and bridges shall be left in as good condition as they were in at the time of using them as aforesaid: Provided, that the rights and privileges conferred in this section shall not be exercised unless the authorities of such city, town or village first give their consent, and afterwards the said authorities shall have full power to control the location of all towers, poles, wires, conductors and all other fixtures, appliances and appurtenances belonging to or operated by any of said companies.

Rev., s. 1133; 1889 (Pr.), c. 35, s. 2.

Use of street by municipality for laying pipes for water or for erecting wires for lighting imposes no additional servitude, and one who has dedicated street is not entitled to additional

compensation for use for pipes, etc.: *Smith v. Goldsboro*, 121-350. **Abutting owner's right to damages from quasi-public corporation injuring trees in street in swinging wires:** *Moore v. Power Co.*, 163-300; *Brown v. Electric Co.*, 138-533.

1142. Trust companies and word "trust." No person, firm, association or corporation domiciled in the state of North Carolina, except corporations reporting to and under the supervision of the corporation commission of this state, may therein advertise any sign as a trust company or in any way solicit or receive deposits or transact business as a trust company, or use the word "trust" as a part of his or its name or title. This section shall not prevent any individual, as such, from acting in any trust capacity as heretofore. A violation of this section is a misdemeanor, and on conviction the offender shall be fined not exceeding five hundred dollars for each offense: Provided, however, that it shall be lawful for any corporation incorporated prior to January 1, 1905, to retain the word "trust" in the name of said corporation, though it does not transact a banking business or such other business as requires its examination by the corporation commission. 1915, c. 196, s. 3; 1919, c. 108.

1143. Actions by attorney-general to prevent ultra vires acts, etc. In the following cases the attorney-general may, in the name of the state, upon his own information, or upon the complaint of a private party, bring an action against the offending parties for the purpose of—

1. Restraining by injunction a corporation from assuming or exercising any franchise or transacting any business not allowed by its charter.
2. Restraining any person from exercising corporate franchises not granted.
3. Bringing directors, managers, and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of the property confided to their care.
4. Removing such officers or trustees upon proof of gross misconduct.
5. Securing, for the benefit of all interested, the said property or funds.
6. Setting aside and restraining improper alienations of the said property or funds.
7. Generally compelling the faithful performance of duty and preventing all fraudulent practices, embezzlement, and waste.

Rev., s. 1197; Code, ss. 607, 686; 1901, c. 2, s. 107.

Section embodies provisions of R. C., c. 26, s. 28; R. S., c. 26, s. 10; 1831, c. 24, s. 5, which authorized attorney-general in equity by injunction to restrain corporations from ultra vires acts, and which was applicable where purpose was not to dissolve corporation, as under section 1187, but to preserve it in its useful functions without abuse of powers: *Atty.-Gen. v. R. R.*, 28-456. Section merely referred to: *McCall v. Webb*, 135-366; *Hargett v. Bell*, 134-396; *Barnhill v. Thompson*, 122-495; *Saunders v. Gatling*, 81-301.

Stockholder may restrain corporation from contemplated ultra vires act: *Victor v. Louise Mills*, 148-107.

ART. 4. DIRECTORS AND OFFICERS

1144. Directors. The business of every corporation shall be managed by its directors, who must be at least three in number, and at all times bona fide stockholders in case the corporation is one issuing stock. A corporation may, by its certificate of incorporation or by-laws, determine the number of shares a stockholder must own to qualify him as a director. The directors shall be chosen annually by the stockholders at the time and place provided in the by-laws, and

shall hold office for one year and until others are chosen and qualified in their stead; but by so providing in its certificate of incorporation, a corporation may classify its directors in respect to the time for which they will severally hold office, the several classes to be elected for different terms, but no class may be elected for a shorter period than one year, or for a longer period than five years, and the term of office of at least one class must expire in each year. A corporation which has more than one kind of stock may, by so providing in its certificate of incorporation, confer the right to choose the directors of any class upon the stockholders of such class, to the exclusion of the others. One director of every corporation of this state shall be, and only one need be, an actual resident of the state, notwithstanding the provisions of the charter or any other act.

Rev., ss. 1147, 1148; 1901, c. 2, ss. 14, 44.

Directors are to certain extent trustees in respect to corporate management and their business dealings with corporate property: *Besseliew v. Brown*, 177-65; *Steel Co. v. Hardware Co.*, 175-450; *Wall v. Rothrock*, 171-388; *Whitlock v. Alexander*, 160-465; *Pender v. Speight*, 159-612; *White v. Kincaid*, 149-415; *McIver v. Hardware Co.*, 144-478; *Graham v. Carr*, 130-271; *Townsend v. Williams*, 117-330; *Hill v. Lumber Co.*, 113-173. Directors are agents of corporation, but not of stockholder, and stockholder has no individual cause of action for directors' corporate mismanagement: *Coble v. Beall*, 130-533, and see under section 1156. As officers of corporation, notice to whom, in course of business, chargeable to corporation: *Anthony v. Jeffress*, 172-378.

Directors liable for wilful or negligent failure to perform official duties, but not for mere errors of judgment; they must exercise good faith and care of prudent man under like circumstances: *Besseliew v. Brown*, 177-65; *Braswell v. Bank*, 159-628; *McIver v. Hardware Co.*, 144-478; *Townsend v. Williams*, 117-330, and see *White v. Kincaid*, 149-415. Liable for disseminating false statements of condition of corporation to those injured by reliance thereon: *Houston v. Thornton*, 122-365, and cases cited. The law charges them with knowledge of their corporation's financial condition: *Anthony v. Jeffress*, 172-378, and cases cited.

Directors, on insolvency of corporation, cannot take advantage of their position to secure preference for themselves: *Steel Co. v. Hardware Co.*, 175-450, and cases cited; *Powell v. Lumber Co.*, 153-52. But directors and officers of going solvent corporation not forbidden to aid it with loans and to take security therefor: *Powell v. Lumber Co.*, 153-52; *Hill v. Lumber Co.*, 113-173; see *Wall v. Rothrock*, 171-388. Purchase by director of bonds and stock of insolvent corporation valid if bona fide and for value: *Graham v. Carr*, 130-271; and see *Latta v. Electric Co.*, 146-285. Where directors buy land sold by corporation under mortgage they are presumed to buy for corporation: *Craft v. Assn.*, 127-163.

For directors' elections, see section 1175—meetings, section 1168 et seq. For their power to declare dividends, see section 1178—to value property received for stock, sections 1157, 1158—to assess for unpaid stock, section 1165—to be trustees on dissolution, section 1194. For their liability for fraud, see section 1152—for improper reduction of capital, section 1161—for impairing capital, section 1179.

1145. Officers, agents, and vacancies. Every corporation organized under this chapter shall have a president, secretary, and treasurer, to be chosen either by the directors or stockholders, as the by-laws direct, and they shall hold office until others are chosen and qualified in their stead; the president shall be chosen from among the directors; the secretary shall record all the votes of the corporation and directors in a book to be kept for that purpose, and perform such other duties as are assigned to him; the treasurer may be required to give bond for the faithful discharge of his duty in such sum, and with such surety or sureties, as are required by the by-laws. Any two of these offices may be held by the same person, if the body electing so determine. The corporation may have such other officers and agents, who shall be chosen in the manner and hold office for the terms, and upon the conditions, prescribed by the by-laws or determined by the

board of directors. Any vacancy occurring among the directors, or in the office of president, secretary or treasurer, shall be filled in the manner provided for in the by-laws; in the absence of such provision the vacancy shall be filled by the board of directors.

Rev., ss. 1149, 1150, 1151; 1901, c. 2, ss. 15, 16, 17.

Corporate officers from highest to lowest are agents of corporation, and principles of agency are applicable: *Rumbough v. Improvement Co.*, 112-751. President may have entire control of business by express resolution of directors or their acquiescence: *Watson v. Mfg. Co.*, 147-469. Powers of vice-president depend on by-laws and practice of the corporation: *Sanatorium v. Yadkin River Co.*, 167-326. For powers of other officers, see *Powell v. Lumber Co.*, 168-632; *Clowe v. Pine Products Co.*, 114-304; *Lewis v. R. R.*, 95-179. For discussion of corporation agents' "apparent authority," see *Powell v. Lumber Co.*, 168-632; *Havens v. Bank*, 132-214; *Williams v. R. R.*, 93-42. Ratification of unauthorized act: *Bank v. Drug Co.*, 152-142.

Third persons must ascertain agent's authority: *Stephens v. Lumber Co.*, 160-108. Notice to officer or agent as notice to corporation, see *Brite v. Penny*, 157-110; *Anthony v. Jeffress*, 172-378; *Bank v. Burgwyn*, 110-267. As to contracts between agent and corporation, see *Pegram v. R. R.*, 84-696, and under section 1144.

For liability of officers for reports and for fraud, see sections 1151, 1152.

1146. Books to be audited on request of stockholders. Upon request of twenty-five per cent of the stockholders, or of any stockholder or stockholders owning twenty-five per cent of the capital stock, of a private corporation organized under the laws of North Carolina and doing business in this state, it is the duty of the officers of the corporation to have all of its books audited by a competent accountant, so that its financial status may be ascertained. Upon refusal or failure of the corporation to commence the auditing of its books within thirty days after such request, the requesting stockholder or stockholders, after ten days notice to the corporation, may apply to the judge of the district, or to the judge holding the courts of the district, in which the corporation has its residence, either at chambers or term time, at any place in the district, and the judge shall appoint an auditor and require the books to be audited at the expense of the corporation. The officers of the corporation shall render to the auditor any assistance or information they can, and give him access to all of the assets, books, papers, etc., relating to the affairs of the corporation, in order that a proper audit may be made. Upon completion of the audit the auditor shall render a statement to the corporation, and to the petitioning stockholder or stockholders.

1911, c. 174, s. 1; 1913, c. 76, s. 1.

1147. Loans to stockholders. No loan of money may be made to a stockholder or officer of a corporation, and if any is made, the officers who made it or assented thereto are jointly and severally liable, to the extent of such loan and interest, for all the debts of the corporation until the repayment of the sum loaned.

Rev., s. 1160; 1901, c. 2, s. 53.

1148. Reports to corporation commission. In addition to the information required to be given in the annual report of corporations to the corporation commission under the provisions of the Revenue and Machinery Acts, spaces shall be provided in such manner as the corporation commission deem proper so that each corporation, whether stock or nonstock, shall report whether the stock, if any, issued by it was issued for cash or for purchase of property, designating what property, the names of all the directors and officers, with the date of the election or appointment, terms of office, residence and postoffice address of each,

the character of its business, and the name of the agent in charge thereof upon whom process against the corporation may be served; but this shall not prevent service of process on other agents authorized by law. This information, together with the amount of stock issued and outstanding by the corporation, shall be available to the public upon application to the corporation commission. After these reports have been made to the corporation commission and the excess tax thereon has been computed and determined, it is the duty of the corporation commission to certify a list of such corporations, showing amount of stock issued by each, whether owing an excess tax or not, to the state treasurer, who shall add to such excess tax, if any, the amount due by the corporation on account of franchise tax, and forward a statement of such indebtedness to the corporation for payment, under the penalties provided by law. Every corporation failing to comply with the provisions of this section shall forfeit to the state \$100, to be collected by the sheriff of the county where the principal office of the corporation is situated, in a civil action to be brought before a justice of the peace, and when collected shall be remitted by the sheriff to the corporation commission, after deducting his cost as allowed by law, which he shall collect in addition to the penalty.

1913, c. 198, ss. 1, 2, 3.

1149. Secretary of state may call for special reports. The secretary of state has power to call for special reports from corporations, of the same character as their regular reports, at such times as he may deem the public interest requires, but no fees shall be charged for filing these special reports.

Rev., s. 1153.

1150. Secretary of state to publish list of corporations created. The secretary of state shall annually compile and publish from the records of his office a complete alphabetical list of the original and amended certificates of incorporation filed during the preceding year, together with the location of the principal office of each in this state, the name of the agent in charge thereof, the amount of authorized capital stock, the amount with which business is to be commenced, the amount issued, the date of filing the certificate, and the period for which the corporation is to continue; but the secretary of state and the corporation commission shall confer and arrange the statistics so as to prevent the same facts being embodied in the reports of both departments.

Rev., s. 1244; 1901, c. 2, s. 104; 1911, c. 211, s. 10; 1913, c. 198, s. 5.

1151. Liability of officers failing to make reports or making false reports. If any of the officers neglect or refuse to make any report required of them by law for thirty days after written request so to do by a creditor or stockholder of the corporation, they are jointly and severally liable to the person demanding such report, for the amount of his debt if he is a creditor, or for the amount of his loss if he is a stockholder. If any report or certificate made, or any public notice given, by the officers in pursuance of the provisions of this chapter, is false in any material representation, all the officers who signed the same, knowing it to be false, are jointly and severally liable for all the debts of the corporation contracted while they were stockholders or officers thereof, as a penalty enforceable in the courts of this state only.

Rev., ss. 1154, 1163; 1901, c. 2, ss. 27, 56.

1152. Liability for fraud. In case of fraud by the president, directors, managers, or stockholders, in a corporation, the court shall adjudge personally liable to creditors and others injured thereby the directors and stockholders who were concerned in the fraud.

Rev., s. 1155; Code, s. 686; 1901, c. 2, s. 107.

Directors' liability for fraud: Anthony v. Jeffress, 172-378, and cases cited; Houston v. Thornton, 122-365, and see under section 1144. **In suit by stockholder against president for fraudulent disposition of funds, proper to make trustee in bankruptcy of the corporation party plaintiff:** Floyd v. Layton, 172-64. **Officer liable for loss due to his bad faith:** Besseliew v. Brown, 177-65. **Stockholders taking part in fraudulent organization of corporation liable to creditors to amount of stock subscribed by them:** Foundry Co. v. Killian, 99-501, and cases cited.

1153. Joint and several liability of officers, etc.; contribution. When the officers, directors or stockholders of a corporation are liable to pay its debts, or any part thereof, any person to whom they are liable has a right of action against any one or more of them. And any such officer, director or stockholder has the right of equitable contribution in any action for that purpose against any other officer, director or stockholder who is liable with him for any amount which he has been compelled to pay as provided in this section.

Rev., s. 1156; 1901, c. 2, s. 90.

See under sections 1144, 1145, 1152 for directors' and officers' liability. **Who may sue to enforce liability:** Besseliew v. Brown, 177-65. **Where corporation officers have misappropriated funds of a stranger, injured party may sue them personally without joining corporation:** Chemical Co. v. Floyd, 158-455—or sue both officers and corporation, Cone v. Fruit Growers' Assn., 171-530.

1154. Officers paying may enforce exoneration against corporation. An officer, director or stockholder who pays a debt of a corporation for which he is made liable by the provisions of this chapter may recover the amount paid, in an action against the corporation for money paid for its use, in which action only the property of the corporation is liable to be taken, and not the property of any stockholder, except as provided in the preceding section.

Rev., s. 1157; 1901, c. 2, s. 91.

1155. Assets of corporation first exhausted. No sale or other satisfaction shall be had of the property of a director or stockholder for a debt of the corporation of which he is director or stockholder until judgment be obtained therefor against the corporation and execution thereon returned unsatisfied, or until it is shown to the court that the corporation has no property available for the satisfaction of the indebtedness.

Rev., s. 1158; 1901, c. 2, s. 92.

ART. 5. CAPITAL STOCK

1156. Classes of stock. Every corporation has power to create two or more kinds of stock of such classes, with such designations, preferences, and voting powers or restriction or qualification thereof as are prescribed by those holding two-thirds of its outstanding capital stock; and the power to increase or decrease the stock as herein elsewhere provided applies to all or any of the classes of stock; and the preferred stock may, if desired, be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the certificate

thereof; and the holders thereof are entitled to receive, and the corporation is bound to pay thereon, a fixed yearly dividend, to be expressed in the certificate, payable quarterly, half-yearly or yearly, before any dividend is set apart or paid on the common stock, and such dividends may be made cumulative. In case of insolvency, its debts or other liabilities shall be paid in preference to the preferred stock. No corporation shall create preferred stock except by authority given to the board of directors by a vote of at least two-thirds of the stock voted at a meeting of the common stockholders, duly called for that purpose. The terms "general stock" and "common stock" are synonymous.

Rev., s. 1159; 1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3.

Preferred stockholder is not creditor, but stockholder: *Power Co. v. Mill Co.*, 154-76.

Capital stock is trust fund for creditors: *Goodman v. White*, 174-399; *Drug Co. v. Drug Co.*, 173-502; *Bernard v. Carr*, 167-481; *Gilmore v. Smathers*, 167-440; *McIver v. Hardware Co.*, 144-478; *Hobgood v. Ehlen*, 141-344; *Smathers v. Bank*, 135-410; *Cotton Mills v. Cotton Mills*, 115-475; *Clayton v. Ore Knob Co.*, 109-385; *Heggie v. Bldg. and Loan Assn.*, 107-581; *Foundry Co. v. Killian*, 99-501. Unpaid stock subscriptions a trust fund for creditors: *Cooper v. Security Co.*, 122-463, and see under section 1160. On insolvency capital stock and property constitute trust fund first for creditors, next for stockholders: *Hill v. Lumber Co.*, 113-173; *Bank v. Cotton Mill*, 115-507; *Harmon v. Hunt*, 116-678; *Holshouser v. Copper Co.*, 138-248; *Silk Co. v. Spinning Co.*, 154-421. "Creditor" within this rule liberally construed: *Silk Co. v. Spinning Co.*, 154-421. Stockholder whose shares corporation has bought is a creditor: *Blalock v. Mfg. Co.*, 110-99.

1157. Stock to be paid in money or money's worth; issue for labor or property. Nothing but money shall be considered as payment for any part of the capital stock of any corporation organized under this chapter, except as herein provided in case of the purchase of property or labor performed. Any corporation may issue stock for labor done or personal property or real estate, or leases thereof, and, in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive.

Rev., ss. 1159, 1160; 1901, c. 2, ss. 19, 53; 1903, c. 660, ss. 2, 3.

Section intended to protect subscriptions in their integrity for benefit of creditors: *Goodman v. White*, 174-399.

STOCK SUBSCRIPTIONS. Payment for stock must be in money except as issue is authorized for property or labor: *Whitlock v. Alexander*, 160-465—must be in money or money's worth: *Hobgood v. Ehlen*, 141-344; *Foundry Co. v. Killian*, 99-501. Secret stipulations or conditions that subscriber not to pay in money or to substitute something else for payment void: *Drug Co. v. Drug Co.*, 173-502 (attempted set-off of debt from corporation not allowed); *Boushall v. Stronach*, 172-273; *Gilmore v. Smathers*, 167-440; *Foundry Co. v. Killian*, 99-501. Subscription cannot be varied by parol: same cases; condition precedent to subscription may be valid: *Alexander v. Saving Bank*, 155-124. Subscription on "special terms" or condition subsequent enforceable to protect creditors and other stockholders: *Coöperative Assn. v. Boyd*, 171-184, citing *Boushall v. Myatt*, 167-328; *Farrish v. Cotton Mills*, 157-188. Subscription induced by fraud voidable at election of subscriber, if election without laches: *Chamberlain v. Trogden*, 148-139; *Printing Co. v. McAden*, 131-178. Payment of subscription may be waived or subscriber released with consent of all parties interested, including all stockholders and existing creditors: *Boushall v. Myatt*, 167-328; *Drug Co. v. Drug Co.*, 173-502.

No defense in suit on subscription that corporation has abandoned object for which it was incorporated: *Improvement Co. v. Andrews*, 176-280—or that corporation not legally organized where subscriber to be held has enjoyed benefits of membership: *Cotton Mills v. Burns*, 114-353—or has participated in organization: *Foundry Co. v. Killian*, 99-501, and as to corporations de facto, see end of first note to section 1114.

Power to issue stock for "labor done" does not authorize acceptance of prospective services in payment of stock: *Hobgood v. Ehlen*, 141-344. See, also, as to stock for property, sections 1158, 1159.

1158. Stock issued for property; how value ascertained; how stock reported.

Any corporation formed under this chapter may purchase any property necessary for its business, and issue stock to the amount of the value thereof in payment therefor. The stock so issued shall be full-paid stock, and not liable to any further call, nor shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of actual fraud the judgment of the directors as to the value of the property shall be conclusive. In all statements and reports of the corporation to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the facts.

Rev., s. 1161; 1901, c. 2, s. 54.

As to power to issue stock for property, see also section 1157. Though statute adopts, in absence of fraud, "good faith" rule as to valuation of property received for stock, yet overvaluation may be evidence of fraud: *Whitlock v. Alexander*, 160-465—and if grossly excessive and knowingly made, may be conclusive: *Hobgood v. Ehlen*, 141-344. Whether there has been overvaluation in issue of stock for patents held question for jury on facts: *Whitlock v. Alexander*, 160-465—the burden of showing that property constituted payment being on party alleging payment: *Goodman v. White*, 174-399, and see *Clayton v. Ore Knob Co.*, 109-385, where charter provision that stock issued for mining property was "full-paid stock" considered.

1159. Construction companies building railroads, etc., may take stock therein; how issued, valued, and reported. Corporations having for their object the building or repairing of railroads, water, gas or electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers, or any like works of internal improvement or public use, may subscribe for, take, pay for, hold, use and dispose of stock or bonds in any corporation formed for the purpose of constructing, maintaining and operating any such public works; and the directors of any such corporation formed for the purpose of constructing, maintaining and operating any public work of the description aforesaid may accept in payment of any such subscription, or purchase, real or personal property, necessary for the purposes of such corporation, or work, labor and services performed, or materials furnished to, or for, such corporation to the amount of the value thereof, and from time to time issue upon any such subscription or purchase, in such installments or proportions as such directors may agree upon, full-paid stock, in full or partial performance of the whole, or any part of such subscription or purchase, and the stock so issued shall be full-paid stock, and not liable to any further call, nor shall the holder thereof be liable for any further payments. And in all statements and reports of the corporation to be published or filed, this stock shall not be stated, or reported, as being issued for cash paid to the corporation, but shall be reported and published in this respect according to the fact.

Rev., s. 1172; 1901, c. 2, s. 55.

1160. Liability for unpaid stock. Where the capital stock of a corporation has not been paid in and the assets are insufficient to satisfy its debts and obligations, each stockholder is bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter, or such proportion of that sum as is required to satisfy such debts and obligations; but no person holding stock in any corporation in this state as executor, administrator, guardian, or trustee, or as collateral security, is personally subject to any liability as a stockholder of the corporation; but the person pledging the stock is con-

sidered as holding the same, and is liable as a stockholder accordingly, and the estate and funds in the hands of such executor, administrator, guardian, or trustee, is liable in like manner, and to the same extent, as the testator or intestate, or the ward, or the person interested in such fund, would have been had he been living and competent to act and hold the stock in his own name.

Rev., s. 1162; 1893, c. 471; 1901, c. 2, s. 22.

Unpaid stock subscriptions constitute trust fund for creditors, who may subject them to the payment of corporation debts: *Smathers v. Bank*, 135-410; *Cooper v. Security Co.*, 127-219, 122-463; see cases under sections 1156, 1157.

Creditor exhausting remedy against corporation may sue stockholder to amount of unpaid subscriptions, but not necessary to make other stockholders parties: *Cooper v. Security Co.*, 127-219. Statute of limitations does not run against subscriptions to stock payable as called for: *Ibid.* Where subscriber resides in state, unpaid subscription may be attached by creditors of foreign corporation: *Cooper v. Security Co.*, 122-463. Corporation is liable on stock it holds of another corporation, which becomes insolvent: *Meares v. Imp. Co.*, 126-662. If whole of unpaid subscriptions not necessary to pay debts, subscriber only required to pay ratable part: *Harmon v. Hunt*, 116-678. Subscriber can only share in surplus of funds after discharging all liabilities of corporation to creditors: *Heggie v. Bldg. and Loan Assn.*, 107-595.

Dissenting subscriber released of liability on subscription where charter of corporation materially altered by legislature after subscription to stock: *Bank v. Charlotte*, 85-433; *R. R. v. Comrs.*, 87-131; *Thompson v. Guion*, 58-113; *R. R. v. Leach*, 49-340—but in order to be released he must show that he did not assent to alteration, *R. R. v. Leach*, 49-348.

Creditors have a right to examine into affairs of corporation to ascertain if subscriptions to stock have been paid, and how: *Foundry Co. v. Killian*, 99-501.

Husband holding stock as trustee for wife not personally liable: *Smathers v. Bank*, 155-283.

1161. Decrease of capital stock. The decrease of capital stock may be effected by—

1. Retiring or reducing any class of the stock.
2. Drawing the necessary number of shares by lot for retirement.
3. The surrender by every stockholder of his shares and the issue to him in place thereof of a decreased number of shares.
4. The purchase at not above par of certain shares for retirement.
5. Retiring shares owned by the corporation.
6. Reducing the par value of shares.

When a corporation decreases the amount of its capital stock as above provided, the certificate decreasing the same shall be published at least once a week for three successive weeks in a newspaper published in the county in which the principal office of the corporation is located, the first publication to be made within fifteen days after the filing of the certificate. In default of such publication the directors of the corporation are jointly and severally liable for all debts of the corporation contracted before the filing of the certificate, and the stockholders are also liable for such sums as they respectively receive of the amount so reduced. No such decrease of capital stock decreases the liability of any stockholder whose shares have not been fully paid, for debts of the corporation theretofore contracted.

Rev., s. 1164; 1901, c. 2, s. 32.

For power to increase or decrease capital stock by amendment of charter, see section 1131. For prohibition on reduction of capital stock, except as provided, see section 1179. Provision for notice hereunder is necessary only to protect stockholders against creditors, and as between stockholders a valid reduction may be effected by corporate action: *Meisenheimer v. Alexander*, 162-226. Agreement between stockholders for retirement of shares before liabilities of stock are discharged is void as to creditors: *Pender v. Speight*, 159-612. Purchase and retire-

ment by corporation of its own stock results in decrease of capital stock and void as to creditors: *Heggie v. B. and L. Assn.*, 107-581—but valid between stockholders when creditors not affected: *Blalock v. Mfg. Co.*, 110-99. As to capital stock as trust fund for creditors, see under section 1156.

1162. Certificates and duplicates. Every stockholder shall have a certificate signed by the president and treasurer, or secretary, certifying the number of shares owned by him. A corporation may issue a new certificate of stock in the place of any certificate theretofore issued by it, alleged to have been lost or destroyed, and the directors authorizing such issue of a new certificate may require the owner of the lost or destroyed certificate, or his legal representatives, to give the corporation a bond, in such sum as they may direct, as an indemnity against any claim that may be made against the corporation. A new certificate may be issued without requiring any bond when, in the judgment of the directors, it is proper to do so.

Rev., ss. 1165, 1166; 1885, c. 265; 1901, c. 2, s. 94.

Certificate of stock not necessary to membership, but is merely evidence thereof: *Powell v. Lumber Co.*, 153-52. Tender of certificate not necessary before suit on note given for stock: *Cotton Mills v. Abernathy*, 115-402. Provision in section for issue of duplicate to replace lost or destroyed certificate is valid: *Hendon v. R. R.*, 125-124, 127-110; as to compelling issuance, see section 1163.

1163. Action to compel issuance of duplicate certificates. When a corporation has refused to issue a new certificate of stock in place of one theretofore issued by it, or by a corporation of which it is a successor, alleged to have been lost or destroyed, the owner of the lost or destroyed certificate or his legal representatives may maintain a civil action in the superior court of the county in which the principal office of the corporation is located to compel the corporation to issue a duplicate certificate in the place of the one alleged to have been lost or destroyed; and if the issues of fact arising upon the pleadings are found in favor of the plaintiff, the court shall make an order requiring the corporation or other party, within such time as it designates, to issue and deliver to the plaintiff a new certificate for the number of shares of the capital stock of the corporation which have been found to be owned by the plaintiff. In making the order the court shall direct that the plaintiff deposit such security as to the court appears sufficient to indemnify any person other than the plaintiff, who shall thereafter appear to be the lawful owner of such certificate stated to be lost or destroyed; and the court may also direct publication of such notice, either preceding or succeeding the making of such final order, as it deems proper. Any person who thereafter claims any rights under the certificate so lost or destroyed shall have recourse to said indemnity, and the corporation shall be discharged from all liability to such person by reason of compliance with the order.

Rev., s. 1167; 1901, c. 2, s. 95.

When action for duplicate certificate is based on alleged loss, which is denied, question is for jury: *Hendon v. R. R.*, 125-124. Section construed and applied: *Travers v. R. R.*, 133-322.

1164. Transfer of shares. The shares of stock in a corporation are personal property, and are transferable on the books of the corporation in the manner and under the regulations provided by the by-laws. Whenever a transfer is made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer.

Rev., s. 1168; Code, s. 689; 1901, c. 2, s. 21.

Shares of stock are personalty: *Belo v. Comrs.*, 82-415; *Worth v. Comrs.*, 82-420, 90-409.

Transfer of stock certificate indorsed in blank carries entire title as between the parties, notwithstanding charter requires transfer on book: *Cox v. Dowd*, 133-537; *Havens v. Bank*, 132-214; *Bank v. Dew*, 175-79. Requirement of registration is only for benefit of corporation in determining membership, right to vote, etc.: *Bleakley v. Candler*, 169-16; *Mitchell v. Realty Co.*, 169-516. Holder of shares as purchaser or pledgee has priority over subsequent attachment, though transfer not entered on books: *Bleakley v. Candler*, 169-16. But see as to prior attachment, *Morehead v. R. R.*, 96-362. Transfer as collateral, rights of purchaser or holder: *Bank v. Dew*, 175-79.

Duty of corporation to protect interested persons against unauthorized transfers: *Baker v. R. R.*, 173-365; *Wooten v. R. R.*, 128-119, 129-246; *Cox v. Bank*, 119-302. When transfer is made by executor, corporation fixed with knowledge of will and its contents: *Baker v. R. R.*, 173-365; *Wooten v. R. R.*, 128-119.

"Voting trust" agreements by contracts not to sell stock do not prevent sale: *Harvey v. Imp. Co.*, 118-693, and see section 1173.

1165. Assessments, sale, and notice. The directors of a corporation may, from time to time, make assessments upon the shares of stock subscribed for, not exceeding, in the whole, the par value thereof, remaining unpaid; and the sums assessed shall be paid to the treasurer at such times and by such installments as the directors direct, the directors having given thirty days notice of the assessment and of the time and place of payment, either personally, by mail, or by publication in a newspaper published in the county where the corporation is established. If the owner of any share or shares neglects to pay a sum assessed thereon for thirty days after the time appointed for payment, the treasurer, when ordered by the board of directors, shall sell, at public auction, such share or shares of the delinquent owner as will pay any assessment due from him, with interest, and all necessary incidental charges, and shall transfer the share or shares sold to the purchaser, who is entitled to a certificate therefor. The treasurer shall give notice of the time and place appointed for the sale, and of the sum due on each share, by advertising the same once a week for three successive weeks before the sale in a newspaper published in the county where the principal office of the corporation is located, at the courthouse door, and by mailing a notice thereof to the last known postoffice address of the delinquent stockholder.

Rev., ss. 1169, 1170, 1171; 1901, c. 2, ss. 23, 24, 25.

Statute of limitations does not run upon subscriptions payable on call: *Cooper v. Security Co.*, 127-219.

Provisions of section as to sale of shares to pay assessments valid: *Cotton Mills v. Dunstan*, 121-12. Where proceeds of sale of stock do not pay the assessments in full, party held personally for remainder: *Ibid.* Stock advertised to be sold for unpaid assessments and tender made of amount due before sale, subsequent sale void: *Wilson v. Telephone Co.*, 139-395—and delinquent subscriber entitled to mandamus to compel issuance of stock upon payment of amount due, interest, and costs, *Ibid.* Law passed subsequent to incorporation without assent of subscribers, changing place of sale of forfeited shares, is no invasion of rights granted by charter: *Navigation Co. v. Benton*, 9-10.

1166. One corporation may purchase stock, etc., of another. A corporation may purchase stock, securities or other evidences of indebtedness created by any other corporation or corporations of this or any other state, and while owner of such may exercise all the rights, powers and privileges of ownership.

Rev., s. 1173; 1903, c. 660, s. 3.

Section changes rule as stated in *Meares v. Imp. Co.*, 126-662.

As to corporation holding its own shares, see *Heggie v. B. and L. Assn.*, 107-581; *Blalock v. Mfg. Co.*, 110-99, and sections 1161, 1174, last sentence.

1167. Mutual corporations may create stock. A mutual corporation, upon the consent in writing of all its members, may provide for and create a capital stock and may provide for the payment of the stock, and fix and prescribe the rights and privileges of the stockholders therein not inconsistent with law.

Rev., s. 1245; 1901, c. 2, s. 105.

ART. 6. MEETINGS, ELECTIONS AND DIVIDENDS

1168. Place of stockholders' and directors' meetings. The meetings of the stockholders of every corporation of this state shall be held at the principal office in this state. The directors may hold their meetings, and have an office and keep the books of the corporation (except the stock and transfer books) outside the state. Every corporation shall maintain a principal office in this state, and have an agent in charge thereof.

Rev., s. 1179; 1901, c. 2, s. 49.

STOCKHOLDERS' MEETINGS. Stockholders can act to bind corporation only when assembled in representative capacity, at a meeting legally called, organized and conducted: *Hill v. R. R.*, 143-539; *Duke v. Markham*, 105-131. Individual consent of each stockholder given separately does not validate corporate action: *Ibid.*

Notice to each stockholder or member of time and place of meeting essential, unless all present or unless meeting a stated one, definitely fixed by statute, charter or usage: *Hill v. R. R.*, 143-539; *Benbow v. Cook*, 115-324. Where all present, formal notice waived; effect of contemporary or subsequent record in minutes of meeting: *Benbow v. Cook*, 115-324. Meeting called for special purpose is limited to that purpose unless all the stockholders are present and consent: *Asbury v. Mauney*, 173-454. As to first or constituent meeting of corporation and notice thereof, see section 1118 and citations there.

PRINCIPAL PLACE OF BUSINESS. Requirement that every corporation maintain principal office in state held applicable to corporation created by special act providing for principal office in Virginia; duty to comply with requirement not abrogated by provision stated: *Roberson v. Lumber Co.*, 153-120. Before enactment of section, duty to maintain principal office held imposed by general legislative system: *Simmons v. S. S. Co.*, 113-147. See as to books at principal office, section 1170; as to change of office, section 1133.

DIRECTORS' MEETINGS must be at stated time provided in charter or by-laws, or each director must have notice; therefore acts of majority of directors at unusual place without notice void: *Bank v. Lumber Co.*, 116-827, and see cases cited above as to stockholders' meetings.

1169. Meeting called by three stockholders. When, for any reason, a legal meeting of the stockholders of any corporation cannot be otherwise called, three stockholders with voting power may call such meeting by publishing in a newspaper published in the county in which the principal office in this state is located ten days notice of the time, place and purposes of the meeting, and mailing this notice to all stockholders whose postoffice address is known or can be ascertained. A meeting so called is a legal meeting of the corporation, and if there are no officers present, the stockholders may elect officers for the meeting; and the secretary of the meeting shall record the proceedings thereof in the minute book of the corporation.

Rev., s. 1190; 1901, c. 2, s. 51.

See *Bridgers v. Staton*, 150-216.

1170. Transfer and stock books. Every corporation shall keep at its principal and registered office in this state the transfer books, in which the transfer of stock shall be registered, and the stock books, which shall contain the names and

addresses of the stockholders, and the number of shares held by them respectively, and shall at all times during the usual hours for business be open to the examination of every stockholder. These books shall be the only evidence as to who are the stockholders entitled to examine them, and to vote at elections. In case the right to vote upon any share of stock is questioned, the stock books of the corporation shall be referred to, to ascertain who are the stockholders, and in case of a discrepancy between the books, the transfer book shall control and determine who are entitled to vote.

Rev., ss. 1180, 1181; 1901, c. 2, ss. 38, 45.

Section referred to: *Bridgers v. Staton*, 150-216. Duty of corporations to keep books within state affirmed: *Simmons v. S. S. Co.*, 113-147.

1171. Directors to produce books at election. The board of directors shall produce at the time and place of elections the transfer books and the stock books, there to remain during the election, and the neglect or refusal of the directors to produce the same after a demand therefor shall render them ineligible to any office at such election. All elections of directors held under this chapter prior to February 28, 1913, where these books were not produced, and no demand was made therefor, are ratified and confirmed and given full legal force and effect, but this ratification does not affect litigation pending on the above date.

Rev., s. 1180; 1901, c. 2, s. 38; 1913, c. 14.

1172. Superior court may require production. The superior court may, upon proper cause shown, order any or all of the books of the corporation to be forthwith brought within this state, and kept therein at such place and for such time as is designated in such order. The charter of any corporation failing to comply with such order may be declared forfeited by the court making the order, and all its directors and officers shall be liable to be punished for contempt of court for disobedience of the order.

Rev., s. 1179; 1901, c. 2, s. 49.

1173. Votes stockholders entitled to; cumulative voting. Unless otherwise provided in the charter or by-laws of a corporation, at every election each stockholder is entitled to one vote in person, or by proxy duly authorized in writing, for each share of the capital stock held by him, but no proxy may be voted after three years from its date; nor may there be voted at any election a share of stock which has been transferred on the books of the corporation within twenty days prior to the election. The certificate of incorporation of any corporation authorized to issue shares of capital stock may provide that at all elections of directors, managers, or trustees, each stockholder is entitled to as many votes as equal the number of his shares of stock multiplied by the number of directors, managers, or trustees to be elected, and that he may cast all of his votes for a single director, manager, or trustee, or may distribute them among the number to be voted for, or any two or more of them, as he sees fit. This right of cumulative voting may be exercised in the absence of charter provision when at the time of the election the stock transfer book of such corporation discloses, or it otherwise appears, that more than one-fourth of the capital stock of the corporation is owned or controlled by one person. A stockholder owning or controlling more than twenty-five per cent of the stock has the same right to vote cumulatively as any other stockholder; and no amendment of the charter

or by-laws of a corporation can abrogate or abridge any right herein conferred. The right to vote cumulatively cannot be exercised unless some stockholder announces in open meeting, before the voting for directors, trustees, or managers begins, his purpose to exercise such right, and then every other stockholder may likewise vote cumulatively.

Rev., ss. 1183, 1184; 1907, c. 457, s. 1; 1909, c. 827, s. 1.

Right to vote by proxy does not exist at common law: *Harvey v. Imp. Co.*, 118-693. Any one may act as proxy, including officers of corporation: *Hill v. Life Assn.*, 128-463. No proxy to be voted more than three years from date; cannot be irrevocable: *Bridgers v. Staton*, 150-216; *Bridgers v. Bank*, 152-293; *Sheppard v. Power Co.*, 150-776.

Cumulative voting discussed: *Bridgers v. Staton*, 150-216.

“Voting trusts” held opposed to public policy and void as depriving consenting stockholders of right to vote and share in control inherent in stock ownership: *Harvey v. Imp. Co.*, 118-693; *Bridgers v. Staton*, 150-216; *Sheppard v. Power Co.*, 150-776; *Bridgers v. Bank*, 152-293.

1174. Stock held by fiduciary, pledgor, life tenant, or corporation. Every person holding stock as executor, administrator, guardian or trustee, or in any other representative or fiduciary capacity, may represent it at all meetings of the corporation, and may vote it as a stockholder, with the same effect as if the absolute owner thereof, unless the instrument creating the trust provides to the contrary. Every person who has pledged his stock as collateral security may represent it at all such meetings, and may vote it as a stockholder, unless in the transfer to the pledgee on the books of the corporation he has expressly empowered the pledgee to vote it, in which case only the pledgee or his proxy may represent and vote said stock. Where stock is owned by, or has been transferred on its record books to, one for life and remainder over, the life tenant at all meetings of the corporation may represent and vote the stock in person or by proxy, in the same manner and with the same effect as if he were the absolute owner thereof. Shares of stock of a corporation belonging to the corporation cannot be voted directly or indirectly.

Rev., ss. 1185, 1186, 1187; 1901, c. 2, ss. 42, 43; 1901, c. 474, ss. 1, 2.

Where stock bequeathed to daughters for life with remainders over on contingent limitations, the control being vested in persons named “executors and trustees,” the right to vote such stock is, under first sentence of section, in persons named executors, etc.: *Hayward v. Wright*, 152-421. Provision of section as to life tenants voting applies only to life tenant holding as owner without qualification: *Ibid.* As to right to dividends as between life tenant and remainderman, see under section 1178.

As to corporation’s ownership of its own stock, see under section 1161.

Section cited: *Bridgers v. Staton*, 150-216.

1175. Election of directors. All elections for directors shall be by ballot, unless otherwise provided in the charter, or by-laws, and a majority of the issued and outstanding stock must be present in person or by proxy; the polls must remain open one hour, unless all the stockholders are present in person or by proxy and have sooner voted, or unless all the stockholders waive this provision in writing; the persons receiving the greatest number of votes shall be the directors.

Rev., s. 1182; 1901, c. 2, s. 39.

Election by minority of stockholders after motion to adjourn carried is invalid: *Bridgers v. Staton*, 150-216.

1176. Failure to hold election. If the election for directors of a corporation is not held on the day designated by the charter or by-laws, the directors shall

cause the election to be held as soon thereafter as is convenient. No failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation; and if the directors fail or refuse for thirty days after receiving a written request for such election from those owning one-tenth of the outstanding stock, to call a meeting for the election, the judge of the district, or the judge presiding in the courts of the district, in which the principal office of the corporation is located, may, upon the application of any stockholder, and on notice to the directors, order an election or make such other order as justice requires. The proceedings governing the issuance and hearing of injunctions shall, as far as applicable, govern such hearing.

Rev., s. 1188; 1901, c. 2, s. 46.

After failure to elect directors, provisions of section applicable: *Bridgers v. Staton*, 150-216.

1177. Jurisdiction of superior court over elections. The superior court judge, upon application of any person who may complain of any election, or any proceeding, act or matter pertaining to the same, ten days notice having been given to the adverse party, or to those who are to be affected thereby, of such intended application, shall proceed forthwith, at chambers, in any county in the district in which the principal office of the corporation is situated, to hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matter or causes of complaint, and thereupon establish the election complained of, or order a new election, or make any order and give any relief in the premises as right and justice requires. The proceedings shall, as far as applicable, be the same as in injunctions.

Rev., s. 1189; 1901, c. 2, s. 47.

See *Bridgers v. Staton*, 150-216.

1178. When dividend declared. The directors of every corporation created under this chapter shall, in January of each year, unless some specific time for that purpose is fixed in its charter, or by-laws, and in that case at the time so fixed, after reserving, over and above its capital stock paid in, as a working capital for the corporation, whatever sum has been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount reserved, and pay it to the stockholders on demand. The corporation may, in its certificate of incorporation or by-laws, give the directors power to fix the amount to be reserved as a working capital.

Rev., s. 1191; 1901, c. 2, s. 52.

Dividend due from and declared by private corporation is a debt recoverable by stockholder: *University v. R. R.*, 76-103. Sale of stock held to vest buyer with right to dividend declared before to be paid at date subsequent to sale: *Burroughs v. R. R.*, 67-376. Right to dividends as between life tenant and remainderman: *Humphrey v. Lang*, 169-601. Sale of stock reserving dividends of certain date held to reserve only cash dividends and not stock dividends declared at date specified: *Trust Co. v. Mason*, 152-660. Right to declare stock dividend: *Whitlock v. Alexander*, 160-465. Stock dividend remains as capital, cash dividend is income: *Humphrey v. Lang*, 169-601. Holder of stock issued as dividend not liable to existing creditors, but is liable to subsequent creditors: *Whitlock v. Alexander*, 160-465.

1179. Dividends from profits only; directors' liability for impairing capital. No corporation may declare and pay dividends except from the surplus or net profits arising from its business, or when its debts, whether due or not, exceed two-thirds of its assets, nor may it reduce, divide, withdraw, or in any way

pay to any stockholder any part of its capital stock except according to this chapter. In case of a violation of any provision of this section, the directors under whose administration the same occurs are jointly and severally liable, at any time within six years after paying such dividend, to the corporation and its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend paid, or capital stock reduced, divided, withdrawn, or paid out, with interest on the same from the time such liability accrued. Any director who was absent when the violation occurred, or who dissented from the act or resolution by which it was effected, may exonerate himself from such liability by causing his dissent to be entered at large on the minutes of the directors at the time the action was taken or immediately after he has had notice of it.

Rev., s. 1192; Code, s. 681; 1901, c. 2, ss. 33, 52.

Dividend from capital under guise of division of profits: *Atty.-Gen. v. Bank*, 21-545. Agreement to distribute assets of corporation void as to creditors: *Heggie v. B. and L. Assn.*, 107-581. Right of creditors to follow assets wrongfully distributed or transferred until bona fide creditor or purchaser reached: *McIver v. Hardware Co.*, 144-478. Capital a trust fund for creditors, see under section 1156.

Whether stock dividend fraudulently issued is question for jury: *Whitlock v. Alexander*, 160-465. Contract of one corporation to guaranty dividends of another corporation considered: *Stagg v. Land Co.*, 171-583.

Directors' liability to creditors for impairing capital: *McIver v. Hardware Co.*, 144-478—for dividends wrongfully declared: *Houston v. Thornton*, 122-365; *Solomon v. Bates*, 118-311; *Caldwell v. Bates*, 118-323. For directors' liability generally, see under section 1144 and references there given.

ART. 7. FOREIGN CORPORATIONS

1180. Powers existing independently of permission to do business. A corporation created by another state of the United States, or by any foreign state, kingdom, or government may acquire by devise or otherwise, and may hold, mortgage, lease, and convey real estate in this state for the purpose of prosecuting its business or objects, or such real estate as it may acquire by way of mortgage or otherwise in the payment of debts due to it, but is not eligible or entitled to qualify in this state as executor, administrator, guardian, or trustee under the will of any person domiciled in this state at the time of his death. The right to acquire, hold and convey real estate exists only where at the time of the acquisition, the foreign state, government, or kingdom under whose laws the corporation was created is not at war with the United States.

Rev., s. 1193; 1901, c. 2, s. 93; 1915, c. 196, s. 1.

By comity foreign corporation may exercise in this state powers conferred by its charter, if exercise not contrary to statute or public policy, subject, however, to right of state to exclude altogether or to prescribe terms not violative of federal rights: *Tobacco Co. v. Tobacco Co.*, 145-367; *Fisher v. Ins. Co.*, 136-217; *Shields v. Ins. Co.*, 119-380. Status of corporation of another state chartered to do business in this state: *Mining Co. v. Lumber Co.*, 173-593; *Barcello v. Hapgood*, 118-712—right to hold and convey lands: same cases. Laws of state of domicile determine liability of stockholders in case of bankruptcy: *Hobgood v. Ehlen*, 141-344. Courts here will not unnecessarily examine charter, by-laws, and regularity of foreign corporation: *Moore v. Mining Co.*, 104-534.

1181. Requisites for permission to do business. Every foreign corporation before being permitted to do business in this state, insurance companies excepted, shall file in the office of the secretary of state a copy of its charter or articles of agreement, attested by its president and secretary, under its corporate seal, and a statement attested in like manner of the amount of its capital stock authorized,

the amount actually issued, the principal office in this state, the name of the agent in charge of such office, the character of the business which it transacts, and the names and postoffice addresses of its officers and directors. And such corporation shall pay to the secretary of state, for the use of the state, twenty cents for every one thousand dollars of the total amount of the capital stock authorized to be issued by such corporation, but in no case less than twenty-five dollars nor more than two hundred and fifty dollars; and also a filing fee of five dollars. Such corporation may withdraw from the state upon filing in the office of the secretary of state a statement signed by its president and secretary and attested by its corporate seal, setting forth the fact that such corporation desires to withdraw, and upon payment to the secretary of state of a fee of five dollars. Every corporation failing to comply with the provisions of this section shall forfeit to the state five hundred dollars, to be recovered, with costs, in an action to be prosecuted by the attorney-general, who shall prosecute such actions whenever it appears that this section has been violated. This section does not apply to railroad, banking, express or telegraph companies which, prior to March 9, 1915, had been licensed to do business in this state, or were engaged in business in this state, having a regularly appointed agent upon whom service of process could be made, located in this state.

Rev., s. 1194; 1901, c. 2, s. 57; 1903, c. 76; 1915, c. 263.

Legislature has undoubted power to prescribe terms for admission of foreign corporations: *Williams v. Life Assn.*, 145-128, and see under section 1180.

If corporation fails to comply with section, state may sue for penalty: *Tobacco Co. v. Tobacco Co.*, 144-352—but contract made without compliance is not void and may be enforced as any *ultra vires* contract: *Ober v. Katzenstein*, 160-439; *Tobacco Co. v. Tobacco Co.*, 144-352.

Compliance with section, or "domestication," enables plaintiff to get personal service upon foreign corporation, but does not remove its property to state, or change situs of debts created elsewhere: *Strause v. Ins. Co.*, 126-223—nor by compliance does foreign corporation lose its right of removal to federal court: *Southern R. Co. v. Allison*, 190 U. S., 326, reversing *Allison v. R. R.*, 129-336, and overruling *Beach v. R. R.*, 131-399, decided pending *Allison* appeal, and *Debnam v. Telephone Co.*, 126-831.

See following cases of interest: *Staton v. R. R.*, 144-135; *Coal, etc., Co. v. R. R.*, 144-732.

For requirement as to resident process agent, see section 1137 and cases thereunder. As to foreign insurance companies, see section 6411.

ART. 8. DISSOLUTION

1182. Voluntary, generally. When in the judgment of the board of directors it is deemed advisable and for the benefit of a corporation that it be dissolved, the board, within ten days after the adoption of a resolution to that effect by a majority of the whole board, at a meeting called for that purpose, of which meeting every director shall have received three days notice, shall cause notice of adoption of such resolution to be mailed to each stockholder residing in the United States, to his last known postoffice address, and also, beginning within said ten days, cause a like notice to be published in a newspaper published in the county wherein the corporation has its principal office, at least once a week for four successive weeks, next preceding the time appointed for the same, of a meeting of the stockholders to be held at the office of the corporation, to take action upon the resolution. The stockholders' meeting thus called may, on the day appointed, by consent of a majority in interest of the stockholders present, be adjourned from time to time for not less than eight days at one time,

of which adjourned meeting notice by advertisement in said newspaper shall be given. If at such meeting two-thirds in interest of all the stockholders consent in writing that a dissolution take place, their consent, together with the list of the names and residences of the directors and officers, certified by the president and the secretary or treasurer, shall be filed in the office of the secretary of state, who, upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that the consent has been filed, and the board of directors shall cause this certificate to be recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located, and published once a week for four successive weeks in a newspaper published in said county. Upon the filing in the office of the secretary of state of an affidavit of the manager or publisher of such newspaper that the certificate has been so published, the corporation is dissolved, and the board shall proceed to settle up and adjust its business and affairs. Whenever all the stockholders consent in writing to a dissolution, no meeting or notice thereof is necessary, but on filing the consent in the office of the secretary of state he shall forthwith issue a certificate of dissolution, which shall be published as above provided, and recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located.

Rev., s. 1195; 1901, c. 2, s. 34.

Ways of dissolution of corporations explained: *Stagg v. Land Co.*, 171-583, referring to section. Effect of dissolution on corporate property, real and personal: *Wilson v. Leary*, 120-90, overruling *Fox v. Horah*, 36-358; *Torrence v. Charlotte*, 163-562. Distribution of funds of corporation under section 1198 dissolves corporation without more, see section cited. Dissolution of corporation does not extinguish debts due from or to it, or abate actions against it, see section 1199.

Section settled mooted question as to stockholders' power to dissolve corporation and how power might be validly exercised; section enters into every corporate charter: *White v. Kincaid*, 149-415. When discretionary power of dissolution has been exercised in compliance with section, courts will not generally interfere, as by injunction: *Ibid.* Directors hereunder are trustees and must act faithfully in interest of corporation and not to oppress a portion of stockholders: *Ibid.*

Corporation continues until legally dissolved, and, in absence of statutory provision, cessation of business and voluntary winding up cannot affect position of its assets as trust fund for creditors: *Heggie v. B. and L. Assn.*, 107-581; *Perry v. Ins. Co.*, 139-374—nor can sale of the corporate property dissolve the corporation: *James v. R. R.*, 121-523, and cases cited; *Navigation Co. v. Costen*, 63-264. But see *Coal, etc., Co. v. R. R.*, 144-732.

As to trust fund doctrine, see section 1156; for liability of shareholders, section 1157; of directors and officers, section 1144.

Where under statute one corporation dissolved and another formed, creditors of defunct corporation may have its assets applied to their debts by means of a receiver: *Marshall v. R. R.*, 92-322. Formation of new corporation by officers of existing corporation does not affect existence of latter or render such officers personally liable to its creditors: *Perry v. Ins. Co.*, 139-374.

1183. Liability of stockholders. The stockholders of a corporation chartered under the laws of this state are individually liable for all taxes, costs and fees for the dissolution of the corporation, and the attorney-general is authorized to enforce the provisions of this section by suit before a justice of the peace or in the superior court in the county where such corporation had its principal place of business, whenever it appears upon report from the secretary of state that the corporation has ceased to transact business and fails to pay the taxes due the

state or to file annual statements or to dissolve itself as provided by law. If a nonresident stockholder of the corporation refuses to sign the certificate of dissolution the resident stockholders shall make affidavit to that effect, and the written assent of such resident stockholders, accompanied by such affidavit, is sufficient to dissolve the corporation. If no stockholder of such corporation is found within the state the secretary of state has authority to declare the charter of the corporation forfeited, and shall publish annually in his corporation report a list of the corporations whose charters have been so forfeited.

1909, c. 730, s. 1.

1184. Voluntary, before payment of stock. The incorporators named in a certificate of incorporation, before the payment of any part of the capital stock, and before beginning the business for which the corporation was created, may surrender all their corporate rights and franchises, by filing in the office of the secretary of state a certificate, verified by oath, that no part of the capital stock has been paid and such business has not been begun, and surrendering all rights and franchises. Thereupon the corporation is dissolved.

Rev., s. 1177; 1901, c. 2, s. 35.

1185. Involuntary, at instance of private persons. Corporations may be dissolved by civil action, instituted by the corporation, a stockholder, or creditor, or by authority of the attorney-general in the name of the state, in the following cases:

1. For any abuse of its powers to the injury of the public or of its stockholders, creditors, or debtors.
2. For nonuser of its powers for two or more consecutive years.
3. When it is insolvent, or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate rights.
4. Upon any conviction of the company of a persistent criminal offense.

Rev., s. 1196; Code, s. 694; 1901, c. 2, s. 73.

Section authorizes dissolution in action to dissolve brought by one of corporators for abuse of powers in failing to maintain principal office and in withdrawing agencies from state: *Simmons v. S. S. Co.*, 113-147, and see under section 1168. Court under its equitable powers may decree dissolution in suit where facts bringing case under this section exist and proper parties are present, though direct proceeding under section more orderly: *Greenleaf v. Land Co.*, 146-505.

Section referred to generally: *Asheville Div. v. Aston*, 92-578; *Stagg v. Land Co.*, 171-583— as to effects of nonuser, *R. R. v. Alsbrook*, 110-137.

As to obtaining leave of attorney-general, see sections 871, 872, but query whether attorney-general does not proceed here as under section 1187, unless corporator, etc., sues for himself as in *Simmons v. S. S. Co.*, 113-147.

1186. Involuntary, by stockholders. When stockholders owning one-fifth or more in amount of the paid-up stock of any corporation organized under the laws of and doing business in this state, except corporations organized for religious, charitable, fraternal, and educational purposes, and except banking and public-service corporations, apply in term or vacation to the judge of the superior court holding the courts for the county in which the principal place of business of the corporation is situated, by petition containing a statement that for three years next preceding the filing of the petition, which time shall begin to run from three years after it has begun business, the net earnings of the corporation have

not been sufficient to pay in good faith an annual dividend of four per cent upon the paid stock of the corporation, over and above the salaries and expenses authorized by its by-laws and regulations, or that the corporation has paid no dividend for six years preceding said application; or whenever stockholders owning one-tenth or more in amount of the paid-up common stock of any such corporation apply to the judge of the superior court as aforesaid by petition containing a statement that the corporation has paid no dividend on the common stock for ten years preceding said application, and that they desire a dissolution of the corporation, the judge shall make an order requiring the officers of the corporation to file in court, within a reasonable time, inventories showing all the real and personal estate of the corporation, a true account of its capital stock, the names of the stockholders, their residences, the number of shares belonging to each, the amount paid in upon said shares and the amount still due thereon, and a statement of all the encumbrances on the property of the corporation and all its contracts which have not been fully satisfied and canceled, specifying the place and residence of each creditor, the sum owing to each, the nature of the debt or demand, and the consideration therefor, and the books and papers of the corporation. Upon the filing of the inventories, accounts and statements, the court shall enter an order requiring all persons interested in the corporation to appear before a referee to be appointed by the court, at a time and place named in the order, service of which may be made by publication for such time as may be deemed proper by the court, and show cause why the corporation should not be dissolved. If it appears to the court that the statements contained in the petition are true, the court may adjudge a dissolution of the corporation and shall appoint one or more receivers, who shall have all powers of receivers conferred by this chapter for the winding up the affairs and distribution of the assets of the corporation. If it appears to the court that the corporation is insolvent or in imminent danger of insolvency, the court may appoint a temporary receiver of the corporation pending dissolution. No suit shall be brought for the dissolution of a corporation under the provisions of this section until each and all of the petitioners have owned their stock for the term of two years prior to the institution of the action; nor shall any such suit be brought for the period of three years after a final judgment upon a prior petition as herein provided.

1913, c. 147; 1915, c. 137, s. 1.

Section intended to prevent abuse of powers by majority to detriment of minority stockholders, not to affect withholding dividends by unanimous consent for legitimate business reasons: *Winstead v. Hearne*, 173-606. Stockholder who has agreed to investment of surplus in enlarging business estopped to ask under section dissolution because no dividends declared: *Ibid.* The provision for "ten" years suspension of dividends, line 17 of section (added by 1915, c. 137), seems inconsistent with "six" years in line 13 (laws 1913, c. 147), and ten years must elapse: *Ibid.* Court not confined to decree of dissolution hereunder, but considering provisions of article 12 of this chapter on Reorganization, ss. 1221-1224, may decree sale of franchise with property, conferring on purchasers right to reorganize: *Wood v. Staton*, 174-245.

1187. Involuntary, by attorney-general. An action may be brought by the attorney-general in the name of the state against a corporation for the purpose of annulling its charter upon the ground that it was procured upon a fraudulent suggestion, or concealment of a material fact, by the persons incorporated

or by some of them, or with their knowledge or consent; or for the purpose of annulling the existence of a corporation, other than municipal, when such corporation—

Corporation cannot endure for longer time than prescribed in charter, and no judicial proceedings necessary to terminate its existence; but forfeiture at an earlier date for fraud in procuring charter, or for abuse, usurpation or nonuser of its powers can only be enforced by state hereunder: *Asheville Div. v. Aston*, 92-578. The state may waive the forfeiture: *Atty.-Gen. v. R. R.*, 28-456.

Formerly attorney-general could not bring action to vacate charter of his own motion, but required authority of legislature: *Atty.-Gen. v. R. R.*, 134-481.

1. Offends against the act creating, altering, or renewing it.

See *Mining Co. v. Goodhue*, 118-981, considering effect of state corporation organizing by holding first stockholders' meeting outside state.

2. Violates any law by which it has forfeited its charter by abuse of its power.

See *Atty.-Gen. v. R. R.*, 28-456.

3. Has forfeited its privileges or franchises by failure to exercise its power.

4. Has done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises.

5. Has exercised a franchise or privilege not conferred upon it by law.

Quo warranto said to be remedy against foreign corporation improperly doing business in state: *Mining Co. v. Lumber Co.*, 173-593—to determine corporation's right to exercise eminent domain: *Power Co. v. Power Co.*, 171-248; *Land Co. v. Traction Co.*, 162-314—to determine right of banking company to establish branches: *Banking Co. v. Tate*, 122-313.

See generally as to effect of ultra vires acts, under section 1128.

6. Has failed to use its powers for two or more consecutive years.

7. Has become insolvent as manifested by the return of an execution unsatisfied upon a judgment against the corporation docketed in the superior court of the county where it has its principal place of business.

See *Simmons v. S. S. Co.*, 113-147.

It is the duty of the attorney-general, whenever he has reason to believe that any of these acts or omissions can be established by proof, to bring an action in every case of public interest, and also in every other case in which satisfactory security is given to indemnify the state against the costs and expenses to be incurred thereby.

Rev., s. 1198; Code, ss. 604, 605; 1889, c. 533.

1188. Forfeiture or dissolution for failure to organize or act. When a charter has been granted creating a corporation, and the incorporators for two years neglect to organize and carry into effect the intent of the charter, or when organized, if they for two consecutive years cease to act, then this disuse of their corporate privileges and powers is a forfeiture of the charter. If, after thirty days notice by the secretary of state, the corporation fails to surrender its corporate rights or to dissolve, in the manner provided in this chapter, the secretary of state shall report it to the attorney-general, who shall institute an appropriate action for its dissolution.

Rev., s. 1246; Code, s. 688; 1901, c. 2, s. 106.

Failure for two years to organize may be ground for state to bring quo warranto, but cannot be taken advantage of collaterally to attack corporation's right to exercise its powers: *Boyd v. Redd*, 120-335, and cases cited. See, also, under sections 1128, 1187.

Section referred to: *R. R. v. Alsbrook*, 110-137.

1189. Forfeiture for nonuser by hydro-electric companies. All waterpower, hydro-electric power, and water companies or corporations organized in this state shall be required to begin active work in making their proposed development within two years after their organization and diligently to prosecute their work on the same until it has been completed; and a failure to begin the work or development within the time, and to diligently prosecute work on the same until its completion, as herein provided, shall be legal grounds for declaring their charter rights, privileges and franchises forfeited, by the state, acting through its attorney-general, upon the recommendation of the corporation commission of this state: Provided, this section shall not apply to any company which is supplying the public and is meeting the demands of the public for its services.

1913, c. 133, s. 2.

1190. Involuntary, by bankruptcy. When a corporation chartered under the laws of this state is adjudged bankrupt under the laws of the United States, the charter of the corporation is forfeited without further action, unless the stockholders determine by appropriate resolutions to continue the corporate existence of the corporation after the adjudication in bankruptcy, and furnish the secretary of state with a duly certified copy of the resolutions, all within six months after the adjudication. The stockholders of a bankrupt corporation whose existence is continued by the foregoing procedure must pay all privilege taxes which have accrued against the corporation since the adjudication, together with a fee of one dollar allowed the secretary of state for recording and filing the certificate provided for in this section.

1915, c. 134, ss. 2, 3.

Section applied: *Stagg v. Land Co.*, 171-583.

1191. When franchises forfeited by neglect, etc., corporation dissolved; costs. If it is adjudged that a corporation against which an action has been brought has forfeited by neglect, abuse, or surrender, its corporate rights, privileges and franchises, judgment shall be rendered that the corporation be excluded from such rights, privileges and franchises, and that it be dissolved. If judgment is rendered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs to be collected by execution against the persons making the claim, or by attachment or process against the directors or other officers of the corporation.

Rev., ss. 1209, 1210; Code, ss. 617, 618.

1192. Service of summons in action for dissolution. In an action for the dissolution of a corporation, or for the appointment of a receiver thereof, the summons must be served on the corporation by service on an officer or agent upon whom other process can be served, and shall be served on the stockholders, creditors, dealers and others interested in the affairs of the company by publishing a copy at least weekly for two successive weeks in some newspaper printed in the county in which the corporation has its principal place of business, or if there is no such newspaper published, by posting a copy of the summons at the door of the courthouse of such county, and publishing a copy for the time and in the manner aforesaid in a newspaper published nearest the county seat of the county in which the corporation has its principal place of business or in a news-

paper published in the city of Raleigh. This publication is sufficient service on all the stockholders, creditors of, or dealers with, the corporation, and upon the corporation, if no officer can after due diligence be found in the state and it has no process agent in the state; and all such stockholders, creditors or dealers or other parties interested may intervene in said proceedings and become parties thereto for themselves, or for others in like interest, under such rules as the court for the purpose of justice prescribes.

Rev., s. 1199; Code, s. 695; 1911, c. 173, s. 1.

1193. Corporate existence continued three years. All corporations whose charters expire by their own limitation, or are annulled by forfeiture or otherwise, shall continue to be bodies corporate for three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of their property, and to divide their assets; but not for the purpose of continuing the business for which the corporation was established. In any pending action the court, in its discretion, may extend the time for winding up the affairs of such corporation.

Rev., s. 1200; Code, s. 667; 1901, c. 2, s. 58.

Section relates to corporations whose charters expire by limitation or are annulled by forfeiture or otherwise: *Heggie v. B. and L. Assn.*, 107-581—and statutory remedy must be pursued within three years or corporation and individual stockholders released from liability: *Von Glahn v. DeRossett*, 81-467.

Judgment against corporation rendered upon process issued after it has ceased to exist is of no validity: *Dobson v. Simonton*, 86-492—and where old corporation merged into new this section does not apply so as to make old corporation necessary party to action against succeeding corporation, *Friedenwald v. Tobacco Works*, 117-544.

Section merely referred to: *Smathers v. Bank*, 135-413; *Kruger v. Bank*, 123-19; *Wilson v. Leary*, 120-92; *Asheville Div. v. Aston*, 92-586; *Marshall v. Railroad*, 92-332.

1194. Directors to be trustees; powers and duties. On the dissolution in any manner of a corporation, unless otherwise directed by an order of the court, the directors are trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, and, after paying its debts, divide any surplus money and other property among the stockholders. The trustees have power to meet and act under the by-laws of the corporation, and, under regulations to be made by a majority, to prescribe the terms and conditions of the sale of such property, and they may sell all or any part for cash, or partly on credit, or take mortgages or bonds for part of the purchase price for all or any part of the property. They have power to sue for and recover the said debts and property in the name of the corporation, and are suable in the same name for the debts owing by it, and are jointly and severally responsible for such debts only to the amount of property of the corporation which comes into their possession as trustees.

Rev., ss. 1201, 1202; Code, s. 687; 1901, c. 2, ss. 59, 60.

Duty of directors to preserve assets of corporation and administer them for benefit of creditors: *McIver v. Hardware Co.*, 144-478; *Bank v. Cotton Mills*, 115-507; *Electric Light Co. v. Electric Light Co.*, 116-119; *Hill v. Lumber Co.*, 113-173—and they cannot sell practically entire assets for own advantage and to prejudice of creditors, and in case they do they are jointly and severally liable, together with purchaser, for corporate debts, *Ibid.*

Confession of judgment by insolvent corporation in favor of director who is a creditor, upon debt theretofore existing, is void as against other creditors: *Hill v. Lumber Co.*, 113-173.

Failure to proceed under statute within three years releases corporation and stockholders from liability for debts: *Von Glahn v. DeRossett*, 81-467.

Corporation debts not extinguished by dissolution, see section 1199.

As to "trust fund" doctrine of corporation assets, especially after insolvency, see under section 1156. For position of directors, see under 1144. For corporate receivers, see sections 1195, 1208 et seq.

1195. Jurisdiction of superior court. When a corporation is dissolved, in any manner whatsoever, the superior court, on application of a creditor or stockholder, may either continue the directors as trustees or appoint one or more persons receivers of the corporation. The court has jurisdiction of the application, and of all questions arising in the proceedings thereon, and may make, at any place in the district, any orders, injunctions, or decrees therein as justice and equity require. The powers of such trustees or receivers are as elsewhere given in this chapter, and may be continued as long as the court thinks necessary.

Rev., ss. 1203, 1204; Code, ss. 619, 668, 669; 1901, c. 2, ss. 61, 62.

See as to corporation receivers, generally, section 1208 et seq.

Statutory remedy provided in this and two preceding sections for securing settlement of affairs of defunct corporation is exclusive and supersedes equitable powers of the court: *Von Glahn v. DeRossett*, 81-467. Under section court may take entire charge of winding up corporate business after dissolution, and it must do so at instance of creditor or stockholder: *White v. Kincaid*, 149-415. Section applies to foreign corporations doing business here: *Silk Co. v. Spinning Co.*, 154-421. Remedy of creditors is by creditor's bill to have assets administered for their benefit: *Latta v. Electric Co.*, 146-285; *Holshouser v. Copper Co.*, 138-251; *Hill v. Lumber Co.*, 113-173.

As to appointment of receiver, see *Mitchell v. Realty Co.*, 169-516; *Silk Co. v. Spinning Co.*, 154-421; *Greenleaf v. Land Co.*, 146-505; *Latta v. Electric Co.*, 146-285; *Smathers v. Bank*, 135-413; *Huet v. Lumber Co.*, 138-443; *Bank v. Bank*, 127-432; *Black v. Gentry*, 119-504; *Bank v. Cotton Mills*, 115-507; *Guilford v. Georgia Co.*, 112-34; *Marshall v. R. R.*, 92-322; *Young v. Rollins*, 85-485, 90-125; *Railroad v. Rollins*, 82-523; *Dobson v. Simonton*, 78-66. If, during existence of corporation, its officers fraudulently or unlawfully dispose of any of its property, creditors are entitled to receiver: *Latta v. Electric Co.*, 146-285. Where receiver appointed at suit of one creditor, it is for benefit of all creditors: *Lenoir v. Imp. Co.*, 117-471.

As to title of receiver to the assets of corporation, and the lien gained thereon by creditor's bill, see *Bank v. Bank*, 127-432; *Fisher v. Bank*, 132-769. Receiver represents the corporation: *Howe v. Harper*, 127-358.

For general powers and duties of receivers hereunder, see *Davis v. Industrial Mfg. Co.*, 114-326; *Atty.-Gen. v. Roanoke Nav. Co.*, 84-710. Receiver may sue either in own name or in that of corporation: *Millinery Co. v. Ins. Co.*, 160-130; *Smathers v. Bank*, 135-413; *Davis v. Mfg. Co.*, 114-321; *Gray v. Lewis*, 94-392—and in such suit mutual debts and credits may be adjusted: *Davis v. Mfg. Co.*, 114-321. Receiver may collect assets, and prosecute and defend suits after corporation ceases to exist by expiration of charter: *Asheville Div. v. Aston*, 92-578—moreover power of receiver may be continued as long as court may think necessary for settlement, *Ibid.*; also *Young v. Rollins*, 90-125. For action by receiver to collect assets alleged to have been wasted, see *Dunn v. Johnson*, 115-258. For sufficiency of pleadings in suit by receiver to collect unpaid subscriptions, see *Worth v. Wharton*, 122-376. For liability of officers of defunct corporation to account with receiver for assets, see *McIver v. Hardware Co.*, 144-478; *Young v. Rollins*, 90-125.

Judgments rendered upon process issued after corporation ceased to exist are of no validity: *Dobson v. Simonton*, 86-492.

As to meaning of "court" in the provision giving "court" jurisdiction, see section 1113, subsection 5.

Section referred to: *Wilson v. Leary*, 120-90; *Bank v. Cotton Mills*, 115-507; *Foundry Co. v. Killian*, 99-501.

1196. Injunction; notice and undertaking. An injunction to suspend the general and ordinary business of a corporation or to appoint a receiver shall not be

granted without due notice of the application therefor to the corporation, except where the state is a party to the proceeding, unless the plaintiff gives a written undertaking, executed by two sufficient sureties to be approved by the judge, to the effect that the plaintiff will pay all damages, not exceeding the sum mentioned in the undertaking, which the corporation may sustain by reason of the injunction, or the appointment of the receiver, if the court finally decides that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court directs.

Rev., s. 1205; Code, s. 343; C. C. P., s. 194.

For injunctions generally, see sections 843-858. As to receivers, see under section 1195 and infra sections 1208-1217. Facts sufficient to sustain cause of action must be alleged before injunction will issue: *Moore v. Mining Co.*, 104-534; *Jones v. Comrs.*, 107-265, and cases cited. Where directors, who are authorized to issue and sell stock, make sale and sell stock it is too late for injunction: *Huet v. Lumber Co.*, 138-443.

Individual stockholders in their own name are not proper parties to assert rights of corporation: *Moore v. Mining Co.*, 104-534—unless they resort to remedy specified by charter and fail to secure same, *Ibid.*

As to remedy of creditors by creditor's bill, see *Holshouser v. Copper Co.*, 138-251; *Hill v. Lumber Co.*, 113-173.

1197. Wages for two months lien on assets. In case of the insolvency of a corporation all persons doing labor or service of whatever character in its regular employment have a lien upon the assets thereof for the amount of wages due to them for all labor, work, and services rendered within two months next preceding the date when proceedings in insolvency were actually instituted and begun against the corporation, which lien is prior to all other liens that can be acquired against such assets.

Rev., s. 1206; 1901, c. 2, s. 87.

Lien given by statute recognized: *Riley v. Sears*, 156-267. Contractors not entitled to lien as laborers: *Iron Co. v. Bridge Co.*, 169-512. Officers and owners of corporation not entitled to lien hereunder: *Alexander v. Farrow*, 151-320. Lien does not attach to property not belonging to corporation: *Roberts v. Mfg. Co.*, 169-27—does not have priority over mortgage on property when acquired by corporation: *Humphrey v. Lumber Co.*, 174-514. Notice of lien not required to be filed: *Walker v. Lumber Co.*, 170-460. Lien herein given does not destroy lien for labor after company in hands of receiver: *Ibid.* Bankruptcy proceeding works dissolution unless statutory conditions complied with: *Stagg v. Lumber Co.*, 171-583.

Mortgaged property subject to execution for labor, etc., see section 1140 and cases cited there.

1198. Distribution of funds. After payment of all allowances, expenses and costs, and the satisfaction of all general and special liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionately to the amount of their respective debts, and shall be entitled to distribution on debts not due, making in such case a rebate of interest when interest is not accruing on the same. Any surplus funds, after payment of the creditors and costs, expenses and allowances, shall be paid to the preferred stockholders according to their respective shares, and if there still be a surplus, it shall be divided and paid to the general stockholders proportionately, according to their respective shares. Upon the distribution of the assets of an insolvent corporation, judgment of dissolution shall be entered and a certified copy of the judgment filed in the office of the secretary of state, and also in the office of the clerk of the superior court of the county in which the principal office of the

corporation is located, and the same shall be recorded in the Corporation Book and in the Record of Incorporations in these offices respectively. Thereupon the corporation is dissolved without being required to comply with section 1182 under this chapter.

Rev., s. 1207; Code, s. 670; 1901, c. 2, ss. 63, 89; 1909, c. 15, s. 1.

See, as to receivers, under section 1195 and sections 1208-1217. Order for distribution of funds should not be made until fund is in court; such order can be made at any time as to funds then in court: *Strauss v. Loan Assn.*, 118-556. Receiver required to pay all debts if assets sufficient: *McIver v. Hardware Co.*, 144-483; *Bank v. Cotton Mills*, 115-515—and if assets insufficient must distribute equally and ratably subject to priorities already accrued: *Worth v. Bank*, 122-404; *Bank v. Cotton Mills*, 115-115. Debts to be paid pro rata after valid liens: *Observer Co. v. Little*, 175-42. Priorities determined for payment of funds in hands of receiver: *Humphrey v. Lumber Co.*, 174-514.

Judgment against receiver merely establishes debt, and gives judgment creditor no preference in distribution of assets: *Lacy v. Clinton Loan Assn.*, 132-131.

Corporate debts must be paid before stockholders get anything: *McIver v. Hardware Co.*, 144-483.

In taxing costs and expenses of receiver of insolvent corporation, lower liens should lose rather than prior liens: *Lumber Co. v. Lumber Co.*, 152-270.

Receiver is not justified in appealing from a judgment in an action between creditors as to distribution of fund: *Bank v. Bank*, 127-432.

Section merely referred to in *Asheville Div. v. Aston*, 92-586.

For construction of provision for voluntary dissolution, referred to in last line of this section, see under section 1182.

1199. Debts not extinguished nor actions abated. In case of the dissolution of a corporation, the debts due to and from it are not thereby extinguished, nor do actions against a corporation which is dissolved before final judgment abate by reason thereof, but no judgment shall be entered therein without notice to the trustees or receivers of the corporation.

Rev., ss. 1201, 1208; Code, s. 687; 1901, c. 2, ss. 59, 64.

For directors as trustees on dissolution, section 1194; for receivers, section 1195 and references.

1200. Copy of judgment to be filed with secretary of state; costs. A copy of every judgment dissolving a corporation or forfeiting its charter shall be forthwith filed by the clerk of the court in the office of the secretary of state, and a note thereof shall be made by the secretary of state on the charter or certificate of incorporation and in the index thereof, and be published by him in the annual report hereinafter provided for, the cost of which shall be taxed by the clerk of the superior court in the action wherein the corporation is dissolved.

Rev., s. 1211; 1901, c. 2, s. 65.

ART. 9. EXECUTION

1201. How issued; property subject to execution. If a judgment is rendered against a corporation, the plaintiff may sue out such executions against its property as is provided by law to be issued against the property of natural persons, which executions may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation.

Rev., s. 1212; 1901, c. 2, s. 66.

For executions, see section 675. Proceedings supplemental to execution lie against corporations: *LaFountain v. Underwriters Assn.*, 79-514. Corporate property and franchise must go together in certain cases and cannot be sold separately: *James v. Railroad*, 121-527; *Pipe*

and Foundry Co. v. Howland, 111-625; Gooch v. McGee, 83-59. Court may enjoin sale under execution of franchise and property of corporation when it is in hands of the court: Atty.-Gen. v. Roanoke Nav. Co., 84-705.

1202. Agent must furnish information as to property to officer. Every agent or person having charge or control of any property of the corporation, on request of a public officer having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, so far as he has knowledge of the same.

Rev., s. 1213; 1901, c. 2, s. 67.

1203. Shares of stock subject to; agent must furnish information. Any share or interest in any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of this state, or incorporated or established under the authority of the United States, belonging to the defendant in execution, may be taken and sold by virtue of such execution in the same manner as goods and chattels. The clerk, cashier, or other officer of such company who has at the time the custody of the books of the company shall, upon being shown the writ of execution, give to the officer having it a certificate of the number of shares or amount of the interest held by the defendant in the company; and if he neglects or refuses to do so, or if he willfully gives a false certificate, he shall be liable to the plaintiff for the amount due on the execution, with costs.

Rev., ss. 1214, 1215; 1901, c. 2, ss. 69, 70.

Prior to statute, shares not subject to execution: Pool v. Glover, 24-129; Cooper v. Canal Co., 6-195. Action to compel corporation to transfer on books stock purchased under execution sale: Morehead v. R. R., 96-362. Shares liable to attachment, see section 318; also Bleakley v. Candler, 169-16.

1204. Debts due corporation subject to; duty and liability of agent. If an officer holding an execution is unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such execution in whole or in part out of any debts due the corporation; and it is the duty of any agent or person having custody of any evidence of such debt to deliver it to the officer, for the use of the creditor, and such delivery, with a transfer to the officer in writing, for the use of the creditor, and notice to the debtor, shall be a valid assignment thereof; and the creditor may sue for and collect the same in the name of the corporation, subject to such equitable setoffs on the part of the debtor as in other assignments. Every agent or person who neglects or refuses to comply with the provisions of this and the last preceding section is liable to pay to the execution creditor the amount due on the execution, with costs.

Rev., s. 1216; 1901, c. 2, s. 68.

1205. Violations of three preceding sections misdemeanor. If any agent or person having charge or control of any property of a corporation, or any clerk, cashier, or other officer of a corporation, who has at the time the custody of the books of the company, or if any agent or person having custody of any evidence of debt due to a corporation, shall, on request of a public officer having in his hands for service an execution against the said corporation, willfully refuse to

give to such officer the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, or shall willfully refuse to give to such officer a certificate of the number of shares, or amount of interest held by such corporation in any other corporation, or shall willfully refuse to deliver to such officer any evidence of indebtedness due or to become due to such corporation, he shall be guilty of a misdemeanor.

Rev., s. 3690; 1901, c. 2, ss. 67, 68, 70.

1206. Proceedings when custodian of corporate books is a nonresident. When the clerk, cashier, or other officer of any corporation incorporated under the laws of this state, who has the custody of the stock-registry books, is a nonresident of the state, it is the duty of the sheriff receiving a writ of execution issued out of any court of this state against the goods and chattels of a defendant in execution holding stock in such company to send by mail a notice in writing, directed to the nonresident clerk, cashier, or other officer at the postoffice nearest his reputed place of residence, stating in the notice that he, the sheriff, holds the writ of execution, and out of what court, at whose suit, for what amount, and against whose goods and chattels the writ has been issued, and that by virtue of such writ he seizes and levies upon all the shares of stock of the company held by the defendant in execution on the day of the date of such written notice. It is also the duty of the sheriff on the day of mailing the notice to affix and set up upon any office or place of business of such company, within his county, a like notice in writing, and on the same day to serve like notice in writing upon the president and directors of the company, or upon such of them as reside in his county, either personally or by leaving the same at their respective places of abode. The sending, setting up, and serving of such notices in the manner aforesaid constitutes a valid levy of the writ upon all shares of stock in such company held by the defendant in execution, which have not at the time of the receipt of the notice by the clerk, cashier, or other officer, who has custody of the stock-registry books, been actually transferred by the defendant; and thereafter any transfer or sale of such shares by the defendant in execution is void as against the plaintiff in the execution, or any purchaser of such stock at any sale thereunder.

Rev., s. 1217; 1901, c. 2, s. 71.

1207. Duty and liability of nonresident custodian. The nonresident clerk, cashier, or other officer in such corporation, to whom notice in writing is sent as prescribed in the preceding section, shall send forthwith to the officer having the writ, a statement of the time when he received the notice and a certificate of the number of shares held by the defendant in the corporation at the time of the receipt, not actually transferred on the books of the corporation; and the sheriff, or other officer, on receipt by him of this certificate, shall insert the number of shares in the inventory attached to the writ. If the clerk, cashier, or other officer in such corporation neglects to send the certificate as aforesaid or willfully sends a false one, he is liable to the plaintiff for double the amount of damages occasioned by his neglect, or false certificate, to be recovered in an action against him; but the neglect to send, or miscarriage of the certificate, does not impair the validity of the levy upon the stock.

Rev., s. 1218; 1901, c. 2, s. 72.

ART. 10. RECEIVERS

1208. **Appointment and removal.** When a corporation becomes insolvent or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate rights, or its corporate existence has expired by limitation, a receiver may be appointed by the court under the same regulations that are provided by law for the appointment of receivers in other cases; and the court may remove a receiver or trustee and appoint another in his place, or fill any vacancy. Everything required to be done by receivers or trustees is valid if performed by a majority of them.

Rev., ss. 1219, 1223; Code, s. 668; 1901, c. 2, ss. 73, 79.

As to receivers generally, see sections 859-862, in chapter Civil Procedure. For other annotations as to corporation receivers, see section 1195.

Receiver may be appointed, when corporation fails to meet obligation or suspends business: *Holshouser v. Copper Co.*, 138-251; *Bank v. Mfg. Co.*, 176-318—or when corporation insolvent or in imminent danger of insolvency, *Bank v. Cotton Mills*, 115-515; *Silk Co. v. Spinning Co.*, 154-421—or when trustee of sinking fund to pay debts of corporation loaned the money to a bankrupt firm without authority, *Railroad v. Wilson*, 81-223—or where corporation dissolved and there is a contest as to rights of different creditors to the assets, there being no officer of the corporation, *Dobson v. Simonton*, 78-63. Receiver should not be appointed to enable stockholder, who has deposited stock as collateral for debt, to have an account of corporate assets: *Huet v. Lumber Co.*, 138-443. Organization of new corporation at once dissolves the old; and creditors of defunct corporation are entitled to have receiver appointed to apply its property to their debts: *Marshall v. R. R.*, 92-322.

Where prior action for appointment of receiver is pending, court will not entertain jurisdiction of another action in which same relief demanded: *Young v. Rollins*, 85-485—also where corporation dissolved by legislature and powers transferred to new corporation, courts cannot on ex parte application appoint receiver of defunct corporation, *Ibid.*

Party to proceedings should not be appointed receiver: *Ibid.*

Powers of directors and stockholders cease upon appointment of receiver, and they can make no contract which will bind corporation after such appointment: *Lenoir v. Imp. Co.*, 117-475.

Party who has had receiver appointed has no right to have him discharged against protest of nonsatisfied creditor who might be damaged by such discharge: *Ibid.*

Existence of corporation not affected by fact that corporation has gone into hands of receiver and property sold: *Pinchback v. Mining Co.*, 137-171. As to duration of receivership, see *Asheville Div. v. Aston*, 92-586; *Young v. Rollins*, 90-125.

Right of receiver to bring suit: *Millinery Co. v. Ins. Co.*, 160-130.

Section merely referred to in *Smathers v. Bank*, 135-413; *Fisher v. Bank*, 132-774; *Wilson v. Leary*, 120-92; *Cotton Mills v. Cotton Mills*, 115-485; *Dunn v. Johnson*, 115-258; *Foundry Co. v. Killian*, 99-504.

1209. **Powers and bond.** The receiver has power and authority to—

1. Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation.

2. Foreclose mortgages, deeds of trust, and other liens executed to the corporation.

3. Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the corporation, and he shall, upon application by him, be substituted as party plaintiff in the place of the corporation in any suit or proceeding pending at the time of his appointment.

4. Sell, convey, and assign all of the said estate, rights, and interest.

5. Appoint agents under him.

6. Examine persons and papers, and pass on claims as elsewhere provided in this article.

7. Do all other acts which might be done by the corporation, if in being, that are necessary for the final settlement of its unfinished business.

The powers of the receiver may be continued as long as the court thinks necessary, and the receiver shall hold and dispose of the proceeds of all sales of property under the direction of the court, and, before acting, must enter into such bond and comply with such terms as the court prescribes.

Rev., ss. 1222, 1231; Code, s. 668; 1901, c. 2, ss. 74, 84.

See, also, references at head of note to section 1208.

Title of receiver relates to date of appointment: *Fisher v. Bank*, 132-775; *Bank v. Bank*, 127-432—but his possession does not interfere with prior liens, *Pelletier v. Lumber Co.*, 123-596. Where corporation in hands of receiver, before stockholder can sue for injury to corporation, he must show demand on, and refusal of, receiver to sue: *Coble v. Beall*, 130-533. Receiver may sue either in own name or in that of corporation: *Smathers v. Bank*, 135-413, and cases under 1195.

As to duration of receivership, see *Asheville Div. v. Aston*, 92-586; *Young v. Rollins*, 90-125.

POWERS AND DUTIES OF RECEIVER. Receiver has sole right to collect assets of insolvent corporation: *Dunn v. Johnson*, 115-258—and may maintain action against officer of insolvent corporation to recover corporate property in his hands, *Ibid.*—also has right to enjoin resident creditor of corporation from prosecuting suit in another state which hinders his collection of assets, *Davis v. Lumber Co.*, 132-233—to recover for usury paid, *Riley v. Sears*, 154-509.

Receiver may collect assets and prosecute and defend suits after corporation ceases to exist by expiration of charter: *Asheville Div. v. Aston*, 92-578—though judgments against corporation rendered upon process issued after it has ceased to exist are of no validity, *Dobson v. Simonton*, 86-493. It is duty of receiver to appeal where he thinks the corporation he represents has not had justice: *Strauss v. Loan Assn.*, 118-556—though not his duty to appeal in interest of one creditor or stockholder against another, *Ibid.*

Sufficiency of complaint in action by receiver to recover unpaid subscriptions discussed in *Worth v. Wharton*, 122-376. For duty of officers of defunct corporation to turn over corporate property to receiver, see *Young v. Rollins*, 90-125.

Corporation purchasing practically entire assets of another corporation without provision for debts is liable to receiver of defunct corporation for such debts: *McIver v. Hardware Co.*, 144-478; see *Marshall v. R. R.*, 92-322.

RECEIVER'S BOND. Liability of sureties on receiver's bond only enforceable by action; they cannot be proceeded against by motion in the cause: *Black v. Gentry*, 119-502. Where judgment is obtained against receiver he is not necessary party to action against sureties on bond: *Ibid.* Leave of court necessary before suing sureties: *Black v. Gentry*, 119-504; *Boothe v. Upchurch*, 110-64—except where receiver is ex officio receiver of certain funds, *Boothe v. Upchurch*, 110-62; *Black v. Gentry*, 119-504—and complaint should allege that leave has been granted in case where same necessary, *Ibid.*—but omission to so allege is cured by failure to demur upon that ground, *Ibid.*; *Wilson v. Rankin*, 129-447.

1210. Title and inventory. All of the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects, upon the appointment of a receiver, forthwith vest in him, and the corporation is divested of the title thereto. Within thirty days after his appointment he shall lay before the court a full and complete inventory of all estate, property, and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained, and shall make a report of his proceedings to the superior court at every civil term during the continuance of the trust.

Rev., ss. 1224, 1225; 1901, c. 2, ss. 75, 80.

The property vests in the receiver, and he should be made a party to an action affecting it: *Black v. Power Co.*, 158-468; *Hollowell v. R. R.*, 153-19; *Kissenger v. Fitzgerald*, 152-247.

Title of receiver relates only to time of appointment: *Hardware Co. v. Holt*, 173-308; *Fisher v. Bank*, 132-769; *Bank v. Bank*, 127-432; *Pelletier v. Lumber Co.*, 123-596—and he takes property subject to existing liens: *Withrell v. Murphy*, 154-82; *Fisher v. Bank*, 132-769; *Bank v. Bank*, 127-432; *Pelletier v. Lumber Co.*, 123-596. Receiver's title has priority over judgment docketed after appointment and before qualification: *Hardware Co. v. Holt*, 173-308—and over unregistered mortgages, etc., *Observer Co. v. Little*, 175-42.

Vesting of property in receiver is not a change of ownership that would forfeit insurance policy: *Pants Co. v. Ins. Co.*, 159-78.

For duty of officers of defunct corporation to turn over corporate property to receiver, see *Young v. Rollins*, 90-125.

1211. May send for persons and papers; penalty for refusing to answer. The receiver has power to send for persons and papers, and to examine any persons, including the creditors, claimants, president, directors, and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills, choses in action, real and personal estate and effects of every kind; and also respecting its debts, obligations, contracts, and liabilities, and the claims against it; and if any person refuses to be sworn or affirmed, or to make answers to such questions as may be put to him, or refuse to declare the whole truth touching the subject-matter of the examination, the court may, on report of the receiver, commit such person as for contempt.

Rev., s. 1227; 1901, c. 2, s. 78.

Duty of receiver to investigate claim: *Black v. Power Co.*, 158-468.

1212. Proof of claims; time limit. All claims against an insolvent corporation must be presented to the receiver in writing; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver directs, and shall produce such books and papers relating to the claim as shall be required. The receiver has power to examine under oath or affirmation all witnesses produced before him touching the claim, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination. The court may limit the time within which creditors may present and prove to the receiver their respective claims against the corporation, and may bar all creditors and claimants failing to do so within the time limited from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, must be given to creditors of such limitation of time.

Rev., ss. 1228, 1229; 1901, c. 2, ss. 81, 82.

Court may limit time for creditors to present claims: *Black v. Power Co.*, 158-468—or may permit filing after time limited, *Hardware Co. v. Holt*, 173-304; see *Bank v. Creditors*, 80-9.

Manner of presenting claims: *Black v. Power Co.*, 158-468. All claims should be heard and disposed of before receiver discharged: *Lenoir v. Imp. Co.*, 117-472—and officer filing claim for salary should be allowed opportunity to show contract with company for entire year made before appointment of receiver: *Ibid.*

1213. Report on claims to court; exceptions and jury trial. It is the duty of the receiver to report to the term of the superior court subsequent to a finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within ten days after notice of the finding by the

receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions.

Rev., s. 1230; 1901, c. 2, s. 83.

Claims reported to and acted on by court: *Black v. Power Co.*, 158-468.

1214. Property sold pending litigation. When the property of an insolvent corporation is at the time of the appointment of a receiver incumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of incumbrance, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale, to be disposed of as the court directs.

Rev., s. 1232; 1901, c. 2, s. 86.

1215. Compensation and expenses. Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services, not to exceed five per cent upon receipts and disbursements, and the costs and expenses of administration of his trust and of the proceedings in said court, to be first paid out of said assets.

Rev., s. 1226; 1901, c. 2, s. 88.

Costs and expenses of receivership are to be paid first out of assets, but are not prior to mortgage, subject to which corporation acquired the property: *Humphrey v. Lumber Co.*, 174-514. Error to tax costs against first mortgage whose priority established over general creditors: *Lumber Co. v. Lumber Co.*, 150-281.

Commissions are part of costs and expense of suit, and should be paid as such: *Cotton Mills v. Cotton Mills*, 115-475; *Simmons v. Allison*, 119-556—and are usually taxed against losing party, *Simmons v. Allison*, 119-556—though court below may in its discretion divide same between parties, *Ibid.*

Allowance of commissions and counsel fees by court prima facie correct, and supreme court will alter same only where clearly inadequate or excessive: *Graham v. Carr*, 133-449. Allowance of commissions is reviewable when made on wrong principle or when clearly inadequate or excessive: *Bank v. Bank*, 126-531. Allowance of commissions premature before work finished, as it cannot be determined before then whether commissions excessive or inadequate: *Delafield v. Construction Co.*, 118-105. Order allowing commissions is a final judgment, and appeal lies: *Bank v. Bank*, 126-531.

Rate not exceeding five per cent on receipts and disbursements seems to be limit allowed: *Bank v. Bank*, 126-531, and cases cited.

1216. Debts provided for, receiver discharged. When a receiver has been appointed, and it afterwards appears that the debts of the corporation have been paid, or provided for, and that there remains, or can be obtained by further contributions, sufficient capital to enable it to resume its business, the court may, in its discretion, a proper case being shown, discharge the receiver, and decree that the property, rights, and franchises of the corporation revert to it, and thereafter the corporation may resume control of the same, as fully as if the receiver had never been appointed.

Rev., s. 1220; 1901, c. 2, s. 76.

1217. Reorganization. When a majority in interest of the stockholders of the corporation have agreed upon a plan for its reorganization and a resumption by it of the management and control of its property and business, the corporation may, with the consent of the court, upon the reconveyance to it of its property and franchises, either by deed or decree of the court, mortgage the same for an amount necessary for the purposes of the reorganization; and may issue bonds or other evidences of indebtedness, or additional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purposes of the reorganization.

Rev., s. 1221; 1901, c. 2, s. 77.

ART. 11. TAXES AND FEES

1218. Taxes for filing. For filing a certificate or other paper in the office of the secretary of state, for the corporate purposes named below, the following taxes shall be paid to the state treasurer for the use of the state:

1. Certificate of incorporation, or extension or renewal of corporate existence, 20 cents for each \$1,000 of the total amount of capital stock authorized, but in no case less than \$25.

2. Increase of capital stock, 20 cents for each \$1,000 of the total increase authorized, but in no case less than \$20.

3. Change of name or nature of business, amended certificate of incorporation (other than those otherwise provided for in this section), decrease of capital stock, increase or decrease of par value or number of shares, \$20.

4. Dissolution or change of principal place of business, \$5.

The above taxes are not cumulative, but when two or more are incurred at the same time, the largest single tax applicable shall apply. No such taxes need be paid by a benevolent, religious, educational, or charitable organization with no capital stock, or by a corporation created by virtue of section 1123 under this chapter for public parks and drives.

Rev., s. 1233; 1901, c. 2, s. 96; 1911, c. 155, s. 5.

1219. Fees to secretary of state and clerk of superior court. The secretary of state shall collect and retain the following fees: For recording the certificate of incorporation, one dollar for the first three copy sheets and ten cents for each copy sheet in excess thereof, and for official seal one dollar; for copying, the same fees as for recording. There shall be paid the clerk of the superior court for recording the certificate of incorporation a fee of three dollars.

Rev., s. 1234; Code, s. 680; 1893, c. 318, s. 4; 1901, c. 2, s. 96; 1917, c. 231, s. 84.

1220. Corporate property in receiver's hands liable for taxes. When listed or unlisted taxes are duly assessed and charged against and are due and unpaid by a corporation with chartered rights, doing business or with property in this state, or against a person residing in, doing business, or having property in this state, it is competent for an officer or tax collector who has the tax list to levy upon, seize, and take possession of that part of the property belonging to the corporation necessary to pay such taxes, even though the property is in the hands of a receiver duly appointed; and the officer or collector need not apply to the court appointing the receiver, or with jurisdiction of the property or the

receiver, for an order for the payment of said taxes. This section applies to all taxes, whether state, county, town or municipal, and shall be liberally construed in favor of and in furtherance of the collection of such taxes.

Rev., ss. 1236, 1237; Code, ss. 699, 670.

ART. 12. REORGANIZATION

1221. Corporations whose property and franchises sold under order of court or execution. When the property and franchises of a public-service corporation are sold under a judgment or decree of a court of this state, or of the district court of the United States, or under execution, to satisfy a mortgage debt or other encumbrance thereon, such sale vests in the purchaser all the right, title, interest and property of the parties to the action in which such judgment or decree was made, to said property and franchise, subject to all the conditions, limitations and restrictions of the corporation; and the purchaser and his associates, not less than three in number, thereupon become a new corporation, by such name as they select, and they are the stockholders in the ratio of the purchase money by them contributed; and are entitled to all the rights and franchises and subject to all the conditions, limitations and penalties of the corporation whose property and franchises have been so sold. In the event of the sale of a railroad in foreclosure of a mortgage or deed of trust, whether under a decree of court or otherwise, the corporation created by or in consequence of the sale succeeds to all the franchises, rights and privileges of the original corporation only when the sale is of all the railroad owned by the company and described in the mortgage or deed of trust, and when the railroad is sold as an entirety. If a purchaser at any such sale is a corporation, such purchasing corporation shall succeed to all the properties, franchises, powers, rights, and privileges of the original corporation: Provided, that this shall not affect vested rights and shall not be construed to alter in any manner the public policy of the state now or hereafter established with reference to trusts and contracts in restraint of trade.

Rev., s. 1238; Code, ss. 697, 698; 1897, c. 305; 1901, c. 2, s. 99; 1913, c. 25, s. 1; 1919, c. 75.

Method of reorganization under this article (sections 1221-1224) examined: *Wood v. Staton*, 174-245. Reorganization is made and certificate filed as evidence of corporate existence: *Ibid.* Section applies to judicial sale of property, not to lease: *Hyder v. R. R.*, 167-584. Corporate property and franchise must be sold together: *James v. R. R.*, 121-527; *Bradley v. R. R.*, 119-927 (Appx.); *Pipe and Foundry Co. v. Howland*, 111-625; *Gooch v. McGee*, 83-59. Sale of railroad under second mortgage, and conveyance thereunder subject to first mortgage, does not extinguish corporate existence of company: *James v. R. R.*, 121-523—nor release corporation from liability to public for manner in which railroad operated, *Ibid.*—and in order that sale should work dissolution, another corporation must take the place, and assume obligations of old corporation, *Ibid.*—though, when this is done, corporation will be domestic corporation, *Ibid.* See discussion of *James v. R. R.*, 121-523, in *Coal, etc., Co. v. R. R.*, 144-732. Upon foreclosure of mortgage of railroad, purchaser takes rights acquired by company in relation to right of way under charter: *Barker v. R. R.*, 137-214; *Hendrick v. R. R.*, 101-617.

Dissolution effected by distribution of assets of insolvent corporation, see section 1198; by bankruptcy, see section 1190.

1222. New owners to meet and organize. The persons for whom the property and franchises have been purchased shall meet within thirty days after the delivery of the conveyance made by virtue of said process or decree, and organize the new corporation, ten days written notice of the time and place of the

meeting having been given to each of the said persons. At this meeting they shall adopt a corporate name and seal, determine the amount of the capital stock of the corporation, and shall have power and authority to make and issue certificates of stock in shares of such amounts as they see fit. The corporation may then, or at any time thereafter, create and issue preferred stock to such an amount, and at such time, as they may deem necessary.

Rev., ss. 1239, 1240; 1901, c. 2, ss. 100, 101, 102.

1223. Certificate to be filed with secretary of state. It is the duty of the new corporation, within one month after its organization to make certificate thereof, under its common seal, attested by the signature of its president, specifying the date of the organization, the name adopted, the amount of capital stock, and the names of its president and directors, and transmit the certificate to the secretary of state, to be filed and recorded in his office, and there remain of record. A certified copy of this certificate so filed shall be recorded in the office of the clerk of the superior court of the county in which is located the principal office of the corporation, and is the charter and evidence of the corporate existence of the new corporation.

Rev., s. 1241; 1901, c. 2, s. 103.

1224. Effect on liens and other rights. Nothing contained in this article in any manner impairs the lien of a prior mortgage, or other encumbrance, upon the property or franchises conveyed under the sale, when by the terms of the process or decree under which the sale was made, or by operation of law, the sale was made subject to the lien of any such prior mortgage or other encumbrance. No such sale and conveyance or organization of such new corporation in any way affects the rights of any person, body politic, or corporate, not a party to the action in which the decree was made, nor of the said party except as determined by the decree. When a trustee has been made a party to such action and his cestui que trust, for reason satisfactory to the court, has not been made a party thereto, the rights and interest of the cestui que trust are concluded by the decree.

Rev., s. 1241; 1901, c. 2, s. 103.

CHAPTER 23

COSTS

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- 1225. Items allowed as costs.
- 1226. Summary judgment for official fees.
- 1227. Sureties on prosecution or appeal bonds liable for costs.
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ART. 2. WHEN STATE LIABLE FOR COSTS.

- 1236. Civil actions by the state; joinder of private party.
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- 1241. Costs allowed plaintiff; limited by recovery; several suits on one instrument.
- 1242. Costs allowed to defendant.
- 1243. Costs allowed or not, in discretion of court.
- 1244. Costs allowed either party or apportioned in discretion of court.
- 1245. Petitioner to pay costs in certain cases.
- 1246. Defendant unreasonably defending after notice of no personal claim to pay costs.
- 1247. Suits in forma pauperis, no costs unless recovery.
- 1248. Party seeking recovery on usurious contract, no costs.
- 1249. Costs in special proceedings.
- 1250. Fees and disbursements in supplemental proceedings.
- 1251. Costs of laying off homestead and exemptions.
- 1252. Costs of reassessment of homestead.
- 1253. Costs against infant plaintiff; guardian responsible.
- 1254. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party.
- 1255. Costs against assignee after action brought.

ART. 4. COSTS ON APPEAL.

- 1256. Costs on appeal generally.
- 1257. Costs of transcript on appeal taxed in supreme court.
- 1258. Costs on appeal from justices of the peace.

ART. 5. LIABILITY OF COUNTIES IN CRIMINAL ACTIONS.

- 1259. County to pay costs in certain cases; if approved, audited and adjudged.
- 1260. Local modifications as to counties paying costs.
- 1261. Liability of county when defendant acquitted in supreme court.
- 1262. County where offense committed liable for costs.
- 1263. Liability of counties, where trial removed from one county to another.
- 1264. Statement of costs against county to be filed with commissioners.
- 1265. Expenses in conveying prisoner to another county; provision for payment.
- 1266. Costs of investigating lynchings.

ART. 6. LIABILITY OF DEFENDANT IN CRIMINAL ACTIONS.

- 1267. Costs against defendant convicted, confessing, or submitting.
- 1268. Defendant imprisoned not discharged until costs paid.
- 1269. Judgment confessed or bond given to secure fine and costs.
- 1270. Arrest for nonpayment of fine and costs.

ART. 7. LIABILITY OF PROSECUTOR FOR COSTS.

1271. Prosecutor liable for costs in certain cases; court determines prosecutor.
 1272. Imprisonment of prosecutor for nonpayment of costs, if prosecution frivolous.

ART. 8. FEES OF WITNESSES.

1273. Not entitled to fees in advance.
 1274. Witness to prove attendance; action for fees.
 1275. Witness tickets to be filed; only two witnesses for single fact.
 1276. Local: trafficking in witness tickets regulated.
 1277. Fees of witnesses before jury of view, commissioner, etc.
 1278. Fees of witnesses before grand jury.
 1279. Local modifications as to fees of witnesses before grand jury.
 1280. Pay of witnesses in criminal cases.
 1281. County to pay state's witnesses in certain cases.
 1282. Local modifications as to counties paying state's witnesses.
 1283. County to pay defendant's witnesses in certain cases.
 1284. Fees of state witnesses; two only in misdemeanors; one fee for day's attendance.
 1285. On appeal from justice only two witnesses bound over.
 1286. Discharge of witnesses for state; certificate of attendance by solicitor.
 1287. Witness not paid without certificate; court's discretion.

ART. 9. CRIMINAL COSTS BEFORE JUSTICES.

1288. Liability for criminal costs before justice.
 1289. Imprisonment of defendant for nonpayment of fine and costs.

ART. 1. GENERALLY

1225. Items allowed as costs. To either party for whom judgment is given there shall be allowed as costs his actual disbursements for fees to the officers, witnesses, and other persons entitled to receive the same.

Rev., s. 1249; Code, s. 528.

As to costs in criminal cases, see sections 1267, 1271, 1283.

Costs were not recoverable at common law and are regulated now by statute: *State v. Means*, 175-820—dependent upon statute, *Costin v. Baxter*, 29-111; *Clerk's Office v. Comrs.*, 121-29, and cases cited—and by our statute the party who obtains judgment is entitled to costs, *Costin v. Baxter*, 29-111; *Vestal v. Sloan*, 83-555. Where plaintiff prevails in part of his action he is entitled to cost: *Vanderbilt v. Johnson*, 141-370; *Field v. Wheeler*, 120-264; *Ferrabow v. Green*, 110-416; *Horton v. Horne*, 99-219—as where he alleges two causes of action and recovers on one, *Cotton Mill v. Hosiery Mills*, 154-462. Nominal damages carries costs: *Britton v. Ruffin*, 123-67. No part of costs can be taxed against party recovering judgment: *Williams v. Hughes*, 139-20; *Wall v. Covington*, 76-150; *Field v. Wheeler*, 120-270; *Wooten v. Walters*, 110-251; *Horton v. Horne*, 99-219. But prevailing party taxed with costs of unsuccessful attempt to enforce judgment: *Norris v. Luther*, 101-196.

Costs against plaintiff failing to recover over amount tendered by defendant: *Smith v. B. and L. Assn.*, 119-257; *Coward v. Comrs.*, 137-299; *Pollock v. Warwick*, 104-638; *Murray v. Windley*, 29-201.

Costs in trial court follow final judgment therein: *Smith v. R. R.*, 148-334; *Williams v. Hughes*, 139-16—except in few exceptional instances: *Dodson v. R. R.*, 133-624; *Smith v. R. R.*, 148-334. Rule that costs follow final judgment applies also in criminal cases; hence where prisoner was convicted, but afterwards acquitted on new trial, his costs in both trials taxable against county: *State v. Horne*, 119-853. On appeal party finally losing entitled to set off such costs as he has properly paid on successful appeals, including transcripts, etc.: *Smith v. R. R.*, 148-334.

Only fees of witnesses duly subpoenaed and examined or tendered can be taxed against party cast, and then not more than two to prove one material fact: *Cureton v. Garrison*, 111-271; *Sitton v. Lumber Co.*, 135-540; *Moore v. Guano Co.*, 136-248; *Chadwick v. Ins. Co.*, 158-380; *Loftis v. Baxter*, 66-340; see, also, *Stern v. Herren*, 101-516—but this does not apply to cases of nonsuit: *Henderson v. Williams*, 120-339. Fees of absent witness only when materiality of his evidence shown and that absence due to sickness or other excusable cause: *Hobbs v.*

R. R., 151-134. While not more than two witnesses to a single point may be taxed against losing party in a civil action, party who subpoenaed them still liable for their compensation: *State v. Massey*, 104-877.

Attorney's fees not taxed as costs: *Midgett v. Vann*, 158-128.

Motion to retax is collateral matter, not a reopening of case, and may be made within twelve months: *Chadwick v. Ins. Co.*, 158-380, and cases cited. As to retaxing costs in action where plaintiff was required to pay accrued costs to get a continuance, but judgment finally rendered for him, see *Owen v. Paxton*, 122-770. Denial of motion to retax, when appealable: *Van Dyke v. Ins. Co.*, 174-78.

Whether judgment for costs merely is appealable, see under section 1256.

As to whether item properly chargeable as costs, or whether, taking case below as properly decided, the costs are properly adjudged, are questions reviewable on appeal: *State v. Horne*, 119-853, and cases cited therein.

MISCELLANEOUS POINTS. Defendant cannot bar plaintiff's right to costs by admitting, at close of evidence, his right to relief demanded: *Rawls v. White*, 127-17. Referee's fees are costs and prorate with other items of costs; not preferred debt against administrator: *Cobb v. Rhea*, 137-295. See, also, as to referee's fees, section 1244 (6). Where arbitrator's report objected to, costs awarded against party objecting: *Knight v. Holden*, 104-107. Costs in processioning proceedings must not be adjudged until final determination: *Roberts v. Dickey*, 110-67. Where suit abates by death, each party liable for own costs: *Officers v. Taylor*, 12-99. Costs adjudged against married woman, but not made charge against her separate property: *LaRoque v. Kennedy*, 156-360, 161-459. Where mortgagor sues mortgagee for usury and to restrain sale under mortgage, defendant entitled to costs if he recovers judgment for mortgage debt, though issue of usury found against him: *Cook v. Patterson*, 103-127. Defendant establishing right to betterments entitled to costs: *Vann v. Newsome*, 110-122.

1226. Summary judgment for official fees. If any officer, to whom fees are payable by any person, fails to receive them at the time the service is performed, he may have judgment therefor on motion to the court in which the action is or was pending, upon twenty days notice to the person to be charged, at any time within one year after the termination of the action in which the same was performed. If the motion for judgment be in behalf of the clerk of the superior court, it shall be made to the judge of the court in or out of term.

Rev., s. 1250; Code, s. 3760; 1868-9, c. 279, s. 561.

Clerk can have judgment, on motion, for his costs, when not paid: *Andrews v. Whisnant*, 83-447. Judgment in favor of officers for fees, if docketed, is a lien on land: *Sheppard v. Bland*, 87-167. Execution can issue, even though defendant in execution is the successful party: *Clerk v. Wagoner*, 26-131.

This section permits a motion to retax costs to be made in favor of officer within one year after termination of action: *In re Smith*, 105-169; see *Owen v. Paxton*, 122-770. Clerk may demand fee in advance for docketing transcript; appellant's undertaking does not cover this fee: *Dunn v. Clerk's Office*, 176-50.

1227. Sureties on prosecution or appeal bonds liable for costs. When an action is brought in any court in which security is given for the prosecution thereof, or when any case is brought up to a court by an appeal or otherwise, in which security for the prosecution of the suit has been given, and judgment is rendered against the plaintiff for the costs of the defendant, the appellate court shall also give judgment against the surety for said costs, and execution may issue jointly against the plaintiff and his surety.

Rev., s. 1251; Code, s. 543; R. C., c. 31, s. 126; 1831, c. 46; 1913, c. 189, s. 1.

Section applies in supreme court, where judgment may be given on plaintiff's prosecution bond filed in superior court: *Kenney v. R. R.*, 166-566—and applies to defendant's defense bond in action for land: *Grimes v. Andrews*, 171-367.

Recovery on bonds to secure costs may be had in actions in which they are given: *McCall v. Zachary*, 131-466.

1228. Execution for unpaid fees; itemized bill of costs to be annexed. The clerks of the supreme, superior and criminal courts, where suits are determined and the fees are not paid by the party from whom they are due, shall sue out executions, directed to the sheriff of any county in the state, who shall levy them as in other cases; and to the said execution shall be annexed a bill of costs, written in words so as plainly to show each item of costs and on what account it is taxed; and all executions for costs, issuing without such a bill annexed, shall be deemed irregular, and may be set aside as to the costs, at the return term, at the instance of him against whom it is issued.

Rev., s. 1252; Code, s. 3762; R. C., c. 102, s. 24.

Order taxing costs is in effect a judgment, and when docketed is lien on land enforceable by judgment: Sheppard v. Bland, 87-163; see, also, King v. Featherston, 20-259.

1229. Jurors' tax fees. On every indictment or criminal proceeding, tried or otherwise disposed of in the superior or criminal courts, the party convicted, or adjudged to pay the costs, shall pay a tax of four dollars. In every civil action in any court of record the party adjudged to pay the costs shall pay a tax of five dollars; but this tax shall not be charged unless a jury shall be impaneled. Said tax fees shall be charged by the clerk in the bill of costs, and collected by the sheriff, and by him paid into the county treasury. And the fund thus raised in any county shall be set apart for the payment of the jurors attending the courts thereof.

Rev., s. 1253; Code, s. 732; R. C., c. 28; 1830, c. 1; 1879, c. 325; 1881, c. 249; 1905, c. 348; 1909, c. 1; 1919, c. 319.

1230. In criminal cases, not demandable in advance. In all cases of criminal complaints before justices of the supreme court, judges of the superior and criminal courts, justices of the peace and other magistrates having jurisdiction of such complaints, the officers entitled by law to receive fees for issuing or executing process are not entitled to demand them in advance. Such officers shall indorse the amounts of their respective fees on every process issued or executed by them, and return the same to the court to which it is returnable.

Rev., s. 1254; Code, s. 1173; 1868-9, c. 178, subch. 3, s. 40.

1231. Clerk to state in detail in entry of judgment. The clerk shall insert in the entry of judgment the allowances for costs allowed by law, and the necessary disbursements, including the fees of officers and witnesses, and the reasonable compensation of referees and commissioners in taking depositions. The disbursements shall be stated in detail. When it is necessary to adjust costs in any interlocutory proceedings, or in any special proceedings, the same shall be adjusted by the clerk of the court to which the proceedings were returned, except in those matters in which the allowance is required to be made by the judge.

Rev., s. 1255; Code, s. 532.

1232. Clerk to itemize bills of criminal costs; approval of solicitor. It is the duty of the clerks of the several courts of record, at each term of the court, to make up an itemized statement of the bill of costs in every criminal action tried or otherwise disposed of at said term, which shall be signed by the clerk and approved by the solicitor.

Rev., s. 1256; Code, s. 733; 1873-4, c. 116; 1879, c. 264.

1233. Justices required to itemize costs. In all trials before justices of the peace any party, plaintiff or defendant, may demand of the justice of the peace before whom the trial is held an itemized statement of the costs of the action. Upon such demand it shall be the duty of the justice to furnish the statement demanded. No person shall be compelled to pay any cost in any trial before a justice of the peace until an itemized statement of the costs has been made out and given to the party charged. It shall be the duty of the justice to insert in the entry of the judgment in every criminal action tried or otherwise disposed of by him a detailed statement of the different items of cost, and to whom due.

Rev., ss. 1257, 2789; Code, s. 734; 1887, c. 297.

Full discussion of costs in criminal cases in courts of justices of the peace: *Merrimon v. Comrs.*, 106-369.

1234. Justice of the peace refusing to furnish bill of costs. If any justice of the peace before whom any trial is held shall refuse to furnish an itemized bill of costs, when demanded by the plaintiff or defendant, he shall be guilty of a misdemeanor, and upon conviction shall be punished at the discretion of the court.

Rev., s. 3588; Code, s. 734; 1887, c. 297.

1235. Bills of costs open to the public. Every bill of costs shall at all times be open to the inspection of any person interested therein.

Rev., s. 1258; Code, s. 735; 1873-4, c. 116.

ART. 2. WHEN STATE LIABLE FOR COSTS

1236. Civil actions by the state; joinder of private party. In all civil actions prosecuted in the name of the state, by an officer duly authorized for that purpose, the state shall be liable for costs in the same cases and to the same extent as private parties. If a private person be joined with the state as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the state till after execution issued therefor against such private party and returned unsatisfied.

Rev., s. 1259; Code, s. 536.

Incidental bills of cost (except certain ones mentioned) for failure of actions authorized by state are not "expenses of the state government" within the meaning of the act providing that certain taxes shall be applied to their payment: *Garner v. Worth*, 122-250.

Injunction asked for by state dissolved, carries costs against state: *State v. R. R.*, 74-287. If plaintiff, solicitor and relator, to vacate oyster entry in name of state be nonsuited, county not liable for costs: *Blount v. Simmons*, 118-9.

When solicitor ordered to bring action as relator in name of state, state liable for costs: *Blount v. Simmons*, 120-19, 119-50.

Supreme court has no original jurisdiction of clerk's claim against state for costs: *Miller v. State*, 134-270.

As to distinction between suits where state brings for benefit of individual and for public benefit, as to costs, see *State v. McGalliard*, 62-346; *State v. King*, 23-22.

1237. Civil actions by and against state officers. In all civil actions depending, or which may be instituted, by any of the officers of the state, or which have been or shall be instituted against them, when any such action is brought or defended pursuant to the advice of the attorney-general, and the same is decided against such officers, the costs thereof shall be paid by the state treasurer upon the warrant of the auditor for the amount thereof as taxed.

Rev., s. 1260; Code, s. 3373; 1874-5, c. 154.

1238. **Actions by state for private persons, etc.** In an action prosecuted in the name of the state for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the state.

Rev., s. 1261; Code, s. 537.

1239. **Costs of county in certain bribery prosecutions to be a charge against state.** The expenses incurred by any county in investigating and prosecuting any charge of bribery or attempt to bribe any state officer or member of the general assembly within said county, and of receiving bribes by any state officer or member of the general assembly in said county, shall be a charge against the state, and the properly attested claim of the county commissioners shall be paid by the treasurer of the state.

Rev., s. 1262; Code, s. 742; 1868-9, c. 176, s. 6; 1874-5, c. 5.

1240. **On appeal by state to supreme court of United States.** In all cases, whether civil or criminal, to which the state of North Carolina is a party, and which are carried from the courts of this state, or from the district court of the United States, by appeal or writ of error, to the United States circuit court of appeals, or to the supreme court of the United States, and the state is adjudged to pay the costs, it is the duty of the attorney-general to certify the amount of such costs to the auditor, who shall thereupon issue a warrant for the same, directed to the treasurer, who shall pay the same out of any moneys in the treasury not otherwise appropriated.

Rev., s. 1263; Code, s. 538; 1871-2, c. 26.

ART. 3. CIVIL ACTIONS AND PROCEEDINGS

1241. **Costs allowed plaintiff; limited by recovery; several suits on one instrument.** Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

Recovery means ultimate recovery: *Williams v. Hughes*, 139-17. One not a party not liable for costs: *Loven v. Parson*, 127-301. One who sues in another's name without consent must pay costs incurred by that other: *Metcalf v. Alley*, 24-38. Section is subject to section 103: *Whitaker v. Whitaker*, 138-204. Section discussed in connection with sections 1242, 1243: *Yates v. Yates*, 170-533.

1. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial.

Consult *Vanderbilt v. Johnson*, 141-370; *Kennedy v. Maness*, 138-35; *Moore v. Angel*, 116-843; *Wooten v. Walters*, 110-251; *Ferrabow v. Green*, 110-414; *Currie v. Clark*, 101-321; *Spruill v. Arrington*, 109-192. Costs of survey and witness fees of surveyor taxable against losing party: *Porter v. Durham*, 79-596; see *Wileox v. -----*, 2-484. Where, in a proceeding to sell land for assets, defendants set up title to land, but issue found against them, all costs should be taxed against them except that of filing petition: *Noble v. Koonce*, 76-405. In action for trespass, where title disputed, plaintiff must be successful in both issues to be entitled to costs: *Murray v. Spencer*, 92-264. One successful in maintaining equitable defense against recovery of land on bare legal title entitled to costs: *Vestal v. Sloan*, 83-555; see *Patterson v. Ramsey*, 136-561.

Plaintiff entitled to costs where only part of land claimed is recovered unless defendant files disclaimer: *Swain v. Clemmons*, 175-240; *Bryan v. Hodges*, 151-413.

Costs in proceedings to establish boundary: *Staley v. Staley*, 174-640.

In case involving equitable jurisdiction between mortgagor and mortgagee, costs held to be discretionary; falls under section 1243: *Yates v. Yates*, 170-533, disapproving *Bruner v. Threadgill*, 93-225.

2. In an action to recover the possession of personal property.

Successful party in claim and delivery recovers costs: *Rawlings v. Neal*, 126-271; *Auto Co. v. Rudd*, 176-497. Where, in claim and delivery, plaintiff establishes title to portion of property, he is entitled to costs: *Field v. Wheeler*, 120-264; *Horton v. Horne*, 99-219; *Phillips v. Little*, 147-282. Where plaintiff recovers the personalty and defendant recovers counterclaim, the recoveries are distinct and costs in each taxed in favor of party succeeding therein: *Southerland v. Brown*, 176-187.

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

This subsection construed with section 1243 renders costs discretionary in equity cases as under old system: *Yates v. Yates*, 170-533. Upon judgment for plaintiff, defendant liable for costs, including costs of guardian ad litem: *Van Dyke v. Ins. Co.*, 174-78. In case for interpleader, if the stakeholder decides to litigate and withhold the property, he may be liable for costs: *Ibid.*

See *Williams v. Hughes*, 139-16.

4. In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recovers less than fifty dollars damages, he shall recover no more costs than damages.

In assault and battery where plaintiff recovers less than \$50, he gets no more costs than damages: *Palmer v. Rwy. and Electric Co.*, 131-249.

See as to slander under former statute: *Coates v. Stephenson*, 52-123.

5. When several actions are brought on one bond, recognizance, promissory note, bill of exchange or instrument in writing, or in any other case, for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided the party or parties proceeded against in such other action or actions were within the state and not secreted at the commencement of the previous action or actions.

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

1242. Costs allowed to defendant. Costs shall be allowed as of course to the defendant, in the actions mentioned in the preceding section, unless the plaintiff be entitled to costs therein. In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor or any of them.

Rev., s. 1266; Code, ss. 526, 527; C. C. P., s. 277.

Defendant recovers cost where he successfully maintains an equitable defense against recovery of land on bare legal title: *Patterson v. Ramsey*, 136-561; *Currie v. Clark*, 101-329; citing *Vestal v. Sloan*, 83-555—where he prevails in action of ejectment, *Kennedy v. Maness*, 138-35; *Wilson v. Wilson*, 174-755—where plaintiff fails in attempt to enforce his judgment, *Norris v. Luther*, 101-196—where plaintiff fails to set aside deed to grantee, *Brisco v. Norris*, 112-671—where plaintiff fails in action on covenant of warrant, *Britton v. Ruffin*, 123-67—where plaintiff fails to show both title and trespass in action for trespass where title in issue, *Murray v. Spencer*, 92-264—where plaintiff fails to establish his demand, *Griffith v. Winborne*, 105-403.

One defending in forma pauperis is entitled to cost where he successfully defends action to recover real estate: *Dempsey v. Rhodes*, 93-120, and cases cited on page 128.

Surety on prosecution bond not liable for plaintiff's cost, but costs which defendant recovers of plaintiff: *Smith v. Arthur*, 116-871; *Swain v. McCulloch*, 75-495.

Where several plaintiffs have been forced to withdraw from action because they did not file cost bond, not erroneous to enter judgment against them for cost: *Lafoon v. Shearin*, 95-391. Section cited, *Yates v. Yates*, 170-533.

1243. Costs allowed or not, in discretion of court. In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law.

Rev., s. 1267; Code, s. 527.

Cases in which costs have been adjudged in discretion of court: *Bond v. Cotton Mills*, 166-20; *Hockaday v. Lawrence*, 156-319; *Whitaker v. Whitaker*, 138-208; *Satterthwaite v. Good-year*, 137-305; *Sprinkle v. Wellborn*, 132-468; *Herndon v. R. R.*, 121-500; *Simmons v. Allison*, 119-556; *Wooten v. Walters*, 110-259; *McNamee v. Alexander*, 109-242; *Parton v. Boyd*, 104-422; *Smith v. Smith*, 101-468; *Kron v. Smith*, 96-386; *Gulley v. Macy*, 89-345.

In cases in equitable jurisdiction costs in discretion of court: *Yates v. Yates*, 170-533.

This section is modified by the statute with reference to costs in actions against executors and administrators: *Whitaker v. Whitaker*, 138-205.

Cases referring to this section: *Williams v. Hughes*, 139-18; *Patterson v. Ramsey*, 136-563; *Harrington v. Rawls*, 136-68; *Harrington v. Hatton*, 129-148; *Taylor v. Vann*, 127-245; *Gore v. Davis*, 124-234; *Reade v. Street*, 122-301; *Hawkins v. Cedar Works*, 122-92; *Ladd v. Ladd*, 121-121; *Crenshaw v. Johnson*, 120-270; *State v. Horne*, 119-855; *Smith v. B. and L. Assn.*, 119-262, 256; *Briseo v. Norris*, 112-677; *McNeill v. McBryde*, 112-412; *Ferrabow v. Green*, 110-416; *Jones v. Mial*, 85-597.

1244. Costs allowed either party or apportioned in discretion of court. Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

Section cited, *Hockaday v. Lawrence*, 156-319.

1. Application for year's support, for widow or children.
2. Caveats to wills.

It is discretionary with court to direct payment of costs out of estate: *Mayo v. Jones*, 78-406. In caveat costs in discretion of court: *In re Winston's Account*, 172-270.

3. Habeas corpus; and the court shall direct what officer shall tax the costs thereof.

4. In actions for divorce or alimony; and the court may both before and after judgment make such order respecting the payment of such costs as may be incurred by the wife, either by the husband or by her from her separate estate, as may be just.

See *Broom v. Broom*, 130-562.

5. Application for the establishment, alteration or discontinuance of a public road, cartway or ferry. The board of road supervisors or board of county commissioners may order the costs incurred before them paid in their discretion.

See *McDowell v. Asylum*, 101-656; *Davis v. Hill*, 33-9.

6. The compensation of referees and commissioners to take depositions.

Apportionment of referee's fees is in discretion of court: *Cobb v. Rhea*, 137-295; *Field v. Wheeler*, 120-264—and not reviewable, *Worthy v. Brower*, 93-492. Such fees to be taxed within discretion of judge, and where in rendering judgment he fails to tax such fees they may be taxed at a subsequent term: *Horner v. Water Co.*, 156-494. As to method of taxing under former statute, see *Young v. Connelly*, 112-646; *Wall v. Covington*, 76-150.

7. All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the chapter entitled Partition.

Costs in partition proceedings are within discretion of court and not reviewable: *Fortune v. Hunt*, 152-715. See *Hinnant v. Wilder*, 122-149; *Wilson v. Lumber Co.*, 131-163.

8. In all proceedings under the chapter entitled Drainage, except as therein otherwise provided.

9. In proceedings for reallocation of homestead for increase in value, as provided in the chapter, Civil Procedure.

See section 732.

See for provision as to discretionary costs in various proceedings: To charge heirs, etc., with ancestor's debts, sections 61, 65; to replace burnt or lost records, section 378; costs of answer of guardian ad litem in certain cases, section 453.

Rev., s. 1268; Code, ss. 2134, 2161, 1660, 1294, 2039, 2056, 533, 1422, 1323; 1889, c. 37; 1893, c. 149, s. 6.

1245. **Petitioner to pay costs in certain cases.** The petitioner shall pay the costs in the following proceedings:

1. In petitions for draining or damming lowlands.

2. In petitions for condemnation of water mill-sites when the petitioner is allowed to erect the mill; but when he is not allowed to erect the mill, the costs shall be paid by the person who is allowed to do so.

3. In petitions for condemnation of land for railroads, street railways, telegraph, telephone or electric power or light companies, or for water supplies for public institutions, or for the use of other quasi-public or municipal corporations; unless in the opinion of the superior court the defendant improperly refused the privilege, use or easement demanded, in which case the costs must be adjudged as to the court may appear equitable and just.

4. When the petition is refused.

Rev., s. 1269; Code, ss. 1299, 1855, 2013; 1893, c. 63; 1903, c. 562.

In condemnation proceedings judge may tax costs as it appears to him to be equitable and just: *R. R. v. Gahagan*, 161-190.

1246. **Defendant unreasonably defending after notice of no personal claim to pay costs.** In case of a defendant, against whom no personal claim is made, the plaintiff may deliver to such defendant with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects real or personal property, and that no personal claim is made against such defendant. If a defendant on whom such notice is served unreasonably defends the action, he shall pay costs to the plaintiff.

Rev., s. 1270; Code, s. 216.

1247. **Suits in forma pauperis, no costs unless recovery.** When any person sues as a pauper, no officer shall require of him any fee, and he shall recover no costs, except in case of recovery by him.

Rev., s. 1265; Code, s. 212; 1895, c. 149; 1868-9, c. 96, s. 3.

No officer shall require any fee of one suing as pauper: *Booshee v. Surles*, 85-90—but pauper must pay the clerk for transcript on appeal to supreme court in civil cases, *Speller v. Speller*,

119-356; *Brown v. House*, 119-622; *State v. Deyton*, 119-883; *Bailey v. Brown*, 105-127; *Andrews v. Whisnant*, 83-446—though he need not in criminal cases, *State v. Deyton*, 119-880; *State v. Nash*, 109-822.

The order in forma pauperis extends only to court making it: *Clark v. Dupree*, 13-411.
As to who may sue or defend in forma pauperis, see sections 494, 496.

1248. Party seeking recovery on usurious contracts, no costs. No costs shall be recovered by any party, whether plaintiff or defendant, who may endeavor to recover upon any usurious contract.

Rev., s. 1271; 1895, c. 69.

See sections 2305, 2306.

1249. Costs in special proceedings. The costs in special proceedings shall be as allowed in civil actions, unless otherwise specially provided.

Rev., s. 1272; Code, s. 541.

In proceedings to make real estate assets, where defendants set up title to land, which issue decided against them, defendants must pay costs: *Noble v. Koonce*, 76-405. As to costs in partition proceedings, see section 1244 (7).

1250. Fees and disbursements in supplemental proceedings. The court or judge may allow to the judgment creditor, or to any party examined in proceedings supplemental to execution, whether a party to the action or not, witnesses' fees and disbursements.

Rev., s. 1273; Code, s. 499; C. C. P., s. 273.

1251. Costs of laying off homestead and exemption. The costs and expenses of appraising and laying off the homestead or personal property exemptions, when the same is made under execution, shall be charged and included in the officer's bill of fees upon such execution or other final process; and when made upon the petition of the owner, they shall be paid by such owner, and the latter costs shall be a lien on said homestead.

Rev., s. 1274; Code, s. 510.

Lien exists in favor of officers for their fees, sheriff having right to retain costs out of amount collected, and no compromise between debtor and creditor can affect officer's remedy: *Long v. Walker*, 105-90. Sheriff can demand fees in advance, except in suit in forma pauperis: *Whitmore v. Hyatt*, 175-117.

1252. Costs of reassessment of homestead. If the superior court at term shall confirm the appraisal or assessment, or shall increase the exemption allowed the debtor or claimant, the levy shall stand only upon the excess remaining, and the creditor shall pay all the costs of the proceeding in court. If the amount allowed the debtor or claimant is reduced, the costs of the proceeding in court shall be paid by the debtor or claimant, and the levy shall cover the excess then remaining.

Rev., s. 1275; Code, s. 521.

Sheriff may demand fees for laying off exemptions before proceeding to act: *Whitmore v. Hyatt*, 175-117. See *Beavans v. Goodrich*, 98-217.

1253. Costs against infant plaintiff; guardian responsible. When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor.

Rev., s. 1276; Code, s. 534.

1254. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected out of the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defense. And when any claim against a deceased person is referred, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law.

Rev., s. 1277; Code, s. 535.

No judgment recoverable against executors, etc., for costs unless it appears that payment unreasonably delayed or neglected or that defendant refused to refer matter in controversy: *Whitaker v. Whitaker*, 138-205; *Morris v. Morris*, 94-613; *May v. Darden*, 83-238; *Thompson v. Smith*, 159-438—or acted in bad faith or was guilty of mismanagement, *Sugg v. Bernard*, 122-156; *Lewis v. Johnston*, 69-395; *Davis v. Duval*, 112-833; *Varnar v. Johnston*, 112-577. An administrator should be taxed with the cost of a suit subjecting him to liability for misapplication of funds: *Valentine v. Britton*, 127-57. Old case of interest: *Arrington v. Coleman*, 5-102. See, also, as to administrators and executors, sections 99, 103.

Costs in actions by and against trustee should be taxed against estate in hands of trustee except where trustee guilty of mismanagement or bad faith, when they can be taxed against him personally: *Smith v. King*, 107-278; *Lance v. Russell*, 165-626. A trustee, as against those for whose benefit the trust is created, will be allowed to apply so much of the fund to payment of costs and expenses: *Chemical Co. v. Johnson*, 101-223.

Section followed in cases of next friend: *Hockoday v. Lawrence*, 156-319. Where court finds that "next friend" officiously procured his appointment or was guilty of mismanagement or bad faith, it may tax him with costs: *Smith v. Smith*, 108-365.

Costs in cases of settlement with trustee or administrator: *Overman v. Lanier*, 157-544.

Referee's fees in action against deceased persons are taxed against losing party: *Wall v. Covington*, 76-150.

As to taxing costs against receiver, see *Battle v. Mayo*, 102-433.

1255. Costs against assignee after action brought. In actions in which the cause of action becomes by assignment after the commencement of the action, or in any other manner, the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party.

Rev., s. 1278; Code, s. 539.

See *Davis v. Higgins*, 92-203.

ART. 4. COSTS ON APPEAL

1256. Costs on appeal generally. On an appeal from a justice of the peace to a superior court, or from a superior court or a judge thereof to the supreme court, if the appellant recovers judgment in the appellate court, he shall recover the costs of the appellate court and those he ought to have recovered below had the judgment of that court been correct, and also restitution of any costs of the court appealed from which he has paid under the erroneous judgment of such court. If in any court of appeal there is judgment for a new trial, or for a new jury, or if the judgment appealed from is not wholly reversed, but partly affirmed and partly disaffirmed, the costs shall be in the discretion of the appellate court.

Rev., s. 1279; Code, s. 540.

Costs of transcript on appeal, section 1257.

Section discussed generally in *Williams v. Hughes*, 139-17.

Error in judgment of lower court, to which exception taken, entitles plaintiff to cost in supreme court, although only nominal damages recovered: *Lumber Co. v. Lumber Co.*, 137-131.

Where certain infant appellees were not represented by guardian or next friend it was deemed proper to tax costs of appeal against appellants: *Cooper, ex parte*, 136-130.

When party establishes a part of his demand in action to enforce lien he is entitled to costs of appeal: *Hogsd v. Lumber Co.*, 170-529.

Successful party on appeal entitled to entire costs, including preparation of record, but unnecessary matter in record taxed against appellant unless sent up by consent of appellee (Rules 22, 23): *Waldo v. Wilson*, 174-767, 177-461; and see under section 1257. Where judgment modified, costs on appeal taxed against appellee: *McLean v. Breece*, 113-393. Where judgment reversed, it includes cost: *Stafford v. Newsom*, 34-17.

On appeal from decision of clerk in eminent domain, if owner recovers damages, costs will follow verdict, though damages reduced: *Durham v. Davis*, 171-305.

Appellant from justice's court to superior court, if he recovers judgment, should recover all costs, including what he should have recovered in justice's court: *Kincaid v. Graham*, 92-155—but if appellant is a defendant appealing from justice's judgment refusing his counterclaim, and in superior court jury allows counterclaim, yet plaintiff gets judgment for balance due, costs of superior court should be awarded plaintiff, *Ibid*.

Where subject-matter of action is destroyed before appeal heard, judgment below is presumed to be correct until reversed, and no part of costs should be adjudged against appellee: *Taylor v. Vann*, 127-243; *Comrs. v. Gill*, 126-86; *Wikel v. Comrs.*, 120-452. There is no appeal from a judgment awarding costs only, and the supreme court will not entertain appeal upon the merits of a case just to settle the matter of costs: *Comrs. v. Gill*, 126-86; *Taylor v. Vann*, 127-243; *Herring v. Pugh*, 125-437; *State v. Horne*, 119-853; *Futrell v. Deanes*, 116-38; *Elliott v. Tyson*, 116-184; *Russell v. Campbell*, 112-404; *Pritchard v. Baxter*, 108-129; *State v. Byrd*, 93-624; *Hasty v. Funderburk*, 89-93; *State v. R. R.*, 74-287; *Martin v. Sloan*, 69-128; *Osborne v. Henry*, 66-354; but see *Blount v. Simmons*, 120-19; *Mills Co. v. Lytle*, 118-837; *Hobson v. Buchanan*, 96-444; *May v. Darden*, 83-237. For rule and exceptions, see *Van Dyke v. Ins. Co.*, 174-78—and that judgment involving merely taxation of bill of costs appealable, see *Waldo v. Wilson*, 177-461, citing cases.

Where appeal was awarded a partial new trial, as to one issue only out of several, costs of appeal are in court's discretion: *Rayburn v. Casualty Co.*, 142-376. When costs of appeal will be taxed against appellant in discretion of court: *Riley v. Sears*, 154-509. Where new trial granted in supreme court, the awarding of costs is discretionary: *Metal Co. v. R. R.*, 145-293; *Satterthwaite v. Goodyear*, 137-302. Where new trial awarded, but imperfect record sent up, costs divided: *Sprinkle v. Wellborn*, 132-469.

Appellant failing to show that order he appealed from is prejudicial; taxed with cost: *Harrington v. Rawls*, 136-65.

Where, pending appeal, statute under which action brought is repealed, judgment below as to cost will stand: *Wikel v. Comrs.*, 120-452.

In a fragmentary appeal judgment below as to division of costs will not be disturbed: *Rodman v. Calloway*, 117-13.

Judgment for costs in supreme court is rendered in that court: *Johnson v. R. R.*, 109-504.

Where both parties appeal from judgment dismissing action, which judgment is affirmed, defendant's appeal will be dismissed with cost: *Horne v. Horne*, 72-534.

Undertaking for costs required is to secure costs of appellee, therefore surety not liable for appellant's cost: *Morris v. Morris*, 92-142.

1257. Costs of transcript on appeal taxed in supreme court. When an appeal is taken from the superior court to the supreme court, the clerk of the superior court, when he sends up the transcript, shall send therewith an itemized statement of the costs of making up the transcript on appeal, and the costs thereof shall be taxed as a part of the costs of the supreme court.

Rev., s. 1280; 1905, c. 456.

Appellant will be taxed with cost of unnecessary and irrelevant matter in the record in case on appeal: *Overman v. Lanier*, 157-544; *Yow v. Hamilton*, 136-357; *Harris v. Davenport*,

132-697; Land Co. v. Jennett, 128-3; Gray v. Little, 127-304; Tobacco Co. v. McElwee, 96-71; Kivett v. McKeithan, 90-106—and this is so even though he succeeds in getting final judgment, Yow v. Hamilton, 136-363; Gray v. Little, 127-304; Kivett v. McKeithan, 90-106, and see under section 1256.

The successful party on appeal from superior court is entitled to recover back cost of transcript and certificate, though subsequently final judgment rendered in lower court against him: Dobson v. Rwy., 133-624.

Successful party on appeal will not be allowed to recover cost for printing record in excess of amount prescribed by supreme court rule, except in extraordinary cases where the necessity for such printing is made to appear: Roberts v. Lewald, 108-405.

Section changed rule as announced previously that cost of transcript is superior court, not supreme court, cost; see former rule in Roberts v. Lewald, 108-405.

1258. Costs on appeal from justices of the peace. 1. After an appeal from the judgment of a justice of the peace is filed with a clerk of a superior court, the costs in all subsequent stages shall be as herein provided for actions originally brought to the superior court.

Rev., s. 1281; Code, s. 542.

See Kincaid v. Graham, 92-154. Judge may or may not require prosecution bond of plaintiff on appeal from justice of the peace: Smith v. R. R., 72-62.

2. If, on appeal from a justice of the peace, judgment is entered for the plaintiff, and he shall not recover on his appeal a greater sum than was recovered before the justice, besides interest accrued since the rendition of the judgment, he shall not recover the costs of the appeal, but shall be liable at the discretion of the court to pay the same.

Rev., s. 1282; Code, s. 566; R. C., c. 31, s. 106; 1794, c. 414, s. 17.

ART. 5. LIABILITY OF COUNTIES IN CRIMINAL ACTIONS

1259. County to pay costs in certain cases; if approved, audited and adjudged. If there is no prosecutor in a criminal action, and the defendant is acquitted, or convicted and unable to pay the costs, or a nolle prosequi is entered, or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one-half their lawful fees; except in capital cases and in prosecutions for forgery, perjury, or conspiracy, when they shall receive full fees. No county shall pay any such costs unless the same is approved, audited and adjudged against the county as provided in this chapter.

Rev., s. 1283; Code, ss. 733, 739; R. C., c. 28, s. 8; R. S., c. 28, s. 12.

Section cited: State v. Means, 175-820.

Constitution exempts acquitted defendant from payment of necessary witness fees of defense, but does not require that they be paid by public: State v. Hicks, 124-829.

Where nol. pros. is entered upon indictment for homicide, as to murder in first degree, state's witnesses subsequently attending trial entitled to only half fees: Coward v. Comrs., 137-299.

COUNTY'S LIABILITY. This section and sections 1283, 1284, 1287 leave it in discretion of judge to refuse to direct fees of witnesses for the state or for an acquitted defendant to be paid by county, and from his decision there is no appeal: State v. Hicks, 124-829, citing numerous cases; State v. Ray, 122-1095.

State and county only liable for costs where statute provides: Guilford v. Comrs., 120-23. County cannot be taxed with any part of clerk's fees, or fees of other officers, in criminal actions if grand jury returns "not a true bill": Ibid.

County pays half fees when defendant is convicted and unable to pay, except in capital cases and in other cases mentioned in statute: State v. Saunders, 146-597; State v. Wheeler, 141-773.

The rule that costs follow final judgment applies in criminal as well as in civil cases; hence where prisoner was convicted but afterwards acquitted on new trial, payment of his witnesses in both trials was properly taxed against county: *State v. Horne*, 119-853.

COSTS IN APPELLATE COURT. Officers of supreme court are not entitled to collect from county the costs accruing in supreme court on appeal in criminal cases where defendant was allowed to appeal without bond and without order allowing him to appeal as a pauper and is insolvent: *Clerk's Office v. Comrs.*, 121-29; *Clerk's Office v. Comrs. of Richmond*, 79-598; but see section 1261.

Where, on appeal to superior court from a judgment of justice of the peace in a matter in which he had final jurisdiction, a nol. pros. was entered by solicitor, error to tax county with cost accrued in superior court: *State v. Shuffler*, 119-867; see, also, *Merrimon v. Comrs.*, 106-369.

FOR STATUTES APPLICABLE TO PARTICULAR COUNTIES, see sections 1260, 1279, 1282.

1260. Local modification as to counties paying costs. In the following counties the county shall pay one-half the fees specified when "not a true bill" is found: Alexander, Alleghany, Ashe, Bertie, Brunswick, Burke, Caldwell, Caswell, Catawba, Chatham, Clay, Craven, Davie, Duplin, Gaston, Granville, Greene, Henderson, Iredell, Jackson, Johnston, Jones, Lenoir, Lincoln, Macon, Madison, McDowell, Mecklenburg, Mitchell, Montgomery, Northampton, Onslow, Orange, Pamlico, Pender, Person, Pitt, Polk, Richmond, Robeson, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Wake, Watauga, Wilkes, Yadkin, Yancey.

Rev., s. 1283; Code, ss. 733, 739; 1907, cc. 94, 162, 208, 606, 627, 695; 1909, cc. 50, 107; P. L. 1911, cc. 76, 167; P. L. 1915, c. 22.

In Bladen County, where in a criminal proceeding before the grand jury a "true bill" is not found, the county shall pay one-half fees to clerks, sheriffs, officers, or constables who served any process in such proceeding.

1909, c. 183.

In Brunswick and Catawba counties the county shall not be liable for any part of the costs of justices of the peace, when "not a true bill" is found.

Rev., s. 1283; 1905, c. 598; 1909, c. 107.

In Montgomery County, in criminal cases, where the defendant is convicted in superior court, justices of the peace are entitled to full fees, if any are legally taxed in the bill of costs.

1909, c. 223.

In New Hanover County, in a criminal action, if there is no prosecutor, and the defendant is convicted and serves out his sentence on the public roads of the county, the county shall pay one-half fees as provided in the first sentence of this section.

Rev., s. 1283; 1905, c. 511.

As to half fees after road sentence in New Hanover, see *State v. Saunders*, 146-597.

1261. Liability of county when defendant acquitted in supreme court. If, on appeal to the supreme court in criminal actions, the defendant is successful, the county from which the appeal was taken shall pay one-half the costs of the appeal, and all such sums as have been properly expended by the defendant for the transcript of the record and printing done under the rules of the court.

Rev., s. 1284.

See *Clerk's Office v. Comrs.*, 121-29.

1262. County where offense committed liable for costs. In all cases where the county is liable to pay costs, that county wherein the offense is alleged to have been committed shall be adjudged to pay them.

Rev., s. 1285; 1889, c. 354.

Where judge below orders insolvent prosecutor to pay costs and he fails or is unable to pay, county in which offense committed is liable for same: *Pegram v. Comrs.*, 75-120; *Guilford v. Comrs.*, 120-28.

1263. Liability of counties, where trial removed from one county to another. The costs taxed in any case removed from another county for trial shall include the fees and expenses allowed for summoning the special venire, if one is ordered in the case, and the per diem and mileage of jurors who are impaneled to try the case, together with all other costs and expenses of the trial of the case, the amount of which, if not provided for by law, to be fixed by the presiding judge, so as to fully relieve the county in which the trial is had of all costs and expenses thereof. All fines, forfeitures, penalties and amercements imposed or levied in the case shall belong to the county from which the case was removed and be paid to the treasurer of said county. When a prisoner is sent from one county to another to be held for trial, or for any other cause or purpose, the county from which he is sent shall pay his prison expenses, unless the same is collected from him, on or before the first Monday in each month, and upon a failure to do so, it shall be the duty of the county to which he is sent to pay the same to the sheriff or jailer entitled to receive it at the same rate and under the same regulations as its own prison expenses are paid; and the county liable shall repay the same within thirty days after demand, and upon failing to do so the county to which the money is due shall be entitled to recover in the superior court, or, if the amount be within its jurisdiction, the court of justice of the peace of its own county, the amount due, with ten per cent additional, together with eight per cent interest on the sum due; and said courts of said county shall have full jurisdiction to hear, try and determine all actions and proceedings that may be brought for the purpose of enforcing the collection of the same. When the county to which such prisoner has been sent has paid the prison expenses and has made demand therefor upon the county liable as above provided and such demand be not complied with within ten days, the sheriff or jailer shall at once return such prisoner to the county from which such prisoner was sent, and deliver him to the sheriff or jailer thereof.

Rev., s. 1285; 1889, c. 354; 1901, c. 718.

1264. Statement of costs against county to be filed with commissioners. In all criminal actions where the county is liable in whole or in part for costs, it is the duty of the clerks of the courts to make out a statement of such costs from the record or docket, within thirty days after the hearing, trial, determination, or other disposition thereof, and file the same with the board of commissioners of the county.

Rev., s. 1286; Code, s. 736; 1873-4, c. 116, s. 3.

1265. Expenses in conveying prisoner to another county; provision for payment. When a sheriff or other officer arrests a person under a *capias* or other legal process, which requires him to have the person arrested before a court or judge of another county, and such sheriff or other officer is obliged to incur expense in the safe delivery of such person by reason of his failing to give bond for his appearance, or if the sheriff or other officer of the county to which the pris-

oner is to be carried incurs any expense in going for and conveying said prisoner to his county, then in either case the sheriff or other officer shall file with the court or judge issuing the *capias* or other legal process and with the register of deeds an itemized and sworn account of such expenses, which shall be presented by the register to the board of commissioners at their next regular meeting, to be audited by them. Such sworn statement shall be received by the said board as *prima facie* correct. Upon such auditing the board of commissioners shall cause to be issued to such sheriff or other officer an order on the county treasurer for the amount so audited and allowed by them, and shall notify the court or judge of their action, to the end that the amount so allowed shall be taxed in the costs to the use of the county.

Rev., s. 1287; 1885, c. 262; 1901, c. 64.

1266. Cost of investigating lynchings. In all cases of investigation and trial of the crime of lynching, the entire cost incurred in the prosecution, unless paid by the person or persons convicted, shall be paid by the county wherein the crime shall have been committed. And whenever any solicitor goes to a county to investigate a crime of breaking or entering a jail for the purpose of lynching, the county where such crime is committed shall pay the solicitor the sum of one hundred dollars for making the investigation.

Rev., s. 1288; 1893, c. 461, s. 6.

Section cited: *State v. Lewis*, 142-626.

ART. 6. LIABILITY OF DEFENDANT IN CRIMINAL ACTIONS

1267. Costs against defendant convicted, confessing, or submitting. Every person convicted of an offense, or confessing himself guilty, or submitting to the court, shall pay the costs of prosecution.

Rev., s. 1291; Code, s. 1211; R. C., c. 35, s. 46.

Section cited: *Abernathy v. Comrs.*, 169-631.

Pardon does not exempt one from payment of officer's cost: *State v. Mooney*, 74-98; but see *State v. Underwood*, 64-599.

The "costs of prosecution" are those incurred in the conduct of the prosecution, and do not include costs of defendant in his defense: *State v. Wallin*, 89-578. A witness for defendant has no right to have his ticket for attendance allowed in the bill of costs of the prosecution with which defendant is taxed: *Ibid.*—for it is a personal debt of defendant which witness may enforce by execution in the cause, *Ibid.*

Defendant liable for witness fees for entire time where *nol. pros.* entered and another indictment for same offense later returned, witnesses never having been discharged: *State v. Harshaw*, 4-230.

Expenses of transporting criminal insane person no part of costs of prosecution: *Neal v. Comrs.*, 85-420.

Fees due officers are vested rights and are not discharged when defendant receives unconditional pardon after conviction and sentence: *State v. Mooney*, 74-98; but see *State v. Underwood*, 64-599.

The legal effect of a conviction and judgment is to vest the right to the costs in those entitled to them: *State v. Crook*, 115-765.

Costs constitute no part of the punishment in criminal actions, though the payment of them may be considered in mitigation of sentence: *Ibid.*

Where judgment is directed by supreme court to be entered in lower court for punishment and costs, and at succeeding term judgment only for punishment entered, judgment may be entered at subsequent term *nunc pro tunc* for costs also against defendant and his sureties on his appeal to supreme court: *State v. Patterson*, 27-89.

Cases illustrating how insolvents are discharged: *State v. McNeely*, 92-829; *State v. Miller*, 97-451; *State v. Williams*, 97-414; *State v. Davis*, 82-610.

1268. Defendant imprisoned not discharged until costs paid. If the sentence be that the guilty person be imprisoned for a time certain, and that he pay the costs, there shall be added to it that he shall remain in prison, after the expiration of the fixed time for his imprisonment, until the costs shall be paid, or until he shall otherwise be discharged according to law.

Rev., s. 1292; Code, s. 905; 1868-9, c. 178.

1269. Judgment confessed or bond given to secure fine and costs. In cases where a court, mayor, or a justice of the peace permits a defendant convicted of any criminal offense to give bond or confess judgment, with sureties to secure the fine and costs which may be imposed, the acceptance of such security shall be upon the condition that it shall not operate as a discharge of the original judgment against the defendant nor as a discharge of his person from the custody of the law until the fine and costs are paid.

Rev., s. 1293; Code, s. 749; 1885, c. 364; 1879, c. 264.

Power of court to suspend judgment upon payment of costs discussed: *State v. Everitt*, 164-399; *State v. Hilton*, 151-687.

1270. Arrest for nonpayment of fine and costs. In default of payment of such fine and costs, it is the duty of the court at any subsequent term thereof, on motion of the solicitor of the state, to order a *capias* to issue to the end that such defendant may be again arrested and held for the fine and costs until discharged according to law; and a justice of the peace or mayor may at any subsequent time arrest the defendant and hold him for the fine and costs until discharged according to law.

Rev., s. 1294; Code, s. 750; 1885, c. 364; 1879, c. 264.

Suspending judgment on payment of costs, see under section 1269.

ART. 7. LIABILITY OF PROSECUTOR FOR COSTS

1271. Prosecutor liable for costs in certain cases; court determines prosecutor. In all criminal actions, if the defendant is acquitted, *nolle prosequi* entered, judgment against him arrested, or if the defendant is discharged from arrest for want of probable cause, the costs, including the fees of all witnesses summoned for the accused, whom the judge, court or justice of the peace before whom the trial took place shall certify to have been proper for the defense, shall be paid by the prosecutor, whether marked on the bill or warrant or not, whenever the judge, court or justice is of opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. And every judge, court or justice is hereby fully authorized to determine who the prosecutor is at any stage of a criminal proceeding, whether before or after the bill of indictment has been found, or the defendant acquitted: Provided, that no person shall be made a prosecutor after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecutor of record.

Rev., s. 1295; Code, s. 737; 1889, c. 34; R. C., c. 35, s. 37; 1799, c. 4, s. 19; 1800, c. 558; 1868-9, c. 277; 1874-5, c. 151; 1879, c. 49.

Section cited: *State v. Ownby*, 146-677.

When prosecution frivolous and malicious, prosecutor must pay cost: *State v. Butts*, 134-607; *State v. Jones*, 117-768; *State v. Baker*, 114-812; *State v. Lance*, 109-789; *State v. Carlton*, 107-958; *State v. Roberts*, 106-662; *State v. Hamilton*, 106-660; *State v. Dunn*,

95-697; *State v. Powell*, 86-640; *State v. Adams*, 85-560; *State v. Norwood*, 84-794; *State v. Cannady*, 78-541; *State v. Darr*, 63-516. Legislature has power to prescribe that prosecutor pay cost when prosecution frivolous or malicious: *State v. Cannady*, 78-541. Prosecutor in peace warrant failing to pay cost, where prosecution frivolous or malicious, can be imprisoned: *Ibid.*

Prosecutor insolvent and failing to pay costs, county liable: *Pegram v. Comrs.*, 75-120. Justice's judgment taxing prosecutor with cost is appealable: *State v. Byrd*, 93-627; *State v. Powell*, 86-640. Prosecutor cannot be taxed with cost where "not a true bill" is found: *State v. Horton*, 89-581—or where grand jury ignores the bill, *State v. Gates*, 107-832.

Error to tax costs of defendant's witnesses against prosecutor on a finding that prosecution was malicious and not for public good in the absence of a finding that the witnesses were proper for the defense: *State v. Jones*, 117-768. Prosecutor of an action "not for the public interest" properly adjudged to pay cost: *State v. Baker*, 114-812.

State cannot appeal from refusal of judge to mark one as prosecutor: *State v. Moore*, 84-724.

As to when prosecutor can be adjudged to pay cost in a magistrate's court, see *State v. Carlton*, 107-958. Solicitor's fee cannot be charged against prosecutor: *State v. Dunn*, 95-697.

Before prosecutor can be taxed with costs he is entitled to notice and hearing: *State v. Collins*, 169-323.

For notice to party of motion to mark him as prosecutor, see *State v. Jones*, 117-768; *State v. Hamilton*, 106-660; *State v. Norwood*, 84-794; *State v. Hughes*, 83-665; *State v. Crosset*, 81-579. The court may order *ex mero motu* that prosecutor be taxed with cost: *State v. Adams*, 85-560. One marked as prosecutor has notice of all subsequent proceedings, and he cannot make motion to set aside irregular judgment against him for costs after a year: *State v. Horton*, 89-581; see, also, *State v. Spencer*, 81-519; *State v. Owens*, 87-565.

Power of court to adjudge who is prosecutor and to tax him with costs exists at any stage of the proceeding: *State v. Stone*, 153-614. Prosecutor can be marked, upon notice given, after prosecution ended: *State v. Jones*, 117-772; *State v. Hughes*, 83-665—or, upon motion and notice to show cause, at a subsequent term, *State v. Sanders*, 111-700—and where he was present attending trial, judgment for costs may be entered in his absence where he left the courtroom before judgment, *State v. Owens*, 87-565; *State v. Spencer*, 81-519. Formerly the name of prosecutor had to be marked on bill before being sent to grand jury, but now it can be marked after acquittal, upon motion and notice: *State v. Hughes*, 83-665.

FINDINGS OF FACT. Prosecutor should not be taxed with cost without a previous finding of fact by court: *State v. Roberts*, 106-662.

Where taxation of costs could not be sustained because of failure to find prerequisite facts, new motion could be made several terms later: *State v. Sanders*, 111-702.

The findings by the judge below that prosecution was frivolous and malicious is conclusive and will support a judgment that prosecutor pay costs or in default thereof be imprisoned: *State v. Lance*, 109-789; *State v. Carlton*, 107-958; *State v. Hamilton*, 106-660; *State v. Dunn*, 95-697; *State v. Adams*, 85-560; *State v. Norwood*, 84-794; but see *State v. Powell*, 86-640. Before defendant's witnesses can be taxed against prosecutor, a finding that they were proper for the defense must be made: *State v. Jones*, 117-768.

1272. Imprisonment of prosecutor for nonpayment of costs, if prosecution frivolous. Every such prosecutor may be adjudged not only to pay the costs, but he shall also be imprisoned for the nonpayment thereof, when the judge, court, or justice of the peace before whom the case was tried shall adjudge that the prosecution was frivolous or malicious.

Rev., s. 1297; Code, s. 738; R. C., c. 35, s. 37; 1800, c. 558; 1879, c. 49; 1881, c. 176.

As to when prosecutor pays costs, see under section 1271. Costs of prosecution is not a debt within the constitutional inhibition against imprisonment for debt: *State v. Wallin*, 89-578; *State v. Cannady*, 78-539—and a prosecutor failing to pay costs adjudged against him may be imprisoned where court finds that prosecution was frivolous or malicious: *State v. Stone*, 153-614; *State v. Lance*, 109-789; *State v. Carlton*, 107-956; *State v. Roberts*, 106-662; *State v. Wallin*, 89-578; *State v. Cannady*, 78-539.

ART. 8. FEES OF WITNESSES

1273. Not entitled to fees in advance. Witnesses are not entitled to receive their fees in advance; but no witness in a civil action or special proceeding, unless summoned on behalf of the state or a municipal corporation, shall be compelled to attend more than one day, if the party by or for whom he was summoned shall, after one day's attendance, on request and presentation of a certificate, fail or refuse to pay what then may be due for traveling to the place of examination and for the number of days of attendance.

Rev., s. 1298; Code, s. 1368; 1868-9, c. 279, subch. 11, s. 3.

As to fees of witnesses, see section 3893; as to when fees generally are payable in advance, see section 3849.

Pauper must pay his witnesses: *Booshee v. Surles*, 85-91; *Bailey v. Brown*, 105-129. Witnesses in civil case, except for state or municipal corporation, refused compensation, need not attend but one day: *State v. Massey*, 104-881; see, also, *Carter v. Wood*, 33-22. Witness cannot be summoned before grand jury when mere matter of inquiry; he is entitled to fees when indorsed on bill as sworn and sent: *Lewis v. Comrs.*, 74-194. Witness tickets are merely evidence of attendance: *Moore v. Comrs.*, 70-340.

1274. Witness to prove attendance; action for fees. Every person summoned, who shall attend as a witness in any suit, before the clerk of the court, or before the referee or officer taking the testimony, ascertain by his own oath or affirmation the sum due for traveling to and from court, attendance and ferriage, which shall be certified by the clerk; and on failure of the party, at whose instance such witness was summoned (witnesses for the state and municipal corporations excepted), to pay the same previous to the departure of the witness from court, such witness may at any time sue for and recover the same from the party summoning him; and the certificate of the clerk shall be sufficient evidence of the debt. Where recovery may be had before a justice of the peace on a witness ticket, the justice shall deface it by writing the word judgment, and deliver the same to the person of whom it is recovered.

Rev., s. 1299; Code, s. 1369; R. C., c. 31, s. 73; 1777, c. 115, s. 46; 1796, c. 458; 1868-9, c. 279, subch. 11, ss. 2, 4.

A witness not subpoenaed cannot charge the losing party: *Stern v. Herren*, 101-516; *Thompson v. Hodges*, 10-318—nor can witness who is a nonresident, though subpoenaed, charge mileage even if he attends, *Ibid.*—and witnesses subpoenaed cannot be charged against losing party unless examined or sworn and tendered, *State v. Means*, 175-820; *Staley v. Staley*, 174-640; *Moore v. Guano Co.*, 136-248; *Sitton v. Lumber Co.*, 135-540; *Cureton v. Garrison*, 111-271; but see *Herring v. R. R.*, 144-208; *Loftis v. Baxter*, 66-340—except when nonsuit taken, *Henderson v. Williams*, 120-339—or if absent, unless shown to be material, *Hobbs v. R. R.*, 151-134. Only two witnesses to a material point can be charged losing party: *State v. Wheeler*, 141-777; *Ex parte Beekwith*, 124-115; *State v. Massey*, 104-881—except in action of slander, where more can prove in court's discretion, *Holmes v. Johnson*, 33-55—also except where "value" is to be proven, *Ex parte Beekwith*, 124-111.

All witnesses may recover from the party who subpoenaed them: *Sitton v. Lumber Co.*, 135-540; *Cureton v. Garrison*, 111-271; *Office v. Lockman*, 12-146—but they must prove their attendance before the clerk and get a ticket each term, *Thompson v. Hodges*, 10-318; see *Moore v. Islar*, 1-81—which ticket is sufficient evidence in court upon which to recover judgment against party cast or against party who subpoenaed witness, if party cast is insolvent, the statute making it presumptive evidence of the attendance, for whom, how long, for how much, and miles traveled, *Deaver v. Comrs.*, 80-116; *Belden v. Snead*, 84-243.

Witness is not at liberty after final judgment to withdraw his witness ticket and sue upon it. His fees for attendance should be taxed and collected with other costs against party adjudged to pay, if solvent, and if not, then the party who summoned and required his testimony is responsible: *Belden v. Snead*, 84-243; *Carter v. Wood*, 33-22.

One cannot recover for attendance of an incompetent witness: *Keith v. Goodwin*, 51-398.

Witnesses for the losing party receive no pay unless he is solvent, and witnesses for state in criminal actions where convicted party is insolvent receive only half pay: *State v. Wheeler*, 141-777.

Where material witness theretofore present is absent at trial for sufficient cause, he may be taxed against losing party: *Loftis v. Baxter*, 66-340, cited in *Herring v. R. R.*, 144-208; see, also, *Carpenter v. Taylor*, 4-689.

1275. Witness tickets to be filed; only two witnesses for single fact. At the court where the cause is finally determined the party recovering judgment shall file in the clerk's office the witness tickets; the amount whereof shall be taxed in the bill of costs, to be levied and recovered for the benefit of said party. The party cast shall not be obliged to pay for more than two witnesses to prove a single fact.

Rev., s. 1300; Code, s. 1370; R. C., c. 31, s. 74; 1783, c. 189, s. 3; 1796, c. 458, s. 2.

Section referred to: *Chadwick v. Ins. Co.*, 158-380.

Where a party is apprehensive that clerk will err in taxation of costs he should move court for special directions to the officer as to taxing costs: *Wooley v. Robinson*, 52-30.

Witness ticket omitted may, after notice and motion, be charged, and execution issued therefor: *Tate v. Kincaid*, 9-334.

Only two witnesses to a material fact subpoenaed by the prevailing party can be charged against losing party: *State v. Wheeler*, 141-777; *Ex parte Beckwith*, 124-115; *State v. Massey*, 104-877—except in action of slander, where more than two can prove, in the discretion of the court, *Holmes v. Johnson*, 33-55—and where value is to be proven: *Ex parte Beckwith*, 124-111.

For witness tickets as evidence, see *Deaver v. Comrs.*, 116-80; *Belden v. Snead*, 84-243; *Moore v. Comrs.*, 70-340.

Where case in Rowan removed to Iredell county for trial, but returned to original court for some cause and then removed to Cabarrus, costs of officers and witnesses in Iredell court properly taxable by clerk: *Boyden v. Williams*, 84-608.

For further annotations, see under section 1274.

1276. Local: trafficking in witness tickets regulated. *1. Amounts paid for tickets to be endorsed thereon.* Whenever any person shall prove a ticket as a witness in any criminal action, wherein any county in this state shall be adjudged to pay the cost or any part thereof, and such person shall sell or assign the same to any other person, firm or corporation, he shall state on the back of the ticket the amount which he shall receive from the assignee named for such sale or assignment, and the assignee shall make an affidavit of the truthfulness of such amount as stated in the endorsement of sale.

2. Amount receivable by assignee. It shall be unlawful for any assignee of any ticket proved in a criminal action, wherein any county is or shall be adjudged to pay the costs thereof, to receive from the county any greater sum than the amount paid by such person, firm or corporation, with ten per cent added to the amount received by the person proving the ticket.

3. If improperly endorsed not taxed against county. It shall be the duty of the clerk of the superior court, in making out the bills of cost which shall be adjudged against the county for payment, to examine carefully all witness tickets, and whenever any ticket shall fail to show the amount paid for any transfer, sale or assignment properly endorsed on said ticket, and sworn to, as above provided in subsection one, he shall not tax the same against any county for payment.

4. *Collection of greater amount misdemeanor.* If any person shall collect from any county in this state a sum greater than the amount received by the person proving said ticket, with ten per cent added thereto, he shall be guilty of a misdemeanor, and shall, upon conviction, be fined double the amount so collected by him, not exceeding the sum of fifty dollars, or imprisoned not more than thirty days.

5. *False statement perjury.* Any person purchasing any ticket in any criminal action, wherein the county shall be adjudged to pay the cost or any part thereof, who shall make a false statement of the amount paid by him for such ticket or tickets, shall be guilty of perjury, and upon conviction shall be punished as for that offense.

6. *To what counties applicable.* This section shall apply only to the counties of Anson, Buncombe, Columbus, Forsyth, Gaston, Richmond, Robeson, Rutherford, and Surry.

1907, c. 120; P. L. 1913, cc. 791, 793; 1915, c. 305.

1277. **Fees of witnesses before jury of view, commissioner, etc.** Witnesses summoned to appear at any survey, or before any jury of view, or before any commissioner, arbitrator, referee, or other person authorized to require their attendance, shall be entitled to the same fees as for similar attendance at the court of the county, and may prove, by their own oath, their attendance, mileage, and ferriage before such person, who is hereby authorized to administer the oath; and when they shall attend on any commission issuing from without the state, they may recover the fees for attendance against the party summoning them, or his agent or attorney directing them to be summoned; and when they shall attend under a commission or authority from any court in this state, the fees for attendance shall be proved as aforesaid, and be certified to the proper court and taxed among the costs of the cause, as if the witness had attended the court; but nevertheless, such fees may be immediately recovered against the party summoning.

Rev., s. 1301; Code, s. 1365; R. C., c. 31, s. 67; 1805, c. 685; 1848, c. 66; 1850, c. 188, s. 3.

1278. **Fees of witnesses before grand jury.** No witness shall receive pay for attendance in a criminal case before a grand jury, unless such witness has been summoned by direction in writing of the foreman of the grand jury, or of the solicitor prosecuting, addressed to the clerk of the court, commanding him to summon such witness, stating the name of the parties against whom his testimony may be needed, or unless he has been bound or recognized by some justice of the peace to appear before the grand jury.

Rev., s. 1302; Code, s. 743; 1879, c. 264.

Grand jury has no right to summon witnesses to appear before them except by permission of foreman or of solicitor: *State v. Wilcox*, 104-847.

1279. **Local modifications as to fees of witnesses before grand jury.** In Martin county all witnesses who are subpoenaed by the court's order to appear before the grand jury and do attend, and all other witnesses who testify for the state in open court, may prove attendance and collect one-half fees.

Rev., s. 1283; 1905, c. 134.

In Moore county all persons subpœnaed as witnesses before the grand jury in any criminal prosecution, or subpœnaed to appear before the judge in any criminal prosecution, shall receive one dollar per day for each day attending, and five cents per mile for each mile traveled to and from court one time, whether a true bill be found or not. The county commissioners shall not have power or authority to allow any less sum than the face of the juror's or witness's tickets provided herein.

1907, c. 93, ss. 4, 5.

In Wayne county witnesses subpœnaed by the state before the grand jury shall receive one-half fees, if the grand jury fails to find "a true bill."

1907, c. 40.

In Cherokee county the law is on the same general lines as in Moore. See 1907, c. 156, ss. 4, 5.

As to Brunswick county, see P. L. 1913, c. 248.

1280. Pay of witnesses in criminal cases. All witnesses summoned or recognized in behalf of the state shall be allowed the same pay for their daily attendance, ferriage and mileage as is allowed to witnesses attending in civil suits; and such fees for attendance shall be paid by the defendant only upon conviction, confession or submission; and if the defendant is acquitted on any charge of an inferior nature, or a nolle prosequi be entered thereto, the court shall order the prosecutor to pay the costs, if such prosecution appears to have been frivolous or malicious; but if the court is of opinion that such prosecution was neither frivolous nor malicious, and a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, nevertheless, order the prosecutor to pay the attendance of such unnecessary witnesses, if it appear that they were summoned at his special request.

Rev., s. 1296; Code, s. 1204; R. C., c. 35, s. 37; 1800, c. 558, s. 1; 1879, c. 49; 1879, c. 92, s. 3; 1881, c. 176.

Section cited: *State v. Means*, 175-820.

For fees of witnesses, see section 3893. As to when defendant pays witnesses, see section 1267. As to when prosecutor pays costs, see section 1271. As to when county pays state's witnesses, see sections 1259, 1281—pays defendant's witnesses, see section 1283.

1281. County to pay state's witnesses in certain cases. Witnesses summoned or recognized on behalf of the state to attend on any criminal prosecution in the superior or criminal courts where the defendant is insolvent, or by law is not bound to pay the same, and the court does not order them to be paid by the prosecutor, shall be paid by the county in which the prosecution was commenced. And in all cases wherein witnesses may be summoned or recognized to attend any such court to give evidence on behalf of the state, and the defendant is discharged, and in cases where the defendant breaks jail and is not afterwards retaken, the court shall order the witnesses to be paid.

Rev., s. 1289; Code, s. 740; R. C., c. 28, s. 9; 1804, c. 665; 1819, c. 1008; 1824, c. 1253.

For additional annotations on this subject, see under section 1259.

Where judge below orders insolvent prosecutor to pay costs and he fails or is unable to pay, county in which offense committed is liable for same: *Pegram v. Comrs.*, 75-120; *State v. Wheeler*, 141-777; *Guilford v. Comrs.*, 120-28.

Tickets given out by clerks in state cases are only evidence of witnesses' attendance, and, until judge passes upon costs, and by whom it is to be paid, county not responsible: *Moore v. Comrs.*, 70-340.

Where nol. pros. entered as to murder in first degree, state's witnesses subsequently attending trial entitled to only half fees: *Coward v. Comrs.*, 137-299.

Witnesses are entitled to compensation where bill is sent to grand jury with names of those summoned endorsed thereon as sworn and sent: *Lewis v. Comrs.*, 74-194.

To tax county with cost in criminal action where defendant is convicted, the trial judge must find that defendant is unable to pay it: *Coward v. Comrs.*, 137-299.

Costs of nonresidents attending as witnesses in a criminal prosecution cannot include more than per diem and mileage to state line: *State v. Means*, 175-820.

1282. Local modifications as to counties paying state's witnesses:

In Durham county, when on the trial of a criminal action the costs, or any part thereof, are taxed against the county, the witness fees of a salaried officer or salaried employee of the county of Durham or the city of Durham shall not be taxed against the county in the bill of costs.

1909, c. 485.

In Wake county, in all criminal cases and proceedings in the superior court where there is a verdict of acquittal, nolle prosequi, arrest of judgment, the return by a grand jury of "not a true bill," the county shall be liable for one-half fees to state's witnesses. Where the defendant is convicted and judgment is suspended, or the defendant is imprisoned, the county shall be liable for full fees to state's witnesses. The clerk of the superior court, immediately upon the determination of the case or proceeding, in any one of the ways provided above, shall make out and sign a statement showing the amount of fees and mileage to which each and every state witness duly subpoenaed to attend court in that case or proceeding is entitled, which, when endorsed by the solicitor holding said court, and a certificate made thereon by the sheriff of the county that the witness has paid all taxes for which he is liable, shall be presented to the treasurer of the county, who shall immediately pay the same out of the general county fund. In all cases where judgment is suspended, or the imprisoned defendant is taxed with the costs, the costs, when collected, shall be paid by the clerk to the treasurer of the county and placed in the general county fund.

1907, c. 204; Ex. Sess. 1908, c. 25.

At least thirty days before each criminal term of the superior court of Wilkes county the clerk shall file with the board of county commissioners an estimate of the amount of money necessary to pay witnesses for the state fifty cents on the dollar of the amount due. Upon the filing of such estimate it is the duty of the commissioners to order the county treasurer to pay to the clerk an amount of money sufficient to pay state's witnesses fifty per cent of their witness fee and take receipt for same. At each term of the court, when witnesses who have been duly subpoenaed on behalf of the state are discharged upon filing their ticket with the clerk and assigning the ticket to the county, the clerk shall pay the witness fifty per cent of the face value of the ticket. The ticket shall be preserved by the clerk till the case is finally disposed of, and at the termination of the case, if the defendant is adjudged to pay the cost, the same shall be taxed in the bill of cost which, when collected, shall be paid over to the county treasurer, who shall pay the balance to the witness. Within thirty days after each criminal term of court the clerk shall pay over to the treasurer all the money so collected from defendants on witness fees, and file a sworn statement of all money so collected. It is the duty of the solicitor as each witness is discharged to give him a certifi-

cate showing the number of days he is entitled to prove as a witness, which certificate shall be filed with the clerk. If any individual purchases any witness ticket from any witness, the county shall not be liable to pay said witness, unless it shows upon the ticket the amount so paid by the purchaser, and then no greater amount than the amount paid, and in no case to exceed fifty per cent of the face value thereof.

1909, c. 38.

1283. County to pay defendant's witnesses in certain cases. When the defendant is acquitted, a nolle prosequi entered, or judgment against him arrested, and it is made to appear to the court, by certificate of counsel or otherwise, that said defendant had witnesses, duly subpoenaed, bound or recognized, in attendance, and that they were necessary for his defense, it is the duty of the court, unless the prosecutor is adjudged to pay the costs, to make and file an order in the cause directing that said witness be paid by the county in such manner and to such extent as is authorized by law for the payment of state's witnesses in like cases.

Rev., s. 1290; Code, s. 747; 1879, c. 264; 1881, c. 312.

This section, construed with sections 1259, 1284, 1287, leaves it in discretion of judge to refuse to direct fees of witnesses for state or acquitted defendant, in whole or in part, to be paid by county, and his decision not reviewable: *State v. Hicks*, 124-829.

The constitution exempts an acquitted defendant from payment of necessary witness fees of defense, but does not require them to be paid by public: *Ibid.*

The provision of this section does not extend to a case where indictment quashed: *State v. Massey*, 104-877.

The provision of the constitution forbidding any defendant being taxed with cost of necessary witnesses summoned by him unless found guilty does not, *ex vi termini*, authorize such costs to be taxed against the county: *Ibid.*

Liability of county for defendant's witnesses is restricted to same cases in which county responsible for half fees to officers, except that county is not liable to defendant's witnesses where he is convicted and is unable to pay: *Guilford v. Comrs.*, 120-23.

Where a prisoner was convicted, but afterwards was acquitted upon a new trial, payment of witnesses at both trials was properly taxed against county: *State v. Horne*, 119-853.

It seems that an acquitted defendant's costs for witnesses can be taxed against a county only in those cases where a private prosecutor may be taxed with them: *State v. Massey*, 104-877.

Old cases in which there are several defendants and some acquitted, those acquitted entitled to their costs: *Stockstill v. Shuford*, 5-39; *Harriss v. Lee*, 46-226.

1284. Fees of state witnesses; two only in misdemeanors; one fee for day's attendance. No person shall receive pay as a witness for the state on the trial of any criminal action unless such person was summoned by the clerk under the direction of the solicitor prosecuting in the court in which the action originated, or in which it shall be tried if removed; and no solicitor shall direct that more than two witnesses shall be summoned for the state in any prosecution for a misdemeanor, nor shall any county or defendant in any such prosecution be liable for or taxed with the fees of more than two witnesses, unless the court, upon satisfactory reasons appearing, otherwise directs. And no witness summoned in a criminal action or proceeding shall be paid by the county for attendance in more than one case for any one day; nor shall the county be required to pay any such witness if his attendance shall be taxed in more than one case on the same day.

Rev., s. 1303; Code, s. 744; 1871-2, c. 186; 1879, c. 264.

For the history of taxation of witness fees, see *State v. Massey*, 104-877. As to when county pays state's witnesses, see under sections 1259, 1281.

This section, construed with sections 1259, 1283, places it in discretion of judge to refuse to direct fees of state's witnesses to be paid by county, and from his decision there is no appeal: *State v. Hicks*, 124-829; *State v. Ray*, 122-1095—unless he bases the decision upon want of power, *In re Smith*, 105-167. Where several actions consolidated and judgment rendered against both parties for their costs in each case, witnesses subpoenaed were entitled to prove but one attendance and in one action, and but one bill of costs could be taxed: *Mills Co. v. Lytle*, 118-837.

Section cited: *State v. Means*, 175-820.

1285. On appeal from justice only two witnesses bound over. When the defendant appeals from the judgment of the justice of the peace, in any criminal action, it is the duty of such justice of the peace to select and bind over on behalf of the state not more than two witnesses, and neither the county nor the defendant shall be liable for the fees of more than two witnesses on such appeal, unless additional witnesses are summoned by order of the appellate court as provided in the preceding section.

Rev., s. 1304; Code, s. 745; 1879, c. 264.

Where on appeal from justice's court, in a matter where justice had final jurisdiction, nol. pros. entered, county does not pay costs: *State v. Shuffler*, 119-867.

1286. Discharge of witnesses for state; certificate of attendance by solicitor. It is the duty of all solicitors prosecuting in the several courts, as each criminal prosecution is disposed of by trial, removal, continuance or otherwise, to call and discharge the witnesses for the state, either finally or otherwise, as the disposition of the case may require; and he shall thereupon file with the clerk of the court a certificate giving the names of the witnesses entitled to prove their attendance, with the date of their discharge. The said certificate shall be in the following or similar form, and blanks thereof shall be furnished to the solicitor by the clerk at the county expense, viz.:

North Carolina, _____County.
 _____Court, _____Term, 19____
 State v. _____
 Witness _____
 discharged _____ day of _____, 19____, Solicitor.

Rev., s. 1305; Code, s. 746; 1879, c. 264; 1881, c. 312.

1287. Witnesses not paid without certificate; court's discretion. No county, prosecutor or defendant shall be liable to pay any witness, nor shall his fees be embraced in the bill of costs to be made up as hereinbefore provided, unless his name is certified to the clerk by the solicitor, or included in the order of the court. And the judge or justice may, in his discretion, for satisfactory cause appearing, direct that the witnesses, or any of them, shall receive no pay, or only a portion of the compensation authorized by law. The court, at any time within one year after judgment, may order that any witness may be paid who for any good reason satisfactory to the court failed to have his fees included in the original bill of costs.

Rev., s. 1306; Code, ss. 733, 748; 1879, c. 264; 1881, c. 312.

For other annotations, see under sections of this article. For amount of witness fees, see section 3893.

Judge may refuse fees to state's witnesses in his discretion: *State v. Hicks*, 124-837— and such discretion not reviewable, *State v. Ray*, 122-1095; *State v. Massey*, 104-878—but whether costs rightly adjudged on particular item properly chargeable is reviewable, *State v. Horne*, 119-853. When defendant bound over to court case becomes proceeding of superior court, and all the costs from beginning are governed accordingly: *Merrimon v. Comrs.*, 106-372.

ART. 9. CRIMINAL COSTS BEFORE JUSTICES

1288. Liability for criminal costs before justice. The party convicted in a criminal action or proceeding before a justice shall always be adjudged to pay the costs; and if the party charged be acquitted, the complainant shall be adjudged to pay the costs, and may be imprisoned for the nonpayment thereof, if the justice shall adjudge that the prosecution was frivolous or malicious. But in no action or proceeding of which he has final jurisdiction, commenced or tried in a court of a justice of the peace, shall the county be liable to pay any costs.

Rev., s. 1307; Code, s. 895; 1868-9, c. 178; 1879, c. 92, s. 3; 1881, c. 176.

The law as to costs in criminal cases before magistrates stated in *Merrimon v. Comrs.*, 106-369.

Costs in cases where magistrates have jurisdiction cannot be taxed against county: *State v. Butts*, 134-608; *State v. Morgan*, 120-565; *Guilford v. Comrs.*, 120-27; *State v. Carlton*, 107-956; *Merrimon v. Comrs.*, 106-369.

Complainant prosecutor shall be adjudged to pay the cost and imprisoned for nonpayment thereof if the court finds the prosecution frivolous or malicious: *State v. Butts*, 134-607; *State v. Jones*, 117-768; *State v. Carlton*, 107-956; *State v. Lance*, 109-789; *State v. Roberts*, 106-662; *Merrimon v. Comrs.*, 106-369; *State v. Dunn*, 95-697; *State v. Powell*, 86-640; *State v. Adams*, 85-560; *State v. Norwood*, 84-794; *State v. Murdock*, 85-598—from which judgment prosecutor may appeal, *State v. Morgan*, 120-563.

Prosecutor taxed with costs may appeal to superior court where the findings of the justice may be reviewed, but on appeal to supreme court findings of fact by judge are conclusive: *State v. Bailey*, 162-583.

1289. Imprisonment of defendant for nonpayment of fine and costs. If the justice sentences the party found by him to be guilty to pay a fine and costs, and the same are not immediately paid, the justice shall commit the guilty person to the county jail until the same are paid, or until he is otherwise discharged according to law.

Rev., s. 1308; Code, s. 904; 1868-9, c. 178, subchap. 4, s. 15.

Defendant convicted may be imprisoned for failure to pay costs: *Merrimon v. Comrs.*, 106-369.

NOTE. For costs in taking depositions to be used in another state, see Evidence.

For costs of advertising for creditors of deceased person, see Administration.

For fees to clerk superior court for issuing orders, etc., in guardianship matters, see Guardian and Ward.

For security for costs, see Civil Procedure.

For costs in bastardy cases, see Bastardy; in actions against guardians, see Guardian and Ward; in habeas corpus proceedings, see Habeas Corpus; in foreclosing liens, see Liens; in draining lowlands, see Drainage; when plaintiff refuses to accept tender of judgment, and fails to recover more, see Civil Procedure; in pauper suits, see Civil Procedure; in actions between landlord and tenant, see Landlord and Tenant; in actions to establish public mills, see Mills; in partition proceedings, see Partition; in actions for forfeiture of corporate charter, see Corporation.

CHAPTER 24

COUNTIES AND COUNTY COMMISSIONERS

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- 1331. Accounts to be itemized, verified, and audited.
- 1332. Accounts to be numbered as presented.
- 1333. Claims to be numbered as allowed; copy to board annually.
- 1334. Annual statement of claims and revenues to be published.

ART. 8. COUNTY POOR.

- 1335. Support of poor; superintendent of county home; paupers removing to county.
- 1336. County home for aged and infirm.
- 1337. Records for county home to be kept.
- 1338. Support of county home.
- 1339. Property of indigent to be sold or rented.
- 1340. Families of indigent militiamen to be supported.
- 1341. Paupers not to be hired out at auction.
- 1342. Legal settlements; how acquired.
- 1343. Removal of indigent to county of settlement; maintenance; penalties.

ART. 9. COUNTY PRISONERS.

- 1344. Bond of prisoner in criminal case returned to court.
- 1345. Bond of prisoner committed on *capias* in civil action.
- 1346. Jailer to cleanse jail, furnish food and water.
- 1347. Prisoner to pay charges and prison fees.
- 1348. Prisoner may furnish necessaries.
- 1349. United States prisoners to be kept.
- 1350. Guard when escape apprehended; compensation.
- 1351. What counties liable for guarding and removing prisoners.
- 1352. Transfer of prisoners to succeeding sheriff.
- 1353. Where no jail, sheriff may imprison in jail of adjoining county.
- 1354. Where no jail, courts may commit to jail of adjoining county.
- 1355. When jail destroyed, transfer of prisoners provided for.
- 1356. Counties and towns may hire out certain prisoners.
- 1357. Persons hiring may prevent escape.
- 1358. Sheriff to have control of prisoners hired out.
- 1359. Convicts who may be sentenced to or worked on roads.
- 1360. Deductions from sentence allowed for good behavior.
- 1361. Convicts sentenced to roads to be under county control.
- 1362. When sentenced to state's prison in lieu of roads.
- 1363. State's prison to furnish convicts to county roads.
- 1364. Taxes may be levied for expenses of convicts.

ART. 10. HOUSES OF CORRECTION.

- 1365. Commissioners may establish houses of correction.
- 1366. Who must or may be committed to such institutions.
- 1367. Levy of taxes authorized; to be paid to manager.
- 1368. Bonds may be issued.
- 1369. Governor to be notified of establishment.
- 1370. Directors to be appointed; duties.
- 1371. Term of office of directors.
- 1372. Manager to be appointed; bond; duties.
- 1373. Manager to assign employment to inmates.
- 1374. Compensation of officers.
- 1375. Sheriff to convey persons committed.
- 1376. Absconding officers punished.
- 1377. Release of vagrants.
- 1378. Suits in name of county.
- 1379. Counties may establish joint house of correction.
- 1380. Directors of joint house of correction.
- 1381. Directors to appoint manager; bond; term; duties.
- 1382. Compensation of manager and other officers.

ART. 1. CORPORATE EXISTENCE AND POWERS OF COUNTIES

1290. County as corporation; acts through commissioners. Every county is a body politic and corporate, and has the powers prescribed by statute, and those necessarily implied by law, and no others; which powers can only be exercised by the board of commissioners, or in pursuance of a resolution adopted by them.

Rev., s. 1309; Code, ss. 702, 703; 1868, c. 20, ss. 1, 2; 1876-7, c. 141, s. 1.

COUNTIES GENERALLY. The political and legal relation of counties; their creation, organization, division, enlargement; legislative provision for taxes and payment of public

debt: Woodall v. Highway Com., 176-377; Comrs. v. Comrs., 157-515; Trustees v. Webb, 155-379; R. R. v. Washington, 154-334; Jones v. Comrs., 143-59; Prichard v. Comrs., 126-908; Tate v. Comrs., 122-812; Harris v. Wright, 121-172; Manuel v. Comrs., 98-9; Dare v. Currituck, 95-189; McCormac v. Comrs., 90-445; White v. Comrs., 90-438; Watson v. Comrs., 82-17; Comrs. of Currituck v. Comrs. of Dare, 79-565; Hill v. Comrs., 67-367; Manly v. Raleigh, 57-370; Taylor v. Comrs., 55-141; Love v. Schenck, 34-304; Mills v. Williams, 33-558; State v. Jones, 23-414. Distinction between counties and municipal corporations such as cities and towns discussed in Manuel v. Comrs., 98-11, and cases cited; but see Winslow v. Comrs., 64-220.

POWERS OF COUNTIES GENERALLY. Shall have those "prescribed by statute": Manuel v. Comrs., 98-11; Dare v. Currituck, 95-191; McCormac v. Comrs., 90-447; Gooch v. Gregory, 65-143—and must be strictly construed, Vaughn v. Comrs., 118-641. Implied powers restricted to the doing of that which is necessary to the complete exercise of the express powers: Vaughn v. Comrs., 118-641. Powers of county are exercised by county commissioners: Fountain v. Pitt, 171-113; Wilson v. Holding, 170-352; Bunch v. Comrs., 159-335; Halford v. Senter, 169-546; Cotton Mills v. Comrs., 108-681; Dare v. Currituck, 95-191; State v. Hargrave, 103-335. For specific powers of counties and of county commissioners, see sections 1291, 1297.

Legislature can direct counties to do whatever it can empower them to do: Tate v. Comrs., 122-812; Jones v. Comrs., 137-579; Withers v. Comrs., 163-341.

1291. Corporate powers of counties. A county is authorized—

1. To sue and be sued in the name of the county.

Rights of action against counties are ordinarily such only as are given by statute: Hitch v. Comrs., 132-573; Jones v. Comrs., 130-451; Moody v. State's Prison, 128-16; Bell v. Comrs., 127-85; Prichard v. Comrs., 126-912; Threadgill v. Comrs., 99-352; Manuel v. Comrs., 98-9; White v. Comrs., 90-437; Winslow v. Comrs., 64-218. A county is not liable for tort: White v. Comrs., 90-437; Moffitt v. Asheville, 103-237; Keenan v. Comrs., 167-356, and cases cited.

Counties have corporate capacity to sue and be sued: Comrs. v. Comrs., 107-297. Commissioners must be sued in their own county: Steele v. Comrs., 70-137. Formerly counties were sued in the name of the commissioners: State v. Hargrove, 103-328; State v. Wilkerson, 98-696; Winslow v. Comrs., 64-218; but now they sue and are sued in the name of the county: Fountain v. Pitt, 171-113; Lenoir v. Crabtree, 158-357.

2. To purchase and hold lands within its limits and for the use of its inhabitants, subject to the supervision of the general assembly.

3. To make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its powers.

See generally under section 1297.

4. To make such orders for the disposition or use of its property as the interests of its inhabitants require.

For power to purchase land at public sale, see section 2623. See Vaughn v. Comrs., 118-636. Rev., s. 1310; Code, s. 704; 1868, c. 20, s. 3.

ART. 2. COUNTY COMMISSIONERS

1292. Election and number of commissioners. There shall be elected in each county of the state, at the general election to be held in the year one thousand eight hundred and ninety-six, and every two years thereafter, by the duly qualified voters thereof, three persons to be chosen from the body of the county, who shall be styled "the board of commissioners for the county of-----" and shall hold their office for two years from date of their qualification and until their successors are elected and qualified.

Rev., s. 1311.

1293. Local modifications as to term and number. The number of commissioners shall be five instead of three in the counties of Alamance, Beaufort, Bertie, Buncombe, Cabarrus, Carteret, Catawba, Chowan, Columbus, Craven, Cumberland, Durham, Edgecombe, Franklin, Granville, Greene, Guilford, Halifax, Harnett, Hertford, Iredell, Johnston, Jones, Lenoir, Lincoln, Martin, Mecklenburg, Nash, New Hanover, Pasquotank, Perquimans, Pitt, Richmond, Robeson, Rockingham, Rowan, Tyrrell, Vance, Warren, Wayne and Wilson.

In Gaston county six persons shall be elected, one of whom must be a resident of Gastonia township, one a resident of River Bend township, one a resident of South Point township, one a resident of Crowders Mountain township, one a resident of Cherryville township, and one a resident of Dallas township. If at any time the board of commissioners of Gaston county are equally divided upon any question pending before them and there is a tie vote, then the clerk of said board is authorized and empowered to cast the deciding vote and to determine such question.

In Wake county five persons shall be elected, three of whom shall compose a class whose terms of office shall be for four years on and after the first Monday in December, one thousand nine hundred and ten, and two of whom shall compose a class whose terms of office shall be for four years on and after the first Monday in December, one thousand nine hundred and twelve.

Rev., ss. 1311, 1312; Code, s. 716; 1876-7, c. 141, s. 5; 1887, c. 307; 1895, c. 135; 1899, cc. 103, 147, 153, 187, 297, 301, 346, 450, 467, 488, 609; 1901, cc. 14, 60, 328, 330, 581; 1903, cc. 4, 7, 14, 36, 46, 59, 137, 191, 203, 206, 207, 228, 265, 446, 515, 790; 1905, cc. 37, 44, 58, 73, 148, 338, 340, 346, 397, 422, 553; 1907, cc. 2, 16, 55, 61, 125, 178, 291, 350; 1909, cc. 12, 53, 213, 302, 625, 729; P. L. 1917, cc. 32, 175, 381.

As to elections for commissioners in Polk county. P. L. 1919, c. 96.

1294. Vacancies in board; how filled. In case of a vacancy occurring in the board of commissioners of a county, the clerk of the superior court for the county shall appoint to said office for the unexpired term.

Rev., s. 1314; Code, s. 719; 1895, c. 135, s. 7; 1909, c. 490, s. 1.

1295. When to qualify; oath to be filed. The board of commissioners shall qualify and enter upon the duties of their office on the first Monday of December next succeeding their election, and they may take the oaths of office before the clerk of the superior court, or some judge, or justice of the peace or other person qualified by law to administer oaths. The oaths of office severally taken and subscribed by them shall be deposited with the clerk of the superior court.

Rev., s. 1316; Code, s. 708; 1895, c. 135, s. 4.

De facto board of commissioners exercise all appropriate functions until new board qualifies: *Jones v. Jones*, 80-127.

Necessity of taking oath of office: *Worthy v. Barrett*, 63-199.

1296. Meetings of the board of commissioners. The board of commissioners in each county shall hold a regular meeting at the courthouse, on the first Mondays in December and June. Special meetings may be held on the first Monday in every month, but shall not continue longer in session than two days. Meetings may be held at other times for the more convenient dispatch of business at the call of the chairman, on the written request of one member of the board, but public notice of the time and place of all such called meetings shall be posted at the courthouse door for not less than six days, and published one time in a

county newspaper, if there is one. The board shall receive no compensation for attending such called meetings. The board may adjourn its regular meetings in December and June from day to day until the business before it is disposed of. Every meeting shall be open to all persons. A majority of the board constitute a quorum. At each regular December meeting the board shall choose one of its members as chairman for the ensuing year; in his absence the members present shall choose a temporary chairman.

Rev., s. 1317; Code, s. 706.

Meetings in certain counties are governed by special laws as follows: Ashe, P. L. 1911, c. 94; Buncombe, P. L. 1913, c. 392; Clay, 1889, c. 184; Dare, 1909, c. 68; Durham, 1901, c. 309; Edgecombe, 1901, c. 429; Forsyth, 1897, c. 437; Gaston, 1903, c. 34; Mecklenburg, 1893, c. 199; Union, 1907, c. 347; Wake, 1899, c. 297.

County commissioners are not prohibited from meeting on other day than specified, after giving notice to all concerned, but they cannot get compensation: *People v. Green*, 75-329; for election had at an adjourned meeting subject to call of chairman: *Tripp v. Comrs.*, 158-180. For compensation of commissioners, see section 3918.

1297. Powers of board. The boards of commissioners of the several counties have power—

Has only those powers conferred by statute: *Fidelity Co. v. Fleming*, 132-337. Court has jurisdiction to compel commissioners to perform their duty: *Comrs. v. Comrs.*, 107-291; also *Jones v. Comrs.*, 137-579. Succeeding commissioners must obey mandamus issued against predecessors: *Pegram v. Comrs.*, 65-114. Mandamus lies to compel commissioners to issue bonds when required by the legislature: *Jones v. Comrs.*, 137-579. Statutes embracing words "authorize and empower" when mandatory on commissioners: *Ibid.* As to powers (formerly) exercised jointly with justices, see *Cotton Mills v. Comrs.*, 108-678, 692. Not fraudulent for commissioners to lend their personal credit to county, when: *Long v. Comrs.*, 76-278.

Commissioners are responsible for failure to exercise their powers as to the public buildings and property of the county: *Threadgill v. Comrs.*, 99-352; *Moffitt v. Asheville*, 103-258— or bridges and highways, *White v. Comrs.*, 90-437. County commissioners' liability defined generally: *Staton v. Wimberly*, 122-107; *Templeton v. Beard*, 159-63; *Hipp v. Ferrall*, 169-551; s. c., 173-167; *Fore v. Feimster*, 171-551.

A majority of the governing body of a county can exercise its powers: *Cotton Mills v. Comrs.*, 108-678; see *Comrs. v. Trust Co.*, 143-115. Commissioners cannot defend mandamus for tax levy on ground that claim is void: *Bear v. Comrs.*, 122-434.

TAXATION AND FINANCE

1. To exempt from capitation tax. To exempt from capitation tax in special cases, on account of poverty and infirmity.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

2. To levy county taxes. To levy, in like manner with the state taxes, the necessary taxes for county purposes; but the taxes so levied shall never exceed the double of the state tax, except for a special purpose, and with the special approval of the general assembly. All county taxes shall be levied at the regular meeting of the board on the first Monday in June. The board may extend the time for the collection and settlement of the county taxes to such time as may be deemed expedient, not beyond the first day of May next after the taxes were levied.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

As to constitutional limitation upon county taxation, see *R. R. v. Cherokee County*, 177-86; *Bennett v. Comrs.*, 173-625; *French v. Comrs.*, 74-692; *Jones v. Comrs.*, 107-248; *Blanton v. Comrs.*, 101-532; *Cromartie v. Comrs.*, 87-134; *Mauney v. Comrs.*, 71-486; *Trull v. Comrs.*, 72-388; *Clifton v. Wynne*, 80-145.

Commissioners can levy tax for necessary expenses and to pay bonds issued therefor up to the constitutional limitation. They can levy beyond limitation when legislature authorizes, and no vote of the people is required. But they cannot levy for any purpose not necessary without the legislature authorizes and a majority of the qualified voters vote for it: *R. R. v. Cherokee County*, 177-86; *Guire v. Comrs.*, 177-516; *Parvin v. Comrs.*, 177-508; *Woodall v. Highway Com.*, 176-377; *Bennett v. Comrs.*, 173-625; *Moose v. Comrs.*, 172-419; *Jackson v. Comrs.*, 171-379; *Hargrave v. Comrs.*, 168-626; *Pritchard v. Comrs.*, 160-476; *s. c.*, 159-636; *R. R. v. Comrs.*, 148-220; *R. R. v. Comrs.*, 148-248; *Cotton Mills v. Waxhaw*, 130-298; *Smathers v. Comrs.*, 125-488; *Herring v. Dixon*, 122-420; *McCless v. Meekins*, 117-34; *Cromartie v. Comrs.*, 87-139; *Tate v. Comrs.*, 122-812; *Tucker v. Raleigh*, 75-267.

Courts have the right to say what are necessary expenses, but cannot control the discretion of commissioners in incurring the debt when the expense is necessary: *Black v. Comrs.*, 129-121; *Vaughn v. Comrs.*, 117-429; *Hightower v. Raleigh*, 150-569; *Jackson v. Comrs.*, 171-379; also cases cited under section 1325.

The equation of taxation to be observed applies only to general county purposes and not to special taxes: *Wagstaff v. Highway Com.*, 177-354; *Bennett v. Comrs.*, 173-625; *Moose v. Comrs.*, 172-419; *R. R. v. Comrs.*, 148-220; *Jones v. Comrs.*, 107-248. What is a special purpose: *R. R. v. Cherokee County*, 177-86, and cases cited.

The commissioners are required to levy sufficient tax to run the public schools six months, and the constitutional limitation does not prevent such levy: *Collie v. Comrs.*, 145-170, overruling *Barksdale v. Comrs.*, 93-472, and *Bd. of Education v. Comrs.*, 111-578; *Bd. of Education v. Comrs.*, 150-116.

County bonds not issued for necessary expense, but authorized by legislative act and popular vote, are valid; but the commissioners cannot levy a tax beyond the constitutional limitation unless authorized to do so by the special act: *Comrs. v. MacDonald*, 148-125.

Where county pledges its faith or lends its credit it must levy taxes on all property in the same, except such as is exempt: *Jones v. Comrs.*, 107-248. And if for a special purpose, the tax need not be uniform in the different sections, but may depend upon the benefits to be derived: *Faison v. Comrs.*, 171-411.

The statute makes no difference in grade or necessity among the several necessary expenditures of a county for which commissioners must provide by taxation: *Long v. Comrs.*, 76-278.

Commissioners have implied power, after making assessment for taxes on unlisted property, to authorize collection by sheriff: *Lumber Co. v. Smith*, 146-199.

For an action to have tax levied for special purpose applied thereto, see *McCless v. Meekins*, 117-34. Where legislature authorized tax for special purpose beyond the constitutional limitation and part of it was to be "for meeting other current expenses," held invalid: *Williams v. Comrs.*, 119-520.

Where tax, levied for special purpose beyond the limitation, provides more funds than necessary, the remnant can be turned into the general fund if the statute authorizing it is *infra vires*; but if for a special purpose and a general purpose together, the statute would be *ultra vires* and void: *Williams v. Comrs.*, 119-520.

There is no constitutional requirement that tax rate for county purposes should be the same in the several counties, townships, etc.: *Jones v. Comrs.*, 143-59.

What property subject to tax levy stated in *Jones v. Comrs.*, 107-248.

Taxes for county purposes are to be levied only once a year: *Bradshaw v. Comrs.*, 92-278. *Mandamus* to compel commissioners to levy tax to pay off debts of county does not warrant them in levying taxes in any other manner or at any other time than law prescribes: *Mauney v. Comrs.*, 71-486; *Cromartie v. Comrs.*, 87-139.

As to tax levy on territory taken from one county and annexed to another, see *Watson v. Comrs.*, 82-17; *Currituck v. Dare*, 79-565.

A majority of the governing body of a county can levy the tax: *Cotton Mills v. Comrs.*, 108-678; *State v. Woodside*, 30-104—and the record must show it, *Dudley v. Oliver*, 27-227. Board, when sitting with justices as required in some counties, has power of old county court in matters of taxation; within its jurisdiction it is a court of record: *Guilford v. Georgia Co.*, 112-34.

The constitutional requirement that every act passed levying taxes shall state the object to which they shall be appropriated has no application to "county taxes": *Parker v. Comrs.*, 104-166—the tax levy "for county purposes" being sufficient, *Ibid.*

See, also, subsections 3, 5, 6, 9, 18, 19, 22, 28, and annotations.

3. *To borrow money for necessary expenses, provide for payment by taxation.* To borrow money for the necessary expenses of the county, and to provide for its payment, with interest, in periodical installments, by taxation.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

As to what are necessary expenses of a county, see under section 1325. As to funding county indebtedness, see *McCless v. Meekins*, 117-34. As to issuing bonds in place of orders previously issued for necessary expenses without vote of the people: *McCless v. Meekins*, 117-34; *Tucker v. Raleigh*, 75-267; see, also, subsection 5.

Majority of governing body of county can exercise power hereunder: *Cotton Mills v. Comrs.*, 108-678. For raising money by taxation with which to pay off debts for money borrowed for necessary expenses, see under subsections 2 and 5 of this section.

Legislature has power to authorize commissioners to issue bonds with which to pay indebtedness incurred for necessary expenses: *Comrs. v. Stafford*, 138-453. And such authority is construed to be mandatory in *Jones v. Comrs.*, 137-579. The power to incur a debt for necessary expense implies the power to borrow money for payment, unless restricted by the legislature: *Bennett v. Comrs.*, 173-625; *Pritchard v. Comrs.*, 159-636; s. e., 160-476; *Vaughn v. Comrs.*, 117-429.

4. *To exchange county bonds for outstanding notes of county.* Any county in this state which is authorized by law to sell its bonds for the purpose of funding or paying floating indebtedness now outstanding and evidenced by notes bearing interest at a higher rate than the bonds which the county proposes to issue, may, in lieu of selling such bonds, issue them in exchange for a like principal amount of such notes, provided the holders of the notes are willing to make such an exchange and to pay any interest accrued on such bonds up to the time of such exchange. When such an exchange is made, any interest accrued on such notes up to the time of such exchange may be paid out of any available funds of the county. The powers conferred by this subsection shall be exercised by the board or body authorized by law to sell the bonds herein referred to. Nothing herein shall be construed as requiring any bonds to be exchanged for notes, rather than to be sold. The powers granted by this subsection are granted in addition to and not in substitution for existing powers of counties, and are not subject to any limitation or restriction contained in any other law.

1919, c. 297.

As to funding county indebtedness, see *McCless v. Meekins*, 117-35.

5. *To provide for payment existing debts by taxation or otherwise.* To provide by taxation or otherwise for the prompt and regular payment, with interest, of any existing debt owing by the county.

Rev., s. 1318; Code, 707; 1868, c. 20, s. 8.

For authority to provide for debt incurred for necessary expenses and for other than necessary expenses, see annotations under subsection 2.

Mandamus lies to compel commissioners to pay debt: *Hughes v. Comrs.*, 107-598; *Fry v. Comrs.*, 82-304; *Gas Co. v. Raleigh*, 75-274; *McLendon v. Comrs.*, 71-38; *Lutterloh v. Comrs.*, 65-403; *Pegram v. Comrs.*, 64-557; *Winslow v. Comrs.*, 64-223—but it will not warrant commissioners levying tax in manner or at times other than law specifies: *Mauney v. Comrs.*, 71-486; *Cromartie v. Comrs.*, 87-139. As to levying of taxes generally, see subsection 2. As to issuing of bonds for necessary expenses, see under subsection 3.

6. *To submit proposition to contract debt to vote.* To submit to a vote of the qualified electors in the county, after having obtained the approval of the general assembly, any proposition to contract a debt, or loan the credit of the county, under section seven, article seven, of the Constitution; to order the time for voting upon such proposition, which shall be upon public notice thereof at one or more places in each township in the county, and publication in one or

more county newspapers, if there are any, for three months next immediately preceding the time fixed on; and such election shall take place and be conducted under the laws as prescribed for the election of members of the general assembly; and the commissioners shall provide for giving effect, in case of the adoption of the proposition, to the expressed will of a majority of the qualified voters in such election.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

For special law as to Durham, see 1907, c. 982.

For authority to levy tax, see annotations under subsection 2. As to who are qualified voters, see section 2691.

For a municipal corporation (and this applies to counties) to incur a debt for other than necessary expense there must be the vote of a majority of the qualified voters in favor of it: Pritchard v. Comrs., 160-476; s. c., 159-636; R. R. v. Comrs., 116-563; Bank v. Comrs., 116-339; Claybrook v. Comrs., 114-453; s. c., 117-456; Riggsbee v. Durham, 99-341; s. c., 98-81; Wood v. Oxford, 97-228; McDowell v. Construction Co., 96-514; Markham v. Manning, 96-132; Duke v. Brown, 96-127; Southerland v. Goldsboro, 96-49; Norment v. Charlotte, 85-387; R. R. v. Comrs., 72-486; Reiger v. Comrs., 70-319.

For a necessary expense the popular vote is not required unless the legislature so provides, then it must be had; but a majority of the votes cast would be sufficient: Woodall v. Highway Com., 176-377; Swindell v. Belhaven, 173-1; Bramham v. Durham, 171-196; Burwell v. Lillington, 171-94; Murphy v. Webb, 156-402; Ellison v. Williamston, 152-147; Jones v. New Bern, 152-64; Burgin v. Smith, 151-561; Robinson v. Goldsboro, 135-382; Asheville v. Webb, 134-72; Wadsworth v. Concord, 133-587; Black v. Comrs., 129-121.

As to what is a necessary expense, see annotations under section 1325.

As to validity of bond election for special purposes when there is a defect in passage of act authorizing: Guire v. Comrs., 177-516; Pritchard v. Comrs., 159-636; Russell v. Troy, 159-366; Bank v. Laey, 151-3; Comrs. v. Trust Co., 143-110; Graves v. Comrs., 135-49; Cotton Mills v. Waxhaw, 130-293; Comrs. v. DeRossett, 129-275; Comrs. v. Stafford, 138-453; Glenn v. Wray, 126-730; Comrs. v. Snuggs, 121-394; Bank v. Comrs., 119-214; Comrs. v. Payne, 123-432; Comrs. v. Call, 123-308; Charlotte v. Shepard, 122-602—when return indicated a ‘majority of votes cast’ instead of ‘majority of qualified voters’: R. R. v. Comrs., 109-159—or when there are other irregularities, Jones v. Comrs., 107-248; Comrs. v. Trust Co., 164-301.

Where commissioners authorized to issue bonds, they have sole power to determine whether conditions hereunder have been complied with: Belo v. Comrs., 76-489—and a finding of court below that majority of qualified voters approve bonds is conclusive, Norment v. Charlotte, 85-387; Claybrook v. Comrs., 114-453; s. c., 117-456.

When the law requires that county bonds shall not be sold below par, a contract for such sale will be declared void: Moose v. Comrs., 172-419.

Townships may subscribe for capital stock of railroad by consent of a majority of the qualified voters, after legislature authorizes: Jones v. Comrs., 107-248; Brown v. Comrs., 100-92; Wood v. Oxford, 97-227—but county commissioners cannot order such election nor issue bonds on the credit of a township under section 3431: Graves v. Comrs., 135-57.

Where a township voted and issued bonds for a railroad, the legislature can require county commissioners to apply taxes from the railroad property in that township to the building of bridges, schoolhouses, etc., in such township until entire fund is repaid the township: Jones v. Comrs., 143-59.

Where the township voted bonds for roads, to be exchanged for state bonds under act of 1917, c. 6, s. 20, the county commissioners could not issue county bonds for such purpose, and the part of the act so authorizing is unconstitutional: Comrs. v. Laey, 174-141.

Townships and other taxing districts may be authorized to contract debts, issue bonds, etc.: Trustees v. Webb, 155-379; Highway Com. v. Webb, 152-710; Smith v. School Trustees, 141-143.

7. *To purchase county indebtedness.* To purchase if they desire, at any price, not exceeding their par value and accumulated interest, any of the outstanding bonds or other indebtedness of the county.

Rev., s. 1320; Code, s. 718; 1868-9, c. 269, s. 2.

8. *To levy taxes for interest and sinking funds for outstanding bonds not provided for.* (a) To levy, in like manner with the county taxes, the necessary taxes to pay the interest and create a sinking fund for the retirement of bonds issued and sold for the purpose of meeting necessary expenses of the county, where no other provision for such levy has been specially provided for. In making such levy the constitutional equation must be preserved, and the levy shall not exceed any constitutional limitation.

(b) To levy, in like manner with the county taxes, the necessary taxes to pay the interest and create a sinking fund for the retirement of township road improvement bonds, issued either by vote of the people or by act of the general assembly, where the amount of levy provided by the act under which the vote is held or tax levied is inadequate to pay the interest on bonds heretofore issued or authorized by acts now in force, but the constitutional equation must be observed, and the levy shall not exceed any constitutional limitation.

1917, c. 121, ss. 1, 2.

For commissioners' power to revise sheriff's tax-collecting itinerary, see section 7997.

COUNTY BUILDINGS

9. *To erect and repair county buildings.* To erect and repair the necessary county buildings, and to raise, by taxation, the moneys therefor.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

For special law as to Tyrrell, see 1909, c. 413.

Cost of building a courthouse and jail is a necessary county expense, and discretionary act of commissioners in levying tax to pay for the building of one is not reviewable: *Jackson v. Comrs.*, 171-379; *Haskett v. Tyrrell*, 152-714; *Vaughn v. Comrs.*, 117-429; *Brodnax v. Groom*, 64-244; *Satterwaite v. Comrs.*, 76-153; also see section 1325. But the legislature may impose a restriction which must be observed: *Burgin v. Smith*, 151-561. Commissioners cannot mortgage courthouse to secure contractors for building it: *Vaughn v. Comrs.*, 118-636.

As to number of commissioners necessary to act hereunder, see *Cotton Mills v. Comrs.*, 108-678. Court cannot control discretion of commissioners as to what kind of courthouse is needed: *Vaughn v. Comrs.*, 117-429.

Commissioners must provide for the repair of buildings; liable if they neglect; county not liable: *Moffitt v. Asheville*, 103-258; *Threadgill v. Comrs.*, 99-352. The duty is obligatory: *Long v. Comrs.*, 76-273; but it will not be enforced by mandamus, the remedy is by indictment, *Ward v. Comrs.*, 146-534; *State v. Leeper*, 146-655. The fact that a prosecution has been directed by the judge will not make the action of the commissioners voidable for duress: *Jackson v. Comrs.*, 171-379. Requiring bond in contract for public building, see section 2445.

10. *To designate site for county buildings.* To remove or designate a new site for any county building; but the site of any county building already located shall not be changed, unless by an unanimous vote of all the members of the board at the regular December meeting, and unless upon notice of the proposed change, specifying the new site. Such notice shall be published in a newspaper printed in the county, if there is one, and posted in one or more public places in every township in the county for three months, next immediately preceding the annual meeting at which the final vote on the proposed change is to be taken. Such new site shall not be more than one mile distant from the old, except upon the special approval of the general assembly.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

Special law as to Lincoln, see 1909, c. 182, s. 12.

A majority of the governing body of a county necessary to act hereunder: *Cotton Mills v. Comrs.*, 108-678.

A jail is not a nuisance per se, and its location at a certain place cannot be enjoined: *Burwell v. Comrs.*, 93-73.

COUNTY OFFICERS

11. *To require officers to report.* To require from any county officer, or other person employed and paid by the county, a report under oath at any time on any matters connected with his duties.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

12. *To approve bonds of county officers and induct into office.* To qualify and induct into office at the meeting of the board, on the first Monday in the month next succeeding their election or appointment, the following named county officers, to wit: clerk of the superior court, sheriff, coroner, treasurer, register of deeds, surveyor, and constable; and to take and approve the official bonds of such officers, which the board shall cause to be registered in the office of the register of deeds. The original bonds shall be deposited with the clerk of the superior court, except the bond of the said clerk, which shall be deposited with the register of deeds, for safe keeping.

If the board declares the official bonds of any of said county officers to be insufficient, or declines to receive the same, the officer may appeal to the superior court judge riding the district in which the county is, or to the resident judge of said district, as he may elect, who shall hear said appeal in chambers, at any place in said district he designates, within ten days after notice by him of the same, and if, upon the hearing of the appeal, the judge is of the opinion that the bond is sufficient, he shall issue an order to the board of commissioners to induct the officer into office, or that he shall be retained in office, as the case may be. If, upon the hearing of the appeal, the judge is of the opinion that the bond is insufficient, he shall give the appellant ten days in which to file before him an additional bond, and if the appellant within the ten days files before the judge a good and sufficient bond, in the opinion of the judge, he shall so declare and issue his order to said board directing and requiring them to induct the appellant into office, or retain him, as the case may be. If, in the opinion of the judge, both the original and the additional bonds are insufficient, he shall declare the said office vacant and notify the commissioners, who shall notify the clerk of the superior court, who shall appoint to fill the vacancy, except in cases of the clerk of the superior court, which vacancy shall be filled by the resident judge. The judgment of the superior court judge shall be final. The appeal and the finding and judgment of the superior court judge shall be recorded on the minutes of the board of commissioners.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8; 1874-5, c. 237, s. 3.

For duty of commissioners in renewing bonds, see sections 326-337.

Failure of officer to give bond hereunder; effect: Bray v. Barnard, 109-44; Cole v. Patterson, 97-360; Kilburn v. Latham, 81-312; Worley v. Smith, 81-304; Dixon v. Comrs., 80-118.

Duty of commissioners to qualify, induct county officers into office and fill all vacancies: Jones v. Jones, 80-127—to induct those whose election has been announced by canvassers, Swain v. McRae, 80-111. All three of sheriff's bonds must be approved before inducting him: Dixon v. Comrs., 80-118. The duty to induct officers into office is quasi-judicial, and for an honest error the commissioners are not liable: Hannon v. Grizzard, 99-161.

Commissioners cannot be compelled to induct a person plainly ineligible: McNeill v. Somers, 96-467; Hannon v. Grizzard, 96-293. **Bonds must be approved before officers inducted:** Worley v. Smith, 81-304. **Commissioners may refuse time in which to fortify bond that is insufficient, and from their refusal there is no appeal:** Cole v. Patterson, 97-364.

Where sheriff inducted into office without giving bonds required, subsequently gives bonds, defect cured: Worley v. Smith, 81-304.

13. *To fill vacancies.* To fill by appointment a vacancy in the offices of sheriff, constable, coroner, register of deeds, county treasurer, or county surveyor.

Rev., s. 1321; Code, s. 720.

For power to declare office vacant, see section 328.

Upon failure to give or renew bond, as the case may be, office declared vacant: *Bray v. Barnard*, 109-44; *Kilburn v. Latham*, 81-312; *Worley v. Smith*, 81-304; *Jones v. Jones*, 80-127; *People v. Green*, 75-329. Sheriff failing to give bond, commissioners should declare vacancy and appoint: *Sneed v. Bullock*, 80-132—but a sheriff cannot be deprived of his office without a day in court, *Vann v. Pipkin*, 77-408.

Commissioners are liable to penalty for failure to declare office vacant and fill same when they should have done so: *Bray v. Creekmore*, 109-49.

Vacancy in office of treasurer filled by commissioners: *Rhodes v. Hampton*, 101-633. De facto board can appoint: *Jones v. Jones*, 80-127.

COUNTY PROPERTY

14. *To make orders respecting county property.* To make such orders respecting the corporate property of the county as may be deemed expedient.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

County commissioners' liability for failing to make proper orders for the repairing of buildings outlined in *Moffitt v. Asheville*, 103-258—and failing to protect health of prisoners, *Moffitt v. Asheville*, 103-237—and for failing to have privy cleaned, *Threadgill v. Comrs.*, 99-355.

15. *To sell or lease real property.* To sell or lease any real property of the county and to make deeds or leases for the same to any purchaser or lessee.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

A majority of the governing body may exercise the power to sell: *Cotton Mills v. Comrs.*, 108-678. Power to sell does not include power to mortgage: *Vaughn v. Comrs.*, 118-636.

COUNTY PURCHASES

16. *To purchase for public buildings, and at execution sale.* To purchase real property necessary for any public county building, and for the support of the poor, and to determine the site thereof, where it has not already been located; and to purchase land at any execution sale, when it is deemed expedient to do so, to secure a debt due the county. The deed shall be made to the county, and the board may, in its discretion, sell any lands so purchased.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8; 1879, c. 144, s. 1.

As to locating public buildings, see subsection 10. Can acquire and hold property only for necessary public purposes and for benefit of all its citizens: *Hughes v. Comrs.*, 107-598; *Gooch v. Gregory*, 65-142. It is assumed that commissioners hold county property as trustees: *Threadgill v. Comrs.*, 99-355. For effect of restrictive covenants in a deed to the county, see *Guilford v. Porter*, 167-366; s. c., 170-310; s. c., 171-356.

17. *To purchase or lease a county farm, and work convicts thereon.* To lease or purchase a county farm, and where proper provisions are made for securing and caring for convicts, such of them as are subject to road duty may be worked on said farm, and, in the discretion of the board, such farms may be made experimental farms. The court, in its discretion, may sentence convicted prisoners either to said farm or to the roads. Where a farm is purchased or leased in those counties having a road system, the board may work the convicts on such farms.

1915, c. 140.

HIGHWAYS AND BRIDGES

18. *Laying out, alteration and discontinuance of highways.* To exercise authority in laying out, altering, repairing and discontinuing highways; in establishing and settling ferries; in building and keeping up bridges; in laying off or discontinuing cartways; in providing draws in all bridges, where the same may be necessary for the convenient passage of vessels; in appointing overseers of highways; in excusing persons from working on the highways; in allowing and contracting for the building of toll-bridges, and taking bond from the builders thereof; and in licensing the erection of gates across highways. This authority shall be exercised under the rules, regulations, restrictions and penalties in all respects prescribed and imposed in the chapter entitled Roads and Highways.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

See Roads and Highways for statutes authorizing county and local road commissions.

The power of the commissioners over roads and bridges will not be interfered with by the court, unless there is an abuse of such power: *Edwards v. Comrs.*, 170-448; *Scott v. Comrs.*, 170-327; *Supervisors v. Comrs.*, 169-548; *Glenn v. Comrs.*, 139-412; *Brodnax v. Groom*, 64-244; *Lenoir v. Crabtree*, 158-357.

Power of commissioners to establish ferries does not deprive legislature of that power: *In re Spease Ferry*, 138-219. Legislature making it unlawful to operate a ferry within a certain distance of one established is a limitation on power of commissioners: *Ibid.* Commissioners cannot bind successors as to establishment of bridge: *Glenn v. Comrs.*, 139-412. Public bridge or ferry must be part of public road: *Greenleaf v. Comrs.*, 123-30. Commissioners cannot delegate their powers hereunder; effect if they do: *McPhail v. Comrs.*, 119-330. Commissioners may exercise their discretion as to how draws may be placed in a bridge: *Lenoir v. Crabtree*, 158-357. And they are not liable for honest error of judgment in placing or refusing drawbridge: *Staton v. Wimberly*, 122-107.

Remedy of any one injured by the erroneous discharge of duty hereunder by commissioners: *McArthur v. McEachin*, 64-454.

Counties are not liable in damages for injury caused by defective highway; nor are the commissioners personally liable unless they act corruptly or of malice: *Hipp v. Ferrall*, 173-167; s. c., 169-551; *Templeton v. Beard*, 159-63.

19. *To raise money for highways.* To raise by tax the necessary highway moneys, in such manner as may be prescribed by law.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

This duty obligatory: *Long v. Comrs.*, 76-278. When specific fund provided, general fund cannot be used: *Hornthall v. Comrs.*, 126-26. General power to levy tax and issue bonds explained: *Guire v. Comrs.*, 177-516, and cases cited.

20. *To appoint an inspector of highways and bridges.* To appoint an inspector of highways and bridges for the county, if deemed necessary; to fix and provide for his compensation and regulate his duties, not inconsistent with the laws of the state. The commissioners of two or more counties may unite in employing an inspector of highways and bridges, and apportioning his compensation between the respective counties as may be agreed upon.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

21. *To regulate speed of automobiles.* To regulate the speed of automobiles, motorcycles and other like vehicles on the public roads and bridges, and make such ordinances as they may deem necessary governing the same. This subsection shall not apply to the counties of Mecklenburg and New Hanover.

Rev., s. 1318; 1905, c. 331.

22. *To construct and repair bridges.* To construct and repair bridges in the county, and to raise by tax the money necessary therefor, and when a bridge

is necessary over a stream which divides one county from another, the board of commissioners of each county shall join in constructing or repairing such bridge; and the charge thereof shall be defrayed by the counties concerned, in proportion to the number of taxable polls in each.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

Duty to raise money for this purpose obligatory: Long v. Comrs., 76-278; Cromartie v. Comrs., 87-138. **Bridge between counties must be authorized by both counties and built at joint expense:** McPeeters v. Blankenship, 123-651. **Remedy, when a county refuses to join, is by an enabling act:** Ibid. **The fact that the middle of the stream is made the dividing line between the two counties does not change the apportionment of expense:** Bridge Co. v. Comrs., 151-215.

A county is not liable in damages for an injury resulting from defective bridge: White v. Comrs., 90-437; **nor are the commissioners personally liable unless they act corruptly or through malice:** Hipp v. Ferrall, 173-167; s. e., 169-551.

Number of commissioners necessary to act on matters within this subsection: Cotton Mills v. Comrs., 108-678. **Commissioners alone determine necessity for construction and repair of bridges, and cannot delegate their powers:** McPhail v. Comrs., 119-330. **As to contracts for bridge construction, see** Bridge Co. v. Comrs., 111-317; McPhail v. Comrs., 119-330.

The court will not interfere with the exercise of discretion on the part of commissioners in building bridges, unless that power is abused: Davenport v. Comrs., 163-147.

23. To appoint commissioners to open rivers and creeks. To appoint a commissioner to open and clear the rivers and creeks within the county, or where such river or creek forms a county line or a part thereof. For this purpose the board is authorized to withdraw from the public roads such lands as may be deemed necessary, and allot them to such work under overseers and the direction of the commissioners. The board may impose the duties of this subsection on the inspector of highways and bridges when appointed; and shall in all respects conduct the opening and clearing of such rivers and creeks as prescribed by law.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

24. To grant right to bridge navigable streams. To grant, subject to the approval and permission of the war department, to any person, firm or corporation owning or occupying lands on both sides of any navigable stream or creek lying wholly within the limits of the county, the right to construct and maintain a bridge across the said navigable water between the lands owned or occupied by them upon such terms and conditions and for such time as the said board shall deem advisable and proper. Before any order allowing the construction of the same shall be made, it shall be made to appear to the board that four weeks notice of the application for such right has been given by posting a notice at the courthouse door and four other public places in the county, and also (if there be a newspaper published in the county) by publishing once a week for four consecutive weeks in some newspaper in the county. Any party aggrieved may appeal from the order of the commissioners to the superior court of the county in term time.

P. L. 1911, c. 227.

INSPECTION AND LICENSES

25. To license peddlers. To license peddlers and retailers of spirituous and other liquors as prescribed by law. No license shall be good for more than one year, nor granted to two or more persons to peddle as partners in trade.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

See chapter on Prohibition. Mandamus will not lie to control discretion of commissioners hereunder: Howell v. Comrs., 135-26; Bridgers v. Comrs., 135-25; Barnes v. Comrs., 135-27;

Mathis v. Comrs., 122-416; *Jones v. Comrs.*, 106-436; *Maxton v. Robeson*, 107-335; *Muller v. Buncombe*, 89-171—but will lie to compel them to issue license if refusal is arbitrary, *Ibid.* **May revoke license:** *State v. Voight*, 90-741. **Discretion is a limited legal one:** *Hillsboro v. Smith*, 110-417; *Muller v. Comrs.*, 89-171.

26. To license auctioneers. To license for the term of one year any number of persons to exercise the trade and business of auctioneers in each county, and to take their bonds as prescribed by law.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

27. To establish public landings, places of inspection, and inspectors. To establish such public landings and places of inspection as the board may think proper; and to appoint such inspectors in any town or city as may be authorized by law.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

This power does not include the right to condemn land under eminent domain: *Comrs. v. Bonner*, 153-66.

POOR AND HOSPITALS

28. To provide for the maintenance of the poor. To provide by tax for the maintenance, comfort and well-ordering of the poor; to employ, biennially, some competent person as overseer of the poor; to institute proceedings by the warrant of the chairman against any person coming into the county who is likely to become chargeable thereto, and cause the removal of such poor person to the county where he was last legally settled; and to recover by action in the superior court from the said county all the charges and expenses incurred for the maintenance or removal of such poor person.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

Where tax levy for support of poor was deficient because commissioners levied tax to repair courthouse: *Long v. Comrs.*, 76-273. **Any one officiously providing for pauper cannot recover of county:** *Copple v. Comrs.*, 138-132. **Commissioners may require all paupers who are a county charge to go to home for aged and infirm:** *Ibid.*

Liability of county for support of pauper depends upon residence or settlement: *Comrs. of Burke v. Comrs. of Buncombe*, 101-520. **Commissioners may remove pauper to place of last legal settlement and recover therefor:** *Ibid.*

29. To establish public hospitals and tuberculosis dispensaries. To establish public hospitals for the county in cases of necessity, and to establish and maintain wholly or in part one or more tuberculosis dispensaries or sanatoria, and to make rules, regulations and by-laws for preventing the spread of contagious and infectious diseases, and for taking care of those afflicted thereby, the same not being inconsistent with the laws of the state; and to raise by taxation the necessary moneys to defray the charges and expenses so incurred.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

No action lies against commissioners in their corporate capacity for failing to establish hospital: *Bell v. Comrs.*, 127-90. **Commissioners' power to prevent spread of contagious disease stated in** *Prichard v. Comrs.*, 126-911. **Liability of county for expense of quarantine:** *Comrs. v. Henderson*, 163-114.

PRISONS AND PRISONERS

30. To provide for a house of correction. To make provision for the erection in each county of a house of correction, where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed; to regulate the employ-

ment of labor therein; to appoint a superintendent thereof, and such assistants as are deemed necessary, and to fix their compensation.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

A majority of governing body of a county can exercise this power: *Cotton Mills v. Comrs.*, 108-678. Remarks of Dillard, J., upon houses of correction: *State v. Garrell*, 82-580. Referred to merely in *State v. Williams*, 97-416.

31. *To provide for employment of prisoners.* To provide for the employment on the highways or public works in the county of all persons condemned to imprisonment with hard labor, and not sent to the penitentiary.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

Can hire out prisoner to his wife under certain circumstances: *State v. Shaft*, 78-463.

TOWNSHIPS

32. *To divide county into townships.* To divide each county into convenient districts, called townships, and to determine the boundaries and prescribe the names of said townships. A map and survey of said townships shall be filed in the office of the clerk of the board of commissioners, and also in the office of the secretary of state.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

33. *To erect, divide and alter townships.* To erect, divide, change the names of, or alter townships in the manner following: In any county, any three freeholders of each township to be affected may, after the notice presently to be mentioned, apply by petition to the board of commissioners to erect a new township, or divide an existing township, or change the name of or alter the boundaries thereof. Notice of the application shall be posted in one or more public places in each of such townships, and published in a newspaper printed in the county, if there is one, for at least four weeks preceding the meeting at which the application is made to the board. No township shall have or exercise any corporate powers whatsoever, unless authorized by an act of the general assembly, to be exercised under the supervision of the board of commissioners.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8; 1876-7, c. 141, ss. 3, 5.

For power of the legislature of itself or through its agencies to divide up the state into counties, townships, school districts, etc., see *McCormac v. Comrs.*, 90-441. For political relation of township, see *Jones v. Comrs.*, 107-265. For the legal status of a township, see *Wittkowsky v. Comrs.*, 150-90; *Goldsboro v. Broadhurst*, 109-231; *Brown v. Comrs.*, 100-92; *Wallace v. Trustees*, 84-164. Has no corporate powers except such as are authorized by the legislature: *Graves v. Comrs.*, 135-55; *Wittkowsky v. Comrs.*, 150-90.

Necessary expenses of a township defined in *Goldsboro v. Broadhurst*, 109-231.

For power of township to subscribe to the capital stock of a railroad, see *Jones v. Comrs.*, 107-265; *Brown v. Comrs.*, 100-92; *Wood v. Oxford*, 97-227.

By special enactment townships may become bodies corporate and exercise the powers of a governmental agency: *Price v. Trustees*, 172-84; *Trustees v. Webb*, 155-379; *Highway Com. v. Webb*, 152-710; *Sanderlin v. Luken*, 152-738; *Smith v. Trustees*, 141-143. But county bonds cannot be issued upon a vote of a township, for the benefit of such township, under act of 1917, c. 6, s. 20: *Comrs. v. Lacy*, *State Treas.*, 174-141.

34. *To apportion funds between altered townships.* When a township has been altered, erected, or divided, to apportion, in its discretion, the public funds of such township between the new township divisions or subdivisions, and the warrant of the board upon the treasurer for the apportionment shall constitute a valid voucher for the payment thereof. In those counties where the township

public roads are under the control of road trustees, the board shall appoint the requisite number of trustees to perform the duties of the office until the regular date for the appointment or election of such trustees and until their successors are elected and qualified; but this shall not apply where another method of election has been provided.

Ex. Sess. 1913, c. 44.

MISCELLANEOUS

35. To authorize chairman to issue subpoenas. To authorize the chairman to issue subpoena to compel the attendance before the board of persons, and the production of books and papers relating to the affairs of the county, for the purpose of examination on any matter within the jurisdiction of the board. The subpoena shall be served by the sheriff or any constable to whom it is delivered; and upon return of personal service thereof, whoever neglects to comply with the subpoena or refuses to answer any proper question shall be guilty of contempt and punishable therefor by the board. A witness is bound in such cases to answer all the questions which he would be bound to answer in like case in a court of justice; but his testimony given before the board shall not be used against the witness on the trial of any criminal prosecution other than for perjury committed on the examination. The chairman of the board of county commissioners for each county is authorized in his official capacity to administer oaths in any matter coming before either of such boards. Any member of such board while temporarily acting as such chairman has and may exercise like authority.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

36. To audit accounts. To audit accounts against the county, and direct the raising of the moneys necessary to defray them.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

Commissioners must audit claims at regular meetings: *Bank v. Warlick*, 125-594—but must first have them itemized and verified, *Turner v. McKee*, 137-251. Civil action proper to test rejected claim: *Jones v. Comrs.*, 88-56. Effect of allowing claim and auditor's refusing to recognize it: *Wilson v. Holding*, 170-352.

37. To appoint proxies. To appoint proxies to represent in any annual or other meetings the shares or other interest held by any county in a railroad company, or other corporation, under the charter of such corporation, or under any special acts of the general assembly, authorizing county subscriptions in such cases.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

For special law as to Cherokee, see P. L. Ex. Sess. 1913, c. 115.

38. To procure weights and measures. To procure for each county sealed weights and measures, according to the standard prescribed by Congress; and to elect a standard keeper, who shall qualify before the board and give bond approved by the board, as prescribed by law.

Rev., s. 1318; Code, s. 707; R. C., c. 117, s. 4; 1868, c. 20, s. 26.

39. To adopt a county seal. To adopt a seal for the county, a description and impression of which shall be filed in the office of superior court clerk and of the secretary of state.

Rev., s. 1318; Code, s. 707; 1868, c. 20, s. 8.

40. *To promote farmers coöperative demonstration work.* To coöperate with the state and national departments of agriculture to promote the farmers coöperative demonstration work, and to appropriate such sum as they may agree upon for the purpose.

1911, c. 1.

41. *To appropriate for the national guard.* To appropriate such sums of money to the various organizations of the national guard, and at such times, as the board may deem proper.

1915, c. 259.

42. *To make appropriations for libraries.* Together with the county board of education of any county in which there is a public city or town library, in their discretion, to coöperate with the trustees of said library in extending the service of such library to the rural communities of the county, and to appropriate out of the funds under their control an amount sufficient to pay the expense of such library extension service.

1917, c. 149.

1298. Local: authority to interdict certain shows. The boards of commissioners of the several counties shall have power to direct the sheriff of the county to refuse to issue any license to any carnival company and shows of like character, moving picture and vaudeville shows, museums and menageries, merry-go-rounds and ferris-wheels, and other like amusement enterprises conducted for profit under the same management and filling week-stand engagements or in giving week-stand exhibitions, whether under canvas or not, whenever in the opinion of the board of county commissioners the public welfare will be endangered by the licensing of such companies. This section shall apply only to the counties of Anson, Bladen, Burke, Cabarrus, Carteret, Catawba, Duplin, Forsyth, Greene, Haywood, Iredell, Lee, Madison, Mitchell, Nash, Orange, Pamlico, Pasquotank, Polk, Randolph, Robeson, Scotland, Tyrrell, Washington, Wilson, Yadkin.

1919, c. 164.

1299. To settle disputed county lines. When there is any dispute concerning the dividing line between counties, the board of commissioners of each county interested in the adjustment of said line, a majority of the board consenting thereto, may appoint one or more commissioners, on the part of each county, to settle and fix the line in dispute; and their report, when ratified by a majority of the commissioners in each county, is conclusive of the location of the true line, and shall be recorded in the register's office of each county, and in the office of the secretary of state.

Rev., s. 1322; Code, s. 721; R. C., c. 27; 1836, c. 3.

1300. How commissioners sworn and paid. Such commissioners, before entering on the duties assigned them, shall be sworn before a justice of the peace; and they, with all others employed, shall be allowed reasonable pay for their labors.

Rev., s. 1323; Code, s. 722.

1301. Approving insufficient bond misdemeanor. If any county commissioner shall approve any official bond which he knows or believes to be insufficient in the penal sum, or in the security thereof, he shall be guilty of a misdemeanor, and

on conviction shall be removed from office and forever disqualified from holding or enjoying any office of honor, trust or profit under the state.

Rev., s. 3573; Code, s. 1880; 1869-70, c. 169, s. 70.

See sections 3931-3933.

1302. Neglect of duty misdemeanor. If any county commissioner shall neglect to perform any duty required of him by law as a member of the board, he shall be guilty of a misdemeanor, and shall also be liable to a penalty of two hundred dollars for each offense, to be paid to any person who shall sue for the same.

Rev., s. 3590; Code, s. 711.

Each county commissioner is liable for the penalty here imposed when the board fails to declare an office vacant and fill such vacancy when they are required to do so by law; but only one penalty can be collected, not one for failure to declare vacant and another for failure to fill vacancy: *Bray v. Creekmore*, 109-49; *Bray v. Barnard*, 109-44. Liability for penalty for failure to repair public roads: *Templeton v. Beard*, 159-63. Sufficient complaint in action for penalty: *Turner v. McKee*, 137-251. The allegations in complaint should show a cause of action against the commissioners personally: *Bell v. Comrs.*, 127-85. Corrupt intent, gross negligence, or intentional neglect should be shown: *Staton v. Wimberly*, 122-107; *State v. Norris*, 111-652; *Bray v. Barnard*, 109-44.

Indictment against commissioners for failure to erect and repair courthouse: *State v. Leeper*, 146-655. Defendant may ask for bill of particulars: *Ibid.* Liable to indictment for failure to levy sufficient school tax: *Collie v. Comrs.*, 145-170; *Bd. of Ed. v. Comrs.*, 150-116.

Section cited in *Manuel v. Comrs.*, 98-11; *Glenn v. Comrs.*, 139-418; *Hudson v. McArthur*, 152-445. See, also, annotations under sections 4384, 4385. Liability for taxes, see section 3933.

ART. 3. STATE ASSOCIATION OF COUNTY COMMISSIONERS

1303. Membership of association. The State Association of County Commissioners consists of the boards of county commissioners of the several counties, and any member of the board of any county may be a member of the association, but it is not mandatory for any county to become a member.

1909, c. 870, ss. 1, 2.

1304. Purposes of association. The purpose of the association is to promote and cultivate more intimate association and more friendly relations among the county commissioners of the state; to secure as far as possible a uniform valuation of property for taxation; to promote the cause of good roads; to propose laws for the best interests of county governments; to secure uniformity in the handling of county affairs; to propose laws for the protection of county finances, and preservation of resources and assets; and to promote the general welfare of the state.

1909, c. 870, s. 1.

1305. Powers of association. The association has power to adopt by-laws, rules and regulations for the government of its members, for the collection of fees and dues, for the number and election of its officers and the duties thereof, for the safe keeping of its property, and the general management of its affairs, and has power to alter, modify or amend such by-laws, rules and regulations, from time to time, as it deems best.

1909, c. 870, s. 3.

1306. Officers of association. The officers shall be a president, a vice president at large and ten other vice presidents, or one from each congressional district, a secretary and treasurer, and an executive committee. The duties of the officers shall be prescribed by the by-laws, rules and regulations.

1909, c. 870, s. 4.

1307. **Dues and expenses of members.** There shall be assessed against each county an annual membership fee of five dollars, which shall be paid by the county treasurer upon the order of the board of county commissioners, but the executive committee of the association may increase the annual membership fee to a sum not to exceed ten dollars. The various boards of commissioners are authorized to pay out of the county treasury the expenses of one of its members attending the meetings of the association.

1909, c. 870, ss. 5, 7.

1308. **Meetings of association.** The annual meeting of the association shall be held on Wednesday after the second Monday in August of each year, and the place of meeting shall be designated by the executive committee. Upon ten days notice, the president or a majority of the executive committee may call a called meeting, and the time and place shall be designated, together with a short statement of the object of the meeting.

1909, c. 870, s. 6.

ART. 4. CLERK TO BOARD OF COMMISSIONERS

1309. **Register clerk ex officio to board; compensation.** The register of deeds is ex officio clerk of, and his compensation shall be fixed by, the board of commissioners.

Rev., s. 1324; Code, s. 710; 1895, c. 135, s. 4.

1310. **Duties of clerk.** It is the clerk's duty—

1. To record in a book to be provided for the purpose all the proceedings of the board.
2. To enter every resolution or decision concerning the payment of money.
3. To record the vote of each commissioner on any question submitted to the board, if required by any member present.
4. To preserve and file in alphabetical or other due order all accounts presented or acted on by the board, and to designate upon every account audited the amount allowed and the charges for which it was allowed.
5. To keep the books and papers of the board free for the examination of all persons.
6. To administer oaths to all persons presenting claims against the county, but he shall receive no fee therefor.

Rev., s. 1325; Code, s. 712; 1905, c. 530.

1311. **Clerk to publish annual statement.** The clerk shall annually, on or within five days next before the first Monday of December, make out and certify, and cause to be posted at the courthouse, and published in a newspaper printed in the county, if there is one, for at least four weeks, a statement for the preceding year, showing—

1. The amount, items and nature of all compensation audited by the board to the members thereof severally.
2. The number of days the board was in session, and the distance traveled by the members respectively in attending the same.
3. Whether any unverified accounts were audited, and if any, how much and for what.

Rev., s. 1326; Code, s. 713.

Failure to publish statement is a misdemeanor, section 4384. See, also, under **Municipal Corporations**, section 2687.

ART. 5. FINANCE COMMITTEE

1312. Election and duties of finance committee. The board of commissioners may elect by ballot three discreet, intelligent tax-paying citizens, to be known as the "finance committee," whose duty it is to inquire into, investigate and report by public advertisement, at the courthouse and one public place in each township of the county, or in a newspaper, at their option, if one is published in the county, a detailed and itemized account of the condition of the county finances, together with any other information appertaining to any funds, misappropriation of county funds, or any malfeasance in office by any county officers.

Rev., s. 1389; Code, s. 758; 1897, c. 513; R. C., c. 28, s. 17; 1838, c. 31, s. 1; 1871-2, c. 71, s. 1.

Mistake made in report of finance committee, money refunded to officer paying same: *Moore v. Comrs.*, 87-209. Section cited in *Wilson v. Holding*, 170-352. Power of legislature to appoint a special finance and auditing committee: *Audit Co. v. McKenzie*, 147-461.

1313. Oath of members. The members of the finance committee before entering upon their duties shall, before the clerk of the superior court, subscribe to the following oath or affirmation:

I, A. B., do solemnly swear (or affirm) that I will diligently inquire into all matters relating to the receipts and disbursements of county funds and a true report make, without partiality. So help me, God.

Rev., s. 1390; Code, s. 762; 1871-2, c. 71, s. 4.

1314. Powers of finance committee. The finance committee has power and authority to send for persons and papers, and to administer oaths; and any person failing to obey their summons, or to produce promptly any paper relating or supposed to relate to any matter appertaining to the duties of the finance committee, is guilty of a misdemeanor, and on conviction in the superior court, shall be fined and imprisoned at the discretion of the court.

Rev., s. 1391; Code, s. 759; 1831, c. 31; 1871-2, c. 71, s. 2; R. C., c. 28, s. 17; 1883, c. 252. Section cited in *Wilson v. Holding*, 170-352.

1315. Penalty on officer failing to settle. If any clerk, sheriff, constable, county treasurer, register of deeds, justice of the peace, or other officer or commissioner, who holds any county money, fails duly to account for the same, the finance committee shall give such person ten days previous notice, in writing, of the time and place at which they will attend to make a settlement; and every officer receiving notice and failing to make settlement as required by this chapter shall forfeit the sum of five hundred dollars, to be sued for in the name of the state and prosecuted for the use and at the expense of the county, unless the court releases the officers from the forfeiture.

Rev., s. 1392; Code, s. 760; R. C., c. 28, s. 19; 1831, c. 31, s. 3.

1316. Annual report of finance committee. It is the duty of the finance committee to make and publish their reports as hereinbefore directed on or before the first Monday of December in each year.

Rev., s. 1393; Code, s. 761; 1871-2, c. 71, s. 3.

For criminal costs for which county is liable, see *Costs*.

For finance committee of Robeson, see 1907, c. 488.

ART. 6. COURTHOUSE AND JAIL BUILDINGS

1317. Built and repaired by commissioners. There shall be kept and maintained in good and sufficient repair in every county a courthouse and common jail, at the expense of the county wherein the same are situated. The boards of commissioners of the several counties respectively shall lay and collect taxes, from year to year, as long as may be necessary, for the purpose of building, repairing and furnishing their several courthouses and jails, in such manner as they think proper; and from time to time shall order and establish such rules and regulations for the preservation of the courthouse, and for the government and management of the prisons, as may be conducive to the interests of the public and the security and comfort of the persons confined.

Rev., s. 1335; Code, s. 782; R. C., c. 30, s. 1; 1741, c. 33, ss. 1, 2; 1795, c. 433, s. 1; 1816, c. 911, s. 1.

Courthouse and jail necessary expense, see annotations under section 1325. The court will not interfere with the discretion of commissioners as to the kind of building: *Jackson v. Comrs.*, 171-379; *Haskett v. Tyrrell*, 152-714; *Vaughn v. Comrs.*, 117-429. The legislature may impose a restriction upon the expense: *Burgin v. Smith*, 151-561. Commissioners are indictable for failure to provide a suitable courthouse: *State v. Leeper*, 146-655.

Noxious air of city guardhouse "accelerating" the death of prisoner, city liable: *Lewis v. Raleigh*, 77-229; *Shields v. Durham*, 118-456. The least that is required is that persons confined in public prison shall have a clean place, comfortable bedding, wholesome food and drink, and necessary attendance: *Ibid.*; *Moffitt v. Asheville*, 103-237. But city is not liable for injury to a person placed in a city prison when arrested by the officer for violation of state law: *Hobbs v. Washington*, 168-293.

In the absence of statutory provision, counties are not liable for damages sustained by negligent acts of their agents and servants: *Manuel v. Comrs.*, 98-9; *White v. Comrs.*, 90-437; *Jones v. Comrs.*, 130-452; *Pritchard v. Comrs.*, 126-908; *Moody v. State's Prison*, 128-12. County not liable for damages to prisoner for neglect of commissioners to furnish adequate means for his health and protection: *Manuel v. Comrs.*, 98-9; see *Shields v. Durham*, 118-456—and as to whether commissioners personally liable, *quere*, *Ibid.*

1318. Jail to have five apartments. The common jails of the several counties shall be provided with at least five separate and suitable apartments, one for the confinement of white male criminals; one for white female criminals; one for colored male criminals; one for colored female criminals; and one for other prisoners.

Rev., s. 1336; Code, s. 783; R. C., c. 30, s. 2; 1795, c. 433, s. 4; 1816, c. 911.

Misdemeanor to confine prisoners in improper apartment, section 4408. As to separate apartment for Cherokee Indians of Robeson county, see section 6258. Separate rooms or cells for tuberculous prisoners, sections 7207, 7208.

1319. To be heated. It is the duty of the board of commissioners in every county to have the common jails so heated by furnaces, stoves, or otherwise, as to render them warm and comfortable. A failure to discharge the duty herein specified shall constitute a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court.

Rev., s. 1337; Code, s. 784; 1879, c. 25.

See annotations under section 1317.

1320. Bedding to be furnished. The board of county commissioners, from time to time, as may be necessary, shall order the sheriff of the county to purchase, for the use of their jail, a certain number of good, warm blankets or other suitable bedclothing, which shall be securely preserved by the jailer, and furnished

to the prisoners for their use and comfort, as the season or other circumstances may require; and the sheriff, at least once in every year, shall report to the board of commissioners the condition and number of such blankets and bedclothing.

Rev., s. 1338; Code, s. 3465; R. C., c. 87, s. 10; 1822, c. 1136.

As to duty of county or town to furnish proper bedding, etc., see *Moffitt v. Asheville*, 103-237; *Threadgill v. Comrs.*, 99-352; *Manuel v. Comrs.*, 98-9.

1321. Prison bounds. For the preservation of the health of persons committed to jail, the board of commissioners of each county shall mark out such a parcel of the land as they think fit, not exceeding six acres, adjoining the prison, for the rules thereof; and every prisoner not committed for treason or felony, giving bond with good security to the sheriff of the county to keep within the rules, shall have liberty to walk therein, out of the prison, for the preservation of his health; and on keeping continually within the said rules, shall be deemed to be in law a true prisoner. In order that every person may know the true bounds of said rules, they shall be recorded in the county records, and the marks thereof shall be renewed as occasion may require.

Rev., s. 1339; Code, s. 3466; R. C., c. 87, s. 11; 1741, c. 33, s. 3.

For construction of former similar statute, see *Ex parte Bradley*, 26-544. Prison bounds not allowed to one in execution for criminal offense: *State v. Pearson*, 100-414; *Ex parte Bradley*, 26-544. Allowed only to prisoners in civil actions and in criminal cases where prisoner committed in default of bail: *State v. Pearson*, 100-417. Bond to keep prison bounds, taken before prisoner committed to close custody is invalid: *Northam v. Terry*, 30-175.

Sheriff liable where he refuses to accept bond to keep prison bounds or to admit prisoner to rules: *Mann v. Vick*, 8-427. Sheriff's duty to furnish blank bond: *Ibid*.

Defendant arrested while in prison bounds by another creditor and confined within prison may be released as insolvent: *In re Huntington*, 6-369.

ART. 7. COUNTY REVENUE

1322. Taxes collected by sheriff. The county taxes shall be collected by the sheriff of the county. He is entitled to the same commissions and is subject to the same rules and regulations in respect to his settlement of the said taxes with the county treasurer as he is in his settlement of the public taxes with the treasurer of the state; and he shall also settle with the county treasurer or board of commissioners for the taxes on the unlisted property in his county, under the same rules and regulations as he accounts with the auditor of the state.

Rev., s. 1376; Code, s. 723; R. C., c. 28, s. 2; 1798, c. 509, s. 2; 1811, c. 823.

See, also, sections 3943, 7972, and chapter on Taxation, articles 13 and 14. For construction of the words "county taxes," see *Board v. Comrs.*, 137-66.

County taxes must be collected by sheriff: *Board v. Comrs.*, 137-65; *King v. Hunter*, 65-603. Legislature cannot deprive him of right to collect: *King v. Hunter*, 65-603; see, also, the "officeholding cases" cited under section 870, and especially *Mial v. Ellington*, 134-138, which gives as reason why sheriff cannot be deprived of right to collect that it is fixed by the constitution, not that sheriff has property right in office.

Sheriff insane, his sureties may collect current tax list: *Somers v. Comrs.*, 123-582. Sheriff or tax collector is an insurer of the safety of all money officially received by him against loss by any means whatever, including such losses as arise from act of God or public enemy: *Comrs. v. Clarke*, 73-255; *Smith v. Patton*, 131-397, and cases there cited.

All school taxes are included in the accounting to be made between county treasurer and sheriff: *Tillery v. Candler*, 118-888.

No appeal lies from refusal of commissioners to allow a credit to sheriff in his settlement of taxes; remedy of sheriff is by civil action: *McMillan v. Comrs.*, 90-28; *Jones v. Comrs.*, 88-56, and cases cited. Commissioners have no power to release sheriff from liability to pay over county taxes: *Fidelity Co. v. Fleming*, 132-337; *Comrs. v. Clarke*, 73-255. As to com-

missions allowed, see section 8043. A mistake in settlement of taxes for one year cannot be used by sheriff as a counterclaim against those due for another year: *Comrs. v. Hall*, 177-490.

The legislature may place sheriff on a salary, and the fees for collecting taxes will go to the county: *Mills v. Deaton*, 170-386. But a sheriff whose term expires is entitled to collect taxes for the preceding year on the tax books in his hands and retain fees, if not otherwise provided, though the office has been placed on a salary basis: *Comrs. v. Bain*, 173-377.

1323. **Statement of fines kept by clerk.** It is the duty of the clerks of the several courts, and of the several justices of the peace, to enter in a book, to be supplied by the county, an itemized and detailed statement of the respective amounts received by them in the way of fines, penalties, amercements and forfeitures, and said books shall at all times be open to the inspection of the public.

Rev., s. 1377; Code, s. 725; 1873-4, c. 116, s. 4; 1879, c. 96, s. 1.

1324. **Fines paid to treasurer for schools; annual report.** All fines, forfeitures, penalties and amercements collected in the several counties by any court or otherwise shall be accounted for and paid to the county treasurer by the officials receiving them within sixty days after receipt thereof, and shall be faithfully appropriated by the county board of education for the establishment and maintenance of free public schools; and the amounts collected in each county shall be annually reported to the superintendent of public instruction on or before the first Monday in January, by the board of commissioners.

Rev., s. 1378; Const., Art. IX, s. 5; Code, ss. 724, 726; R. C., c. 28, s. 3; 1879, c. 96, ss. 2, 5.

See, also, section 7875. Only clear proceeds of all penalties that accrue to the state to go to school fund: *State v. Maultsby*, 139-583; *School Directors v. Asheville*, 128-249, 137-508; *Carter v. R. R.*, 126-445; *Bd. of Ed. v. Henderson*, 126-695; *Goodwin v. Fertilizer Co.*, 119-122; *Sutton v. Phillips*, 116-502; *Hodge v. R. R.*, 108-30; *Katzenstein v. R. R.*, 84-688—and likewise as to fines, the "clear proceeds" of which are indicated, *State v. Maultsby*, 139-585; *Bd. of Ed. v. Henderson*, 126-695; *School Directors v. Asheville*, 137-508. Power of legislature to appropriate or give fines and penalties to other causes discussed in *State v. Maultsby*, 139-583; *School Directors v. Asheville*, 137-503. For liability of municipalities for fines, penalties and forfeitures hereunder, see *School Directors v. Asheville*, 128-249; *Bd. of Ed. v. Henderson*, 126-689; *Comrs. v. Raleigh*, 88-120. Forfeited bail in appeal on habeas corpus, to test validity of extradition, goes to school fund: *In re Wiggins*, 171-372.

1325. **Expenditures of county funds directed by commissioners.** The board of commissioners is invested with full power to direct the application of all moneys arising by virtue of this chapter for the purposes herein mentioned, and to any other good and necessary purpose for the use of the county.

Rev., s. 1379; Code, s. 753; R. C., c. 28, s. 16; 1777, c. 129, s. 4.

For additional important annotations on this subject, see section 1297, subsections 2, 3, 5.

General power of commissioners to contract a debt for necessary expense and to levy a tax, explained: *Guire v. Comrs.*, 177-516, and cases cited. General power of commissioners in expending county funds compared with duty of auditor: *Wilson v. Holding*, 170-352.

Courts have right to say what are necessary expenses, but cannot control discretion of commissioners in incurring debt when expenses are necessary: *Jackson v. Comrs.*, 171-379; *Hightower v. Raleigh*, 150-569; *Haskett v. Tyrrell*, 152-714; *Ward v. Comrs.*, 146-534; *Black v. Comrs.*, 129-121; *Mayo v. Comrs.*, 122-5; *Vaughn v. Comrs.*, 117-429; but see *McKethan v. Comrs.*, 92-243; *Evans v. Comrs.*, 89-154; *Satterthwaite v. Comrs.*, 76-153; *Brodnax v. Groom*, 64-244.

Legislature may confer upon county the right to create debts for necessary expenses without consent of majority of qualified voters of county: *Evans v. Comrs.*, 89-154; *Halcombe v. Comrs.*, 89-346; *Guire v. Comrs.*, 177-516; *Woodall v. Highway Com.*, 176-377, and other cases cited under section 1297, subsection 6. Where the legislature requires popular vote or imposes other restrictions, they must be observed: *Burgin v. Smith*, 151-561, and other cases under subsection 6, section 1297. Neither county nor commissioners individually liable for misappli-

cation of funds, where they act in good faith, but under mistake of law: *Bd. of Ed. v. Comrs.*, 113-387. Expense of convicts is paid out of county fund: *Chambers v. Walker*, 120-401.

Power of commissioners to expend the public money for improvement of roads is not taken away by implication by a special act regulating roads in townships: *Bunch v. Comrs.*, 159-335.

NECESSARY EXPENSES. Constructing and maintaining public roads and bridges: *Guire v. Comrs.*, 177-516; *Woodall v. Highway Com.*, 176-377; *Moose v. Comrs.*, 172-419; *Hargrave v. Comrs.*, 168-626; *Pritchard v. Comrs.*, 159-636; s. c., 160-477; *Comrs. v. Comrs.*, 165-632; *Trustees v. Webb*, 155-379; *Crocker v. Moore*, 140-429; *Glenn v. Comrs.*, 139-412; *Tate v. Comrs.*, 122-812; *Herring v. Dixon*, 122-420; *McCless v. Meekins*, 117-35; *Evans v. Comrs.*, 89-154; *Satterthwaite v. Comrs.*, 76-153; *Brodnax v. Groom*, 64-244. Building courthouse and jail: *Jackson v. Comrs.*, 171-379; *Haskett v. Tyrrell*, 152-714; *Black v. Comrs.*, 129-121; *Burgin v. Smith*, 151-561; *Vaughn v. Comrs.*, 117-429; *Halcombe v. Comrs.*, 89-346. A fence in stock-law territory: *Tripp v. Comrs.*, 158-180; but not outside of such territory, *Keith v. Lockhart*, 171-451. County home for aged and infirm: *Comrs. v. Spitzer*, 173-147.

Support of schools not a necessary expense for county: *Hill v. Lenoir County*, 176-572; *Williams v. Comrs.*, 176-554; *Snider v. Jackson County*, 175-590; *Moran v. Comrs.*, 168-289; *Sprague v. Comrs.*, 165-603; *Lane v. Stanly*, 65-153.

Summary of constitutional rules as to the levying of taxes for necessary expenses in *Tate v. Comrs.*, 122-815; *Guire v. Comrs.*, 177-516. See, also, section 2691.

1326. County officers receiving funds to report annually. Sheriffs, treasurers, clerks of any court, registers of deeds and all other officers of the several counties, into whose hands any public funds may come by virtue or under color of their office, shall make an annual account and report of the amount and management of the same, on the first Monday of December, or oftener if required, in each year, to the board of commissioners. Such report shall give an itemized and detailed account of the public funds received and disbursed, the amount, date and source from which it was received, and the amount, date and person to whom paid. It shall be addressed to the chairman of the board of commissioners for the county, and shall be subscribed and verified by the oath of the party making the same, before any person authorized to administer oaths.

Rev., s. 1380; Code, s. 728; 1874-5, c. 151, s. 1; 1876-7, c. 276, s. 1.

1327. Board to enforce duty to report. If any person required to make any of the reports herein provided for fails to do so, or if, after a report has been made, the board of commissioners disapprove the same, such board may take such legal steps to compel a proper report to be made, either by suit on the bond of such officer failing to comply or otherwise, as said board may deem best.

Rev., s. 1381; Code, s. 730; 1874-5, c. 151, s. 3; 1876-7, c. 276, s. 3.

1328. Reports to be recorded in register's office. If the board of commissioners approves of any of the said reports, it shall cause the same to be registered in the office of the register of deeds in a book to be furnished to the register of deeds by the county, which book shall be marked and styled Record of Official Reports, with a proper index of all reports recorded therein, and each official report shall, if approved, be indorsed by the chairman of the board with the word "approved," with the date of approval, and when recorded by the register of deeds he shall indorse thereon the date of registration, the page of the Record of Official Reports upon which the same is registered, sign the same and file it in his office.

Rev., s. 1382; Code, s. 729; 1874-5, c. 151, s. 2; 1876-7, c. 276, s. 2.

1329. Penalty for failure to report. If any clerk, sheriff, justice of the peace, or other officer, fails or neglects to account for and pay over as required by law

any taxes on suits, or any fines, forfeitures and amercements, as required by this chapter, or fails to make the returns herein specified, he shall forfeit and pay five hundred dollars, to be recovered in the name of the board of commissioners for the use of the public schools of the county.

Rev., s. 1383; Code, s. 764; R. C., c. 28, s. 7; 1808, c. 756; 1809, c. 769; 1813, c. 864; 1830, c. 1, ss. 11-13.

“Account” defined: *State v. Dunn*, 134-668. Penalty statutes must be strictly construed: *Alexander v. R. R.*, 144-93. “Penalty” defined: *Board v. Henderson*, 126-689. As to actions for recovery of penalties, see sections 423, 464.

1330. Demand before suit against municipality; complaint. No person shall sue any city, county, town, or other municipal corporation for any debt or demand whatsoever unless the claimant has made a demand upon the proper municipal authorities. And every such action shall be dismissed unless the complaint is verified and contains the following allegations: (1) That the claimant presented his claim to the lawful municipal authorities to be audited and allowed, and that they had neglected to act upon it, or had disallowed it; or (2) that he had presented to the treasurer of said municipal corporation the claim sued on, which had been so allowed and audited, and that such treasurer had notwithstanding neglected to pay it.

Rev., s. 1384; Code, s. 757.

For time in which such demand made and action brought, see section 442. For additional annotations, see section 1331.

DEMAND. Claims must be audited and presented for payment and refused before action will lie: *Leach v. Comrs.*, 84-830; *Jones v. Comrs.*, 73-182; *Alexander v. Comrs.*, 67-330; *Love v. Comrs.*, 64-706. This section does not apply to actions *ex contractu* where the damages are unliquidated, nor to torts: *Sugg v. Greenville*, 169-606; *Neal v. Marion*, 126-412; *Sheldon v. Asheville*, 119-606; *Frisby v. Marshall*, 119-570; *Shields v. Durham*, 118-450. Where the municipal charter provides that all claims must be presented in writing within a certain time, it must be complied with, and the officers cannot waive compliance: *Hartsell v. Asheville*, 164-193; s. c., 166-633; *Pender v. Salisbury*, 160-363. If plaintiff is unable to present claim by reason of mental or physical disability, the delay will be excused: *Terrell v. Washington*, 158-281; *Hartsell v. Asheville*, 166-633.

Complaint against county or town must allege demand upon proper officers: *Williams v. Smith*, 134-252; *School Directors v. Greenville*, 130-87; *Leach v. Comrs.*, 84-830; *Jones v. Comrs.*, 73-182; *Love v. Comrs.*, 64-706. **Duty of county commissioners and auditor with respect to claims presented:** *Wilson v. Holding*, 170-352; *Halford v. Senter*, 169-546.

MANDAMUS TO ENFORCE PAYMENT. See section 866. Debt reduced to judgment, creditor entitled to mandamus to compel payment: *Drainage Dist. v. Comrs.*, 174-738; *Withers v. Comrs.*, 163-341; *Fry v. Comrs.*, 82-304; *Hughes v. Comrs.*, 107-598; *Cromartie v. Comrs.*, 85-211, 87-134; *Gas Co. v. Raleigh*, 75-274; *McLendon v. Comrs.*, 71-38; *Johnston v. Comrs.*, 67-101; *Askew v. Pollock*, 66-49; *Gooch v. Comrs.*, 65-142; *Lutterloh v. Comrs.*, 65-403; *Pegram v. Comrs.*, 64-557; *Winslow v. Comrs.*, 64-223—and that without prior demand, *Nicholson v. Comrs.*, 121-27—and mandamus should be addressed to commissioners as board and not as individuals: *Thomas v. Comrs. of Carteret*, 66-521; *Askew v. Pollock*, 66-49. A writ of mandamus does not authorize commissioners to levy and collect taxes otherwise than as prescribed by law: *Mauney v. Comrs.*, 71-486; see *Hughes v. Comrs.*, 107-598; *Cromartie v. Comrs.*, 85-211, 87-134. **Mandamus to compel payment of salary of superintendent of health:** *Halford v. Senter*, 169-546; *McCullers v. Comrs.*, 158-75; see, also, section 7067.

When peremptory mandamus issues: *Fry v. Comrs.*, 82-304; *Edwards v. Comrs.*, 70-571; *Uzz'e v. Comrs.*, 70-564; *Lutterloh v. Comrs.*, 65-405—mandamus failing, debtor moves for attachment, *Fry v. Comrs.*, 82-307. **Facts which must be shown before mandamus issues:** *Bear v. Comrs.*, 124-204; *Hughes v. Comrs.*, 107-598.

That constitutional limit of taxation has been reached is a sufficient answer by commissioners to a writ of mandamus: *Hughes v. Comrs.*, 107-598; *Cromartie v. Comrs.*, 85-211, 87-134—but alias mandamus should issue to the end that any excess of revenue raised may

be applied to debt, *Cromartie v. Comrs.*, 87-134. That claim upon which judgment based is void is no defense to writ, unless claim shown not to be for necessary expenses: *Bear v. Comrs.*, 122-434, modified by the same case in 124-204.

Action of debt may be maintained against county without asking for mandamus where it appears that county has property subject to trusts or such as can be reached only by supplementary proceedings: *Hughes v. Comrs.*, 107-598. As to enforcing judgment against county property where mandamus unavailable because tax rate up to constitutional limitation, see *Hughes v. Comrs.*, 107-598; *Winslow v. Comrs.*, 64-223.

Legislature can compel county to issue bonds to fund indebtedness for necessary expenses: *Jones v. Comrs.*, 137-579—and mandamus is the proper remedy to force commissioners to comply with act "authorizing and empowering" them to fund it, same being mandatory, *Ibid.*; overruling *Jones v. Comrs.*, 135-218, and *Bank v. Comrs.*, 135-230.

School orders are no charge upon public funds, and payment cannot be enforced by mandamus: *Bear v. Comrs.*, 124-204. County warrant must be paid by treasurer; he cannot dispute its validity except on constitutional grounds: *Martin v. Clark*, 135-180. As to duties of county auditor, see *Wilson v. Holding*, 170-352.

1331. Accounts to be itemized, verified, and audited. No account shall be audited by the board for any services or disbursements unless it is first made out in items and has attached to and filed with it the affidavit of the claimant that the services therein charged have been in fact made and rendered, and that no part thereof has been paid or satisfied. Each account shall state the nature of the services, and where no specific compensation is provided by law, it shall also state the time necessarily devoted to the performance thereof. The board may disallow or require further evidence of the account, notwithstanding the verification. All county commissioners acting on January the twenty-seventh, one thousand nine hundred and five, or elected theretofore, are released, whether as individuals or in their corporate capacity, from any and all penalties incurred by reason of failure to comply with the provisions of this section, prior to said date.

Rev., s. 1385; Code, s. 754; 1905, c. 55; 1868, c. 20, s. 10.

The accounts of the county officers of Washington county are audited by the state auditor annually. 1919, c. 153.

See annotations under section 1330. Complaint against commissioner for penalty under section 1302, alleging failure to require itemized and verified account before auditing and approving claim, states cause of action: *Turner v. McKee*, 137-251. Provision that no account shall be audited by commissioners unless itemized and verified is mandatory, *Ibid.*; see, also, *Dockery v. Hamlet*, 162-118. Unadjusted claims are required to be audited and ordered paid, but absolute and unconditional obligations already ascertained and audited are per se order and authority to officer to pay: *Leach v. Comrs.*, 84-830.

Claims must be audited at regular meeting of board: *Bank v. Warlick*, 125-594. Allowance of claim only prima facie evidence of correctness, and order making same may be modified or annulled: *Abernathy v. Phifer*, 84-711; *Wright v. Kinney*, 123-618. Mandamus lies to compel commissioners to consider claim: *Martin v. Clark*, 135-179; *Bennett v. Comrs.*, 125-469; *Koonce v. Comrs.*, 106-192. Treasurer cannot refuse to pay county warrant except on ground that its issue unconstitutional: *Martin v. Clark*, 135-180. As to duty of auditor, see *Wilson v. Holding*, 170-352.

County warrants are not negotiable in the sense of the law merchant, though transferable so as to authorize the holder to demand payment, with or without action, in his own name: *Wright v. Kinney*, 123-618; *Bank v. Warlick*, 125-594; *McPeeters v. Blankenship*, 123-651.

Holder of valid county warrant, who is refused payment, has two remedies against county treasurer, either to sue on his bond or apply for mandamus, of neither of which has a magistrate jurisdiction: *Wright v. Kinney*, 123-618. Unauthorized endorsement of "approved," signed by chairman, of an order invalid upon its face will not render commissioner personally liable in absence of fraud or misrepresentation: *Ibid.* County orders are presumed to be for necessary expenses: *McCless v. Meekins*, 117-34.

1332. Accounts to be numbered as presented. All accounts presented in any year, beginning at each regular meeting in December, shall be numbered from one upwards, in the order in which they are presented, and the time of presentation, the names of the persons in whose favor they are made out, and by whom presented, shall be carefully entered on the minutes of the board; and no such account shall be withdrawn from the custody of the board or its clerk, except to be used as evidence in a judicial proceeding, and after being so used it shall be promptly returned.

Rev., s. 1386; Code, s. 755; 1868, c. 20, s. 12.

1333. Claims to be numbered as allowed; copy to board annually. The clerk of the board of commissioners, if so ordered by the board, shall number all claims, orders and certificates that may be allowed by the board in a book kept for that purpose, and he shall annually, the day before the board proceeds to lay a county tax for the ensuing year, furnish the chairman of the board with a copy of the same.

Rev., s. 1387; Code, s. 751; R. C., c. 28, s. 12; 1793, c. 387.

1334. Annual statement of claims and revenues to be published. The board shall cause to be posted at the courthouse within five days after each regular December meeting and for at least four successive weeks, or after each regular monthly meeting, if they deem it advisable, and for one week, the name of every individual whose account has been audited, the amount claimed and the amount allowed; and also at the same time and in the same manner post a full statement of county revenue and charges, showing by items the income from every source and the disbursements on every account for the past year, together with the permanent debt of the county, if any, when contracted, and the interest paid or remaining unpaid thereon. The board shall also publish the said statement in some newspaper in the county: Provided, the cost of such publication shall not exceed one-half of a cent a word.

Rev., s. 1388; Code, s. 752; 1901, c. 196; 1905, c. 227.

This section does not subject a commissioner, whose term of office expired on the day of the meeting designated, to the penalty for failure to publish: *Shelton v. Moody*, 146-426. See section 2687.

ART. 8. COUNTY POOR

1335. Support of poor; superintendent of county home; paupers removing to county. The board of commissioners of each county is authorized to provide by taxation for the maintenance of the poor, and to do everything expedient for their comfort and well-ordering. They may employ biennially some competent person as superintendent of the county home for the aged and infirm, and may remove him for cause. They may institute proceedings against any person coming into the county who is likely to become chargeable thereto, and cause his removal to the county where he was last legally settled; and they may recover from such county by action all charges and expenses incurred for the maintenance or removal of such poor person.

Rev., s. 1327; Code, s. 3540; 1891, c. 138.

Providing a county home for aged and infirm is a necessary expense: *Comrs. v. Spitzer*, 173-147. The general duty is imposed of providing for the poor; the place, method and extent of relief are vested in the judgment and discretion of the county commissioners: *Copple v. Comrs.*, 138-132.

Under this section to provide for the poor, in order that there may be a binding pecuniary obligation on the county, there must be an express contract to that effect, or service must be done at express request of proper county officer or agent: *Copple v. Comrs.*, 138-127.

It is the exclusive right of the legislature to determine and declare by whom and how the indigent of the state entitled to support shall be ascertained and from what fund and by whom allowances for their support shall be made: *Board v. Comrs.*, 113-379.

1336. County home for aged and infirm. All persons who become chargeable to any county shall be maintained at the county home for the aged and infirm, or at such place or places as the board of commissioners select or agree upon.

Rev., s. 1328; Code, s. 3541; 1891, c. 138.

For local laws as to Lincoln, Robeson, and Vance, see 1915, c. 558.

Commissioners may require all poor for whom they care to be placed in the home: *Copple v. Comrs.*, 138-132.

1337. Records for county, how to be kept. The keeper or superintendent in charge of each county home in North Carolina, or the board of county commissioners in each county where there is no county home, shall keep a record book showing the following: Name, age, sex, and race of each inmate; date of entrance or discharge; mental and physical condition; cause of admission; family relation and condition; date of death if in the home; cost of supplies and per capita expense of home per month; amount of crops and value, and such other information as may be required by the board of county commissioners or the state board of charities and public welfare; and give a full and accurate report to the county commissioners and to the state board of charities and public welfare. Such report to be filed annually on or before the first Monday of December of each year.

1919, c. 72.

1338. Support of county home. The board of commissioners may provide for the support of the persons admitted by them to the home for the aged and infirm by employing a superintendent at a certain sum, or by paying a specified sum for the support of such persons to any one who will take charge of the county home for the aged and infirm, as said board may deem for the best interest of the county and the cause of humanity.

Rev., s. 1329; Code, s. 3543; 1876-7, c. 277, s. 3.

The overseer of the poor is a public officer and liable to indictment at common law for any neglect of his duties or abuse of powers: *State v. Hawkins*, 77-494.

1339. Property of indigent to be sold or rented. When any indigent person who becomes chargeable to a county for maintenance and support in accordance with the provisions of this article, owns any estate, it is the duty of the board of commissioners of any county liable to pay the expenses of such indigent person to cause the same to be sold for its indemnity or reimbursement in the manner provided under article 3 of the chapter entitled *Insane Persons and Incompetents*, or they may take possession thereof and rent the same out and apply the rent toward the support of such indigent person.

Rev., s. 1330; Code, s. 3547; 1866, c. 49.

1340. Families of indigent militiamen to be supported. When any citizen of the state is absent on service as a militiaman or member of the state guard, and his family are unable to support themselves during his absence, the board of

commissioners of his county, on application, shall make towards their maintenance such allowance as may be deemed reasonable.

Rev., s. 1331; Code, s. 3546; R. C., c. 86, s. 14; 1779, c. 152.

1341. *Paupers not to be hired out at auction.* No pauper shall be let out at public auction, but the board of commissioners may make such arrangements for the support of paupers with their friends or other persons, when not maintained at the county home for the aged and infirm, as may be deemed best.

Rev., s. 1332; Code, s. 3542; 1876-7, c. 277, s. 2.

1342. *Legal settlements; how acquired.* Legal settlements may be acquired in any county, so as to entitle the party to be supported by such county, in the manner following, and not otherwise:

The county of settlement is liable for a pauper: *Comrs. of Burke v. Comrs. of Buncombe*, 101-520; *Comrs. v. Comrs.*, 121-295.

1. *By one year's residence.* Every person who has resided continuously in any county for one year shall be deemed legally settled in that county.

Twelve months continuous residence gives legal settlement: *Comrs. v. Comrs.*, 121-295; *State v. Giles*, 103-394; *State v. Elam*, 61-460.

2. *Married women to have settlement of their husbands.* A married woman shall always follow and have the settlement of her husband, if he have any in the state; otherwise, her own at the time of her marriage, if she then had any, shall not be lost or suspended by the marriage, but shall be that of her husband, till another is acquired by him, which shall then be the settlement of both.

3. *Legitimate children to have settlement of father.* Legitimate children shall follow and have the settlement of their father, if he has any in the state, until they gain a settlement of their own; but if he has none, they shall, in like manner, follow and have the settlement of their mother, if she has any.

4. *Illegitimate children to have settlement of mother.* Illegitimate children shall follow and have the settlement of their mother, at the time of their birth, if she then have any in the state. But neither legitimate nor illegitimate children shall gain a settlement by birth in the county in which they may be born, if neither of their parents had any settlement therein.

County of legal settlement of mother chargeable for bastard: *State v. Giles*, 103-391; *State v. Elam*, 61-460—but where mother has no legal settlement in state, bastard is chargeable on county in which born, *State v. McQuaig*, 63-550. Bastard without settlement to be apprenticed by county of mother's settlement at birth: *Ferrell v. Boykin*, 61-9.

5. *Settlement to continue until new one acquired.* Every legal settlement shall continue till it is lost or defeated by acquiring a new one, within or without the state; and upon acquiring such new settlement, all former settlements shall be defeated and lost.

Old settlement continues until new one acquired: *Comrs. v. Comrs.*, 121-295.

Rev., s. 1333; Code, s. 3544; R. C., c. 86, s. 12; 1777, c. 117, s. 16.

1343. *Removal of indigent to county of settlement; maintenance; penalties.* Upon complaint made by the chairman of the board of county commissioners, before a justice of the peace, that any person has come into the county who is likely to become chargeable thereto, the justice by his warrant shall cause such

poor person to be removed to the county where he was last legally settled; but if such poor person is sick or disabled, and cannot be removed without danger of life, the board of commissioners shall provide for his maintenance and cure at the charge of the county; and after his recovery shall cause him to be removed, and pay the charges of his removal. The county wherein he was last legally settled shall repay all charges occasioned by his sickness, maintenance, cure and removal, and all charges and expenses whatever, if such person die before removal. If the board of commissioners of the county to which such poor person belongs refuses to receive and provide for him when removed as aforesaid, every commissioner so refusing shall forfeit and pay forty dollars, for the use of the county whence the removal was made; moreover, if the board of commissioners of the county where such person was legally settled refuses to pay the charges and expenses aforesaid, they shall be liable for the same. If any housekeeper entertains such poor person without giving notice thereof to the board of commissioners of his county, or one of them, within one month, the person so offending shall forfeit and pay ten dollars.

Rev., s. 1334; Code, s. 3545; R. C., c. 86, s. 13; 1777, c. 117, s. 17; 1834, c. 21.

County not bound to pay for services to paupers unless there is an express contract: *Copple v. Comrs.*, 138-127.

Where a pauper temporarily absent from county of "settlement" is so disabled as to require immediate medical services, and is furnished by authorities of another county with such attention and board, the latter county is entitled to recover expenses thereof from county of settlement: *Comrs. v. Comrs.*, 121-295.

Counties are not liable for torts unless such liability is imposed by statute: *Moffitt v. Asheville*, 103-258; *Threadgill v. Comrs.*, 99-352.

Difference between status and liability of towns and counties illustrated in *Lewis v. Raleigh*, 77-229; *Moffitt v. Asheville*, 103-237; see, also, *Shields v. Durham*, 118-456.

Section merely referred to in *McKenzie v. Buchanan*, 51-31; *State v. Justices*, 11-196.

ART. 9. COUNTY PRISONERS

1344. Bonds of prisoner in criminal case returned to court. Every bond taken of any person confined for an offense, or otherwise than on process issuing in a civil case, shall be returned to the court by whose order or process such person is confined, or which may be entitled to cognizance of the matter, and shall be of the force and effect of a recognizance. On breach thereof it shall be forfeited and collected as a forfeiture in the name and for the use of the state, and applied as other forfeited recognizances.

Rev., s. 1340; Code, s. 3467; R. C., c. 87, s. 12.

Bond to keep prison bounds need not be proved by subscribing witness, for it must be deemed a record so far as concerns proof of execution: *Wynn v. Buckett*, 1-93.

In summary proceedings on bond to keep prison bounds, defendant, pleading matters in pais, entitled to jury trial: *Whitley v. Gaylord*, 48-286.

Sureties to bond not liable for breach thereof, where prisoner released after taking insolvent debtor's oath: *Howard v. Pasteur*, 7-270.

A prisoner's going out of the limits of the rules, after being arrested and put back in close prison by another creditor and discharged as an insolvent debtor, was lawful, although he was in close jail at instance of another creditor, the order of liberation extending to discharge him from all imprisonment for debt: *Ibid.*

1345. Bond of prisoner committed on *capias* in civil action. Every bond given by any person committed in arrest and bail, or in custody after final judgment, shall be assigned by the sheriff to the party at whose instance such person was

committed to jail, and shall be returned to the office of the clerk of the court where the judgment was rendered, and shall have the force of a judgment. If any person who obtains the rules of any prison, as aforesaid, escapes out of the same before he has paid the debt or damages and costs according to the condition of his bond, the court where the bond is filed, upon motion of the assignee thereof, shall award execution against such person and his sureties for the debt or damages and costs, with interest from the time of escape till payment; and no person committed to jail on such execution shall be allowed the rules of prison: Provided, the obligors have ten days previous notice of such motion, in writing; but they shall not be admitted to deny the making of the bond in their answer, unless by affidavit they prove the truth of the plea.

Rev., s. 1341; Code, s. 3469; R. C., c. 87, s. 14; 1759, c. 65, ss. 2, 3.

Proper procedure on bond is by motion: *Brown v. Frazier*, 5-421. The above section gives to bond the force of a judgment, and it cannot be treated as a common deed and action brought upon, but need only to have execution issued, on motion: *Ibid*.

1346. Jailer to cleanse jail, furnish food and water. The sheriff or keeper of any jail shall, every day, cleanse the room of the prison in which any prisoner is confined, and cause all filth to be removed therefrom; and shall also furnish the prisoner plenty of good and wholesome water, three times in every day; and shall furnish each prisoner fuel, not less than one pound of wholesome bread, one pound of good roasted or boiled flesh, and every necessary attendance.

Rev., s. 1343; Code, s. 3464; R. C., c. 87, s. 9; 1816, c. 911, s. 2.

For annotations touching upon subject-matter of this section, see under section 1317. Statute referred to in *Lewis v. Raleigh*, 77-229; *Moffitt v. Asheville*, 103-256.

1347. Prisoner to pay charges and prison fees. Every person committed by lawful authority, for any criminal offense or misdemeanor, shall bear all reasonable charges for guarding and carrying him to jail, and also for his support therein until released; and all the estate which such person possessed at the time of committing the offense shall be subjected to the payment of such charges and other prison fees, in preference to all other debts and demands. If there is no visible estate whereon to levy such fees and charges, the amount shall be paid by the county.

Rev., s. 1346; Code, s. 3461; R. C., c. 87, s. 6; 1795, c. 433, s. 7.

Consult *State v. Peter*, 53-346; *State v. Isaac*, 13-47.

1348. Prisoner may furnish necessaries. Prisoners shall be allowed to purchase and procure such necessaries, in addition to the diet furnished by the jailer, as they may think proper; and to provide their own bedding, linen and clothing, without paying any perquisite to the jailer for such indulgence.

Rev., s. 1344; Code, s. 3463; R. C., c. 87, s. 8; 1795, c. 433, s. 6.

Jailer injuring prisoner liable for treble damages and guilty of misdemeanor, see section 4407.

1349. United States prisoners to be kept. When a prisoner is delivered to the keeper of any jail by the authority of the United States, such keeper shall receive the prisoner, and commit him accordingly; and every keeper of a jail refusing or neglecting to take possession of a prisoner delivered to him by the authority aforesaid shall be subject to the same pains and penalties as for neglect or refusal to commit any prisoner delivered to him under the authority of the state. The

allowance for the maintenance of any prisoner committed as aforesaid shall be equal to that made for prisoners committed under the authority of the state.

Rev., s. 1342; Code, s. 3456; R. C., c. 87, s. 1; 1790, c. 322, ss. 1, 2.

1350. Guard when escape apprehended; compensation. When the sheriff of the county, or keeper of the jail, apprehends that there is danger of a prisoner escaping, through the insufficiency of the jail or other cause, it is his duty, without delay, to make information thereof to a judge of the superior court, the attorney-general, or a solicitor, if any of those officers is in the county, and if not, then to three justices of the peace, and they are authorized, if they deem it advisable, to furnish the sheriff or keeper of the jail with an order in writing, addressed to the commanding officer of the militia of the county, setting forth the danger, and requiring him forthwith to furnish such guard as to him may appear to be suitable for the occasion. For which service the persons ordered on guard shall receive such compensation as militiamen in actual service for defense of the state; and on application for pay, the letter to the commanding officer, on which the guard was ordered, and the certificate of such officer, countersigned by the sheriff or jailer, together with the deposition of the officer of the guard, stating the time of service, and that it was faithfully performed, shall be sufficient to authorize the payment of the same.

Rev., s. 1345; Code, s. 3460; R. C., c. 87, s. 5; 1795, c. 433, s. 8.

As to payment of expenses of guard furnished for prison, see *Comrs. v. Comrs.*, 75-240.

1351. What counties liable for guarding and removing prisoners. The expense for guarding prisons shall be paid by the county where the prison is situated; and for conveying prisoners, as also the expense attending such prisoners while in jail, when the same may be chargeable on the county, shall be paid by the county from which the prisoner is removed.

Rev., s. 1347; Code, s. 3462; R. C., c. 87, s. 7; 1808, c. 757, s. 2.

Expense of guarding prisoner chargeable on county from which he was removed: *Comrs. v. Comrs.*, 75-240.

1352. Transfer of prisoners to succeeding sheriff. The delivery of prisoners, by indenture between the late and present sheriff, or the entering on record in court the names of the several prisoners, and the causes of their commitment, delivered over to the present sheriff, shall be sufficient to discharge the late sheriff from all liability for any escape that shall happen.

Rev., s. 1348; Code, s. 3470; R. C., c. 87, s. 15; 1777, c. 118, s. 12.

1353. Where no jail, sheriff may imprison in jail of adjoining county. The sheriffs, constables, and other ministerial officers of any county in which there is no jail have authority to confine any prisoner arrested on process, civil or criminal, and held in custody for want of bail, in the jail of any adjoining county, until bail be given or tendered. And any sheriff or jailer having a prisoner in his custody, by virtue of any mode of commitment provided in this chapter, shall be liable, civilly and criminally, for his escape, in the same manner as if such prisoner had been confined in the prison of his proper county.

Rev., s. 1349; Code, s. 3459; R. C., c. 87, s. 4; 1835, c. 2, s. 3.

1354. Where no jail, courts may commit to jail of adjoining county. Whenever there happens to be no jail, or when there is an unfit or insecure jail, in any

county, the superior court judges, justices of the peace, and all judicial officers of such county may commit all persons brought before them, whether in a criminal or civil proceeding, to the jail of any adjoining county, for the same causes and under the like regulations that they might have ordered commitments to the usual jail; and the sheriffs, constables, and other officers of such county in which there is no jail, or an unfit one, and the sheriffs or keepers of the jails of the adjoining counties, shall obey any order of commitment so made. Any officer failing to obey such order shall be guilty of a misdemeanor.

Rev., s. 1350; Code, s. 3458; R. C., c. 87, s. 3; 1835, c. 2, s. 2.

1355. When jail destroyed, transfer of prisoners provided for. When the jail of any county is destroyed by fire or other accident, any justice of the peace of such county may cause all prisoners then confined therein to be brought before him; and upon the production of the process under which any prisoner was confined shall order his commitment to the jail of any adjacent county; and the sheriff, constable, or other officer of the county deputed for that purpose, shall obey the order; and the sheriff or keeper of the common jail of such adjacent county shall receive such prisoners upon the order aforesaid. Any officer failing to obey such order of commitment shall be guilty of a misdemeanor.

Rev., s. 1351; Code, s. 3457; R. C., c. 87, s. 2; 1835, c. 2, s. 1.

1356. Counties and towns may hire out certain prisoners. The board of commissioners of the several counties, within their respective jurisdictions, or such other county authorities therein as may be established, and the mayor and intendant of the several cities and towns of the state, have power to provide under such rules and regulations as they may deem best for the employment on the public streets, public highways, public works, or other labor for individuals or corporations, of all persons imprisoned in the jails of their respective counties, cities and towns, upon conviction of any crime or misdemeanor, or who may be committed to jail for failure to enter into bond for keeping the peace or for good behavior, and who fail to pay all the costs which they are adjudged to pay, or to give good and sufficient security therefor: Provided, such prisoner or convict shall not be detained beyond the time fixed by the judgment of the court. The amount realized from hiring out such persons shall be credited to them for the fine and bill of costs in all cases of conviction. It is unlawful to farm out any such convicted person who may be imprisoned for the nonpayment of a fine, or as punishment imposed for the offense of which he may have been convicted, unless the court before whom the trial is had shall in its judgment so authorize.

Rev., s. 1352; Code, s. 3448; 1866-7, c. 30; 1872-3, c. 174, s. 10; 1874-5, c. 113; 1876-7, c. 196, s. 1; 1879, c. 218.

See, also, section 1359, containing annotations of interest. This section to be construed with sections 1359, 1458, 2157: *State v. Morgan*, 141-726. Statute constitutional: *State v. Weathers*, 98-685.

Prisoner cannot be farmed out unless judge before whom tried shall so authorize: *State v. Pearson*, 100-414. The provision prohibiting the farming out of certain prisoners without court's authority refers to farming them to individuals and private corporations: *State v. Yandle*, 119-874; *State v. Sneed*, 94-806.

Persons imprisoned for failure to pay costs in criminal cases can be worked out: *State v. Morgan*, 141-726—and their disposition is left in the discretion of the county commissioners, *State v. Norwood*, 93-578—but they cannot be detained beyond time fixed by court: *State v. Williams*, 97-416. The placing of prisoner to work on the roads is not an additional punishment, but merely incident to the sentence: *State v. Yandle*, 119-875.

Legislative power to authorize certain counties to employ on roads certain classes of convicts discussed in *Herring v. Dixon*, 122-420.

Putative father in bastardy cannot be worked upon the public roads for failure to pay costs and maintenance: *State v. Addington*, 143-683; *State v. Morgan*, 141-726, overruling *Myers v. Stafford*, 114-234. Persons sentenced to house of correction cannot be worked out under this section: *State v. Morgan*, 141-726. A person imprisoned in a proceeding as for contempt cannot be worked on roads: *State v. Moore*, 146-653.

Section merely referred to in *State v. White*, 125-678; *State v. Nelson*, 119-801.

1357. Person hiring may prevent escape. The party in whose service said convicts may be may use the necessary means to hold and keep them in custody and to prevent their escape.

Rev., s. 1353; Code, s. 3454; 1876-7, c. 196, s. 3.

1358. Sheriff to have control of prisoners hired out. All convicts hired or farmed out by the county or other municipal authorities shall at all times be under the supervision and control, as to their government and discipline, of the sheriff, or his deputy, of the county in which they were convicted and imprisoned, and the sheriff, or his deputy, shall be deemed a state officer for the purpose of this section.

Rev., s. 1354; Code, s. 3453; 1876-7, c. 196, s. 2.

1359. Convicts who may be sentenced to or worked on roads. When any county has made provision for the working of convicts upon the public roads, or when any number of counties have jointly made provision for working convicts upon the public roads, it is lawful for and the duty of the judge holding court in such counties to sentence to imprisonment at hard labor on the public roads for such terms as are now prescribed by law for their imprisonment in the county jail or in the state's prison, the following classes of convicts: First, all persons convicted of offenses the punishment whereof would otherwise be wholly, or in part, imprisonment in the common jail; second, all persons convicted of crimes the punishment whereof would otherwise, wholly or in part, be imprisonment in the state's prison for a term not exceeding ten years.

In such counties there may also be worked on the public roads, in like manner, all persons sentenced to imprisonment in jail by any magistrate; and also, all insolvents imprisoned by any court in said counties for nonpayment of costs in criminal causes may be retained in imprisonment and worked on the public roads until they repay the county to the extent of the half fees charged up against the county for each person taking the insolvent oath. The rate of compensation to be allowed each insolvent for work on the public roads shall be fixed by the county commissioners at a just and fair compensation, regard being had to the amount of work of which each insolvent is capable.

Rev., s. 1355; 1887, c. 355; 1889, c. 419.

For special law as to Mecklenburg and Wake counties, see P. L. 1915, c. 792.

See annotations under section 1356. For a full discussion of this section, see *State v. Young*, 138-571.

Prisoner properly assigned by court to work on public roads: *State v. Young*, 138-571, and cases cited; *State v. Smith*, 126-107; *State v. Haynie*, 118-1265—of another county, *State v. Hamby*, 126-1066. Judge's duty to assign to roads when provision made by county: *State v. Saunders*, 146-597.

Where convict imprisoned for nonpayment of costs he is to be detained only until he has repaid county the "half fees" charged up against it: *State v. Saunders*, 146-597.

Where judgment has been rendered that prisoner be worked upon the public roads it is presumed that county commissioners have made provision for its enforcement: *State v. Hicks*, 101-747. Statutes authorizing working of prisoners on public roads by county authorities are constitutional: *State v. Weathers*, 98-685.

Where a person who is unable to pay cost is convicted of criminal offense not within the exceptions to section 1259, and sentenced to work on public roads, county is liable only for one-half fees: *State v. Saunders*, 146-597.

1360. Deductions from sentence allowed for good behavior. When a convict has been sentenced to work upon the public roads of a county, and has faithfully performed the duties assigned to him during his term of sentence, he is entitled to a deduction from the time of his sentence of five days for each month, and he shall be discharged from the county roads when he has served his sentence, less the number of days he may be entitled to have deducted. The authorities having him in charge shall be the sole judges as to the faithful performance of the duties assigned to him. Should he escape or attempt to escape he shall forfeit and lose any deduction he may have been entitled to prior to that time. This section shall apply also to women sentenced to a county farm or county home.

1913, c. 167, s. 1.

1361. Convicts sentenced to roads to be under county control. The convicts sentenced to hard labor upon the public roads, under second section preceding, shall be under the control of the county authorities, and the county authorities have power to enact all needful rules and regulations for the successful working of convicts upon the public roads. The county commissioners may work such convicts on the public roads or in canalizing the main drains and swamps or on other public work of the county.

Rev., s. 1356; 1887, c. 355, s. 2; 1891, c. 164.

Convicts cannot be subjected to flogging: *State v. Morris*, 166-441; *State v. Nipper*, 166-272. Statute referred to in *State v. Young*, 138-571.

1362. When sentenced to state's prison in lieu of roads. In all cases where the judge presiding is satisfied that there is good reason to fear that an attempt might be made to release or to injure any person convicted of any of the offenses mentioned in the second class [section 1359], it is lawful for the judge to sentence such convicts to imprisonment in the state's prison, as is now provided by law: Provided, that no person who has been convicted and sentenced on a charge of murder, manslaughter, rape, attempt to commit rape, or arson, shall be assigned to county roads under this chapter.

Rev., s. 1357; 1887, c. 355, s. 4.

1363. State's prison to furnish convicts to county roads. In addition to the convicts to railroad companies. Any county applying for convicts under this article is authorized and directed to furnish to the authorities of any county within the state, convicts, not exceeding twenty-five in number during any one year, for the purpose of working the public roads in said county. The said convicts shall be at all times under the supervision and control as to their government and discipline of the board of directors of the state's prison as in case of hiring convicts to railroad companies. Any county applying for convicts under this article shall erect suitable stockades for their safe keeping and protection, and shall pay the expense of their transportation from and to the state's prison.

Rev., s. 1358; 1887, c. 355, s. 5.

1364. Taxes may be levied for expenses of convicts. The board of county commissioners of the several counties in the state taking advantage of this chapter shall levy a special tax annually as other taxes are levied for the purpose of paying the expenses of said convicts, building of stockades, etc., and the expenses shall be paid by the counties taking advantage of this article.

Rev., s. 1359; 1887, c. 355, s. 6.

ART. 10. HOUSES OF CORRECTION

1365. Commissioners may establish houses of correction. The board of commissioners may, when they deem it necessary, establish within their respective counties one or more convenient institutions to be known as houses of correction, or, in the discretion of the board of commissioners, as training schools, municipal farms, or juvenile farms, with workshops and other suitable buildings for the safe keeping, correcting, governing, and employing of offenders legally committed thereto. They may also, to that end, procure machinery and material suitable for such employment in said institutions, or on the premises; and moreover attach thereto a farm or farms; and all lands purchased for the purposes aforesaid shall vest in the directors hereinafter provided for, and their successors in office. The said board also has power to make, from time to time, such rules and regulations as it may deem proper for the kind and mode of labor and the general management of the said institutions.

Rev., s. 1360; Code, s. 786; 1866, c. 35, s. 1; 1919, c. 273, s. 1.

Prisoner committed to workhouse entitled to be discharged upon taking insolvent debtor's oath: *State v. Williams*, 97-414. Where prisoner committed to house of correction, officer cannot justify for escape by alleging that prisoner should have been confined in county jail: *State v. Garrell*, 82-580.

1366. Who must or may be committed to such institutions. It shall be the duty of the judges of the criminal courts and other committing magistrates of such county or counties to sentence or commit thereto all youthful offenders of the age of sixteen years and under, convicted of any crime or misdemeanor, whereof the punishment by statute prescribes a fine or sentence of imprisonment or working the roads. Said judges and committing magistrates may also sentence thereto any female prisoners and such other offenders convicted of misdemeanors who by reason of physical infirmities or mental deficiencies ought not to be imprisoned in the county jail or worked on the public roads. Nothing herein shall be construed to prevent the working at light labor of any partially disabled or infirm convict, or female prisoner, on or about any of the public works, buildings, or grounds in any such county, at and upon the request of the board of county commissioners, with the approval of the court or committing magistrate.

1919, c. 273, s. 1.

See Art. 2, c. 90, Child Welfare.

See section 5048.

1367. Levy of taxes authorized; to be paid to manager. The board of commissioners, in addition to the ordinary county taxes, shall also, at the time said taxes are laid, lay such tax as may be necessary to carry into effect this article, which shall be collected and paid to the manager at the same time as other county taxes

are to be paid; for which, and such other funds as may come into his hands as manager, he shall be accountable; and he shall disburse the same under the authority of the directors.

Rev., s. 1361; Code, s. 790; 1866, c. 35, s. 5.

1368. Bonds may be issued. The board of commissioners may, if deemed advisable by them, issue county bonds to raise money to establish the institutions herein provided for.

Rev., s. 1362; Code, s. 796; 1866, c. 35, s. 11.

1369. Governor to be notified of establishment. When any institution is established in pursuance of this article, it is the duty of the chairman of the board of commissioners of the county wherein the same is established to certify the fact to the governor, who shall cause it to be noted in a book kept for that purpose.

Rev., s. 1363; Code, s. 797; 1866, c. 35, s. 12.

1370. Directors to be appointed; duties. The board of commissioners shall annually appoint not less than five nor more than nine directors for each such institution hereunder established, whose duty it is to superintend and direct the manager hereinafter named in the discharge of his duties; to visit said houses at least once in every three months; to see that the laws, rules and regulations relating thereto are duly executed and enforced, and that the persons committed to his charge are properly cared for, and not abused or oppressed. The directors shall keep a journal of their proceedings, and publish annually an account of the receipts and expenditures. They shall further make a quarterly report to their respective county commissioners of the general condition of their charge, and of the receipts and expenditures of the institution. They shall also make such by-laws and regulations for the government thereof as shall be necessary, which shall be reported to, and approved by, the said commissioners. The directors shall be paid for the services rendered, by the county treasurer, each director first making it appear to the satisfaction of the board of county commissioners, by his oath, the character and extent of the services rendered for which he claims compensation; and such payment shall be made by the county treasurer out of any funds in his hands not otherwise appropriated.

Rev., s. 1364; Code, s. 787; 1866, c. 35, s. 2.

1371. Term of office of directors. The directors shall continue in office until others are appointed; and if any vacancy happens among them, it shall be filled by the residue of the directors.

Rev., s. 1365; Code, s. 795; 1866, c. 35, s. 10.

1372. Manager to be appointed; bond; duties. The board of commissioners shall appoint a manager for each house or establishment, who shall give a bond, with two or more solvent sureties, in such sum as may be required, payable to the state of North Carolina, conditioned for the faithful discharge of his duties. He shall hold his office during the pleasure of the board, and be at all times under the supervision of the directors; and in case of his misconduct, of which they shall be the sole judges, he may be forthwith removed by them and a successor appointed, who shall discharge the duties of the office until another manager is appointed by the board of commissioners. It is the duty of the manager to

receive all persons sent to the house of correction, to keep them during the time of their sentence, and to employ and control them according to the rules and regulations established therefor. He shall have the direction and control over the subordinate officers, assistants and servants, who may be appointed by the directors. He shall make monthly reports to the directors of his management of the institution and his receipts and expenditures.

Rev., s. 1366; Code, s. 788; 1866, c. 35, s. 3.

1373. Manager to assign employment to inmates. The manager shall assign to each person sent to such institution the kind of work in which such person is to be employed.

Rev., s. 1367; Code, s. 794; 1866, c. 35, s. 9.

1374. Compensation of officers. The said board of commissioners shall direct what compensation the manager and such subordinate officers, assistants and servants, as shall be appointed, shall receive, and shall provide for the payment thereof.

Rev., s. 1368; Code, s. 789; 1866, c. 35, s. 4.

1375. Sheriff to convey persons committed. When a person is sentenced to such institution he shall forthwith be committed by the court to the custody of the sheriff, to whom the clerk shall immediately furnish a certified copy of the sentence, in which it shall be stated (if the fact be so) that the offender is committed as a vagrant. The sheriff shall convey the offender to the institution, and deliver him to the manager with the certified copy aforesaid, and take the manager's receipt for the body; which receipt the sheriff shall return to the clerk of the board of commissioners, with his indorsement of the time when the offender was committed to him and delivered to the manager, and the clerk shall record the same in a book kept for that purpose, and file the original with the papers in the case.

Rev., s. 1369; Code, s. 793; 1866, c. 35, s. 8.

1376. Absconding offenders punished. If any offender absconds, escapes, or departs from any such institution without license, the manager has power to pursue, retake and bring him back, and to require all necessary aid for that purpose; and when brought back, the manager may confine him to his work in such manner as he may judge necessary, or may put him in close confinement in the county jail or elsewhere, until he submits to the regulations of such institution; and for every escape each offender shall be held to labor in such institution for the term of one month in addition to the time for which he was first committed.

Rev., s. 1370; Code, s. 791; 1866, c. 35, s. 6; 1919, c. 273, s. 2.

1377. Release of vagrants. If a person committed as a vagrant behaves well and reforms, he may, on the certificate of the manager, be released by the directors. But if otherwise committed, he may be released by the committing authority, upon the certificate of the manager and directors, upon such conditions as they may deem proper.

Rev., s. 1371; Code, s. 792; 1866, c. 35, s. 7.

1378. Suits in name of county. All suits brought on behalf of the institution shall, unless it be otherwise prescribed, be brought in the name of the county, to the use of the directors of the institution, without designating such directors by name.

Rev., s. 1372; Code, s. 798; 1866, c. 35, s. 13.

1379. Counties may establish joint house of correction. Any two or more counties, acting through their respective boards of commissioners, may jointly establish one or more convenient houses of correction, as is provided in the preceding sections, for the joint use of the counties so agreeing together; and the same may be established at such place or places, and be in all respects managed under such by-laws, rules and regulations as a majority of the general board of directors, to be appointed as hereinafter directed, shall determine.

Rev., s. 1373; Code, s. 799; 1866-7, c. 130, s. 1.

1380. Directors of joint house of correction. The board of commissioners of each of the respective counties agreeing as aforesaid to the establishment of one or more houses of correction for use jointly with any other county or counties shall annually appoint not less than three nor more than five directors in behalf of their several counties, and the directors so appointed by each of such counties shall together constitute the general board of directors of any such joint establishment.

Rev., s. 1374; Code, s. 800; 1866-7, c. 130, s. 2; 1919, c. 273, s. 3.

1381. Directors to appoint manager; bond; term; duties. Said general board of directors shall appoint a manager or superintendent for every such joint establishment, and such assistants and servants as they may deem necessary. The manager shall give bond with two or more able sureties, to be approved by said board, in such sum as may be required, payable to the state of North Carolina, and conditioned for the faithful performance of his duties. He shall hold his office during the pleasure of the general board of directors, and be, at all times, under their supervision; and of his misconduct they shall be the sole judges, and they may at any time remove him. He shall perform all such duties as may be prescribed by such general board of directors, and all such as may be incident to the office of manager by virtue of this chapter.

Rev., s. 1375; Code, s. 801; 1866-7, c. 130, s. 3.

1382. Compensation of manager and other officers. The compensation of the manager and such subordinate officers, assistants and servants as may be appointed by the general board shall be fixed by said general board.

Rev., s. 1375; Code, s. 801; 1866-7, c. 130, s. 3.

CHAPTER 25

COUNTY SURVEYOR

SEC.

1383. Election and term of office.

1384. Bond required.

1385. May appoint deputies.

1386. Power to administer oaths.

1383. Election and term of office. There shall be elected in each county, by the qualified voters thereof, as provided for the election of members of the general assembly, a county surveyor, who shall hold office for the term of two years.

Const., Art. 7, s. 1; Rev., s. 4296.

For vacancies in office and method of filling, see Counties and County Commissioners, s. 1297.

1384. Bond required. The county surveyor of each county shall enter into bond in the sum of one thousand dollars, payable to the state of North Carolina, with sufficient surety, for the faithful discharge of the duties of his office.

Rev., s. 303; Code, s. 2762; R. C., c. 42, s. 5; 1777, c. 114, s. 13.

For actions on official bonds, see section 354.

1385. May appoint deputies. Every surveyor may appoint deputies, who shall, previous to entering on the duties of their office, be qualified in a similar manner with the surveyor; and the surveyor making such appointment shall be liable for the conduct of such deputies, as for his own conduct in office.

Rev., s. 1720; Code, s. 2763; R. C., c. 42, s. 6; 1779, c. 140, s. 5.

Must not appoint the enterer, inferred from *Avery v. Walker*, 8-160.

1386. Power to administer oaths. The county surveyors of the several counties are empowered to administer oaths to all such persons as are required by law to be sworn in making partition of real estate, in laying off widows' dower, in establishing boundaries and in surveying vacant lands under warrants.

Rev., s. 2361; Code, s. 3314; 1881, c. 144.

For vacancies filled, see Counties and County Commissioners, Art. 2.

For duties as to Entries and Grants, see State Lands, subchapter 1, Art. 4.

CHAPTER 26

COUNTY TREASURER

Sec.

- 1387. Election of county treasurer.
- 1388. Bond; penalty; when renewed.
- 1389. Local: Commissioners may abolish office and appoint bank.
- 1390. Office includes person acting as treasurer.
- 1391. Is treasurer of county board of education.
- 1392. Sheriff acting as treasurer; bond liable.
- 1393. Duties of county treasurer.
- 1394. Treasurer not to speculate in county claims; penalty.
- 1395. Treasurer administers property held in trust for county.
- 1396. Treasurer to take charge of county trust funds; additional bond.
- 1397. Commissioners to keep record of trust funds.
- 1398. Treasurer to exhibit separate statement as to trust funds.
- 1399. Treasurer to pay no claim unless audited.
- 1400. Treasurer to deliver books, etc., to successor.
- 1401. Action on treasurer's bond to be by commissioners.
- 1402. Officers failing to account to treasurer sued by commissioners.

1387. Election of county treasurer. In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the general assembly, a treasurer.

Rev., s. 1394; Const., Art. VII, s. 1.

Treasurer's term of office two years: *Aderholt v. McKee*, 65-257. Power of county commissioners to fill vacancy, section 1297, subsection 13; see, also, *Rhodes v. Hampton*, 101-629. Term of office of a treasurer appointed by board of commissioners to fill a vacancy is only that of unoccupied term of his predecessor: *Aderholt v. McKee*, 65-257. Revisal, s. 1395, which authorized the justices of the peace to abolish the office of county treasurer, was repealed by act of 1919, c. 141. When the office was thus abolished, the sheriff became treasurer: *Koonce v. Comrs.*, 106-192; *Rhodes v. Hampton*, 101-629.

1388. Bond; penalty; when renewed. The county treasurer, before entering upon the duties of his office, shall give bond with three or more sufficient sureties, to be approved by the board of commissioners, payable to the state, conditioned that he will faithfully execute the duties of his office, and pay according to law, and on the warrant of the chairman of the board of commissioners, all moneys which shall come into his hands as treasurer, and render a just and true account thereof to the board when required by law or by the board of commissioners. The penalty of his bond shall be a sum not exceeding the amount of the county and local taxes assessed during the previous year, and the board of commissioners at any time, by an order, may require him to renew, increase or strengthen his bond. A failure to do so within ten days after the service of such an order shall vacate his office, and the board shall appoint a successor: Provided, the board of commissioners may fix the bond of the treasurer of Forsyth county at such sum as they may deem best, not less than twenty thousand dollars, and may increase it at any time; and in Craven county the bond of the treasurer shall be equal to the county funds during the preceding year, but not to exceed forty thousand dollars.

Rev., s. 297; Code, s. 766; 1868-9, c. 157, s. 4; 1895, c. 270, s. 2; 1899, c. 132; 1899, c. 207, s. 4; 1903, c. 12, s. 2; 1901, c. 536; 1899, c. 54, s. 52.

Failure to file bond, office vacated: *Kilburn v. Latham*, 81-312. County commissioners are proper parties relator in action on treasurer's bond: *Comrs. v. Magnin*, 86-286. Example of

bond held sufficient to protect school moneys: *Ibid.* New duty, added by statute, of being treasurer of board of education, with requirement of special bond, old official bond not liable for school moneys: *Bd. Education v. Bateman*, 102-52. A settlement of outgoing treasurer does not discharge liability on bond: *Comrs. v. McRae*, 89-95. Cited merely in *Koonce v. Comrs.*, 106-199. For annotations on official bonds generally, see sections 354, 356.

1389. Local: Commissioners may abolish office and appoint bank. In the counties of Bladen, Carteret, Chatham, Cherokee, Chowan, Craven, Edgecombe, Granville, Hyde, Madison, Mitchell, Montgomery, Martin, Moore, Onslow, Perquimans, Polk, Rowan, Stanly, Tyrrell, and Union, the board of county commissioners is hereby authorized and empowered, in its discretion, to abolish the office of county treasurer in the county; but the board shall, before abolishing the office of treasurer, pass a resolution to that effect at least sixty days before any primary or convention is held for the purpose of nominating county treasurer. When the office is so abolished, the board is authorized, in lieu of a county treasurer, to appoint one or more solvent banks or trust companies located in its county as financial agent for the county, which bank or trust company shall perform the duties now performed by the treasurer or the sheriff as *ex officio* treasurer of the county. Such bank or trust company shall not charge nor receive any compensation for its services, other than such advantages and benefit as may accrue from the deposit of the county funds in the regular course of banking.

The bank or trust company, appointed and acting as the financial agent of its county, shall be appointed for a term of two years, and shall be required to execute the same bonds for the safe keeping and proper accounting of such funds as may come into its possession and belonging to such county and for the faithful discharge of its duties, as are now required by law of county treasurers.

1913, c. 142; *Ex. Sess.* 1913, c. 35; P. L. 1915, cc. 67, 268, 458, 481; 1919, c. 48.

The bank selected is entitled to receive the county money, including that from drainage district: *Comrs. v. Lewis*, 174-528 (decision under special act for Robeson county, P. L. 1917, c. 46).

1390. Office includes person acting as treasurer. The office of county treasurer shall always be construed to refer to, and include, the person authorized by law to perform the duties of that office in any county, if there is no county treasurer therein.

Rev., s. 1396; *Code*, s. 770.

See *Comrs. v. Lewis*, 174-528. County treasurer *ex officio* treasurer of county board of education: *Koonce v. Comrs.*, 106-198; *Comrs. v. Magnin*, 86-288, 78-183.

1391. Is treasurer of county board of education. The county treasurer is *ex officio* treasurer of the county board of education.

Rev., s. 1396; *Code*, s. 770.

For duties as such treasurer, see sections 5444-5453.

1392. Sheriff acting as treasurer, bond liable. In counties where the office of county treasurer is abolished, and where the sheriff is authorized to perform the duties of county treasurer, the bond he gives as sheriff shall be construed to include his liabilities and duties as such county treasurer, and may be increased to such amount by the board of commissioners as may be deemed necessary to cover the trust funds coming to his hands.

Rev., s. 1397; *Code*, s. 769; 1879, c. 202.

For liability on sheriff's bond as treasurer, see sections 1388 and 3930.

1393. Duties of county treasurer. It is the duty of the treasurer—

1. To keep county moneys. To receive all moneys belonging to the county, and all other moneys by law directed to be paid to him; to keep them separate and apart from his own affairs, and to apply them and render account of them as required by law.

Treasurer's duty to pay warrant drawn by commissioners on specific fund: *Martin v. Clark*, 135-178—to receive money belonging to county; and for money not belonging to county which he attempts to care for he is personally liable, not the county, *Burbank v. Comrs.*, 92-259—to pay claims audited and allowed by commissioners, *Jones v. Comrs.*, 73-182.

For general view of treasurer's duties and county's liability for his acts, see *Burbank v. Comrs.*, 92-259.

Not within power or duty of treasurer to refuse to pay county order issued by commissioners because he does not think it a just and lawful claim or for any other reason, which has been passed upon by board and within its power to act: *Martin v. Clark*, 135-178; *Audit Co. v. McKenzie*, 147-461; *Wilson v. Holding*, 170-352.

2. To keep true accounts. To keep a true account of the receipts and expenditures of all such moneys, taking proper vouchers in every case in books provided for that purpose at the expense of the county; which said books shall at all times show the date, amount, and from whom he has received such moneys; the date, amount, and to whom he has paid out any of the said moneys; the total amount received and the total amount paid out during the current fiscal year for school purposes, for general county purposes, for jury fund, and for each special purpose, all separately kept, so that at all times his said books shall correctly and accurately show the condition of the said several accounts. His account of expenditures for general county purposes shall also show separately the amounts expended each year on account of the county home, indigent persons, jails, workhouses, courthouse, bridges, insolvent fees, courts, and such other special accounts as the board of commissioners of the county require, the total of said accounts being the aggregate amount expended during the fiscal year for general county purposes. He shall post at the courthouse door on the first Monday in each month a correct statement of such receipts and expenditures, showing the amount received, and from what source, and the amounts paid out, and to whom, and for what purpose, and the balance in his hands belonging to the county.

3. To call on county officers for funds in their hands. To call on the sheriff, or the clerk of the superior court, or other officer having county moneys in his hands, at least once in each month, or oftener if necessary, to pay over to him, and to account for all such moneys.

For actions on official bonds, see section 354.

4. To keep accounts of fines, etc. To enter in a book to be kept by him the exact amount of any fine, penalty or forfeiture paid over to him, giving the date of payment, the name of the clerk or other person so paying the same, the name of the party from whom such fine, penalty or forfeiture was collected, and in what case.

5. To exhibit to the board of commissioners his books and accounts as treasurer for examination. To exhibit his books and accounts and moneys once every three months, or oftener, if the board of commissioners of his county deem it necessary, to a committee to be composed of the chairman of the board of

commissioners and one other person to be selected by the board of commissioners, who shall be an expert accountant. It is the duty of this committee to examine the books and accounts of his office, and to see that the accounts are correctly and properly kept, and to count the money in the hands of the treasurer, and to see that it corresponds with the amount shown by the books to be in his hands. At every such examination of the books and accounts of his office the county treasurer shall exhibit a full, perfect and itemized statement to said committee of the use he has made of every dollar of public funds in his hands since the last exhibition of his books to said committee; and if any part of said funds has been loaned out, this statement shall state to whom loaned and on what security and the amount of interest paid on said loan, and such interest shall be covered into the county treasury by the treasurer. This statement shall be sworn to and published in a county newspaper or at the courthouse door. Nothing herein contained shall be construed to authorize the county treasurer to lend any public funds.

If at any time there is a deficit in the amount of money in the hands of the treasurer, the committee shall so report to the board of commissioners, whose duty it is to institute proceedings in the superior court against said treasurer for violation of his official duties.

For action on treasurer's bond, see section 1388.

Rev., s. 1398; Code, ss. 96, 773; 1889, c. 242.

1394. Treasurer not to speculate in county claims; penalty. No county treasurer purchasing a claim against the county at less than its face value is entitled to charge the county a greater sum than what he actually paid for the same; and the board of commissioners may examine him as well as any other person on oath concerning the matter. Any county treasurer who is concerned or interested in any such speculation shall forfeit his office.

Rev., s. 1399; Code, s. 772; 1868-9, c. 157, s. 8.

1395. Treasurer administers property held in trust for county. All real and personal property held by deed, will or otherwise by any person or officer in trust for any county, or for any charitable use to be administered in and for the benefit of such county or the citizens thereof, shall be transferred to and vest in the county treasurer, to be administered and applied by him under the direction of the board of commissioners, upon the same uses, purposes and trusts as declared by the grantor, testator or other person in the original deed, devise or other instrument of donation.

Rev., s. 1400; Code, s. 778; 1869-70, c. 85.

1396. Treasurer to take charge of county trust funds; additional bond. It is the duty of the county treasurer to take charge of all such trust funds and property; but he shall not do so without giving a bond payable to the state, in a penalty double the estimated value of said property or funds, with three or more sureties, each of whom is worth at least the amount of the penalty of the bond over and above all his liabilities and property exempt from execution, which bond shall be taken by the board of commissioners, and recorded and otherwise treated and dealt with as the official bond of the treasurer.

Rev., s. 1401; Code, s. 779; 1869-70, c. 85, s. 2.

1397. Commissioners to keep record of trust funds. The board of commissioners shall keep a proper record of all such trust property or charitable funds, and when necessary shall institute proceedings to recover for the treasurer all such as may be unjustly withheld.

Rev., s. 1402; Code, s. 780; 1869-70, c. 85, s. 3.

1398. Treasurer to exhibit separate statement as to trust funds. The county treasurer, whenever he is required to exhibit to the board of commissioners the financial condition of the county, shall exhibit also distinctly and separately the amount and condition of all such trust funds and property, how invested, secured, used, and other particulars concerning the same.

Rev., s. 1403; Code, s. 781; 1869-70, c. 85, s. 4.

1399. Treasurer to pay no claim unless audited. It is unlawful for the county treasurer to pay a claim against the county, unless the same has been audited and allowed by the board of commissioners.

Rev., s. 1404; Code, s. 777; 1868, c. 19.

Duty to pay claim when audited and allowed by commissioners: *Jones v. Comrs.*, 73-182.

County treasurer cannot refuse to pay a warrant drawn by commissioners because he does not think claim lawful or just or for any other reason, which has been passed upon by the board and within its power to act: *Martin v. Clark*, 135-180; *Audit Co. v. McKenzie*, 147-461; *Wilson v. Holding*, 170-352.

Section referred to in *State v. Wilkerson*, 98-701.

1400. Treasurer to deliver books, etc., to successor. When the right of any county treasurer to his office expires, the books and papers belonging to his office, and all moneys in his hands by virtue of his office, shall, upon his oath, or, in case of his death, upon the oath of his personal representative, be delivered to his successor.

Rev., s. 1405; Code, s. 767; 1868-9, c. 157.

It is treasurer's duty to know what moneys remain in his hands at the expiration of his term and to what funds they belong, and, until these moneys are paid, the bond is liable; and a settlement with county is not conclusive of the amounts, but is open to correction: *Comrs. v. MacRae*, 89-95.

No demand upon treasurer is necessary before bringing suit for funds he should have turned over to his successor: *Comrs. v. Magnin*, 86-286.

As to actions on treasurer's bond, see section 1388.

1401. Action on treasurer's bond to be by commissioners. The board of commissioners shall bring an action on the treasurer's bond whenever they have knowledge or a reasonable belief of any breach of the bond.

Rev., s. 1406; Code, s. 771; 1868-9, c. 157.

County commissioners are proper parties relator in action on treasurer's bond: *Comrs. v. Magnin*, 86-286. For example of bond held sufficient to protect school moneys, see *Ibid.* Where new duty, added by statute, of being treasurer of board of education, with requirement of special bond, old official bond not liable for school moneys: *Bd. Education v. Bateman*, 102-52. A settlement of outgoing treasurer does not discharge liability on bond: *Comrs. v. MacRae*, 89-95.

Section cited in *Koonce v. Comrs.*, 106-199. For annotations on official bonds generally, see sections 354, 356.

1402. Officers failing to account to treasurer sued by commissioners. In case of the failure or refusal of a sheriff, clerk, or other officer to account and pay over,

when called on as directed in this article, the treasurer shall report the facts to the board of commissioners, who may forthwith bring suit on the official bond of such delinquent officer, and the said board is also allowed to bring suit on the official bond of the clerk of the superior court of any adjoining county.

Rev., s. 1407; Code, s. 775; 1868-9, c. 157, s. 10.

For actions on official bonds generally, see section 354. For liability of clerk, see section 928—of county treasurer, see section 1388—of sheriff, see section 3930—of register of deeds, see section 3545—of constable, see section 973—and of other officers, see section prescribing their bonds. Where after giving bond new duties are added to office by statute, effect on liability: *Daniel v. Grizzard*, 117-110; *County Bd. Education v. Bateman*, 102-52; *Prairie v. Worth*, 78-169; *State v. Bradshaw*, 32-229. The bond of a public officer is liable for money that comes into his hands, as an insurer, and not merely for exercise of good faith: *Smith v. Patton*, 131-396; *Presson v. Boone*, 108-78; *Bd. Education v. Bateman*, 102-52; *Morgan v. Smith*, 95-396; *Havens v. Lathene*, 75-505; *Bd. Comrs. v. Clarke*, 73-257, and cases therein cited. Even though public officer may not be liable on bond, he may be personally liable: *Holt v. McLean*, 75-346.

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CHAPTER 27

COURTS

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SUBCHAPTER I. SUPREME COURT

ART. 1. ORGANIZATION AND TERMS

1403. Number of justices. The supreme court shall consist of a chief justice and four associate justices.

Rev., s. 1532; Const., Art. 4, s. 6.

1404. Election and term of office. The justices of the supreme court shall be elected by the qualified voters of the state, as is provided for the election of members of the general assembly. They shall hold their offices for eight years.

Const., Art. 4, s. 21.

1405. Oath of office. The justices, before they act as such, shall, before the governor or some judicial officer, take and subscribe the oaths appointed for the qualification of public officers, and also an oath of office, which shall be certified by the officer taking the same and delivered to the secretary of state, to be safely kept.

Rev., s. 1533; Code, s. 955; R. C., c. 33, s. 3; 1818, c. 963.

1406. Name of court; where records to be kept. The court bears the name and style of The Supreme Court of North Carolina, and is a court of record; and the papers and records belonging to the clerk's office thereof shall be constantly kept within the city of Raleigh.

Rev., s. 1536; Code, s. 954; R. C., c. 33, s. 2; R. S., c. 33, s. 2; 1884, c. 660; 1805, c. 674; 1818, c. 962; 1828, c. 13.

1407. Quorum. Three justices constitute a quorum for the transaction of the business of the court.

Rev., s. 1534; Code, s. 956; 1889, c. 230.

“Court” means the three (now five) justices sitting together, consulting and advising one with the others, upon questions before them for judicial decision: *State v. Lane*, 26-435. The distinction between the three (now five) judges and the “court” pointed out: *Ibid*.

Upon the death of a member, the two surviving judges have full power and authority to hold court and exercise its functions: *Ibid.*, page 434.

1408. Terms of court. There shall be held at the seat of government of the state in each year two terms of the supreme court, commencing on the first Monday in February and the last Monday in August.

The court shall sit at each term until all the business on the docket shall be determined or continued on good cause shown. In case no one of the justices shall attend the term during the first week thereof, at the end of that time the court shall stand adjourned till the next term, and the causes on the docket be continued.

Rev., ss. 1535, 1536; Code, ss. 953, 954; 1901, c. 660; 1887, c. 49; 1881, c. 178; R. C., c. 33, s. 2; R. S., c. 33, s. 2; 1804, c. 660; 1805, c. 674; 1818, c. 932; 1828, c. 13; 1842, c. 15; 1846, cc. 28, 29.

ART. 2. JURISDICTION

1409. Original jurisdiction. The supreme court has original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action.

Rev., s. 1537; Const., Art. IV, s. 9.

Jurisdiction conferred upon supreme court by this section to hear claims against state is confined to determination of legal validity of such claims: *Baltzer v. The State*, 104-265—the jurisdiction only attaching when questions of law are involved, *Miller v. State*, 134-270; *Reeves v. The State*, 93-257; *Horne v. The State*, 82-384; *Clodfelter v. State*, 86-51; *Bledsoe v. The State*, 64-392; *Reynolds v. The State*, 64-460—and this jurisdiction will not be exercised where the matter is small and there is no doubt about the law, *Horne v. The State*, 82-384; *Sinclair v. State*, 69-47—nor where facts pertaining to alleged claim against state are well known, or readily ascertainable, and no “grave questions of law” to be decided, *Cowles v. State*, 115-173. If case only involves questions of fact, legislature is proper place to obtain redress: *Reeves v. State*, 93-257; *Sinclair v. State*, 69-47.

Section is relaxation of rule that state cannot be sued, and enables citizen to obtain opinion of supreme court as recommendation to legislature, and no more: *Blount v. Simmons*, 119-51.

Original jurisdiction conferred by section applies only in cases in which plaintiff cannot otherwise obtain relief by reason of state being a party: *Bain v. State*, 86-49—confined to such claims as are legal—*Clodfelter v. State*, 86-51—and, as against any other defendant, could be reduced to judgment and enforced by execution, *Ibid.*; *Bain v. State*, 86-49. Jurisdiction to hear claim against state wherein plaintiff demands return of bonds alleged to have been exchanged for other bonds in 1862, is exclusively in supreme court: *Martin v. Worth*, 91-45—as is also jurisdiction to pass upon validity of coupons as claims against state, *Horne v. The State*, 82-382.

Supreme court has not original jurisdiction of action against state by clerk of superior court for fees in action instituted by state and for which it has been adjudged liable: *Miller v. State*, 134-270; *Blount v. Simmons*, 119-52.

Where the legislature by act or resolution directs treasurer of state to pay claims against state, then supreme court has jurisdiction of such claims: *Horne v. The State*, 84-364—but where legislature is prohibited by constitution from exercise of such power, and can only order payment after obtaining assent of people by popular vote, then supreme court has no jurisdiction, *Ibid.* State may plead bar of statute of limitations to prevent recommendatory decision: *Cowles v. State*, 115-173.

Amendment incorporated into article 1, section 6, of constitution takes away jurisdiction of court to hear claims against state founded upon obligations alleged to have been incurred by state by virtue of ordinances and statutes passed within a prescribed period: *Baltzer v. The State*, 104-265; *Horne v. State*, 84-362—and such deprivation of jurisdiction after suit brought not inhibited by federal constitution as impairing obligation of contracts, *Horne v. State*, 84-362.

In an action by the state the defendant cannot plead a set-off, unless it amounts to a credit or payment: *Battle v. Thompson*, 65-406.

The supreme court’s decision is “merely recommendatory” to legislature: *Garner v. Worth*, 122-252; *Baltzer v. The State*, 104-265; *Battle v. Thompson*, 65-408—which may provide for its payment if it sees proper to do so, *Baltzer v. The State*, 104-265—the courts being forbidden to issue any process upon their decision, *Garner v. Worth*, 122-252; *Baltzer v. The State*, 104-265. Upon decision of court in favor of plaintiff upon claim preferred against state, proper course is for clerk to transmit proceedings in cause, together with judgment of court, to governor to be communicated by him to general assembly: *Clements v. The State*, 77-142; *Bledsoe v. The State*, 64-397.

Quere: Whether claim for damages against state, arising out of failure and refusal of public officer to perform statutory duty imposed on him, can be filed in this court: *Stewart v. State*, 118-624. Where a matter has become a quasi-public question, and one of much concern to the several departments of the state government, this court will entertain petition for the construction of a statute, and a contract made thereunder by state officials; *Ibid.* See, also, *Farthington v. Carrington*, 116-315.

Section merely referred to in *Rand v. The State*, 65-194; *Bonner v. Adams*, 65-644; *Bayne v. Jenkins*, 66-356.

1410. Procedure to enforce claims against the state. Any person having any claim against the state may file his complaint in the office of the clerk of the supreme court, setting forth the nature and grounds of his claim. He shall cause a copy of his complaint to be served on the governor, and therein request

him to appear on behalf of the state and answer his claim. The copy shall be served at least twenty days before application for relief shall be made to the court. In case of an appearance for the state by the governor, or any other authorized officer, the pleadings and trial shall be conducted in such manner as the court shall direct. If an issue of fact shall be joined on the pleadings, the court shall transfer it to the superior court of some convenient county for trial by a jury, as other issues of fact are directed to be tried, and the judge of the court before whom the trial is had shall certify to the supreme court, at its next term, the verdict and the case, if any, made up and settled as prescribed in cases of appeal to the supreme court. If the state shall not appear in the action by any authorized officer, the court may make up issues and send them for trial, as aforesaid. The supreme court shall in all cases report the facts found, and their recommendation thereon, with the reasons thereof, to the general assembly at its next term.

Rev., s. 1538; Code, s. 948.

See cases cited under section 1409. As supporting section, see *Horne v. The State*, 82-384. In proceedings under section for adjudication of alleged claims against state, state has right to plead bar of statute of limitations to prevent recommendatory decision: *Cowles v. The State*, 115-173. As to pleading set-off in action by the state against private party, see *Battle v. Thompson*, 65-406. Section authorizes no judgment: *Garner v. Worth*, 122-257.

State, not public treasurer, is proper party defendant in action wherein plaintiff demands return of bonds alleged to have been exchanged for other bonds in 1862: *Martin v. Worth*, 91-45.

Upon decision of court in favor of plaintiff upon claim preferred against state, proper course is for clerk to transmit proceedings in cause, together with judgment of court, to governor, to be communicated by him to general assembly: *Clements v. The State*, 77-142; *Bledsoe v. The State*, 64-397.

Practice is to ascertain facts by reference to clerk of court or to have issues for jury: *Clements v. State*, 76-201; *Bledsoe v. State*, 64-394.

As bearing upon section, see *Henry v. State*, 68-465.

1411. Appellate jurisdiction. The supreme court has jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over "issues of fact" and "questions of fact" is the same exercised by it before the adoption of the constitution of one thousand eight hundred and sixty-eight, and the court has the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts.

Rev., s. 1539; Const., Art. IV, s. 8.

As to what matters are subject to review on appeal, see cases cited under section 638. For appeals in criminal actions, see sections 4649, 4650 et seq. For certiorari as substitute for appeal, see section 630. For time and manner of making exceptions in lower court and for motion for new trial, see sections 589-591.

GENERAL JURISDICTION TO REVIEW. In our practice, both before and after establishment of constitution of 1868, supreme court has had all powers of court of errors at common law: *Rush v. Steamboat Co.*, 68-72. What is meant hereunder by jurisdiction to "review upon appeal" discussed: *Ibid*.

The supreme court, except as to claims against the state, derives its jurisdiction solely by an appeal from a court having jurisdiction: *James v. R. R.*, 123-299; *Gordon v. Sanderson*, 83-1—such lower court being constituted and organized according to law or recognized as having essential attributes of properly constituted tribunal and competent to exercise jurisdiction of controversies between litigants: *State v. Hall*, 142-710—and no appeal from such lower court will be entertained unless transcript sent up shows jurisdiction and that cause was properly constituted there, *Gordon v. Sanderson*, 83-1.

The jurisdiction of supreme court is limited to correction of errors in rulings below: *Tyson v. Tyson*, 100-360; *Scroggs v. Stevenson*, 100-354—hence where there has been no ruling on question presented by record, supreme court cannot pass upon it, *Ibid.* Appeals from pro forma judgments will not be considered: *Hines v. Hines*, 84-122—or where the case presents only a “moot question,” *Kistler v. R. R.*, 170-666.

Matters within the discretion of the lower court are not reviewable unless some matter of law or legal inference is involved or the discretion has been abused: *Billings v. Charlotte Observer*, 150-540; *Clark v. Machine Co.*, 150-372, and cases cited under section 638.

In criminal cases appellate jurisdiction of court is confined to review and correction of errors in law committed in trial below: *State v. Rowe*, 98-630; *State v. Starnes*, 94-973; *State v. Jones*, 69-16—and a new trial for newly discovered evidence will not be granted: *State v. Lilliston*, 141-867. In a civil action a new trial may be granted for newly discovered evidence, but not when the evidence is only cumulative: *Gates County v. Hill*, 158-584, and annotations under section 1414.

Court will not *ex mero motu* review former decision upon second appeal in same case: *Best v. Mortgage Co.*, 131-70; *Carson v. Bunting*, 156-29—but it is not precluded under doctrine of law of case from passing on question not determined on first appeal, *Vann v. Edwards*, 135-661.

Court will not review its own ruling or a ruling of court below which does not injuriously affect complaining party, even if ruling erroneous: *Balk v. Harris*, 132-16; *Nissen v. Gold Mining Co.*, 104-309; *Butts v. Screws*, 95-215; *Lutz v. Cline*, 89-186; *Bateman v. Lumber Co.*, 154-248; *Smith v. Hancock*, 172-150.

Granting a new trial is a matter for the court, and the consent of the parties cannot control it: *Kenney v. R. R.*, 165-99.

When supreme court has decided a case and term is ended, its jurisdiction is at an end: *State v. Marsh*, 134-197—so, also, when opinion certified to lower court for judgment there, *James v. R. R.*, 123-299; *R. R. v. Horton*, 176-115; *Davis v. R. R.*, 176-186; *Finlayson v. Kirby*, 127-222. Supreme court has no power to change judgment rendered at a former term, except when issued by mistake or inadvertence, in which case it may be altered so as to speak the truth: *James v. R. R.*, 123-299.

The jurisdiction of supreme court to review decisions on matters of law or legal inference is not impaired by act of legislature postponing right of appeal to final determination of cause: *Railroad v. Warren*, 92-620. Agreement that other pending causes shall abide the determination of particular case does not authorize supreme court to assume jurisdiction in cases not before it: *Belden v. Snead*, 84-243.

The court in granting a new trial on appeal in a criminal case should decide upon the legal merits of the case, if it appears that state cannot ultimately succeed in prosecution: *State v. Robinson*, 143-620.

The power of courts to declare statutes unconstitutional is a high prerogative and ought to be exercised with great caution, and they should not declare statute void unless its nullity and invalidity are placed in their judgment beyond reasonable doubt, and a reasonable doubt must be solved in favor of legislative action: *King v. R. R.*, 66-283; *State v. Baskerville*, 141-811; *Railroad v. Alamance*, 82-264; *Stannire v. Taylor*, 48-210; *State v. Moss*, 47-67; *Bonitz v. School Trustees*, 154-375; *Williams v. Bradford*, 158-36; *R. R. v. Cherokee County*, 177-86; *Bickett v. Tax Com.*, 177-433.

JURISDICTION TO REVIEW ISSUES OF FACT AND QUESTIONS OF FACT. An “issue of fact” is where a matter is alleged on one side and denied on the other, the decision of which would be final and conclude the parties as to the matter in controversy: *Kirk v. R. R.*, 97-82; *Wright v. Cotten*, 140-1; *Crawford v. Masters*, 149-205; *Tucker v. Satterthwaite*, 120-118; *Patton v. R. R.*, 96-455; *McAdoo v. R. R.*, 105-140; *Armfield v. Brown*, 70-27; *Heilig v. Stokes*, 63-612; *Klutts v. McKenzie*, 65-102—distinguished from question of fact in *Goode v. Rogers*, 126-62; *Keener v. Finger*, 70-35; *Beavans v. Goodrich*, 98-217; *Foushee v. Pattershall*, 67-453. See cases cited under section 582. As to what findings of fact are reviewable in cases of reference, see section 579—in application for injunctive relief, see section 843—in proceedings to set aside judgment for mistake, inadvertence, surprise, or excusable neglect, see section 600.

As to amendment restoring jurisdiction over issues of fact and questions of fact as exercised before adoption of constitution of 1868, see *Jones v. Boyd*, 80-260. Jurisdiction of supreme court over “issues of fact” is restricted to interlocutory and final judgments which

are exclusively equitable in their nature: *Young v. Rollins*, 90-125—which a court of equity could alone render under former system, *Ibid.*—and does not extend to cases at law under former practice, in which only errors of law could have been corrected on appeal, *Greensboro v. Scott*, 84-184; *Jones v. Boyd*, 80-260. See *Drewry v. Bank*, 173-664.

Supreme court has jurisdiction, in actions purely equitable, to review evidence and findings of fact in court below where entire testimony is transmitted: *Gatewood v. Burns*, 99-357; *Coates v. Wilkes*, 92-376; *Worthy v. Shields*, 90-192—but will not exercise this jurisdiction upon fragmentary or summary statement of evidence, *Gatewood v. Burns*, 99-357; *Runnion v. Ramsay*, 93-410.

In appeals from superior courts of law, purely discretionary powers of such courts were never reviewed by supreme court. Otherwise in appeals from courts of equity, in which every order and decree of such court, affecting rights of parties, were proper subjects of review: *Long v. Holt*, 68-53; see *Long v. Gooch*, 86-710; *Graham v. Skinner*, 57-94. Proceedings for partition are not equity proceedings within the jurisdiction of supreme court under the amendment restoring jurisdiction over issues of fact and questions of fact which supreme court, prior to 1868, possessed: *Simmons v. Foscue*, 81-86.

On appeal from order granting or refusing injunction, court has power to review questions of fact upon which propriety of order depends: *Jones v. Boyd*, 80-258; *Burns v. McFarland*, 146-382; *Hooker v. Greenville*, 130-472; *Mayo v. Comrs.*, 122-5; *Roberts v. Lewald*, 107-305; *Evans v. R. R.*, 96-47—and will do so when the evidence is sent up, *Seip v. Wright*, 173-14; *Roberts v. Lewald*, 107-305—and also may review the facts upon which injunction continued to the hearing, *Evans v. R. R.*, 96-45. As to waiver of right to have findings of fact reviewed by supreme court, see *Runnion v. Ramsay*, 93-410.

Quere: Whether action of covenant, to which equitable defense was made, falls within provisions of this section so that findings of jury may be reviewed: *Gragg v. Wagner*, 77-246.

ISSUING REMEDIAL WRITS. Writ of habeas corpus cannot be made substitute for writ of error or appeal: *Ex parte McCown*, 139-95; *In re Schenck*, 74-607; *State v. Webb*, 155-426.

As to power of supreme court to issue writ of prohibition to supervise and control the inferior courts, see *State v. Whitaker*, 114-818; *Perry v. Shepherd*, 78-83; *Railroad v. Newton*, 133-136; *Page v. Page*, 166-90. As to power to issue writ of certiorari, see section 630. The court will issue a supersedeas to prevent enforcement of a judgment only in case of necessity: *McArthur v. Timber Co.*, 164-383; see, also, section 630. For mandamus, see sections 866-868.

1412. Power to render judgment and issue execution. In every case the court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon; and it may at its discretion make the writs of execution which it may issue returnable either to the said court or to the superior court: Provided, that when an execution shall be made returnable as last mentioned, a certificate of the final judgment of the supreme court shall always be transmitted to the superior court aforesaid, and there be recorded: Provided further, that the said superior court may enforce obedience to the execution, and in the event of its not being executed may issue new or further execution or process thereon in the same manner as though the first execution had issued from the said superior court: Provided, also, that in criminal cases the decision of the supreme court shall be certified to the superior court from which the case was transmitted, which superior court shall proceed to judgment and sentence agreeable to the decision of the supreme court and the laws of the state.

Rev., s. 1542; Code, s. 957; R. C., c. 33, s. 6; 1799, c. 520; 1818, c. 963; 1830, c. 2; 1868-9, c. 962.

See section 658. Provisions of section authorizing court to give such judgment as shall appear "on inspection of whole record" ought to be rendered, refers to such matters only as are necessarily of record, as pleadings, verdict and judgment: *State v. Ashford*, 120-588; *Wills v. Fisher*, 112-540; *McKinnon v. Morrison*, 104-354; *Thornton v. Brady*, 100-38. Supreme court will take notice of errors on face of record proper without any assignment of error:

Ullery v. Guthrie, 148-417; Wilson v. Lumber Co., 131-163; Appomattox Co. v. Buffalo, 121-37; Rogers v. Bank, 108-578; Robeson v. Hodges, 105-52; Hutson v. Sawyer, 104-1; Thornton v. Brady, 100-38.

Court will render such judgment as shall appear to be proper from inspection of whole record: Mfg. Co. v. Hobbs, 128-46; Rogers v. Bank, 108-578; Hutson v. Sawyer, 104-1; Morrison v. Watson, 95-479; Bush v. Hall, 95-82—shall render such judgment as should have been rendered in superior court, whenever the record presents fully the merits of whole case, Duvall v. Rollins, 71-218; Robison v. Robison, 123-137; Long v. Swindell, 77-176; Perry v. Tupper, 71-380; Rush v. Steamboat Co., 68-72; Isler v. Brown, 67-175. If no error appears on face of record proper, there being no valid case on appeal, judgment below will be affirmed: Wallace v. Salisbury, 147-58; Cressler v. Asheville, 138-482; Hicks v. Westbrook, 121-131; Barnes v. R. R., 121-504; Roberts v. Partridge, 118-355; Delafield v. Construction Co., 115-21; Fertilizer Co. v. Black, 114-591; Maggett v. Roberts, 114-227; Forte v. Boone, 114-176; Rosenthal v. Roberson, 114-594; Cummings v. Hoffman, 113-267; Lovic v. Ins. Co., 109-302; Howell v. Jones, 109-102; Mitchell v. Tedder, 108-266; Simmons v. Andrews, 106-201; Mfg. Co. v. Simmons, 97-89; Rencher v. Andrews, 95-208; McCoy v. Lassiter, 94-131; State v. Freeman, 93-558; Mott v. Ramsay, 90-29; Neal v. Mace, 89-171; State v. Fox, 81-578; Turner v. Foard, 83-683; State v. Hooks, 82-696; Paschall v. Bullock, 80-8; State v. Murray, 80-364; State v. Orrell, 44-217; State v. Ray, 32-29—also, where no error assigned by defendant and none appears upon record, judgment below will be affirmed, Holmes v. Brewer, 117-347; State v. Whitmire, 112-895; Marshall v. Stine, 112-697; Simmons v. Andrews, 106-201; Taylor v. Plummer, 105-56; Walker v. Scott, 102-487; Anthony v. Estes, 99-598; Wilson v. Shepherd, 98-154; Carroll v. Barden, 97-191; Mfg. Co. v. Simmons, 97-89; Justice v. R. R., 96-412; Williams v. Johnston, 94-633; Howell v. Ferguson, 87-115; State v. Hovis, 76-117; Swepson v. Summey, 74-551; Stephenson v. Jones, 12-15.

The court will not presume error, and the ruling of the lower court will be sustained unless prejudicial error appears: Bailey v. Justice, 174-753; Alston v. Holt, 172-417; Gardiner v. May, 172-192; State v. Smith, 164-479; In re Smith's Will, 163-466; McLeod v. Gooch, 162-122; Todd v. Mackie, 160-357; Lumber Co. v. Buhmann, 160-385; Davis v. Stephenson, 149-113; Albertson v. Terry, 108-75.

The court will not reverse a judgment of the lower court for errors which could not have prejudiced the appellant's rights: State v. Davis, 175-723; Schas v. Assurance Society, 170-420; s. c., 166-55; In re Craven, 169-561; Ferebee v. Berry, 168-281; Webb v. Tel. Co., 167-483; State v. Smith, 164-480; Comrs. v. Indemnity Co., 155-219.

If inspection of record proper discloses error in judgment below, it will not be affirmed, although no exception entered thereto or particular assignment of errors therein: Huntsman v. Lumber Co., 122-583; Appomattox Co. v. Buffalo, 121-37. Supreme court renders judgment upon inspection of whole record, and must, therefore, be satisfied of sufficiency of such record: State v. Daniel, 121-574. When no error apparent upon record court will not interfere with judgment upon speculative reasoning as to how jury arrived at verdict: Williams v. Johnson, 94-633. Appeal will be dismissed where transcript fails to show judgment of record from which same was taken: Logan v. Harris, 90-7. Where, but for errors alleged, record would sustain judgment given in court below, same must be sustained by supreme court unless errors are shown: Collins v. Gilbert, 65-135—but otherwise where nothing in record to sustain judgment of court below, *Ibid.* Where no statement of case accompanies record, judgment will be affirmed: Green v. Dawson, 92-61—unless upon looking into record it is found that there is want of jurisdiction, or apparent from whole case that plaintiff entitled to no relief, *Ibid.* Where in attachment proceedings it appears from whole record that statute substantially complied with, action will not be dismissed nor attachment dissolved: Best v. British and American Co., 128-351.

Irrespective of reasons of trial court, its judgments will be affirmed where supreme court finds sufficient reasons in record to sustain judgment: Burns v. McFarland, 146-382. Where facts appear only from statement of case, there being no transcript of record, and it does not appear that court held at time and place appointed by law, appeal dismissed: Sneed v. Harris, 107-311. Where on appeal by state from order arresting judgment, transcript of record erroneously showing judgment below to be "new trial" instead of "arrest of judgment," appeal dismissed: State v. Keeter, 82-547. If there is irreconcilable conflict in findings of jury upon issues submitted, or between verdict and judgment, new trial will be awarded: Morrison v. Watson, 95-479. Where it appears from record that no cause of action exists,

supreme court will ex mero motu dismiss appeal: *Peacock v. Scott*, 104-154; *Norris v. McLam*, 104-159; *Crotts v. Winston-Salem*, 170-24; or where it appears from the record that the court has no jurisdiction, *Moore v. Rankin*, 172-599.

Appeal will not be dismissed where there is no statement of case on appeal because there may be error apparent on face of record: *McCoy v. Lassiter*, 94-131. Where upon inspection of whole record it appears that judgment unwarranted upon facts, the court will, ex mero motu, reverse it: *Everett v. Raby*, 104-479. Where appellant does not show error affirmatively and record insufficient to determine whether or not error committed by trial judge, judgment affirmed: *McCrimmen v. Parish*, 116-614. If errors appear in record proper new trial will be granted: *McDaniel v. Scurlock*, 115-295. Upon objection that judgment erroneous upon record proper, court will construe judgment with reference to pleadings, evidence, and charge, and not with regard to issues alone: *Sutton v. Walters*, 118-495. Errors not excepted to on trial below will not be considered in supreme court unless apparent upon record: *Cunningham v. Cunningham*, 121-413.

Settled rule of supreme court to affirm every judgment not appearing to be erroneous: *Thomas v. Alexander*, 19-385. Judgment of court below will be affirmed where no case on appeal, and nothing in record to show exception taken: *Mott v. Ramsay*, 90-29—where no statement of case, assignment of error, nor any error apparent in record, *State v. Whitmire*, 112-895—where only exception in case on appeal is exception to whole of charge, and it not affirmatively appearing that not more than one proposition of law laid down therein, no error appearing on face of record proper, *Hemphill v. Morrison*, 112-756.

Insufficiency of verdict to support judgment is a defect on face of record proper: *Strauss v. Wilmington*, 129-99. Where it appears from record that question of law was reserved by court below, to which verdict subject, and that question was decided in favor of appellee, verdict set aside and nonsuit ordered, but judge fails to state what question was, there must be venire de novo: *Brown v. Kyle*, 47-442. Where court unable to ascertain from record and statement of trial judge sufficient facts to determine case, new trial will be ordered: *Sprinkle v. Wellborn*, 132-468. Where record or case clearly discloses ground of appeal, same will not be dismissed for absence of formal exceptions or assignment of error: *Allen v. Griffin*, 98-120. Supreme court not bound to look to sufficiency of whole record and pronounce judgment upon it where same might be perfected by amendment before judgment necessary: *Caroon v. Rogers*, 51-240. When pleadings are so confused and vague as to leave it in doubt what parties are contending over, supreme court will not take cognizance of cause on appeal: *Woodlief v. Merritt*, 96-226. Appeal will be dismissed where it does not appear in record that appeal taken: *Mfg. Co. v. Simmons*, 97-89. Appeals will be dismissed where no index is sent up in record and printed, and no marginal references prepared: *Sigman v. R. R.*, 135-181.

Where record proper differs from statement of case on appeal, former must control: *Holton v. Lee*, 173-105; *Ladd v. Teague*, 126-544; *Sutton v. Phillips*, 117-230; *Threadgill v. Comrs.*, 116-616; *McDaniel v. Scurlock*, 115-295; *State v. Ramsour*, 113-642; *State v. Carlton*, 107-956; *McCanless v. Flinchum*, 98-358; *McNeill v. Lawton*, 97-16; *State v. Keefer*, 80-472, 82-547; *Cansler v. Cobb*, 77-30; *Farmer v. Willard*, 75-401—but where verdict in record ambiguous and case on appeal explanatory thereof, case will govern, *Sutton v. Phillips*, 117-228—and where matters stated in case in regard to which record silent, they will be accepted as facts, *McNeill v. Lawton*, 97-16.

Where the parties have tried a case upon a certain theory, the supreme court will consider it in the same way: *Webb v. Rosemond*, 172-848; *Coble v. Barringer*, 171-445; *Warren v. Susman*, 168-457; *Brown v. Chemical Co.*, 165-421; s. c., 162-83.

Where the supreme court is equally divided, the judgment of the lower court will be affirmed: *Miller v. Bank*, 176-152; *Alexander v. Auten's Auto Hire*, 175-720; *Smith v. Comrs.*, 163-97. When the complaint alleges a cause of action against one defendant which necessarily excludes the cause alleged against another defendant, the case will be remanded for an election: *Huggins v. Waters*, 154-443; s. c., 167-197. Where error is found as to some of the issues, the court may order a new trial as to all the issues: *Hawk v. Lumber Co.*, 149-10. The court will not set aside a verdict for excessive damages, unless the judge below has abused his discretion: *Harvey v. R. R.*, 153-567.

When the cause of action is destroyed pending an appeal, the court will not proceed, but will allow the judgment as to costs to stand: *Reid v. R. R.*, 162-355; *Wallace v. Wilkesboro*, 151-614.

When final judgment rendered in supreme court upon appeal from final judgment in superior court, latter court has power to issue no other process in case than execution for its own costs: *Grissett v. Smith*, 61-297. Judgment for costs in supreme court is rendered in that court: *Johnston v. R. R.*, 109-504. The supreme court may enter a compromise judgment: *Chavis v. Brown*, 174-122. A judgment dissolving a restraining order may be entered in the supreme court: *Griffin v. R. R.*, 150-312. On appeal in a mandamus proceeding, the court may cause the writ to be issued instead of remanding the case: *Battle v. Rocky Mount*, 156-329. Upon confirming a judgment on appeal, the court may direct the clerk of superior court to issue a writ to enforce the judgment: *R. R. v. R. R.*, 148-59. Effect of judgment on appeal in quo warranto proceeding to try title to office: *Caldwell v. Wilson*, 121-480.

Section merely referred to in *Printing Co. v. Herbert*, 137-319; *Pender v. Mallett*, 123-61; *Kruger v. Bank*, 123-18; *Bradsher v. Cheek*, 112-839; *Allen v. R. R.*, 106-518; *Walker v. Scott*, 106-61; *Phipps v. Pierce*, 94-516; *Greenlee v. Sudderth*, 65-470; *Bible Society v. Hollister*, 54-12; *Cates v. Whitfield*, 53-267; *Jones v. McLaurine*, 52-393.

1413. No judgment on interlocutory order; opinion certified. When an appeal is taken to the supreme court from any interlocutory judgment, the supreme court shall not enter any judgment reversing, affirming or modifying the judgment, order or decree so appealed from, but shall cause their opinion to be certified to the court below, with instructions to proceed upon such order, judgment or decree, or to reverse or modify the same according to said opinion, and the court below shall enter upon its records the opinion at length, and proceed in the cause according to the instructions.

Rev., s. 1544; Code, s. 962.

See section 638 as to cases in which an appeal may be taken.

No appeal should be taken from an interlocutory judgment or order, unless it affects a substantial right of appellant: *Rogerson v. Lumber Co.*, 136-266; *Navigation Co. v. Worrell*, 133-93; *Brown v. Nimocks*, 126-808; *Benton v. Collins*, 121-66; *Harding v. Hart*, 118-839; *Bruce v. Crabtree*, 116-528; *Brendle v. Reese*, 115-552; *Sinclair v. R. R.*, 111-507; *Sprague v. Bond*, 111-425; *Hilliard v. Oran*, 106-467; *Warren v. Stancill*, 117-112; *Clement v. Foster*, 99-255; *Blackwell v. McCaine*, 105-460; *Arrington v. Arrington*, 91-301; *Hailey v. Gray*, 93-195; *Welch v. Kinsland*, 93-281; *Loftin v. Rouse*, 94-508; *Sneeden v. Harris*, 107-311; *Williams v. Walker*, 107-334; *Railroad v. Warren*, 92-620; *Leak v. Covington*, 87-501; *Comrs. v. Cook*, 86-18; *Hines v. Hines*, 84-122; *Tel. Co. v. R. R.*, 83-420; *State v. Pollard*, 83-597; *Martin v. Flippin*, 101-452; *Lane v. Richardson*, 101-181; *Merrill v. Merrill*, 92-657; *Davis v. Ely*, 100-283; *Leak v. Covington*, 95-193; *Spencer, ex parte*, 95-271. No appeal will be entertained from order appointing commissioners to assess damages until after final judgment in action: *Hendrick v. R. R.*, 98-431; *Railroad v. Warren*, 92-620; *Telegraph Co. v. R. R.*, 83-420—nor from interlocutory order making additional parties, *Lane v. Richardson*, 101-181—nor from order made to ascertain controverted facts and without prejudice to parties, *Sutton v. Schonwald*, 80-20—nor from an order of reference, *Shankle v. Whitley*, 131-168; *Jones v. Wooten*, 137-421—nor from order setting aside arbitrator's award and directing other proceedings, *Warren v. Stancill*, 117-112—nor from order of examination of person in supplementary proceeding, *Bruce v. Crabtree*, 116-528—nor from order assessing defendant's damages on dissolution of attachment, *Brown v. Nimocks*, 126-808—nor from order of state court to certify record for removal to federal court, *Mayo v. Dockery*, 127-1—nor from order remanding condemnation proceedings to clerk, though plea in bar filed by defendant, *Railroad v. Newton*, 133-132—nor from interlocutory order in an action for damages for timber, which leaves open exceptions on question of damages: *Moore v. Lumber Co.*, 150-261.

If appeal does not lie from an interlocutory order, the court may, in its discretion, hear the case: *Barnes v. Fort*, 169-431; *Best v. Best*, 161-513.

In criminal cases, appeal lies only from final judgment, and never from interlocutory ruling: *State v. Nash*, 97-514; *State v. Hazell*, 95-623; *State v. Polk*, 91-652; *State v. Saunders*, 90-651; *State v. Twiggs*, 90-685; *State v. McDowell*, 84-798; *State v. Pollard*, 83-597; *State v. Hinson*, 82-540; *State v. Keeter*, 80-472; *State v. Wiseman*, 68-203; *State v. Jefferson*, 66-309; *State v. Bailey*, 65-426.

Appeals from interlocutory orders, judgments and decrees, carried up for review only on rulings of court upon that specific point: *Green v. Griffin*, 95-50; *Perry v. Tupper*, 71-380—but order or judgment appealed from not vacated, though further proceedings under same suspended until validity there determined, *Green v. Griffin*, 95-50; *Combes v. Adams*, 150-70; *Bonner v. Rodman*, 163-1; *Pruett v. Power Co.*, 167-598—and until decision certified to superior court to the end that cause may be proceeded with, *Perry v. Tupper*, 71-380. See section 655.

Interlocutory judgments, as to which no assignment of errors is set out or appears on record, will not be considered: *Shields v. McNeill*, 118-590.

When supreme court passes upon interlocutory order and decides no error, court below cannot modify it in any respect: *Murrill v. Murrill*, 90-120; *Dobson v. Simonton*, 100-56—its power being confined to incidental matters of detail necessary to carry decree into effect, not inconsistent therewith, *Murrill v. Murrill*, 90-120. *Mandamus* may issue to compel the lower court to obey the order of supreme court: *Tussey v. Owen*, 147-335. Dismissing an appeal from an interlocutory order dissolving an injunction leaves the action still pending: *Wallace v. Wilkesboro*, 151-614.

If supreme court commits error in ordering superior court to issue certain process, only remedy is by petition to rehear: *Perry v. Tupper*, 71-380.

See *Grissett v. Smith*, 61-299, where section quoted at length.

As to premature appeals, see *Ward v. Martin*, 175-287; *Riley v. Sears*, 151-187; *Richardson v. Express Co.*, 151-60; *Gray v. James*, 147-139; *State v. Dewey*, 139-556; *Rogerson v. Lumber Co.*, 136-266; *Navigation Co. v. Worrell*, 133-93; *Ayers v. Makely*, 131-60; *Shankle v. Whitley*, 131-168; *Hughes v. Pritchard*, 129-42; *Connor v. Dillard*, 129-50; *Jones v. R. R.*, 127-188; *Best v. Dunn*, 126-560; *Goode v. Rogers*, 126-62; *Gammon v. Johnson*, 126-64; *Railroad v. King*, 125-454; *Benton v. Collins*, 121-66; *Harding v. Hart*, 118-839; *Bennett v. Shelton*, 117-103; *Vann v. Lawrence*, 111-32; *Milling Co. v. Finlay*, 110-411; *Guilford County v. Georgia Co.*, 109-310; *Turner v. Holden*, 109-182; *Bain v. Bain*, 106-241; *Hilliard v. Oram*, 106-467; *Blackwell v. McCaine*, 105-460; *Bazemore v. Bridgers*, 105-191; *Mfg. Co. v. Buxton*, 105-74; *Wallace v. Douglas*, 105-42; *Thornton v. Lambeth*, 103-86; *Martin v. Flippin*, 101-452; *Lane v. Richardson*, 101-181; *Hendrick v. R. R.*, 98-431; *University v. State National Bank*, 92-651; *Jones v. Call*, 89-188.

While an appeal may be dismissed as premature, the court may, in its discretion, pass upon the question involved: *Mfg. Co. v. Spruill*, 169-618; *Bradshaw v. Bank*, 172-632.

1414. Power of amendment and to require further testimony. The supreme court has power to amend any process, pleading or proceeding either in form or substance for the purpose of furthering justice, on such terms as shall be deemed just at any time before final judgment; and to amend by making proper parties to any case where the court may deem it necessary and proper for the purposes of justice and on such terms as the court may prescribe. And whenever it appears necessary for the purpose of justice, the court may allow and direct the taking of further testimony in any case which may be pending in the court, under such rules as may be prescribed, or may remand the case to the intent that amendments may be made, further testimony taken or other proceedings had in the court below.

Rev., s. 1545; Code, s. 965; R. C., c. 33, s. 17; 1777, c. 115, s. 75; 1785, c. 233; 1792, c. 360; 1831, c. 46.

See annotations under section 547.

POWER TO AMEND. Supreme court may amend only to same extent and in such cases as could superior court: *Robeson v. Hodges*, 105-50. Power extends to appointment of guardian ad litem: *Perry v. Perry*, 175-141; s. c., 172-62. Where objection for defect of parties made below and overruled, supreme court will not exercise discretionary power of amendment to destroy exception duly taken below: *West v. R. R.*, 140-620; *Grant v. Rogers*, 94-755; see *Justices v. Simmons*, 48-188. Supreme court will not allow amendment where it would perhaps present case substantially different from one tried below, and raise question of law not presented in present appeal: *Bonner v. Stotesbury*, 139-3. Supreme court will not grant order to make parties unless it appears that they are in some way necessary to complete determination of action: *Lee v. Eure*, 92-283. Where action on administration bond brought in name

of administrator de bonis non, instead of state on his relation, amendment making proper plaintiff will be allowed in supreme court, without terms: *Grant v. Rogers*, 94-755—but such amendment will not be allowed when it would destroy just legal ground for appeal which existed when same taken, *Ibid.* When assignment of judgment made during pendency of appeal, real purchaser and not nominal assignee should be substituted as plaintiff: *Field v. Wheeler*, 120-264. Amendment of process by insertion of words “State on relation of” may be allowed in supreme court: *Porte v. Boone*, 114-176. While amendment substituting parties can be allowed in supreme court, it will not be permitted when it will put opposite party at disadvantage: *Hodge v. R. R.*, 108-24; *Kent v. Bottoms*, 56-69.

Supreme court has power to allow pleadings to be amended in that court: *Deligny v. Furniture Co.*, 170-189; *Kenney v. R. R.*, 165-99; *Allen v. Sallinger*, 108-160; *Fleming v. Murph*, 59-61. Amendment to answer by striking out \$2,337 and substituting \$3,500 therefor asked by petitioner under section cannot be allowed: *Mfg. Co. v. Gray*, 126-108. Supreme court may permit pleadings to be filed in that court nunc pro tunc: *McLean v. Breece*, 113-393. The court may allow amendment to pleadings to conform to proof: *Andrews v. Grimes*, 148-437; *Leatherwood v. Fulbright*, 109-683. Where agreed in court below the complaint may be amended so as to supply necessary averments, but it is not done, supreme court will allow amendment: *Freight Discrimination Cases*, 95-434.

Failure of receivers, suing as such, to produce certified copy of order of dissolution of bank and of their appointment as receivers, such allegation not being admitted in answer, is defect of proof which cannot be supplied, after appeal, by amendment under this section: *Person v. Leary*, 126-504. While it may be that supreme court has power to direct or allow amendment to record below of cause while appeal pending, it is clear that it has no such power after final judgment rendered therein: *Walton v. McKesson*, 101-428. Amendment will be refused where effect of same would be to reverse judgment below, which was rightly given, and to enter judgment here for different party plaintiff: *Justices v. Simmons*, 48-188.

CASE REMANDED TO SUPERIOR COURT FOR FURTHER ACTION. Where plaintiff becomes insane pending appeal by defendant from judgment awarding plaintiff custody of her minor children, case will be remanded to superior court for proper action: *Jones v. Cotten*, 108-457. Supreme court may remand case so that amendments may be made in court below: *Robeson v. Hodges*, 105-50. In certain cases supreme court may direct further testimony to be taken: *Gatewood v. Burns*, 99-357—or direct issue of fact to be framed and remanded for trial by jury, *Ibid.* Supreme court has power in proper cases to remand causes to the end that proper amendments may be made or further proceedings taken in court below: *Holley v. Holley*, 96-229; *Vaughan v. Davenport*, 159-369; *Lumber Co. v. Blue*, 170-1.

Where the case below is referred to the judge, and he fails to find the facts sufficiently to allow his conclusions of law to be reviewed, it will be remanded for further findings: *Straus v. Beardsley*, 79-59; *Knott v. Taylor*, 96-553. Where the jury leaves undetermined the question of payment, the case may be remanded to have such issue tried: *Barnes v. Brown*, 69-439.

Where judgment below rendered against three defendants, only one of whom appealed, supreme court, upon affirming judgment, will remand case so that judgment may be enforced against all of defendants: *Baxter v. Wilson*, 95-137. When demurrer filed for want of proper party, from facts presented by pleadings, and matter left in doubt, court must remand case: *Bunting v. Foy*, 66-193. Where no facts found and pleadings and affidavits conflicting, case will be remanded that facts may be found by court below, or by jury upon proper issues: *Kitchen v. Troy*, 72-50. Where judge below does not find facts upon which he overruled defendant's exceptions, court will remand case that such facts may be found: *Froneberger v. Lewis*, 70-456.

Where transcript fails to set out facts necessary for determination of case on appeal, it will be remanded to the end that same may be supplied or found by court below: *Bank v. Blossom*, 89-341. When it appears that other parties necessary to final determination of action, court will remand cause that such interested parties may be brought in: *Kornegay v. Morris*, 123-128; *Meadows v. Marsh*, 123-189; *Brooks v. Headen*, 80-11. Where demurrer overruled in court below, with leave to defendant to answer over and to plaintiff to amend complaint, cause will be remanded for further proceedings in court below: *Morris v. Gentry*, 89-248. Cause will not be remanded for purpose of making case substantially different from one tried in court below: *Whitehead v. Spivey*, 103-66. Upon allegation of inadvertence in including supersedeas bond in appeal bond, issue therein may be sent down to superior court to be tried by jury: *Burnett v. Nicholson*, 86-728. Where issues submitted do not cover the whole merits

of case, supreme court will retain cause and frame other issues to be passed upon by jury in court below: *Allen v. Baker*, 86-92. Where answer insufficient to defeat plaintiff's recovery, and court below held same to be sufficient, case will be remanded to give defendant opportunity to move for such amendment as he may be advised: *Foy v. Haughton*, 83-467. Where no judgment entered in court below, record will be remanded so that judgment may be entered: *Baum v. Shooting Club*, 94-217. Where, in superior court, additional findings necessary in order to do justice between parties, case may be sent back for trial of additional issues: *McDonald v. Carson*, 95-377. Where judgment below reversed, cause in certain cases should be remanded to be proceeded with as if no erroneous ruling had been made: *Scott v. Queen*, 95-340.

When the supreme court will grant a new trial for newly discovered evidence, and what the application must show: *Alexander v. Cedar Works*, 177-536; *Gainey v. Godwin*, 171-754; *Padgett v. McCoy*, 167-508; *Steeley v. Lumber Co.*, 165-27; *Carson v. Ins. Co.*, 165-135; *Wheeler v. Cole*, 164-378; *Warwick v. Taylor*, 163-68; *Johnson v. R. R.*, 163-431; *Gates County v. Hill*, 158-584; *Gay v. Mitchell*, 146-509. Not allowed in criminal case: *State v. Ice Co.*, 166-403, and cases cited.

As bearing upon section, see *Crenshaw v. Street R. R. Co.*, 140-192.

For cases under old practice, see *Hart v. Roper*, 41-349; *Mallory v. Mallory*, 45-80; *Williams v. Chambers*, 45-75.

Section merely referred to in *Hollomon v. Hollomon*, 125-33; *Wilkinson v. Brinn*, 124-725; *Monger v. Kelly*, 115-295; *Boyer v. Teague*, 106-573; *Wilson v. Pearson*, 102-290; *Grant v. Edwards*, 88-250.

1415. Proof of exhibits. Exhibits or other documents relative to cases pending in the supreme court may be proved by the parol testimony of witnesses to be examined in the court in the same manner and under the same rules as such exhibits or documents may be proved in the superior court, and suitors in the court may have subpoenas to enforce the attendance of witnesses, who shall be liable to the same penalties and actions for nonattendance, and be entitled to the same pay for traveling, ferriage and attendance as witnesses in the superior court: Provided, that witnesses attending the supreme court shall be taxed in the bill of costs and paid by the party on whose behalf they may be summoned.

Rev., s. 1547; Code, s. 963; R. C., c. 33, s. 21; 1820, c. 1070; 1825, c. 1282; 1842, c. 1.

Though witnesses in some instances may be summoned to supreme court, it has not been the practice: *In re Deaton*, 105-63.

1416. Opinions and judgments to be in writing. The justices shall deliver their opinions and judgments in writing, and the clerk shall make no entry upon the records of the court that any cause pending therein is decided, nor give to any person a certificate of such decision, nor issue execution in such suit, until after the opinion of the court shall have been delivered publicly in open court, and a written copy of the same opinion shall have been delivered to the clerk; which shall afterwards be filed among the records of the court and published in the reports of the decisions made by the court: Provided, that the justices shall not be required to write their opinions in full except in cases in which they deem it necessary.

Rev., s. 1548; Code, s. 964; 1893, c. 379, s. 5; R. C., c. 33, s. 16; 1810, c. 785.

As to what is meant by "opinions," see *State v. Lane*, 26-435.

Filing of written opinion discretionary with supreme court: *Parker v. R. R.*, 133-335—the legislature not having the power to compel it, *State v. Council*, 129-515, and cases cited.

Justices not required to write their opinions in full: *State v. Council*, 129-511—nor to state the reasons for opinion, but can simply announce decision, *Bradsher v. Cheek*, 112-838.

No provision of law requiring clerk supreme court to certify to court below opinion as distinguished from decision of case: *State v. Ketchey*, 71-147.

1417. Certificates to superior courts; execution for costs; penalty. The clerk on the first Monday in each month shall transmit by some safe hand, or by mail, to the clerks of the superior courts certificates of the decisions of the supreme court in cases sent from such courts, which shall have been on file ten days; and thereupon the clerks respectively shall issue execution for the costs incurred in the courts from which the cases were sent; and the clerk of the supreme court shall issue execution for the costs incurred in that court, including all publications in newspapers made in the progress of the cause in that court, and by order of the same, and all postage on letters which concern the transfer of original papers. And if the clerk shall fail for the space of twenty days to perform the duty herein enjoined of transmitting the certificates of decisions, he shall forfeit and pay to the party or parties in whose favor the supreme court shall have decided, one hundred dollars.

Rev., s. 1549; Code, s. 96S; 1887, c. 41; R. C., c. 33, s. 21; 1820, c. 1070; 1825, c. 1282; 1842, c. 1, s. 3.

DECISIONS CERTIFIED TO SUPERIOR COURT. Opinions should be certified down on first Monday in each month, provided they have been on file for ten days: *State v. Council*, 129-514. Certificate from supreme court announcing no error in judgment appealed from, precludes court below from all right or power to modify that judgment in any respect: *Chavis v. Brown*, 174-122; *Merrimon v. Lyman*, 126-541; *Banking Co. v. Morehead*, 126-279; *Dobson v. Simonton*, 100-56; *Murrill v. Murrill*, 99-120—or to take any action in case, *McCall v. Webb*, 126-760. Supreme court having certified decision to court below for judgment there, has no further jurisdiction of case: *James v. R. R.*, 123-299; *Davis v. R. R.*, 176-186; *R. R. v. Horton*, 176-115.

Judgment for costs in supreme court is rendered in that court: *Johnston v. R. R.*, 109-504—and superior court has no jurisdiction in matter, *Ibid.*; *Midgett v. Vann*, 158-128.

This section and section 1419 are in *pari materia* and must be construed together: *Emery v. R. R.*, 102-234. Section requires decisions of supreme court to be certified to lower courts during the term, thus placing them beyond control of court in term time: *Ibid.* No provision of law requiring clerk of supreme court to certify to court below opinion as distinguished from decision of case: *State v. Ketchy*, 71-147. The court, in its judgment, may direct an opinion certified down in advance of statutory time: *State v. Herndon*, 107-934.

As to costs on appeal, see sections 1256, 1257.

DUTY OF SUPERIOR COURT UPON CERTIFICATE FILED. It is the duty of the judge of superior court to follow the decision of supreme court: *Penny v. R. R.*, 161-523. Practice in entering judgment on certificate from supreme court discussed in *Johnston v. R. R.*, 109-504. When final judgment rendered in supreme court upon appeal from final judgment in superior court, latter court has power to issue no other process than execution for its own costs: *Grissett v. Smith*, 61-297.

Where on appeal in capital case there is no statement of case, and no error appears in record, it will be certified to court below that there was no error, so that it may proceed to judgment: *State v. Leitch*, 82-539; *State v. Murray*, 80-364; *State v. Edney*, 80-360.

Where supreme court decides appeal in favor of state it is duty of judge below to pass sentence at next term of court: *State v. McIntire*, 46-1.

Where a new trial or venire de novo awarded by supreme court, case goes back for new trial on whole merits, and court below should proceed as though no former trial had taken place: *McMillan v. Baker*, 92-110; *Beville v. Cox*, 109-265.

Decision of court in criminal cases not a judgment or sentence, but simply an order to court below to "proceed to judgment and sentence agreeable to the decision and the laws of the state": *State v. Applewhite*, 75-229; *State v. Jones*, 69-16. Where case heard in supreme court and certified to court below to proceed with according to law, no notice necessary of motion for judgment in conformity with certificate: *Williams v. Whiting*, 94-481. See section 4656.

1418. Appeals dismissed. Suits and appeals pending in the supreme court may be dismissed on failure to prosecute the same, after a rule obtained for

that purpose and served on the plaintiff or appellant, his agent or attorney, at least thirty days before the term next ensuing that of entering the rule; when, if the party shall fail to prosecute his suit or appeal, the court shall, at the election of the adverse party, dismiss the suit or appeal at the costs of the plaintiff or appellant, or proceed to hear and determine it.

Rev., s. 1543; Code, s. 967; R. C., c. 33, s. 20; 1848, c. 28; Supm. Ct. Rules, 15, et seq.

FAILURE TO DOCKET. Appeal is not properly pending in supreme court until same has been docketed: *Avery v. Pritchard*, 93-267; *Cross v. Williams*, 91-497—and this provides only for dismissing appeal regularly brought up and docketed, *Cross v. Williams*, 91-497. Appeal dismissed for failure to docket transcript: *Cox v. Lumber Co.*, 177-227; *McNeill v. R. R.*, 173-729; *State v. Trull*, 169-363; *Land Co. v. McKay*, 168-83; *Transportation Co. v. Lumber Co.*, 168-60; *Hawkins v. Tel. Co.*, 166-213. Where both parties appeal: *Caudle v. Morris*, 158-594. Not dismissed if delay excusable: *Walker v. Scott*, 104-481. Motions to dismiss appeals will be allowed, upon a failure to comply with the rules of court, without discussing the merits of the case: *Davis v. Wall*, 142-450. Special attention called to this ruling in *Marable v. R. R.*, 142-557.

DISMISSAL FOR FAILURE TO PROSECUTE. It is the duty of appellant to prosecute his appeal according to rules of court, which are not merely directory: *Wiseman v. Comrs.*, 104-330. Appeal not prosecuted for two terms of supreme court will be dismissed when reached in regular order, unless good cause be shown for a continuance: *Brantly v. Jordan*, 92-291; *Wiseman v. Comrs.*, 104-330. Where appellant, pending appeal from his conviction of crime, breaks jail, and is beyond process of court at time case called, appeal will be dismissed: *State v. Keebler*, 145-560; *State v. DeVane*, 166-281.

DISMISSAL FOR FAILURE TO PERFECT APPEAL. Appeal will be dismissed, on motion of appellee, where requirements of statute for perfecting it are not complied with: *Walsh v. Burleson*, 154-174; *Hutchison v. Rumpfelt*, 82-425; *Sever v. McLaughlin*, 82-332; *Walton v. Pearson*, 82-464—except where record shows written agreement waiving lapse of time, or where alleged agreement is oral and disputed and such waiver can be shown by affidavit of appellee, rejecting that of appellant, *Ibid.* Compliance with the statutory regulations as to appeals is a condition precedent, without which (unless waived) the right to appeal does not become potential; hence it is no defense to say that negligence was the negligence of counsel and not negligence of the party: *Cozart v. Assurance Co.*, 142-522. Appeal will not be dismissed upon ground that no notice of appeal given, where record shows that appeal bond filed and approved by court: *Capehart v. Biggs*, 90-373. Appeal will be dismissed for failure of appellant to file printed record or brief in time prescribed, unless, for good cause shown, time extended: *Bradshaw v. Stansberry*, 164-356; *Stroud v. Tel. Co.*, 133-253; *Calvert v. Carstarphen*, 133-25. Failure to comply with requirements as to case on appeal: *Land Co. v. McKay*, 168-83; *Transportation Co. v. Lumber Co.*, 168-60; *Hawkins v. Tel. Co.*, 166-213; *Mirror Co. v. Casualty Co.*, 157-28. See annotations under section 1421.

If appeal bond is not filed within ten days after rendition of judgment, unless waived by agreement of counsel of record, appeal will be dismissed: *Lunsford v. Alexander*, 162-528; *State v. Hamby*, 126-1069; *Harmon v. Herndon*, 99-477; *Boyden v. Williams*, 92-546; *Applewhite v. Forte*, 85-596; *Smith v. Reeves*, 85-594; *Brown v. Williams*, 83-684; *Sever v. McLaughlin*, 82-332; *State v. Walker*, 82-696; *State v. Donaldson*, 83-683; *State v. Spurtin*, 80-362; *State v. Patrick*, 72-217; *Taylor v. Brower*, 78-8; *Wade v. Newbern*, 72-498; *State v. Hawkins*, 72-180; *Bryan v. Hubbs*, 69-423; see, also, *Walker v. Scott*, 104-481; *Worthy v. Brady*, 91-265; *Chamblee v. Baker*, 95-98; *Turrentine v. R. R.*, 92-642—but not so if filed before the transcript is sent up, or later, where good excuse shown for delay, *Jones v. Asheville*, 114-620; *Graves v. Hines*, 106-323; *Howerton v. Sexton*, 104-75; *Harrison v. Hoff*, 102-25; *Jones v. Wilson*, 103-13. Where case remanded that a lost record might be supplied by court below, but, though several terms of such court have passed, nothing has been done and no excuse offered by appellant, appeal will be dismissed: *Cox v. Jones*, 113-276. Where appeal reinstated, failure to print within time prescribed will not be deemed sufficient ground for dismissal: *Briggs v. Jervis*, 98-454. Sickness of attorney is sufficient excuse for want of diligence in perfecting appeal: *Mott v. Ramsay*, 90-372. Appeal will be dismissed where it appears that it is frivolous and only for delay: *Barnes v. Saleeby*, 177-256; *Blount v. Jones*, 175-708; *Ludwick v. Mining Co.*, 171-60.

PROCEDURE BY APPELLEE TO DISMISS. Where appellant has failed to prosecute, appellee can have transcript sent up, or a certificate of clerk that appeal was taken, and case docketed and dismissed: *McLean v. McDonald*, 175-418; *Cross v. Williams*, 91-496; *Avery v. Pritchard*, 93-266. The motion to dismiss must be made in writing: *Brafford v. Reed*, 124-346. The privilege to have case dismissed belongs to the appellee, not appellant: *Davenport v. Grissom*, 113-38. Motion to dismiss because appellant has failed to perfect appeal must be made at or before entering upon the hearing: *Hutchison v. Rumpfelt*, 82-425; *Chastain v. Chastain*, 87-283—and comes too late after argument, *Yancey v. Greenlee*, 90-317.

Notice of motion to dismiss need not be given when made on ground that no appeal bond has been filed: *Jones v. Asheville*, 114-620; *Harmon v. Herndon*, 99-477; *Bowen v. Fox*, 98-396—but where motion made on ground that appeal bond is irregular, or sureties have failed to justify, then notice of motion to dismiss must be given, *McGee v. Fox*, 107-766; *Lackey v. Pearson*, 101-651; *Allison v. Whittier*, 101-490; *Harmon v. Herndon*, 99-477; *Bowen v. Fox*, 98-396; *Jones v. Slaughter*, 96-541. No notice required when motion made to dismiss for failure to comply with rules as to transmission, docketing and printing record: *Johnston v. Whitehead*, 109-207.

Upon motion to dismiss for failure to docket appeal, appellant should then render his excuses, for he cannot take advantage of them on motion to reinstate: *Mortgage Co. v. Long*, 116-77. Though a cause is docketed too late to be heard on the call of district to which it belongs, this court will enter a motion to dismiss after due notice to appellant, that trial of cause below may not be delayed by an invalid appeal: *Dunn v. Marks*, 141-232. Where appellee fails to move to dismiss when appellant has not docketed the transcript within time required, he cannot so move when appellant has docketed the transcript before ending of the term and before appellee makes motion: *Laney v. Mackey*, 144-630; *Packing Co. v. Williams*, 122-406; *Craddock v. Barnes*, 140-427; *Curtis v. R. R.*, 137-308; *Benedict v. Jones*, 131-474, and cases cited. Motion by appellee to docket and dismiss, made before docketing transcript, though not at first opportunity, will be allowed, *Worth v. Wilmington*, 131-532. Motion to dismiss denied when appellant has abandoned his appeal: *Mirror Co. v. Casualty Co.*, 157-28.

The appellee's motion to dismiss the appeal because (1) the exceptions are not "briefly and clearly stated and numbered" as required by the statute, sec. 643, and rule 27 of this court; (2) the exceptions relied on are not grouped and numbered immediately after the end of the case on appeal as required by rules 19 (2) and 21; (3) the index is not placed at the front of the record as required by rule 19 (3), is allowed under rule 20, in the expectation that appellants hereafter will conform to these requirements: *Davis v. Wall*, 142-450.

For rules of court governing appeals, see 174-828, 164-540.

REINSTATEMENT OF DISMISSED APPEAL. Motion to reinstate dismissed appeal may be heard not later than next term: *Wiseman v. Comrs.*, 104-330. Motion to reinstate appeal dismissed for failure to print must be made at the same term, and will only then be allowed for good cause shown: *Pipkin v. Green*, 112-355. Motion to reinstate must show no laches on the part of appellant: *Ibid.*; *State v. Goodlake*, 166-434. Motion to reinstate will not be allowed on an excuse which should have been sent up in answer to the motion to dismiss: *Paine v. Cureton*, 114-606. Motion to reinstate on appellant's affidavit that his attorney was sick, it not appearing that appellant made any inquiries of his attorney regarding appeal, or sought to get other counsel to prosecute, was refused: *Martin v. Chambers*, 116-673—allowed, however, when appellant shows no laches, *Mott v. Ramsay*, 90-372. It is not duty of counsel to file appeal bond: *Churchill v. Life Ins. Co.*, 92-485; *Winborn v. Byrd*, 92-7—nor his duty to have record printed, *Griffin v. Nelson*, 106-238—and where appellant does not show due diligence as to both he cannot have his appeal reinstated, *Ibid.*; *Bowen v. Fox*, 99-127.

Excuses for failure to docket must be rendered in reply to motion to dismiss and not upon motion to reinstate appeal: *Mortgage Co. v. Long*, 116-77. Failure of counsel to answer motion to dismiss, regularly made, cannot be excused because he did not think motion would be considered at once: *Parker v. R. R.*, 121-501. That clerk failed to send up transcript in time for docketing will not excuse laches of appellant in failing to have transcript sent up within time required: *Fain v. R. R.*, 130-29. An offer to comply with statute by filing bond, etc., is too late after appeal dismissed: *State v. Martin*, 172-977.

1419. **Petition to rehear; execution restrained.** A petition to rehear may be filed during the vacation succeeding the term of the court at which the judgment

was rendered, or within twenty days after the commencement of the succeeding term, and upon the filing of such petition the chief justice, or either of the associate justices, may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to rehear shall have been determined.

Rev., s. 1546; Code, s. 966; R. C., c. 33, s. 18; Supreme Court Rules 52, 53, 54.

Proper and only way to review decision of supreme court is by petition to rehear; and not by a second appeal: *Holland v. R. R.*, 143-437; *Holley v. Smith*, 132-36; *Jones v. R. R.*, 131-133; *Setzer v. Setzer*, 129-296; *Kramer v. R. R.*, 128-269; *Hendon v. R. R.*, 127-110; *Green v. Green*, 143-406; *Best v. Mortgage Co.*, 131-70; *State Hospital v. Fountain*, 129-90; *Perry v. R. R.*, 129-334; *Wright v. R. R.*, 128-77; *Shoaf v. Frost*, 127-307; *Pretzfelder v. Ins. Co.*, 123-164; *Gerock v. Tel. Co.*, 147-1; *Britt v. R. R.*, 148-37; *Hunter v. Nelson*, 151-184; *Carson v. Ins. Co.*, 165-135; *Latham v. Fields*, 166-215.

Second rehearing is permissible only when in first rehearing court has reversed or materially changed opinion sought to be reheard: *Nelson v. Hunter*, 145-334. Unnecessary to consider assignment of error in petition to rehear, "for that, granting correctness of every legal proposition laid down by court and that findings of fact supported by record, yet conclusion erroneous": *Bunn v. Braswell*, 142-113. Where new trial without passing upon certain exceptions and upon rehearing of exceptions upon which new trial granted is reversed, supreme court, personnel of same having been partially changed, orders a reargument of exceptions not passed upon, without petition for same being filed: *Fleming v. R. R.*, 132-714. Motion for new trial upon newly discovered evidence is not properly before court upon petition to rehear: *Flemming v. Borden*, 127-214; see, also, *Smith v. Moore*, 150-158. Word "filed," as used in section, defined: *Bird v. Gilliam*, 123-63. On petition to rehear case formerly decided, supreme court will not consider matters not contained in transcript of record: *Presnell v. Garrison*, 122-595. Petition to rehear must be upon record as it was at former hearing: *Ibid.* Rehearings granted only in exceptional cases, and, when granted, every presumption is in favor of judgment already rendered: *Weisel v. Cobb*, 122-67. Section cannot be allowed to give losing party absolute right to rehearing, and to have his petition considered by whole court contrary to its rule governing practice in such cases: *Herndon v. Ins. Co.*, 111-384, wherein section generally discussed. This section and section 1417 are in pari materia, and must be construed together: *Emery v. R. R.*, 102-234. Semble, that proper way to obtain relief against judgment of supreme court dismissing appeal on point of law is by petition to rehear, and not motion to reinstate: *Bowen v. Fox*, 99-127. Court will not, on petition to rehear, reexamine same authorities and same course of reasoning in order to reverse judgment: *Dupree v. Ins. Co.*, 93-237. Where grounds of error assigned in petition to rehear substantially same as those argued and passed upon in former hearing, court will not disturb judgment: *Ruffin v. Harrison*, 91-76—nor in such case will order restraining collection of execution upon judgment be granted, *Ibid.*

Applications for rehearing are based only upon alleged errors in law and newly discovered evidence: *Wilson v. Lineberger*, 90-180—therefore such proceedings not proper mode of asserting claim to uncollected assets not included in former account of party to be charged, *Ibid.*

Supreme court has no power to entertain petition to rehear criminal actions: *State v. Council*, 129-511; *State v. Jones*, 69-16; *State v. Starnes*, 94-981; *State v. Lilliston*, 141-887; *State v. Ice Co.*, 166-403.

Rehearing will not be granted after time limited: *Strickland v. Draughan*, 91-103; *Young v. Greenlee*, 85-593. When rehearing has been ordered and a manifest error is made to appear, court will correct it: *Hodgin v. Bank*, 125-503. The burden of showing error is on the petitioner: *Webb v. Hicks*, 125-201; *Weisel v. Cobb*, 122-67. Where first decision reversed on rehearing, purchasers of land, before time for rehearing expired, not protected: *Bird v. Gilliam*, 125-76. Effect of reversal upon a new trial already had under first decision, see *Hodgin v. Bank*, 125-503. Point heard, considered and decided on former hearing will not be considered on rehearing where no new authority presented and nothing overlooked: *Moore v. Beaman*, 112-558. No rehearing granted on summary motion to modify final judgment of supreme court: *Ruffin v. Harrison*, 91-398. Case where rehearing granted, before opinion certified down, without formal petition: *Robinson v. McDowell*, 125-343. Court will not consider point not certified as erroneous by counsel making certificate: *Kerr v. Hicks*, 133-175. Case where former opinion modified, but petition dismissed: *Coble v. Huffines*, 133-426.

Where a decision has been certified down, the court has no jurisdiction to recall it and change the order; the remedy is by petition to rehear: *Davis v. R. R.*, 176-186.

GROUND FOR REHEARING. In order to obtain a rehearing it must appear either that decision handed down was clearly erroneous: *School Directors v. Asheville*, 137-503; *In re Drury*, 136-81; *Capehart v. Burrus*, 124-48; *Hudson v. Jordan*, 110-250; *Emry v. R. R.*, 105-45; *Weathersbee v. Farrar*, 98-255; *Barcroft v. Roberts*, 92-249; *Wilson v. Lineberger*, 90-180; *University v. Harrison*, 93-84; *Devereux v. Devereux*, 81-12; *Perry v. Tupper*, 71-380—that some fact found and relied upon by court was incorrectly found, *Webb v. Hicks*, 125-200; *Mullen v. Canal Co.*, 115-15—that decision was hastily made, *Mullen v. Canal Co.*, 115-15; *Hudson v. Jordan*, 110-250; *Haywood v. Daves*, 81-8—that material point of law or fact or a direct authority overlooked, *Weston v. Lumber Co.*, 168-98; *Mullen v. Canal Co.*, 115-15; *Tucker v. Tucker*, 110-333; *Hudson v. Jordan*, 110-250; *Gay v. Grant*, 105-478; *Weathersbee v. Farrar*, 98-255; *Fisher v. Mining Co.*, 97-95; *Dupree v. Ins. Co.*, 93-237; *Lockhart v. Bell*, 90-501; *Mizell v. Simmons*, 82-1; *Haywood v. Daves*, 81-8; *Watson v. Dodd*, 72-240—that, in its application of law or facts of case, court failed to consider material fact, *Gay v. Grant*, 105-478—that new evidence has been discovered, *Barcroft v. Roberts*, 92-249; *Wilson v. Lineberger*, 90-180—that court overlooked material admissions in pleadings of prevailing party, *Mason v. Pelletier*, 80-66—that court did not consider material defenses, *Williams v. Williams*, 71-216—or that some weighty consideration requires a rehearing, *Emry v. R. R.*, 105-45; *Fisher v. Mining Co.*, 97-95.

No ground for a rehearing that opinion of court was not put in writing: *Parker v. R. R.*, 133-335.

PRACTICE IN OBTAINING REHEARING. Petition must be filed in accordance with requirements of rule 12 (now rules 52 and 53) and this section: *Strickland v. Draughan*, 91-103; *Teeter v. Express Co.*, 172-620. Petition may be filed at any time before expiration of the first twenty days of the next succeeding term: *Bird v. Gilliam*, 123-63, 125-79—and may be filed during term at which opinion filed, *Emery v. R. R.*, 102-234. In computing time in which petition must be filed, first day must be excluded: *Cook v. Moore*, 95-4; *Barcroft v. Roberts*, 92-249—and last day also when falls on Sunday, *Ibid.* The time begins to run from the day the opinion is filed in the office of the clerk of supreme court: *McGeorge v. Nicola*, 173-733. Petition must contain plain, concise statement of facts or law overlooked or erroneously decided, and not mere argument: *Weathers v. Borders*, 124-610; *White v. Jones*, 92-388—and must not assign other grounds for alleged error than those presented at first hearing, *McDonald v. Carson*, 95-377; *Weathersbee v. Farrar*, 98-255; but see *Hodgin v. Bank*, 125-503; also cases cited in paragraph above.

As bearing upon section, see *Allen v. R. R.*, 106-515; *Morisey v. Swinson*, 106-221; *Solomon v. Bates*, 118-322.

1420. Records to be made. The court may order the clerk to record such parts of the record of cases as it may deem necessary.

Rev., s. 1550; Code, s. 959.

1421. Power to make rules of court. The justices of the supreme court shall prescribe and establish from time to time rules of practice for that court and also for the superior courts. The clerk shall certify to the judges of the superior court the rules of practice for such court, to be entered on the records thereof in each county.

Rev., s. 1541; Code, s. 961; R. C., c. 33, s. 13; 1818, c. 963.

Supreme court has exclusive power to prescribe rules for the conduct of cases therein: *Lee v. Baird*, 146-361; *Calvert v. Carstarphen*, 133-27; *Horton v. Green*, 104-400; *Herndon v. Ins. Co.*, 111-384—and is not subject to legislative control, *Calvert v. Carstarphen*, 133-27; *Herndon v. Ins. Co.*, 111-384; *State v. Edwards*, 110-511; *Rencher v. Anderson*, 93-105.

Legislature may prescribe rules for the courts inferior to supreme court: *Calvert v. Carstarphen*, 133-27; *State v. Edwards*, 110-511; *Cheek v. Watson*, 90-307—and if it fails to provide rules of practice in every particular, supreme court may do so, it having been given this power by statute, *Calvert v. Carstarphen*, 133-27; *Barnes v. Easton*, 98-116; *Cheek v. Watson*, 90-302; *Johnson v. Sedberry*, 65-5.

Rules of supreme court are mandatory, not directory: *Calvert v. Carstarphen*, 133-27; *Wiseman v. Comrs.*, 104-330; *Walker v. Scott*, 102-487; *Edwards v. Henderson*, 109-84—and are sole code of practice for supreme court, and are to be observed as strictly as are legislative provisions as to practice in lower courts, *Calvert v. Carstarphen*, 133-28; *Lee v. Baird*, 146-361.

Discussion of practice in supreme court and its powers under old and new constitution in *Herndon v. Ins. Co.*, 111-384.

Effect of failure to comply with various rules: *Davis v. Wall*, 142-450 (rules 19, 20, 27); *Marable v. R. R.*, 142-557 (same); *Lee v. Baird*, 146-361 (rules 19, 21, 27); *Thompson v. R. R.*, 147-412 (rules 19, 20, 21, 27); *Ullery v. Guthrie*, 148-417 (rules 19, 20); *Smith v. Mfg. Co.*, 151-260 (rule 19); *Pegram v. Hester*, 152-765 (rule 27); *Jones v. R. R.*, 153-419 (rule 19); *McDowell v. Kent*, 153-555 (rule 19); *Wheeler v. Cole*, 164-378 (rule 27); *Porter v. Lumber Co.*, 164-396 (rule 19); *Register v. Power Co.*, 165-234 (rules 19, 27); *Carter v. Reaves*, 167-131 (rule 27); *Land Co. v. McKay*, 168-83 (rule 17); *Merritt v. Dick*, 169-244 (rule 19); *Sloan v. Assurance Soc.*, 169-257 (rule 19); *Estes v. Rash*, 170-341 (rule 28); *Thresher Co. v. Thomas*, 170-680 (rule 27); *Rogers v. Jones*, 172-156 (rule 27); *Phillips v. Junior Order*, 175-133 (rule 36); *Cox v. Lumber Co.*, 177-227 (rule 5).

For last rules of practice in supreme court, see 174-828; in superior court, 174-847.

ART. 3. OFFICERS OF COURT

1422. **The court may appoint acting attorney-general.** If the attorney-general should fail at any term of the supreme court to attend to the business which by law is assigned him, the court may appoint some counsel learned in the law to discharge his duties during the term.

Rev., s. 1551; Code, s. 969; R. C., c. 33, s. 22; 1846, c. 29.

1423. **Reporter.** The supreme court may employ a reporter of its decisions.

Rev., s. 1552; Code, s. 3363; 1893, c. 379, s. 4; 1897, c. 429.

For compensation, see section 3889.

1424. **Clerk.** The clerk of the supreme court shall be appointed by the court, and shall hold his office for eight years.

Rev., s. 1553; Const., Art. IV, s. 15.

1425. **Clerk's bond and oath of office.** Before undertaking his duties, the clerk of the supreme court shall enter into bond with sufficient surety payable to the state of North Carolina, in the sum of fifteen thousand dollars, conditioned for the faithful discharge of his duties and for the safe keeping of all records committed to his custody, which bond shall be lodged with the secretary of state; and he shall also before said justices, or one of them, take the oaths which are prescribed for clerks of the superior court, and shall keep his office in the city of Raleigh.

Rev., s. 290; Code, s. 958; R. C., c. 33, s. 9; 1812, c. 829, s. 2; 1818, c. 963, s. 5; 1846, c. 28, s. 3; 1799, c. 520, s. 2.

For annotations on official bonds generally, see sections 354, 356.

1426. **Clerk to report money on hand.** The clerk of the supreme court shall, at the beginning of each fall term, produce to the court a statement on oath of all moneys remaining in his hands which have been paid into his office three years or more previous thereto, whether received directly from parties or from his predecessor in office, and is not detained in his hands by special order of the

court, specifying therein the name of the person to whom the same is payable, and his address, if known; a copy of which report shall be transmitted to the state treasurer and to the auditor.

Rev., s. 1554; Code, s. 1864; R. C., c. 73; 1823, c. 1186; 1831, c. 3.

1427. Marshal appointed. The supreme court may appoint an officer to be styled Marshal of the Supreme Court, removable at will, who shall attend upon the court during its sessions.

Rev., s. 1555; Code, s. 950; 1873-4, c. 34; 1881, c. 306.

1428. Librarian appointed. The justices of the supreme court have charge of the law library and may, in their discretion, employ a librarian, who shall perform his duties under such rules and regulations as may be prescribed by the court.

Rev., s. 5084; Code, s. 3606; 1889, c. 482; 1883, c. 100.

SUBCHAPTER II. SUPERIOR COURTS

ART. 4. ORGANIZATION

1429. Number of judges and solicitors. The state shall be divided into twenty superior court judicial districts, for each of which a judge and a solicitor shall be chosen in the manner now prescribed by law.

1913, cc. 9, 63; Const., Art. 4, s. 10.

The appointment of a judge before the district is created is invalid: *State v. Shuford*, 128-588. See, also, *Cook v. Meares*, 116-582; *Rhyne v. Lipscombe*, 122-650.

1430. Election and term of office of judges. The judges of the superior courts shall be elected in like manner as is provided for justices of the supreme court, and shall hold their offices for eight years.

Const., Art. 4, s. 21.

See annotations under Constitution.

1431. Election and term of office of solicitors. A solicitor shall be elected for each judicial district by the qualified voters thereof, as is prescribed for members of the general assembly, who shall hold office for the term of four years, and prosecute on behalf of the state in all criminal actions in the superior courts, and advise the officers of justice in his district.

Const., Art. 4, s. 23.

See annotations under Constitution.

1432. Residence and rotation of judges. Every judge of the superior court shall reside in the district for which he is elected. The judges shall preside in the courts of the different districts successively, but no judge shall hold the courts in the same district oftener than once in four years, but in case of the protracted illness of the judge assigned to preside in any district, or of any other unavoidable accident to him, by reason of which he shall be unable to preside, the governor may require any judge to hold one or more specified terms in said district in lieu of the judge assigned to hold the courts of the said district.

Const., Art. 4, s. 11.

See annotations under Constitution and under sections 1446, 1447, post.

1433. Oath of office. Every judge before he shall act as such shall, in open court, or before the governor, or before one of the judges of the supreme or superior courts, or before some justice of the peace, take the oath appointed for public officers, and also an oath of office. The officer or court before whom the judge shall qualify shall cause the judge to subscribe the oaths by him taken, and having certified the same, shall return the oaths to the secretary of state, who shall carefully preserve them; and if any judge shall act in his office before he shall have taken the oaths directed, he shall forfeit and pay two thousand dollars, one-half to the use of the state and the other half to the person who shall sue for the same.

Rev., s. 1497; Code, s. 924; R. C., c. 31, ss. 18, 19; 1777, c. 115; 1806, c. 694, s. 13; 1848, c. 45.

1434. Vacancies filled. All vacancies occurring by death, resignation or otherwise in the offices of justice of the supreme or judge of the superior court of the state shall be filled for the unexpired term at the next general election for members of the general assembly held after such vacancy is created. The persons elected at such election shall be commissioned by the governor immediately after the ascertainment of the result in the manner provided by law, and shall qualify and enter upon the discharge of the duties of the office within ten days after receiving such commission.

Rev., s. 1498; 1899, c. 613; Const., Art. 4, s. 25.

Cases of interest hereunder rendered prior to this enactment: *Cloud v. Wilson*, 72-155; *Hargrove v. Hilliard*, 72-169.

1435. When judge may discharge solicitor. When any state solicitor, authorized by election or appointment to act as prosecuting attorney for or in behalf of the state of North Carolina, in any of the courts of said state, shall appear at such court, in term time, drunk or intoxicated, or when it shall be brought to the knowledge of the judge presiding at such court that the solicitor whose duty it is to represent the state at such court is in the town in which such court is being held, drunk or intoxicated, at any time, it shall become the duty of such judge and he is hereby directed to immediately discharge such solicitor from the duties of such court, for the term then being held, and appoint some competent attorney to act as state solicitor for the term. The appointee shall be allowed all the fees and compensation belonging to the solicitor for such term.

Rev., s. 1499; 1901, c. 717.

Power of court to designate some one to act as solicitor in other cases: *State v. Wood*, 175-809.

ART. 5. JURISDICTION

1436. Original jurisdiction. The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.

Rev., s. 1500; Code, s. 922; 1889, c. 504, s. 2; Const., Art. IV, ss. 12, 27; 1879, c. 92, s. 11; 1881, c. 210.

Superior court of Beaufort county has concurrent jurisdiction with recorders' courts in certain cases. Ex. Sess. 1913, c. 78.

GENERAL OBSERVATIONS. As to meaning of term 'superior court' in interpreting legislation establishing inferior courts, see *Rhyne v. Lipscombe*, 122-650. Legislature has power to establish, limit and define jurisdiction of superior courts: *Bynum v. Powe*, 97-374—and to prescribe extent, manner, time and place of exercising their jurisdiction, *Ibid.*—but it cannot deprive them of any constitutional or inherent powers essential to their existence, *Ex parte McCown*, 139-95; *Mott v. Comrs.*, 126-866; *Scott v. Fishblate*, 117-275, and cases cited—nor can it abolish them in whole or in part, *Pate v. R. R.*, 122-877; *Rhyne v. Lipscombe*, 122-650. While jurisdiction of superior court may be made largely appellate by conferring such part of its original jurisdiction on such inferior courts as legislature may provide, yet its jurisdiction must be retained by original or appellate process: *Rhyne v. Lipscombe*, 122-650. The legislature can confer upon courts established by it inferior to supreme court exclusive original jurisdiction, or jurisdiction concurrent with superior court, of matters heretofore cognizable in superior court (except appellate jurisdiction over justices of the peace): *Pate v. R. R.*, 122-877; *Tate v. Comrs.*, 122-661—yet it cannot change status of superior court as head of superior court system, *Taylor v. Johnson*, 171-84; *Pate v. R. R.*, 122-877—nor can it emasculate the superior courts by transferring concurrent jurisdiction of cases, which have originated and are pending in them, down to circuit or other inferior court, *Tate v. Comrs.*, 122-661.

For creation and jurisdiction of recorder's court, see section 1536 et seq.

Constitutional jurisdiction of superior courts, generally, may be stated as intermediate between supreme court and courts of justices of the peace: *Mott v. Comrs.*, 126-866. Code of Civil Procedure does not take away from superior courts jurisdiction heretofore exercised by courts of equity: *Barcello v. Hapgood*, 118-712; *Wilson v. Bynum*, 92-717. Courts of state have jurisdiction only of criminal offenses committed within its territorial boundaries: *State v. Mitchell*, 83-674—though if committed in another state, that is matter of defense under plea of not guilty, *Ibid.* Court must have jurisdiction of subject before it can adjudge anything, and therefore has no jurisdiction over lands in another state: *Davenport v. Gannon*, 123-362.

Consent of parties cannot give jurisdiction generally where same does not attach under constitution and laws: *Cary v. Allegood*, 121-54; *State v. Miller*, 100-543; *Planing Mills v. McNinch*, 99-517; *Hawkins v. Hughes*, 87-115; *Leach v. R. R.*, 65-486; *Branch v. Houston*, 44-87—yet when complaint does not show jurisdiction as to parties and subject-matter, parties can consent to amendment whereby such jurisdiction appears, *Planing Mills v. McNinch*, 99-517—and it seems that court has power to allow such amendment without consent of defendants, *Ibid.*

Superior court has exclusive original jurisdiction in all cases when same not given to some other court: *State v. Waldrop*, 63-508; *Wilmington v. Davis*, 63-582.

Where total want of jurisdiction apparent upon face of proceedings, court will of its own motion stay, quash or dismiss suit: *Short v. Gill*, 126-803; *State v. Miller*, 100-543; *Hannah v. R. R.*, 87-351; *McMinn v. Hamilton*, 77-300; *Israel v. Ivey*, 61-551; *Branch v. Houston*, 44-85—but where such not the case, objection must in apt time be brought forward by plea to jurisdiction, otherwise there is no implied waiver of objection, *Short v. Gill*, 126-803; *McMinn v. Hamilton*, 77-300; *Branch v. Houston*, 44-88.

Where complaint states facts upon which action, either in tort or contract, could be based, courts will so treat action as to sustain jurisdiction: *Mitchem v. Pasour*, 173-487; *White v. Eley*, 145-36; *Parker v. Express Co.*, 132-130; *Sams v. Price*, 119-572; *Brittain v. Payne*, 118-989; *Schulhofer v. R. R.*, 118-1096; *Bowers v. R. R.*, 107-721; *Stokes v. Taylor*, 104-394. Though judgments are not treated as contracts for all purposes, they are so treated for purpose of distinguishing therefrom causes of action *ex delicto*: *Moore v. Nowell*, 94-265. The legal existence of a court cannot be drawn in question by a plea to the jurisdiction, for such a plea presupposes that the court was regularly called and organized, as jurisdiction means the right to hear and determine causes between litigants, which nothing but a court can do: *State v. Hall*, 142-710.

JURISDICTION, CIVIL ACTIONS ARISING EX CONTRACTU. Where sum demanded in good faith in action on contract exceeds \$200 the superior court has jurisdiction: *Carter v. R. R.*, 126-437; *Hornor School v. Wescott*, 124-519; *Burrell v. Hughes*, 116-431; *Martin v. Goode*, 111-288; *McPhail v. Johnson*, 109-571; *Maggett v. Roberts*, 108-174; *Kearns v. Heit-*

man, 104-332; Moore v. Nowell, 94-265; Usry v. Suit, 91-406; Coggins v. Harrell, 86-317; Morris v. Saunders, 85-138; Brickell v. Bell, 84-82; Dalton v. Webster, 82-279; Walton v. Walton, 80-26; Bryan v. Rousseau, 71-194; Fell v. Porter, 69-140.

It is the amount demanded in good faith, along with the other facts which reasonably tend to support it, that fixes the jurisdiction: R. R. v. Iron Works, 172-188; Petree v. Savage, 171-437; Wooten v. Drug Co., 169-64; Tillery v. Benefit Society, 165-262; Faircloth v. Kenlaw, 165-228; Realty Co. v. Corpening, 147-613; Thompson v. Express Co., 144-389; Watson v. Farmer, 141-452; Shankle v. Ingram, 133-254; Boyd v. Lumber Co., 132-184; Sloan v. R. R., 126-487; Cromer v. Marsha, 122-563; Morris v. O'Briant, 94-72; Wiseman v. Witherow, 90-140. As to what is the real amount demanded that determines jurisdiction, see Brantley v. Finch, 97-91; Dalton v. Webster, 82-283; Bryan v. Rousseau, 71-194; Froelich v. Express Co., 67-3; Fell v. Porter, 69-142; Hedgecock v. Davis, 64-651.

Though there may be several causes of action, each of which is for less than \$200, if aggregate demand is for more than \$200, superior court has jurisdiction, when causes can be joined in one action: Boyd v. R. R., 132-184; Sloan v. R. R., 126-487; Carter v. R. R., 126-437; Burrell v. Hughes, 116-430; Martin v. Goode, 111-289; Maggett v. Roberts, 108-174; Moore v. Nowell, 94-265—but should demand be reduced under \$200 by failure of proof or by sustaining a demurrer to any part thereof or to some of the causes of action, jurisdiction would not thereby be ousted, Brown v. Southerland, 142-227; Boyd v. R. R., 132-187; Shankle v. Ingram, 133-259; Martin v. Goode, 111-289; Usry v. Suit, 91-406; Brickell v. Bell, 84-82—except when sum demanded is so palpably in bad faith as to amount to a fraud on jurisdiction: Martin v. Goode, 111-289; Wiseman v. Witherow, 90-140—or where there is misjoinder of parties, Martin v. Goode, 111-289; Mitchell v. Mitchell, 96-14. Where the action was before a justice of the peace for the same cause, and excess over \$200 was remitted, plaintiff cannot recover more than \$200 in the superior court: Broek v. Scott, 159-513.

Where items of account constitute one transaction, or different accounts have been combined into one statement and assented to, if the amount is over \$200, the superior court has jurisdiction: Copland v. Tel. Co., 136-11; Fort v. Penny, 122-230; Cotton Mills v. Cotton Mills, 115-475; Simpson v. Elwood, 114-528; Marks v. Ballance, 113-28; McPhail v. Johnson, 109-571; Kearns v. Heitman, 104-332; Jarrett v. Self, 90-478; Magruder v. Randolph, 77-79; Hawkins v. Long, 74-781; Boyle v. Robbins, 71-130; Caldwell v. Beatty, 69-365; Waldo v. Jolly, 49-173. And such account cannot be split up so as to give a justice of the peace jurisdiction: Jarrett v. Self, 90-478, and other cases cited supra. See, also, annotations under section 1473.

Superior court has no jurisdiction of action *ex contractu* where sum sought to be recovered is \$200 or less: Howard v. Ins. Co., 125-49; Gillam v. Ins. Co., 121-369; Powell v. Allen, 103-46; Burbank v. Comrs., 92-257; Hannah v. R. R., 87-351; McDonald v. Cannon, 82-245; Foster v. Penny, 76-131; Pullen v. Green, 75-217; Latham v. Rollins, 72-454; Templeton v. Summers, 71-269; Froelich v. Express Co., 67-1; Winslow v. Weith, 66-432—no jurisdiction where debt sued on was for over \$200 and payments reduced it to less than \$200, Wiseman v. Witherow, 90-140; Harvey v. Johnson, 133-352—nor where tort is waived and action is on contract for less than \$200, Winslow v. Weith, 66-432.

The superior court having jurisdiction in actions whereof justices have not exclusive original jurisdiction, it has jurisdiction of actions on contract for \$200 and less where title to land in controversy: Brown v. Southerland, 142-225; Smith v. Garris, 131-36; Alexander v. Gibbon, 118-805; Wright v. Harris, 116-460; Boone v. Drake, 109-83; Edwards v. Cowper, 99-421; Forsythe v. Bullock, 74-135; Credle v. Gibbs, 65-192—and the controversy referred to must be between the parties, Davis v. Davis, 83-71; Evans v. Williamson, 79-86. Mere allegation of defendant in action on contract for \$200 or less that title is in controversy will not give jurisdiction to superior court: Brown v. Southerland, 142-225; Pasterfield v. Sawyer, 132-258; McDonald v. Ingram, 124-272; Alexander v. Gibbon, 118-805; Paine v. Cureton, 114-608; Hahn v. Guilford, 87-172. Defendant, by moving to dismiss on pleadings, cannot oust jurisdiction of superior court, provided complaint sets forth facts which present case in which title to real estate is in controversy: Brown v. Southerland, 142-225. See sections 1473, 1477.

In action for forcible entry and detainer, superior court and not justice has jurisdiction: Perry v. Shepherd, 78-83; State v. Yarborough, 70-250; Railroad v. Sharpe, 70-509. Superior court and not justice has jurisdiction of action of vendor against vendee for possession: Johnson v. Hauser, 82-375—and where vendor brought summary ejectment against vendee,

claiming that vendee had abandoned his rights and sustained the relation of tenant, justice had no jurisdiction if evidence of abandonment insufficient, *Boone v. Drake*, 109-79.

In action on penal bond, where penalty of bond does not exceed \$200, a justice of the peace and not the superior court has jurisdiction, same being an action *ex contractu*: *Railroad v. Hardware Co.*, 135-73; *Darden v. Blount*, 126-251; *Joyner v. Roberts*, 112-114; *Coggins v. Harrell*, 86-317; *Bryan v. Rousseau*, 71-194; *Fell v. Porter*, 69-140—likewise in action for the recovery of a penalty given by statute not over \$200, *Carter v. R. R.*, 126-437; *Henderson v. Davis*, 106-88; *Doughty v. R. R.*, 78-22; *Maggett v. Roberts*, 108-174; *Katzenstein v. R. R.*, 84-688—and in action on penal bond greater than \$200, plaintiff cannot remit excess to bring it within justice's jurisdiction, *Coggins v. Harrell*, 86-317; *Morris v. Saunders*, 85-140. Where several counterclaims pleaded, the aggregate sum will be taken as jurisdictional amount: *Electric Co. v. Williams*, 123-51. Judgment by confession without action, founded on contract in superior court for sum not in excess of \$200, is void for want of jurisdiction: *Slocumb v. Shingle Co.*, 110-24.

JURISDICTION, CIVIL ACTIONS ARISING EX DELICTO. In all actions *ex delicto*, where the value of the property in controversy does not exceed \$50, the superior court and the court of a justice of the peace have concurrent jurisdiction: *Houser v. Bonsal*, 149-51; *Duckworth v. Mull*, 143-461; *Watson v. Farmer*, 141-452; *Thomas v. Cooksey*, 130-148; *Kiser v. Blanton*, 123-400; *Malloy v. Fayetteville*, 122-480; *Johnson v. Williams*, 115-33; *Crinkley v. Egerton*, 113-142; *Harvey v. Hambright*, 98-446; *Montague v. Mial*, 89-137; *Noville v. Dew*, 94-43; *Ashe v. Gray*, 90-137—but where value exceeds \$50 superior court has exclusive original jurisdiction: *McDonald v. Cannon*, 82-247; *Crinkley v. Egerton*, 113-142; *Spencer v. Bell*, 109-39; *Bowers v. Railroad*, 107-722; *Asher v. Reizenstein*, 105-213; *Long v. Fields*, 104-221; *Edwards v. Cowper*, 99-421; *Noville v. Dew*, 94-43; *Barneycastle v. Walker*, 92-198; *Womble v. Leach*, 83-84. See section 1474.

The jurisdiction is determined by the damages claimed or the value of the property involved, being the amount demanded in good faith: *Thompson v. Express Co.*, 144-389; *Watson v. Farmer*, 141-452; *Noville v. Dew*, 94-45; see, also, *Knight v. Taylor*, 131-84; *Sloan v. R. R.*, 126-487, and cases cited on page 490; *Cromer v. Marsha*, 122-563; *Martin v. Goode*, 111-288; *Brantley v. Finch*, 97-91; *Morris v. O'Briant*, 94-72; *Moore v. Nowell*, 94-265; *Wiseman v. Witherow*, 90-140. The words "property in controversy" mean the value of the injury complained of and involved in the litigation: *Duckworth v. Mull*, 143-461; *Malloy v. Fayetteville*, 122-480; but see *Noville v. Dew*, 94-43; *Pippin v. Ellison*, 34-61; *Smith v. Campbell*, 10-590. Mere demand of judgment for amount of damages greater than alleged in complaint will not give superior court jurisdiction: *Bowers v. R. R.*, 107-721.

Where action, brought for tort in justice's court, goes up to superior court on appeal, the jurisdiction being concurrent, that court will take cognizance, however irregular the proceedings in the justice's court may have been: *Boing v. R. R.*, 87-364. In action by landlord against tenant to recover crop or value thereof, it appeared that tenant's contract was to pay him one-fourth of crop or \$200, the superior court has jurisdiction, since action not on contract, but for possession of crop: *McGehee v. Breedlove*, 122-277.

Where complaint alleges two causes of action, one for deceit in sale of horse and other for breach of warranty, in each damages claimed less than \$150, and verdict against plaintiff on first, but for him in sum of \$65 on second, superior court has jurisdiction: *Fields v. Brown*, 160-295; *Long v. Fields*, 104-221; see *Harvey v. Hambright*, 98-446; *Ashe v. Gray*, 90-137; *Bullinger v. Marshall*, 70-520.

See annotations under section 1474.

JURISDICTION IN EQUITY AND PROBATE MATTERS. The Code of Civil Procedure does not take away from superior courts jurisdiction heretofore exercised by courts of equity: *Barcello v. Hapgood*, 118-712; *Wilson v. Bynum*, 92-717. Superior court possesses same equitable powers and jurisdiction, when not limited by statute, formerly exercised by courts of equity: *Settle v. Settle*, 141-553; *McLarty v. Urquhart*, 153-339.

Justices' courts have no jurisdiction to enforce an equity, such jurisdiction being lodged in the superior court: *Weathers v. Borders*, 124-612; *Smaw v. Cohen*, 95-85; *Levin v. Gladstein*, 142-482; *Markham v. McCown*, 124-163; *Kiser v. Blanton*, 123-400; *Holden v. Warren*, 118-326; *Cotton Mills v. Cotton Mills*, 116-649, and cases cited: *Bell v. Howerton*, 111-69; *Hunter v. Yarborough*, 92-68; *Dougherty v. Sprinkle*, 88-300; *Lutz v. Thompson*, 87-337; *McAdoo v. Callum*, 86-419; *Fisher v. Webb*, 84-50. See annotations under section 1473.

Superior court has jurisdiction of action on county treasurer's bond: *Wright v. Kinney*, 123-618—of application for mandamus against treasurer, *Ibid.*; *Robinson v. Howard*, 84-151—of action to foreclose mortgage, although debt secured less than \$200, *Murphy v. McNeill*, 82-221—of counterclaim consisting of alleged indebtedness arising out of unadjusted partnership dealings, *Love v. Rhyne*, 86-576—of creditor's bill, *Wadsworth v. Davis*, 63-251; *Mebane v. Layton*, 86-572; *Fulp v. Power Co.*, 157-157—of actions to set up lost bonds and deeds, *McCormick v. Jernigan*, 110-406—of action by creditor to subject property fraudulently conveyed by debtor to payment of debt, *Mebane v. Layton*, 86-572; *Greer v. Cagle*, 84-385—of action for specific performance, *Keener v. Den*, 73-132—to declare trust in real estate and have title executed to plaintiff, and also to impeach a sale of the land under decree of probate court had in special proceeding then ended, *Gulley v. Macy*, 81-356—to enjoin sale of land subject to dower, which was estimated by taking into consideration decedent's interest in the realty of an insolvent firm to adjust the rights of widow and firm creditors, *Sparger v. Moore*, 117-449—to issue writs of mandamus, *Tate v. Comrs.*, 122-661—of action by assignee of dower right to enforce allotment of same, *Parton v. Allison*, 109-674; see, also, *In re Gorham*, 177-271; *Efland v. Efland*, 96-488—of action to charge separate property of married woman with payment of debts, *Planing Mills v. McNinch*, 99-518; *Moore v. Wolfe*, 122-711; *Patterson v. Gooch*, 108-503; *Berry v. Henderson*, 102-525; *Smaw v. Cohen*, 95-85; *Dougherty v. Sprinkle*, 88-300; *Neville v. Pope*, 95-346; *Weathers v. Borders*, 124-612; but see *Robinson v. Jarrett*, 159-165, and cases cited under section 2507.

Superior court has jurisdiction of action on claim for contribution by one defendant against another where amount exceeds \$200, except in cases of contribution between persons claiming as devisees under will or as heirs at law of testator to whom undivided land has descended, *Wharton v. Wilkerson*, 92-407—of action instituted by creditor of lunatic for recovery of debt contracted prior to lunacy, *Blake v. Respass*, 77-193—of action to foreclose mortgage where mortgaged property allotted to bankrupt by court of bankruptcy as homestead, *Brown v. Hoover*, 77-40—of action to recover legacy where executor has assented to it or it is sought to be enforced as a trust, *Hendrick v. Mayfield*, 74-626; *McFarland v. McKay*, 74-258; *Hodge v. Hodge*, 72-616; *Miller v. Barnes*, 65-67—of action by administrator against widow, heirs and all other interested parties, for account and restraining order where ground for equitable relief alleged, *Kirkman v. Phipps*, 86-428—of action to enforce express trust created by contract and also constructive trust arising ex delicto, *Oliver v. Wiley*, 75-320—of action by creditor against administrator for breach of contract made by intestate, *Shields v. Payne*, 80-291—of action to have defendant declared a trustee in which statement of his account as executor demanded as necessary incident to determination of same, *Cain v. Nicholson*, 77-411—of action to surcharge and falsify an account, *Houston v. Dalton*, 70-662—of action for cancellation of fraudulent releases obtained from plaintiffs, and account and settlement of estate of decedent, *Netherton v. Candler*, 78-88.

Superior court has jurisdiction concurrent with probate court of actions to compel administrator to account and other actions of like nature: *Pegram v. Armstrong*, 82-326; *Fisher v. Trust Co.*, 138-90; *Godwin v. Watford*, 107-168; *Bratton v. Davidson*, 79-423; see, also, section 135—of actions to enforce settlement of estates and their subjection to payment of debts, *Shober v. Wheeler*, 144-403; *Shields v. Payne*, 80-293; *Haywood v. Haywood*, 79-42. Advisory jurisdiction in the construction of wills: *Reid v. Alexander*, 170-303; *Heptinstall v. Newsome*, 146-503.

Superior court has jurisdiction of a proceeding in the nature of a bill of interpleader, although amount involved is under \$200: *Timber Co. v. Wells*, 171-262. To appoint a trustee to prevent a failure of trust: *Gold Mining Co. v. Lumber Co.*, 170-273. To punish for contempt in violating order of court, by striking out answer and rendering judgment: *Lumber Co. v. Cottingham*, 168-544.

Superior court has no jurisdiction of original motion to set aside execution and order of sale granted by justice of peace: *Hamer v. McCall*, 121-197—to direct disposition of money paid into office of clerk by executors, administrators and collectors under sections 148 and 149, *Cassidey, ex parte*, 95-225—to issue writ of prohibition, *Perry v. Shepherd*, 78-83—to change the compensation of a trustee as fixed in the deed of trust, *Banking Co. v. Leach*, 169-706—but may determine reasonableness of expense of attorney for trustee, *Ibid.*

Quere: Whether superior court has original jurisdiction of proceedings for removal of executors and administrators: *Edwards v. Cobb*, 95-4.

JURISDICTION IN CRIMINAL ACTIONS. Superior court has exclusive original jurisdiction of all criminal actions whereof original jurisdiction not conferred upon inferior courts: *State v. Waldrop*, 63-508—and has concurrent jurisdiction of all offenses within justice's jurisdiction where indictment made after six months (now twelve) from date of crime and no justice has taken cognizance of same, *State v. Dalton*, 101-682; *State v. Roberts*, 98-756; *State v. Cunningham*, 94-824; *State v. Reaves*, 85-553; *State v. Watts*, 85-519; *State v. Berry*, 83-604; *State v. Moore*, 82-659; *State v. Hooper*, 82-663. See section 1481, jurisdiction of justice; sections 1541, 1567, recorder's court.

Superior court has exclusive original jurisdiction of assaults with deadly weapons: *State v. Roseman*, 108-766; *State v. Phillips*, 104-786; *State v. Murphy*, 101-701; *State v. Cunningham*, 94-824; *State v. Taylor*, 84-774; *State v. Moore*, 82-659—of assaults where serious damage done, *State v. Shelly*, 98-673; *State v. Huntley*, 91-617; *State v. Cunningham*, 94-824; *State v. Taylor*, 84-773; *State v. Moore*, 82-659—of assaults with intent to commit rape, *State v. Taylor*, 84-773; *State v. Moore*, 82-659—of assaults with intent to kill, *Ibid.*—of offenses punishable within court's discretion, *State v. Cherry*, 72-124; *State v. Perry*, 71-523; *State v. Heidelberg*, 70-496—of misdemeanor punishable by fine of not less than ten dollars nor more than fifty or by imprisonment of not less than ten days, *State v. Hampton*, 77-526—of misdemeanors where punishment is by a fine exceeding fifty dollars or imprisonment exceeding thirty days, *Washington v. Hammond*, 76-33—of offense of retailing spirituous liquors without license, *State v. Edwards*, 113-653; *State v. Deaton*, 101-728; *State v. Cooper*, 101-684—of allowing stock to run at large where statute prescribes fine of \$10 for each hog permitted to run at large, and warrant charges running at large of ten hogs, *State v. Wiseman*, 131-795.

Superior court has jurisdiction concurrent with justice's court of affrays committed within one mile of place of the sitting of court: *State v. Bowers*, 94-910—and has jurisdiction as to both offenders where in an affray a deadly weapon is used, *State v. Coppersmith*, 88-614.

A deadly weapon is not one that must or may kill, but one which would likely produce death by manner of its use by defendant: *State v. Beal*, 170-764; *State v. Sinclair*, 120-603; *State v. Archbell*, 139-537; *State v. Norwood*, 115-789—is an instrument capable of producing death, *State v. Huntley*, 91-167—some weapons being deadly per se, others owing to manner of their use become deadly, *State v. Archbell*, 139-537; *State v. Huntley*, 91-617—but a club is *ex vi termini* a deadly weapon, *State v. Phillips*, 104-786; *State v. Porter*, 101-713—as is also an axe, *State v. Shields*, 110-497—and court will take judicial notice that a pistol is also a deadly weapon, *State v. Swann*, 65-330.

Whether weapon used is a deadly weapon is a question of law for the court where there is no dispute about the facts concerning its character, size, etc.: *State v. Sinclair*, 120-603; *State v. Norwood*, 115-789; *State v. Phillips*, 104-786; *State v. Speaks*, 94-865; *State v. West*, 51-505; *State v. Huntley*, 91-617; *State v. Collins*, 30-407; *State v. Craton*, 28-164—and in determining the question, the size, nature and manner of use of weapon, and size and strength of assailant, and person upon whom it is used, should be considered, *State v. Sinclair*, 120-603—as a gun or a penknife, under certain circumstances, may both be deadly weapons, *Ibid.*—for even a pin is a deadly weapon where it is pushed down the throat of an infant, producing death, *State v. Norwood*, 115-789. Where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used, it is proper and necessary to submit the matter to jury with proper instructions: *State v. Beal*, 170-764; *State v. Archbell*, 139-537, citing *State v. Huntley*, 91-621.

As to "serious damage done" it is necessary to describe the damage done, its character and extent, so that court can see from face of indictment that the damage was serious: *State v. Battle*, 130-657; *State v. Stafford*, 113-635; *State v. Phillips*, 104-786; *State v. Porter*, 101-713; *State v. Shelly*, 98-673; *State v. Earnest*, 98-740; *State v. Russell*, 91-624; *State v. Moore*, 82-659. "Serious damage" must be such physical injury as gives rise to great bodily pain: *State v. Nash*, 109-824—or must be such as is damaging to the peace, good order, decencies and proprieties of society, *State v. Huntley*, 91-620.

Affray is the fighting together of two or more persons in a public place to the terror of the citizens: *State v. Allen*, 11-356; *State v. Woody*, 47-335; *State v. Perry*, 50-9—or the using of abusive language in a public place, thereby bringing on a fight, *State v. Perry*, 50-9; *State v. Robbins*, 78-431.

Where indictment charges assault with deadly weapon, or other offense of which superior court has jurisdiction, and proof shows simple assault or other lesser degree of offense, juris-

diction of superior court not ousted: *State v. Fritz*, 133-725; *State v. Price*, 111-705; *State v. Roseman*, 108-765; *State v. Fesperman*, 108-770; *State v. Porter*, 101-715; *State v. Earnest*, 98-740; *State v. Johnson*, 94-863; *State v. Cunningham*, 94-824; *State v. Russell*, 91-624; *State v. Speller*, 91-528; *State v. Ray*, 89-587; *State v. Reaves*, 85-553. Charge of simple assault in indictment gives superior court *prima facie* jurisdiction and puts burden on defendant to show twelve months had not elapsed since commission of offense and before superior court took jurisdiction: *State v. Shelly*, 98-673; *State v. Fesperman*, 108-771; *State v. Porter*, 101-714; *State v. Earnest*, 98-743; *State v. Moore*, 82-662.

The superior court has jurisdiction of an affray in which deadly weapon was used, but if one of the parties did not use a deadly weapon, his conviction before a justice is a valid defense: *State v. Lancaster*, 169-284; but not if judgment rendered by collusion, *State v. Dockery*, 171-828.

Bill of indictment is required, on appeal from a justice, in a criminal case over which the justice has no jurisdiction: *State v. McAden*, 162-575. Bill found by grand jury for assault and battery need not aver that deadly weapon was used: *State v. Taylor*, 83-801—that any serious damage done, *Ibid.*—that six (now twelve) months had elapsed before finding of bill, and no justice had taken jurisdiction, *Ibid.*; *State v. Moore*, 82-659—or that offense was committed within one mile of court during session thereof, *State v. Taylor*, 83-601—but where jury by special verdict finds that assault was committed within six (now twelve) months next before finding of indictment, jurisdiction of superior court ousted, *State v. Berry*, 83-601.

Objection to jurisdiction is matter of defense and may be taken advantage of under plea of not guilty: *State v. Reaves*, 85-553; *State v. Berry*, 83-604; *State v. Taylor*, 83-601; *State v. Moore*, 82-659; *State v. Hooper*, 82-663.

1437. Concurrent jurisdiction. In all cases in which by any statute original jurisdiction of criminal actions has been taken from the superior court and vested exclusively in courts of inferior jurisdiction, such exclusive jurisdiction is hereby divested, and jurisdiction of such actions shall be concurrent and exercised by the court first taking cognizance thereof. Appeals shall be, as heretofore, to the superior court from all judgments of such inferior courts: Provided, that this section shall not apply to the counties of Cabarrus, Forsyth, Gaston, Mecklenburg, and Surry.

1919, c. 299.

1438. Jurisdiction in vacation or at term. In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election.

Rev., s. 1501; Code, c. 10, s. 230; 1871-2, c. 3.

Judge has no power to decide any matter out of courthouse except "chambers business" without consent: *Delafield v. Construction Co.*, 115-22; *May v. Ins. Co.*, 172-795.

Judge has no power to render judgment after expiration of term of court without consent of parties, except in cases where law clothes him with jurisdiction at chambers: *Hardin v. Ray*, 89-364—has no right to amend a judgment, *Hinton v. Ind. Co.*, 116-22—nor to make order in bastardy prejudicial to mother, *State v. Parsons*, 115-730.

By consent a judgment or order can be signed in vacation: *Hawkins v. Cedar Works*, 122-87; *Bank v. Gilmer*, 118-668; *Fertilizer Co. v. Taylor*, 112-141; *Brooks v. Stephens*, 100-297; *Anthony v. Estes*, 99-598; *Bynum v. Powe*, 97-374; *Coates v. Wilkes*, 94-174; *Branch v. Walker*, 92-87; *McDowell v. McDowell*, 92-227; *Shackleford v. Miller*, 91-181; *Hardin v. Ray*, 89-364; *Badger v. Daniel*, 82-468; *Molyneaux v. Huey*, 81-106; *Harrell v. Peebles*, 79-26; *Hervey v. Edmunds*, 68-243.

Consent order that judgment of confirmation of judicial sale may be entered up in vacation is valid: *Crabtree v. Scheelky*, 119-56.

By consent a cause can be heard and judgment signed outside of district: *Hawkins v. Cedar Works*, 122-87.

Trial judge may, by consent, determine a case after adjournment of court, although his riding of district be finished before his decision is rendered: *Benbow v. Moore*, 114-263. As

to hearing causes, making orders and signing judgments outside of county by consent, see *Cox v. Boyden*, 175-368; s. c., 167-320; *Barger v. Alley*, 167-362; *Hawkins v. Cedar Works*, 122-87; *Henry v. Hilliard*, 120-479; *Crabtree v. Scheelky*, 119-56; *Bank v. Gilmer*, 118-668; *Brooks v. Stephens*, 100-297.

It seems that superior court has power to make amendment to interlocutory order in ancillary proceeding out of term. If appellant does not except at the time he will be taken to have assented to it: *Coates v. Wilkes*, 94-174.

As to hearing motions out of county during vacation, see *Ledbetter v. Pinner*, 120-457; *Skinner v. Terry*, 107-103; *McNeill v. Hodges*, 99-248; *Gatewood v. Leak*, 99-363; *Bynum v. Powe*, 97-374; *Coates v. Wilkes*, 94-174.

Where judgment rendered in vacation by consent, but not entered of record before judge went out of office, a motion at subsequent term to enter the judgment nunc pro tunc will be allowed: *McDowell v. McDowell*, 92-227.

Resident judge of district has no other powers within such district in vacation than any other judge of superior court: *State v. Ray*, 97-510.

Quere: Whether judge can grant judgment taxing county with payment of costs at chambers and in vacation: *Ibid.*

1439. Appellate jurisdiction. The superior court has appellate jurisdiction of all issues of law or of fact, determined by a clerk of the superior court or a justice of the peace, and of all appeals from inferior courts for error assigned, in matters of law, as provided by law.

Rev., s. 1502; Const., Art. IV, ss. 12, 27; Code, s. 923.

For appeals from clerk to superior court, see sections 633-637—from justice of the peace, see section 1528—from corporation commissioners, see sections 1097-1099—from county commissioners, as to establishment of roads, see sections 3761, 3764—from recorder's court, see sections 1546, 1574.

The superior court has general appellate power over the inferior courts: *Taylor v. Johnson*, 171-84; *State v. Tripp*, 168-150; *Rhyn v. Lipscombe*, 122-650. Jurisdiction of superior court on appeal is entirely derivative, and if lower court had no jurisdiction, superior court has none: *McLaurin v. McIntyre*, 167-350; *State v. Wiseman*, 131-797; *Ijames v. McClamrock*, 92-362; *Raisin v. Thomas*, 88-150; *Boing v. R. R.*, 87-364; *Boyett v. Vaughan*, 85-365—and the superior court cannot allow a counterclaim in excess of the jurisdiction of the lower court, *Fertilizer Works v. Aiken*, 175-398. See, also, annotations under section 660.

In appeals from the clerk, the court has complete jurisdiction: *In re Anderson*, 132-243, and annotations under section 637.

1440. Cases transferred from former courts. All suits, petitions and other proceedings pending in the late courts of equity, and in the late courts of pleas and quarter sessions, and not determined by final judgment or decree, and all such cases wherein any act was decreed to be done or deed to be executed, and said act was not done or deed executed, may be transferred to the superior court of the county in which they were pending, at the instance of any person interested. And the superior court shall have power to make all orders, judgments and decrees that shall be necessary for finally adjudicating and settling the same.

Rev., s. 1503; Code, s. 944; 1871-2, c. 161; 1873-4, c. 183; 1874-5, c. 81; 1876-7, c. 9.

Section gives any party interested right to have proceedings, lately pending in courts of equity and pleas and quarter sessions, transferred to superior court: *Herman v. Watts*, 107-646.

Courts which existed under former system continued to act and were recognized as courts until adoption of code of civil procedure: *Lash v. Thomas*, 86-313.

Action not transferred to docket of superior court according to law is subsisting one until disposed of by judgment: *Murrill v. Humphrey*, 88-138.

Section merely referred to in *Adams v. Howard*, 110-18; *Runnion v. Ramsay*, 93-410; *Curtis's Heirs*, 82-438.

ART. 6. JUDICIAL DISTRICTS AND TERMS OF COURT

1441. **Number of districts.** The state shall be divided into twenty superior court judicial districts, numbered first to twentieth, composed of the counties hereafter designated in this chapter.

1913, c. 63; 1913, c. 196.

An act creating a judge without a district is void: *State v. Shuford*, 128-588.

1442. **Eastern and western judicial divisions.** The state shall be divided into two judicial divisions, the Eastern and Western Judicial Divisions.

The counties which are now or may hereafter be included in the judicial districts from one to ten, both inclusive, shall constitute the Eastern Division, and the counties which are now or may hereafter be included in the judicial districts from eleven to twenty, both inclusive, shall constitute the Western Division. The judicial districts shall retain their numbers from one up to twenty, and all such other districts as may from time to time be added by the creation of new districts shall be numbered consecutively.

1915, c. 15.

1443. **Terms of court.** A superior court shall be held by a judge thereof at the courthouse in each county. The twenty judicial districts of the state shall be composed of the counties designated in this section, and the superior courts in the several counties shall be opened and held in each year at the times herein set forth. Each court shall continue in session one week, and be for the trial of criminal and civil cases, except as otherwise provided, unless the business thereof shall be sooner disposed of. Each county shall have the number of regular weeks of superior court as set out in this section.

1913, cc. 63, 196.

Where term of court set by statute to begin on a certain Monday, and to last for "one week" or two or three weeks, it embraces Sunday of each week, unless sooner adjourned: *Taylor v. Ervin*, 119-274—and term expires by limitation at midnight of that day, *Ibid.*—therefore verdict rendered or entered on Sunday of week set for duration of court, in absence of earlier adjournment, is legal, *Ibid.*; *State v. Penley*, 107-808; *State v. Ricketts*, 74-187.

In special cases *ex necessitate*, court may sit on Sunday: *Taylor v. Ervin*, 119-274; *State v. McGimsey*, 80-377; *State v. Howard*, 82-626.

Statute declaring certain days public holidays does not prohibit courts from exercising functions on those days: *State v. Moore*, 104-743.

Where there are several statutes regulating terms of superior courts, they will be interpreted, if possible, so as to secure harmony in their operations and effectuate general purpose of legislation: *Wortham v. Basket*, 99-70; *McNeill v. McDuffie*, 119-336. A division of terms into civil and criminal is valid: *State v. Lew*, 133-664.

The term of court does not extend to the end of the period prescribed, but ends when the business is disposed of and the judge finally leaves the bench: *May v. Ins. Co.*, 172-795; *Hardee v. Timberlake*, 159-552; *Delafield v. Construction Co.*, 115-21; *Hinton v. Ins. Co.*, 116-22; *Boyd v. Teague*, 111-246; *Branch v. Walker*, 92-87; *Foley v. Blank*, 92-476. The judge cannot hear matters outside of courthouse or out of term, except by consent, unless the same could be heard at chambers: *Delafield v. Construction Co.*, 115-21, and cases cited *supra*.

EASTERN DIVISION

First district. The first district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Currituck—Fifth Monday before the first Monday in March, for civil cases only; first Monday in March; first Monday in September.

1913, c. 196; Ex. Sess. 1913, c. 51.

Camden—First Monday after the first Monday in March; seventh Monday before the first Monday in September, for civil cases only; and ninth Monday after the first Monday in September.

1913, c. 196.

Pasquotank—Ninth Monday before the first Monday in March, to continue for two weeks, for civil cases only; third Monday before the first Monday in March, for civil cases only; second Monday after the first Monday in March; second Monday after the first Monday in September, to continue for two weeks, the second week for civil cases only; tenth Monday after the first Monday in September, for civil cases only.

1913, c. 196; Ex. Sess. 1913, c. 51.

Perquimans—Sixth Monday before the first Monday in March; sixth Monday after the first Monday in March; eighth Monday after the first Monday in September.

1913, c. 196; Ex. Sess. 1913, c. 51.

Chowan—Fourth Monday after the first Monday in March; first Monday after the first Monday in September; thirteenth Monday after the first Monday in September.

1913, c. 196.

Gates—Third Monday after the first Monday in March; fifth Monday before the first Monday in September; fourteenth Monday after the first Monday in September.

1913, c. 196.

Dare—Twelfth Monday after the first Monday in March; seventh Monday after the first Monday in September.

1913, c. 196; Ex. Sess. 1913, c. 51.

Tyrrell—Seventh Monday after the first Monday in March, to continue two weeks, the second week for civil cases only; twelfth Monday after the first Monday in September; fourth Monday before the first Monday in September, for civil cases only. The courts shall be open on Monday of each term as soon as the morning train arrives at Columbia.

1913, c. 196; Ex. Sess. 1913, c. 51; 1919, c. 128, s. 1.

Hyde—Eleventh Monday after the first Monday in March; sixth Monday after the first Monday in September.

1913, c. 196.

Beaufort—Seventh Monday before the first Monday in March, for criminal cases only; second Monday before the first Monday in March, to continue for two weeks, for civil cases only; fifth Monday after the first Monday in March, for civil cases only; ninth Monday after the first Monday in March, to continue for two weeks, for civil cases only; sixth Monday before the first Monday in September, for criminal cases only; fourth Monday after the first Monday in September, to

continue for two weeks, for civil cases only; eleventh Monday after the first Monday in September; fifteenth Monday after the first Monday in September, for civil cases only.

1913, c. 196; Ex. Sess. 1913, c. 51; 1919, c. 128, ss. 3, 4.

Second district. The second district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Washington—Eighth Monday before the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March, for civil cases only; eighth Monday before the first Monday in September; sixth Monday after the first Monday in September.

1913, cc. 63, 196; Ex. Sess. 1913, c. 51; 1919, c. 128, s. 2; c. 133.

Martin—Second Monday after the first Monday in March, to continue for two weeks; fifteenth Monday after the first Monday in March; second Monday after the first Monday in September, to continue for two weeks; fourteenth Monday after the first Monday in September.

1913, c. 196; 1919, c. 133.

Edgecombe—First Monday in March; fourth Monday after the first Monday in March, to continue for two weeks, for civil cases only; thirteenth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in September; tenth Monday after the first Monday in September, to continue for two weeks, for civil cases only.

The grand jury drawn by the commissioners of Edgecombe county for the term of court beginning on the first Monday in March of each year shall also serve as the grand jury for the term beginning on the thirteenth Monday after the first Monday in March, and shall be charged with the same duties and clothed with the same power at each of said terms and shall receive for each term such mileage and compensation as is now provided by law.

1913, c. 196; Ex. Sess. 1913, c. 17; 1915, c. 107; 1917, c. 12; 1919, c. 133.

Nash—Sixth Monday before the first Monday in March; first Monday before the first Monday in March, for civil cases only. First Monday after the first Monday in March; eighth Monday after the first Monday in March, to continue for two weeks, the first week for criminal cases only, and the second week for civil cases only; twelfth Monday after the first Monday in March, for civil cases only. First Monday before the first Monday in September; fifth Monday after the first Monday in September; twelfth Monday after the first Monday in September, to continue for two weeks.

1913, c. 196; 1915, c. 63; 1919, c. 133.

No court held in Nash on Thanksgiving Day. P. L. 1913, c. 685.

Wilson—Fourth Monday before the first Monday in March, to continue for two weeks, the first week for criminal cases only, and the second week for civil cases only; tenth Monday after the first Monday in March, to continue for two weeks, the first week for criminal cases only, and the second week for civil cases only; sixteenth Monday after the first Monday in March, for civil cases only; first Monday in September; fourth Monday after the first Monday in September,

for civil cases only; eighth Monday after the first Monday in September, to continue for two weeks, for civil cases only; fifteenth Monday after the first Monday in September.

1913, c. 196; 1915, c. 45; 1917, c. 12; 1919, c. 133.

Third district. The third district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Hertford—First Monday before the first Monday in March; sixth Monday after the first Monday in March, to continue for two weeks; fourth Monday before the first Monday in September; sixth Monday after the first Monday in September, to continue for two weeks.

1913, c. 196; 1915, c. 282; 1919, c. 142.

Bertie—Third Monday before the first Monday in March; ninth Monday after the first Monday in March, to continue for two weeks; first Monday before the first Monday in September, to continue for two weeks; tenth Monday after the first Monday in September, to continue for two weeks.

1913, c. 196; Ex. Sess. 1913, c. 16; 1915, c. 78; 1917, c. 226.

Northampton—Fourth Monday after the first Monday in March; eighth Monday after the first Monday in September, each to continue two weeks; first Monday in August, for civil actions only, except jail cases on the criminal docket.

1913, c. 196.

Halifax—Fifth Monday before the first Monday in March; second Monday after the first Monday in March; thirteenth Monday after the first Monday in March; third Monday before the first Monday in September; twelfth Monday after the first Monday in September; each to continue for two weeks.

1913, c. 196; Ex. Sess. 1913, c. 2; 1915, c. 78.

Warren—Seventh Monday before the first Monday in March; eleventh Monday after the first Monday in March; second Monday after the first Monday in September, each to continue for two weeks.

1913, c. 196; 1917, c. 256.

Vance—First Monday in March; fifteenth Monday after the first Monday in March; fourth Monday after the first Monday in September, each to continue two weeks.

1913, c. 196; 1917, c. 256.

Fourth district. The fourth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Wayne—Sixth Monday before the first Monday in March; twelfth Monday after the first Monday in March; second Monday before the first Monday in September; twelfth Monday after the first Monday in September, each to continue for two weeks; fifth Monday after the first Monday in March, and fifth Monday after the first Monday in September, each to continue for two weeks, for civil cases only.

1913, c. 196.

Johnston—First Monday after the first Monday in March; third Monday before the first Monday in September, for criminal cases only; fourteenth Monday after the first Monday in September, to continue for two weeks; second Monday before the first Monday in March; seventh Monday after the first Monday in March, and third Monday after the first Monday in September, each to continue for two weeks; and the last three terms for civil cases only.

1913, c. 196.

Harnett—Eighth Monday before the first Monday in March; fourth Monday before the first Monday in March, to continue for two weeks, for civil cases only. Eleventh Monday after the first Monday in March; first Monday in September, to continue for two weeks, the second week for civil cases only. Tenth Monday after the first Monday in September, to continue for two weeks, for civil cases only.

1913, c. 196.

Chatham—Seventh Monday before the first Monday in March; tenth Monday after the first Monday in March; seventh Monday after the first Monday in September; second Monday after the first Monday in March, for civil cases only; fifth Monday before the first Monday in September for two weeks, for civil and criminal cases, the criminal docket to be called the first day of the term and the trial of criminal cases to continue until the criminal docket is disposed of.

1913, c. 196; 1917, c. 228; 1919, c. 35.

Lee—Third Monday after the first Monday in March, to continue for two weeks; ninth Monday after the first Monday in March; second Monday after the first Monday in September, for civil cases only; eighth Monday after the first Monday in September, to continue for two weeks, the first week for criminal and civil cases and the second for civil cases only; seventh Monday before the first Monday in September, to continue for two weeks. When any party has been duly served with summons and a copy of the complaint thirty days before the commencement of any term of the court of Lee county, the case shall stand for trial at said term.

1913, c. 196; Ex. Sess. 1913, c. 24; 1917, c. 228.

Fifth district. The fifth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Pitt—Seventh Monday before the first Monday in March, for civil cases only; sixth Monday before the first Monday in March; fifth Monday before the first Monday in March, for civil cases only; second Monday before the first Monday in March, for civil cases only; second Monday after the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March, for civil cases only; seventh Monday after the first Monday in March; eleventh Monday after the first Monday in March, for civil cases only; twelfth Monday after the first Monday in March, for civil cases only; second Monday before the first Monday in September, for civil cases only; first Monday before the first Monday in September; first Monday after the first Monday in September, for civil cases only; second Monday after the first Monday in September; third Monday after the first Monday in September, for civil cases only; ninth Monday after the first Monday in September, for civil cases only; tenth Monday after the first Monday in September.

1913, c. 196; Ex. Sess. 1913, c. 25; 1915, cc. 111, 139; 1917, c. 217; 1919, c. 56.

Craven—Eighth Monday before the first Monday in March; thirteenth Monday after the first Monday in March, and the first Monday in September for criminal cases only; fifth Monday after the first Monday in March, for civil cases and jail cases on the criminal docket; fourth Monday before the first Monday in March; fourth Monday after the first Monday in September; eleventh Monday after the first Monday in September, each to continue for two weeks, for civil cases only; tenth Monday after the first Monday in March, for civil cases only.

1913, c. 196; 1915, c. 111; 1917, c. 217.

Pamlico—Eighth Monday after the first Monday in March, and seventh Monday after the first Monday in September, each to continue for two weeks.

1913, c. 196.

Jones—Fourth Monday after the first Monday in March; and thirteenth Monday after the first Monday in September.

1913, c. 196; Ex. Sess. 1913, c. 19; P. L. 1915, c. 363.

Carteret—Fourteenth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in March, and sixth Monday after the first Monday in September.

1913, c. 196.

Greene—First Monday before the first Monday in March, to continue for two weeks; sixteenth Monday after the first Monday in March; fourteenth Monday after the first Monday in September, to continue for two weeks.

1913, cc. 63, 171, 196; Ex. Sess. 1913, cc. 19, 47; 1915, c. 139.

Sixth district. The sixth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Lenoir—Sixth Monday before the first Monday in March; eleventh Monday after the first Monday in March; second Monday before the first Monday in September, and fourteenth Monday after the first Monday in September, each for criminal cases only. Second Monday before the first Monday in March, two weeks, for civil cases only. Fifth Monday after the first Monday in March; fourteenth Monday after the first Monday in March, and ninth Monday after the first Monday in September, terms of two weeks each for civil cases only. Sixth Monday after the first Monday in September.

1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 240; 1917, c. 13.

For civil actions at criminal terms, see end of district.

Duplin—Eighth Monday before the first Monday in March, two weeks, and for civil cases only. Fifth Monday before the first Monday in March, for criminal cases. Third Monday after the first Monday in March, two weeks, for civil cases only. First Monday before the first Monday in September, three weeks, for civil cases only. Eleventh Monday after the first Monday in September, two weeks, the first week for criminal and civil cases, and the second week for civil cases only. Sixth Monday before the first Monday in September, for criminal cases only.

1913, c. 196; Ex. Sess. 1913, c. 53; 1915, c. 240.

Onslow—Sixth Monday after the first Monday in March, to continue for two weeks for civil cases only; seventh Monday before the first Monday in Sep-

tember, for civil cases only; fifth Monday after the first Monday in September; thirteenth Monday after the first Monday in September, for civil cases only; first Monday in March.

1913, c. 196; Ex. Sess. 1913, c. 75; 1915, c. 240.

The commissioners of Onslow county, whenever in their discretion the best interests of the county demand it, may, by order, abrogate, in any year, the holding of those terms of the courts of Onslow county which convene on the sixth Monday after the first Monday in March, and the seventh Monday before the first Monday in September, and on the thirteenth Monday after the first Monday in September, all or either of said terms, and when any of these terms are so abrogated, thirty days notice of the same shall be given by the commissioners, in each instance, by publication of same in a newspaper published in the county, and at the courthouse door and at four other public places in the county.

1915, c. 25.

Sampson—Fourth Monday before the first Monday in March; first Monday after the first Monday in March; fourth Monday before the first Monday in September; second Monday after the first Monday in September; seventh Monday after the first Monday in September; eighth Monday after the first Monday in March, each to continue for two weeks; the September and March terms to be for civil cases only.

1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 240.

At criminal terms of the superior court in the sixth judicial district, civil actions which do not require a jury may be heard by consent; and at criminal terms in the county of Lenoir, any order, judgment, or decree may be entered in a civil action not requiring a jury trial.

1915, c. 240, s. 3; 1917, c. 13.

For process, pleadings, and motions in civil actions, see s. 1444.

Seventh district. The seventh district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Wake—Criminal courts: Eighth Monday before the first Monday in March; fourth Monday before the first Monday in March; first Monday in March; fifth Monday after the first Monday in March; ninth Monday after the first Monday in March; thirteenth Monday after the first Monday in March; eighth Monday before the first Monday in September; first Monday after the first Monday in September; fifth Monday after the first Monday in September; ninth Monday after the first Monday in September; fourteenth Monday after the first Monday in September. These terms shall be for criminal cases only.

Civil courts: Fifth Monday before the first Monday in March; third Monday before the first Monday in March; first Monday after the first Monday in March, to continue for two weeks; third Monday after the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March, to continue for two weeks; eighth Monday after the first Monday in March; eleventh Monday after the first Monday in March, to continue for two weeks; fourteenth Monday after the first Monday in March, to continue for two weeks; second

Monday after the first Monday in September, to continue for two weeks; fourth Monday after the first Monday in September; seventh Monday after the first Monday in September, to continue for two weeks; twelfth Monday after the first Monday in September, to continue for two weeks. These terms shall be for civil cases only, and no criminal process shall be returnable to such terms.

1913, c. 196; 1917, c. 116; 1919, c. 113.

For grand juries at fall and spring terms, see Grand Jury, sec. 2334.

Franklin—Seventh Monday before the first Monday in March, to continue for two weeks; second Monday before the first Monday in March, to continue for two weeks, for civil cases only; tenth Monday after the first Monday in March; first Monday before the first Monday in September, to continue for two weeks, for civil cases only; sixth Monday after the first Monday in September, for criminal cases only; tenth Monday after the first Monday in September, to continue for two weeks, for civil cases only.

1913, c. 196; 1917, c. 116.

Eighth district. The eighth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

New Hanover—Third Monday before the first Monday in September, for criminal cases only; first Monday after the first Monday in September, two weeks, for civil cases only; sixth Monday after the first Monday in September, three weeks, for civil cases only; tenth Monday after the first Monday in September; thirteenth Monday after the first Monday in September, two weeks, for civil cases only; seventh Monday before the first Monday in March, for criminal cases only; fourth Monday before the first Monday in September, two weeks, for civil cases only; third Monday after the first Monday in March, for criminal cases only; fourth Monday after the first Monday in March, three weeks, for civil cases only; ninth Monday after the first Monday in March, for criminal cases only; eleventh Monday after the first Monday in March, two weeks, for civil cases only; fourteenth Monday after the first Monday in March, for criminal cases only.

1913, c. 196; 1915, c. 60; 1919, c. 167.

Brunswick—Second Monday after the first Monday in March; fifteenth Monday after the first Monday in March, for civil cases only; second Monday before the first Monday in September for civil cases only; fifth Monday after the first Monday in September.

1913, c. 196; Ex. Sess. 1913, c. 56; 1917, c. 18.

Columbus—Fifth Monday before the first Monday in March; second Monday before the first Monday in March, to continue for two weeks, for civil cases only; seventh Monday after the first Monday in March, to continue two weeks; first Monday before the first Monday in September, to continue two weeks; eleventh Monday after the first Monday in September, to continue two weeks, for civil cases only; fifteenth Monday after the first Monday in September, for criminal cases only.

1913, c. 196; Ex. Sess. 1913, c. 61. 1917, c. 124, provides for a calendar for Columbus county.

Pender—Sixth Monday before the first Monday in March; first Monday in March, to continue two weeks, for civil cases only; thirteenth Monday after the

first Monday in March; third Monday after the first Monday in September, to continue two weeks, for civil cases only; ninth Monday after the first Monday in September.

1913, c. 196.

Ninth district. The ninth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Bladen—Eighth Monday before the first Monday in March, for civil cases and criminal cases where defendants are confined in jail only; the seventh Monday after the first Monday in March and the sixth Monday after the first Monday in September, for civil cases only; the first Monday after the first Monday in March and the fourth Monday before the first Monday in September, for criminal cases only.

The presiding judge at any term of the superior court of Bladen county may, in his discretion, on the first day of the term, direct the sheriff of the county to summon such additional jurors for the term as may be necessary for the proper dispatch of the business before the court.

1913, c. 196; 1915, c. 110.

For civil process, pleadings, trials and judgments at criminal terms, see s. 1444.

Cumberland—Seventh Monday before the first Monday in March; twelfth Monday after the first Monday in March; first Monday before the first Monday in September; eleventh Monday after the first Monday in September, each for criminal cases only. Third Monday before the first Monday in March; second Monday after the first Monday in March; eighth Monday after the first Monday in March; second Monday after the first Monday in September; seventh Monday after the first Monday in September, each to continue for two weeks, for civil cases only. At all criminal terms of said court civil trials which do not require a jury may be heard by consent of the parties, and motions may be heard upon ten days notice to the adverse party prior to said term.

1913, c. 196; Ex. Sess. 1913, c. 23.

For process, pleadings and judgments in civil actions at criminal terms, see s. 1444.

Hoke—Sixth Monday before the first Monday in March; sixth Monday after the first Monday in March; third Monday before the first Monday in September, to continue for two weeks; and twelfth Monday after the first Monday in September.

1913, c. 196; 1917, c. 233.

Robeson—Fifth Monday before the first Monday in March; eighth Monday before the first Monday in September; ninth Monday after the first Monday in September, each for criminal cases. Fourth Monday before the first Monday in March, for civil cases only; first Monday before the first Monday in March, two weeks, for civil cases only; fourth Monday after the first Monday in March, two weeks; tenth Monday after the first Monday in March, two weeks; first Monday in September, two weeks; fourth Monday after the first Monday in September, two weeks; thirteenth Monday after the first Monday in September, two weeks; the last four terms for civil cases.

1913, c. 196; 1915, c. 208; 1919, c. 105.

For process, pleadings, trials, and judgments in civil actions at criminal terms, see s. 1444.

Tenth district. The tenth district shall be composed of the following counties, and the superior courts thereof shall be held in each year at the following times, to wit:

Alamance—First Monday in March; the second Monday before the first Monday in September; the twelfth Monday after the first Monday in September, each term for criminal cases only; the sixth Monday before the first Monday in March; the twelfth Monday after the first Monday in March (to continue for two weeks); the first Monday after the first Monday in September (to continue for two weeks), each of said terms for civil cases only.

1913, c. 196; 1915, c. 53.

Durham—First Monday before the first Monday in March; eleventh Monday after the first Monday in March; first Monday before the first Monday in September; and fourteenth Monday after the first Monday in September, each for criminal cases. Eighth Monday before the first Monday in March; first Monday after the first Monday in March; third Monday after the first Monday in September, each to continue for two weeks, for civil cases only. Eighth Monday after the first Monday in March; fifteenth Monday after the first Monday in March; ninth Monday after the first Monday in September, each for civil cases only.

1913, c. 196; 1915, c. 68.

For process, pleadings, trials, and judgments in civil actions at criminal terms, see s. 1444.

Granville—Third Monday before the first Monday in March; fifth Monday after the first Monday in March; tenth Monday after the first Monday in September, each to continue for two weeks; sixth Monday before the first Monday in September.

1913, c. 196; 1915, c. 7.

Orange—Ninth Monday after the first Monday in March, for civil cases only; fourth Monday after the first Monday in March; first Monday in September; thirteenth Monday after the first Monday in September.

1913, c. 196; 1915, cc. 33, 54; 1917, c. 52.

Person—Fourth Monday before the first Monday in March; seventh Monday after the first Monday in March; third Monday before the first Monday in September; sixth Monday after the first Monday in September.

1913, c. 196; 1915, c. 54.

WESTERN DIVISION

Eleventh district. The eleventh district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Ashe—Fifth Monday after the first Monday in March, and eighth Monday before the first Monday in September, each to continue for two weeks; sixth Monday after the first Monday in September.

1913, c. 196; Ex. Sess. 1913, c. 34.

Alleghany—Ninth Monday after the first Monday in March, and third Monday after the first Monday in September.

1913, c. 196.

Surry—Seventh Monday after the first Monday in March, and first Monday before the first Monday in September, each to continue for two weeks; fourth Monday before the first Monday in March; seventh Monday after the first Monday in September, to continue for two weeks.

1913, c. 196; Ex. Sess. 1913, c. 34.

Forsyth—Eighth Monday before the first Monday in March, to continue for two weeks; third Monday before the first Monday in March, to continue for two weeks, for civil cases only; first Monday after the first Monday in March, to continue for two weeks, for civil cases only; third Monday after the first Monday in March, for criminal cases only; eleventh Monday after the first Monday in March, to continue for three weeks, for civil cases only; sixth Monday before the first Monday in September, to continue for two weeks, for criminal cases only; first Monday after the first Monday in September, to continue for two weeks, for civil cases only; fourth Monday after the first Monday in September, to continue for two weeks; ninth Monday after the first Monday in September, to continue for two weeks, for civil cases only; fourteenth Monday after the first Monday in September, for criminal cases only.

1913, c. 196; 1917, c. 169; 1919, c. 87. P. L. 1917, c. 375, provides for a criminal calendar for Forsyth.

Rockingham—Sixth Monday before the first Monday in March, for criminal cases only; fourth Monday before the first Monday in September, to continue for two weeks, for criminal cases only. First Monday before the first Monday in March; fifteenth Monday after the first Monday in March; and eleventh Monday after the first Monday in September, each to continue for two weeks, for civil cases only. Tenth Monday after the first Monday in March.

1913, c. 196; Ex. Sess. 1913, c. 49; 1917, c. 107. P. L. 1915, c. 60, provides for a calendar in Rockingham county.

Caswell—Fourth Monday after the first Monday in March; second Monday before the first Monday in September, and thirteenth Monday after the first Monday in September.

The commissioners of Caswell county, whenever in their discretion the best interests of the county demand it, may, by order, abrogate in any year the holding of that term of court which convenes on the second Monday before the first Monday in September; and when the term is so abrogated, thirty days notice of the same shall be given by the commissioners by publication in some newspaper published in Caswell county and at the courthouse door and four other public places in the county.

1913, c. 196; 1919, c. 289.

Twelfth district. The twelfth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Guilford—Fifth Monday before the first Monday in March; eighth Monday after the first Monday in March; fifteenth Monday after the first Monday in March; second Monday after the first Monday in September; fourteenth Monday after the first Monday in September; fifteenth Monday after the first Monday in September, each for criminal cases only. Seventh Monday before the first

Monday in March; third Monday before the first Monday in March; first Monday after the first Monday in March; sixth Monday after the first Monday in March; tenth Monday after the first Monday in March; third Monday before the first Monday in September; first Monday in September; fifth Monday after the first Monday in September; ninth Monday after the first Monday in September, each to continue for two weeks, for civil cases only. Third Monday after the first Monday in March; fourteenth Monday after the first Monday in March; third Monday after the first Monday in September; thirteenth Monday after the first Monday in September, each for civil cases only.

1913, c. 196.

For grand juries at fall and spring terms, see Grand Jury, s. 2334.

Davidson—First Monday before the first Monday in March; twelfth Monday after the first Monday in March; fifth Monday before the first Monday in September; eleventh Monday after the first Monday in September, each to continue for two weeks; ninth Monday after the first Monday in March, the last two terms being for civil cases only.

1913, c. 196; Ex. Sess. 1913, c. 14.

Stokes—Fourth Monday after the first Monday in March, and seventh Monday after the first Monday in September, for criminal cases only; fifth Monday after the first Monday in March and eighth Monday after the first Monday in September, for civil cases only.

1913, c. 196; Ex. Sess. 1913, c. 1.

1913, c. 48, provides for carrying forward the cases from term to term in Stokes county.

Thirteenth district. The thirteenth district shall be composed of the following counties, and the superior courts shall be held at the following times, to wit:

Union—Fifth Monday before the first Monday in March; third Monday after the first Monday in March; fifth Monday before the first Monday in September, each for criminal cases. Sixth Monday after the first Monday in September, to continue for two weeks, the second week for civil cases only; second Monday before the first Monday in March, and second Monday before the first Monday in September, each to continue for two weeks; ninth Monday after the first Monday in March; the last three terms for civil cases only.

In the first three terms of court for Union county for the trial of criminal cases, if it shall appear to the clerk of the superior court that the criminal docket will not be sufficient to take up the entire term, he may make or cause to be made a calendar of civil cases as is made at other terms, and such cases shall be tried at such term in the same manner as if it were a civil term.

If it shall appear to the county commissioners for the county of Union, prior to the drawing of a jury or grand jury for any criminal term of court, that there is no prisoner in jail in the county or that the criminal docket at such term is not sufficient to justify the holding of the term, then the clerk is not to make or cause to be made a calendar of civil cases to be tried at said term, and the county commissioners, within their discretion, may not draw a jury or grand jury for such term, and notice shall be given immediately to the judge not to hold said court.

1913, c. 196; Ex. Sess. 1913, c. 22; 1915, c. 72; 1917, cc. 28, 117.

Anson—Seventh Monday before the first Monday in March, for criminal cases only; first Monday in March, for civil cases only; sixth Monday after the first Monday in March, to continue for two weeks, the second week to be for civil cases only; fourteenth Monday after the first Monday in March, for civil cases only; first Monday after the first Monday in September, for criminal cases only; fourth Monday after the first Monday in September, for civil cases only; tenth Monday after the first Monday in September, for civil cases only.

1913, c. 196.

For process, pleadings, trials, and judgments in civil actions at criminal terms, see s. 1444.

Scotland—First Monday after the first Monday in March, for civil cases only; eighth Monday after the first Monday in March; thirteenth Monday after the first Monday in March; eighth Monday after the first Monday in September, for civil cases only; twelfth Monday after the first Monday in September.

1913, c. 196; Ex. Sess. 1913, c. 22; 1917, c. 105.

Moore—Sixth Monday before the first Monday in March, for criminal cases only; third Monday before the first Monday in March, for civil cases only; eleventh Monday after the first Monday in March, for civil cases only; third Monday before the first Monday in September, for criminal cases only; second Monday after the first Monday in September, for civil cases only; fourteenth Monday after the first Monday in September, for civil cases only. Each of the terms designated for the trial of criminal cases shall also be a return term for such civil process as may be returnable at term, and for the hearing of motions in civil cases; and civil cases requiring a jury may, by consent of parties thereto, be tried at such terms.

1913, c. 196; Ex. Sess. 1913, c. 30; 1915, c. 64.

Richmond—Eighth Monday before the first Monday in March; fifth Monday after the first Monday in March; sixth Monday before the first Monday in September; ninth Monday after the first Monday in September, all for criminal cases. Second Monday after the first Monday in March; twelfth Monday after the first Monday in March; fifteenth Monday after the first Monday in March; seventh Monday before the first Monday in September; first Monday in September; third Monday after the first Monday in September; thirteenth Monday after the first Monday in September, all for civil cases.

Each of the terms designated for the trial of criminal cases shall also be the return term for such civil process as may be returnable at term, and for the hearing of motions in civil actions; and civil cases requiring a jury may by consent of the parties thereto be tried at such terms.

1913, c. 196; 1915, c. 72; 1917, c. 117; 1919, c. 98.

Stanly—Fourth Monday before the first Monday in March, for civil cases only; fourth Monday after the first Monday in March; tenth Monday after the first Monday in March, for civil cases only; eighth Monday before the first Monday in September; fifth Monday after the first Monday in September, for civil cases only; eleventh Monday after the first Monday in September.

1913, c. 196.

Fourteenth district. The fourteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Gaston—Seventh Monday before the first Monday in March; sixth Monday after the first Monday in March; thirteenth Monday after the first Monday in March; second Monday before the first Monday in September; seventh Monday before the first Monday in September, each for criminal cases only. Sixth Monday before the first Monday in March; second Monday after the first Monday in September; thirteenth Monday after the first Monday in September; each to continue for two weeks, for civil cases only. Third Monday before the first Monday in September, for civil cases only. The board of commissioners of Gaston county may in their discretion, by an order at their regular meeting held on the first Monday in July in any year, dispense with the term of court for the third Monday before the first Monday in September.

1913, c. 196; Ex. Sess. 1913, c. 12; 1915, c. 153; 1919, c. 187.

For grand juries at fall and spring terms, see Grand Jury, s. 2334.

For judgments in civil actions at criminal terms, see s. 1444.

Mecklenburg—Eighth Monday before the first Monday in March; first Monday before the first Monday in March; tenth Monday after the first Monday in March; fourteenth Monday after the first Monday in March; eighth Monday before the first Monday in September; first Monday before the first Monday in September; fourth Monday after the first Monday in September; and tenth Monday after the first Monday in September, which eight terms are for criminal cases only. Fourth Monday before the first Monday in March, to continue three weeks; the first Monday in March; fourth Monday after the first Monday in March; eighth Monday after the first Monday in March; eleventh Monday after the first Monday in March; fifteenth Monday after the first Monday in March; the first Monday in September; fifth Monday after the first Monday in September; eighth Monday after the first Monday in September; eleventh Monday after the first Monday in September, each of the last named nine terms to continue for two weeks, and all of the last named ten terms are for civil cases only. The board of county commissioners of Mecklenburg county may in their discretion, by an order at their regular meeting held on the first Monday in March in any year, provide the holding of a term of court for the seventh Monday after the first Monday in March, and for the trial of criminal and civil cases, either or both, at said term.

No process nor other writ of any kind pertaining to civil actions shall be made to any of the criminal terms, and no business pertaining to civil actions shall be transacted at the criminal terms for Mecklenburg county.

1913, c. 196; Ex. Sess. 1913, cc. 11, 18; 1915, c. 153; 1919, c. 187.

For grand juries at fall and spring terms, see Grand Jury, s. 2334.

Fifteenth district. The fifteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Davie—First Monday before the first Monday in March, to continue for two weeks; first Monday before the first Monday in September; tenth Monday after the first Monday in September.

1913, c. 196.

Iredell—Fifth Monday before the first Monday in March; eleventh Monday after the first Monday in March; fifth Monday before the first Monday in September; sixth Monday after the first Monday in September, each to continue for two weeks.

1913, c. 196.

Randolph—Second Monday after the first Monday in March, to continue for two weeks, for civil cases only; fourth Monday after the first Monday in March, for criminal cases; seventh Monday before the first Monday in September, to continue for two weeks, for civil cases only; first Monday in September, for criminal cases; thirteenth Monday after the first Monday in September, to continue for two weeks. Each of the terms designated for the trial of criminal cases shall also be a return term for such civil process as may be returnable at term, and for the hearing of motions in civil cases; and civil cases requiring a jury may, by consent of parties thereto, be tried at said terms.

1913, c. 196; Ex. Sess. 1913, c. 31.

Rowan—Third Monday before the first Monday in March, to continue for two weeks; first Monday after the first Monday in March, for civil cases only; ninth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in September, to continue for two weeks; fifth Monday after the first Monday in September, for civil cases only; eleventh Monday after the first Monday in September, to continue for two weeks.

1913, c. 196; Ex. Sess. 1913, c. 5.

Cabarrus—Eighth Monday before the first Monday in March; seventh Monday after the first Monday in March; third Monday before the first Monday in September; eighth Monday after the first Monday in September, each to continue for two weeks.

1913, c. 196.

Montgomery—Sixth Monday before the first Monday in March, for criminal cases: Provided, said term shall be a return term for such civil process as may be returnable at term, and for hearing motions on the civil docket, and civil cases requiring a jury may also be tried at said term by consent of the parties thereto. Fifth Monday after the first Monday in March, to continue for two weeks, for civil cases only. Eighth Monday before the first Monday in September; third Monday after the first Monday in September, for civil cases; fourth Monday after the first Monday in September.

1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 183; 1917, c. 122.

Sixteenth district. The sixteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Polk—Sixth Monday after the first Monday in March, and second Monday after the first Monday in September, each to continue for two weeks.

1913, c. 196.

Cleveland—Third Monday after the first Monday in March; sixth Monday before the first Monday in September; eighth Monday after the first Monday in September; each to continue for two weeks.

1913, c. 196; 1915, c. 173; 1917, c. 245.

Lincoln—Fifth Monday before the first Monday in March; seventh Monday before the first Monday in September; sixth Monday after the first Monday in September; the last term to continue for two weeks, the second week for civil cases only.

1913, c. 196; P. L. 1915, c. 210.

Burke—First Monday after the first Monday in March, and fourth Monday before the first Monday in September, each to continue for two weeks; fourth Monday after the first Monday in September, and thirteenth Monday after the first Monday in September, each to continue for two weeks, the last two terms for civil cases only.

1913, c. 196; 1915, c. 67.

Caldwell—First Monday before the first Monday in March; second Monday before the first Monday in September, each to continue two weeks; eleventh Monday after the first Monday in March, to continue two weeks, for civil cases only; tenth Monday after the first Monday in September, to continue three weeks.

1913, c. 196; 1915, c. 35.

Seventeenth district. The seventeenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Mitchell—Fifth Monday after the first Monday in March, to continue for two weeks; sixth Monday before the first Monday in September, to continue for two weeks, for civil cases only; tenth Monday after the first Monday in September, to continue for two weeks.

1913, c. 196.

Watauga—Third Monday after the first Monday in March; first Monday in September, each to continue for two weeks.

1913, c. 196.

Wilkes—First Monday after the first Monday in March, and fourth Monday before the first Monday in September, each to continue for two weeks; first Monday after the fourth Monday in May, and fourth Monday after the first Monday in September, each to continue for two weeks, the last two terms for civil cases only.

1913, c. 196; 1919, c. 165.

Alexander—Second Monday before the first Monday in March; second Monday after the first Monday in September, to continue for two weeks.

1913, c. 196.

Yadkin—First Monday in March; second Monday before the first Monday in September, and twelfth Monday after the first Monday in September.

1913, c. 196.

Catawba—Fourth Monday before the first Monday in March; ninth Monday after the first Monday in March, for civil cases only; eighth Monday before the first Monday in September; eighth Monday after the first Monday in September, each to continue for two weeks.

1913, c. 196; Ex. Sess. 1913, c. 7.

Avery—Seventh Monday after the first Monday in March, to continue for two weeks; ninth Monday before the first Monday in September, for civil cases only; sixth Monday after the first Monday in September, to continue for two weeks.

1913, c. 196; 1915, c. 169.

Eighteenth district. The eighteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Transylvania—Sixth Monday after the first Monday in March; sixth Monday before the first Monday in September; twelfth Monday after the first Monday in September; each to continue for two weeks.

The board of commissioners of Transylvania county may, for good cause, decline to draw the grand jury for the July term of court provided for in this chapter.

1913, c. 196; 1915, c. 66.

Henderson—First Monday in March, to continue for three weeks; fourth Monday after the first Monday in September, to continue for two weeks; twelfth Monday after the first Monday in March, to continue for two weeks, for civil cases only; tenth Monday after the first Monday in September, to continue for two weeks, for civil cases only.

1913, c. 196; 1917, c. 115; 1919, c. 162.

Rutherford—Eighth Monday after the first Monday in March, and sixth Monday after the first Monday in September, each to continue for two weeks. Fourth Monday before the first Monday in March, and second Monday before the first Monday in September, each to continue for two weeks, for civil cases only.

1913, c. 196; 1915, c. 116.

McDowell—Second Monday before the first Monday in March; eighth Monday before the first Monday in September; second Monday after the first Monday in September, each to continue for two weeks; sixth Monday before the first Monday in March, to continue for two weeks, for civil cases only.

1913, c. 196.

Yancey—Third Monday after the first Monday in March, the eighth Monday after the first Monday in September, each to continue for two weeks; the second Monday in August, for civil cases only.

1913, c. 196; Ex. Sess. 1913, c. 38; 1915, c. 71.

Nineteenth district. The nineteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Buncombe—The second Monday in January, the first Monday in March, the first Monday in May, the second Monday in July, the first Monday in September, and the first Monday in November, each to continue for three weeks, for both criminal and civil cases; the first Monday in February, the first Monday in April, the first Monday in June; the first Monday in August, the first Monday in October, and the first Monday in December, each to continue for three weeks, for civil cases only.

1913, c. 196; 1915, c. 117; 1917, c. 79.

Madison—The fourth Monday in February, the fourth Monday in March, the fourth Monday in April, the fourth Monday in May, the fourth Monday in August, the fourth Monday in September, the fourth Monday in October, the fourth Monday in November.

1913, c. 196; 1915, c. 117; 1917, c. 79.

Twentieth district. The twentieth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Cherokee—Sixth Monday before the first Monday in March; fourth Monday after the first Monday in March; fourth Monday before the first Monday in September; ninth Monday after the first Monday in September, each to continue two weeks.

1913, c. 196; Ex. Sess. 1913, c. 21; 1917, c. 114.

Graham—Second Monday after the first Monday in March; thirteenth Monday after the first Monday in March, to be held for civil cases only; first Monday in September, each to continue for two weeks.

1913, c. 196; Ex. Sess. 1913, c. 28; 1917, c. 54.

Swain—First Monday in March; sixth Monday before the first Monday in September; seventh Monday after the first Monday in September, each to continue for two weeks: Provided, that the board of commissioners of Swain county may, when the public interest requires it, decline to draw a grand jury for the July term.

1913, c. 196.

Haywood—Eighth Monday before the first Monday in March, to continue for two weeks, for civil cases only; fourth Monday before the first Monday in March, to continue for two weeks; ninth Monday after the first Monday in March, to continue for two weeks, for civil cases only; eighth Monday before the first Monday in September, and second Monday after the first Monday in September, each to continue for two weeks.

1913, c. 196; 1917, cc. 7, 114.

Jackson—Second Monday before the first Monday in March; eleventh Monday after the first Monday in March, for civil cases only; fifth Monday after the first Monday in September, each to continue for two weeks.

1913, c. 196.

Macon—Seventh Monday after the first Monday in March; second Monday before the first Monday in September, and eleventh Monday after the first Monday in September, each to continue for two weeks. The board of commissioners of Macon county may, for good cause, decline to draw a jury for more than one week for any term of court provided for in this chapter.

1913, c. 196.

Clay—Sixth Monday after the first Monday in March, and fourth Monday after the first Monday in September.

1913, c. 196.

1444. Civil cases at criminal terms. At criminal terms of court, all civil process may be returned and pleadings filed which may be returned and filed at civil terms; motions in civil actions may be heard upon due notice, and trials in civil actions may be heard by consent of parties.

Rev., s. 1507; 1901, c. 28; 1913, c. 196, s. 2; Ex. Sess. 1913, c. 23; 1915, cc. 68, 240; 1917, c. 13.

The word "return" defined: *Watson v. Mitchell*, 108-364.

At the criminal terms of court in the counties of Anson, Bladen and Robeson, all civil process may be returned and pleadings filed which may be returned and filed at civil terms; civil actions which do not require a jury, motions and divorce cases, including jury trials in divorce cases, may be heard, and other civil actions may be heard by consent of parties.

1913, c. 28; 1915, c. 110; 1917, c. 15.

At the criminal terms of court in the counties of Anson, Bladen, Cumberland, Durham, Gaston, and Robeson, judgments by default final and by default and inquiry may be rendered in civil actions without further notice than that contained in the summons.

1913, c. 28; Ex. Sess. 1913, c. 23; 1915, cc. 68, 110, 114; 1917, c. 15; 1919, c. 187.

See, also, under terms of court in sixth district, s. 1443.

1445. No criminal business at civil terms. No grand juries shall be drawn for the terms of court designated by law as being for the trial of civil cases exclusively, and the solicitors shall not be required to attend nor be entitled to their certificates for attendance upon any exclusively civil terms, unless there are cases on the civil docket in which they officially appear, and no criminal process shall be returnable to any term designated for the trial of civil actions alone.

Rev., s. 1508; 1901, c. 28, ss. 3, 7; 1913, c. 196.

1446. Rotation of judges. The judges of the superior court shall hold the courts of the several judicial districts successively, according to the following order and system: The judges resident in the Eastern Judicial Division shall hold the courts for the fall term, one thousand nine hundred and fifteen, as follows: The judge of the first district shall hold the courts of the fifth district; the judge of the second, the courts of the sixth; the judge of the third, the courts of the seventh; the judge of the fourth, the courts of the eighth; the judge of the fifth, the courts of the ninth; the judge of the sixth, the courts of the tenth; the judge of the seventh, the courts of the first; the judge of the eighth, the courts of the second; the judge of the ninth, the courts of the third; the judge of the tenth, the courts of the fourth; and the judges of the Eastern Judicial Division shall thereafter successively hold the courts of this division, but may make exchange of the courts as now provided by law.

The judges resident in the Western Judicial Division shall hold the courts for the fall term, one thousand nine hundred and fifteen, as follows: The judge of the seventeenth district shall hold the courts of the eleventh; the judge of the eighteenth, the courts of the twelfth; the judge of the nineteenth, the courts of the thirteenth; the judge of the twentieth, the courts of the fourteenth; the judge of the eleventh, the courts of the fifteenth; the judge of the twelfth, the courts of the sixteenth; the judge of the thirteenth, the courts of the seventeenth;

the judge of the fourteenth, the courts of the eighteenth; the judge of the fifteenth, the courts of the nineteenth; the judge of the sixteenth, the courts of the twentieth; and the judges resident in the Western Judicial Division shall thereafter successively hold the courts of this division, subject to such exchanges of courts as are now provided by law.

The judge riding any spring circuit shall hold all the courts which fall between January and June, both inclusive, and the judge riding any fall circuit shall hold all the courts which fall between July and December, both inclusive.

Rev., s. 1509; Code, s. 911; 1913. c. 196, ss. 4, 5, 6, 9; 1915, c. 15, ss. 3, 4; 1901, c. 28, ss. 4, 9; R. C., c. 31, s. 20; 1876-7, c. 27; 1879, c. 11; 1885, c. 180; Const., Art. 4, s. 11.

Judge assigned to district is judge thereof for six months, beginning either January or July 1st: *Hamilton v. Icard*, 112-589—and where restraining order made returnable before such judge at place outside of district, and after courts were over, but before end of term of assignment to district, such judge has jurisdiction to hear application and grant injunction to hearing, *Ibid.*

Before act of 1879, assigning judges to the different districts, an exchange of circuits, with consent of governor, under act of 1877 was not in violation of section 2, article 4, of the amended constitution: *State v. McGimsey*, 80-377.

1447. Exchange of courts. By consent of the governor the judges may exchange the courts of a particular county or counties; and the judges resident in the western division and the judges resident in the eastern division may exchange courts or circuits with the consent of the governor; but no judge shall hold all the courts in one district oftener than once every four years. When a judge shall die or resign, his successor shall hold the courts of the district allotted to his predecessor.

Rev., s. 1511; Code, s. 913; R. C., c. 31, s. 20; 1879, c. 11; 1915, c. 15, s. 4; Const., Art. 4, s. 11.

Partial exchange of circuits between two judges of superior court, with approval of governor, is legal: *State v. Graham*, 75-256. Governor can require judge of superior court to hold term of court in county not within his district: *State v. Watson*, 75-136—and where governor “authorizes and empowers” judge to hold such court, also stating that same done with his consent, and judge so holds court, the consent and authority of governor is equivalent to a command, *Ibid.*

The inhibition that “no judge shall be assigned to hold the courts of any district oftener than once in four years” does not apply to the holding by any judge of one or more regular terms by exchange with another judge with the sanction of the governor, nor to the holding of special terms under this section: *State v. Turner*, 119-841; *State v. Lewis*, 107-976—does not apply to the several terms of the court in any one county embraced in a “circuit” or “riding,” but only to the series of courts held in the various counties constituting such “circuit” or “riding” as a whole, *State v. Speaks*, 95-689; *State v. Monroe*, 80-373—nor does it apply where a new apportionment of districts has been made and judge has been assigned to new district containing counties of district he has just been serving, *State v. Bowman*, 80-438; *State v. McGimsey*, 80-383—nor does it prohibit legislature from creating extra term of superior court of county and designating resident judge to hold same, *State v. Monroe*, 80-373.

Upon the death of one of the judges of the superior court, governor may appoint and require one of the other judges to hold one or more specified terms of court in district assigned to deceased judge: *State v. Lewis*, 107-967—or may designate a judge to hold a regular term of court when the judge assigned to the district is delayed by another court: *State v. Wood*, 175-809.

When governor issues commission to judge of superior court authorizing him to hold certain terms of court, and the judge undertakes to discharge such duties, he is a *de facto* judge as far as the public and third persons are concerned, although the commission issued without

authority of law: *State v. Lewis*, 107-967; *State v. Turner*, 119-841; *State v. Speaks*, 95-689—but, after he makes known that he is not a *de jure* judge, he cannot, as a *de facto* judge, arrest judgment where verdict already rendered and entered, *Ibid*.

See annotations under section 1450.

1448. Court adjourned by sheriff when judge not present. If the judge of a superior court shall not be present to hold any term of a court at the time fixed therefor, he may order the sheriff to adjourn the court to any day certain during the term, and on failure to hear from the judge it shall be the duty of the sheriff to adjourn the court from day to day until the fourth day of the term inclusive, unless he shall be sooner informed that the judge from any cause cannot hold the term. If by sunset on the fourth day the judge shall not appear to hold the term, or if the sheriff shall be sooner advised that the judge cannot hold the term, it shall then be the duty of the sheriff to adjourn the court until the next term.

Rev., s. 1510; Code, s. 926; 1901, c. 269; 1887, c. 13.

For term expiring pending trial, see Criminal Procedure, Art. 15, s. 4637.

If judge not present to hold court at time fixed by law, duty of sheriff to adjourn from day to day until sunset on fourth day: *State v. McGimsey*, 80-377.

Section by operation of law carries all matters over to next term in same plight and condition: *State v. Horton*, 123-695.

Where record recited that regular term of superior court was opened and held Wednesday instead of Monday of week fixed by statute, presumption is that sheriff duly opened court and adjourned same from day to day as provided by section: *State v. Weaver*, 104-758.

Where sheriff does not adjourn court on fourth day thereof hereunder, the acts of the term are not avoided by such failure so to do when judge afterwards appeared and held court: *Norwood v. Thorp*, 64-682; *McNeill v. McDuffie*, 119-336; *State v. Wood*, 175-809. Where a newly elected judge has not qualified on the first day of the term, the court may be adjourned from day to day until he qualifies: *State v. Harden*, 177-580; *State v. Davis*, 177-573; *State v. Simmerson*, 177-545.

ART. 7. SPECIAL TERMS OF COURT

1449. Governor may designate judge. The governor has the power to appoint any judge to hold special terms of the superior court in any county.

Rev., s. 1511; Code, s. 913; 1879, c. 11; Const., Art. 4, s. 11.

See annotations under sections 1447, 1450.

1450. Governor may order special terms. Whenever it shall appear to the governor by the certificate of any judge, a majority of the board of county commissioners, or otherwise, that there is such an accumulation of criminal or civil actions in the superior court of any county as to require the holding of a special term for its dispatch, he shall issue an order to the judge of the judicial district in which such county is, or to any other judge of the superior court, requiring him to hold a special term of the superior court for such county, to begin on a certain Monday, not to interfere with any of the regular terms of the courts of his district, and hold for such time as he may designate, unless the business be earlier disposed of.

Rev., s. 1512; Code, s. 914; R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44.

Power of governor to order a special term is not restricted to instances where there is an accumulation of business: *State v. Register*, 133-749—nor, when such fact is recited in commission as reason for special term, is the power of the court restricted to trial of indictments

found before that term, *Ibid.* Governor is sole judge of sufficiency of evidence to satisfy him that business of court is such as to require the holding of special term: *State v. Lewis*, 107-977—and he need not assign the reason for calling it, *State v. Watson*, 75-139.

Special terms have all the necessary jurisdiction and powers to dispose of such business as may be authorized to be heard under the commission constituting the court: *State v. Ketehey*, 70-623. Judge specially commissioned to hold court in county outside of his district has same jurisdiction of matters transferred to that court by consent from another county as judge of district comprising both counties: *Henry v. Hilliard*, 120-479.

Where governor is empowered to require judge to hold court in district other than the one to which he is assigned, upon certain conditions, and governor issued commission, supreme court will assume that emergency had arisen which would sanction issuing of commission, and same will be recognized as valid if governor could have lawfully issued it: *State v. Lewis*, 107-967.

This section is not unconstitutional: *State v. Ketehey*, 70-621.

In appointing special terms of court, governor is not bound by certificate of judge, so far as to confine such terms to trial of a particular class of cases: *State v. Ketehey*, 70-621. When it appears from record that cause was tried at special term of superior court, it is *prima facie* presumed that order for holding same was duly made and that court duly held: *Sparkman v. Daughtry*, 35-168. The plea of defendant that special term of court unlawfully called and organized because governor was absent from state when he attempted to order the holding of court was properly overruled: *State v. Hall*, 142-710. A plea denying the existence of the court is unheard of: *Ibid.*—and it is not necessary that prisoner be arraigned and plead at preceding regular term to special term at which tried, *State v. Ketehey*, 70-621.

See, also, annotations under section 1447.

1451. Compensation of judge. The judge appointed to hold a special term of court shall attend and hold such court, and shall be paid as compensation therefor at the rate of one hundred dollars per week by the county in which the special term is held. But any judge who is in a district having fewer than twenty regular weeks of court for the six months shall hold without extra compensation, if directed by the governor, enough extra weeks of court to make out twenty weeks for the six months.

Rev., s. 1512; Code, s. 914; 1913, c. 63; 1901, c. 167; R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; 1909, c. 85, s. 1.

1452. Notice of special terms. Whenever the governor shall call a special term of the superior court for any county, he shall notify the chairman of the board of commissioners of the county of such call, and such chairman shall take immediate steps to cause competent persons to be drawn and summoned as jurors for said term; and also to advertise the term at the courthouse and at one public place in every township of his county, or by publication of at least two weeks in some newspaper published in his county in lieu of such township advertisement.

Rev., s. 1513; Code, s. 915; 1868-9, c. 273.

The notice provided for herein does not constitute part of the record of the term: *State v. Lewis*, 107-975.

1453. Certificate of attendance. The clerk shall give the judge a certificate of attendance for the number of days occupied by the court, and the judge shall thereupon be entitled to receive from the commissioners of the county in which the court is held the compensation provided by law.

Rev., s. 1514; Code, s. 918; 1901, c. 167; 1868-9, c. 273; 1909, c. 85, s. 1; 1913, c. 63.

1454. Grand juries at special terms. There shall be no grand jury at any special term, unless the same shall be ordered by the governor.

Rev., s. 1515; Code, s. 921; 1868-9, c. 273.

Section referred to in *State v. Lew*, 133-664.

1455. Jurisdiction. The special terms of the superior court held in pursuance of this chapter shall have all the jurisdiction and powers that regular terms of the superior court have.

Rev., s. 1516; Code, s. 916; 1868-9, c. 273.

Special terms have all necessary jurisdiction and powers to dispose of such business as may be authorized to be heard under the commission constituting the court: *State v. Ketehey*, 70-623.

Judge specially commissioned to hold court in county outside his district has same jurisdiction of matters transferred to that court, by consent, from another county, as judge of district comprising both counties: *Henry v. Hilliard*, 120-479.

Superior courts at special term have same power to remove cause to another county that courts have at regular terms: *Sparkman v. Daughtry*, 35-168. Power to render judgment by default: *Reynolds v. Machine Co.*, 153-342.

1456. Attendance and process at special terms. All persons and witnesses summoned at the regular or special term, and officers or others who may be bound to attend the next regular term of the court, shall attend the special term, under the same rules, forfeitures and penalties as if the term were a regular term. But no process shall be made returnable thereto except subpoenas, or other process for the attendance of witnesses.

Rev., s. 1517; Code, s. 919; R. C., c. 31, s. 23; 1844, c. 10; 1848, c. 29.

Defendant bound over to answer criminal charge at regular term of superior court, which term not held in consequence of absence of judge, required by section to attend at intervening special term subsequently appointed and held: *State v. Horton*, 123-695. Word "return" defined: *Watson v. Mitchell*, 108-364. Section referred to in *Reynolds v. Machine Co.*, 153-342.

1457. Subpoenas returnable. Subpoenas may issue returnable on any day of any special term.

Rev., s. 1518; Code, s. 920; 1868-9, c. 273.

ART. 8. SPECIAL REGULATIONS

1458. Reading the minutes. Every morning during the term the judge presiding shall order the reading of the minutes of the court for the day preceding, and the minutes of the last day shall be read immediately preceding the final adjournment of the term.

Rev., s. 1519; Code, s. 925; 1861, c. 3.

1459. Officer attending juries sworn. When any officer (except such as are appointed to attend the grand jury) shall be appointed or summoned to attend any superior court, the clerk, at the time of the first going out of a jury on the trial of any civil or criminal action, shall administer an oath to such officer, faithfully to attend the several juries that may be put under his care during that term, that shall be charged in the trial of any civil or criminal action; and

after such officer shall be once so sworn, he shall be considered to all intents and purposes as acting upon the same oath while attending every jury that he may be called to attend during that term.

Rev., s. 1527; Code, s. 927; R. C., c. 31, s. 36; 1801, c. 592.

1460. Quakers may wear hats in court. The people called Quakers may wear their hats in courts of judicature, as elsewhere, according to the custom of their sect.

Rev., s. 1528; Code, s. 943; R. C., c. 31, s. 131; 1784, c. 209.

1461. Court stenographers. Upon the request of a judge holding a superior court in any county in the state, the board of county commissioners in such county shall employ a competent stenographer to take down the proceedings of the court, at a compensation not to exceed five dollars per day and actual expenses, to be paid by the county in which the court is held.

The judge is authorized to tax a reasonable fee against the losing party in every action, civil and criminal, to be turned into the county treasury towards reimbursing the county, but no fee shall be taxed against a losing party suing in forma pauperis.

Every stenographer so employed shall make three copies of the proceedings in every case appealed to the supreme court, without extra charge, and shall furnish one copy to the attorneys on each side and file one copy with the clerk of the superior court of the county in which any such case is tried, and shall obey all orders of the judge relative to the time in which any such work shall be done.

Every stenographer so employed shall, before entering upon the discharge of his duties, be duly sworn to well, truly, and correctly take down and transcribe the proceedings of the court, except the argument of counsel, and the charge of the court thus taken down and transcribed shall be held to be a compliance with the law requiring the judge to put his instructions to the jury in writing.

This section shall not apply to any county which has a court stenographer authorized by law: Provided, that the board of county commissioners of Mecklenburg county may, by resolution approving this act, bring said county within the provisions of the same: Provided further, that this act shall not apply to the following counties: Alleghany, Brunswick, Caldwell, Camden, Carteret, Caswell, Chatham, Currituck, Dare, Davidson, Davie, Forsyth, Greene, Haywood, Hoke, New Hanover, Orange, Pender, Perquimans, Person, Surry, Transylvania, Union, Watauga.

Ex. Sess. 1913. c. 69.

For stenographer's notes as evidence, see *Cooper v. R. R.*, 170-490; *Settee v. Electric R. R.*, 171-440.

SUBCHAPTER III. JUSTICES OF THE PEACE

ART. 9. ELECTION AND QUALIFICATION

1462. Constitution, article seven, abrogated; exceptions. All the provisions of article seven of the constitution inconsistent with this chapter, except those contained in sections seven, nine and thirteen, are hereby abrogated, and the

provisions of this article substituted in their place; subject, however, to the power of the general assembly to alter, amend or abrogate the provisions of this article, and to substitute others in their stead, as provided in section fourteen of article seven of the constitution.

Rev., s. 1408; Code, s. 818; 1876-7, c. 141, s. 7.

Courts of justices were created by constitution, and legislature cannot abolish them: *Rhyme v. Lipscombe*, 122-650—though may give inferior courts concurrent original jurisdiction with justice's, *Ibid.*

1463. Election and number of justices. At every general election held for members of the general assembly there shall be elected in each township three justices of the peace, and for each township in which any city or incorporated town is situated, one justice of the peace for every one thousand inhabitants in such city or town, who shall hold office for a term of two years from and after the first Monday in December next after their election.

Rev., s. 1409; Code, s. 819; 1876-7, c. 141; 1895, c. 157; 1905, cc. 35, 44, 148; 1907, c. 225; 1909, ss. 177, 716.

Justices elected by townships: *Edenton v. Wool*, 65-379; *Wilmington v. Davis*, 63-582. A ticket containing more names than entitled to be voted for is void: *Mitchell v. Alley*, 126-84. Section merely referred to in *Gilmer v. Holton*, 98-27.

1464. Local modifications as to number and election of justices. In the city of Wilmington in the county of New Hanover there shall be elected five justices of the peace; in the county of Edgecombe there shall be elected one justice of the peace for every one hundred duly qualified electors in each township, and for every fraction of one hundred over fifty; and in the counties of Bertie, Caswell, Chowan, Franklin, and Granville the justices of the peace shall be elected by the general assembly, to hold office for the term of two years as provided in the preceding section.

Rev., s. 1409; Code, s. 819; 1899, c. 392; 1903, cc. 191, 207, 790; 1905, c. 447; 1907, c. 293; P. L. 1913, c. 771; P. L. 1919, c. 106.

1465. Warren county; election of justices. Upon a petition of two-thirds of the qualified electors in any township in Warren county, the board of commissioners of the county shall call an election at the time and in the manner appointed for the election of members of the general assembly, for the election of not more than five nor less than three justices of the peace, as the petition shall designate, to be voted for and elected by the voters of the township in which they reside, and who shall hold their office for two years and until their successors are elected and qualified.

Rev., s. 1410; 1905, c. 73, s. 2.

1466. Vance county; election of justices. Upon petition of a majority of the qualified voters of any township in Vance county, the board of county commissioners shall call an election, at the time and in the manner appointed for the election of members of the general assembly, for the election of not more than five nor less than two justices of the peace, to be voted for and elected by the voters of the township in which they reside. The justices of the peace so elected shall hold office for a term of two years and until their successors are elected and qualify.

P. L. 1915, c. 648.

1467. Oath of office; vacancies filled. Every person elected or appointed a justice of the peace, before his term of office begins or within thirty days thereafter, shall take and subscribe the prescribed oath of office before the clerk of the superior court, who shall file the same. All elections of justices of the peace by the general assembly or by the people shall be void unless the persons so elected shall qualify as herein directed. All original vacancies in the offices of justice of the peace occurring before qualification as provided in this section shall be filled for the term by the governor. All other vacancies shall be filled by the clerk of the superior court.

Rev., s. 1411; Code, s. 821; 1901, c. 37.

Provisions of section authorizing governor to fill vacancies caused by failure of appointee of legislature to qualify within prescribed time held constitutional: *Gilmer v. Holton*, 98-26. Duty of clerk of court to administer oath to justice: *Ibid.*—and duty of justice to take such oath, *Ibid.*—though failure to qualify, where he exercises duties of office, will not relieve him from liability for misbehavior in office, *State v. Cansler*, 75-442. Authority of clerk to appoint justices of the peace to fill vacancies is confined to those vacancies caused by death, resignation or other causes during term: *Gilmer v. Holton*, 98-26.

1468. Governor may appoint justices. The governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as justices of the peace, who shall hold their office for four years from and after the date of their appointment; and, on exhibiting their commission to the clerk of the superior court of the county in which they are to act, shall be duly qualified by taking before said clerk an oath of office and the oaths prescribed for other officers. The governor shall issue to each justice of the peace so appointed a commission, a certificate of which shall be deposited with the clerk of the court and filed among the records, and he shall note on his minutes the qualification of the justice of the peace.

1917, c. 40.

1469. Forfeiture of office. When any justice of the peace removes out of his township and does not return therein for the space of six months, he thereby forfeits and loses his office; and any such justice presuming to act thereafter, contrary to this section, unless reëlected or reappointed, shall be guilty of a misdemeanor.

Rev., ss. 1412, 3589; Code, s. 822.

1470. Resignation. Justices of the peace wishing to resign must deliver their letters of resignation to the clerk of the superior court, who shall file the same.

Rev., s. 1413; Code, s. 823.

1471. Removal and disqualification for crime. Upon the conviction of any justice of the peace of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this state.

Rev., s. 1414; Code, s. 826.

Where justice acting ministerially, if he acts corruptly, oppressively, or from other bad motive, he is liable criminally: *State v. Sneed*, 84-816.

It is a misdemeanor for justice to sell or transfer judgment in his possession by virtue of the office: *State v. Zachary*, 44-432—whether same rendered by himself or by another justice, *Ibid.* Where justice attempts to take cognizance of offense which he knows is already in

superior court, and has party arrested, he is amenable to the law: *State v. Sneed*, 84-816. Sufficiency of indictment charging justice with corruption in office discussed in *State v. Zachary*, 44-432.

Upon trial of an indictment against public officer for neglect or omission of duty, evidence of acts of positive misfeasance is inadmissible: *State v. Hawkins*, 77-494.

1472. Justice may hold other office. Any justice of the peace may accept a civil office or appointment of trust or profit, under the authority of the United States, the duties of which confine him to the county where he is resident.

Rev., s. 1415; Code, s. 825; Const., Art. 14, s. 7.

Section merely referred to in *Barnhill v. Thompson*, 122-496.

Constitution does not prohibit a justice from being also recorder of the city court: *State v. Lord*, 145-479; or holding other office, Const., Art. 14, s. 7.

ART. 10. JURISDICTION

1473. Jurisdiction in actions on contract. Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract, except—

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

2. Wherein the title to real estate is in controversy.

Rev., s. 1419; Const., Art. 4, s. 27; Code, s. 834.

GENERAL OBSERVATIONS. For a general review of the jurisdiction of justices under the constitution, see *Rhyne v. Lipsecombe*, 122-650. Legislature cannot confer on mayor of town judicial powers of justice in civil actions: *Washington v. Hammond*, 76-34; *Edenton v. Wool*, 65-379; *Wilmington v. Davis*, 63-582. Where two causes of action set out, in only one of which justice has jurisdiction, he may try that, treating other as surplusage: *Railroad v. Hardware Co.*, 135-73; *Hargrove v. Harris*, 116-418; *Starke v. Cotten*, 115-81; *Mfg. Co. v. Barrett*, 95-36; *Deloatch v. Coman*, 90-186; *Ashe v. Gray*, 90-137. A judgment is a contract under this section: *Moore v. Nowell*, 94-265; see *McDonald v. Dickson*, 87-404.

The summons as a substitute for a complaint must show upon its face that cause of action is within justice's legal cognizance: *Leathers v. Morris*, 101-184; *Allen v. Jackson*, 86-322; *Teal v. Templeton*, 149-32; *Riddle v. Milling Co.*, 150-689; *Love v. Huffines*, 151-378.

The court will ex mero motu take notice of the want of jurisdiction: *Hannah v. R. R.*, 87-351. Where a justice takes cognizance of an action of which he has no jurisdiction and it goes by appeal to superior court, that court acquires no jurisdiction: *McLaurin v. McIntyre*, 167-350; *State v. Wiseman*, 131-797; *Ijames v. McClamroch*, 92-362; *Raisin v. Thomas*, 88-150; *Boing v. R. R.*, 87-364; *Boyett v. Vaughan*, 85-365. The legal existence of a court cannot be drawn in question by a plea to the jurisdiction, for such a plea presupposes that court was regularly called and organized: *State v. Hall*, 142-710.

DETERMINING JURISDICTION IN ACTIONS ON CONTRACT. In action on contract jurisdiction of justice determined by sum demanded: *Shoe Store Co. v. Wiseman*, 174-716; *Wooten v. Drug Co.*, 169-64; *Teal v. Templeton*, 149-32; *Knight v. Taylor*, 131-84; *Shankle v. Ingram*, 133-259; *Boyd v. R. R.*, 132-184; *Sloan v. R. R.*, 126-487, and cases cited on page 490; *Cromer v. Marsha*, 122-563; *Martin v. Goode*, 111-288; *Brantley v. Finch*, 97-91; *Morris v. O'Briant*, 94-72; *Moore v. Nowell*, 94-265; *Wiseman v. Witherow*, 90-140; see, also, *Thompson v. Express Co.*, 144-389; *Watson v. Farmer*, 141-452—which demand must be made in good faith and not for purpose of conferring jurisdiction, *Wiseman v. Witherow*, 90-140. Words "sum demanded" defined in *Brantley v. Finch*, 97-91; *Hedgecock v. Davis*, 64-651; *Coggins v. Harrell*, 86-317; *Morris v. Saunders*, 85-140; *Brickell v. Bell*, 84-85; *Derr v. Stubbs*, 83-539; *Dalton v. Webster*, 82-283; *Bryan v. Rousseau*, 71-194; *Froelich v. Express Co.*, 67-3; *Fell v. Porter*, 69-142. Without averment in summons of amount demanded, court acquires no jurisdiction and judgment is void: *Leathers v. Morris*, 101-184—but where it appears that court would have jurisdiction, though proper allegations omitted in summons by mistake or inadvertence, court may permit necessary amendment pending action, *Ibid.*; *McPhail v. Johnson*, 115-298; *Cox v. Grisham*, 113-279; *Singer Mfg. Co. v. Barrett*, 95-40; *Allen v. Jackson*, 86-323.

Where the sum demanded in good faith does not exceed \$200, a justice of the peace has exclusive original jurisdiction: *Wooten v. Drug Co.*, 169-64; *Davis v. Evans*, 142-464; *McPeters v. English*, 141-492; *Parker v. Express Co.*, 132-128; *Railroad v. Hardware Co.*, 135-73; *Exchange Bank v. Land and Lumber Co.*, 128-193; *Calloway v. Angel*, 127-414; *Kiser v. Blanton*, 123-400; *Cromer v. Marsha*, 122-563; *Proctor v. Finley*, 119-536; *Slocumb v. Shingle Co.*, 110-24; *Hartness v. Wallace*, 106-427; *Brantley v. Finch*, 97-91; *Norville v. Dew*, 94-43; *Burbank v. Comrs.*, 92-257; *DeLoatch v. Coman*, 90-186; *Wiseman v. Witherow*, 90-140; *Hannah v. R. R.*, 87-351; *Lowery v. Perry*, 85-131; *Katzenstein v. R. R.*, 84-688; *Latham v. Rollins*, 72-454; *Templeton v. Summers*, 71-269; *Froelich v. Express Co.*, 67-1; *Edenton v. Wool*, 65-380; *Hedgecock v. Davis*, 64-650; *Wilmington v. Davis*, 63-582—and where sum demanded in good faith exceeds \$200 the superior court has jurisdiction, *Carter v. R. R.*, 126-437; *Hornor School v. Wescott*, 124-519; *Burrell v. Hughes*, 116-430; *Martin v. Goode*, 111-288; *McPhail v. Johnson*, 109-571; *Maggett v. Roberts*, 108-174; *Kearns v. Heitman*, 104-332; *Moore v. Nowell*, 94-265; *Usry v. Suit*, 91-406; *Coggins v. Harrell*, 86-317; *Morris v. Saunders*, 85-138; *Brickell v. Bell*, 84-82; *Dalton v. Webster*, 82-279; *Bryan v. Rousseau*, 71-194; *Fell v. Porter*, 69-140. Though there may be several causes of action, each of which is for less than \$200, if aggregate demand is for more than \$200, superior court has jurisdiction, whenever causes of action are such as can be joined in one action: *Boyd v. R. R.*, 132-184; *Sloan v. R. R.*, 126-487; *Carter v. R. R.*, 126-437; *Burrell v. Hughes*, 116-430; *Martin v. Goode*, 111-289; *Maggett v. Roberts*, 108-174; *Moore v. Nowell*, 94-265—but should demand be reduced under \$200 by failure of proof or by sustaining a demurrer to any part thereof or to some of the causes of action, jurisdiction would not thereby be ousted, *Brown v. Southerland*, 142-227; *Boyd v. R. R.*, 132-184; *Shankle v. Ingram*, 133-259; *Martin v. Goode*, 111-289; *Usry v. Suit*, 91-406; *Brickell v. Bell*, 84-82—except where sum demanded is so palpably in bad faith as to amount to a fraud on jurisdiction: *Martin v. Goode*, 111-289; *Wiseman v. Witherow*, 90-140—or where there is misjoinder of parties, *Martin v. Goode*, 111-289; *Mitchell v. Mitchell*, 96-14. See cases cited under section 1436, jurisdiction in civil actions *ex contractu*.

Payment cannot be applied to the principal of a note to reduce it below \$200, leaving interest unpaid, and thus bring it within justice's jurisdiction: *Riddle v. Milling Co.*, 150-689.

Where action before justice for breach of contract by express company to deliver package was appealed and in superior court jury found that defendant "negligently failed to deliver the package," it was action on contract and justice had jurisdiction, amount sued for not exceeding \$200: *Parker v. Express Co.*, 132-128, citing *Froelich v. Express Co.*, 67-1.

Justice has jurisdiction of action on note for purchase money of land where amount demanded does not exceed \$200: *Davis v. Evans*, 142-464; *McPeters v. English*, 141-492; *Proctor v. Finley*, 119-536—also in action on note given for a contract to convey land, the only defense being that payments had been made on note, *Patterson v. Freeman*, 132-357.

In action on bond justice has jurisdiction where penalty of bond does not exceed \$200, same being an action *ex contractu*: *Railroad v. Hardware Co.*, 135-73; *Darden v. Blount*, 126-251; *Joyner v. Roberts*, 112-114; *Coggins v. Harrell*, 86-317; *Bryan v. Rousseau*, 71-194; *Fell v. Porter*, 69-140—likewise has jurisdiction for the recovery of a penalty given by statute not over \$200, *Henderson v. Davis*, 106-88; *Doughty v. R. R.*, 78-22; *Maggett v. Roberts*, 108-174; *Carter v. R. R.*, 126-437; *Katzenstein v. R. R.*, 84-688—and in action on penal bond he cannot make remittance to bring it down to justice's jurisdiction, *Coggins v. Harrell*, 86-317; *Morris v. Saunders*, 85-140.

A counterclaim, in order to entitle one to affirmative relief in a justice's court in action on contract, must be one on which judgment might be had in the action, and therefore must come within justice's jurisdiction: *Electric Co. v. Williams*, 123-51; *Boyett v. Vaughan*, 85-363; *Derr v. Stubbs*, 83-539; see, also, section 521—and, where several counterclaims pleaded, the aggregate sum will be taken as jurisdictional amount, *Electric Co. v. Williams*, 123-51. But a demand over \$200 may be used as a set-off: *Cheese Co. v. Pipkin*, 155-394; *Fertilizer Works v. Aiken*, 175-398.

Where the pleadings before a justice do not show want of jurisdiction, and no objection was made thereto, such objection cannot be made on appeal to superior court: *Cromer v. Marsha*, 122-563.

For remitting amount over jurisdiction, see section 1475.

SPLITTING UP CAUSES TO COME WITHIN JURISDICTION. An indivisible cause of action cannot be split in order that separate suits may be brought for the various parts

before a justice: *Norvell v. Mecke*, 127-401; *Fort v. Penny*, 122-230; *Cotton Mills v. Cotton Mills*, 115-475; *Magruder v. Randolph*, 77-79; *Boyle v. Robbins*, 71-130.

Where items of account are incurred under different contracts, an action can be brought on each item before a justice, the separate items being less than \$200: *Copland v. Tel. Co.*, 136-11; *Simpson v. Elwood*, 114-528; *Boyle v. Robbins*, 71-130; *Caldwell v. Beatty*, 69-370. Where, in executing an express contract under which plaintiff was to receive compensation for services, plaintiff advanced money at request of defendant, former may sue separately on contract and for money advanced: *Fort v. Penny*, 122-230. An account for a bill of goods purchased on one day is taken as one entire transaction, unless otherwise appears: *Magruder v. Randolph*, 77-79. The fact that demand arose out of an indivisible contract which was split for jurisdictional purposes must be taken advantage of by plea in abatement before pleading to merits: *Fort v. Penny*, 122-230; *Blackwell v. Dibbrell*, 103-270—and cannot be taken advantage of on appeal, *Cotton Mills v. Cotton Mills*, 115-475; *Blackwell v. Dibbrell*, 103-270—and where, on appeal of several actions brought on split-up accounts, all due under single contract cognizable in superior court, the actions were consolidated, held that superior court did not thereby gain jurisdiction, its appellate jurisdiction being derived solely from the rightful one assumed by court below, *Jarrett v. Self*, 90-478; *Ijames v. McClamroch*, 92-362; *Robeson v. Hodges*, 105-51; *Allen v. Jackson*, 86-321; *Boyett v. Vaughan*, 85-363.

WAVING TORT AND SUING ON CONTRACT. Where complaint can be either construed to be in tort or contract it will be construed to be according to the election of plaintiff so as to uphold jurisdiction: *White v. Eley*, 145-36; *Schulhofer v. R. R.*, 118-1097; *Bowers v. R. R.*, 107-721; *Stokes v. Taylor*, 104-394; *Mitchem v. Pasour*, 173-487, and cases cited; *Stroud v. Ins. Co.*, 148-54; *Fidelity Co. v. Grocery Co.*, 147-510; *Manning v. Fountain*, 147-18.

Where property is tortiously taken and sold, owner may waive tort and maintain an action to recover proceeds of sale if do not exceed \$200: *Brittain v. Payne*, 118-989; *Land Co. v. Brooks*, 109-698; *Wall v. Williams*, 91-477; *McDonald v. Cannon*, 82-245; *Bullinger v. Marshall*, 70-526; *Winslow v. Weith*, 66-432—or where property was delivered to express company and negligently lost, tort may be waived and action brought on contract to carry and deliver, *Froelich v. Express Co.*, 67-1—but where the right to recover involves a question of title, the question of jurisdiction is determined, and plaintiff cannot avoid it by waiving tort and declaring on contract, *Edwards v. Cowper*, 99-421.

EQUITY CLAIMS AND DEFENSES GENERALLY. Justice has no jurisdiction to administer or enforce an equitable cause of action: *Wilson v. Ins. Co.*, 155-173; *Levin v. Gladstein*, 142-482; *Markham v. McCown*, 124-163; *Weathers v. Borders*, 124-612; *Kiser v. Blanton*, 123-400; *Holden v. Warren*, 118-326; *Cotton Mills v. Cotton Mills*, 116-649, and cases cited; *Bell v. Howerton*, 111-69; *Hunter v. Yarborough*, 92-68; *Dougherty v. Sprinkle*, 88-300; *Lutz v. Thompson*, 87-337; *McAdoo v. Callum*, 86-419; *Fisher v. Webb*, 84-50—though defendant may interpose equitable defense before him, *Levin v. Gladstein*, 142-482; *Holden v. Warren*, 118-326; *Bell v. Howerton*, 111-69; *Hurst v. Everett*, 91-405; *Lutz v. Thompson*, 87-334; *McAdoo v. Callum*, 86-419; *Mebane v. Layton*, 86-575; *Fisher v. Webb*, 84-44.

Justice has no jurisdiction of action by assignee to recover partnership assets disposed of by one partner, where amount claimed is less than \$200: *Hartness v. Wallace*, 106-427—or of action upon county treasurer's bond, *Wright v. Kinney*, 123-618—or of application for mandamus against treasurer, *Ibid.*; *Robinson v. Howard*, 84-151—or of action to foreclose mortgage, although debt secured less than \$200, *Murphy v. McNeill*, 82-221—or of counterclaim consisting of alleged indebtedness arising out of unadjusted partnership dealings, *Love v. Rhyne*, 86-576. Equitable powers of justice discussed in *Fisher v. Webb*, 84-44.

Justice has jurisdiction if action is for \$200 and less which equitably belongs to a party: *Markham v. McCown*, 124-163—of action upon a lost note where sum demanded does not exceed \$200, *Fisher v. Webb*, 84-44—of action for balance due on account where through mistake plaintiff had accepted less than was due him, notwithstanding plaintiff prayed for equitable relief, *Holden v. Warren*, 118-326. Where defendant's liability depends upon articles of partnership and no equities to adjust, justice has jurisdiction: *Davis v. Sanderlin*, 119-84.

WHERE MARRIED WOMAN IS A PARTY. It is not true that a justice has no jurisdiction in any case of a married woman. She may be sued before a justice for a debt due by her, or on a contract made by her, before marriage: *McAfee v. Gregg*, 140-449; *Beville v.*

Cox, 109-269; Hodges v. Hill, 105-130; Neville v. Pope, 95-346—or for necessities, Robinson v. Jarrett, 159-165—or to enforce lien for materials used in building house, being for less than \$200, Finger v. Hunter, 130-529; Smaw v. Cohen, 95-85—but justice has no jurisdiction in action to charge her separate personal property, Patterson v. Gooch, 108-503—or in action upon promise to pay for work done on separate real estate, Dougherty v. Sprinkle, 88-300; Berry v. Henderson, 102-525—or to enforce payment out of separate estate for her contracts, Smaw v. Cohen, 95-85; Planing Mills v. McNinch, 99-517—or to enforce her contracts generally unless she be a free-trader, whether she has separate property which she has charged or not, Berry v. Henderson, 102-525; Moore v. Wolfe, 122-711. What must be shown in order to render judgment of a justice against married woman void, discussed in McAfee v. Gregg, 140-448.

Where the business is conducted by her husband as agent, without complying with section 3292, a justice has jurisdiction of contracts not exceeding \$200: Scott v. Ferguson, 152-346.

But since the Martin act, 1911, a married woman is liable on her contracts and may be sued as if she were single, see Lipinsky v. Revell, 167-508; Robinson v. Jarrett, 159-165, and cases cited under section 2507.

WHERE TITLE TO LAND IN CONTROVERSY. Justice has no jurisdiction of action where title to land in controversy: Brown v. Southerland, 142-225; Smith v. Garris, 131-36; Alexander v. Gibbon, 118-805; Wright v. Harris, 116-460; Boone v. Drake, 109-83; Edwards v. Cowper, 99-421; Forsythe v. Bullock, 74-135; see sections 1476 and 1477—and the controversy referred to must be between the parties, Davis v. Davis, 83-71; Evans v. Williams, 79-86—and jurisdiction once acquired cannot be divested by intervener claiming paramount title, Davis v. Davis, 83-71.

Mere allegation of defendant that title is in controversy will not oust justice's jurisdiction: Jerome v. Setzer, 175-391; Pasterfield v. Sawyer, 132-258; McDonald v. Ingram, 124-272; Alexander v. Gibbon, 118-805; Paine v. Cureton, 114-608; Hahn v. Guilford, 87-172—but justice should proceed with trial until evidence shows title is involved, McDonald v. Ingram, 124-272; Smith v. Garris, 131-36; Parker v. Allen, 84-466.

The title to land is not in controversy in an action on the note for the purchase money: Parker v. Horton, 176-143; McPeters v. English, 141-491—nor in a proceeding to recover penalty prescribed by town charter for obstructing street, Town of Henderson v. Davis, 106-88.

In action for forcible entry and detainer justice has no jurisdiction: Perry v. Shepherd, 78-83; State v. Yarborough, 70-250; Railroad v. Sharpe, 70-509.

Justice has no jurisdiction of action of vendor against vendee for possession: Johnson v. Hauser, 82-375—and where vendor brought summary ejectment against vendee, claiming that vendee had abandoned his rights and sustained the relation of tenant, justice had no jurisdiction if evidence of abandonment insufficient, Boone v. Drake, 109-79. In summary ejectment by mortgagor to oust mortgagee, justice has no jurisdiction: Smith v. Garris, 131-36; Greer v. Wilbar, 72-592—and mere allegation that defendant is tenant of plaintiff will not give jurisdiction, Smith v. Garris, 131-36.

In summary ejectment under landlord and tenant act the issue is only as to tenancy, and title to land is not drawn in question: Hahn v. Guilford, 87-172; Davis v. Davis, 83-71; see McDonald v. Ingram, 124-272; McIver v. R. R., 163-544.

1474. Jurisdiction in actions not on contract. Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed fifty dollars.

Rev. s. 1420; Const., Art. 4, s. 27; Code, s. 887.

This section comprehends all actions ex delicto: Duckworth v. Mull, 143-461. The phrase "property in controversy" means the value of the injury complained of and involved in the litigation: Ibid.; Houser v. Bonsal, 149-51; Malloy v. Fayetteville, 122-480; but see Noville v. Dew, 94-43; Pippin v. Ellison, 34-61; Smith v. Campbell, 10-590.

Where action can be sustained either as ex delicto or ex contractu, it will be construed according to election of plaintiff so as to sustain jurisdiction of court: Mitchem v. Pasour, 173-487; Manning v. Fountain, 147-18; White v. Eley, 145-36; Schulhofer v. R. R., 118-1096, and cases cited on page 1097—and where complaint contains causes of action of which court has not, and others of which it has jurisdiction, it will disregard former and try latter, Hargrove v. Harris, 116-418; Starke v. Cotten, 115-81; Railroad v. Hardware Co., 135-73; Mfg. Co. v. Barrett, 95-36; Deloatch v. Coman, 90-186; Ashe v. Gray, 90-137.

As to splitting up damages or value of property to obtain jurisdiction, see *Kiser v. Blanton*, 123-400; *Johnson v. Williams*, 115-33; *Bell v. Howerton*, 111-69; see under section 1473.

Where plaintiff demanded \$75 due as rent and asked for delivery to him of crop upon which it was a lien, held that in absence of allegation that crop was worth "not more than \$50" justice was not deprived of jurisdiction, and correctly gave judgment for the debt and disregarded ancillary remedy: *Hargrove v. Harris*, 116-418.

Where action brought for tort in justice's court goes up to superior court on appeal, the jurisdiction being concurrent, that court will take cognizance, however irregular the proceedings in the justice's court may have been: *Boing v. R. R.*, 87-364.

Where jury renders verdict for over \$50 the excess can be remitted and judgment taken for sum demanded: *Watson v. Farmer*, 141-452; *Noville v. Dew*, 94-43—but in claim and delivery there can be no remitter of excess over \$50, *Ibid.*

DETERMINING THE JURISDICTION. In all actions *ex delicto* where the value of the injury complained of and involved in the litigation does not exceed \$50, a justice of the peace has jurisdiction concurrent with superior court: *Mitchem v. Pasour*, 173-487; *Wilson v. Ins. Co.*, 155-173; *Houser v. Bonsal*, 149-51; *Duckworth v. Mull*, 143-461; *Watson v. Farmer*, 141-452; *Thomas v. Cooksey*, 130-148; *Kiser v. Blanton*, 123-400; *Malloy v. Fayetteville*, 122-480; *Johnson v. Williams*, 115-33; *Crinkley v. Egerton*, 113-142; *Bell v. Howerton*, 111-69; *Harvey v. Hambright*, 98-446; *Montague v. Mial*, 89-137; *Noville v. Dew*, 94-43—but where value exceeds \$50 he has no jurisdiction, *Spencer v. Bell*, 109-39; *Bowers v. R. R.*, 107-722; *Asher v. Reizenstein*, 105-213; *Long v. Fields*, 104-221; *Edwards v. Cowper*, 99-421; *Noville v. Dew*, 94-43; *Barneycastle v. Walker*, 92-198.

The jurisdiction is determined by the damages claimed or the value of the property involved, being the amount demanded in good faith in the warrant or complaint: *Thompson v. Express Co.*, 144-389; *Watson v. Farmer*, 141-452; *Noville v. Dew*, 94-45; see, also, *Knight v. Taylor*, 131-84; *Sloan v. R. R.*, 126-487, and cases cited on page 490; *Cromer v. Marsha*, 122-563; *Martin v. Goode*, 111-288; *Brantley v. Finch*, 97-91; *Morris v. O'Briant*, 94-72; *Moore v. Nowell*, 94-265; *Wiseman v. Witherow*, 90-140—and summons should set out the amount, *Leathers v. Morris*, 101-184; *Noville v. Dew*, 94-43; *Allen v. Jackson*, 86-321—for without such averment in summons the court acquires no jurisdiction and judgment void, *Leathers v. Morris*, 101-184.

Mortgagor, being entitled to the possession of the articles included in mortgage aggregating value over \$50, may take out papers for each article separately, in which case justice would have jurisdiction where article does not exceed \$50 valuation: *Kiser v. Blanton*, 123-400.

The special jurisdiction under landlord and tenant act does not extend to torts, but is confined to actions for enforcing contracts: *Montague v. Mial*, 89-137.

1475. Action dismissed for want of jurisdiction; remitter. Where it appears, in any action brought before a justice, that the principal sum demanded exceeds two hundred dollars, the justice shall dismiss the action and render a judgment against the plaintiff for the costs, unless the plaintiff shall remit the excess of principal, above two hundred dollars, with the interest on said excess, and shall, at the time of filing his complaint, direct the justice to make this entry: "The plaintiff, in this action, forgives and remits to the defendant so much of the principal of this claim as is in excess of two hundred dollars, together with the interest on said excess."

Rev., s. 1421; Code, s. 835; 1868-9, c. 159, s. 3; 1876-7, c. 63.

Where principal sum demanded exceeds \$200 justice has no jurisdiction unless plaintiff remits and same is entered of record: *Dalton v. Webster*, 82-279; *Knight v. Taylor*, 131-84; *Riddle v. Milling Co.*, 150-689. See section 1473.

Objection that plaintiff did not use statutory formula in making the remitter must be made in justice's court, not on appeal: *Cromer v. Marsha*, 122-563.

Where sum demanded is not in excess of \$200 and account sued on is in excess of \$200, no remittance of excess of account required, the amount demanded determining jurisdiction: *Knight v. Taylor*, 131-85; *Cromer v. Marsha*, 122-563; *Brantley v. Finch*, 97-92.

In action on penal bond where penalty over \$200, plaintiff cannot make remitter: *Coggins v. Harrell*, 86-317; *Morris v. Saunders*, 85-140.

Where counterclaim before justice amounted to more than \$200, remitter cannot be entered in superior court so as to cure jurisdiction: *I James v. McClamroch*, 92-362.

Where summons did not state amount demanded, but plaintiff in his complaint claimed only \$200 and forgave and remitted the excess of his account, superior court can allow summons to be amended, not to confer jurisdiction, but only to show it: *McPhail v. Johnson*, 115-298, and cases cited on page 302.

When excess over \$200 has been remitted and nonsuit taken in justice's court, recovery in superior court cannot exceed \$200: *Broek v. Scott*, 159-513.

1476. Title to real estate in controversy as a defense. In every action brought in a court of a justice of the peace, where the title to real estate comes in controversy, the defendant may, either with or without other matter of defense, set forth, in his answer, any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice.

Rev., s. 1422; Code, s. 836.

See annotations under section 1473.

Mere allegation of defendant that title is in controversy will not oust justice's jurisdiction: *Jerome v. Setzer*, 175-391; *Pasterfield v. Sawyer*, 132-258; *McDonald v. Ingram*, 124-272; *Alexander v. Gibbon*, 118-805; *Paine v. Cureton*, 114-608; *Hahn v. Guilford*, 87-172; *Foster v. Penry*, 77-160—but it must also appear by evidence, *Pasterfield v. Sawyer*, 132-260—and justice should proceed with trial until evidence shows that title to land is involved, *McDonald v. Ingram*, 124-272; *Smith v. Garris*, 131-36; *Parker v. Allen*, 84-466.

It matters not that defendant filed no defense in writing to the effect that title to land would be brought in question, statute requires that when at the trial it appears in controversy, action should be dismissed: *Edwards v. Cowper*, 99-423, and cases cited.

The requirement that answer showing that title is in controversy shall be in writing and signed is not satisfied by brief memorandum taken down by justice and transmitted with appeal, and would not, if plaintiff should afterwards sue in superior court, estop defendant from denying jurisdiction: *Evans v. Williamson*, 79-88; see *Brown v. Southerland*, 142-228.

1477. Title to real estate in controversy, action dismissed. If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs.

Rev., s. 1423; Code, s. 837.

As to when title to real estate in controversy, see under section 1473; also, see section 1476.

As to meaning of words "real estate" in this section, see *Foster v. Penry*, 77-161.

The allegation in writing that title to land in controversy need not be made: *Edwards v. Cowper*, 99-423—and if made, justice cannot act on it alone, *Jerome v. Setzer*, 175-391; *Pasterfield v. Sawyer*, 132-258; *McDonald v. Ingram*, 124-272; *Alexander v. Gibbon*, 118-805; *Paine v. Cureton*, 114-608; *Hahn v. Guilford*, 87-172; *Foster v. Penry*, 77-160—but trial must proceed until evidence shows that title involved, *McDonald v. Ingram*, 124-272; *Smith v. Garris*, 131-36; *Parker v. Allen*, 84-466—when it is required of justice that he dismiss the action, *Hudson v. Hodge*, 139-308; *Edwards v. Cowper*, 99-421; *Parker v. Allen*, 84-466.

Proceedings before justice where title in controversy may be treated as a nullity by defendant, but it does not follow that plaintiff, who initiated and took benefit of them, can: *Dulin v. Howard*, 66-433.

1478. Another action in superior court. When an action, before a justice, is dismissed upon answer, and proof by the defendant, that the title to real estate is in controversy in the case, the plaintiff may prosecute an action for the same cause in the superior court, and the defendant shall not be admitted in that court to deny the jurisdiction by an answer contradicting his answer in the justice's court.

Rev., s. 1424; Code, s. 838.

Where action before justice was dismissed upon answer and proof that title to real estate comes in controversy, defendant cannot question jurisdiction of superior court if action for

same cause subsequently brought in that court: *Pasterfield v. Sawyer*, 132-260—and where justice refused to dismiss upon such grounds, and judgment reversed and action dismissed in superior court, and another action brought in superior court for same relief, held plaintiff estopped by former judgment from alleging want of jurisdiction in superior court, *Peck v. Culberson*, 104-425—but where written answer alleging that title will come in controversy was not filed before justice, defendant not estopped in superior court from denying jurisdiction by answer contradicting answer before justice, *Evans v. Williamson*, 79-88.

Section cannot be invoked where it does not appear that action before justice was dismissed upon answer and proof by defendant that title to real estate was in controversy, as this cannot be inferred: *Brown v. Southerland*, 142-225.

1479. Justice may act anywhere in county. A justice of the peace may issue a summons or other process anywhere in his county, but he shall not be compelled to try a cause out of the township for which he was elected or appointed.

Rev., s. 1425; Code, s. 824.

Summons issued by one justice cannot be made returnable before another, except in cases of bastardy: *Williams v. Bowling*, 111-295—or of summary ejection under landlord and tenant act.

1480. Punishment for contempt in certain cases. If any person shall profanely swear or curse in the hearing of a justice of the peace, holding court, the justice may commit him for contempt, or fine him not exceeding five dollars.

Rev., s. 1426; Code, s. 848; R. C., c. 115; 1741, c. 30.

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

Rev., s. 1427; Const., Art. 4, s. 27; Code, s. 892; 1889, c. 504, s. 2.

For criminal procedure in justice's court, see Criminal Procedure.

For criminal jurisdiction of superior court, see section 1436; recorder's court, sections 1541, 1567.

Section held constitutional: *State v. Johnson*, 64-581; *State v. Huntley*, 31-619.

The legal existence of court cannot be drawn in question by a plea to the jurisdiction, for such a plea presupposes that court was regularly called and organized: *State v. Hall*, 142-710.

Justice has jurisdiction of simple assault where no deadly weapon used or serious damage inflicted: *State v. Johnson*, 94-863—where statute prescribes fine not less than \$10 nor more than \$50, and no imprisonment imposed, *State v. Davis*, 129-570—where punishment prescribed is fine of not less than \$20 nor more than \$40, *State v. Addington*, 121-538—where punishment for offense cannot exceed fine of \$50 or imprisonment for thirty days, *State v. Harrison*, 126-1049; *State v. Fesperman*, 108-771; *State v. Deaton*, 101-729; *State v. Dalton*, 101-682; *State v. Lachman*, 98-765; *State v. Roberts*, 98-756; *State v. Powell*, 86-642; *State v. Watts*, 85-519; *State v. Benthall*, 82-665; *State v. Edney*, 80-360; *State v. Heidelberg*, 70-496—of

offense of failing to work roads under section 3811, *State v. Craig*, 82-668—of trespass upon land after being forbidden under section 4305, *State v. Dudley*, 83-660—of cruelty to animals, *State v. Bossee*, 145-579—of crime of hunting on Sunday under section 3956, *State v. Wilson*, 84-777—of misdemeanors arising from violations of town ordinances, *State v. Wood*, 94-855; *State v. Cainan*, 94-880—of affrays, concurrently with superior court, committed within mile of courthouse while court in session, *State v. Battle*, 130-656; *State v. Bowers*, 94-910.

Superior court and not justice has jurisdiction of assaults with deadly weapons: *State v. Roseman*, 108-766; *State v. Phillips*, 104-786; *State v. Murphy*, 101-701; *State v. Cunningham*, 94-824; *State v. Taylor*, 84-774; *State v. Moore*, 82-659—of assaults where serious damage done, *State v. Shelly*, 98-673; *State v. Cunningham*, 94-824; *State v. Huntley*, 91-617; *State v. Taylor*, 84-773; *State v. Moore*, 82-659—of assault with intent to kill or commit rape, *State v. Smith*, 157-578; *State v. Taylor*, 84-773; *State v. Moore*, 82-659—of offense of retailing spirituous liquors without license, *State v. Edwards*, 113-653; *State v. Deaton*, 101-728—of offenses against local option act, *State v. Cooper*, 101-689—of allowing stock to run at large where statute permits fine of \$10 for each hog permitted to run at large and warrant charges running at large of ten hogs, *State v. Wiseman*, 131-795—where offense punishable by fine and imprisonment in discretion of court, *State v. Cherry*, 72-124; *State v. Perry*, 71-523; *State v. Heidelberg*, 70-496—or imprisonment for 30 days, or fine of \$50, or both, *State v. McAden*, 162-575—of misdemeanor punishable by fine of not less than \$10 nor more than \$50, or by imprisonment of not less than ten days, *State v. Hampton*, 77-526.

After expiration of six months (now twelve months) superior court has concurrent jurisdiction with justice of cases of which before justice had exclusive jurisdiction: *State v. Dalton*, 101-682; *State v. Roberts*, 98-756; *State v. Reaves*, 85-553; *State v. Watts*, 85-519; *State v. Berry*, 83-604; *State v. Moore*, 82-659; *State v. Hooper*, 82-663.

Where indictment charges assault with deadly weapon, or other offense of which superior court has jurisdiction, and proof shows simple assault, or other lesser degree of offense, jurisdiction of superior court not ousted: *State v. Smith*, 157-578; *State v. Fritz*, 133-725; *State v. Price*, 111-705; *State v. Roseman*, 108-765; *State v. Fesperman*, 108-770; *State v. Porter*, 101-715; *State v. Earnest*, 98-740; *State v. Johnson*, 94-863; *State v. Cunningham*, 94-824; *State v. Russell*, 91-624; *State v. Speller*, 91-526; *State v. Ray*, 89-587; *State v. Reaves*, 85-553—though charge of simple assault in indictment would give superior court *prima facie* jurisdiction, and burden is on defendant to show twelve months had not elapsed since commission of offense and before superior court took jurisdiction, *State v. Shelly*, 98-673; *State v. Fesperman*, 108-771; *State v. Porter*, 101-714; *State v. Earnest*, 98-743; *State v. Moore*, 82-662; *State v. Smith*, 157-578.

Affray is cognizable in superior court as to both defendants where deadly weapon used by either: *State v. Coppersmith*, 88-614; but see *State v. Lancaster*, 169-284.

Objection to jurisdiction is a matter of defense and may be taken advantage of under plea of not guilty: *State v. Reaves*, 85-553; *State v. Berry*, 83-604; *State v. Taylor*, 83-601; *State v. Moore*, 82-659; *State v. Hooper*, 82-663. If justice had no jurisdiction, the superior court will have none where the trial is on the warrant: *State v. Wiseman*, 131-795.

“DEADLY WEAPON.” A deadly weapon is not one that must or may kill, but one which would likely produce death by manner of its use by defendant: *State v. Sinclair*, 120-603; *State v. Archbell*, 139-537; *State v. Norwood*, 115-789—is an instrument capable of producing death, *State v. Huntley*, 91-617—some weapons being deadly per se, others owing to manner of use become deadly, *State v. Archbell*, 139-537; *State v. Huntley*, 91-617—but a club is *ex vi termini* a deadly weapon, *State v. Phillips*, 104-786; *State v. Porter*, 101-713—as is also an axe, *State v. Shields*, 110-497—and court will take judicial notice that a pistol is also a deadly weapon, *State v. Swann*, 65-330.

Whether weapon used is a deadly weapon is a question of law for the court where there is no dispute about the facts concerning its character, size, etc.: *State v. Sinclair*, 120-603; *State v. Norwood*, 115-789; *State v. Phillips*, 104-786; *State v. Speaks*, 94-865; *State v. Huntley*, 91-617; *State v. West*, 51-505; *State v. Collins*, 30-407; *State v. Craton*, 28-164—and in determining the question, the size, nature and manner of use of weapon, and size and strength of assailant, and person upon whom it is used, should be considered, *State v. Sinclair*, 120-603—as a penknife, as well as a gun, may, under certain circumstances, be a deadly weapon, *Ibid.*—for even a pin is a deadly weapon where it is pushed down the throat of an infant, producing death, *State v. Norwood*, 115-789. Where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner

in which it is used, it is proper and necessary to submit the matter to jury with proper instructions: *State v. Archbell*, 139-537; *State v. Beal*, 170-764.

“SERIOUS DAMAGE DONE.” It is necessary to describe the serious damage done, its character and extent, so that court can see from face of indictment that the damage was serious: *State v. Battle*, 130-657; *State v. Stafford*, 113-635; *State v. Phillips*, 104-786; *State v. Porter*, 101-713; *State v. Shelly*, 98-673; *State v. Earnest*, 98-740; *State v. Russell*, 91-624; *State v. Moore*, 82-659. “Serious damage” must be such physical injury as gives rise to great bodily pain: *State v. Nash*, 109-824—and also damage to the peace, good order, decencies and proprieties of society, *State v. Huntley*, 91-620.

AFFRAY. Affray is the fighting together of two or more persons in a public place to the terror of the citizens: *State v. Allen*, 11-356; *State v. Woody*, 47-335; *State v. Perry*, 50-10—or the using of abusive language in a public place, bringing on a fight, *State v. Perry*, 50-9; *State v. Robbins*, 78-431.

Justice has final original jurisdiction of affrays where no deadly weapon used or serious damage done: *State v. Shields*, 78-417; *State v. Davis*, 65-298—but where affray committed within a mile of courthouse while court in session, the justice has concurrent jurisdiction with superior court, *State v. Battle*, 130-656; *State v. Bowers*, 94-910.

ART. 11. DOCKETS

1482. Justice shall keep docket. A civil and a criminal docket shall be furnished each justice, at the expense of the county, by the board of county commissioners, in which shall be entered a minute of every proceeding had in any action before such justice.

Rev., s. 1416; Code, s. 831.

Justices' courts are not courts of record: *Building Co. v. Hardware Co.*, 173-55; *Williams v. Bowling*, 111-295; *Whitehurst v. Transportation Co.*, 109-342; *Reeves v. Davis*, 80-209—and proceedings before justice in civil action are not strictly a record, *Bailey v. Hester*, 101-538—yet they possess many attributes of a record, *Ibid*.

Although the court of a justice is not a court of record, its proceedings are authoritative and judicial in their nature: *Whitehurst v. Transportation Co.*, 109-344—and it possesses and may exercise many of the powers of such tribunals, *Bailey v. Hester*, 101-538.

1483. Entries to be made. The justice shall enter all his proceedings in a cause tried before him in his docket. No part of such proceedings must be entered on the summons, on the pleadings, or on any other paper in the cause.

Rev., s. 1470, Rule 14; Code, s. 840, Rule 13.

1484. Dockets filed with clerk. Each justice of the peace, as often as he has filled his docket, shall file the same with the clerk of the superior court for his county.

Rev., s. 1417; Code, s. 827.

Section merely referred to in *Williams v. Bowling*, 111-296; *Bailey v. Hester*, 101-540.

1485. Dockets, papers, and books delivered to successor. When a vacancy exists, from any cause, in the office of a justice of the peace, whose docket is not filled, or when such justice goes out of office by expiration of his term, such former justice, if living, and his personal representative, if dead, shall deliver such docket, all law and other books furnished him as a justice of the peace, and all official papers, to the clerk of the superior court for his successor, who is authorized to hear and determine any unfinished action on said docket, in the same manner as if such action had been originally brought before such successor.

Rev., s. 1418; Code, s. 828; 1885, c. 372.

Section merely referred to in *Whitehurst v. Transportation Co.*, 109-344; *Bailey v. Hester*, 101-540.

ART. 12. PROCESS

1486. Action begun by summons. Civil actions in these courts shall be commenced by the issuing of a summons.

Rev., s. 1444; Code, s. 830; 1868-9, c. 159, s. 9.

Civil action shall be commenced by issuing summons, except in cases where defendant is not within reach of process of court and cannot be personally served, when it may be commenced by affidavit, to be followed by publication: *Mills v. Hansel*, 168-651; *Armstrong v. Kinsell*, 164-125; *Grocery Co. v. Bag Co.*, 142-174 (overruling *McClure v. Fellows*, 131-509); *Best v. Mortgage Co.*, 128-351; also, see *Fisher v. Bank*, 132-776; *Ditmore v. Goins*, 128-327; *Lyon v. Comrs.*, 120-242; *Webster v. Sharpe*, 116-466; *Fleming v. Patterson*, 99-404; *Calvert v. Peebles*, 82-338; *Belmont v. Reilly*, 71-260; *Steele v. Comrs.*, 70-140; *Thompson v. Berry*, 64-79; *Patrick v. Joyner*, 63-573.

The office of the summons is to bring party into court: *Barneycastle v. Walker*, 92-198.

As to name of plaintiff in summons, see *Rosenbacher v. Martin*, 170-236; *Heath v. Morgan*, 117-504; *Patterson v. Walton*, 119-500—name of defendant in summons, *Fisher v. Ins. Co.*, 136-217; *Plemmons v. Imp. Co.*, 108-614; *Clawson v. Wolfe*, 77-100.

Summons is issued, when: *Smith v. Lumber Co.*, 142-26; *Houston v. Thornton*, 122-366; *Currie v. Hawkins*, 118-593; *Neal v. Nelson*, 117-401; *Webster v. Sharpe*, 116-466; see, also, section 404. Appearance waives all defects or irregularities as to summons: *Caldwell v. Wilson*, 121-425; *Roberts v. Allman*, 106-391; *Etheridge v. Woodley*, 83-11; *Wheeler v. Cobb*, 75-21; *Middleton v. Duffy*, 73-72; *Duffy v. Averitt*, 27-455; *Hyatt v. Tomlin*, 24-149; also, see sections 401 and 490.

1487. Issuance and contents of summons. The summons shall be issued by the justice and signed by him. It shall run in the name of the state, and be directed to any constable or other lawful officer, commanding him to summon the defendant to appear and answer the complaint of the plaintiff at a place, within the county, to be therein specified, and at a time to be therein named, not exceeding thirty days from the date of the summons. It shall also state the sum demanded by the plaintiff or the value of the property sued for, where specific property is claimed.

Rev., s. 1445; Code, s. 832; 1874-5, c. 234.

Summons issued by one justice cannot be made returnable before another: *Williams v. Bowling*, 111-295; *Cherry v. Lilly*, 113-26—except in cases provided by statute, to wit, bastardy proceedings, *Williams v. Bowling*, 111-297—and in summary proceedings in ejectment, *Ibid.*

Summons issued by justice under section 1489 must be issued or addressed to officer of county where same is to be served: *Fertilizer Co. v. Marshburn*, 122-411—and to authorize town constable to serve process beyond limit of town, same must be directed to him, *Davis v. Sanderlin*, 119-84; *Baker v. Brem*, 126-367; s. c., 127-322. Necessary that summons shall contain statement of sum demanded or value of property sought to be recovered: *Leathers v. Morris*, 101-184; *Noville v. Dew*, 94-43; *Allen v. Jackson*, 86-321; *Brantley v. Finch*, 97-91; *McPhail v. Johnson*, 115-298; *Cromer v. Marsha*, 122-563; *Teal v. Templeton*, 149-32; *Love v. Huffines*, 151-378; *Shoe Store Co. v. Wiseman*, 174-716.

Summons presumed to bear true date of issue, but it is competent to show that it was not in fact then issued: *Currie v. Hawkins*, 118-593; *Houston v. Thornton*, 122-365; *Webster v. Sharpe*, 116-466. Summons improperly issued and served does not bring defendant into court, and judgment rendered against him void: *Fertilizer Co. v. Marshburn*, 122-411.

As to stating names of parties in summons, see *Rosenbacher v. Martin*, 170-236; *Fisher v. Ins. Co.*, 136-217; *Heath v. Morgan*, 117-504; *Patterson v. Walton*, 119-500; *Plemmons v. Imp. Co.*, 108-614; *Kerlee v. Corpening*, 97-330; *Clawson v. Wolfe*, 77-100.

That summons is made returnable more than 30 days from its issue is immaterial when jurisdiction is acquired by attachment and publication: *Mills v. Hansel*, 168-651. A justice when out of his township may issue summons returnable in his township: *Davis v. Sanderlin*, 119-84.

1488. **Service and return of summons.** The officer to whom the summons is delivered shall execute the same within five days after its receipt by him, or immediately, if required to do so by the plaintiff. Before proceeding to execute it, he is entitled to require of the plaintiff his fees for the service. When executed he shall immediately return the summons, with the date and manner of the service, to the justice who issued the same.

Rev., s. 1446; Code, s. 833.

For manner of service, see sections 482, 483, 485-490. **Voluntary appearance, section 490.** Service by telephone is insufficient: *Lowman v. Ballard*, 168-16. The endorsement of service on the summons by the officer is sufficient in the absence of evidence to the contrary: *Marler Co. v. Clothing Co.*, 150-519.

1489. **Process issued to another county.** No process shall be issued by any justice of the peace to any county other than his own, unless one or more bona fide defendants shall reside in, and also one or more bona fide defendants shall reside outside of, his county; in which case, only, he may issue process to any county in which any such nonresident defendant resides.

Rev., s. 1447; Code, s. 871; 1876-7, c. 287.

This being a restricted legislative grant of power, when exercised it must be strictly pursued: *Fertilizer Co. v. Marshburn*, 122-414. Process under this section must be issued or addressed to officers of county where same is to be served: *Ibid.*

This section does not apply to foreign corporations: *Allen-Fleming Co. v. R. R.*, 145-37; see section 1494. Where summons issued against a resident of county and a nonresident of county, and on trial summons amended by striking out name of resident defendant, justice should dismiss action: *Wooten v. Maultsby*, 69-462.

Process can issue to another county only when one or more bona fide defendants reside in plaintiff's county and one or more bona fide defendants reside in the other county: *Austin v. Lewis*, 156-461; *Marler Co. v. Clothing Co.*, 150-519; *Rutherford v. Ray*, 147-253. A judgment rendered upon such improper process is void: *Rutherford v. Ray*, 147-253—and a lien filed on the land of the nonresident defendant within the county of the justice will not render the proceeding valid, *Ibid.*

Section referred to in *Dixon v. Haar*, 158-341; *Fisher v. Bullard*, 109-574.

1490. **Civil process in inferior courts.** The process of any recorder's court, county court, or other court inferior to the superior courts of the state, when such court is exercising the jurisdiction of a justice of the peace in civil matters, shall run only as does the process of the court of a justice of the peace for the county in which such court is located.

1915, c. 19.

See *Oil Co. v. Grocery Co.*, 169-521.

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

Rev., s. 1449; Code, s. 872.

Process should be directed to officer of county where it is to be served: *Fertilizer Co. v. Marshburn*, 122-415. This section and section 1492 only method of procedure; endorsement of warrants, etc., applies only to criminal actions: *Dixon v. Haar*, 158-341.

Section referred to in *Oil Co. v. Grocery Co.*, 169-521; *Austin v. Lewis*, 156-461; *Lilly v. Purcell*, 78-82.

1492. Certificate of clerk on process for another county. In all cases referred to in the preceding section it shall be lawful for the clerk of the superior court of the county in which the action is brought to certify, under the seal of his court, on the process or a duplicate thereof, that the justice of the peace who issued the same is an acting justice of the peace in his county. And in all such cases it shall be the duty of any sheriff or constable to whom it may be directed to make an entry of the date of its reception, and to execute the same as provided for the service of civil process in courts of justices of the peace, and return it by mail to the justice of the peace from whose court it issued.

Rev., s. 1450; Code, s. 873; 1870-1, c. 60, s. 2.

See cases cited under section 1491. Section referred to in *Wooten v. Maultsby*, 69-463.

1493. Judgment against defendant in another county. No justice of the peace shall enter a judgment under the two preceding sections against any defendant who may be a nonresident of his county, unless it shall appear that the process was duly served upon him at least ten days before the return day of the same.

Rev., s. 1451; Code, s. 874; 1876-7, c. 57.

Section applies only to cases where justice's summons issued against defendant residing in another county: *Williams v. B. and L. Assn.*, 131-268. This is not sufficient ground to dismiss the action, but reasonable time should be given to defendant to make defense: *Bank v. Carlile*, 174-624; *Laney v. Hutton*, 149-264.

1494. Service on foreign corporation. Whenever any action of which a justice of the peace has jurisdiction shall be brought against a foreign corporation, which corporation is required to maintain a process agent in the state, the summons may be issued to the sheriff of the county in which such process agent resides, and when certified under the seal of his office by the clerk of the superior court of the county in which the justice issuing such summons resides to be under the hand of such justice, the sheriff of the county to which such summons shall be issued shall serve the same as in other cases and make due return thereof. No justice of the peace shall enter a judgment in such cases against any such foreign corporation unless it shall appear that the process was duly served upon such process agent at least twenty days before the return day of the same. The summons may be made returnable at a time to be therein named, not exceeding forty days from the date of such summons: Provided, this section shall not apply to actions commenced in a county where the defendant has an officer or agent upon whom process may be served.

Rev., s. 1448; 1907, c. 473.

For agent of foreign corporation upon whom process can be served, see sections 483, 1137, 6414.

Under this section a summons issued against a foreign corporation to a county where it has a process agent, properly certified under seal of the clerk, served on such corporation or its agent more than twenty days before return day, is valid: *Allen-Fleming Co. v. R. R.*, 145-39. An action for a penalty can be brought against a foreign defendant before a justice of the peace in any county in which defendant does business or has property, or where plaintiff resides: *Ibid.*

Section merely referred to in *Kelly v. Lefaiver*, 144-7; *Oil Co. v. Grocery Co.*, 169-521.

1495. Attendance of witnesses. The justice, on application of either party, shall, by a subpoena or by an order in writing, on the process, direct the constable or other officer to summon witnesses to appear and give testimony at the time and place appointed for the trial. Each witness failing to appear shall

forfeit and pay eight dollars to the party at whose instance he was summoned, and shall be further liable to such party for all damage sustained by non-attendance. The fine herein imposed may be recovered, on motion, before the justice who tried the action, unless the witness on a notice of five days, by affidavit or other proof, show sufficient excuse for his failure to attend.

Rev., s. 1452; Code, s. 847.

Justice not authorized to put witness under bond to appear at subsequent trial before him: *Lovick v. R. R.*, 129-427—and if he does so he, and those advising him to do so, thereby become trespassers, *Ibid.* Section merely referred to in *State v. Aiken*, 113-652.

1496. Subpœna issued to another county. Justices of the peace, in all civil cases, may issue subpœnas to counties other than their own; such subpœnas shall be authenticated in the same manner as provided by law for the authentication of process. When so authenticated the sheriff, constable or other officer to whom the same is directed shall execute and return the same as provided for the return of process: Provided, that where witnesses attend in counties other than their own under such subpœna they shall receive the same per diem and mileage as witnesses who attend the superior courts: Provided further, that before issuing such subpœnas the party wanting such witness shall deposit with the justice before whom the cause is pending one day's per diem and the mileage of the witness to and returning from place of trial, which amount shall be paid to the witness on his attendance and taxed against the party cast in the trial.

Rev., s. 1453; 1893, c. 436.

1497. Subpœna duces tecum in case against railroad. When any action is brought against a railroad company before a justice of the peace, the justice before whom such action is made returnable shall have power to issue a subpœna to any county within the limits of the state, commanding the president or any officer, director, agent, or any one in the employment of such company, to appear before him at the time and place of trial and to produce such books, cards and other papers as the justice shall deem proper, and to give evidence in said cause; and each witness summoned as aforesaid failing or refusing to appear and testify and produce the books and papers aforesaid in obedience to such writ shall be deemed guilty of a contempt of court and fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., s. 1454; 1885, c. 221, s. 2.

ART. 13. PLEADING AND PRACTICE

1498. Removal of case. In all proceedings and trials, both criminal and civil, before justices of the peace, the justice before whom the writ or summons is returnable shall, upon written request made by either party to the action before evidence is introduced, move the same to some other justice residing in the same township, or to the justice of some neighboring township if there be no other justice in said township; but no cause shall be more than once removed.

Rev., s. 1455; Code, s. 907; 1880, c. 15; 1883, c. 66; 1917, c. 48.

Justice's duty, upon affidavit and motion for removal being filed, to remove case before another justice residing in same township: *State v. Ivie*, 118-1227; *State v. Warren*, 100-489 (act of 1917, c. 48, requires only written request)—though if no other justice in same township, can remove case to justice of neighboring township, *State v. Ivie*, 118-1227—but if case removed to justice of neighboring township when another justice in township where

action originated, justice to whom removed has no jurisdiction and judgment void, *Ibid.* Section not applicable to mayor's court, and defendant therein not entitled to removal: *State v. Joyner*, 127-541.

1499. Removal in case of death or incapacity. If any justice of the peace dies or becomes incapacitated by removal, resignation or other cause, having any action, civil or criminal, pending before him, which has not been finally determined, such action shall not abate or be discontinued, but the plaintiff in such civil action, or any one on behalf of the state in such criminal action, may remove such action for further and final determination before any other justice of the peace of the same township in which the original action was pending, or before any justice of the peace of the same county when there is no other in the township, by filing the papers in said action with the justice to whom the same is removed and by giving ten days notice to the defendant of such removal; and if the plaintiff in any civil action shall fail to give such notice of removal within ten days from the happening of the death, removal, or resignation, or incapacity of such justice, then the defendant in such action may remove the same by giving like notice to the plaintiff; and if no notice is given by either party to such action within twenty days, then such action shall stand discontinued without prejudice. The justice of the peace before whom such action may be removed shall proceed to try and determine the same, but he shall demand no fees or costs which have heretofore been properly advanced by any party to such action. After such removal either party shall be entitled to all the rights given in the preceding section.

Rev., s. 1456; 1905, c. 121.

1500. Rules of practice:

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

1. The complaint of the plaintiff.
2. The answer of the defendant.

Rev., s. 1457; Code, s. 840.

Referred to in *Baxter v. Irvin*, 158-277; *Poston v. Rose*, 87-282.

Rule 2, Complaint. The complaint must state, in a plain and direct manner, the facts constituting the cause of action.

Rev., s. 1459; Code, s. 840, Rule 3.

For contents of complaint generally, see section 506. Where no written pleadings before justice, summons constitutes complaint: *Parker v. Southern Express Co.*, 132-130, and cases there cited; *Moore v. Wolfe*, 122-711; *Cromer v. Marsha*, 122-564; *Allen v. Jackson*, 86-321. Justice should require plaintiff to state in plain and direct manner facts constituting cause of action: *Smith v. Newberry*, 140-385—and substance of oral pleadings entered by justice on docket must contain in plain and direct manner the ground of action, *Montague v. Brown*, 104-161. See, also, *Love v. Huffines*, 151-378; *Baxter v. Irvin*, 158-277.

Rule 3, Answer. The answer may contain a denial of the complaint, or of any part thereof, and also a statement, in a plain and direct manner, of any facts constituting a defense or counterclaim.

Rev., s. 1460; Code, s. 840, Rule 4.

For important annotations as to answers in general, see section 519. For important and full annotations on counterclaims generally, see section 521.

Memorandum "general issue" entered on justice's docket as embracing defendant's defense is construed to mean a general denial of plaintiff's cause of action: *Blackwell v. Dibrell*,

103-270. Pendency of another action must be specially pleaded in answer or is deemed waived: *Montague v. Brown*, 104-163; *Blackwell v. Dibrell*, 103-270; *Hawkins v. Hughes*, 87-115—and former judgment must be specially pleaded, for it will not be considered under plea merely denying indebtedness, *Smith v. Lumber Co.*, 140-375; *Blackwell v. Dibrell*, 103-270; *Harrison v. Hoff*, 102-126. In oral pleadings, if facts relied upon as defense be new matter, notice of same must be given on docket in plain and direct manner: *Montague v. Brown*, 104-161. See *Baxter v. Irvin*, 158-277.

Counterclaim in excess of \$200 cannot be entertained by justice: *Ijames v. McClamroch*, 92-362; *Hurst v. Everett*, 91-403; *Raisin v. Thomas*, 88-148; *Meneely v. Craven*, 86-364; *Boyett v. Vaughan*, 85-363—and want of jurisdiction cannot be cured by entering remitter in superior court, *Ijames v. McClamroch*, 92-362; *Raisin v. Thomas*, 88-148—nor has justice jurisdiction of counterclaim in damages assessed by jury at more than \$200, though voluntarily reduced to that amount, *Raisin v. Thomas*, 88-148—but defendant may recoup damages to amount claimed in complaint, *Hurst v. Everett*, 91-399—and where several actions brought on notes, he has right to set up such defense in each until amount of damages exhausted, *Ibid.* Defendant may plead as a set-off or defense a claim over \$200, but not as a ground for affirmative relief: *Cheese Co. v. Pipkin*, 155-394; *R. R. v. Dill*, 171-176.

Where court has jurisdiction it seems that claim sounding in damages may be used as set-off: *Raisin v. Thomas*, 88-148—though counterclaim consisting of alleged indebtedness arising out of unadjusted partnership dealings between partners cannot be set up before justice, *Love v. Rhyne*, 86-576—and plaintiff cannot set up counterclaim in reply to counterclaim asserted by defendant, *Boyett v. Vaughan*, 85-363—and counterclaim cannot be set up for enough to extinguish plaintiff's claim and then recover \$200, *Derr v. Stubbs*, 83-539—but claim for funeral expenses may be pleaded as set-off in suit by administrator for debt due intestate, *Barbee v. Green*, 86-158.

Equitable defense may be set up before justice: *Levin v. Gladstein*, 142-482, and cases under section 1473.

Distinction between counterclaim, set-off, and recoupment pointed out in *Hurst v. Everett*, 91-399; *Raisin v. Thomas*, 88-150.

Since pleadings may be oral, no judgment is rendered on a counterclaim for failure of plaintiff to reply: *Teal v. Templeton*, 149-32.

Rule 4, Demurrer. Either party may demur to a pleading of his adversary, or to any part thereof, when it is not sufficiently explicit to enable him to understand it, or contains no cause of action or defense, although it be taken as true.

Rev., s. 1461; Code, s. 840, Rule 11.

For demurrer generally, see sections 503-518.

Rule 5, Order on demurrer. If the justice deem the objection well founded, he shall order the pleading to be amended on such terms as he may think just; and if the party refuse to amend, the defective pleading shall be disregarded.

Rev., s. 1462; Code, s. 840, Rule 12.

For amendments generally, see section 547.

Rule 6, Pleadings, oral or written. The pleadings may be either oral or written; if oral, the substance must be entered by the justice on his docket; if written, they must be filed by the justice, and a reference to them be made on his docket.

Rev., s. 1458; Code, s. 840, Rule 2.

Pleadings may be oral: *Montague v. Brown*, 104-161; *Little v. McCarter*, 89-237—but if so, substance must be entered on docket, *Montague v. Brown*, 104-161. Different pleadings explained: *Baxter v. Irvin*, 158-277. When written pleadings are filed, material allegations not denied may be taken as admitted: *Parker v. Horton*, 176-143.

The rule as to verification of pleadings does not apply to justice's court: *Building Co. v. Hardware Co.*, 173-55—nor does the rule as to reply to counterclaim, *Teal v. Templeton*, 149-32.

Section referred to in *Durham v. Wilson*, 104-598.

Rule 7, No particular form for pleadings. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is meant.

Rev., s. 1463; Code, s. 840, Rule 5.

Section merely referred to in *Smith v. Newberry*, 140-387; *Turner v. McKee*, 137-253.

Rule 8, No judgment by default. Where a defendant does not appear and answer, the plaintiff must still prove his case before he can recover.

Rev., s. 1464; Code, s. 840, Rule 6.

Section merely referred to in *Durham v. Wilson*, 104-598; *Montague v. Brown*, 104-163.

Rule 9, Action on account or note. In an action or defense, founded on an account, or an instrument for the payment of money only, it is sufficient for a party to deliver the account or instrument to the justice and state that there is due him thereon from the adverse party a specified sum, which he claims to recover or set off.

Rev., s. 1465; Code, s. 840, Rule 7.

In action before justice on promissory note exhibition of same with statement that specified sum is due thereon, which plaintiff seeks to recover, is sufficient complaint: *Evans v. Williamson*, 79-86.

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

Rev., s. 1469; Code, s. 840, Rule 10.

Bill of particulars may be ordered by court if demanded: *McPhail v. Johnson*, 115-302. Section referred to in *Blackwell v. Dibbrell*, 103-274.

Rule 11, Variance. A variance between the evidence on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled to his prejudice thereby.

Rev., s. 1466; Code, s. 840, Rule 8.

As to variance generally, see section 552.

Rule 12, No process quashed for want of form. No process or other proceeding begun before a justice of the peace, whether in a civil or a criminal action, shall be quashed or set aside for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time either before or after judgment.

Rev., s. 1467; Code, s. 908; R. C., cc. 3, 62, s. 22; 1794, c. 414.

For annotations generally upon subject of amendment of pleading, process, etc., see under sections 545-547.

The power of amendment of criminal process hereunder is not unconstitutional: *State v. Crook*, 91-536. For history of power of amendment in justices' courts, see *State v. Vaughan*, 91-532.

As justices of the peace are clothed with large jurisdiction in criminal matters and are almost universally men unlearned in the law, very liberal powers of amendment should be accorded them, that offenders may not escape just penalties by opposing with technical objections: *State v. Bryson*, 84-783.

A justice may allow officer to amend the return of a summons, where same manifestly incorrect, by inserting proper date of service: *State v. Warren*, 113-684. Justice may allow plaintiff to amend a summons against register of deeds in action for penalty for wrongly issuing marriage license, by inserting the words "without reasonable injury": *Laney v. Mackey*, 144-630—may allow amendment of summons in claim and delivery to state value of property when value is not over \$50, so as to show jurisdiction, not to give jurisdiction, *Cox v. Grisham*, 113-279; *Leathers v. Morris*, 101-184; *Singer Mfg. Co. v. Barrett*, 95-36.

Civil process served by town constable where same not addressed to him, but he was specially deputed, may be amended after service: *Baker v. Brem*, 127-322, reversing same case in 126-367 on rehearing.

Justice has power to allow amendment of criminal warrant or affidavit: *State v. Sykes*, 104-694—but warrant cannot be amended by striking out offense charged and inserting new and different offense, *State v. Taylor*, 118-1262; *State v. Crook*, 91-539; *State v. Vaughan*, 91-532. Where amendment does not change nature of action, power to amend is unrestricted: *State v. Wernwag*, 116-1063, and cases cited.

Where warrant before justice is informal, it may be aided by affidavit if same refers to it, and if court can see from both that offense sufficiently charged, warrant will be sustained: *State v. Gupton*, 166-257; *State v. Norman*, 110-487; *State v. Sykes*, 104-694; *State v. Winslow*, 95-649—but affidavit of complainant does not constitute essential part of warrant issued thereon, *State v. Bryson*, 84-780—and if warrant charges criminal offense it will be sustained, *Ibid*.

Superior court, on appeal from justice's court, pursues a liberal policy as to amendments, see *Shelton v. Kivett*, 110-408; *State v. Currie*, 161-276; *Laney v. Mackey*, 144-630; *Stationery Co. v. Express Co.*, 152-342; *McBride v. Welborn*, 119-508; *Starke v. Cotten*, 115-81; *McPhail v. Johnson*, 115-298; *Moore v. Garner*, 109-157; *State v. Baker*, 106-758; *Leathers v. Morris*, 101-184; *Allen v. Jackson*, 86-321; *Bank v. McArthur*, 82-107; *Beville v. Cox*, 109-265; *Thomas v. Simpson*, 80-4; *Johnson v. Rowland*, 80-1; *Lane v. Morton*, 78-7; *Hinton v. Deans*, 75-18; *State v. Cauble*, 70-62; *Bullard v. Johnson*, 65-436. A justice's warrant may be amended in superior court, even after verdict: *State v. Smith*, 103-410—but it must be made to conform to evidence elicited on trial and shown by record, *State v. Baker*, 106-758. Superior court may amend affidavit and warrant on appeal from justice: *State v. Poythress*, 174-809; *State v. Price*, 175-804; *State v. Yellowday*, 152-793; *State v. Davis*, 111-729; *State v. Gillikin*, 114-832. The warrant of a justice may be amended in superior court upon the finding of a special verdict: *State v. Telfair*, 130-645.

In warrant to recover penalty under a statute, an averment alone that amount claimed is "due by penalty," without stating the facts or pointing out particular statute under which penalty is claimed, is insufficient, but judge may allow amendment on appeal to superior court: *Stone v. R. R.*, 144-220.

Justice's record can be amended on appeal to superior court so as to speak the truth as to what took place in his court: *State v. Jenkins*, 121-637, and cases cited on page 642; *Bank v. McArthur*, 82-107.

Summons in action before justice may be amended on appeal by superior court to show, but not to confer, jurisdiction: *McPhail v. Johnson*, 115-298; *Baker v. Brem*, 126-367; but see same case, 127-322.

Section merely referred to in *State v. Hester*, 122-1050; *Godwin v. Early*, 114-12; *Green v. Deberry*, 24-345; *Clark v. Hellen*, 23-423; *Mead v. Boyd*, 19-521.

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

Rev., s. 1468; Code, s. 840, Rule 9.

Upon an appeal in civil action from magistrate to superior court, the latter has power to amend the pleadings and allow new pleas, or matters of defense, to be set up, and its action in this respect is not ordinarily reviewable: *Moore v. Garner*, 109-157; *Hinton v. Deans*, 75-18; *Stationery Co. v. Express Co.*, 152-342; see section 547 for additional cases. Section referred to in *Cox v. Grisham*, 113-280; *State v. Shine*, 149-480.

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

Rev., s. 1471; Code, s. 840, Rule 16.

Tender must be made, before defense set up, to pay specific sum in discharge of plaintiff's claim, and not sum in excess of counterclaim: *Rand v. Harris*, 83-486—and tender to pay specific amount "as settlement of matter" not sufficient, *Ibid.*

Money paid into court as a tender, if taken out by plaintiff, is a settlement of debt, he having accepted same upon conditions and terms annexed: *Cline v. Rudisil*, 126-523. Tender by tenant of rent accrued after termination of lease does not preclude landlord from recovering possession: *Vanderford v. Forem*, 129-217. Where plaintiff recovers no more than the tender, he should be taxed with costs: *Pollock v. Warwick*, 104-638; see *Smith v. B. and L. Assn.*, 119-256, and cases cited; *Russ v. Brown*, 113-227. Offer of compromise not accepted cannot be given in evidence: *Hughes v. Boone*, 102-137.

Rule 15, Continuance. Any justice before whom an action is brought may, on sufficient excuse therefor shown on the affidavit of either party or any person for him, continue such action from time to time for trial; but such continuance shall not exceed thirty days.

Rev., s. 1472; Code, s. 840, Rule 17.

Rule 16, Chapter on civil procedure applicable. The chapter on civil procedure, respecting forms of actions, parties to actions, the times of commencing actions, and the service of process, shall apply to justices' courts.

Rev., s. 1473; Code, s. 840, Rule 15.

The provision that service of summons on a corporation must be by delivering a copy also applies, under this section, to service of process issued from justice's court: *Aaron v. Lumber Co.*, 112-190; *Katzenstein v. R. R.*, 78-287. Appointment of next friend: *Houser v. Bonsal*, 149-51. The right of defendant, served by publication, to defend after judgment, under section 492, does not apply, the remedy being under section 1530: *Thompson v. Notion Co.*, 160-519.

Section referred to in *Ditmore v. Goins*, 128-325; *Fisher v. Bullard*, 109-575; *Montague v. Brown*, 104-163.

Rule 17, Attachment proceedings. The chapter on civil procedure is applicable to proceedings by attachment before justices of the peace, in all cases founded on contract wherein the sum demanded does not exceed two hundred dollars, and where the title to real estate is not in controversy.

Rev., s. 1474; Code, s. 853.

For attachment proceedings, see section 798 et seq. Section cited in *Thompson v. Notion Co.*, 160-519.

Rule 18, Claim and delivery and arrest and bail. The chapter on civil procedure is applicable, except as herein otherwise provided, to proceedings in justices' courts concerning claim and delivery of personal property and arrest and bail, substituting the words, "justice of the peace" for "judge," "clerk" or "clerk of the court," and inserting the words "or constable" after "sheriff," whenever they occur.

Rev., s. 1475; Code, ss. 849, 889; 1876-7, c. 251.

For arrest and bail, see section 767 et seq.; for claim and delivery, see section 830 et seq. Section cited in *Thompson v. Notion Co.*, 160-519.

Rule 19, Actions for damages and for conversion. All actions in a court of a justice of the peace for the recovery of damages to real estate, or for the conversion of personal property, or any injury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil actions in a justice's court.

Rev., s. 1476; Code, s. 888; 1876-7, c. 251.

Section authorizing action for "damages" not exceeding \$50 to property, though property be of greater value, is constitutional: *Malloy v. City of Fayetteville*, 122-480—but does not authorize actions for slander, libel and other unliquidated damages not arising out of injury to property, *Malloy v. City of Fayetteville*, 122-486. Justice has jurisdiction of action for damages not exceeding \$50 for injury to personal property, notwithstanding same of greater value than \$50, *Malloy v. City of Fayetteville*, 122-480; *Watson v. Farmer*, 141-452—and has jurisdiction of action for damages to real estate where sum demanded not more than \$50, *Duckworth v. Mull*, 143-461.

Rule 20, Action on former judgment. On the trial of an action founded on a former judgment, the judgment itself shall be evidence of the debt, subject to such payments as have been made.

Rev., s. 1477; Code, s. 844.

A judgment of a justice of the peace, if not docketed in superior court within a year of rendition, is dormant and can only be given efficacy by a new action upon it before a justice: *Woodard v. Paxton*, 101-26.

Judgment of justice not competent evidence without proof of his handwriting: *Patterson v. Freeman*, 132-357; *Reeves v. Davis*, 80-209—of his being in office at the time, and the rendition of the same within his court, *Ibid*.

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

Rev., s. 1478; Code, s. 845.

See section 1528; also see, as to recordari, annotations under section 630. For annotations as to mistake or excusable neglect, see section 600.

While new trial cannot be granted by justice, a rehearing may be allowed by him where sickness, mistake or excusable neglect is shown: *Salmon v. McLean*, 116-209; *Navassa Guano Co. v. Bridgers*, 93-439; *Gambill v. Gambill*, 89-201; *Froneburger v. Lee*, 66-333—provided application be made within ten days after date of judgment, *Bullard v. Edwards*, 140-644; *Navassa Guano Co. v. Bridgers*, 93-439; *Gambill v. Gambill*, 89-201—but after lapse of that time justice cannot rehear such cause, *Navassa Guano Co. v. Bridgers*, 93-439—remedy then by recordari.

Where rehearing wrongly granted to defendant, and on day of rehearing plaintiff moves for a continuance, he does not thereby waive his rights: *Bullard v. Edwards*, 140-644.

Where agent of corporation appeared and secured continuance before justice, but neglected to employ counsel until trial day, when, on account of delay in mail, counsel was unable to appear, held inexcusable neglect: *Finlayson v. Accident Co.*, 109-196—and where cause removed at party's request, and he made no inquiry of justice to whom removed, but relied upon assurance of officer of court, held not due diligence, *Bullard v. Edwards*, 140-644. When a judgment is rendered upon service by publication, the defendant is not entitled to a rehearing, but remedy is under section 1530: *Thompson v. Notion Co.*, 160-519. Proceeding to set aside a judgment rendered upon improper service: *Lowman v. Ballard*, 168-16.

Judgment rendered by justice and, upon rehearing by him, similar judgment rendered, statute of limitations begins to run from latter judgment: *Salmon v. McLean*, 116-209.

Section referred to in *Merrell v. McHone*, 126-529; *Hogan v. Kirkland*, 64-251.

ART. 14. JURY TRIAL

1501. Parties entitled to a jury trial. When an issue of fact shall be joined before a justice, on demand of either party thereto, he shall cause a jury of six men to be summoned, who shall try the same.

Const., Art. 4, s. 27.

1502. Jury trial waived. A trial by jury must be demanded at the time of joining the issue of fact, and if neither party demand at such time a jury, they shall be deemed to have waived a trial by jury.

Rev., s. 1431; Code, s. 857.

Quere: Whether principle that on indictments originating in superior court trial by jury cannot be waived by accused applies to appeals in criminal actions of which justices have final jurisdiction: *State v. Wells*, 142-590.

The provision of the federal constitution that no person shall be deprived of his property without due process of law does not imply that all trials in state courts shall be by jury: *Caldwell v. Wilson*, 121-425. The right of appeal to superior court preserves the right of jury trial: *State v. Shine*, 149-480, and cases cited.

For trial by jury in criminal actions before justice, see sections 4627, 4628.

Section merely referred to in *Durham v. Wilson*, 104-598.

1503. Number constituting the jury. Six jurors shall constitute a jury in a justice's court, but, by consent of both parties, a less number may constitute it.

Rev., s. 1440; Code, s. 866.

1504. Jury list furnished. The clerk of the board of commissioners shall furnish, on demand, to each justice of the peace in the county, a list of the jurors for the township for which such justice is elected or appointed.

Rev., s. 1428; Code, s. 854.

As to how commissioners select jury lists, see sections 2312, 2313.

1505. Names kept in jury box. Each justice shall keep a jury box, having two divisions marked respectively number one and number two, and having two locks, the key to be kept by the justice. He shall cause the names on his jury list to be written on small scrolls of paper of equal size, and to be placed in the jury box, in division marked number one, until drawn out for the trial of an issue as required by law.

Rev., ss. 1429, 1430; Code, ss. 855, 856.

For annotations concerning jury box of county, of interest also in connection with this section, see section 2313. Consult *State v. Potts*, 100-457; *State v. Hensley*, 94-1026.

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

Rev., s. 1432; Code, s. 869.

1507. Jury drawn and trial postponed. When a trial by jury is demanded, the justice shall immediately, in the presence of the parties, proceed to draw the names of twelve jurors from division marked number one of the jury box; and the trial of the cause shall thereupon be postponed to a time and place to be fixed by the justice.

Rev., s. 1433; Code, s. 858.

No constitutional limitation upon powers of legislature to prescribe method by which jurors are to be selected and summoned: *State v. Brittain*, 143-668. For annotations as to drawing jury for superior court, which may be of interest, see section 2314.

1508. Summoning the jury. A list of the jurors so drawn shall be immediately delivered by the justice to any constable, or other lawful officer, with an order indorsed thereon, directing him to summon the persons named in the list to appear as jurors at the time and place fixed for the trial; and it is the duty of the officer to proceed forthwith to summon such jurors, or so many of them as can be found, according to the order; and he shall make return thereof at the time and place appointed, stating in his return the names of the jurors summoned by him.

Rev., s. 1434; Code, s. 859.

For summoning jurors in superior court, see section 2320.

1509. Selection of jury. At the time and place appointed, and on return of the order, if the trial be not further adjourned, and if adjourned, then at the time and place to which the trial shall be adjourned, the justice shall proceed, in the presence of the parties, to draw from the jurors summoned the names of six persons to constitute the jury for the trial of the issue.

Rev., s. 1435; Code, s. 860.

For practice in superior court, see section 2333.

1510. Challenges. Each party shall be entitled to challenge, peremptorily, two of the persons drawn as jurors.

Rev., s. 1436; Code, s. 861.

For practice in superior court, see sections 2324-2326, 2331, 2332, 4633, 4634.

1511. Names returned to the jury box. The scrolls containing the names of jurors not summoned, if any, and of those summoned but not drawn, and of those drawn but challenged and set aside, must be returned by the justice to his jury box, in division marked number one: Provided, that the scrolls containing the names of such as are not legally liable or legally qualified to serve as jurors shall be destroyed.

Rev., s. 1437; Code, s. 862.

1512. Names of jurors serving. The scrolls containing the names of the jurors who serve on the trial of an issue must be placed in the jury box in division marked number two, until all the scrolls in division marked number one have been drawn out. As often as that may happen, the whole number of scrolls shall be returned to division marked number one, to be drawn out as in the first instance.

Rev., s. 1441; Code, s. 868.

1513. Tales jurors summoned. If a competent and indifferent jury is not obtained from the twelve jurors drawn, as before specified, the justice may direct others to be summoned from the bystanders, sufficient to complete the jury.

Rev., s. 1438; Code, s. 863.

For practice in superior court, see sections 2321, 2322.

1514. No juror to serve out of township. No person is compelled to serve as a juror in a justice's court out of his own township, except as a talesman.

Rev., s. 1439; Code, s. 867.

1515. Additional deposit for jury fees on adjournment. No adjournment shall be granted after the return of the jury, unless the party asking the same shall, in addition to the other conditions imposed on him by law or by the justice, deposit with the justice, to be immediately paid to the jurors attending, the sum of twenty-five cents each, such amount to be in no case included in the judgment as part of the costs. On such adjournment, the jurors shall attend at the time and place appointed, without further summons or notice; and the fees for the jury, deposited with the justice in the beginning, shall remain in his hands until the jury are impaneled on the trial, and shall be then immediately paid to the jurors or to the party entitled thereto.

Rev., s. 1442; Code, s. 870.

1516. Jury sworn and impaneled; verdict; judgment. The jury shall be sworn and impaneled by the justice, who shall record their verdict in his docket and enter a judgment in the case according to such verdict.

Rev., s. 1443; Code, s. 864.

ART. 15. JUDGMENT AND EXECUTION

1517. Justice's judgment docketed; lien and execution. A justice of the peace, on the demand of a party in whose favor he has rendered a judgment, shall give a transcript thereof which may be filed and docketed in the office of the superior court clerk of the county where the judgment was rendered. And in such case he shall also deliver to the party against whom such judgment was rendered, or his attorney, a transcript of any stay of execution issued, or which

may thereafter be issued, by him on such judgment, which may be in like manner filed and docketed in the office of the clerk of such court. The time of the receipt of the transcript by the clerk shall be noted thereon and entered on the docket; and from that time the judgment shall be a judgment of the superior court in all respects for the purposes of lien and execution. The execution thereon shall be issued by the clerk of the superior court to the sheriff of the county, and shall have the same effect, and be executed in the same manner, as other executions of the superior court; but in case a stay of execution upon such judgment shall be granted, as provided by law, execution shall not be issued thereon by the clerk of the superior court until the expiration of such stay. A certified transcript of such judgment may be filed and docketed in the superior court clerk's office of any other county, and with like effect, in every respect, as in the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing such transcript.

Rev., s. 1479; Code, s. 839.

THE JUDGMENT ITSELF. A justice is under no obligation to write out and sign his judgments with his own hand. He may have them written and his name signed thereto in his presence and under his supervision without making himself liable for delegating his jurisdictional powers: *Reeves v. Davis*, 80-209.

Ordinarily it is a justice's duty to pronounce judgment on day of trial, but in cases of difficulty he may reserve his decision until he can be properly advised, and afterwards enter judgment and give parties notice of his action: *Ibid.*; *Osborne v. Furn. Co.*, 121-364.

Justice's judgment is conclusive and binding until legally set aside, modified or reversed: *Dunham v. Anders*, 128-212; *Whitehurst v. Transportation Co.*, 109-342; *Hiatt v. Simpson*, 35-72—and though docketed in superior court it remains as before, a judgment of the justice when to be impeached, modified or reversed, *Oldham v. Rieger*, 148-548; *Bailey v. Hester*, 101-540; *Patterson v. Walton*, 119-501; *Whitehurst v. Transportation Co.*, 109-344; *Cotton Mills v. Cotton Mills*, 116-647; *Morton v. Rippey*, 84-611; *Birdsey v. Harris*, 68-92; *Ledbetter v. Osborne*, 66-379.

EFFECT OF DOCKETING THE JUDGMENT. When judgment docketed in superior court it becomes judgment of superior court: *Dysart v. Brandreth*, 118-968; *McIlhenny v. Savings and Trust Co.*, 108-311; *Adams v. Guy*, 106-275; *Cannon v. Parker*, 81-322—though it only becomes a judgment of superior court for purpose of creating lien upon real estate of judgment debtor in county, and for purpose of enforcing same by execution or otherwise, *Pants Co. v. Mewborn*, 172-332; *Oldham v. Rieger*, 148-548; *Tarboro v. Pender*, 153-427; *Whitehurst v. Transportation Co.*, 109-345; *Woodard v. Paxton*, 101-29; *Surratt v. Crawford*, 87-374; *Broyles v. Young*, 81-315; *Cannon v. Parker*, 81-322; *Ledbetter v. Osborne*, 66-380.

When judgment has become dormant it cannot be revived by docketing in superior court, *Cowen v. Withrow*, 114-558; *Woodard v. Paxton*, 101-26; *Williams v. Williams*, 85-385. When regularly docketed in superior court judgment cannot be collaterally impeached: *Moore v. Edwards*, 92-43. Judgment may be docketed in superior court, though appeal taken and security given to stay execution, *Dysart v. Brandreth*, 118-968—and when so docketed in superior court lien is not destroyed by appeal and supersedeas bond, *Ibid.*—but being so docketed does not arrest running of statute of limitations, *Daniel v. Laughlin*, 87-433. When judgment given in one county it cannot be docketed in another, unless previously docketed in county where rendered: *McAden v. Banister*, 63-479. The lien of the docketed judgment expires in ten years, notwithstanding the death of the judgment debtor: *Matthews v. Peterson*, 150-134.

The transcript of a judgment need not contain more than essential particulars constituting judgment: *Surratt v. Crawford*, 87-372—the names of plaintiff and defendant, amount of judgment and costs of action being sufficient, *Lee v. Bishop*, 89-257. It should show jurisdictional facts for the protection of purchasers under execution: *Rutherford v. Ray*, 147-253. Judgment may be docketed from original papers before justice, instead of from transcript: *McAden v. Banister*, 63-479.

Where justice's judgments docketed in superior court on same day, they are entitled to priority according to time of day when docketed: *Bates v. Hinsdale*, 65-423.

Where transcript authenticated by justice's certificate, judgment is presumed to have been regularly taken, though judgment proper not signed by justice: *Surratt v. Crawford*, 87-372.

Execution on docketed justice's judgment shall be issued to sheriff and be executed in same manner as other executions of superior court: *Cannon v. Parker*, 81-322; see section 675 et seq. The judgment may be revived as other judgments, when dormant: *Pants Co. v. Mewborn*, 172-332.

For annotations with respect to judgments generally, see section 614.

1518. Effect of judgment on appeal. In cases of appeal to the superior court from a justice's judgment docketed in such court, when judgment is rendered in the superior court on such appeal, the lien acquired by the docketing of such justice's judgment shall merge into the judgment of the superior court, and continue as a lien from the date of the docketing of such justice's judgment, and be superior to any other judgment docketed subsequent to the date of the justice's judgment, except prior attachment liens and judgment on the same. The clerk of the superior court shall carry forward and tax into the judgment of the superior court all costs incurred in the justice's court, including transcript and docketing, as well as all costs incurred in the superior court, and shall issue execution only on the judgment rendered in the superior court, and not upon the justice's judgment. When the judgment of the superior court is satisfied, it shall be a satisfaction of the justice's judgment, and the clerk shall note such satisfaction on the record of the justice's judgment.

Rev., s. 1479; 1903, c. 179.

An appeal does not prevent the docketing of a judgment, nor affect the lien; *Dysart v. Brandreth*, 118-968. The judgment does not become dormant by failure to issue execution pending an appeal, when a bond to stay execution is given: *Ibid.*

1519. Entries made by clerk when judgment is rendered. Whenever a transcript of a judgment taken before a justice of the peace is docketed on the judgment docket of the superior court and the same is afterwards reversed, modified, or affirmed in the superior court on appeal by a final judgment, the clerk of said court shall within ten days thereafter enter on the judgment docket where the said transcript was first docketed, the word "reversed," "modified," or "affirmed," as the case may be, and further refer to the book and page where can be found the judgment reversing, modifying, or affirming the former judgment. Any clerk failing to perform such duties as are required of him in this section shall pay to any person all such damages as he may have sustained by such failure.

Rev., s. 1479; 1907, c. 880.

1520. Justice's judgment removed to another county. Any person who may desire to have a justice's judgment in his favor removed to another county to be enforced against the goods and chattels of the defendant must obtain from the justice who rendered the judgment a transcript thereof, under his hand; and must further procure a certificate from the clerk of the superior court of the county where the judgment was rendered, under the seal of his court, that the justice who gave the judgment was, at the rendition thereof, a justice of the county. On such transcript of the judgment, thus certified, any justice in any other county may award execution for the sum therein expressed.

Rev., s. 1480; Code, s. 846.

Judgment rendered by justice in one county cannot be docketed in another, unless previously docketed in former county: *McAden v. Banister*, 63-479—and what allowed to be dock-

eted in latter county is transcript of judgment as docketed in former, *Ibid.* For sufficient transcript for docketing in another county, see *Wilson v. Patton*, 87-318. Docketing in another county is only for purpose of giving a lien: *Bernhardt v. Brown*, 122-587.

An execution issued to another county and all proceedings under it are void, unless it bears the seal of the clerk of county where rendered: *Taylor v. Taylor*, 83-116.

1521. Issue and return of execution. Execution may be issued on a judgment, rendered in a justice's court, at any time within one year after the rendition thereof, and shall be returnable sixty days from the date of the same.

Rev., s. 1481; Code, s. 840, Rule 14.

Justice may issue execution on judgment unless cause has been removed to and docketed in superior court: *Bailey v. Hester*, 101-540—and may also recall execution which has been improvidently issued, *Ibid.*—but justice has no jurisdiction to direct application by sheriff of proceeds of execution issued by another justice, upon ground that same is null and void, *Cary v. Allegood*, 121-54.

Judgment of justice not docketed within year of rendition is dormant: *Cowen v. Withrow*, 114-558; *Woodard v. Paxton*, 101-26—and vitality can only be restored by new action, *Ibid.*; *Williams v. Williams*, 85-383—and purchaser under execution on justice's judgment docketed after lapse of year acquires no title, though he be a stranger to judgment and without notice, *Cowen v. Withrow*, 114-558.

Judgment of justice does not become dormant by failure to issue execution thereon pending an appeal from judgment when bond has been given to stay execution: *Dysart v. Brandreth*, 118-968.

1522. Levy and lien of execution. Executions issued by a justice, which must be directed to any constable or other lawful officer of the county, shall be a lien on the goods and chattels of the defendant named therein, from the levy thereof only, but shall not be levied on or enforced in any manner against real estate; but when a justice's judgment shall be made a judgment of the superior court, as is elsewhere provided, the execution shall be capable of being levied and collected out of any property of the defendant in execution, and it shall be a lien on the real estate of said defendant from the time when it becomes a judgment of the superior court.

Rev., s. 1482; Code, s. 841; 1868-9, c. 159, s. 5.

Execution must be directed to any constable or other lawful officer of the county: *McGloughan v. Mitchell*, 126-681—and if it comes into the hands of sheriff he must obey it, though constable cannot serve process addressed to sheriff, nor can sheriff serve process addressed to constable alone, *Ibid.* It is not necessary that judgment should be docketed in superior court to entitle judgment creditor to execution against personal property: *McAuley v. Morris*, 101-372. Judgment of justice when docketed in superior court becomes judgment of that court, and is a lien upon real estate of defendant in county: *Dysart v. Brandreth*, 118-968, and cases under sections 1517 and 614—and lien of judgment not extinguished by appeal and supersedeas bond, *Dysart v. Brandreth*, 118-968; *Dunham v. Anders*, 128-212.

Leave to issue execution on justice's judgment docketed in superior court can be granted after lapse of seven years from such docketing, but before lapse of ten years: *Broyles v. Young*, 81-315; *Daniel v. Laughlin*, 87-433; *Patterson v. Walton*, 119-500; *Adams v. Guy*, 106-275.

Superior court has no jurisdiction of original motion to set aside an execution and order of sale granted by a justice of the peace: *Hamer v. McCall*, 121-197.

1523. Stay of execution. In all actions founded on contract, whereon judgments are rendered in justices' courts, stay of execution, if prayed for at the trial by the defendant or his attorney, shall be granted by the justices in the following manner: For any sum not exceeding twenty-five dollars, one month; for any sum above twenty-five dollars and not exceeding fifty dollars, three months; for any sum above fifty dollars and not exceeding one hundred dollars,

four months; for any sum above one hundred dollars, six months. But no stay of execution shall be allowed in any action wherein judgment is rendered on a former judgment taken before a justice of the peace.

Rev., s. 1483; Code, s. 842; 1868-9, c. 272.

1524. Security on stay of execution. The party praying for a stay of execution shall, within ten days after the trial, give sufficient security, approved by the justice, for payment of the judgment, with interest thereon till paid, and cost; and the acknowledgment of the surety, entered by the justice in his docket and signed by the surety, shall be sufficient to bind such surety. If the judgment be not discharged at the time to which execution has been stayed, the justice who awarded the judgment shall issue execution against the principal, or surety, or both.

Rev., s. 1484; Code, s. 843.

Judgment does not become dormant by failure to issue execution thereon pending appeal from same where bond given to stay execution: *Dysart v. Brandreth*, 118-968; see *Dunham v. Anders*, 128-212.

One who signs stay of execution upon judgment as surety becomes thereby party to judgment and bound in like manner as principal: *Barringer v. Allison*, 78-79.

1525. Stay of execution on appeal. In all cases of appeal from justices' courts, if the appellant desires a stay of execution of the judgment, he may, at any time, apply to the clerk of the appellate court for leave to give the undertaking as provided in a subsequent section; and the clerk, upon the undertaking being given, shall make an order that all proceedings on the judgment be stayed. Instead of before the clerk of the appellate court, the appellant may give the undertaking before the justice who tried the cause, who shall indorse his approval thereon.

Rev., ss. 1485, 1486; Code, ss. 882, 883; 1869-70, c. 187.

In action on stay bond provided herein, it is not necessary that plaintiff allege that he has sustained damages on account of appeal: *McMinn v. Patton*, 92-371.

No execution shall be levied on property of sureties on appeal bond until execution against principal returned unsatisfied: *Rush v. Steamboat Co.*, 68-72.

Even though a stay bond is given on appeal, the judgment otherwise remains in full force and effect, even retaining its lien upon real estate when properly docketed: *Dunham v. Anders*, 128-212.

No statutory provision allowing mortgage of real or personal property to be given in lieu of undertaking on appeal: *Comron v. Standland*, 103-207—yet if such mortgage given, and is accepted by opposing litigant, mortgage valid and can be enforced, *Ibid*.

Section merely referred to in *Blair v. Coakley*, 136-409; *Dunham v. Anders*, 128-212.

1526. Nature of undertaking. The undertaking shall be in writing, executed by one or more sufficient sureties, to be approved by the justice or clerk making the order, to the effect that if judgment be rendered against the appellant, the sureties will pay the amount together with all costs awarded against the appellant, and when judgment shall be rendered against the appellant, the appellate court shall give judgment against the said sureties.

Rev., s. 1487; Code, s. 884; 1879, c. 68.

Undertaking with sureties that appellant will pay all costs awarded against him on appeal, and, if judgment affirmed or appeal dismissed, will pay amount adjudged to be paid, is in compliance with section: *Walker v. Williams*, 88-7—and it is not necessary that appellant should sign undertaking in order to bind him, *Ibid*.

No statutory provision allowing mortgage to be given in lieu of undertaking on appeal: *Comron v. Standland*, 103-207—yet if such mortgage given and accepted by appellee, same valid and can be enforced, *Ibid*.

Effect of bankruptcy, pending appeal, upon liability of sureties to appeal undertaking: *Laffoon v. Kerner*, 138-281; *Hamilton v. Mooney*, 84-12.

Summary judgment may be given against sureties on bond for amount of judgment and costs awarded against appellant on appeal: *Brown v. Brittain*, 84-552—as additional remedy to suit on same as common-law bond, *Ibid.* In action on bond, not necessary to allege that plaintiff had sustained damage on account of the appeal: *McMinn v. Patton*, 92-371. Sufficiency of bond under this section discussed in *McMinn v. Patton*, 92-371. Sufficiency of mortgage given in lieu of undertaking on appeal, discussed in *Comron v. Standland*, 103-207.

Sureties to appeal bond are bound for amount of judgment rendered in superior court, and their liability is not restricted to amount of judgment appealed from: *Walker v. Williams*, 88-7.

Section merely referred to in *Dunham v. Anders*, 128-212.

1527. Execution stayed upon order given. A delivery of a certified copy of the order, hereinbefore mentioned, to the justice of the peace shall stay the issuing of an execution on the judgment; if it has been issued, the service of a certified copy of such order on the officer holding the execution shall stay further proceedings thereon. A certified copy of such order shall also be served on the respondent, or on his agent or attorney, within ten days after the making thereof.

Rev., s. 1488; Code, s. 885.

Section referred to in *Dunham v. Anders*, 128-212; *Comron v. Standland*, 103-211.

ART. 16. APPEAL

1528. No new trial; either party may appeal. A new trial is not allowed in a justice's court in any case whatever; but either party dissatisfied with the judgment in such court may appeal therefrom to the superior court, as hereinafter prescribed.

Rev., s. 1489; Code, s. 865.

See s. 1500, Rule 21.

Also sections 660, 661. New trial cannot be had in justice's court, but party dissatisfied with judgment has remedy by appeal: *Thompson v. Notion Co.*, 160-519; *Bullard v. Edwards*, 140-647; *State v. Lucas*, 139-567; *Salmon v. McLean*, 116-209; *Navassa Guano Co. v. Bridgers*, 93-441; *Gambill v. Gambill*, 89-201; *Froneburger v. Lee*, 66-333—though defendant by voluntarily paying judgment waives right of appeal, *Cowell v. Gregory*, 130-80.

Appeal allowed either party in bastardy proceedings, as it is a civil action: *State v. Liles*, 134-742; *State v. Crouse*, 86-617; *Steadman v. Jones*, 65-390. Appeal must be taken to next term of superior court: *Hahn v. Guilford*, 87-172; *Ballard v. Gay*, 108-544; *Sondley v. Asheville*, 110-84; *Rhyne v. Lipscombe*, 122-650. Merely craving an appeal and filing bond is not taking appeal: *Tedder v. Deaton*, 167-479; *MacKenzie v. Development Co.*, 151-276; *Love v. Love*, 139-363; *Blair v. Coakley*, 136-409; *Wilson v. Seagle*, 84-110—for appellant must look after case and see that appeal made effectual, *Love v. Love*, 139-363—and must at least put officer under obligation to act by paying or tendering fees, *Blair v. Coakley*, 136-409.

There is no appeal from a confession of judgment: *Rush v. Steamboat Co.*, 67-47—and none from an interlocutory judgment, *Phelps v. Worthington*, 92-270. Appeal lies from the taxing of prosecutor with costs: *State v. Morgan*, 120-563—but does not lie on the part of the state for a refusal to tax prosecutor, *Ibid.*; see cases cited on page 564 of case. An appeal from judgment discharging one who has been arrested in a civil action vacates judgment and the order of arrest continues in force pending the appeal: *Patton v. Gash*, 99-280.

Legislature cannot take away right of appeal: *Rhyne v. Lipscombe*, 122-655.

For recordari as substitute for an appeal, see section 630.

1529. Appeal does not stay execution. No appeal shall prevent the issuing of an execution on a judgment, or work a stay thereof, except as provided for by giving an undertaking and obtaining an order to stay execution.

Rev., s. 1490; Code, s. 875; 1876-7, c. 251, s. 6.

Appeal from justice does not vacate judgment, nor even suspend its operation: *Dunham v. Anders*, 128-211—and party in whose favor judgment rendered has right to have execution issued where no undertaking given, *Comron v. Standland*, 103-210.

Section merely referred to in *Blair v. Coakley*, 136-409; *State v. Morgan*, 120-564; *Moore v. Garner*, 109-158; *State v. Wallin*, 89-580; *Marshall v. Lester*, 6-227.

1530. Manner of taking appeal. The appellant shall, within ten days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant did not appear and answer, he shall have fifteen days, after personal notice of the rendition of the judgment, to serve the notice of appeal herein provided for.

Rev., s. 1491; Code, s. 876; 1876-7, c. 251, s. 7.

Appeals from justices of the peace must be taken and notice served within ten days from judgment: *Marion v. Tilley*, 119-473; *Finlayson v. Accident Co.*, 109-196; *Green v. Hobgood*, 74-234; *Spaugh v. Boner*, 85-208—but the court may allow it to be taken afterwards, *West v. Reynolds*, 94-333; *Railroad v. Richardson*, 82-343; *Marsh v. Cohen*, 68-283; see annotations as to recordari under section 630—and if judgment was given on process not personally served, but served by publication, and defendant did not appear at trial, defendant may take fifteen days after notice of judgment in which to serve notice of appeal, *Thompson v. Notion Co.*, 160-519; *Merrell v. McHone*, 126-528; *King v. R. R.*, 112-318; *State v. Johnson*, 109-855—but if the adverse party or his attorney is present at the trial, appellant can give notice in open court, *Arundell v. Mill Co.*, 164-238; *Marion v. Tilley*, 119-473; *State v. Crouse*, 86-617; *Richardson v. Debnam*, 75-390.

Notice of appeal must be given either under this section or in open court: *Tedder v. Deaton*, 167-479. The notice of appeal must be served by an officer: *Clark v. Mfg. Co.*, 110-111; *State v. Johnson*, 109-852—and within ten days, *State v. Johnson*, 109-852; *Spaugh v. Boner*, 85-208—stating the grounds upon which appeal is taken, *Spaugh v. Boner*, 85-208—service to be made both upon justice who tried case and upon appellee, *State v. Johnson*, 109-852—though justice may by conduct waive service of formal notice, *Osborne v. Furn. Co.*, 121-365.

If defendant personally served with summons he has notice and bound to take notice of judgment: *Spaugh v. Boner*, 85-209; *Sparrow v. Davidson College*, 77-35; *McDaniel v. Watkins*, 76-399. What amounts to notice of judgment discussed in *McDaniel v. Watkins*, 76-399.

Section referred to in *Davenport v. Grissom*, 113-40; *Montague v. Brown*, 104-163; *Railroad v. Richardson*, 82-344.

1531. No written notice of appeal in open court. Where any party prays an appeal from a judgment rendered in a justice's court, and the adverse party is present in person or by attorney at the time of the prayer, the appellant shall not be compelled to give any written notice of appeal either to the justice or to the adverse party.

Rev., s. 1492; Code, s. 877; 1869-70, c. 187; 1876-7, c. 251, s. 8.

Where appellee present when appeal prayed, no written notice of appeal necessary: *State v. Crouse*, 86-620; *Richardson v. Debnam*, 75-390—though where not so present, notice as required by section 1530 must be issued and served, *Tedder v. Deaton*, 167-479; *Marion v. Tilley*, 119-473—and where appeal prayed in open court, but appellant afterwards told justice not to send up papers, though afterwards changed his mind and filed appeal bond with clerk of court, he was not estopped to prosecute appeal, *Suttle v. Green*, 78-76.

Section referred to in *Davenport v. Grissom*, 113-40; *Clark v. Mfg. Co.*, 110-113.

1532. Justice's return on appeal. The justice shall, within ten days after the service of the notice of appeal on him, make a return to the appellate court and file with the clerk thereof the papers, proceedings and judgment in the case, with the notice of appeal served on him. He may be compelled to make such return by attachment. But no justice shall be bound to make such return until the

fees, prescribed by law for his service, be paid him. The fee so paid shall be included in the costs, in case the judgment appealed from is reversed.

Rev., s. 1493; Code, s. 878.

Justice allowed ten days to send up papers after service of notice of appeal: *Sondley v. Asheville*, 110-89—and if he fail to do so, may be compelled to make return by attachment, *Hawks v. Hall*, 139-176. Statement of testimony heard by justice is not properly part of the return to notice of appeal: *Vinson v. Knight*, 137-408. Failure of justice to sign return does not vitiate proceedings where appellant gave notice and paid fee, and appellee made no motion to dismiss, but entered general appearance: *Hawks v. Hall*, 139-176. Motion to dismiss appeal not docketed within ten days properly refused where delay due to counsel of appellee: *Jerman v. Gullledge*, 129-242. Superior court is not bound to recognize supplemental return to notice of appeal, where same voluntarily made by justice: *Beville v. Cox*, 109-265. After justice transmits appeal and papers to superior court, he has no power to grant motion to set aside judgment for want of jurisdiction: *Forbes v. McGuire*, 116-449.

The appeal must be docketed at the next term, either civil or criminal, beginning after the expiration of ten days allowed for service of notice of appeal: *Barnes v. Saleeby*, 177-256; *Abell v. Power Co.*, 159-348; *Peltz v. Bailey*, 157-166; *Blair v. Coakley*, 136-405; *Johnson v. Andrews*, 132-376; *Pants Co. v. Smith*, 125-588; *Davenport v. Grissom*, 113-38; *Sondley v. Asheville*, 110-84; *Ballard v. Gay*, 108-544. Appellant must see that his appeal is docketed in proper time: *Rawls v. R. R.*, 172-211; *Abell v. Power Co.*, 159-348; *Love v. Huffines*, 151-378; *McKenzie v. Development Co.*, 151-276; *Johnson v. Andrews*, 132-376. The superior court has no power to permit docketing at a later term: *Barnes v. Saleeby*, 177-256, and cases cited; but the appellee may waive a defect in the return and docketing, *Love v. Huffines*, 151-378.

Where there were two cases between the same parties, and upon appeal from judgment in each case the justice consolidated them and sent up one transcript, the appeal should be dismissed: *Drainage Comrs. v. Kirby*, 172-415.

Where defendant appealed and appeal was duly docketed, but defendant failed to appear, there should be a trial of the case and not a dismissal of appeal: *Barnes v. R. R.*, 133-130.

For further regulations as to appeals, see sections 660, 661. Section referred to in *West v. Reynolds*, 94-335; *Phelps v. Worthington*, 92-271; *Poston v. Rose*, 87-281; *Ledbetter v. Osborne*, 66-380.

1533. Defective return amended. If the return be defective, the judge or clerk of the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with the order by attachment.

Rev., s. 1494; Code, s. 879.

If return defective, judge may direct further or amended return: *Hawks v. Hall*, 139-176; *State v. Currie*, 161-276.

1534. Restitution ordered upon reversal of judgment. If the judgment appealed from, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing of the appeal, on a previous notice of six days. If the order be obtained before the judgment of reversal is entered, the amount may be included in the judgment.

Rev., s. 1495; Code, s. 886.

Section only applicable where payments made involuntarily: *Cowell v. Gregory*, 130-81—for defendant by voluntarily paying judgment before justice waives right of appeal, *Cowell v. Gregory*, 130-80.

ART. 17. FORMS

1535. Forms to be used in justice's court. The following forms, or substantially similar ones, shall be sufficient in all cases of proceedings in civil actions, provided for in this article:

[No. 1]

SUMMONS

North Carolina, -----County, -----Township.

A-----B----- }
 against } Before-----, Justice of the Peace.
 C-----D----- }

State of North Carolina, to any constable or other lawful officer of-----County---
 Greeting :

We command you to summon C. D. to appear before G. W. H., Esq., one of the justices of the peace for the county of-----, on the ----- day of -----, 19----, at his office (or elsewhere, as the justice may appoint the place of trial), in-----Township, to answer A. B. in a civil action for the recovery of-----dollars; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this-----day of-----, 19----

G. W. H.-----
 Justice of the Peace.

See sections 1486, 1487.

[No. 2]

SUMMONS ON ALLOWING APPLICATION TO REHEAR

(Title, etc., as in No. 1)

Whereas, A. B., plaintiff above named (or C. D., defendant above named), has applied by affidavit, which is filed, for a rehearing in the above-entitled action, wherein judgment was rendered against the said plaintiff (or defendant), in his absence, at the trial thereof, before the undersigned on the ----- day of -----, 19----; and such application having been allowed, and the cause opened for reconsideration;

Now, therefore, we command you to summon the said plaintiff (or defendant) to appear before G. W. H., Esq., one of the justices of the peace for the county of -----, on the ----- day of -----, 19----, at -----, in said county, when and where the complaint will be reheard and the same proceedings be had as if the case had not been acted on; and have you then and there this precept with the date and manner of its service.

Herein fail not. Witness our said justice, this ----- day of -----, 19----

G. W. H.-----
 Justice of the Peace.

See section 1500, rule 21.

[No. 3]

AFFIDAVIT TO OBTAIN ATTACHMENT

(Title as in No. 1)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to the plaintiff in the sum of ----- dollars (state any cause of action founded on contract, specifying the amount of the claim and the grounds thereof).

2. That the said defendant (state any fact or facts, so as to bring the case within one of the classes in which an attachment may issue. The facts must be stated positively and affirmatively, not merely upon information and belief, except where a fact is alleged with a particular intent. The intent in such case may be stated as on information and belief. See No. 4.)

Sworn to and subscribed before me, this ----- day of -----, 19----

A-----B-----
 G. W. H.-----
 Justice of the Peace.

See sections 799, 809, 1500, rule 17.

[No. 4]

ANOTHER FORM OF AFFIDAVIT TO OBTAIN ATTACHMENT

(Title, etc., as in No. 1)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to plaintiff in the sum of _____ dollars for goods sold and delivered to said defendant by the plaintiff on or about the _____ day of _____, 19____

2. That the said defendant has departed from this state, or keeps himself concealed therein, with intent, as defendant is informed and believes, to avoid the service of a summons (or with intent, etc., to defraud defendant's creditors).

A. B.-----

(Sworn to, etc., as in No. 3.)

See sections 799, 809, 1500, rule 17.

[No. 5]

AFFIDAVIT AGAINST A FOREIGN CORPORATION

North Carolina, _____ County.

A-----B----- }
against } Before _____, Justice of the Peace.
The Highland Mining Co. }

A. B., the plaintiff above named, being duly sworn, deposes and says:

1. That the defendant above named is indebted to the plaintiff in the sum of _____ dollars for the use and occupation of certain premises, by permission of plaintiff, from the _____ day of _____, 19____, until the _____ day of _____, 19____

2. That the defendant is a foreign corporation, created under the laws of the state of _____

3. That the cause of action above stated arose in this state.

A. B.-----

(Sworn to, etc., as in No. 3.)

[No. 6]

UNDERTAKING UPON ATTACHMENT

(Title as in No. 1 or No. 5)

Whereas, the plaintiff above named is about to apply for a warrant of attachment against the property of the above-named defendant:

Now, therefore, we, J. W. B., of _____ County, and W. D. M., of _____ County, undertake in the sum of _____ dollars (the sum must be at least two hundred dollars), that if the said warrant be granted, and the defendant recover judgment in this action, or the attachment be set aside by order of the court, the plaintiff shall pay all costs that may be awarded to defendant in the same, and all damages which he may sustain by reason of such attachment.

J. W. B.-----

W. D. M.-----

Signed and delivered in the presence of G. W. H., Esq., this _____ day of _____, 19____

G. W. H.-----
Justice of the Peace.

See sections 803, 1500, rule 17.

[No. 7]

WARRANT OF ATTACHMENT

(Title as in No. 1 or No. 5)

State of North Carolina, to any constable or other lawful officer of _____ County--
Greeting:

It appearing by affidavit to the undersigned that a cause of action exists in favor of the plaintiff against the defendant for the sum of _____ dollars, and that the defendant is not a resident of this state (or otherwise, as the fact may be), and the plaintiff having given the undertaking as required by law:

Now, therefore, you are commanded forthwith to attach and safely keep all the property of the said defendant C. D. in your county, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, with costs and expenses; and have you this warrant before G. W. H., one of the justices of the peace for your county, at his office in said county, on the ----- day of -----, 19____, with your proceedings hereon.

Witness our said justice, this ----- day of -----, 19____

G. W. H.-----
Justice of the Peace.

See sections 805, 809, 1500, rule 17.

[No. 8]

OFFICER'S RETURN TO BE INDORSED ON ATTACHMENT

I, O. P. M., constable (or sheriff) of ----- County, do hereby return that, by virtue of the within attachment, I have seized and taken into my possession the tangible personal property (or, have levied on the real estate, as the case may be) of the defendant within named, specified in the inventory hereto annexed.

Dated this ----- day of -----, 19____

O. P. M.-----
Constable (or Sheriff).

See sections 807, 808, 1500, rule 17.

[No. 9]

INVENTORY OF PROPERTY ATTACHED TO ABOVE RETURN

(Title as in No. 1 or No. 5)

I do hereby certify that the following is a true and just inventory of all the property seized or levied on by me under a warrant of attachment, issued in the above-entitled action by G. W. H., Esq., with a statement of the books, vouchers, papers, rights and credits taken into my custody by virtue of said warrant. (Insert list of property by items.)

I do further certify that the following property mentioned in the above inventory is perishable, and that the expense of keeping the same until the termination of the suit would exceed one-fifth of its value; and I do hereby apply to this court for authority to sell the same. (Insert a list of perishable property.)

Dated this ----- day of -----, 19____

O. P. M.-----
Constable (or Sheriff).

See sections 807, 1500, rule 17.

[No. 10]

ORDER DIRECTING SALE OF PERISHABLE PROPERTY

(Title as in No. 1 or No. 5)

It appearing by the inventory returned by O. P. M., constable (or sheriff), under the warrant of attachment granted in this action, that the following property mentioned in said inventory is perishable, to wit: (Insert here the list of perishable property.)

It is therefore ordered that the said property be sold by the said officer at public auction, at such time and place as he shall deem advisable, and that the said officer give notice of such sale as the sale of personal property on execution.

It is further ordered that the proceeds of such sale be retained by said officer, and disposed of in the same manner as the property itself, if the same had not been sold.

Dated this ----- day of -----, 19____

G. W. H.-----
Justice of the Peace.

See sections 812, 1500, rule 17.

[No. 11]

NOTICE OF LEVY ON PROPERTY NOT CAPABLE OF MANUAL DELIVERY

To H. B.----- :

Take notice that by warrant of attachment issued in this action, a certified copy of which is herewith served upon you, I have levied upon, and do hereby levy upon, your indebted-

ness, amounting to _____ dollars or thereabouts, to the defendant above named. (Describe as particularly as possible the shares, debts or property levied upon.)

Dated this _____ day of _____, 19____

O. P. M. _____
Constable (or Sheriff).

The officer will indorse on the copy of the attachment served with the above notice the following certificate:

I do hereby certify that the within is a true copy of the warrant of attachment in my possession, issued in this action, and of the whole thereof.

Dated this _____ day of _____, 19____

O. P. M. _____
Constable (or Sheriff).

See sections 817, 818, 1500, rule 17.

[No. 12]

ORDER DIRECTING THIRD PERSON (H. B.) TO APPEAR AND BE EXAMINED

(Title as in No. 1 or No. 5)

It appearing to me by the certificate of O. P. M., constable (or sheriff) of said county, that the said officer, with a warrant of attachment against the property of C. D., the defendant in this action, has applied to H. B. for the purpose of levying upon a debt owing to the defendant by said H. B. (or upon property of said defendant held by said H. B., or otherwise), and that the said H. B. refuses to furnish said officer with a certificate designating the amount of the debt owing by said H. B. to the defendant, or the amount and description of the property held by said H. B. for the benefit of the defendant:

Now, therefore, I do order and require the said H. B. to attend before me at my office on the _____ day of _____, 19____, and be examined on oath concerning the same.

Dated this _____ day of _____, 19____

G. W. H. _____
Justice of the Peace.

See sections 819, 1500, rule 17.

[No. 13]

ATTACHMENT TO ENFORCE OBEDIENCE TO ABOVE ORDER

(Title as in No. 1 or No. 5)

State of North Carolina, to any constable or other lawful officer of _____ County—
Greeting:

Whereas, it appears that H. B. was duly served on the _____ day of _____, 19____, with an order issued by G. W. H., Esq., one of our justices of the peace for said county, requiring said H. B. to attend before said justice at his office, in said county, on the _____ day of _____, 19____, and be examined on oath concerning a certain debt owing to the defendant, named in the above action, by the said H. B. (or property held by the said H. B. for the benefit of the defendant, or otherwise, as the case may be);

And whereas, the said H. B., in contempt of said order, has refused or neglected, and doth still refuse or neglect, to appear and be examined on oath, as in said order he is required to do:

Now, therefore, we command you that you forthwith attach the said H. B., so as to have his body before G. W. H., Esq., one of our justices of the peace for your county, on the _____ day of _____, 19____, at his office, in said county, then and there to answer, touching the contempt which he, as is alleged, hath committed against our authority; and further, to perform and abide by such order as our said justice shall make in this behalf. And have you then and there this writ, with a return, under your hand, of your proceedings thereon.

Hereof fail not, at your peril.

Witness, our said justice, this _____ day of _____, 19____

G. W. H. _____
Justice of the Peace.

See sections 820, 1500, rule 17.

[No. 14]

UNDERTAKING ON DISCHARGE OF ATTACHMENT

(Title of the cause as in No. 1)

Whereas, the property of the above-named C. D. has been attached, and the defendant desires a discharge of said attachment on giving security according to law:

Now, therefore, we, B. B., of _____ County, and D. D., of _____ County, undertake in the sum of _____ dollars (the sum named must be at least double the amount claimed by plaintiff), that if the said attachment be discharged we will pay to the plaintiff, on demand, the amount of the judgment that may be recovered against the defendant in this action.

Dated this _____ day of _____, 19____

(Signed) B. B. _____
D. D. _____Signed and delivered in the presence of G. W. H., Esq., this _____ day of _____,
G. W. H. _____
Justice of the Peace.

ACKNOWLEDGMENT AND AFFIDAVIT OF SURETIES

North Carolina, _____ County.

On this _____ day of _____, 19____, before me personally appeared the above named B. B. and D. D., known to me to be the persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

And the said B. B. and D. D., being severally sworn, each for himself, says that he is a resident of the State of North Carolina and a householder (or freeholder) therein.

B. B. _____
D. D. _____

Sworn and subscribed before me the day above written.

G. W. H. _____
Justice of the Peace.

See sections 814, 815, 1500, rule 17.

[No. 15]

ORDER VACATING ATTACHMENT ON SECURITY BEING GIVEN

(Title as in No. 1 or No. 5)

The defendant having appeared in this action and applied to discharge the attachment on giving security, and the said defendant having delivered to the court an undertaking in due form of law, which has been duly approved by the court:

It is ordered that the attachment issued in this action on the _____ day of _____, 19____, be and the same is hereby vacated and discharged, and the defendant is released therefrom in all respects. It is further ordered that any and all proceeds of sales and money collected by O. P. M., constable (or sheriff), and all property attached, now in said officer's possession, be paid and delivered to the said defendant or his agent.

Dated this _____ day of _____, 19____

G. W. H. _____
Justice of the Peace.

See sections 814, 1500, rule 17.

[No. 16]

FORM OF PUBLICATION TO BE MADE BY PLAINTIFF IN ATTACHMENT

(Title as in No. 1)

[Amount sued for] due by note (or otherwise as the fact may be). Warrant of attachment returnable before G. W. H., Esq., a justice of the peace for _____ County, North Carolina, at his office (or otherwise as the case may be), on the _____ day of _____, 19____, when and where the defendant is required to appear and answer the complaint.

Dated this _____ day of _____, 19____

A. B. _____, Plaintiff.

See sections 806, 810, 1500, rule 17.

[No. 17]

AFFIDAVIT FOR ARREST ON DEBT FRAUDULENTLY CONTRACTED

(Title as in No. 1)

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to the plaintiff in the sum of _____ dollars on an inland bill of exchange, drawn on the _____ day of _____, 19____, by defendant on the First National Bank of Charlotte, North Carolina, payable at sight to the order of plaintiff.

2. That on the _____ day of _____, 19____, the defendant applied to the plaintiff to purchase a bill of goods amounting to _____ dollars, which the plaintiff offered to sell to the defendant for cash; that the defendant, contriving to defraud the plaintiff, represented that he had money on deposit at said National Bank for more than the amount of the proposed purchase, and offered to give plaintiff a sight draft on said bank; that the plaintiff, relying upon the representations of the said defendant, and solely induced thereby, sold and delivered a bill of goods amounting to _____ dollars to the defendant, who thereupon drew the sight order on said bank above referred to; that on the _____ day of _____, 19____, the plaintiff presented said draft at said bank for acceptance, when the same was not accepted for want of any funds in said bank to the credit of the defendant; that notice of nonacceptance was given to the defendant, who has wholly refused to pay the draft or any part thereof; that the representations made as aforesaid by the defendant were, and each and every of them was, as deponent is informed and believes, untrue; and that the defendant, as deponent is informed and believes, did not have, nor expect to have, any funds on deposit at said bank at the making of the representations above mentioned, but said defendant was then and is now wholly insolvent.

Sworn to and subscribed before me, this _____ day of _____, 19____
 A. B. _____
 G. W. H. _____
 Justice of the Peace.

See sections 767, 768, 769, 1500, rule 18.

[No. 18]

UNDERTAKING ON ARREST

(Title as in No. 1)

Whereas, the plaintiff above named is about to apply (or has applied) for an order to arrest the defendant, C. D.;

Now, therefore, we, J. J., of _____ County, and P. P., of _____ County, undertake, in the sum of _____ dollars (the sum must be at least one hundred dollars), that if the said defendant recover judgment in this action the plaintiff will pay all costs that may be awarded to the said defendant and all damages which he may sustain by reason of his arrest in this action.

Signed in my presence, this _____ day of _____, 19____
 J. J. _____
 P. P. _____
 G. W. H. _____
 Justice of the Peace.

See sections 770, 1500, rule 18.

[No. 19]

ORDER OF ARREST

(Title as in No. 1)

North Carolina, _____ County, _____ Township.

To any constable or other lawful officer of said county:

For the causes stated in the annexed affidavit, you are required forthwith to arrest C. D., the defendant named above, and hold him to bail in the sum of _____ dollars (the sum should be the amount of the plaintiff's claim), and to return this order before

the undersigned at his office in said county, on the _____ day of _____, 19____; of which return you will give notice to plaintiff or his attorney.

Dated this _____ day of _____, 19____

G. W. H. _____
Justice of the Peace.

See sections 771, 773, 1500, rule 18.

[No. 20]

UNDERTAKING OF BAIL ON ARREST

(Title as in No. 1)

Whereas, the above named defendant, C. D., has been arrested in this action;

Now, therefore, we, B. B., of _____ County, and D. D., of _____ County, undertake, in the sum of _____ dollars (the sum should be the same as mentioned in the order of arrest), that if the defendant is discharged from arrest he shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce judgment therein.

B. B. _____
D. D. _____

Signed in my presence, this _____ day of _____, 19____

G. W. H. _____
Justice of the Peace.

See sections 777-781, 1500, rule 18.

[No. 21]

NOTICE OF EXCEPTION TO BAIL

(Title as in No. 1)

To O. P. M., constable (or sheriff) of the county of _____:

Take notice, that the plaintiff does not accept the bail offered by the defendant in this action (and if the undertaking is defective in form or otherwise, add also), and further he excepts to the form and sufficiency of the undertaking.

Yours, etc.,

A. B. _____, Plaintiff.

(or M. W. N. _____, Attorney for Plaintiff.)

Dated this _____ day of _____, 19____

See sections 779, 1500, rule 18.

[No. 22]

NOTICE OF JUSTIFICATION OF BAIL

(Title as in No. 1)

To A. B., Plaintiff (or M. W. N., attorney for plaintiff):

Take notice, that the bail in this action will justify before G. W. H., Esq., a justice of the peace for said county, at the office of said justice, in said county, on the _____ day of _____, 19____

Dated this _____ day of _____, 19____

C. D. _____
(or, M. W. N. _____, Attorney for C. D.), Defendant.

See section 1500, rule 18.

[No. 23]

NOTICE OF OTHER BAIL

(Title as in No. 1)

Take notice that R. S., of _____ County (physician), and Y. Y., of _____ County (farmer), are proposed as bail, in addition to (or in place of) B. B. and D. D., the bail already put in; and that they will justify (conclude as in last form). Date, etc.

See sections 780, 1500, rule 18.

[No. 24]

JUSTIFICATION OF BAIL

(Title as in No. 1)

On this _____ day of _____, 19____, before G. W. H., Esq., a justice of the peace for said county, personally appeared B. B. and D. D. (or R. S. and Y. Y., as the case may be), the bail given by the defendant C. D. in this action, for the purpose of justifying pursuant to notice; and the said B. B., being duly sworn, says:

1. That he is a resident and householder (or freeholder) in this state;
2. That he is worth the sum of _____ dollars (the amount specified in the order of arrest), exclusive of property exempt from execution.

And the said D. D., being duly sworn, says:

(As with the other bail.)

(And so on with each bail offered.)

Examination taken and sworn to before me, this _____ day of _____, 19____

(Signatures of bail.)

G. W. H. _____
Justice of the Peace.

See sections 781, 782, 1500, rule 18.

[No. 25]

ALLOWANCE OF BAIL

(Title as in No. 1)

The bail of the defendant, C. D., within mentioned, having appeared before me and justified, I do find the said bail sufficient, and allow the same.

Dated this _____ day of _____, 19____

G. W. H. _____
Justice of the Peace.

See sections 783, 1500, rule 18.

[No. 26]

SUBPŒNA TO TESTIFY

State of North Carolina, _____ County.

To S. T. _____, greeting: (the justice may insert any number of necessary names).

You (and each of you) are commanded to appear personally before G. W. H., Esq., a justice of the peace for said county, at his office in said county, on the _____ day of _____, 19____, to give evidence in a certain civil action now pending before said justice, and then and there to be tried, between A. B., plaintiff, and C. D., defendant, on the part of the defendant (or plaintiff).* Herein fail not, under the penalty prescribed by law. Witness our said justice, this _____ day of _____, 19____

G. W. H. _____
Justice of the Peace.

See sections 1495-1497.

[No. 27]

N. B.—The justice may, instead of a formal subpœna, indorse on the summons or other process an order for witnesses, substantially as follows:

The officer to whom the within process is directed will summon the following persons as witnesses for the plaintiff: _____; and the following as witnesses for the defendant: _____; and will notify all such witnesses to appear and testify at the time and place within named for the return of this process.

Dated this _____ day of _____, 19____

G. W. H. _____
Justice of the Peace.

See section 1495.

[No. 28]

SUBPŒNA DUCES TECUM

If any witness has a paper or document which a party desires as evidence at the trial, the justice will pursue the form No. 26 as far down as the asterisk (*) and then add the following clause:

And you, S. T., are also commanded to bring with you and there produce as evidence a certain bond (describe particularly) which is now in your possession or under your control, together with all papers, documents, writings or instruments in your custody, or under your control. (Conclude as in form No. 26.)

See sections 1497, 1805.

[No. 29]

FORM OF OATH OF WITNESS

You swear that the evidence you will give as to the matters in difference between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth. So help you, God.

[No. 30]

PROCEEDINGS AGAINST DEFAULTING WITNESS

When a witness, under subpœna, fails to attend, the justice will note the fact in his docket by some such entry as the following:

R. P., a witness summoned on behalf of the plaintiff, called and failed.

If the party who suffers by default of the witness wishes to move for the penalty against him, he will serve substantially the following notice on the witness:

(Title as in No. 1)

To R. P.:

Take notice, that on the ____ day of _____, 19____, the plaintiff in the above action will move G. W. H., Esq., the justice before whom the trial of said action was had, on the ____ day of _____, 19____, for judgment against you for the sum of _____ dollars, forfeited by reason of your failure to appear and give evidence on said trial as you were summoned to do.

Dated this ____ day of _____, 19____ A. B. _____, Plaintiff.

The justice will enter the proceedings on the foregoing notice on his docket as follows:

A-----B-----	} Justice's Court.
against	
C-----D-----	

 Motion for penalty against R. P., defaulting witness.

_____ day of _____, 19____, A. B., above named, appears, and according to a notice filed and duly served on R. P., moved for the penalty of _____ dollars forfeited by the said R. P. by reason of his failure to attend and give evidence on the trial of a cause, wherein A. B. was plaintiff and C. D. was defendant, tried before me at my office on the ____ day of _____, 19____, as appears by entry duly made on my docket; when and where the said R. P., a witness summoned on the part of the plaintiff in that action, was called and did fail.

R. P. appears and assigns for excuse "high water," and offers his own affidavit, which is filed. He also offers as a witness in his behalf S. S., who, being duly sworn, testifies that (state what S. S. says about the condition of the water at the time). R. P., having no other evidence, closed the case on his part. Whereupon A. B. offered M. Y. as a witness, who, being sworn, testifies (state what witness says).

Neither party having any other evidence, and after hearing all the proofs and allegations submitted for and against the motion, it is adjudged, on motion of A. B., that A. B. do recover of R. P. the sum of _____ dollars, penalty forfeited by reason of the premises, and the further sum of _____ dollars, costs of this motion.

[No. 31]

FORM OF A VENIRE

The justice will make a list of the persons drawn by him as jurors, and indorse thereon substantially as follows:

To O. P. M., constable of ----- County:

You are hereby directed to summon the persons named within to appear as jurors before me at my office in your county, on the ----- day of -----, 19----, for trial of a civil action now pending between A. B., plaintiff, and C. D., defendant, then and there to be tried. And have you then and there the names of the jurors you shall summon, with this precept.

Dated this ----- day of -----, 19----

G. W. H.-----
Justice of the Peace.

[No. 32]

FORM OF JUROR'S OATH

You swear well and truly to try the matter in difference between A. B., plaintiff, and C. D., defendant, and a verdict to give thereon according to the evidence in the cause. So help you, God.

Juror need not repeat words "so help me, God": State v. Paylor, 89-539. See section 1516.

[No. 33]

FORM OF OATH TO CONSTABLE IN CHARGE OF THE JURY

You swear that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial together in some private and convenient place, without any meat or drink, except such as may be ordered by the court; that you will not suffer any communication, orally or otherwise, to be made to them, and that you will not communicate with them yourself, orally or otherwise, unless by order of the court. So help you, God.

[No. 34]

SUMMONS AGAINST DEFAULTING JUROR TO SHOW CAUSE

State of North Carolina, to any constable or other lawful officer of ----- County—
Greeting:

We command you to summon R. S. to appear before G. W. H., Esq., a justice of the peace for your county, at his office in said county, on the ----- day of -----, 19----, to show cause why he, the said R. S., should not be fined according to law for his nonattendance as a juror before our said justice at his office in said county on the ----- day of -----, 19----, in a certain cause then and there pending, in which A. B. was plaintiff and C. D. was defendant; and have you then and there this precept, with the date and manner of your service thereof.

Witness, our said justice, this ----- day of -----, 19----

G. W. H.-----
Justice of the Peace.

[No. 35]

DEMURRER TO COMPLAINT

(Title as in No. 1)

The defendant demurs to the complaint in this action, for that the said complaint does not state facts sufficient to constitute a cause of action (or, for that the said complaint is not sufficiently explicit to enable this defendant to understand it).

(Signature of defendant or defendant's attorney.)

See section 1500, rule 4.

[No. 36]

DEMURRER TO ANSWER

(Title as in No. 1 or No. 5)

The plaintiff demurs to the answer of the defendant, for that the facts stated in the answer are not legally sufficient to constitute a defense to this action (or, for that the said answer is not sufficiently explicit to make this plaintiff understand it).

(Signature of plaintiff or plaintiff's attorney.)

See section 1500, rule 4.

[No. 37]

JUDGMENT UPON DEMURRER

NOTE.—If the justice thinks the objection raised by the demurrer to the pleadings is well founded, he will make this entry on his docket:

Demurrer to the complaint (or to the answer) filed, heard and sustained; and whereupon it is ordered that the said pleading be amended without cost (or upon payment of costs, as the case may be).

This order to amend the defective pleading is a matter of course, and is the only judgment which the justice can render upon demurrer. He cannot give a final judgment in the cause at this stage, for the party may choose to amend his pleadings and try the case on the facts. If, however, the party refuse to amend the defective pleading, the justice will disregard the same, and proceed to render final judgment, as follows:

The plaintiff (or defendant) having refused to amend his complaint (or his answer) demurred to, it is adjudged that the defendant go without day and recover of the plaintiff the sum of ----- dollars, costs of this action (or that the plaintiff recover of the defendant the sum of ----- dollars, damages, and the further sum of ----- dollars, costs of this action.)

If the justice deem the objection, raised by the demurrer, not well founded, he will enter in his docket as follows:

Demurrer to the complaint (or to the answer) filed, heard and overruled, and he will then proceed to the evidence in the cause.

NOTE.—The following is offered as a general precedent of the manner in which the justice will make the entries in his docket:

As to allowing amendment to pleadings when demurrer sustained, see sections 545-547, 1500, rules 5, 12, 13.

[No. 38]

(Title as in No. 1)

-----, 19----. Summons issued; returnable on the ---- instant at my office.
 -----, 19----. Summons returned, served on defendant by O. P. M., constable, on the ---- instant, both parties appear, the plaintiff in person, the defendant by R. H. R., Esq., attorney.

The plaintiff complains on a promissory note executed by the defendant to him, dated -----, 19----, payable one day after date, for \$-----, and also for goods sold and delivered to the defendant, and claims damages for \$-----

The defendant answers and denies each and every allegation in the complaint, and claims a setoff of \$----- for wood sold and delivered to the plaintiff, and also of \$----- for work and labor performed for the plaintiff.

On joining issue of fact as above, the action is, by consent of parties, adjourned to the ---- instant, at my office.

A venire is also issued at the plaintiff's (or defendant's) demand, returnable at the time and place last mentioned.

-----, 19----. The parties appear and proceed to the trial of the cause. The following jurors are returned as summoned upon the venire by O. P. M., constable. (Insert the names of all jurors summoned.) The following jurors, who are returned as summoned, do not appear. (Insert their names.) The following jurors appear according to the summons. (Insert their names.) The following jurors are sworn to try the action. (Insert their names.)

H. P. and J. M., witnesses for the plaintiff, and W. F., a witness for the defendant, are sworn and testify; J. S., a witness on the part of the defendant, is offered, but objected to by the plaintiff on the ground (state the ground), and rejected.

Having heard the evidence (and the arguments of counsel, if any), the cause is submitted to the jury, who retire, under charge of O. P. M., a constable duly sworn for that purpose, and afterwards return in open court and publicly deliver their verdict, by which they find in favor of the plaintiff for \$----- damages; whereupon, I adjudged that the plaintiff do recover of the defendant—

Damages, - - - - - \$-----
 Costs, - - - - - -----

-----, 19----. Execution issued for above judgment to O. P. M., constable.

-----, 19----. Notice of appeal served on me by defendant; my fee paid and return to the appeal made by me.

N. B.—If the action is tried by the justice without a jury, all that relates to the venire and the verdict in the above form must be left out, and the judgment will be entered as follows:

After hearing the proofs and allegations of the respective parties, I do adjudge that the plaintiff recover, etc. (as above).

Form merely referred to in Smith v. Newberry, 140-387.

[No. 39]

FORM OF NOTICE OF APPEAL TO THE SUPERIOR COURT, WHERE A NEW TRIAL OF THE WHOLE MATTER IS TO BE HAD

(Title as in No. 1)

To G. W. H., Esq., a justice of the peace for said county.

Take notice, that the defendant in the above action appeals to the Superior Court from the judgment rendered therein by you on the ----- day of -----, 19----, in favor of the plaintiff for the sum of sixty-five dollars damages and the further sum of three dollars and seventy-five cents costs, and that this appeal is founded upon the ground that the said judgment is contrary to law and evidence.

Dated this ----- day of -----, 19----

W. W-----
 Attorney for Appellant.

See section 1530.

[No. 40]

RETURN TO NOTICE OF APPEAL

A-----B----- }
 against } County of -----
 C-----D----- }

To the Superior Court of ----- County:

An appeal having been taken in this action by the defendant, I, G. W. H., the justice before whom the same was tried, in pursuance of the notice of appeal hereto annexed, do hereby certify and return that the following proceedings were had by and before me in said action:

On the first of February, one thousand eight hundred and sixty-nine, at the request of the plaintiff, I issued a summons in his favor and against the defendant, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office; and at the same time and place the parties personally appeared.

The plaintiff complained for goods sold and delivered to defendant to the amount of \$75. The defendant denied the right of the plaintiff to recover that amount for the goods, on the ground that he had paid, at or shortly after the purchase of said goods, ----- dollars thereon; and he also claimed to have a setoff against the plaintiff to the amount of \$85 for board and lodging furnished to plaintiff and work and labor done for him; and he claimed to be entitled to judgment against the plaintiff for \$-----

Both parties introduced evidence upon the claims so made by them, and after hearing their proofs and allegations, I rendered judgment in favor of the plaintiff and against the defendant, on the tenth of February, eighteen hundred and sixty-nine, for \$65 damages, and for the further sum of \$3.75, costs of the action.

I also certify that on the eleventh of February, eighteen hundred and sixty-nine, the defendant served the annexed notice of appeal on me, and at the same time paid me my fee of \$1 for making my return.

All of which I send, together with the process, pleadings, and other papers in the cause.
Dated this 15th day of February, 1904.

G. W. H. _____
Justice of the Peace.

N. B.—If the cause was tried by a jury, state the fact and set forth the verdict, with the judgment thereon. It is not necessary to set out in the return a copy of any process, pleading, affidavit or other paper. It is sufficient to refer to such a paper as filed and as herewith sent.

See sections 1532, 1533.

[No. 41]

WHERE THE SUM DEMANDED EXCEEDS TWO HUNDRED DOLLARS

It appearing that the sum demanded by the plaintiff in this action exceeds two hundred dollars, it is ordered that the action be dismissed, and judgment is rendered against A. B., plaintiff, for the sum of _____ dollars, costs.

(Date and sign.)

See sections 1473, 1475.

[No. 42]

WHERE THE TITLE TO REAL ESTATE IS IN QUESTION

N. B.—The defendant, if he wishes to make answer to title, must file a written answer to the complaint, setting forth the facts.

ANSWER OF TITLE

(Title as in No. 1)

The defendant answers to the complaint:

1. That no allegation thereof is true.
2. That the plaintiff ought not to have or maintain his action against the defendant, because the premises mentioned and described in the complaint, at the time when the rent and render, for which said action is brought, is alleged to be due, was and is now the land and freehold of one J. D., and not that of the plaintiff; nor was the plaintiff then, nor is he now, entitled to the possession thereof; and the defendant further answers that the title to said premises was, at the time aforesaid, and is now, in said J. D., and will come in question on the trial of this action.

Dated this _____ day of _____, 19____ C. D. _____, Defendant.

It appearing from the answer and proof of the defendant that the title to real estate is in controversy in this action, it is ordered that the action be dismissed, and judgment is rendered against the plaintiff for _____ dollars, costs.

See sections 1476, 1477.

[No. 43]

TENDER OF JUDGMENT

(Title as in No. 1)

To C. D. _____:

Take notice, that the defendant hereby offers to allow judgment to be taken against him by the plaintiff in the above action for the sum of fifty dollars, with costs.

Dated this _____ day of _____, 19____

C. D. _____, Defendant.

See section 1500, rule 14.

[No. 44]

ACCEPTANCE OF TENDER OF JUDGMENT

(Title as in No. 1)

To A. B.----- :

Take notice, that the plaintiff hereby accepts the offer to allow the plaintiff to take judgment in the above action for the sum of fifty dollars, with costs, and the justice will enter up judgment accordingly.

Dated this ----- day of -----, 19----

A. B.-----, Plaintiff.

See section 1500, rule 14.

[No. 45]

FORM OF JUDGMENT ON TENDER

(Title as in No. 1)

N. B.—The justice will state all the proceedings in the action from the issuing of the summons down to the appearance of the parties and the complaint of the plaintiff, and then proceed as follows :

Whereupon, the said defendant, before answering said complaint, made and served an offer, in writing, to allow the plaintiff to take judgment against him for the sum of fifty dollars with costs;* and the said plaintiff thereupon accepted such offer, and gave notice thereof to the defendant in writing; said offer and acceptance thereof being filed;

Now, therefore, judgment is accordingly rendered in favor of the plaintiff and against the defendant for the sum of fifty dollars damages, and the further sum of one dollar, costs.

If notice of acceptance is not given, the entry will be as follows :

(Follow the foregoing form down to the asterisk (*) and then add) :

And the said plaintiff having refused to accept such offer, the defendant answered the complaint by denying, etc. (state the defense of the defendant down to the judgment, which, in case the plaintiff fails to recover more than the sum mentioned in the offer, will be entered thus) :

After hearing the proofs and allegations of the respective parties, I adjudge that the plaintiff do recover the sum of fifty dollars damages, and the further sum of one dollar, costs.

I further adjudge that the defendant do recover of the plaintiff the sum of two dollars and seventy-five cents, costs accruing in the action subsequent to the offer of the defendant referred to.

[No. 46]

GENERAL FORM—EXECUTION

(Title as in No. 1)

State of North Carolina, to any constable or other lawful officer of ----- County—
Greeting :

Whereas, judgment has been rendered by G. W. H., Esq., a justice of the peace for said county, against C. D., in favor of A. B., for the sum of ----- dollars damages, and the further sum of ----- dollars costs, on the ----- day of -----, 19----

You are therefore commanded forthwith to levy of the goods and chattels of the said C. D. (excepting such goods and chattels as are by law exempt from execution) the amount of such judgment, with interest from the date thereof until the money is recovered.

And make due return, according to law, in sixty days from the date hereof.

Dated this ----- day of -----, 19----

G. W. H.-----

Justice of the Peace.

See sections 675, 1521, 1522.

[No. 47]

EXECUTION IN ATTACHMENT

(Title as in No. 1)

State of North Carolina, to any constable or other lawful officer of _____ County—
Greeting:

Whereas, in pursuance of a warrant of attachment, dated the _____ day of _____, 19____, issued by G. W. H., Esq., a justice of the peace of said county, in an action wherein A. B. was plaintiff and C. D. defendant, the following property of defendant was, on the _____ day of _____, 19____, duly levied on and attached:

(Here insert a list of property)

And whereas, judgment was rendered in said action, on the _____ day of _____, in favor of said plaintiff, and against the said defendant in the sum of _____ dollars:

Therefore, we command you that you satisfy the said judgment out of the property so attached as aforesaid, by the sale of the same or so much thereof as shall be sufficient to satisfy the said judgment; and if a sufficient sum be not realized therefrom, then you satisfy the said judgment out of any other goods and chattels of the said judgment debtor within your county.

And make due return thereof according to law within sixty days from the date hereof.

Witness, our said justice, this _____ day of _____, 19____

G. W. H. _____

Justice of the Peace.

See sections 824, 1500, rule 17.

[No. 48]

RECORD OF CONVICTION OF A CONTEMPT

The justice will make an entry in his docket stating the particular circumstances of the contempt, of which the following is offered as an example:

Whereas, on the _____ day of _____, 19____, while engaged in the trial of an action (or other judicial act, as the case may be) in which A. B. was plaintiff and C. D. was defendant, at my office in _____ County, M. B. did willfully and contemptuously interrupt me, and did then and there conduct himself so disorderly and insolently towards me, and by making a loud noise did disturb the proceedings on said trial (or other judicial act) and impair the respect due to the authority of the law; and on being ordered by me to cease making such noise and disturbance, the said M. B. refused so to do, but on the contrary did publicly declare and with loud voice (state whatever offensive words were used); and whereas, when immediately called upon by me to answer for the said contempt said M. B. did not make any defense thereto, nor excuse himself therefrom; the said M. B. is therefore convicted of the contempt aforesaid, and is adjudged to pay a fine of five dollars and be imprisoned in the county jail for the term of two days, and until he pays such fine or is duly discharged from imprisonment according to law.

G. W. H. _____

Justice of the Peace.

See section 1480.

[No. 49]

WARRANT OF COMMITMENT FOR A CONTEMPT

(Title as in No. 1)

State of North Carolina, to the keeper of the common jail of _____ County—
Greeting:

Whereas, etc. (recite the record of conviction so as to show the entire matter of contempt, together with the judgment therefor, and then proceed as follows):

Therefore, you are hereby commanded to receive the said M. B. into your custody in the said jail, and him there safely keep during the said term of two days, and until he pays the said fine or is duly discharged according to law.

Herein fail not.

Dated this _____ day of _____, 19____

G. W. H. _____

Justice of the Peace.

See section 1480.

Rev., s. 1496; Code, s. 909.

NOTE. For criminal procedure and jurisdiction, see Criminal Procedure.

SUBCHAPTER IV. RECORDERS' COURTS

ART. 18. MUNICIPAL RECORDERS' COURTS

1536. In what cities and towns established; court of record. In each city and town in the state, which has acquired a population of five thousand or over by the last federal census, a recorder's court for such municipality may be established, which shall be a court of record and shall be maintained pursuant to the provisions of this subchapter.

1919, c. 277, ss. 1, 2.

For discontinuing the court, see s. 1582.

[Prior to the adoption of this subchapter inferior courts had been created in different localities under different names, and the cases cited in the annotations were decided under such special statutes.]

Legislature has power to establish courts inferior to the superior court and to prescribe their jurisdiction, civil and criminal, subject to constitutional restrictions: *State v. Boyd*, 175-791; *Oil Co. v. Grocery Co.*, 169-521; *State v. Dunlap*, 159-491; *State v. Collins*, 151-648; *State v. Shine*, 149-480; *State v. Baskerville*, 141-811; *State v. Lytle*, 138-738; *Mott v. Comrs.*, 126-866; *McCall v. Webb*, 125-243; *Wilson v. Jordan*, 124-683; *Rhyne v. Lipscombe*, 122-650; *Ewart v. Jones*; 116-570; *State v. Jones*, 97-469; *Bynum v. Powe*, 97-374; *Washington v. Hammond*, 76-33.

1537. Recorder's election and qualification; term of office and salary. The court shall be presided over by a recorder, who may be a licensed attorney at law, and who shall be of good moral character and, at the time of his appointment or election, a qualified elector of the municipality. The first recorder, upon the establishment of such court, shall be elected by the governing body of the municipality, either at the time of the establishment of the court or within thirty days thereafter, and he shall hold office until the next municipal election and until his successor is duly elected and qualified. If a vacancy occur in the office at any time, the same shall be filled by the election of a successor for the unexpired term by the governing body of the municipality, at the regular or special meeting called for that purpose. After the first elected recorder each succeeding recorder shall be nominated and elected in the municipality in the same manner and at the same time as is now provided by law for the elective officers of the municipality, and in the general election for such officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office, as is now provided by law for a justice of the peace, and shall file the same with the clerk of the board of the city or town. The salary of the recorder shall be determined and fixed in advance by the governing body of the city or town, and shall not be increased or decreased during the term of his office, and shall be paid out of the funds of the municipality.

1919, c. 277, s. 2.

Where a court was created by special statute for a municipal corporation, a mandamus will issue to compel the authorities to elect a recorder: *Battle v. Rocky Mount*, 156-330.

The requirement that the recorder must be "a licensed attorney at law" is unconstitutional: *State ex rel. Spruill v. Bateman*, 162-588.

1538. Time and place of holding court. The court shall be opened for the trial of criminal cases at least one day of each week, to be fixed by the governing body of the municipality, and shall continue its session from day to day until all busi-

ness is legally disposed of. The court shall be held in the city or town hall, or other place provided therefor, and other sessions of the court may be called by the recorder, as necessity may require.

1919, c. 277, s. 3.

1539. No subsequent change of judgment. When a case has been finally disposed of and judgment pronounced therein, it shall not thereafter be reopened or the judgment or sentence rendered therein be modified, changed or stricken out by the recorder after the adjournment of the regular weekly term or after the adjournment of any special term called by the recorder.

1919, c. 277, s. 3.

Power of court to suspend judgment: *State v. Burnette*, 173-734; *State v. Tripp*, 168-150.

1540. Procedure in the court. The recorder shall preside over the court and try and determine all criminal actions coming before him, the jurisdiction of which is conferred by this article, and the proceedings of the court shall be the same as are now prescribed for courts of justices of the peace and for the superior court so far as the same may reasonably apply.

1919, c. 277, s. 9.

1541. Criminal jurisdiction. The court shall have the following jurisdiction within the following named territory:

1. Original, exclusive, and concurrent jurisdiction, as the case may be, of all offenses committed within the corporate limits of the municipality which are now or may hereafter be given to justices of the peace under the constitution and general laws of the state, including all offenses of which the mayor or other municipal court now has jurisdiction.

The jurisdiction may be exclusive as to offenses within the corporate limits: *State v. Baskerville*, 141-811.

2. Original and concurrent jurisdiction with justices of the peace of all offenses committed outside the corporate limits of the municipality and within a radius of two miles thereof, which is now or may hereafter be given to justices of the peace under the constitution and general laws of the state.

Concurrent jurisdiction may be given: *State v. Brown*, 159-467; *State v. Rice*, 158-635; *State v. Doster*, 157-634; *State v. Collins*, 151-648; *State v. Shine*, 149-480.

3. Exclusive, original jurisdiction of all other criminal offenses committed within the corporate limits of such municipality and outside, but within a radius of two miles thereof, which are below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors.

Jurisdiction over petty misdemeanors: *State v. Freeman*, 172-925; *State v. Denton*, 164-530; *State v. Hyman*, 164-411; *State v. Dunlap*, 159-491; *State v. Shine*, 149-480; *State v. Lytle*, 138-738; and such jurisdiction may be exclusive—*State v. Collins*, 151-648; *State v. Alston*, 151-650; *State v. Shine*, 149-480. Provision in special statute to transfer case to superior court: *State v. Burnett*, 173-750.

4. Concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime committed within the territory above mentioned, of which the recorder's court is not herein given final jurisdiction.

5. All jurisdiction given by the general laws of the state to justices of the peace, or to the superior court, to punish for contempt, to issue writs ad testifi-

candum, and other process to require the attendance of witnesses and to enforce the orders and judgments of the court.

1919, c. 277, s. 4.

1542. Jurisdiction to recover penalties. The recorder's court shall also have jurisdiction to try all actions for the recovery of penalties imposed by law, or by any ordinance of the municipality in which the court is located, for any offense committed within the corporate limits of the municipality or outside thereof within two miles of the corporate limits, and all such penalties shall be recovered in the name of the municipality.

1919, c. 277, s. 10.

1543. Disposition of cases when jurisdiction not final. In all cases heard by the recorder against any person for any offense whereof the court has not final jurisdiction and in which probable cause of guilt is found, such person shall be bound in a bond or recognizance with sufficient surety to appear at the next succeeding term of the superior court of the county for the trial of criminal cases, and in default of such bond or recognizance he shall be committed to the common jail of the county to await trial; but in all capital cases such person shall be committed to the common jail of the county without bail.

1919, c. 5.

1544. Disposition of cases when jurisdiction final. All persons pleading guilty or convicted in the court of any offense of which the court has final jurisdiction shall be fined or imprisoned, according to law, and any person entering a plea of guilty, or who may be convicted of any such offense, shall also pay the costs of the prosecution.

1919, c. 277, s. 7.

Power of court to suspend judgment: *State v. Burnette*, 173-734; *State v. Tripp*, 168-150. Proceedings must be in open court, and not before recorder in his private office: *State v. Burnette*, 173-734.

1545. Sentences to be imposed. When any person is convicted, or pleads guilty, of any offense of which the court has final jurisdiction, the recorder may sentence him to the common jail of the county in which the court is held, and assign him to work on the public roads of the county as provided by law; or when such person is a woman or an infant of immature years, the recorder may sentence him or her to the city or county workhouse or state reformatory, or other penal institution provided by law for such purposes. If there is no chain-gang in the county in which the court is held, the recorder may sentence the person to work upon the public roads of any other county provided with a chain-gang for the working of public roads, as authorized by the general laws of the state.

1919, c. 277, s. 8.

1546. Appeal to superior court. Any person convicted of any offense of which the recorder has final jurisdiction may appeal to the superior court of the county from any judgment or sentence of the recorder, in the same manner as is now provided for appeals from courts of justices of the peace. Upon such appeal the defendant shall be required to give bond or recognizance with sufficient surety for his appearance at the next term of the superior court; and in default thereof the recorder shall commit him to the common jail of the county until he shall give bond or be otherwise discharged by law.

1919, c. 277, ss. 5, 9.

Appeals must be to superior court: *State v. Lytle*, 138-738; *State v. Ray*, 122-1097; *Pate v. R. R.*, 122-877; *Tate v. Comrs.*, 122-661; *Rhyne v. Lipsecombe*, 122-650. **And if no appeal is provided, there may be a review by certiorari or recordari:** *Taylor v. Johnson*, 171-84; *State v. Tripp*, 168-150; *State v. Ray*, 122-1097; *Rhyne v. Lipsecombe*, 122-650.

The right of appeal preserves defendant's right to a jury trial: *State v. Tate*, 169-373; *State v. Hyman*, 164-411; *State v. Shine*, 149-480; *State v. Brittain*, 143-668; *State v. Lytle*, 138-738.

A bill of indictment by a grand jury may be dispensed with in petty misdemeanors: *State v. Dunlap*, 159-491; *State v. Shine*, 149-480; *State v. Jones*, 145-460; *State v. Lytle*, 138-738—but not if the offense charged is a felony, *State v. Hyman*, 164-411.

No trial de novo under special statutes referred to: *State v. Hinson*, 123-755; *State v. Davidson*, 124-839; *State v. Bost*, 125-707.

1547. Costs paid to the municipality. All costs incurred in issuing warrants and serving the same in cases where the recorder has not final jurisdiction, and for the service of process arising in such cases when the process is served by the officer of the municipality, except as hereinafter provided, shall be paid to the municipality; and officers serving process issued from said court shall be allowed the same fees as are now allowed sheriffs in like cases, the same, when collected, to be paid over as herein provided. Where such officer is not an officer of a municipality such costs shall be dealt with as is now provided by law.

1919, c. 277, s. 6.

1548. Seal of court. The recorder's court shall have a seal with the impression, "The Recorder's Court of the City of _____," which seal shall be used in the attestation of writs, warrants, or other process, acts, judgments, or decrees of the court, in the same manner and to the same effect as the seal of other courts in the state; but no process issuing from the court, to be executed within the county in which court is held, shall require attestation by seal.

1919, c. 277, s. 11.

1549. Issuance and service of process. The recorder may issue process to the chief of police of the municipality in which the court is held, or to the sheriff, constable, or other lawful officer of the county in which the municipality is located, or to any other county in the state; and such process, when attested by the seal of the court, shall run anywhere in the state, and shall be executed by all public officers authorized to execute process, and be returned by them according to law.

The summons, warrant of arrest, and every other writ, process, or precept issuing from a recorder's court or other court inferior to the superior court, except justices of the peace, may be signed by the recorder, vice recorder, or presiding justice of the court, or by the clerk of the court or deputy clerk, where the court has a clerk or deputy.

1919, c. 277, s. 12; 1919, c. 157.

For civil process, see section 1591.

1550. Vice recorder; election and duties. The governing body of the municipality shall, at the same time and in the same manner as is provided herein for the election of the first recorder, elect a vice recorder, who shall have the jurisdiction and authority conferred upon the recorder when the recorder shall be prevented from attending to his duties on account of sickness or other temporary disability or by reason of his temporary absence. The vice recorder shall receive

the compensation allowed to the recorder for such services for the time that he may render such service, the compensation of the vice recorder to be deducted from the salary of the recorder, and the vice recorder shall be thereafter elected by the governing body of the municipality for the same term as the recorder is elected, and any vacancy occurring in the office of vice recorder shall be filled in the same manner as is provided for the filling of vacancies in the office of recorder.

1919, c. 277, s. 13.

1551. Clerk of court; election and duties; removal. The clerk of the recorder's court shall be elected by the governing body of the city or town at the same time and for the same term as the vice recorder, and all vacancies in the office of the clerk of the court shall be filled in the manner provided for filling vacancies in the office of vice recorder. Before entering upon the duties of his office, the clerk shall enter into a bond, with sufficient surety, in a sum to be fixed by the governing body of the municipality, not to exceed five thousand dollars, payable to the state, conditioned upon the true and faithful performance of his duties as such clerk and for the faithful accounting for and paying over of all money which may come into his hands by virtue of his office. The bond shall be approved by the governing body and shall be filed with the clerk of the superior court of the county. The clerk shall make monthly settlements with the county and city treasurers for all money which has come into his hands belonging to either. The clerk of the governing body of the municipality shall ex officio discharge the duties of the clerk of the court, unless the governing body shall elect some other person to discharge the duties. The governing body of the municipality shall have the right to remove the clerk of the court, either for incapacity or for neglect of the duties of his office; and in case of a vacancy for any cause the office shall be filled in the manner hereinbefore provided.

1919, c. 277, ss. 15, 18.

1552. Clerk to keep records. It shall be the duty of the clerk of the court to keep an accurate and true record of all costs, fines, penalties, forfeitures, and punishments by the court imposed, and the record shall show the name and residence of the offender, the nature of the offense, the date of the hearing of the trial, and the punishment imposed, which record shall at all times be open to inspection by any of the city authorities, or other person having business relating to the court. The clerk shall keep a permanent docket for recording all the processes issued by the court, which shall conform to the dockets kept by the clerk of the superior court. He shall also keep in proper files, to be provided by the city, a record of all cases which shall be disposed of in the court and the disposition made thereof.

1919, c. 277, s. 17.

1553. Clerk to issue process. The clerk of the court shall have all the power and authority now conferred upon justices of the peace to issue warrants for the arrest of all persons charged with the commission of offenses within the territory hereinbefore fixed, which warrants, however, shall be made returnable before the recorder of said court at the next sitting thereof, and shall be issued only upon affidavit made as now required by law to support warrants issued by justices of the peace. The clerk shall also have all power and authority of justices of the

peace or clerk of the superior court to issue subpœnas or other process, to run anywhere within the state; and when such subpœnas or other process shall run beyond the county in which the court is located the same shall be attested by the seal of the court, and shall also be signed by the recorder.

1919, c. 277, s. 18.

The warrant should state the charge with sufficient certainty to enable the court to proceed to judgment: *State v. Lunsford*, 150-862.

1554. Prosecuting attorney; duties and salary. There shall be a prosecuting attorney in the court, who shall appear for the prosecution in all cases therein and, when specially requested by the governing body of the municipality and the recorder, shall assist in the prosecution of all cases which may be bound over or appealed from the court to the superior court; for his services he shall be paid such amount per annum as may be fixed by the governing body, at the same time and in the same manner as is provided for fixing the salary of the recorder. The prosecuting attorney may, or may not, perform the duties of city attorney, in the discretion of the governing body of the municipality.

1919, c. 277, s. 16.

1555. Jury trial, as in justice's court. In all trials in the court, upon demand for a jury by the defendant or the prosecuting attorney representing the state, the recorder shall try the same as is now provided in actions before justices of the peace wherein a jury is demanded, and the same procedure as is now provided by law for jury trials before justices of the peace shall apply: Provided, however, that the compensation allowed jurors in all cases wherein the superior court has heretofore had final jurisdiction shall be the same as is allowed jurors in the superior court of the county in which the recorder's court is established.

1919, c. 277, s. 24.

See section 1501 et seq.

1556. Continuances, recognizances, and transcripts. The recorder's court shall have the same authority to grant continuances, take bonds and recognizances, and render judgments on forfeited bonds and recognizances, as is now vested by law in the superior courts, and the procedure regulating the issuing and service of notices against defendants and their sureties upon bonds and recognizances, and all other proceedings by taking and enforcing judgments in such cases, shall be the same as in the superior court in like cases. Transcripts of any judgments rendered may be docketed in the superior court of the county in which such court is held, in the same manner and with the same effect as judgments of other courts docketed as provided by law.

1919, c. 277, s. 21.

As to docketing judgments, see sections 613, 614, 1517.

1557. Officers' fees; fines and penalties paid. In each case disposed of by the recorder where the defendant is convicted or pleads guilty, there shall, in addition to other lawful costs, be allowed the following fees, to be taxed as a part of the costs against the defendant, viz.: For recorder, one dollar in each case involving the breach of a municipal ordinance and any crime or offense of which a justice of the peace has final jurisdiction, and a fee of two dollars in all other cases; for the prosecuting attorney, one dollar in all cases of violation of municipi-

pal ordinances and of any crime or offense of which a justice of the peace has final jurisdiction, and in all other cases a fee as now provided by law for solicitors prosecuting in the superior court; and for the clerk of such court the same fees as are now allowed to clerks of the superior court in similar cases; but in all cases of the breach of municipal ordinances and cases of which a justice of the peace has final jurisdiction and in which the defendant pleads guilty, the fee herein allowed a prosecuting attorney may be remitted by the recorder in his discretion. All costs recovered and collected in the court, except as herein otherwise provided, shall belong to the municipality and be paid into the treasury thereof. All fines and penalties collected shall be paid by the clerk of the court to the county treasury as provided by law, and all fees allowed by law for an arrest or serving other process in a criminal action, when the same shall have been made by the chief of police or other officer who shall be on a salary, shall be paid over to the treasurer of the municipality for the use of the same, and to reimburse it for the expense of maintaining and supporting the court.

1919, c. 277, s. 14.

1558. County to pay for offenders' work on roads. Whenever, under any judgment of the court, any defendant is sentenced to work upon the public roads or other public work in the county, or to pay a fine and the costs of the prosecution, or costs only, and the defendant shall in fact work out the sentence or fine and costs, or either, upon the public roads or other public works, as aforesaid, then the county shall be liable for and shall pay to the treasurer of the municipality one-half the amount of the costs taxed in the cause: Provided, the sentence imposed shall be of sufficient length to reimburse the county for one-half of such costs.

1919, c. 277, s. 19.

1559. Prosecutor may be taxed with costs. The recorder shall have full power, in any case in which he shall adjudge that the prosecution was not required by the public interests, to tax the prosecutor with the costs of such action; and in the event the recorder shall adjudge that prosecution is frivolous or malicious, he may imprison the prosecutor for the nonpayment of such costs, as provided by law for similar cases in other courts. When the costs are paid, they shall belong to the city.

1919, c. 277, s. 20.

See sections 1271, 1272, 1280.

1560. Justice of the peace to bind defendants to recorder's court; procedure thereon. In case any justice of the peace residing within the territory above mentioned shall bind any person over for any offense committed within said territory, of which the justice has committing, but not final, jurisdiction, but of which the recorder's court has final jurisdiction, then such justice of the peace, instead of binding the defendant over to the superior court of the county, shall bind him to appear at the recorder's court on the day succeeding the trial before the justice, at ten o'clock a.m. The justice of the peace shall at once turn over the case to the clerk of said court, and the clerk shall, upon receipt of the same, enter the case upon the docket of the court, and the recorder shall try such person either upon the original warrant under which he was bound over or upon a new warrant to be issued by him for such offense. In all cases the recorder shall have

the right to amend any warrant issued by him or by the clerk of the court, or sent up by any justice of the peace as hereinbefore provided, in the same manner and to the same extent as justices of the peace are now authorized by law to make amendments to warrants in justices' courts.

1919, c. 277, s. 22.

Appeals from justice of the peace must be taken to superior court: *State v. Ray*, 122-1097.

1561. Transfer of certain cases to recorder's court. All cases which shall be pending in any recorder's, police, mayor's, or other municipal court in the counties where the courts herein provided for shall be established shall, after the election and qualification of recorder and other officers authorized and required by this article, be transferred to the recorders' courts of the respective municipalities, to be tried in the manner and in accordance with the procedure provided; but no case pending in the superior court of any county at the time this article takes effect shall be transferred to the recorder's court, except by order of the presiding judge thereof. No cause shall be removed from the recorder's court as is now provided for the removal of cases from one justice of the peace to another.

1919, c. 277, s. 23.

Cases pending in superior court cannot be transferred: *Tate v. Comrs.*, 122-661.

1562. Jurisdiction of justice of the peace after three months delay. If any criminal offense committed within the jurisdiction of any recorder's court, of which said court is given original, exclusive and final jurisdiction, is not prosecuted to a final termination within three months after the commission of the offense, any justice of the peace within the territory shall acquire jurisdiction to issue his warrant, apprehend the offender, and dispose of such warrant as is now provided by law.

1919, c. 277, s. 23.

ART. 19. COUNTY RECORDERS' COURTS

1563. Established by county commissioners. In any county in which a municipal recorder's court may not be established under the provisions of this subchapter, or in which such court has in fact not been established in the county-seat, the board of commissioners may, in their discretion, establish, in the manner provided by this article, a recorder's court for the entire county, which shall be a court of record and shall be held at the county-seat.

1919, c. 277, s. 25.

See annotations under section 1536.

1564. Recorder's election, qualification, and term of office. The court shall be presided over by a recorder, who shall have the same qualifications as provided for recorders of municipalities. The first recorder shall be elected by the board of commissioners of the county, either at the time of the establishment of the court or within thirty days thereafter, and shall hold the office until the next regular election wherein county officers are elected, and until his successor shall be duly elected and qualified; and should a vacancy occur in said office at any time, the same shall be filled by the election of a successor with the qualifications herein provided, for the unexpired term, by the board of county commissioners at a regular or special meeting called for that purpose. The successor of the

first recorder herein provided for and each succeeding recorder shall be nominated and elected in the county in the same manner and at the same time as is now provided by law for the nomination and election of the elective officers of the county and in the general election for such elective officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office as is now provided by law for justices of the peace, and shall file the same with the clerk of the superior court of the county, who shall duly record the same in a book kept for that purpose. The recorder's salary shall be fixed in advance by the board of commissioners, and paid out of the county funds upon vouchers, and shall not be increased or decreased during his term.

1919, c. 277, s. 25.

See annotations under section 1537.

1565. Time and place for holding court. The court shall be open for the trial of all criminal causes of which it has jurisdiction at least one day of each week, to be fixed by the board of county commissioners, and shall continue its session from day to day until all business is transacted by trial, continuance, or otherwise. The session of the court shall be held in the county courthouse or other place within the county provided by the board of commissioners for that purpose. Special sessions of the court may be called by the recorder as the necessities may require.

1919, c. 277, s. 26.

1566. No subsequent change of judgment. When any case has been finally disposed of by the recorder and judgment pronounced therein, the case shall not thereafter be reopened or the judgment or sentence rendered therein changed, modified or stricken out by the recorder after the adjournment of the regular weekly term of court or after the adjournment of any special term of court by the recorder.

1919, c. 277, s. 26.

See section 1539.

1567. Criminal jurisdiction. The court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and, in addition to the jurisdiction conferred by this section, shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors: Provided, however, that where a special court or recorder's court shall legally exist within such county by virtue of a special act of the legislature passed before the amendments to the constitution in reference thereto, then the county recorder's court, as herein established, shall not have jurisdiction of criminal cases within the territory of such existing recorder's court, so as to interfere with or conflict with the existing recorder's court, but shall have concurrent jurisdiction where the jurisdiction of the two courts covers the same causes or the same subject-matter. This article and the establishment of any court thereunder shall not be construed to repeal, modify or in any wise affect any existing special court or recorder's court by virtue of such former special acts herein referred to.

1919, c. 277, s. 27.

See annotations under section 1541.

1568. Jurisdiction and powers as in municipal court. The recorders of county courts herein provided for shall be vested with all the jurisdiction and authority conferred upon recorders of municipal courts, in like manner and to the same extent as if such jurisdiction and authority had been specifically in this section set forth, in so far as such jurisdiction and authority are applicable to such courts, and the provisions of this subchapter relative to municipal recorders' courts shall in all things apply to the county recorders' courts where same are not inconsistent and in so far as same are practically applicable: Provided, this section shall not take away the jurisdiction of a mayor to try breaches of ordinances when such city has no other municipal court.

1919, c. 277, s. 34.

1569. Removal of cases from justices' courts. When, upon affidavit made before entering on the trial of any cause before any justice of the peace, it shall appear proper for the cause to be removed for trial to some other justice, as is now provided by law, the cause may be removed for trial to the recorder's court of the county.

1919, c. 277, s. 28.

See section 1498.

1570. Defendants bound by justice to recorder's court. In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the recorder's court as provided in this article, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance or surety to appear at the next succeeding session of the recorder's court of the county, for trial; and in default of such surety such person shall be committed to the common jail of the county to await a trial.

1919, c. 277, s. 29.

See section 1560.

1571. Trials upon warrants; by whom warrants issued. All trials of criminal causes in said court shall be upon warrant issued by the clerk of the superior court or deputy clerk herein provided for or by the recorder or by any justice of the peace of the county. In either event such warrant shall be issued upon affidavit duly made and subscribed, setting forth the complaint against the defendant.

1919, c. 277, s. 30.

The warrant should charge the offense with sufficient certainty to enable the court to proceed to judgment: *State v. Lunsford*, 150-862.

1572. Jury trial as in municipal court. In all trials in county recorders' courts, upon demand for a jury by the defendant or the prosecuting attorney representing the state, a jury shall be had in the same manner and under the same provisions as are set forth in this subchapter in reference to municipal courts, so far as the same may be practically applicable to a county court.

1919, c. 277, s. 40.

See section 1555.

1573. Sentence imposed; fines and costs paid. Whenever any person shall be convicted or plead guilty of any offense of which the court has final jurisdiction

the recorder may sentence him to the common jail of the county in which the court shall be held, and assign him to work on the public roads of the county where provision has been made therefor; but if no provision has been made for working convicts upon the public roads in the county, then the recorder may sentence such person to be worked upon the public roads of any other county within the judicial district which has made such provision: Provided, that in case the person so convicted or pleading guilty shall be a woman or an infant of immature years, then the recorder may assign him or her to the county workhouse, reformatory, or other penal institution located in the county; or if there be none, any similar institution that may be located outside of the county to which judges of the superior court are authorized to sentence such person under the general laws of the state. All fines imposed by the court shall be collected by the clerk of such court or the deputy clerk thereof in the same manner as the clerk of the superior court collects fines imposed by the superior court; and, where a defendant is convicted and fails to pay the costs of such conviction, the county shall pay such costs as is allowed by law in similar cases before the superior court.

1919, c. 277, s. 32.

1574. Appeals to superior court. Any person convicted of any offense of which the county recorder has final jurisdiction may appeal to the superior court from any judgment or sentence of the court in the same manner as is now provided for appeals from the courts of justices of the peace; and any person tried before the recorder for any offense of which the court has not final jurisdiction shall, upon the recorder's finding probable cause of guilt, be bound over to the superior court in the same manner as is provided by law in similar cases before justices of the peace.

1919, c. 277, s. 33.

See annotations under section 1546.

1575. Clerk of superior court ex officio clerk of county recorder's court. The clerk of the superior court of any county in which a county recorder's court shall be established shall be ex officio clerk of such court. He shall keep separate criminal dockets in his office for such court in the same manner as he keeps criminal dockets in the superior court; he shall otherwise possess all the powers and functions conferred upon, and discharge all the duties required of, clerks of the superior court under the general law; and he shall be liable upon his official bond as clerk of the superior court for all of his official acts and conduct in reference thereto.

1919, c. 277, s. 36.

1576. Deputy clerk may be appointed. The board of commissioners of any county wherein a county recorder's court may be established shall have the power to appoint a special deputy clerk, who shall assist the clerk of the superior court and shall have all the power and authority in reference to the county recorder's court herein conferred upon the clerk of the superior court, and shall do all things in reference to said recorder's court under the direction of the clerk of the superior court of the county as fully as the clerk of the superior court is authorized to do. The board of commissioners may require and fix the official bond of the deputy clerk for the faithful performance of his duties and fix his salary, which

salary shall be fixed before he enters upon his duties and shall not be raised or lowered during his term of office. His term of office shall be for the same time as the term of the recorder of said court, and shall cease at any time that the court itself shall cease to exist.

1919, c. 277, s. 36.

1577. Compensation of clerk when no deputy appointed. When no deputy clerk is appointed or elected by the board of commissioners, they are authorized to pay annually to the clerk of superior court an amount fixed by the board, which shall be in addition to any salary or fees theretofore allowed by law to the clerk of superior court, and which shall be in compensation for the services rendered by him as clerk of the county recorder's court. Such compensation shall be paid to the clerk of superior court so long as he shall perform the duties of clerk ex officio of the county recorder's court.

1919, c. 277, s. 36.

1578. Deputy clerk to take oath of office. If any deputy clerk shall be appointed as provided in this article he shall take the oath required of deputy clerks under the general law, and in addition thereto shall take and subscribe to an oath to perform faithfully all the duties required of him under this article, both of which oaths shall be recorded in the office of the clerk of the superior court, and such deputy clerk is further authorized to perform all duties of deputy clerk under the general law in addition to the duties set forth in this article.

1919, c. 277, s. 37.

1579. Prosecuting attorney may be elected. The board of commissioners of any county availing itself of the provisions of this article may elect, at the same time, in the same manner, and for the same term as herein provided for the election of a deputy clerk, a prosecuting attorney for said court, and fix his compensation in such amount as they may deem suitable for the services to be rendered: Provided, that the board may require the county attorney to discharge the duties of prosecuting attorney in said court, and fix his compensation accordingly.

1919, c. 277, s. 38.

1580. Fees for issuing and serving process. All justices of the peace, constables and sheriffs issuing or serving warrants or other process returnable to the recorder's court shall have the same fees as are now prescribed by law, which fees shall be collected and paid out in the same manner and by the same officers as collect and distribute such fees in the superior court.

1919, c. 277, s. 31.

1581. Costs and fees taxed as in municipal court. There shall be taxed in the county recorder's court the same costs and fees for the benefit of the officers thereof as provided for municipal recorder's court. Such costs and fees shall be collected by the clerk and paid over monthly to the treasurer of the county as county funds to be dealt with by the commissioners.

1919, c. 277, s. 39.

1582. Courts may be discontinued after two years. The board of commissioners of any county which has established a county recorder's court under the

provisions of this article are authorized, after two years trial of the court, to discontinue the same at any time thereafter if in their judgment the public interest shall require it. If any such court shall be so discontinued, the action or resolution must be taken or adopted at least six months prior to the next general election, and shall not go into effect until the term of office of the recorder shall expire. The governing body of any municipality shall have the same power, to be exercised in the same manner, subject to the same limitations, to abolish municipal recorders' courts.

1919, c. 277, s. 35.

ART. 20. MUNICIPAL-COUNTY COURTS

1583. Established for entire county. The governing body of any municipality possessing a population of two thousand or over, as hereinbefore provided, in which the county courthouse is located, and the board of commissioners of the county, shall have the power, at a joint meeting of the two bodies, by joint resolution, in the manner hereinafter provided, to establish a recorder's court so as to include the entire county, outside of other municipalities therein possessing a population of two thousand or over. After the adoption of such joint resolution such municipal recorder's court shall possess all the powers and functions and exercise all the territorial jurisdiction in this subchapter conferred upon both municipal and county recorder's court under the procedure herein provided for, and subject to the provisions herein in reference to concurrent jurisdiction where a special or recorder's court exists under prior special acts in any portion of the county.

1919, c. 277, s. 41.

1584. Election of recorder. If the territorial jurisdiction of such municipal recorder's court is extended to the entire county, as set forth in the preceding section, then the first recorder shall be selected for the term, and in the manner hereinbefore set forth, by a joint meeting of the governing body of such municipality and the board of commissioners of the county, and such recorder shall be thereafter nominated and elected as is provided for herein for the nomination and election of a county recorder. Such recorder shall be a resident of the municipality, and in all other respects the court shall be conducted under the proceedings herein provided for municipal courts.

1919, c. 277, s. 42.

1585. Mayor's jurisdiction continued, when. In case the jurisdiction of the recorder's court of any municipality in any county shall not be extended in the manner authorized in this article, and no county recorder's court shall be established therein, then the mayors of the various cities and towns in such county shall continue to have all the powers and functions and exercise all the jurisdiction now conferred upon such officials by the general law for municipal corporations.

1919, c. 277, s. 43.

ART. 21. PROVISIONS APPLICABLE TO ALL RECORDERS' COURTS

1586. Offenders may be sentenced to city chain-gang. In case any municipality possessing a population of two thousand or over, as provided for herein,

in which a recorder's court shall be established pursuant to the provisions of this subchapter, shall now or hereafter establish and maintain a city chain-gang, or workhouse or other penal institutions for the imprisonment and working of city prisoners, any recorder may sentence any person convicted of any offense committed within said municipality and punishable by imprisonment, to be imprisoned and worked on such city chain-gang, or in such workhouse or other penal institutions, for such time as the recorder may in his discretion determine in accordance with the law.

1919, c. 277, s. 44.

1587. Recorders' courts substituted for other special courts. Wherever there has been established in any county, city, or town a recorder's court or other special court, which, under the provisions of this subchapter, might have been established hereunder, whether it shall possess exactly the same jurisdiction and functions or not, the board of commissioners of the county or the governing body of such city or town, or the governing body of such city or town and the board of commissioners of the county acting jointly, may abolish such existing court and adopt any one of the courts herein provided for by appropriate resolution of such boards.

1919, c. 277, s. 45.

1588. Reports to attorney-general. The recorder or clerk of any court authorized to be adopted by this subchapter shall make reports to the attorney-general of all criminal actions disposed of by such court in the same manner and to the same extent as is now required by law of the clerks of the superior courts of this state.

1919, c. 277, s. 46.

ART. 22. CIVIL JURISDICTION OF RECORDERS' COURTS

1589. Civil jurisdiction may be conferred. The board of county commissioners of any county in which there is a city or town with a population of not less than ten thousand nor more than twenty-five thousand inhabitants, in which there has been established a recorder's court, under the provisions of this subchapter, or in which there is a recorder's court established by law, may confer upon such recorder's court jurisdiction to try and determine civil actions, as hereinafter provided, wherein the party plaintiff or defendant is a resident of such county, or is doing business in the county. Such jurisdiction may be conferred by resolution by the board of county commissioners of the county, entered upon their minutes.

1919, c. 277, s. 47.

1590. Extent of civil jurisdiction. The jurisdiction of such court in civil actions shall be as follows: (a) Jurisdiction concurrent with that of the justices of the peace within the county; (b) jurisdiction concurrent with the superior court in all actions founded on contract, wherein the amount involved exclusive of interest and costs does not exceed one thousand dollars; (c) jurisdiction concurrent with the superior court in actions not founded upon contract wherein the amount involved exclusive of interest and costs does not exceed the sum of five hundred dollars.

1919, c. 277, s. 48.

Civil jurisdiction conferred upon recorder's court created by special statute: Taylor v. Johnson, 171-84; Oil Co. v. Grocery Co., 169-521. See, also, State v. Boyd, 175-791.

1591. Procedure in civil actions. The rules of practice, issuing process, and filing pleadings shall conform, as near as may be, to the practice in the superior court. The process shall be returnable directly to the court; and no civil process shall be issued by any recorder's court to any county other than that in which the court is located.

1919, c. 277, s. 56.

For issuing process, see s. 1549.

See, also, section 1490.

Civil process issued from recorder's court to another county, before change of statute: Oil Co. v. Grocery Co., 169-521.

1592. Trial by jury in civil actions. In all civil actions the parties shall be deemed to have waived a trial by jury unless demand for such trial is made before the trial begins. The demand shall be in writing and signed by the party making it, or his attorney, and accompanied by a deposit of three dollars to insure the payment of the jury tax: Provided, such demand shall not be used to the prejudice of the party making it.

1919, c. 277, s. 49.

1593. Jurors drawn and summoned. If a trial by jury is demanded, the recorder shall continue the cause until a day to be set, and the recorder, together with the attorneys for all parties, shall immediately proceed to the office of the register of deeds of the county and cause to be drawn a jury of eighteen, observing as nearly as may be the rule for drawing a jury for the superior court. The recorder shall issue the proper writ to the sheriff of the county, commanding him to summon the jurors so drawn to appear at the court on the day set for the trial of the action.

1919, c. 277, s. 50.

For selection of jurors in superior court, see section 2312 et seq.

1594. Talesmen and challenges. The recorder shall have the right to call in bystanders according to the practice in the superior court as nearly as the same is applicable, and each party shall have the same causes of challenge as in the superior court.

1919, c. 277, s. 51.

For practice in superior court, see sections 2321, 2322, 2324-2326.

1595. Jury as in superior court. The jury shall be a jury of twelve, and the trial shall be conducted as nearly as possible as in the superior court.

1919, c. 277, s. 52.

1596. Appeals to superior court. Appeals may be taken from the recorder's court to the superior court of the county in term time, for errors assigned in matters of law, in the same manner as now provided for appeals from the superior court to the supreme court, with the exception that the record may be typewritten instead of printed, and only one copy thereof shall be required. The time for taking and perfecting appeals shall be counted from the end of the term. Upon

such appeal the superior court may either affirm or modify the judgment of the recorder's court, or remand the cause for a new trial. From the judgment of the superior court an appeal may be taken to the supreme court.

1919, c. 277, ss. 53, 54.

For practice in appeals in superior court, see section 638 et seq. For similar practice in criminal action, see *State v. Hinson*, 123-755; *State v. Davidson*, 124-839; *State v. Bost*, 125-707.

1597. Appeals from justices of the peace. In all cases where there is an appeal from a justice of the peace, such appeal shall be first heard in the recorder's court, in the manner provided herein for hearing causes within the jurisdiction of a justice of the peace originating in the recorder's court.

1919, c. 277, s. 54½.

That the appeal from the justice of the peace should go to the superior court, see *Rhyné v. Lipscombe*, 122-650; *State v. Ray*, 122-1097.

1598. Enforcement of judgments. Orders to stay execution shall be the same as in appeals from the superior court to the supreme court. Judgments of the recorder's court may be enforced by executions issued by the clerk thereof, returnable within twenty days. Transcripts of such judgments may be docketed in the superior court, as now provided for judgments of justices of the peace; and the judgment, when docketed, shall in all respects be a judgment of the superior court as if rendered by such court, and shall be subject to the same statute of limitations and the statutes relating to revival of executions.

1919, c. 277, s. 55.

For stay of execution, see section 650. For issuing executions, see section 663 et seq. For docketing judgment, see sections 613, 614, 1517. Statute of limitations, section 437. Dormant judgment revived, section 668.

ART. 23. ELECTIONS TO ESTABLISH RECORDERS' COURTS

1599. Election required. The courts provided for in this subchapter shall be established upon elections held as set forth in this article.

1919, c. 277, s. 58.

1600. Municipal recorder's court. The governing body of any city or town which may, under the terms of this subchapter, establish a court, prior to its establishment shall pass a resolution, if in their judgment such court should be established, reciting such fact and calling an election at a date to be fixed, which shall be not less than thirty days nor more than sixty days from the passage of the resolution, at which election there shall be submitted to the qualified voters of the city the question of establishing such court. At such election all qualified voters favoring the establishment of such court shall vote a ballot upon which shall be printed or written the words, "For Recorder's Court of the City of -----," and those opposing the establishing of such court a ballot upon which shall be printed or written, "Against Recorder's Court of the City of -----."

1919, c. 277, s. 58.

1601. Notice of election. Notice of such election shall be given, signed by the clerk of the city or town or the mayor thereof, containing in substance the resolu-

tion, the date of the election, and a reference to this subchapter, which notice shall be published once a week for four successive weeks prior to said election in some newspaper published in the city or town.

1919, c. 277, s. 59.

1602. New registration may be ordered. The governing body of such city or town may in its discretion order a new registration of the voters for any election authorized hereunder.

1919, c. 277, s. 60.

1603. Manner of holding election. The election shall be held, reported, and recorded in the city or town, under the laws governing general elections as near as may be applicable to the city or town. The result of the election shall be reported to, canvassed and declared by the governing body of the city or town, and recorded upon the minutes thereof. If the majority of the votes cast is declared in favor of such court, it shall be established, and not otherwise.

1919, c. 277, s. 61.

1604. Another election after two years. If the majority of the votes cast at such election is against the court, another election for the same purpose may thereafter be called, but not within less than two years from the first or any succeeding election in reference thereto.

1919, c. 277, s. 62.

1605. County recorders' courts. The board of county commissioners of any county may establish a recorder's court in such county under the terms of this subchapter in the same manner as the governing body of any city or town may establish a municipal court, following the same procedure as nearly as it may be applicable. The board of county commissioners shall perform all the acts herein set forth for the governing body of any city or town, in submitting the establishment of such court to the qualified voters of the county. The form of the ballot shall be, "For Recorder's Court of the County of _____," and "Against Recorder's Court of the County of _____"; and notice of the election shall be published in some newspaper published at the county-seat.

1919, c. 277, s. 62.

1606. Municipal courts with jurisdiction over the entire county. The courts provided for in article twenty of this subchapter shall be established in the following manner: The governing body of the city and the board of county commissioners of the county, at a joint meeting, shall pass a joint resolution calling an election submitting to the voters of the entire county the question of the establishment of said court. The election shall be conducted by the county commissioners as in the case of county recorders' courts; the result of the election shall be recorded in the minutes of the county commissioners and certified to and recorded in the minutes of the governing body of the city. The form of the ballot shall be, "For Municipal-County Court of _____ County," and "Against Municipal-County Court of _____ County."

1919, c. 277, s. 62.

1607. Expense of elections paid. The expense of conducting the elections for "municipal courts" and "municipal-county courts" shall be borne by the city

or municipality concerned, and the expense of conducting the election for "county recorders' courts" shall be borne by the county concerned.

1919, c. 277, s. 63.

1608. Certain districts and counties not included. This subchapter shall not apply to the tenth, fifteenth, seventeenth, eighteenth, nineteenth, and twentieth judicial districts, nor to the eleventh district, except to the county of Caswell; nor shall it apply to the counties of Anson, Chatham, Columbus, Halifax, Hyde, Johnston, New Hanover, Pitt, Polk, and Robeson.

1919, c. 277, s. 64.

CHAPTER 28

DEBTOR AND CREDITOR

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ART. 1. ASSIGNMENTS FOR BENEFIT OF CREDITORS

1609. Debts mature on execution of assignment; no preferences. Upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once, and no such deed of trust or deed of assignment shall contain any preferences of one creditor over another, except as hereinafter stated.

Rev., s. 967; 1893, c. 453; 1909, c. 918, s. 1.

Where an insolvent debtor makes a transfer of the whole or a greater part of his property for the benefit of preëxisting creditors, and there are other existing creditors, it is in effect an assignment: *Bank v. Gilmer*, 116-684; s. c., 117-416; *Odom v. Clark*, 146-544; *Powell v. Lumber Co.*, 153-52; *Williamson v. Bitting*, 159-321; *Wooten v. Taylor*, 159-604; *Teague v. Grocery Co.*, 175-195. An assignment for the benefit of creditors omitting creditors is invalid as a preference: *Taylor v. Lauer*, 127-157.

Note of assignor, with sureties, not yet due becomes due upon assignment being executed, and sureties are bound to pay at once: *Pritchard v. Mitchell*, 139-54.

As to what is a preference, see section 1611.

The act of 1893, Rev., 967, allowed preferences, but required the debtor to file a schedule of preferred debts with clerk of superior court within five days, and a failure to comply rendered the assignment void: *Powell v. Lumber Co.*, 153-52; *Odom v. Clark*, 146-544; *Sutton v. Bessent*, 133-569; *Friedenwald v. Sparger*, 128-446; *Brown v. Nimocks*, 124-417; *Hall v. Cottingham*, 124-402; *Pearre v. Folb*, 123-239; *Cooper v. McKinnon*, 122-447; *Glanton v. Jacobs*, 117-427; *Frank v. Heiner*, 117-79; *Bank v. Gilmer*, 116-684; s. c., 117-416.

As to how to file the schedule, see *Friedenwald v. Sparger*, 128-446; *Hall v. Cottingham*, 124-402; *Brown v. Nimocks*, 124-417. The five days for filing is computed from the actual filing of the deed for registration and not from actual registration: *Glanton v. Jacobs*, 117-427. When schedule of preferred debts affirmed to before justice of peace, who is one of the trustees in deed of assignment, assignment void: *Martin v. Buffaloe*, 128-305, and cases cited.

1610. Trustee to file schedule of debts. Upon the execution of such deed of trust, the trustee, whether named therein or appointed as hereafter provided for, shall file with the clerk of the superior court of the county in which said deed of trust is registered, within ten days after the registration thereof, an inventory under oath, giving a complete, full and perfect account of all property that has come into his hands or to the hands of any person for him, by virtue of such deed of trust, and when further property of any kind not included in any previous return comes to the hands or knowledge of such trustee he shall return the same as hereinbefore prescribed within ten days after the possession or discovery thereof.

Rev., s. 968; 1893, c. 453, s. 2.

This section was held to be mandatory in *Powell v. Lumber Co.*, 153-52; *Odom v. Clark*, 146-544; *Bank v. Gilmer*, 116-684; s. c., 117-416.

1611. Trustee to recover property conveyed fraudulently or in preference. It is the duty of the trustee to recover, for the benefit of the estate, property which was conveyed by the grantor or assignor in fraud of his creditors, or which was conveyed or transferred by the grantor or assignor for the purpose of giving a preference. A preference, under this section, shall be deemed to have been given when property has been transferred or conveyed within four months next preceding the registration of the deed of trust or deed of assignment in consideration of the payment of a preëxisting debt, when the grantee or transferee of such property knows or has reasonable ground to believe that the grantor or assignor was insolvent at the time of making such conveyance or transfer.

1909, c. 918, s. 2.

Meaning of preference as given in this section applied: *Teague v. Grocery Co.*, 175-195; *Wooten v. Taylor*, 159-604. As distinguished from preference under Bankruptcy Act, see *Wilson v. Taylor*, 154-211; *Wooten v. Taylor*, 159-604. The notice or knowledge of insolvency must exist at the time of the transfer: *Teague v. Grocery Co.*, 175-195. The four months time must be counted from the execution of the transfer and not from its registration: *Wooten v. Taylor*, 159-604.

In the absence of statute preventing it, a debtor may make a preference: *Guggenheimer v. Brookfield*, 90-232. For former law preventing preference by mortgage, see *Farthing v. Carrington*, 116-315.

Meaning of insolvency, that debtor has not property sufficient to meet his liabilities: *Mining Co. v. Smelting Co.*, 119-417.

1612. Substitute for incompetent trustee appointed in special proceeding. When a trustee named in a deed of assignment for the benefit of creditors has died or resigned or has in any way become incompetent to execute the trust, the clerk of the superior court of the county wherein said deed of assignment has been registered is authorized and empowered, in a special proceeding in which all persons interested have been made parties, to appoint some discreet and competent person to act as such trustee and to execute all the trusts created in the original deed of assignment, according to its true intent and as fully as if originally appointed trustee therein.

1915, c. 176, s. 1.

See section 2583.

1613. Insolvent trustee removed unless bond given; substitute appointed. Upon the complaint of any creditor of the assignor or trustee in such deed of trust, alleging under oath that the trustee named therein is insolvent, and asking that he be required to give bond or be removed, it is the duty of the clerk of the superior court of the county in which such deed of trust is registered, upon a notice of not more than ten days to such trustee, to hear the complaint. If upon such hearing the clerk is satisfied that such trustee is insolvent, he shall remove such trustee and appoint some competent person to execute the provisions of such deed of trust, unless such insolvent trustee shall file with the clerk a good and sufficient bond, to be approved by him, in a sum double the value of the property in the deed of trust, payable to the state of North Carolina, and conditioned that such trustee shall faithfully execute and carry into effect the provisions of said deed of trust.

Rev., s. 969; 1893, c. 453, s. 3.

Insolvent trustee required to give bond upon proper application to clerk: *Preiss v. Cohen*, 112-282. Section cited in *Wooten v. Taylor*, 159-604.

1614. Trustee removed on petition of creditors; substitute appointed. Upon the written petition of one-fourth of the number of the creditors of the grantor or assignor whose claims aggregate more than fifty per cent of the total indebtedness of said grantor or assignor, the clerk of the superior court of the county in which said deed of trust or deed of assignment is registered, upon a notice of not more than ten days to said trustee of said petition, shall remove said trustee and appoint some competent person to execute the provisions of such deed of trust or deed of assignment.

1909, c. 918, s. 3.

Section cited in *Wooten v. Taylor*, 159-604.

1615. Substituted trustee to give bond. Upon the removal or resignation of any trustee it is the duty of the clerk to require the person appointed to execute the provisions of such deed of trust, before entering upon his duties, to file with the clerk a good and sufficient bond, to be approved by him in a sum double the value of the property in said deed of trust, payable to the state of North Carolina, and conditioned that such person shall faithfully execute and carry into effect the provisions of said deed of trust.

Rev., s. 970; 1893, c. 453, s. 3; 1909, c. 918, s. 4; 1915, c. 176, s. 2.

Section cited in *Wooten v. Taylor*, 159-604.

1616. Only perishable property sold within ten days of registration. It is unlawful for any trustee, whether named in such deed of trust or appointed by a clerk of the superior court, to sell any part of the property described in such deed of trust within ten days from the registration thereof, unless such property or some part thereof be perishable, in which case he may sell such property as is perishable, according to the powers conferred upon him in said deed of trust.

Rev., s. 971; 1893, c. 453, s. 4.

1617. Creditors to file verified claims with clerk; false swearing misdemeanor. All creditors of the maker of such deed of trust shall, before receiving payment of any amount from the said trustee, file with the clerk of the superior court a statement under oath that the amount claimed by him is justly due, after allowing all credits and offsets, to the best of his knowledge and belief. Any creditor who shall knowingly swear falsely in such statement shall be guilty of a misdemeanor.

Rev., ss. 972, 3617; 1893, c. 453, ss. 6, 7.

Creditors who claim under deed of trust, and file claim to share in proceeds of sale, cannot be heard to impeach its provisions: *Chard v. Warren*, 122-75.

1618. Priority of payments by trustee. The trustee, after paying the necessary costs of the administration of the trust, shall pay as speedily as possible (1) all debts which are a lien upon any of the trust property in his hands, to the extent of the net proceeds of the property upon which such debt is a lien; (2) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before registration of said deed of trust or deed of assignment, and (3) all other debts equally ratable.

1909, c. 918, s. 5.

Except as to the two classes mentioned, there can be no discrimination among creditors: *Wooten v. Taylor*, 159-604.

1619. Trustee to account quarterly; final account in twelve months. The trustee, whether named in the deed of trust or appointed by a clerk of a superior court, shall within three months from the registration of such deed of trust, and at each succeeding period of three months, file with the clerk of the superior court of the county in which the same is registered an account under oath, stating in detail his receipts and disbursements and his action as trustee, and within twelve months he shall file his final account of his administration of his trust. The clerk may upon good cause shown extend the time within which the quarterly and final accounts herein provided for are to be filed.

Rev., s. 973; 1893, c. 453, s. 5.

1620. **Trustee violating duties guilty of misdemeanor.** If any trustee in a deed of trust for the benefit of creditors shall fail to file his inventory as required by law, or shall knowingly make any false statement in such inventory, or shall knowingly fail to include any property therein, or shall sell any part of the property described in the deed of trust within ten days unless such property so sold be perishable, or shall fail to file either of the quarterly accounts or the final accounts as required by law, or shall knowingly make any false statement in such quarterly or final account, or shall knowingly fail to include any property, money or disbursement in such quarterly or final account, he shall, in either case, be guilty of a misdemeanor.

Rev., s. 3689; 1893, c. 453, s. 8.

ART. 2. PETITION OF INSOLVENT FOR ASSIGNMENT FOR CREDITORS

1621. **Petition; schedule; inventory; affidavit.** Every insolvent debtor may present a petition in the superior court, praying that his estate may be assigned for the benefit of all his creditors, and that his person may thereafter be exempt from arrest or imprisonment on account of any judgment previously rendered or of any debts previously contracted. On presenting such petition, every insolvent shall deliver therewith a schedule containing an account of his creditors and an inventory of his estate, which inventory shall contain—

1. A full and true account of his creditors, with the place of residence of each, if known, and the sum owing to each creditor, whether on written security, on account, or otherwise.

2. A full and true inventory of his estate, real and personal, with the encumbrances existing thereon, and all books, vouchers and securities relating thereto.

3. A full and true inventory of all property, real and personal, claimed by him as exempt from sale under execution.

He shall annex to his petition and schedule the following affidavit, which must be taken and subscribed by him before the clerk of the superior court, and must be certified by such officer:

I, -----, do swear (or affirm) that the account of my creditors, with the places of their residence, and the inventory of my estate, which are herewith delivered, are in all respects just and true; that I have not at any time or in any manner disposed of or made over any part of my estate for the future benefit of myself or my family, or in order to defraud any of my creditors; and that I have not paid, secured to be paid, or in any way compounded with any of my creditors, with a view that they, or any of them, should abstain or desist from opposing my discharge: so help me, God.

Rev., s. 1930; Code, ss. 2942, 2943, 2944; 1868-9, c. 162, ss. 1, 2, 3.

A petitioner not under arrest must comply with this section and obtain an order of discharge: *Howie v. Spittle*, 156-180. What is sufficient compliance, see *Edwards v. Sorrell*, 150-712. Section merely referred to in *Preiss v. Cohen*, 117-60; *State v. Parsons*, 115-730; *Burgwyn v. Hall*, 108-491; *Wingo v. Hooper*, 98-485. For case prior to enactment of section, see *Ballard v. Waller*, 52-84.

1622. **Clerk to give notice of petition.** On receiving the petition, schedule and affidavit, the clerk of the superior court shall make an order requiring all the creditors of such insolvent to show cause before said officer, within thirty days after publication of the order, why the prayer of the petitioner should not be granted, and shall post a notice of the contents of the order at the courthouse door and three other public places in the county where the application is made

for four successive weeks; or, in lieu thereof, shall publish the same for three successive weeks in any newspaper published in said county, or in an adjoining county.

Rev., s. 1931; Code, ss. 2945, 2946; 1868-9, c. 162, ss. 4, 5.

1623. Order of discharge and appointment of trustee. If no creditor oppose the discharge of the insolvent, the clerk of the superior court before whom the hearing of the petition is had shall enter an order of discharge and appoint a trustee of all the estate of such insolvent.

Rev., s. 1932; Code, s. 2947; 1868-9, c. 162, s. 6.

Section referred to in *State v. Parsons*, 115-733.

1624. Terms and effect of order of discharge. The order of discharge shall declare that the person of such insolvent shall forever thereafter be exempted from arrest or imprisonment on account of any judgment, or by reason of any debt due at the time of such order, or contracted for before that time, though payable afterwards. But no debt, demand, judgment or decree against any insolvent, discharged under this chapter, shall be affected or impaired by such discharge, but the same shall remain valid and effectual against all the property of such insolvent acquired after his discharge and the appointment of a trustee; and the lien of any judgment or decree upon the property of such insolvent shall not be in any manner affected by such discharge.

Rev., s. 1933; Code, s. 2950; 1868-9, c. 162, s. 9.

Debtor who has surrendered property is protected from future arrest or imprisonment on account of any judgment previously rendered or any debts previously contracted, though after-acquired property may be subject to execution and sale in proper cases: *Burgwyn v. Hall*, 108-489; see, also, *Brown v. Long*, 22-138.

For case prior to enactment of section, see *Griffin v. Simmons*, 50-145.

1625. Suggestion of fraud by opposing creditor. Every creditor opposing the discharge of the insolvent may suggest fraud and set forth the particulars thereof in writing, verified by his oath; but the insolvent shall not be compelled to answer the suggestions of fraud in more than one case, though as many creditors as choose may make themselves parties to the issues in such cases.

Rev., s. 1934; Code, s. 2948; 1868-9, c. 162, s. 7.

The creditor suggesting fraud must state the particulars constituting the fraud, which may raise an issue of fact or a question of law: *Edwards v. Sorrell*, 150-712.

Mother of bastard child, to whom allowance directed to be paid, becomes creditor of defendant, and can suggest fraud under section and contest defendant's right to a discharge, as insolvent, from its payment: *State v. Ostwalt*, 118-1210; *Church v. Parsons*, 115-730—but mother has right to suggest fraud only as to allowance, *State v. Parsons*, 115-730—for only the state can suggest fraud as to fine and costs, *Ibid*.

Where debtor arrested under different ca. sa.'s at instance of several creditors, and fraud suggested by creditors, he may require that all creditors he may notify shall join in trial of the one issue: *Williams v. Floyd*, 27-649—but debtor may waive privilege by joining issue with each creditor, in which case verdict in his favor in one action will not discharge him from responsibility in case of another creditor, *Ibid*.

ART. 3. TRUSTEE FOR ESTATE OF DEBTOR IMPRISONED FOR CRIME

1626. Persons who may apply for trustee for imprisoned debtor. When any debtor is imprisoned in the penitentiary for any term, or in a county jail for any term more than twelve months, application by petition may be made by

any creditor, the debtor, or by his wife, or any of his relatives, for the appointment of a trustee to take charge of the estate of such debtor.

Rev., s. 1943; Code, s. 2974; 1868-9, c. 162, s. 40.

Section referred to in *State v. Burton*, 113-655.

1627. Superior court appoints; copy of sentence to be produced. The application must be made to the superior court of the county where the debtor was convicted; and upon producing a copy of the sentence of such debtor, duly certified by the clerk of the court, together with an affidavit of the applicant that such debtor is actually imprisoned under such sentence, and is indebted in any sum, the clerk or the judge may immediately appoint a trustee of the estate of such debtor.

Rev., s. 1944; Code, s. 2975; 1868-9, c. 162, ss. 41, 42.

1628. Duties of trustee; accounting; oath. The trustee of the imprisoned debtor shall pay his debts pro rata. After paying such debts, the trustee shall apply the surplus, from time to time, to the support of the wife and children of the debtor, under the direction of the superior court. When the imprisoned debtor is lawfully discharged from his imprisonment, the trustee shall deliver to him all the estate, real and personal, of such debtor, after retaining a sufficient sum to satisfy the expenses incurred in the execution of the trust and lawful commissions therefor. The trustee shall make his returns and have his accounts audited and settled by the clerk of the superior court of the county where the proceeding was had, in like manner as provided for personal representatives. Before proceeding to the discharge of his duty, the trustee shall take and subscribe an oath, well and truly to execute his trust according to his best skill and understanding. The oath must be filed with the clerk of the superior court.

Rev., ss. 1945, 1946, 1947; Code, ss. 2976, 2978, 2979; 1868-9, c. 162, ss. 43, 45, 46.

1629. Court may appoint several trustees. The court has power, when deemed necessary, to appoint more than one person trustee under this chapter; but in reference to the rights, authorities and duties conferred herein, all such trustees shall be deemed one person in law.

Rev., s. 1948; Code, s. 2980; 1868-9, c. 162, s. 47.

Section referred to in *Burgwyn v. Hall*, 108-489.

1630. Court may remove trustee and appoint successor. In case of the death, removal, resignation or other disability of a trustee, the court making the appointment may from time to time supply the vacancy; and all proceedings may be continued by the successor in office in like manner as in the first instance.

Rev., s. 1949; Code, s. 2981; 1868-9, c. 162, s. 48.

Section referred to in *Burgwyn v. Hall*, 108-489.

ART. 4. DISCHARGE OF INSOLVENT DEBTORS

1631. Insolvent debtor's oath. Prisoners in order to be entitled to discharge from imprisonment under the provisions of this article shall take the following oath:

I, -----, do solemnly swear (or affirm) that I have not the worth of fifty dollars in any worldly substance, in debts, money or otherwise whatsoever, and that I have not at any time since my imprisonment or before, directly or indirectly, sold or

assigned, or otherwise disposed of, or made over in trust for myself or my family, any part of my real or personal estate, whereby to have or expect any benefit, or to defraud any of my creditors: so help me, God.

Rev., s. 1918a; Code, s. 2972; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 31; 1881, c. 76.

This does not contravene constitutional provision in regard to homestead and personal property exemptions: *State v. Williams*, 97-415—as prisoner has election to discharge himself by complying with judgment of court or by complying with statutory provisions and taking oath prescribed, *Ibid.*; *Oakley v. Lasater*, 172-96.

Section merely referred to in *State v. Morgan*, 141-728; *State v. White*, 125-678; *State v. Parsons*, 115-735; *Fertilizer Co. v. Grubbs*, 114-470; *State v. Burton*, 113-655; *State v. Bryan*, 83-612; *State v. Davis*, 82-610.

1632. Persons imprisoned for nonpayment of maintenance in bastardy or of costs in criminal cases. The following persons may be discharged from imprisonment upon complying with this article:

1. Every putative father of a bastard committed for a failure to give bond, or to pay any sum of money ordered to be paid for its maintenance.

2. Every person committed for the fine and costs of any criminal prosecution.

Rev., s. 1915; Code, s. 2967; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 26.

This section does not repeal sections 1356 and 1359, but latter sections modify it: *State v. Morgan*, 141-729—and all three sections must be construed together, *Ibid.*

Where there are three indictments against prisoner, to one of which he pleaded guilty and judgment was suspended upon payment of costs, and he was found guilty on other two, on one of which he was sentenced to imprisonment for ten days, after remaining in jail for such time and twenty days additional, and taking statutory oath, held that he was entitled to discharge in all three cases: *State v. McNeely*, 92-829.

Prisoner entitled to be discharged from imprisonment for nonpayment of fine and costs upon complying with statutory provisions: *State v. Williams*, 97-414; *State v. Davis*, 82-610—and this is so although workhouse has been established by county commissioners in accordance with provisions of section 1365, *State v. Williams*, 97-414.

Imprisonment of putative father for failure to obey order of maintenance, or to give bond, is a matter of legislative discretion, and is not imprisonment for debt: *State v. Morgan*, 141-726—and he may be discharged from imprisonment by complying with provisions of section, *State v. White*, 125-674; *State v. Parsons*, 115-730. Placing one in custody of sheriff until fine, costs and allowance in bastardy are paid is by implication an order to imprison upon failure to pay, and prisoner can be discharged hereunder: *State v. Burton*, 113-655.

1633. Petition; before whom; notice; service. Every such person, having remained in prison for twenty days, may apply by petition to the court where the judgment against him was entered, praying to be brought before such court at a time and place to be named in the petition, and to be discharged upon taking the oath hereinbefore prescribed. The applicant shall cause ten days notice of the time and place of filing the petition to be served on the sheriff or other officer by whom he was committed. In cases of conviction before a justice of the peace the clerk of the superior court of the county where the convicted person confined for costs is, may administer the oath and discharge the prisoner.

Rev., s. 1916; Code, ss. 2968, 2969; 1891, c. 195; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 28; 1874-5, c. 11; 1868-9, c. 162, s. 27; 1873-4, c. 90.

Application of insolvent, confined for nonpayment of costs, is a proceeding in the cause in which he was convicted, and should be made by petition to court wherein judgment against him was entered: *State v. Miller*, 97-451—but if clerk should refuse to allow prisoner to take oath, remedy is by appeal to judge holding courts of that district, and it is intimated that it

is irregular for judge of adjoining district to release prisoner on writ of habeas corpus, *Ibid.*

Neither judge nor solicitor has right to allow defendant in bastardy proceedings to take insolvent debtor's oath and obtain discharge without remaining in prison for twenty days: *State v. Bryan*, 83-611.

Section merely referred to in *State v. White*, 125-677; *Fertilizer Co. v. Grubbs*, 114-470; *State v. Burton*, 113-657.

1634. Warrant issued for prisoner. The clerk of the superior court, or justice of the peace, before whom such petition is presented shall forthwith issue a warrant to the sheriff, or keeper of the prison, requiring him to bring the prisoner before the court, at the time and place named for the hearing of the case, which warrant every such sheriff or keeper shall obey.

Rev., s. 1917; Code, s. 2970; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 29.

1635. Proceeding on application. At the hearing of the petition, if the prisoner has no visible estate, and takes and subscribes the oath or affirmation prescribed in this article, the clerk of the superior court, or justice of the peace, before whom he is brought, shall administer the oath or affirmation to him, and discharge him from imprisonment; of which an entry shall be made in the docket of the court, and, where the proceeding is before a justice of the peace, the justice shall return the petition and orders thereon into the office of the clerk of the superior court to be filed.

Rev., s. 1918; Code, s. 2971; R. C., c. 59, s. 1; 1773, c. 100, s. 1; 1808, c. 746, s. 2; 1810, cc. 797, 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 30.

Where debtor arrested and imprisoned for fraud did not tender oath required by section 1631, nor surrender exemptions, nor file petition or give notice required by section 1633, he was improperly discharged upon affidavit that he had made an assignment for benefit of creditors, and that he was insolvent and not worth more than exemptions allowed by law: *Fertilizer Co. v. Grubbs*, 114-470.

Prisoner entitled to be discharged from imprisonment for nonpayment of fine and costs upon complying with statutory provisions: *State v. Williams*, 97-414; *State v. Davis*, 82-610—and this is so, although workhouse has been established by county commissioners under provisions of section 1365: *State v. Williams*, 97-414.

One who has been found to be father of bastard child, and committed for nonpayment of fines, costs and allowance is entitled to be discharged from prison upon filing petition and complying with statutory requirements: *State v. Parsons*, 115-730.

Section merely referred to in *State v. Burton*, 113-658; *State v. Bryan*, 83-612.

1636. Suggestion of fraud. The chairman of the board of commissioners, and every officer interested in the fee bill taxed against such prisoner, may oppose his taking the insolvent debtor's oath above prescribed, and file particulars of the suggestion in writing, in the court where the same shall stand for trial as prescribed in this chapter in other cases of fraud or concealment.

Rev., s. 1919; Code, s. 2973; 1868-9, c. 162, s. 32.

1637. Persons taken in arrest and bail proceedings, or in execution. The following persons also are entitled to the benefit of this article as hereinafter provided:

1. Every person taken or charged on any order of arrest for default or bail, or on surrender of bail in any action.

2. Every person taken or charged in execution of arrest for any debt or damages rendered in any action whatever.

Rev., s. 1920; Code, s. 2951; 1868-9, c. 162, s. 10.

Defendant taken in arrest and bail or under execution can be discharged by taking insolvent's oath and surrendering all his property, including exemptions, over \$50: *Oakley v. Lasater*, 172-96; *Howie v. Spittle*, 156-180; *Edwards v. Sorrell*, 150-712; *Fertilizer Co. v. Grubbs*, 114-470; *Burgwyn v. Hall*, 108-489. This applies to nonresidents as well as to residents: *Burgwyn v. Hall*, 108-489. The remedies under this section are in addition to those given in sections 775 and 777: *Edwards v. Sorrell*, 150-712.

1638. When petition may be filed. Every person taken or charged as in the preceding section specified may, at any time after his arrest or imprisonment, petition the court from which the process issued on which he is arrested or imprisoned, for his discharge therefrom, on his compliance with this chapter.

Rev., s. 1921; Code, s. 2952; R. C., c. 59, s. 3; 1868-9, c. 162, s. 11.

Section embraces every person taken or charged as in preceding section specified: *Burgwyn v. Hall*, 108-493.

1639. Petition; contents; verification. The petition shall set forth the cause of the imprisonment, with the writ or process and complaint on which the same is founded, and shall have annexed to it a just and true account of all his estate, real and personal, and of all charges affecting such estate, as they exist at the time of filing his petition, together with all deeds, securities, books or writings whatever relating to the estate and the charges thereon; and also what property, real and personal, the petitioner claims as exempt from sale under execution, and shall have annexed to it an oath or affirmation, subscribed by the petitioner and taken before any person authorized by law to administer oaths, to the effect following:

I, -----, the within named petitioner, do swear (or affirm) that the within petition and account of my estate, and of the charges thereon, are, in all respects, just and true; and that I have not at any time or in any manner disposed of or made over any part of my property, with a view to the future benefit of myself or my family, or with an intent to injure or defraud any of my creditors: so help me, God.

Rev., s. 1922; Code, ss. 2953, 2954; R. C., c. 59, s. 3; 1868-9, c. 162, ss. 12, 13.

Section referred to in *Purvis v. Robinson*, 49-96.

1640. Notice; length of notice and to whom given. Twenty days notice of the time and place at which the petition will be filed, together with a copy of such petition and the account annexed thereto, shall be personally served by such debtor on the creditor or creditors at whose suit he is arrested or imprisoned, and such other creditors as the debtor may choose, or their personal representatives or attorneys. If the person to be notified reside out of the state, and has no agent or attorney in the state, the notice may be served on the officer having the claim to collect, or by two weekly publications in any newspaper in the state.

Rev., s. 1923; Code, s. 2955; R. C., c. 59, ss. 3, 20; 1773, c. 100, s. 8; 1868-9, c. 162, s. 14.

Party arrested and seeking relief must notify creditor or plaintiff at whose suit arrested: *Burgwyn v. Hall*, 108-492—but may or may not notify other creditors of his application to surrender his property and be discharged from arrest. Only such creditors as may be so notified will be affected by his discharge: *Ibid.*

1641. Who may suggest fraud. Every creditor upon whom the notice directed in the preceding section is served may suggest fraud upon the hearing of the petition, and the issues made up respecting the fraud shall stand for trial as in other cases.

Rev., s. 1924; Code, s. 2956; R. C., c. 59, s. 13; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 15.

Petitioner entitled to insist that suggestions of fraud, made by creditor, should be verified by oath of creditor and tried by jury: *Purvis v. Robinson*, 49-96—and it is error for judge to decide upon such suggestions without submitting them in an issue to jury, *Ibid.* See, also, *Edwards v. Sorrell*, 150-712.

1642. Where no suggestion of fraud, discharge granted. If no creditor suggests fraud or opposes the discharge of the debtor, the justice of the peace or the clerk of the superior court before whom the petition is heard shall forthwith discharge the debtor, and, if he surrenders any estate for the benefit of his creditors, shall appoint a trustee of such estate. The order of discharge and appointment shall be entered in the docket of the court, and if granted by a justice of the peace a copy thereof shall be certified by him to the clerk of the superior court, where the same shall be recorded, and filed.

Rev., s. 1925; Code, s. 2957; R. C., c. 59, s. 1; 1773, c. 100; 1808, c. 746, s. 2; 1810, c. 797, c. 802; 1830, c. 33; 1838, c. 23; 1840, cc. 33, 34; 1852, c. 49; 1868-9, c. 162, s. 16.

Proper remedy of party seeking to establish and secure damages for tort is to have trustee appointed under section: *Burgwyn v. Hall*, 108-489.

1643. Continuance granted for cause. When it appears to the court that any debtor, who may have given bond for his appearance under this chapter, is prevented from attending court by sickness or other sufficient cause, the case shall be continued to another day, or to the next term, when the same proceedings shall be had as if the debtor had appeared according to the condition of his bond, and in the event of his death in the meantime, his bond shall be discharged.

Rev., s. 1926; Code, s. 2959; R. C., c. 59, s. 10; 1822, c. 1131, s. 1; 1868-9, c. 162, s. 18.

Extreme sickness of principal in bond would excuse nonappearance and entitle him and surety to continuance if same made to appear to court: *Bupis v. Arnold*, 53-234. Sickness of surety no excuse for default of principal under section: *Speight v. Wooten*, 14-327. Defendant in bond given under section bound to attend at every term until cause finally disposed of: *Cowles v. Oaks*, 14-95. As to amount of bond, see *Williams v. Yarborough*, 13-12.

1644. Where fraud in issue, discharge only after trial. After an issue of fraud or concealment is made up, the debtor shall not discharge himself as to the creditors in that issue, except by trial and verdict in the same, or by a discharge by consent.

Rev., s. 1927; Code, s. 2962; R. C., c. 59, s. 17; 1868-9, c. 162, s. 21.

Section only applicable to cases where defendant is in lawful custody and by virtue of an authority competent to order it: *Houston v. Walsh*, 79-36.

1645. If fraud found, debtor imprisoned. If, on the trial, the jury finds that there is any fraud or concealment, the judgment shall be that the debtor be imprisoned until a full and fair disclosure and account of all his money, property or effects be made by the debtor.

Rev., s. 1928; Code, s. 2961; R. C., c. 59, s. 14; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 20.

Where insolvent debtor only surrenders interest in certain property conveyed by deed in trust, and jury find deed fraudulent, he must be imprisoned until he surrenders whole property conveyed: *Hutton v. Self*, 28-285.

For case prior to amendment of section, see *Bunting v. Wright*, 61-296.

1646. Effect of order of discharge. The order of discharge under the last four articles of this chapter, whether granted upon a nonsuggestion of fraud,

upon the finding of a jury in favor of the debtor, or otherwise, shall be in like terms and have like effect as prescribed in section 1624; except that the body of such debtor shall be free from arrest or imprisonment at the suit of every creditor, and as to him only, to whom the notice required may have been given; and the notices, or copies thereof, shall in all cases be filed in the office of the superior court clerk.

Rev., s. 1929; Code, s. 2960; R. C., c. 59, s. 11; 1822, c. 1131, s. 4; 1835, c. 12; 1868-9, c. 162, s. 19.

Discharge of debtor is not discharge of debt: *Norment v. Alexander*, 32-71. As to effect of discharge, see *Rountree v. Waddill*, 52-312; *Norment v. Alexander*, 32-71; *Williams v. Floyd*, 27-649; *Crain v. Long*, 14-371.

ART. 5. GENERAL PROVISIONS UNDER ARTICLES 2, 3, AND 4

1647. **Superior court tries issue of fraud.** In every case where an issue of fraud is made up as provided in this chapter, the case shall be entered in the trial docket of the superior court, and stand for trial as other causes; and upon a finding by the jury in favor of the petitioner the judge shall discharge the debtor; if the finding is against the petitioner he shall be committed to jail until he makes full disclosure.

Rev., s. 1935; Code, s. 2949; 1868-9, c. 162, s. 8.

Upon suggestion of fraud, issue is raised which should be entered upon trial docket of superior court, and stand for trial as other causes: *State v. Parsons*, 115-730.

Where debtor sets out in schedule that he has made deed in trust of certain property, and surrenders all his interest in such property, still competent for creditor to have issue made up as to whether deed not fraudulent: *Adams v. Alexander*, 23-501; *Hutton v. Self*, 28-285—and, if found fraudulent by a jury, to cause debtor to be imprisoned until he surrenders property itself, *Ibid*.

See, as bearing upon section, *Adams v. Beaman*, 48-140.

1648. **Insolvent released on giving bond.** Every debtor entitled under the provisions of this chapter to discharge as an insolvent may, at the time of filing his application for a discharge or at any time afterwards, tender to the sheriff or other officer having his body in charge, a bond, with sufficient surety, in double the amount of the sum due any creditor or creditors at whose suit he was taken or charged, conditioned for the appearance of such debtor before the court where his petition is filed, at the hearing thereof, and to stand to and abide by the final order or decree of the court in the case. If such bond be satisfactory to the sheriff, he shall forthwith release such debtor from custody.

Rev., s. 1936; Code, s. 2958; R. C., c. 59, s. 27; 1868-9, c. 162, s. 17.

The petitioner may give bond during the pendency of the proceedings: *Howie v. Spittle*, 156-180. Bond given for appearance of insolvent at court is good if it is for double the original debt, exclusive of interest and costs: *Williams v. Yarborough*, 13-12. Condition in bond "to appear and claim benefit of act, etc., and not depart without leave" is substantial compliance with section: *Mooring v. James*, 13-254. Defendant in bond bound to attend at every term until cause finally disposed of: *Arrington v. Bass*, 14-95. Debtor who has given bond for his appearance cannot object to informality of same, and pray discharge on account thereof: *Page v. Winningham*, 18-113.

Where bond states date at which court is to be held, which date is erroneous and court held at a different place, there is no default of appearance according to bond: *Winslow v. Anderson*, 20-1. Quere: Whether duty of officer or the defendant to prepare bond to be given for debtor's appearance: *Ibid*. Return day in bond must be certain: *Ibid*.

For old cases under section prior to amendment, see *Wall v. Jarrott*, 25-42; *Williams v. Bryan*, 33-613.

1649. Surety in bond may surrender principal. The surety in any bond conditioned for the appearance of any person under this chapter may surrender the principal, or such principal may surrender himself, in discharge of the bond, to the sheriff or other officer of any court where such principal is bound to appear, in the manner provided in the chapter entitled Civil Procedure, article Arrest and Bail.

Rev., s. 1937; Code, s. 2963; R. C., c. 59, s. 23; 1793, c. 100, s. 7; 1793, c. 380, s. 1; 1822, c. 1131, s. 3; 1868-9, c. 162, s. 22.

See sections 791-793. Where principal obligor in bond was regularly called and failed to appear, and judgment was rendered against him and his surety, surety has no right, *ex debito iustitiæ*, to have judgment set aside to allow him to make surrender of principal: Reynolds v. Boyd, 23-106.

Person surrendered in discharge of bail entitled to benefit of chapter: Smallwood v. Wood, 19-356.

To protect sureties they must surrender principal in court to which *ca. sa.* returnable, or to the sheriff of that county, and, where writ issues to another county, a surrender to sheriff of that county is a nullity: Mooring v. James, 13-254.

1650. Creditor liable for jail fees. When any debtor is actually confined within the walls of a prison, on an order of arrest in default of bail or otherwise, the jailer must furnish him with necessary food during his confinement, if the prisoner requires it, for which the jailer shall have the same fees as for keeping other prisoners. If the debtor is unable to discharge such fees, the jailer may recover them from the party at whose instance the debtor was confined. And at any time after the arrest, the sheriff or jailer may give notice thereof to the plaintiff, his agent or attorney, and demand security of him for the prison fees that accrue after such notice, and if the plaintiff fails to give such security then the sheriff may discharge the debtor out of custody.

Rev., s. 1938; Code, s. 2965; R. C., c. 69, s. 5; 1773, c. 100, ss. 8, 9; 1821, c. 1103; 1868-9, c. 162, s. 24.

Where debtor has given bond for appearance and case continued from court to court, sureties surrendering him from time to time, and issue decided against him and he committed to prison in all cases, at instance of creditor, such creditor responsible to jailer for fees or allowance for food furnished to prisoner during whole time confined in jail: Veal v. Flake, 32-417.

When debtor committed to prison and permitted to take prison bounds, jailer under no obligation, while he continues in bounds, to furnish him with provisions for his support: Phillips v. Allen, 35-10—nor can creditor, at whose suit he is confined, be compelled to reimburse jailer for any sum so expended, *Ibid.*

Where debtor, imprisoned at instance of creditor, has no property in this state out of which prison fees, provisions and support can be satisfied, jailer may recover amount from creditor, notwithstanding debtor may have sufficient property in another state: Faucett v. Adams, 35-235.

Action against creditor for jail fees of insolvent debtor, given by section to jailer, cannot be maintained by sheriff as jailer's principal: Bunting v. McIlhenny, 61-579.

1651. False swearing; penalty. If any insolvent or imprisoned debtor takes any oath prescribed in this chapter falsely and corruptly, and upon indictment for perjury is convicted thereof, he shall suffer all the pains of perjury, and he shall never after have any of the benefits of this chapter, but may be sued and imprisoned as though he had never been discharged.

Rev., ss. 1940, 3614; Code, s. 2964; R. C., c. 59, s. 25; 1793, c. 100, s. 10; 1868-9, c. 162, s. 23.

For additional penalty, see section 4364.

1652. Powers of trustees hereunder. Any trustee appointed under the last four articles of this chapter, as therein contemplated, is hereby declared a trustee of the estate of the debtor, in respect to whose property such trustee is appointed for the benefit of creditors, and is invested from the time of appointment with all the powers and authority, and subject to the control, obligations and responsibilities prescribed by law in relation to personal representatives over the estates of deceased persons; but all debts shall be paid by the trustees *pro rata*.

Rev., s. 1941; Code, s. 2977; R. C., c. 59, ss. 21, 22; 1773, c. 100, ss. 5, 6; 1827, c. 44; 1830, c. 26, s. 2; 1868-9, c. 162, s. 44.

Section referred to in *Burgwyn v. Hall*, 108-489.

1653. Jail bounds. Any imprisoned debtor may take the benefit of the prison bounds by giving security, as required by law, except as follows:

1. A debtor against whom an issue of fraud is found.
2. Any debtor who, for other cause, is adjudged to be imprisoned until he make a full and fair disclosure or account of his property.

Rev., s. 1942; Code, s. 2966; R. C., c. 59, s. 27; 1818, c. 964; 1868-9, c. 162, s. 25.

For regulation as to prison bounds, see section 1321.

CHAPTER 29

DESCENTS

1654. Rules of descent.

- Rule 1. Lineal descent.
- Rule 2. Females inherit with males, younger with older children; advancements.
- Rule 3. Lineal descendant represents ancestor.
- Rule 4. Collateral descent of estate derived from ancestor.
- Rule 5. Collateral descent of estate not derived from ancestor.
- Rule 6. Half blood inherits with whole; parents from child.
- Rule 7. Unborn infant may be heir.
- Rule 8. Widow may take as heir.
- Rule 9. Illegitimate children inherit from mother.
- Rule 10. Heirs of illegitimate.
- Rule 11. Estate for life of another not devised deemed inheritance.
- Rule 12. Seizin defined.
- Rule 13. Issue of certain colored persons to inherit.

1654. Rules of descent. When any person dies seized of any inheritance, or of any right thereto, or entitled to any interest therein, not having devised the same, it shall descend under the following rules:

Rev., s. 1556; Code, s. 1281; R. C., c. 38, s. 1.

Descents in this state are regulated by statute and not by the common law: *University v. Markham*, 174-338; *Edwards v. Yearby*, 168-663. Upon death of ancestor intestate, title to his estate descends and vests at once in his heirs; title cannot in such circumstances stand in abeyance and vest in future: *Harris v. Russell*, 124-547. As to "seized" in this sentence, see rule 12 of this section and *Early v. Early*, 134-258 at 266. For general discussion of canons of descent, see *Clement v. Cauble*, 55-86.

Rule 1, Lineal descent. Every inheritance shall lineally descend forever to the issue of the person who died last seized, entitled or having any interest therein, but shall not lineally ascend, except as hereinafter provided.

Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 1.

Rule merely referred to: *Norton v. McDevit*, 122-755.

Contrary to the rule of the common law, neither actual nor legal seizin is necessary under the statutory rule to make a stock of inheritance: *Sears v. McBride*, 70-152; *Early v. Early*, 134-258; *Redding v. Vogt*, 140-562; and see under rule 12 of this section.

DESCENT OF REVERSIONS AND REMAINDERS. Under present rules of descent, a remainder descends as if it were an estate in possession; so where, during the continuance of the particular estate, the original remainderman died and then his only child died in infancy, the remainder vested, at the end of the particular estate, in the heirs of the infant and not in the heirs of original remainderman, *Early v. Early*, 134-258, distinguishing *King v. Scoggin*, 92-99, and *Lawrence v. Pitt*, 46-344, as involving earlier statutes.

Rule 2, Females inherit with males, younger with older children; advancements. Females shall inherit equally with males, and younger with older children: Provided, that when a parent dies intestate, having in his or her lifetime settled upon or advanced to any of his or her children any real or personal estate, such child so advanced in real estate shall be utterly excluded from any share in the real estate descended from such parent, except so much thereof as will, when added to the real estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And any child so advanced in personal estate shall be utterly excluded from any share in the personal estate of which the parent died possessed, except so much thereof as will, when added to the personal estate

advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And in case any one of the children has been advanced in real estate of greater value than an equal share thereof which may come to the other children, he or his legal representatives shall be charged in the distribution of the personal estate of such deceased parent with the excess in value of such real estate so advanced as aforesaid, over and above an equal share as aforesaid. And in case any of the children has been advanced in personal estate of greater value than an equal share thereof which shall come to the other children, he or his legal representatives shall be charged in the division of the real estate, if there be any, with the excess in value, which he may have received as aforesaid, over and above an equal distributive share of the personal estate.

Rev., s. 1556; Code, s. 1281; R. C., c. 38, s. 1, Rule 2; 1784, c. 204, s. 2; 1808, c. 739; 1844, c. 51, ss. 1, 2.

This rule abolishes preference of male over female line and places males and females on perfect equality both as to collateral and lineal descent: *Bell v. Dozier*, 12-334.

ADVANCEMENTS. Nature of, and general principles regulating advancements: *Thompson v. Smith*, 160-256. Whether gift, loan, or advancement depends on intention of parent at time of transfer: *Ibid.* Value of advancement to be estimated as of time it is made: *Ward v. Riddick*, 57-22; *Lamb v. Carroll*, 28-4; *Stallings v. Stallings*, 16-298. See further for advancements, under section 127.

Rule 3, Lineal descendant represents ancestor. The lineal descendants of any person deceased shall represent their ancestor, and stand in the same place as the person himself would have done had he been living.

Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 3; 1808, c. 739.

Representation under the rule is indefinite as well among collateral as among lineal kindred: *Johnston v. Chesson*, 59-147. So heirs of deceased collaterals represent their ancestor, and take what he, if living, would have taken: *Draper v. Bradley*, 126-72.

In descent of real property, principle of representation is applied whether heirs in equal or unequal degree, and heirs take per stirpes and not per capita in either case: *Crump v. Faucett*, 70-345; *Cromartie v. Kemp*, 66-382; *Haynes v. Johnson*, 58-124; *Clement v. Cauble*, 55-82. But in distribution of personal property, under section 126, representation is resorted to only when claimants in equal degree, and not among those in unequal degree: *Ellis v. Harrison*, 140-444.

Heirs of naked trustee who joined in mortgage take no interest, legal or equitable: *Fleming v. Barden*, 126-450.

Rule 4, Collateral descent of estate derived from ancestor. On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules.

Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 4; 1808, c. 739.

Under this rule descended estates and certain purchased estates (derived by gift, devise, or settlement from an ancestor) descend to the nearest relatives of the blood of the ancestor or person from whom the estate moved: *Burgwyn v. Devereux*, 23-586. See *Bell v. Dozier*, 12-333; *Watson v. Sullivan*, 153-246. Where through a series of descents and settlements an estate goes to a person who dies without issue, it reverts back to those of his collateral relations who would be heirs of the ancestor from whom it originally descended or by whom it was originally settled: *Poisson v. Pettaway*, 159-650; *Wilkerson v. Bracken*, 24-315; *Felton v.*

Billups, 19-308. Collaterals of such blood, however remote, exclude collaterals not of that blood: Poisson v. Pettaway, 159-650; Dozier v. Grandy, 66-484; Little v. Buie, 58-10. Descent under the rule is per stirpes and not per capita: Cromartie v. Kemp, 66-382; Haynes v. Johnson, 58-124; Clement v. Cauble, 55-82.

This rule to be construed with rule 6 of this section: Noble v. Williams, 167-112; Paul v. Carter, 153-26. Where estate vests in surviving mother or father under rule 6, immaterial whether such parent be of blood of purchasing ancestor: McMichal v. Moore, 56-471.

This rule applies only when there is no disposition of the land by will which would interfere with prescribed course of descent: Kirkman v. Smith, 174-603.

When land is devised to one who could not be an heir of devisor (as to grandson who died intestate during his father's life), upon the death of devisee such land descends not under this rule, but as acquired lands under rules 5 and 6: Osborne v. Widenhouse, 56-238; see Burgwyn v. Devereux, 23-586.

When will provided for conversion of land into personalty upon future contingency which never happened, until such contingency happened land descended as ancestral realty under this rule: Elliott v. Loftin, 160-361.

Illustrative cases: where heir, nearest relative of ancestor acquiring estate, was brother: Jones v. Hoggard, 108-181—sister and a sister's child to exclusion of half-brother, Noble v. Williams, 167-112—brothers and sisters to exclusion of half-sister, Forbes v. Savage, 173-706—paternal aunt in exclusion of paternal grandfather and maternal relatives: Gillespie v. Foy, 40-280.

Cases under obsolete statutes superseded by this rule: Seville v. Whedbee, 12-160; Ham v. Martin, 8-423; Doe v. Sheppard, 7-334.

Rule merely referred to: Weeks v. Quinn, 135-425; Early v. Early, 134-258; Sawyer v. Sawyer, 28-408.

Rule 5, Collateral descent of estate not derived from ancestor. On failure of lineal descendants, and where the inheritance has not been transmitted by descent or derived as aforesaid from an ancestor, or where, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the next collateral relation, capable of inheriting, of the person last seized, whether of the paternal or maternal line, subject to the second and third rules.

Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 5; 1808, c. 739.

In descent of acquired estates the only qualification necessary for collateral heir is that he be nearest relation of person last seized: Bell v. Dozier, 12-333.

Where estate had been transmitted by descent, and blood of acquiring ancestor is extinct, upon death of person last seized intestate and without issue, estate descended to his nearest collateral relations: University v. Brown, 23-387.

For cases under old act of 1784, superseded by this rule, see Ross v. Toms, 9-9; Pritchard v. Turner, 9-435.

Rule 6, Half blood inherits with whole; parents from child. Collateral relations of the half blood shall inherit equally with those of the whole blood, and the degrees of relationship shall be computed according to the rules which prevail in descents at common law: Provided, that in all cases where the person last seized leaves no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father and mother, as tenants in common if both are living, and if only one of them is living, then in such survivor.

Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 6; 1808, c. 739; 1915, c. 9, s. 1.

This rule and rule 4 should be construed together: Paul v. Carter, 153-26; Watson v. Sullivan, 153-246; Noble v. Williams, 167-112. Where person last seized survived by child and widow, and child inherits estate from him and dies before widow, heirs of widow and not those of husband inherit estate: Weeks v. Quinn, 135-425. Where child died leaving no issue capable of inheriting, nor brother, nor sister, nor issue of such, but leaving father surviving, inheritance vests in him: Jarvis v. Davis, 99-42; Kincaid v. Beatty, 98-340; McMichal v.

Moore, 56-473—though in such case, where father dead, estate vests in mother, *Early v. Early*, 134-266. Where person died seized of lands descended through mother from her father, and left no issue, nor brother nor sister, except half-sister not of mother's blood, the father surviving took inheritance: *Little v. Buie*, 58-10. Where person dies without issue or sisters or brothers or issue of same, the father or mother will take inheritance regardless of whether he or she is of blood of purchasing ancestor: *McMichal v. Moore*, 56-471.

Proviso in rule applies to cases where surviving brother or sister cannot inherit, as well as to cases where none survive descendants: *Watson v. Sullivan*, 153-246; *Bell v. Dozier*, 12-333.

In cases of adoption, the natural father inherits from the child to the exclusion of the adopted father: *Edwards v. Yearby*, 168-663.

For cases under old act of 1784, superseded by this rule, see *Ross v. Toms*, 9-9; *Pritchard v. Turner*, 9-435; *Doe v. Sheppard*, 7-334.

For decision prior to amendment of rule 1, and passage of rule 12, which changed law, see *Lawrence v. Pitt*, 46-344, as explained in *Sears v. McBride*, 70-152.

As bearing upon rule, see *Dozier v. Grandy*, 66-484; *McKay v. Hendon*, 7-209.

Rule 7, Unborn infant may be heir. No inheritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the person last seized, or shall be born within ten lunar months after the death of the person last seized.

Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 7; 1823, c. 1210.

Upon death of father seized of lands, his wife being then *eniente*, inheritance will immediately vest in child *en ventre sa mere*: *Deal v. Sexton*, 144-157. Inheritance not divested by birth of child more than ten lunar months after death of person last seized: *Britton v. Miller*, 63-270. Rule only applicable where person last seized has died since enactment of same: *Rutherford v. Green*, 37-121.

Rule 8, Widow may take as heir. When any person dies leaving none who can claim as heir to him, his widow shall be deemed his heir, and as such shall inherit his estate.

Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 8; 1801, c. 575, s. 1.

Widow is heir only when there is no one who can claim as heir of the decedent: *Powers v. Kite*, 83-156; *University v. Markham*, 174-338. This rule applies only as to property undeviseed by the husband: *Grantham v. Jinnette*, 177-229.

Rule 9, Illegitimate children inherit from mother. Every illegitimate child of the mother and the descendants of any such child deceased shall be considered an heir: Provided, however, that where the mother leaves legitimate and illegitimate children such illegitimate child or children shall not be capable of inheriting of such mother any land or interest therein which was conveyed or devised to such mother by the father of the legitimate child or children; but such illegitimate child or descendant shall not be allowed to claim, as representing such mother, any part of the estate of her kindred, either lineal or collateral.

Rev., s. 1556, Rule 9; Code, s. 1281; R. C., c. 38, Rule 10; 1799, c. 522; 1913, c. 71.

This rule relates to descents from mother to her illegitimate children and their descendants, and allows illegitimates and their descendants to inherit from their mother, in default of legitimate issue, but excludes the right to inherit any part of estate of mother's kindred, lineal or collateral—connection is broken in ascending line at the mother: *University v. Markham*, 174-338; *Bettis v. Avery*, 140-184; *Flintham v. Holder*, 16-347.

When land devised to daughter with limitation over on her dying "without leaving a lawful heir," and she dies leaving an illegitimate child, such child is, under this rule, a lawful heir: *Harrell v. Hagan*, 147-111. See *Fairly v. Priest*, 56-383.

Rule merely referred to: *Norton v. McDevit*, 122-759; *Tucker v. Tucker*, 110-334, 108-235; *Ivey v. Granberry*, 66-228.

See, further, as to rights of illegitimates, under rule 10 of this section.

Rule 10, Heirs of illegitimate. Illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall descend to such person as would inherit if all such children had been born in wedlock: Provided, that when any illegitimate child dies without issue, his inheritance shall vest in the mother in the same manner as is provided in rule six of this chapter.

Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 11.

Illegitimate children of same mother may inherit from each other: Powers v. Kite, 83-156; McBride v. Patterson, 78-412 (discussing history of statute and earlier cases); Plintham v. Holder, 16-345. See University v. Markham, 174-338—without regard to the status or color of father: Ashe v. Mfg. Co., 154-241.

Legitimate brothers and sisters share in the inheritance of deceased illegitimate brother, all having same mother: McBride v. Patterson, 78-412.

This rule applies to illegitimate children, and is intended to affect only inheritances as between them and their representatives; it is not applicable to the case of a legitimate child of illegitimate father who claims as heir to the illegitimate child of such father's illegitimate sister: Bettis v. Avery, 140-184.

In determining mother's right to inherit, under proviso to this rule, rules 6 and 10 are construed together, and mother must survive illegitimate child to be within proviso: University v. Markham, 174-338.

Persons born in slavery of slave parents, who were not legitimated by marriage of parents subsequent to war, have rights of illegimates as between themselves; hence where there are two brothers coming under this description, and one dies leaving no issue or brother or sister, other brother inherits: Tucker v. Tucker, 108-235.

Rule referred to: Kenney v. R. R., 167-14; Tucker v. Tucker, 110-334; Arrington v. Alston, 6-326.

Rule 11, Estate for life of another, not devised, deemed inheritance. Every estate for the life of another, not devised, shall be deemed an inheritance of the deceased owner, within the meaning and operation of this chapter.

Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 12.

See Batchelor v. Whitaker, 88-356; Brown v. Brown, 168-4.

Rule 12, Seizin defined. Every person, in whom a seizin is required by any of the provisions of this chapter, shall be deemed to have been seized, if he may have had any right, title or interest in the inheritance.

Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 13.

All that is required by rule for creation of new stock of inheritance is that person from whom descent claimed should have had, at time of descent cast, some right, title or interest in inheritance, whether same vested in possession or not: Early v. Early, 134-267—for, under rule, neither actual nor legal seizin necessary to make stock in the devolution of estates, Sears v. McBride, 70-152. See, also, under rule 1 of this section.

Rule merely referred to: Redding v. Vogt, 140-562; Weeks v. Quinn, 135-425; Boyd v. Redd, 118-680.

Rule 13, Issue of certain colored persons to inherit. The children of colored parents born at any time before the first day of January, one thousand eight hundred and sixty-eight, of persons living together as man and wife, are declared legitimate children of such parents or either one of them, with all the rights of heirs at law and next of kin, with respect to the estate or estates of any such parents, or either one of them. If such children be dead, their issue shall represent them with all the rights of heirs at law and next of kin provided by this

section for their deceased parents or either of them if they had been living; and the provision of this section shall apply to the estates of such children as are now deceased or otherwise.

Rev., s. 1556; Code, s. 1281; 1897, c. 153; 1879, c. 73.

For distribution of personal property, see Administration, s. 137.

There are two essential conditions of rule, exclusive cohabitation subsisting at birth of child and paternity of party from whom property claimed is derived: *Spaugh v. Hartman*, 150-454; *Croom v. Whitehead*, 174-305; *Wall v. Fleming*, 174-167; *Nelson v. Hunter*, 140-598; *Woodward v. Blue*, 107-411, 103-116; *Branch v. Walker*, 102-34. These essentials may be shown by reputation, declarations and conduct: *Spaugh v. Hartman*, 150-454.

Rule is valid as to descents after its passage: *Woodward v. Blue*, 103-109—and renders legitimate the children of all colored parents living together as man and wife born before January 1, 1868, *Ibid.* Children of woman of mixed blood, whose mother was white woman, who lived with slave as wife at time of their birth, are rendered legitimate: *Ibid.* Operation of rule does not extend beyond those persons occupying relation of parent and child: *Tucker v. Bellamy*, 98-31. Where former slave died in 1880, seized of lands, without issue, but leaving surviving her children of brother, who died in 1860, a slave, such children incapable of taking lands by descent: *Ibid.* Persons born in slavery, of slave parents, who were not legitimized by parents marrying subsequent to war, not legitimized by rule, except to extent of inheriting from parents: *Tucker v. Tucker*, 108-235. Rule intended to apply to colored persons cohabiting as man and wife, who occupied such relations to each other exclusively: *Branch v. Walker*, 102-34—and not where slave cohabited with several women, also slaves, at same time, *Ibid.* Rule operates only prospectively, and could not divest any estate theretofore acquired: *Jones v. Hoggard*, 108-178; *Tucker v. Bellamy*, 98-33.

Rule legitimates child of colored parents born before January 1, 1868, and merely extends child's right of inheritance to estate of father, which, before this enactment, was restricted to estate of mother: *Bettis v. Avery*, 140-184—but does not transmit any title to such person claiming land as heir of illegitimate first cousin, *Ibid.* Children of slave parents, born prior to January 1, 1868, whose marriage was duly legitimized as provided by section 2497, are legitimate, and can inherit lands of which father died seized: *Jones v. Hoggard*, 108-178—and are also entitled to inherit lands of which mother died seized, to exclusion of children born during cohabitation of mother with another slave, which relation ceased prior to emancipation, *Ibid.*

Fact of cohabitation raises presumption that child is issue of persons cohabiting as man and wife: *Erwin v. Bailey*, 123-635; *Woodward v. Blue*, 107-407, 103-109—yet such presumption may be rebutted, and evidence to repel inference of paternity not subject to stringent rules which apply in cases of established legal marriage, *Woodward v. Blue*, 107-407, 103-109.

CHAPTER 30

DIVORCE AND ALIMONY

- 1655. Jurisdiction.
- 1656. Bond for costs unnecessary.
- 1657. Venue.
- 1658. What marriages may be declared void on application of either party.
- 1659. Grounds for absolute divorce.
- 1660. Grounds for divorce from bed and board.
- 1661. Affidavit to be filed with complaint; affidavit of intention to file complaint.
- 1662. Material facts found by jury; parties cannot testify to adultery.
- 1663. Effects of absolute divorce.
- 1664. Custody of children in divorce.
- 1665. Alimony on divorce from bed and board.
- 1666. Alimony pendente lite; notice to husband.
- 1667. Alimony without divorce.
- 1668. Alimony in real estate, writ of possession issued.

1655. Jurisdiction. The superior court shall have jurisdiction of complaints for divorce and alimony, or either.

Rev., s. 1557; Code, s. 1282; 1868-9, c. 93, s. 45.

“Alimony” defined: *Taylor v. Taylor*, 93-418. Superior court in term time alone has jurisdiction of divorce: *Barringer v. Barringer*, 69-179—and of suits to annul marriage, see under section 1658.

FOREIGN DIVORCES. Where in prosecution for bigamy against resident of this state, divorce obtained in another state is set up as defense, failure of defendant (plaintiff in divorce action) to obtain bona fide residence in state granting decree may be shown without violating full faith and credit clause of federal constitution: *State v. Herron*, 175-754. Status here of divorces obtained in other states examined in light of decisions in this state and of cases in United States supreme court: *Ibid.*

1656. Bond for costs unnecessary. It shall not be necessary for either party to a proceeding for divorce or alimony to give any undertaking to the other party to secure such costs as such other party may recover.

Rev., s. 1558; Code, s. 1294; 1871-2, c. 193, s. 41.

Section referred to: *Broom v. Broom*, 130-562.

1657. Venue. In all proceedings for divorce, the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides.

Rev., s. 1559; Code, s. 1289; 1871-2, c. 193, s. 40; 1915, c. 229, s. 1.

1658. What marriages may be declared void on application of either party. The superior court in term time, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the chapter entitled Marriage, or declared void by said chapter, may declare such marriage void from the beginning, subject, nevertheless, to the proviso contained in said chapter.

Rev., s. 1560; Code, s. 1283; 1871-2, c. 193, s. 33.

As to capacity to enter into marriage contract, see section 2495.

Court has jurisdiction, in proper cases, to declare marriages void ab initio, yet they are not so ipso facto, but must be declared void by a decree of court, for only in the cases embraced in second proviso to section 2495 can they be treated as void in collateral proceedings: *Watters v. Watters*, 168-411; *Setzer v. Setzer*, 97-252. See, also, *Johnson v. Kincaide*, 37-470. Only marriages absolutely void are those forbidden because of difference of race and bigamous marriages: *Watters v. Watters*, 168-411. Judgment declaring marriage void ab initio will not bastardize issue: *Taylor v. White*, 160-38; *Setzer v. Setzer*, 97-252. But nullity has been

decreed after death of parties for want of mutual capacity, though issue not bastardized: *Sims v. Sims*, 121-297, citing *Gathings v. Williams*, 27-487. Question whether marriage void ab initio must be tried between parties and cannot be raised collaterally in suit to share in property after party's death: *Setzer v. Setzer*, 97-252.

To annul, because of negro blood, marriage of person who claims to be white, ancestor within third generation must have been of pure negro blood: *Ferrall v. Ferrall*, 153-174.

Marriage with declared lunatic is void ab initio: *Sims v. Sims*, 121-297; *Crump v. Morgan*, 38-91; *Gathings v. Williams*, 27-487—and for lack of mental capacity at time of marriage, though party not adjudged lunatic, court may declare nullity, *Sims v. Sims*, 121-297; *Johnson v. Kineade*, 37-470. When fact of lunacy established, court must declare nullity, and has no discretion in matter: *Crump v. Morgan*, 38-91. Marriage void for lunacy cannot be cured by cohabitation after restoration: *Sims v. Sims*, 121-297; *Crump v. Morgan*, 38-91—being a nullity, can only be remedied by proceedings to set aside inquisition of lunacy or by new marriage, *Sims v. Sims*, 121-297. Court will declare nullity on ground of insanity only at instance of party entitled to the relief by reason of the fraud of the other party: *Watters v. Watters*, 168-411. Where suit for nullity is brought in behalf of the lunatic it must be in the name of the lunatic by her guardian or in name of guardian: *Sims v. Sims*, 121-297; *Crump v. Morgan*, 38-91.

Marriage entered into by person under legal age for marriage is not void ipso facto, but may be declared void ab initio by court in direct proceeding for that purpose; may be validated by cohabitation after reaching legal age: *State v. Parker*, 106-711; *Koonce v. Wallace*, 52-194. See *Watters v. Watters*, 168-411; *Sims v. Sims*, 121-297.

Marriage between persons nearer of kin than first cousins, if followed by cohabitation and birth of issue, will be declared void only while parties alive: *Baity v. Cranfill*, 91-293.

Marriage capable of avoidance for impotency of party is valid and subsisting until court decrees nullity: *Smith v. Morehead*, 59-360. Husband competent to prove wife's impotency: *Barringer v. Barringer*, 69-179.

Actions for nullity under this section not dismissed for want of affidavit required by section 1661: *Taylor v. White*, 160-38. Nor are they technically actions for divorces, though they come under that heading to extent that alimony pendente lite may be allowed: *Ibid.* See further, *Lea v. Lea*, 104-603; *Johnson v. Johnson*, 141-91, *Clark, J.*, concurring.

As to constitutionality of acts as above, see *Baity v. Cranfill*, 91-293.

1659. Grounds for absolute divorce. Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

Divorce can only be granted upon application of person injured: *House v. House*, 131-142; *Tew v. Tew*, 80-316—and husband not injured where he is cause of wife's misconduct, *Ibid.* Defendant may ask for divorce in the nature of cross-action, but not required to do so, and may bring another action: *Cook v. Cook*, 159-47.

1. If the husband or wife commits adultery.

Issue of adultery must be established; and the finding in another issue that, if committed, it was condoned, is insufficient without the first finding: *McKenzie v. McKenzie*, 153-242.

Where wife commits adultery and husband afterwards lives with her after learning it, and keeps up connubial relations, divorce will not be granted him: *Sparks v. Sparks*, 94-527; see *Lassiter v. Lassiter*, 92-129; *Gordon v. Gordon*, 88-45.

To establish defense of recrimination, plaintiff must have committed acts which would constitute ground for divorce in an action by defendant against plaintiff: *House v. House*, 131-140. Consequently, so long as statute required fornication and adultery of husband to entitle wife to divorce, it was no ground for recrimination that husband had twice committed adultery: *Ibid.* Husband who has wrongfully abandoned wife held entitled to divorce for her adultery committed after his abandonment: *Ellett v. Ellett*, 157-162, overruling *Tew v. Tew*, 80-316. See, also, *Moss v. Moss*, 24-55; *Wood v. Wood*, 27-674; *Foy v. Foy*, 35-90. Where husband sues wife for divorce a vinculo on ground of abandonment under acts of 1895 and 1899 (since repealed) adultery by him after abandonment is not defense: *Setzer v. Setzer*, 128-170, and cases cited. Action for divorce dismissed where both parties guilty of adultery and no condonation proved: *Horne v. Horne*, 72-530.

Petition for divorce because of defendant's adultery need not allege that petitioner has not been guilty of adultery: *Steele v. Steele*, 104-631; *Edwards v. Edwards*, 61-534. As to evidence of physical condition of person with whom adultery alleged to have been committed, see *Perkins v. Perkins*, 88-41. Respondent not compelled to answer if he had had intercourse with wife: *Smith v. Smith*, 116-386. Husband and wife both incompetent to prove adultery in action for divorce on that ground: *Perkins v. Perkins*, 88-41; see, also, section 1801—also their admissions are incompetent, *Steele v. Steele*, 104-631; *Perkins v. Perkins*, 88-41. In addressing the jury it is incompetent for counsel to exhibit baby of defendant to jury and state that if divorce granted it would disgrace and bastardize it: *Hopkins v. Hopkins*, 132-25. Mere neighborhood rumor of improper relations between defendant and paramour are incompetent: *Ibid.* That alleged adulterous wife offered to pay cost of criminal prosecution of paramour is competent: *Toole v. Toole*, 112-152. Cases merely referring to section: *Prendergrast v. Prendergrast*, 146-225; *Morris v. Morris*, 75-169.

UNDER FORMER STATUTE REQUIRING FORNICATION AND ADULTERY BY HUSBAND. "Fornication and adultery" held to have same meaning in divorce statute as in criminal statute: *Prendergrast v. Prendergrast*, 146-225, and see section 4343.

The sexes were put upon equality, so that only adultery required, by 1917, c. 25.

2. If either party at the time of the marriage was and still is naturally impotent.

Husband competent witness to prove impotency of wife: *Barringer v. Barringer*, 69-179. For case prior to section 2495, which makes impotency ground of annulment, see *Smith v. Morehead*, 59-360. Section merely referred to: *Prendergrast v. Prendergrast*, 146-225; *Morris v. Morris*, 75-169.

3. If the wife at the time of the marriage is pregnant, and the husband is ignorant of the fact of such pregnancy and is not the father of the child with which the wife was pregnant at the time of the marriage.

Unknown illicit intercourse, even though incestuous, prior to marriage no ground for divorce unless pregnancy resulted: *Steele v. Steele*, 104-631.

That wife falsely represented to husband that she was pregnant before marriage from intercourse with him, and thereby induced him to marry her, is no ground for divorce: *Bryant v. Bryant*, 171-746.

4. If there has been a separation of husband and wife, and they have lived separate and apart for ten successive years, and the plaintiff in the suit for divorce has resided in this state for that period.

Rev., s. 1561; Code, s. 1285; 1871-2, c. 193, s. 35; 1879, c. 132; 1887, c. 100; 1889, c. 442; 1899, c. 29; 1903, c. 490; 1905, c. 499; 1907, c. 89; 1911, c. 117; 1913, c. 165; 1917, cc. 25, 57.

Former decree of divorce a mensa is no bar to action for absolute divorce hereunder, nor is it required that application be made only by injured party: *Cook v. Cook*, 164-272, 159-47.

1660. Grounds for divorce from bed and board. The superior court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases:

As to rights of husband in wife's land, where she has obtained divorce a mensa, see *Taylor v. Taylor*, 112-134. See, also, under sections 2519 and 2524.

If wife guilty of conduct to provoke misconduct of husband, she is not entitled to relief: *Page v. Page*, 161-170; s. c., 167-346. See, also, notes to section 1659, subdivision 1. Condonation is forgiveness upon condition that party forgiven abstain from like offense afterward. If condition violated, original offense is revived: *Lassiter v. Lassiter*, 92-129; *Gordon v. Gordon*, 88-45. See, also, notes to section 1659. Pendency of action by husband for divorce a vinculo is not necessarily valid defense to action by wife for divorce a mensa: *Cook v. Cook*, 159-47. Complaint must allege statutory grounds and that plaintiff did not contribute to wrong complained of: *Garsed v. Garsed*, 170-672; *Dowdy v. Dowdy*, 154-556; *Page v. Page*, 161-170.

1. If either party abandons his or her family.

Where husband made wife leave him, or so failed to provide for her that she was compelled to leave, it amounts to abandonment of her: *High v. Bailey*, 107-70; *Setzer v. Setzer*, 128-170. To constitute abandonment, it is not necessary to leave state: *Witty v. Barham*, 147-479. Separation by consent is not abandonment, but subsequent acts may constitute it: *Ibid.* Application by wife under this subsection will not be sustained after adverse ruling as to alimony under section 1667: *Medlin v. Medlin*, 175-529.

As to sufficiency of complaint under subsection, see *Griffith v. Griffith*, 89-113; *Jackson v. Jackson*, 105-433. When complaint filed for divorce a mensa hereunder, but, pending action, new statute passed giving divorce a vinculo for same offense, and plaintiff is allowed to amend complaint so as to get divorce a vinculo, failure to file affidavit with amended complaint renders it imperative: *Holloman v. Holloman*, 127-15.

2. Maliciously turns the other out of doors.

Where no evidence of turning feme plaintiff out of doors at any time more than six months before action, issue as to such fact properly excluded: *Jackson v. Jackson*, 105-433; *O'Connor v. O'Connor*, 109-139. Application for divorce by wife hereunder not sustained after adverse ruling as to alimony under section 1667: *Medlin v. Medlin*, 175-529. As to sufficiency of complaint under subsection, see *Jackson v. Jackson*, 105-433; *Griffith v. Griffith*, 89-113; *Little v. Little*, 63-22.

3. By cruel or barbarous treatment endangers the life of the other.

Divorce will not be granted for cruel and barbarous treatment where it appears that acts complained of were committed more than ten years prior to commencement of action, and in meantime parties had continued to live together: *O'Connor v. O'Connor*, 109-139. That husband communicated infectious disease to wife is not ground for divorce under subsection: *Long v. Long*, 9-192—but where drunken husband cursed wife and drove her from house, and by demonstrations of violence caused her to leave bedside of dying child and seek safety at distance of several miles, she is entitled to divorce, *Seoggins v. Seoggins*, 85-347. As to contents of complaint under subsection, see *Martin v. Martin*, 130-27; *O'Connor v. O'Connor*, 109-139; *Jackson v. Jackson*, 105-433; *Griffith v. Griffith*, 89-113.

4. Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome.

What indignities are grounds for divorce have not been particularized by legislature, but matter is left under general words, leaving it to the courts to deal with each case upon its own peculiar circumstances, having regard to station in life, temperament, health, habits and feelings of different persons: *Sanders v. Sanders*, 157-229; *Taylor v. Taylor*, 76-436; *Coble v. Coble*, 55-395. What constitutes indignity held question of law, not of fact: *Harrison v. Harrison*, 29-490. To entitle wife to divorce under subsection, indignity offered by husband must be such as may be expected seriously to annoy woman of ordinary good sense and temper, and must be repeated or continued in, so that it may appear to have been done willfully and intentionally, or at least consciously by husband to annoyance of wife: *Miller v. Miller*, 78-102, overruling *Everton v. Everton*, 50-202. Not necessary that indignities complained of should be striking or even touching body, but foul and injurious accusations, often repeated, with withdrawal of all intercourse, refusing to bed with wife, and denial that she is wife, with threats against her life, are sufficient to entitle her to divorce: *Green v. Green*, 131-533; *Coble v. Coble*, 55-392—but husband communicating infectious disease to wife is not ground for divorce under subsection, *Long v. Long*, 9-192. Where drunken husband cursed wife and drove her from the house, and by demonstrations of violence caused her to leave bedside of dying child and seek safety at distance of several miles, she is entitled to divorce: *Seoggins v. Seoggins*, 85-347—also, where defendant had repeatedly threatened to beat wife, and boasted of having done so, etc., she is entitled to divorce, *Taylor v. Taylor*, 76-433.

Evidence of acts of husband within six months of beginning of action not competent: *Green v. Green*, 131-533; *O'Connor v. O'Connor*, 109-139; *Jackson v. Jackson*, 105-433. Competency of husband and wife hereunder for or against one another: *Taylor v. Taylor*, 76-433.

For defense of condonation, see first note to this section.

As to sufficiency of complaint under subsection, see *Sanders v. Sanders*, 157-229; *Green v. Green*, 131-535; *O'Connor v. O'Connor*, 109-139; *Jackson v. Jackson*, 105-433; *Griffith v. Griffith*, 89-113; *White v. White*, 84-340; *Joyner v. Joyner*, 59-322; *Harrison v. Harrison*, 29-485.

Subsection merely referred to: *McQueen v. McQueen*, 82-471; *Erwin v. Erwin*, 57-83.

5. Becomes an habitual drunkard.

Rev., s. 1562; Code, s. 1286; 1871-2, c. 193, s. 36.

Provocation of wife does not justify or excuse husband's becoming habitual drunkard: *Barringer v. Barringer*, 153-392. Subsection merely referred to: *Taylor v. Taylor*, 112-134.

1661. Affidavit to be filed with complaint; affidavit of intention to file complaint. The plaintiff in a complaint seeking either divorce or alimony, or both, shall file with his or her complaint an affidavit that the facts set forth in the complaint are true to the best of affiant's knowledge and belief, and that the said complaint is not made out of levity or by collusion between husband and wife; and if for divorce, not for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the complaint. The plaintiff shall also set forth in such affidavit, either that the facts set forth in the complaint, as grounds for divorce, have existed to his or her knowledge at least six months prior to the filing of the complaint, and that complainant has been a resident of the state for two years next preceding the filing of the complaint; or, if the wife be the plaintiff, that the husband is removing, or about to remove, his property and effects from the state, whereby she may be disappointed in her alimony. If any wife files in the office of the superior court clerk of the county where she resides an affidavit, setting forth the fact that she intends to file a petition or bring an action for divorce against her husband, and that she has not had knowledge of the facts upon which the petition or action will be based for six months, she may reside separate and apart from her husband, and may secure for her own use the wages of her own labor during the time she remains separate and apart from him. If she fails to file her petition or bring her action for divorce within ninety days after the six months have expired since her knowledge of the facts upon which she intends to file her said petition or bring her said action, then she shall not be entitled any longer to the benefit of this section.

Rev., s. 1563; Code, s. 1287; 1868-9, c. 93, s. 46; 1869-70, c. 184; 1907, c. 1008, s. 1.

The purpose of this enactment discussed in *Nichols v. Nichols*, 128-108; *Holloman v. Holloman*, 127-16. The affidavit required is for the purpose of giving jurisdiction, and court is powerless to make the decree without it: *Johnson v. Johnson*, 142-462; *Grant v. Grant*, 159-528; *Williams v. Smith*, 134-252; *Nichols v. Nichols*, 128-108—for the requirement of statute is mandatory, *Williams v. Smith*, 134-252; *Hopkins v. Hopkins*, 132-22; *Nichols v. Nichols*, 128-108. Affidavit not required in suit for annulment under section 1658: *Taylor v. White*, 160-38.

When defendant asks for divorce, answer must have the affidavit: *Cook v. Cook*, 159-47; s. c., 164-272.

Usual verification of complaint in civil actions is insufficient affidavit as required by this section: *Hopkins v. Hopkins*, 132-22; *Martin v. Martin*, 130-28. Whenever alleged that husband is removing or about to remove property from state, section allows wife to file complaint without regard to time when facts alleged as cause of divorce may have occurred: *Scoggins v. Scoggins*, 80-319; *Gaylord v. Gaylord*, 57-74.

Residence required by section must be actual residence: *Schonwald v. Schonwald*, 62-221, 55-367; see, however, *Moore v. Moore*, 130-335; *Harris v. Harris*, 115-587; *Smith v. Morehead*, 59-360—and it is not divested by wife temporarily leaving state without intention of residing

elsewhere, *Moore v. Moore*, 130-333. Where wife sues who is resident of another state, legal maxim that "her domicile is that of her husband" will not avail instead of actual residence: *Schonwald v. Schonwald*, 55-367, 62-221; *Smith v. Morehead*, 59-364.

Where wife alleging sufficient facts for divorce a mensa and to obtain alimony makes necessary affidavit in reference to husband's removal of property from state, not necessary to file another complaint six months after facts alleged to have occurred, *Scoggins v. Scoggins*, 85-347.

Objection that affidavit is defective may be first taken in supreme court: *Nichols v. Nichols*, 128-108.

THE AFFIDAVIT ITSELF. Must state that action was not brought within six months from time plaintiff first acquired knowledge of facts therein: *Clark v. Clark*, 133-28; *Dickinson v. Dickinson*, 7-327—except in cases where husband about to dispose of property or remove same from state, when wife need not so aver, *Scoggins v. Scoggins*, 80-320; *Gaylord v. Gaylord*, 57-74; *Sanders v. Sanders*, 157-229.

Statement, as basis for divorce, as to knowledge of the facts for six months prior to the action, must be in affidavit, but need not be in complaint: *Kinney v. Kinney*, 149-321.

Affidavit and petition must be verified: *Clark v. Clark*, 133-28. Judge can amend affidavit in his discretion: *Moore v. Moore*, 130-333; *Grant v. Grant*, 159-528.

As bearing upon section, see *McQueen v. McQueen*, 82-471. Section merely referred to: *Cram v. Cram*, 116-294.

1662. Material facts found by jury; parties cannot testify to adultery. The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact.

Rev., s. 1564; Code, s. 1288; 1868-9, c. 93, s. 47.

In action for divorce, verdict by eleven jurors consented to by both parties is valid if for defendant, but invalid for plaintiff: *Hall v. Hall*, 131-185.

Provision of section that allegations of complaint are deemed to be denied applies only to trial upon merits, since facts must be found by jury: *Zimmerman v. Zimmerman*, 113-432. Facts are to be proved only by preponderance of evidence: *Ellett v. Ellett*, 157-162.

In trial for divorce on ground of alleged adultery, neither husband nor wife is competent witness to prove same: *Toole v. Toole*, 112-155; *Perkins v. Perkins*, 88-41; *Hooper v. Hooper*, 165-605; see section 1801—nor shall admissions of either party to each other, or in pleadings, be received in evidence to prove fact, *Perkins v. Perkins*, 88-41; *Steele v. Steele*, 104-631; *Hooper v. Hooper*, 165-605. Declarations of alleged paramour made to or in presence of feme defendant indicating that improper familiarities had been or were about to be indulged in between them, and her reply to such declarations, are competent evidence, *Toole v. Toole*, 112-155—and wife, sued for divorce on ground of adultery, competent to deny evidence of witnesses that she was guilty of adultery with them, *Broom v. Broom*, 130-562. Competency of husband and wife to give evidence for and against each other, except as to adultery: *Taylor v. Taylor*, 76-433.

An issue as to a specific act of adultery is proper if raised by the pleadings: *Kinney v. Kinney*, 149-321. Evidence as to act of adultery between defendant and correspondent at time different from that alleged held competent: *Ibid.*

Abandonment as defense must be pleaded; plaintiff need not allege and plead that he has not abandoned: *Kinney v. Kinney*, 149-321.

For procedure where defendant becomes insane pending action, see *Stratford v. Stratford*, 92-297.

Section merely referred to in *Long v. Long*, 77-305; *Hansley v. Hansley*, 32-510.

1663. Effects of absolute divorce. After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine,

and either party may marry again unless otherwise provided by law: Provided, that no judgment of divorce shall render illegitimate any children in esse, or begotten of the body of the wife during coverture; and, Provided further, that a decree of absolute divorce upon the ground of separation for ten successive years as provided in section 1659 shall not impair or destroy the right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce.

Rev., s. 1569; Code, s. 1295; 1871-2, c. 193, s. 43; 1919, c. 204.

Upon granting absolute divorce, except as provided herein, all rights arising out of marriage cease and determine: *Duffy v. Duffy*, 120-346—hence court has no power to allow permanent alimony in such cases, *Ibid*.

Judgment declaring marriage void ab initio will not bastardize issue: *Setzer v. Setzer*, 97-252; *Taylor v. White*, 160-38.

Where wife, domiciled in another state, obtained decree for divorce a vinculo therein, husband appearing by attorney, he is bound by judgment rendered, and his property rights in her estate here terminated from date thereof: *Arrington v. Arrington*, 102-491.

For effect of absolute divorce on right to administer, see sections 10, 11, 12—on property rights, see section 2522.

1664. Custody of children in divorce. After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or mother, as may be thought best; or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent; and so alternately: Provided, that no order respecting the children shall be made on the application of either party without five days notice to the other party, unless it shall appear that the party having the possession or control of such children has removed or is about to remove the children, or himself, beyond the jurisdiction of the court.

Rev., s. 1570; Code, ss. 1296, 1570; 1871-2, c. 193, s. 46.

For effect of abandonment on custody of children, see section 189. For right of appeal in habeas corpus as to custody of children, see section 2242.

In divorce proceedings, under this section, the question of the custody of minor children is to be determined by the court in its discretion: *Setzer v. Setzer*, 129-296; *Page v. Page*, 167-346, 166-90, 161-170, 167-350—and court may modify its order as to custody from time to time as exigencies may require, *Setzer v. Setzer*, 129-296; *Page v. Page*, 161-170. Where custody of child left open in divorce decree, court may subsequently at suit of father order its production and award custody, and may award damages against mother for concealing child or sending it out of state: *Howell v. Howell*, 162-282. May charge father with support, though custody awarded to mother, making support charge on his land: *Sanders v. Sanders*, 167-317, 157-229. Care to be exercised in awarding custody to nonresident parent: *Harris v. Harris*, 115-587. See, further, as to custody, under section 2241.

1665. Alimony on divorce from bed and board. When any court adjudges any two married persons divorced from bed and board, it may also decree to the party upon whose application such judgment was rendered such alimony as the circumstances of the several parties may render necessary; which, how-

ever, shall not in any case exceed the one-third part of the net annual income from the estate, occupation or labor of the party against whom the judgment shall be rendered.

Rev., s. 1565; Code, s. 1290; 1871-2, c. 193, s. 37.

For alimony pendente lite, see section 1666.

Alimony is that part of husband's estate which is allotted to wife for her support during period of judicial separation: *Taylor v. Taylor*, 93-418. One-third of husband's estate may be assigned to wife when she obtains divorce a mensa: *Davis v. Davis*, 68-180—and whether wife entitled to it is question of law upon facts found, *Moore v. Moore*, 130-333; *Morris v. Morris*, 89-109; *Schonwald v. Schonwald*, 62-215.

Where alimony allotted to wife in specific property of husband, title to such property remains in him, and will revert at death of wife: *Taylor v. Taylor*, 93-418; *Rogers v. Vines*, 28-293—or upon reconciliation, *Ibid.*—and may be reduced or enlarged at any time in discretion of court, *Ibid.*—but where decree in divorce a mensa, obtained by wife, directed that husband pay sum in gross and be discharged from all further support of wife, she is nevertheless entitled to dower in his lands after his death, *Taylor v. Taylor*, 93-418.

Judgment for alimony provable against estate of bankrupt, hence discharge of bankrupt constitutes discharge of judgment: *Arrington v. Arrington*, 131-143; but see *Bankruptcy Act*, s. 17, changing this.

Where trial judge finds that party in contempt for failure to pay alimony could pay part of amount ordered, error to imprison him until he should pay whole amount: *Green v. Green*, 130-578.

For contempt proceedings where defendant fails to comply with order of court awarding alimony, see *Green v. Green*, 143-406; see, also, section 978 et seq.

As bearing incidentally upon section, see *Cooper v. Cooper*, 127-490; *Hodges v. Hodges*, 82-124.

1666. Alimony pendente lite; notice to husband. If any married woman applies to a court for a divorce from the bonds of matrimony, or from bed and board, with her husband, and sets forth in her complaint such facts, which upon application for alimony shall be found by the judge to be true and to entitle her to the relief demanded in the complaint, and it appears to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof, that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, the judge may order the husband to pay her such alimony during the pendency of the suit as appears to him just and proper, having regard to the circumstances of the parties; and such order may be modified or vacated at any time, on the application of either party or of any one interested: Provided, that no order allowing alimony pendente lite shall be made unless the husband shall have had five days notice thereof, and in all cases of application for alimony pendente lite under this or the succeeding section, whether in or out of term, it shall be admissible for the husband to be heard by affidavit in reply or answer to the allegations of the complaint: Provided further, that if the husband has abandoned his wife and left the state, or is in parts unknown, or is about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice is necessary.

Rev., s. 1566; Code, s. 1291; 1871-2, c. 193, s. 38; 1883, c. 67.

Purpose of section is to afford wife present pecuniary relief pending progress of action: *Moore v. Moore*, 130-333; *Morris v. Morris*, 89-111.

CASES IN WHICH COURT MAY AWARD UNDER STATUTE AND AT COMMON LAW. Section is cumulative and declaratory of common law as administered in English ecclesiasti-

cal courts, and right to alimony pendente lite may exist wherever wife is party to divorce proceedings as plaintiff or defendant: *Medlin v. Medlin*, 175-529, overruling *Reeves v. Reeves*, 82-348, which held right to such alimony dependent entirely on statute, and to be granted defendant only when she makes cross-demand for divorce.

Alimony pendente lite granted to feme defendant setting up cross-demand for divorce: *Webber v. Webber*, 79-572; *Barker v. Barker*, 136-316. "Expense money" allowed feme defendant as incident of husband's suit against her for absolute divorce, although in the action alimony pendente lite properly denied to her on her cross-demand for divorce a mensa, where she had previously had judgment against her in independent suit for alimony: *Medlin v. Medlin*, 175-529. Temporary alimony grantable in suit for annulment: *Lea v. Lea*, 104-603, and see under section 1658.

PLAINTIFF'S RIGHT TO ALIMONY—COMPLAINT, ETC. Complaint must allege ground for divorce to entitle plaintiff to alimony pendente lite: *Garsed v. Garsed*, 170-672. But ground alleged may be for divorce a vinculo or a mensa: *Little v. Little*, 63-22; *Hodges v. Hodges*, 82-122. Failure of plaintiff to obtain relief prayed for does not necessarily affect order for alimony pendente lite: *Wood v. Wood*, 61-538. Mutual releases of interests in each other's property by husband and wife do not bar wife in subsequent suit for divorce from claiming alimony pendente lite: *Bailey v. Bailey*, 127-474.

ALIMONY QUESTION OF LAW. Whether wife entitled to alimony is question of law on facts found: *Moore v. Moore*, 130-333; *Morris v. Morris*, 89-109; *Schonwald v. Schonwald*, 62-215. Where evidence failed to show sufficient ground for divorce a mensa, order for temporary alimony was vacated: *Page v. Page*, 161-170. See *Garsed v. Garsed*, 170-672.

INSUFFICIENCY OF WIFE'S MEANS. Wife entitled to alimony when income from her separate estate not sufficient for her support and to defray necessary expenses in prosecuting suit: *Miller v. Miller*, 75-70—for she need not resort to corpus or capital of her separate estate before calling on that of husband, *Ibid.*—and where defendant denies having any property, but admits he is an able-bodied man, court may decree alimony pendente lite without inquiring into value of his property, *Muse v. Muse*, 84-35. Where in petition for divorce from bed and board cruelty was alleged, and also an estimate of value of defendant's estate, held to be sufficient evidence to decree alimony and fix amount: *Pain v. Pain*, 80-322.

MOTION FOR ALIMONY. Application for alimony pendente lite may be made by motion in the cause: *Zimmerman v. Zimmerman*, 113-432; *Reeves v. Reeves*, 82-348—motion may be made after complaint filed before return term, *Moore v. Moore*, 130-333—motion may be heard in or out of term, *Moore v. Moore*, 130-33?

NOTICE OF MOTION. Five days notice of motion must be given adverse party when heard out of term: *Moore v. Moore*, 130-333; *Zimmerman v. Zimmerman*, 113-432; *Jones v. Jones*, 173-279—but notice of motion not necessary where alleged and court finds as fact that husband has abandoned wife and is out of state, *Barker v. Barker*, 136-316. Fact that notice of motion for alimony pendente lite duly served upon defendant did not specify time of hearing, will not invalidate the order allowing same, it having been heard at term at which cause stood regularly for trial: *Zimmerman v. Zimmerman*, 113-432—for application for alimony pendente lite can be made by motion in cause, *Ibid.*; *Reeves v. Reeves*, 82-348—and defendant fixed with notice thereof, *Zimmerman v. Zimmerman*, 113-432—for it is only where motion made out of term that notice necessary, *Ibid.* Order of court continuing motion for alimony to future term of court, made in presence of counsel for both parties, is sufficient notice of such motion: *Lea v. Lea*, 104-603.

FACTS TO BE FOUND BY JUDGE. On motion for alimony pendente lite, judge must find the facts on which order for alimony based: *Easeley v. Easeley*, 173-530; *Zimmerman v. Zimmerman*, 113-432. Order for alimony reciting that no answer filed is sufficient, for in absence of answer, facts stated in complaint are deemed true: *Zimmerman v. Zimmerman*, 113-432. Finding that wife faithful, dutiful and obedient unnecessary: *Lassiter v. Lassiter*, 92-129. Order erroneous if made without finding of facts by judge: *Moody v. Moody*, 118-926.

Where defendant asks alimony, sufficient that court finds facts as alleged in answer and supporting affidavits: *Barker v. Barker*, 136-316. If facts found by judge would if found by jury warrant divorce, they constitute per se sufficient ground for order for alimony: *Lassiter v. Lassiter*, 92-129. Finding that feme plaintiff has made out "prima facie case" held insufficient: *Easeley v. Easeley*, 173-530. But compare *Sparks v. Sparks*, 69-319.

WHAT CONSIDERED IN FINDING FACTS. In finding the facts, judge may consider counter affidavits or answer of defendant: *Easeley v. Easeley*, 173-530; *Zimmerman v. Zimmerman*, 113-432; *Lea v. Lea*, 104-603; *Griffith v. Griffith*, 89-113; *Morris v. Morris*, 89-109. But before amendment of 1883, judge confined to complaint and facts therein stated: *Zimmerman v. Zimmerman*, 113-432; *Scoggins v. Scoggins*, 80-321; *Schonwald v. Schonwald*, 62-215. Facts occurring within six months may be considered when it appears by affidavit or supplementary affidavit that husband about to remove his property from the state, etc.: *Sanders v. Sanders*, 157-229; *Scoggins v. Scoggins*, 80-321.

AMOUNT AND REDUCTION. Amount of alimony is within sound discretion of court and not reviewable unless discretion abused: *Barker v. Barker*, 136-316; *Moore v. Moore*, 131-371, 130-333; *Jones v. Jones*, 173-279.

Motion to reduce alimony pendente lite may be made anywhere in district in which action is pending: *Moore v. Moore*, 131-371, 130-333. Resident judge holding court in another district cannot hear motion to reduce alimony pendente lite in suit pending in district in which he resides: *Moore v. Moore*, 131-371. Where motion to reduce alimony pendente lite disallowed, another motion for same purpose should not be heard unless different state of facts shown and receipt exhibited for reasonable proportion of allowance made at former hearing: *Ibid.*

SECURING AND ENFORCING PAYMENT. Alimony pendente lite and counsel fees may be made a charge on husband's land: *Bailey v. Bailey*, 127-474. Order for alimony may be enforced by attachment for contempt: *Green v. Green*, 130-578; *Zimmerman v. Zimmerman*, 113-432; *Pain v. Pain*, 80-322; *Wood v. Wood*, 61-538. See section 978.

APPEAL. Appeal lies from order granting or refusing alimony pendente lite: *Garsed v. Garsed*, 170-672; *Barker v. Barker*, 136-316; *Moore v. Moore*, 130-333; *Morris v. Morris*, 89-109; *Lynch v. Lynch*, 62-46; *Schonwald v. Schonwald*, 62-215. Facts found must be set out on appeal: *Easeley v. Easeley*, 173-530, and cases cited; *Griffith v. Griffith*, 89-113.

OBsolete HOLDINGS AND STATUTES. Alimony pendente lite once held to exist only under this statute: *Moore v. Moore*, 130-333; *Earp v. Earp*, 54-118; *Wilson v. Wilson*, 19-377; *Everton v. Everton*, 50-206. But see supra this note and *Medlin v. Medlin*, 175-529. For cases under original section before amendment of same, see *Simmons v. Simmons*, 62-63; *Shearin v. Shearin*, 58-233; *Gaylord v. Gaylord*, 57-74; *Earp v. Earp*, 54-118; *Taylor v. Taylor*, 46-528.

1667. Alimony without divorce. If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the superior court of the county in which the cause of action arose to have a reasonable subsistence allotted and paid or secured to her from the estate or earnings of her husband. Pending the trial and final determination of the issues involved in such action, and also after they are determined, if finally determined, in favor of the wife, such wife may make application to the resident judge of the superior court, or the judge holding the superior courts of the district in which the action is brought, for an allowance for such subsistence, and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the separate estate of the wife. Such application may be heard in or out of term, orally or upon affidavit, or either or both. No order for such allowance shall be made unless the husband shall have had five days notice thereof; but if the husband shall have abandoned his wife and left the state, or shall be in parts unknown, or shall be about to remove or dispose of his property for the purpose of defeating the claim of his wife, no

notice shall be necessary. The order of allowance herein provided for may be modified or vacated at any time, on the application of either party or of any one interested. In actions brought under this section, the wife shall not be required to file the affidavit provided in section 1661, but shall verify her complaint as prescribed in the case of ordinary civil actions.

Rev., s. 1567; Code, s. 1292; 1919, c. 24; 1871-2, c. 193, s. 39.

Wife who has been deserted by husband and left unprovided for may, under this section, sue him for support without asking for divorce: *Cram v. Cram*, 116-288.

Fact that summons in proceeding hereunder, of which judge has jurisdiction, was made returnable at term, does not affect jurisdiction of judge to hear and determine matter: *Ibid.*

Vague and indefinite charges of infidelity of wife made by husband in answer to complaint will not affect question of his liability under section: *Ibid.*

Where, in agreement for separation of husband and wife, former agreed to pay certain allowance to wife, and after paying several installments discontinued same, he cannot set up agreement in bar of her action for support: *Ibid.*—even though he discontinued payments because wife demanded that allowance be increased, *Ibid.*

In action under section the only questions are whether marriage relation existed at time of institution of proceedings: *Bidwell v. Bidwell*, 139-409; *Skittletharpe v. Skittletharpe*, 130-72; *Hooper v. Hooper*, 164-1—and whether husband separated himself from wife, *Skittletharpe v. Skittletharpe*, 130-72.

Judgment may direct monthly payments from husband's estate, which includes his income from property and his labor, considering his capacity to work: *Crews v. Crews*, 175-168, overruling on this point *Skittletharpe v. Skittletharpe*, 130-72.

Judgment in such cases is not final in sense that it is always enforceable, and such judgments subject to modification: *Crews v. Crews*, 175-168.

Issues of fact raised in this proceeding should be submitted to jury: *Ibid.*

In proceedings under section, it is province and duty of judge to determine what is reasonable subsistence for wife: *Cram v. Cram*, 116-288—either by hearing testimony himself or by reference to referee to ascertain facts as to income of husband, etc., *Ibid.*

Where application for alimony alone, it cannot be decreased before final hearing: *Hodges v. Hodges*, 82-122—for alimony pendente lite cannot be allowed under this section, *Ibid.*

Amount or specific property to be assigned is left to discretion of court, regard being had to husband's condition, and his means, wherever situated, in determining its value: *Ibid.*; *Cram v. Cram*, 116-295.

In action for support under section, judgment of nonsuit proper where court of state having jurisdiction of cause and parties had adjudged that status of parties was not husband and wife: *Bidwell v. Bidwell*, 139-402.

Section merely cited: *Ellett v. Ellett*, 157-162; *Clark v. Clark*, 133-28; *Reeves v. Reeves*, 82-352; *McKinnon v. McDonald*, 57-2.

1668. Alimony in real estate, writ of possession issued. In all cases in which the court grants alimony by the assignment of real estate, the court has power to issue a writ of possession when necessary in the judgment of the court to do so.

Rev., s. 1568; Code, s. 1293; 1868-9, c. 123, s. 1.

Where alimony allotted to wife in specific property of husband, title to such property remains in him, and will revert at death of wife or upon reconciliation: *Taylor v. Taylor*, 93-418.

CHAPTER 31

DOGS

ART. 1. OWNER'S LIABILITY.

- 1669. Liability for injury to livestock or fowls.
- 1670. Permitting bitch at large.
- 1671. Sheep-killing dogs to be killed.
- 1672. Failing to kill mad dog.

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- 1674. License tags; optional with county commissioners.
- 1675. Dogs to be listed; penalty for failure to list.
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- 1678. Tax listers to make inquiry, compile reports; compensation.
- 1679. Purchasers to ascertain listing.
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- 1682. Mad dogs, dogs killing sheep, etc., may be killed.
- 1683. Dogs, when listed, personal property; larceny of dog a misdemeanor.
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- 1685. Nothing in this article abrogated by Article 2; special tax an additional tax.
- 1686. Special dog tax submitted to voters on petition.
- 1687. Conduct of elections.
- 1688. Commissioners to provide for registration; ballots and machinery.
- 1689. Canvass of votes and returns.
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- 1691. License tax.
- 1692. Collection and application of tax.
- 1693. Listed dogs protected; exceptions.
- 1694. Application of article to counties having dog tax.

ART. 1. OWNER'S LIABILITY

1669. Liability for injury to livestock or fowls. If any dog, not being at the time on the premises of the owner or person having charge thereof, shall kill or injure any livestock or fowls, the owner or person having such dog in charge shall be liable for damages sustained by the injury, killing, or maiming of any livestock, and costs of suit.

1911, c. 3, s. 1.

When owner liable for injury caused by his dog: *Harris v. Fisher*, 115-318; *Perry v. Phipps*, 32-259. See section 1693. Liability for wrongfully killing a dog: *Scott v. Cates*, 175-336; *State v. Smith*, 156-628; *Beasley v. Byrum*, 163-3; *Mowery v. Salisbury*, 82-175; *State v. Latham*, 35-33; *Dodson v. Mock*, 20-282; *Perry v. Phipps*, 32-259. Dog is property, and an action may be brought for possession: *Meekins v. Simpson*, 176-130.

1670. Permitting bitch at large. If any person owning or having any bitch shall knowingly permit her to run at large during the erotic stage of copulation he shall be guilty of a misdemeanor and fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., s. 3303; Code, s. 2501; 1862-3, c. 41, s. 2.

1671. Sheep-killing dogs to be killed. If any person owning or having any dog that kills sheep or other domestic animal, upon satisfactory evidence of the same being made before any justice of the peace of the county, and the owner duly notified thereof, shall refuse to kill it, and shall permit such dog to go at liberty, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days, and the dog may be killed by any one if found going at large.

Rev., s. 3304; Code, s. 2500; 1862-3, c. 41, s. 1; 1874-5, c. 108, s. 2.

Sheep-killing dog may be killed: *Parrott v. Hartsfield*, 20-242; see, also, *Mowery v. Salisbury*, 82-175; *Daniels v. Homer*, 139-252, and sections 1682, 1693.

1672. Failing to kill mad dog. If the owner of any dog shall know, or have good reason to believe, that his dog, or any dog belonging to any person under his control, has been bitten by a mad dog, and shall neglect or refuse immediately to kill the same, he shall forfeit and pay the sum of fifty dollars to him who will sue therefor; and the offender shall be liable to pay all damages which may be sustained by any one, in his property or person, by the bite of any such dog, and shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 3305; Code, s. 2499; R. C., c. 67.

For statutes forbidding bird dogs at large at certain seasons, see Game Laws.

Liability for failure to kill mad dog: *Holton v. Moore*, 165-549; *Wallace v. Douglas*, 32-79. See sections 1682, 1693.

ART. 2. LICENSE TAXES ON DOGS

1673. Amount of tax. Any person owning or keeping about him any open female dog of the age of six months or older shall pay annually a license or privilege tax of two dollars. Any person owning or keeping any male dog, or female dog other than an open female dog of the age of six months or older, shall pay annually on each dog so owned or kept a license or privilege tax of one dollar.

1919, c. 116, ss. 1, 2.

Imposing tax for keeping dog a valid exercise of police powers: *Newell v. Green*, 169-462. Counties in which special tax authorized enumerated: *Ibid*.

1674. License tags; optional with county commissioners. To every person paying the license or privilege tax prescribed in the preceding section there shall be issued by the sheriff a metal tag bearing county name, a serial number, and expiration date, which shall be attached by owner to a collar to always be worn by any dog when not on premises of the owner or when engaged in hunting. The commissioner of agriculture shall at all times keep on hand a supply of tags to be furnished the sheriffs of the several counties: Provided, that the county commissioners of each county shall, by order duly made in regular session, make an order determining whether the collar and tag shall be applied to that county.

1919, c. 116, s. 2½.

1675. Dogs to be listed; penalty for failure to list. It shall be the duty of every owner or keeper of a dog to list the same for taxes at the same time and place that other personal property is listed, and the various tax listers in the state shall have proper abstracts furnished them for listing dogs for taxation, and any person failing or refusing to list such dog or dogs shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or

imprisoned not exceeding thirty days. The owner of the home or lessee of such owner shall be responsible for listing of any dog belonging to any member of his family.

1919, c. 116, s. 3.

1676. When tax due; penalty for failure to pay. The license or privilege tax herein imposed shall be due and payable on the first day of October of each and every year, and all persons after December first thereafter who own or keep a dog or dogs upon which the license or privilege tax is not paid, whether said dog or dogs have been listed or not, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or be imprisoned not more than thirty days.

1919, c. 116, s. 3.

1677. Receipt for tax a license. Upon the payment to the sheriff or tax collector of the license or privilege tax aforesaid, such sheriff or tax collector shall give the owner or keeper of such dog or dogs a receipt for the same, which shall constitute a license under the provisions of this article.

1919, c. 116, s. 3.

1678. Tax listers to make inquiry, compile reports; compensation. The tax listers for each township, town, and city in this state shall annually, at the time of listing property as required by law, make diligent inquiry as to the number of dogs owned, harbored, or kept by any person subject to taxation. The list-takers shall, on or before the first day of July in each year, make a complete report to the sheriff or tax collector on a blank form furnished them by the proper authority, setting forth the name of every owner of any dog or dogs, how many of each and the sex owned or kept by such person. The county commissioners may pay the tax listers for such services such amounts as may be just out of the money arising under this article.

1919, c. 116, ss. 4, 6.

1679. Purchasers to ascertain listing. Any person coming in possession of any dog or dogs after listing time shall immediately ascertain whether such dog or dogs have been listed for taxes or not, and if not so listed, it is hereby made the duty of such owner or keeper of such dog or dogs to go to the sheriff or tax collector of his county and list such dog or dogs for taxes, and it is made the duty of the owner or keeper of such dog or dogs to pay the privilege or license tax as is herein provided for in other cases.

1919, c. 116, s. 4.

1680. Permitting dogs to run at large at night; penalty; liability for damage. No person shall allow his dog over six months old to run at large in the night time unaccompanied by the owner or by some member of the owner's family, or some other person by the owner's permission. Any person intentionally, knowingly, and willfully violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, and shall also be liable in damages to any person injured or suffering loss to his property or chattels.

1919, c. 116, s. 5.

A town ordinance against permitting dogs to run at large unmuzzled is valid: *State v. Clifton*, 152-800.

1681. Proceeds of tax to school fund; proviso, payment of damages; reimbursement by owner. The money arising under the provisions of this article shall be applied to the school funds of the county in which said tax is collected: Provided, it shall be the duty of the county commissioners, upon complaint made to them of injury to person or injury to or destruction of property by any dog, upon satisfactory proof of such injury or destruction, to appoint three freeholders to ascertain the amount of damages done, including necessary treatment, if any, and all reasonable expenses incurred, and upon the coming in of the report of such jury of the damage as aforesaid, the said county commissioners shall order the same paid out of any moneys arising from the tax on dogs as provided for in this article. And in cases where the owner of such dog or dogs is known or can be ascertained, he shall reimburse the county to the amount paid out for such injury or destruction. To enforce collection of this amount the county commissioners are hereby authorized and empowered to sue for the same.

1919, c. 116, s. 7.

The disposition of the proceeds of dog tax is a matter of legislative discretion: *Newell v. Green*, 169-462.

1682. Mad dogs, dogs killing sheep, etc., may be killed. Any person may kill any mad dog, and also any dog if he is killing sheep, cattle, hogs, goats, or poultry.

1919, c. 116, s. 8.

See sections 1671, 1672, 1693.

1683. Dogs, when listed, personal property; larceny of dog a misdemeanor. All dogs, when listed for taxes, become personal property and shall be governed by the laws governing other personal property: Provided, the larceny of any dog upon which aforesaid tax has been paid shall be a misdemeanor.

1919, c. 116, s. 9.

Dog not subject of larceny generally: *State v. Holder*, 81-527; unless tax paid, see sections 1693, 4263.

1684. Failure to discharge duties imposed under this article. Any person failing to discharge any duty imposed upon him under this article shall be guilty of a misdemeanor, and upon conviction shall pay a fine not exceeding fifty dollars or be imprisoned not more than thirty days.

1919, c. 116, s. 10.

ART. 3. SPECIAL LICENSE TAX ON DOGS

1685. Nothing in this article abrogated by Art. 2; special tax an additional tax. Nothing contained in Article 2 of this chapter shall have the effect of abrogating any of the provisions of this article, and the special license tax on dogs provided for under this article shall be in addition to the license tax on dogs provided for under Article 2 of this chapter.

1919, c. 116, s. 11.

1686. Special dog tax submitted to voters on petition. Upon the written application of one-third of the qualified voters of any county in this state made to the board of commissioners of such county, asking that an election be held in said county to adopt the provisions of this article for levying and collecting a special dog tax in said county, it shall be the duty of said board of commissioners from

time to time to submit the question of "special dog tax" or "no special dog tax" to the qualified voters of said county; and if at any such election a majority of the votes cast shall be in favor of said special dog tax, then the provisions of this article shall be in full force and effect over the whole of said county, and the special dog tax hereinafter provided for shall be levied and collected in said county; but if a majority of the votes cast at such election shall be against said special dog tax, then the provisions of this article shall not apply to any part of said county.

1917, c. 206, s. 1.

1687. Conduct of elections. Every election held under the provisions of this article shall be held and conducted under the same rules and regulations and according to the same penalties provided by law for the election of members of the general assembly: Provided, that no such election shall be held in any county oftener than once in two years.

1917, c. 206, s. 3.

1688. Commissioners to provide for registration; ballots and machinery. The board of commissioners of any county in this state in which an election is to be held under the provisions of this article may provide for a new registration of voters in said county if they deem necessary, or they may provide for the use of the registration of voters in effect at the general election for county officers in said county next preceding the holding of the election hereunder, and they shall appoint such officers as may be necessary to properly hold such election and shall designate the time and places for holding such elections, and make all rules, regulations, and do all other things necessary to carry into effect the provisions of this article; they shall provide ballots without device for all qualified voters in said county, on which shall be written or printed the words "For special dog tax," and also shall provide like ballots on which shall be printed or written the words "Against special dog tax."

1917, c. 206, s. 4.

1689. Canvass of votes and returns. At the close of said election the officers holding same shall canvass the vote and certify the returns to the said board of commissioners of said county, and the said board of commissioners shall canvass the said returns and declare the results of said election in the manner now provided by law for holding special-tax school elections.

1917, c. 206, s. 4.

1690. Contents and record of petition; notice of election. The qualified voters of any county who shall make written application to the board of commissioners of said county asking that an election be held under the provisions of this article shall designate and insert in said application the amount of special dog tax to be levied and collected in said county, which tax shall not exceed the sum of five dollars nor be less than the sum of one dollar for each dog, whether male or female, and the board of commissioners shall have said written application, specifying the amount of said special dog tax to be voted for in said county, recorded in the records of their proceedings, and shall cause to be published in some newspaper published or circulated in said county, and posted at the court-

house door and five other public places in said county, a notice of the time and places for holding said election and specifying the amount of tax to be voted for in said county.

1917, c. 206, s. 5.

1691. License tax. Any person or persons, firm or corporation, owning or keeping any dog or dogs, whether male or female, in any county which shall adopt the provisions of this article for the levy and collection of said special dog tax shall pay annually a license or privilege tax on each dog, whether male or female, such sum or sums as may be designated and inserted in the written application of the qualified voters of said county asking for said election and as recorded in the proceedings of the board of county commissioners of said county, which shall not exceed the sum of five dollars nor be less than the sum of one dollar for each dog: Provided, the tax voted for and levied on female dogs may be greater than the tax on male dogs, but in no event shall said special tax exceed the sum of five dollars, nor be less than the sum of one dollar for any dog, whether male or female.

1917, c. 206, s. 6.

The legislature may authorize municipal corporation to levy dog tax: *Mowery v. Salisbury*, 82-175.

1692. Collection and application of tax. The special dog tax voted for under the provisions of this article shall be due and collectible at the same time and in the same manner as provided by law for the collection of taxes on other personal property in said county, and shall be collected by the collector of other taxes in said county in the same manner and under the same penalties provided by law for collection of taxes on other personal property in said county, and shall be applied to the road fund, or school fund, of said county, as may be directed by the board of commissioners of said county.

1917, c. 206, s. 8.

See section 1681.

1693. Listed dogs protected; exceptions. Any person who shall steal any dog which has been listed for taxation as herein provided shall be guilty of a misdemeanor and fined or imprisoned, in the discretion of the court; and any person who shall kill any dog the property of another, after the same has been listed as herein provided, shall be liable to the owner in damages for the value of such dog. Nothing in this act shall prevent the killing of a mad dog, sheep-killing dog, or egg-sucking dog on sight, when off the premises of its owner, and the owner shall not recover any damages for the loss of such dog.

1917, c. 206, s. 9.

See sections 1669, 1680, 1683, 4263.

1694. Application of article to counties having dog tax. Any county in this state which now has a local law taxing dogs may, by election in the manner herein provided for, accept the provisions of this article, and if adopted by a majority of the qualified voters of said county at such election, the local law taxing dogs in such county shall thereby be repealed and annulled, and the provisions of this article shall be in full force and effect in such county.

1917, c. 206, s. 10.

Dog tax for Dare. P. L. 1919, c. 107.

CHAPTER 32

ELECTRIC, TELEGRAPH, AND POWER COMPANIES

ART. 1. ACQUISITION AND CONDEMNATION OF PROPERTY.

- 1695. Use of public highways.
- 1696. Electric and hydro-electric power companies may appropriate highways; conditions.
- 1697. Acquisition of right of way by contract.
- 1698. Grant of eminent domain; exception as to mills and water-powers.
- 1699. Residences, etc., may be taken under certain conditions.
- 1700. Condemnation on petition; parties' interests only taken; no survey required.
- 1701. Copy of petition to be served.
- 1702. Proceedings as under eminent domain.
- 1703. Commissioners to inspect premises.

ART. 2. INTRASTATE TELEGRAPH MESSAGES.

- 1704. Penalty for nondelivery of intrastate telegraph message.

ART. 1. ACQUISITION AND CONDEMNATION OF PROPERTY

1695. Use of public highways. Any duly incorporated company possessing the power to construct telegraph or telephone lines, lines for the conveying of electric power or for lights, either or all, has the right to construct, maintain and operate such lines along any railroad or other public highway, but such lines shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway.

Rev., s. 1571; Code, s. 2007; 1899, c. 64, s. 1; 1903, c. 562; 1874-5, c. 203, s. 2.

This section applies to placing lines along the highway and not over private land: *Wade v. Tel. Co.*, 147-219. That telegraph and telephone lines on a right of way are an additional burden, see *Query v. Tel. Co.*, 178-439; *Teeter v. Tel. Co.*, 172-783; *Brown v. Electric Co.*, 138-533; *Hodges v. Tel. Co.*, 133-225; *Phillips v. Tel. Co.*, 130-513. Section referred to in *R. R. v. R. R.*, 83-496.

1696. Electric and hydro-electric power companies may appropriate highways; conditions. Every electric power or hydro-electric power corporation which may exercise the right of eminent domain under the chapter Eminent Domain, where in the development of electric or hydro-electric power it shall become necessary to use or occupy any public highway, or any part of the same, after obtaining the consent of the board of county commissioners of the county in which such public highway is situate, shall have power to appropriate said public highway for the development of electric or hydro-electric power: Provided, that said electric power or hydro-electric power corporation shall construct an equally good public highway, by a route to be selected by and subject to the approval and satisfaction of the board of county commissioners of the county in which said public highway is situated: Provided further, that said company shall pay all damages to be assessed as provided by law, by the damming of water, the discontinuance of the road, and for the laying out of said new road.

1911, c. 114.

1697. Acquisition of right of way by contract. Such telegraph, telephone, or electric power or lighting company has power to contract with any person or corporation, the owner of any lands or of any franchise or easement therein, over which its lines are proposed to be erected, for the right of way for planting, repairing and preservation of its poles or other property, and for the erection

and occupation of offices at suitable distances for the public accommodation. This section shall not be construed as requiring electric power or lighting companies to erect offices for public accommodation.

Rev., s. 1572; Code, s. 2008; 1899, c. 64; 1903, c. 562, ss. 1, 2; 1874-5, c. 203, s. 3.

A railroad company cannot grant easement over its right of way to telegraph company; this can be done only by owner of soil: *Hodges v. Tel. Co.*, 133-225; *Narron v. R. R.*, 122-856. Adverse user for twenty years may give the easement: *Teeter v. Tel. Co.*, 172-783. Section cited in *Power Co. v. Wissler*, 160-269.

1698. Grant of eminent domain; exception as to mills and water-powers. Such telegraph, telephone, electric power or lighting company shall be entitled, upon making just compensation therefor, to the right of way over the lands, privileges and easements of other persons and corporations, and to the right to erect poles, to establish offices, and to take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, works, or power-houses, with the right to divert the water from such ponds or reservoirs and conduct the same by flume, ditch, conduit, waterway or pipe line, or in any other manner, to the point of use for the generation of power at its said power-houses, returning said water to its proper channel after being so used.

Nothing in this section authorizes interference with any mill or power plant actually in process of construction or in operation; or the taking of water-powers, developed or undeveloped, with the land adjacent thereto necessary for their development. Any provisions in conflict with this chapter in any special charters granted before January thirty-first, one thousand nine hundred and seven, in respect to the exercise of the right of eminent domain are repealed.

Rev., s. 1573; Code, s. 2009; 1874-5, c. 203, s. 4; 1899, c. 64; 1903, c. 562; 1907, c. 74.

These are public-service corporations and are required to begin business within two years, but only the state can take advantage of failure: *Power Co. v. Power Co.*, 175-668; s. c., 171-248.

They are subject to state control and regulation through the corporation commission, see sections 1035, 1060, 1066, 1071. Telegraph companies: *Mayo v. Tel. Co.*, 112-343; *R. R. Com. v. Tel. Co.*, 113-213; *Leavell v. Tel. Co.*, 116-211. Electric power companies: *Horner v. Electric Co.*, 153-535; s. c., 156-495. Telephone companies: *Godwin v. Tel. Co.*, 136-258; *Tel. Co. v. Tel. Co.*, 159-9—must serve the public at reasonable rates and without discrimination, *Godwin v. Tel. Co.*, 136-258; *Tel. Co. v. Tel. Co.*, 159-9; *Woodley v. Tel. Co.*, 163-284—but cannot be compelled to serve an unlawful purpose, *Godwin v. Tel. Co.*, 136-258. Liability for wrongful removal of telephone: *Carmichael v. Tel. Co.*, 157-21; s. c., 162-333.

As to eminent domain granted telegraph companies, see *Hodges v. Tel. Co.*, 133-225; *Phillips v. Tel. Co.*, 130-513—electric power and lighting companies, see *Wheeler v. Tel. Co.*, 172-9; *R. R. v. Light and Power Co.*, 169-471; s. c., 171-314; *R. R. v. Oates*, 164-167; *Moore v. Power Co.*, 163-300; *Brown v. Power Co.*, 140-333; *Brown v. Electric Co.*, 138-533—street railway companies, see *Hester v. Traction Co.*, 138-288; *Merrick v. Street R. R.*, 118-1081; *R. R. v. Street R. R.*, 120-520. The power of eminent domain is to be used only for a public purpose: *Wissler v. Power Co.*, 158-465; *Power Co. v. Wissler*, 160-269.

In conflicting rights to acquire land under eminent domain, priority is given to the company which first defines and locates its route: *Power Co. v. Power Co.*, 171-248; s. c., 175-668. What will amount to abandonment: *Ibid.* Granting the power to one corporation and not to all is not a violation of the constitution: *Ibid.* Special power may be given to condemn water-powers: *Ibid.* But the general power is limited by this section: *R. R. v. Light and Power Co.*, 169-471; *R. R. v. Oates*, 164-167; *Power Co. v. Whitney*, 150-31.

1699. Residences, etc., may be taken under certain cases. Residence property or vacant lots adjacent thereto in towns or cities, or other residences, gardens, orchards, graveyards or cemeteries, may be taken under the preceding section

only when the company alleges, and upon the proceedings to condemn makes it appear to the satisfaction of the court, that it owns or otherwise controls not less than seventy-five per cent of the fall of the river or stream on which it proposes to erect its works, from the location of its proposed dam to the head of its pond or reservoir; or when the corporation commission, upon the petition filed by the company, shall, after due inquiry, so authorize. Nothing in this section repeals any part or feature of any private charter, but any firm or corporation acting under a private charter may operate under or adopt any feature of this section.

1907, c. 74; 1917, c. 108.

For condemnation of water-power, see annotations under section 1698.

1700. Condemnation on petition; parties' interests only taken; no survey required. When such telegraph, telephone, electric power or lighting company fails on application therefor to secure by contract or agreement such right of way for the purposes aforesaid over the lands, privilege or easement of another person or corporation, it is lawful for such company, first giving security for costs, to file its petition before the superior court for the county in which said lands are situate, or into or through which such easement, privilege or franchise extends, setting forth and describing the parcels of land, privilege or easement over which the way, privilege or right of use is claimed, the owners of the land, easement or privilege, and their place of residence, if known, and if not known that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, and if the use or right sought be over or upon an easement or right of way, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right of way be made a party defendant.

Only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right of way of a railroad or railway company sought to be condemned extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such right of way extends.

It is not necessary for the petitioner to make any survey of or over the right of way, nor to file any map or survey thereof, nor to file any certificate of the location of its line by its board of directors.

Rev., s. 1574; Code, s. 2010; 1899, c. 64, s. 2; 1903, c. 562; 1874-5, c. 203, s. 5.

Private property may not be taken for public use, directly or indirectly, without compensation: *Phillips v. Tel. Co.*, 130-513; *Staton v. R. R.*, 111-278; see, also, section 1706 and annotations thereunder—therefore permanent damages may be awarded landowner injured by putting telegraph poles on his land, *Phillips v. Tel. Co.*, 130-513—also for constructing telephone lines, *Lambeth v. Power Co.*, 152-371. Company cannot cut shade trees on sidewalk, even with consent of municipal authorities, without compensation to abutting owner: *Brown v. Electric Co.*, 138-533. In proper case punitive damages may be recovered: *Ibid.*

The act of congress of July 24, 1860, does not give authority to enter private property without consent of owner, but provides that where consent obtained, no state shall prevent use of such postroads for telegraph purposes by such corporations as avail themselves of its privileges: *Phillips v. Tel. Co.*, 130-513.

The right of eminent domain may be extended to include trees near the right of way which would interfere with the lines: *Power Co. v. Wissler*, 160-269.

That telegraph and telephone lines are an additional servitude, see cases cited under section 1695. Where power company built a dam and backed water on railroad right of way to injury of land, the owner is entitled to compensation: *Brown v. Power Co.*, 140-347.

Construction of street car track is not any additional servitude upon property fronting on street: *Hester v. Traction Co.*, 138-288; *Merrick v. Street Rwy.*, 118-1081—provided the track is so constructed as not to shut abutter out or off with embankments, *Merrick v. Street Rwy.*, 118-1081.

The running of street cars over a railroad bridge imposes an additional servitude, for which street car company must render compensation: *Railroad v. Street Rwy.*, 120-520.

Where proceedings to condemn portion of railroad right of way for telegraph poles, etc., landowner must be made party: *Phillips v. Tel. Co.*, 130-513. Landowner is not given the right hereunder to file petition for damage; he must sue in trespass: *Ibid.* Purchaser of land subsequent to the taking and erection thereon of a telegraph line may recover permanent damages, and in suit therefor telegraph company may acquire easement: *Ibid.*

1701. Copy of petition to be served. A copy of such petition, with a notice of the time and place the same will be presented to the superior court, must be served on the persons whose interests are to be affected by the proceeding at least ten days prior to the presentation of the same to the said court.

Rev., s. 1575; Code, s. 2011; 1874-5, c. 203, s. 6; 1899, c. 64, s. 3.

Condemnation proceedings by telegraph company against railroad company to condemn right of way, to which landowner not a party, give no rights against landowner: *Phillips v. Tel. Co.*, 130-513; *Narron v. R. R.*, 122-856.

1702. Proceedings as under Eminent Domain. The proceedings for the condemnation of lands, or any easement or interest therein, for the use of telegraph, telephone, electric power or lighting companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in Article 2, entitled "Condemnation Proceedings," of the chapter Eminent Domain.

Rev., s. 1576; Code, s. 2012; 1899, c. 64; 1903, c. 562.

Section refers to proceedings subsequent to filing of petition and service of required notices: *Phillips v. Tel. Co.*, 130-525.

1703. Commissioners to inspect premises. In considering the question of damages when the interest sought is over an easement, privilege or right of way, the commissioners may inspect the premises or rest their finding on such testimony as to them may be satisfactory.

Rev., s. 1577; Code, s. 2013; 1874-5, c. 203, s. 9.

For certain powers of electric companies, see section 1141.

ART. 2. INTRASTATE TELEGRAPH MESSAGES

1704. Penalty for nondelivery of intrastate telegraph message. Any telegraph company doing business in this state that shall fail to transmit and deliver any intrastate message within a reasonable time shall forfeit and pay to any one who may sue for same a penalty of twenty-five dollars. Such penalty shall be in addition to any right of action that any person may have for the recovery of damages. Proof of the sending of any message from one point in this state to another point in this state shall be prima facie evidence that it is an intrastate message.

1919, c. 175.

Telegraph companies are bound to exercise ordinary prudence and diligence: *Betts v. Tel. Co.*, 167-75; *Hoaglin v. Tel. Co.*, 161-390; *Barnes v. Tel. Co.*, 156-150. Restricting liability unless message is repeated or action brought in thirty days is invalid in this state: *Young v. Tel. Co.*, 168-36; *Williamson v. Tel. Co.*, 151-223; *Brown v. Tel. Co.*, 111-187; *Sherrill v. Tel. Co.*, 109-532. But a limitation of sixty days is reasonable: *Lytle v. Tel. Co.*, 165-504; *Sykes v. Tel. Co.*, 150-431; *Lewis v. Tel. Co.*, 117-436.

The action may be in tort or in contract: *LeHue v. Tel. Co.*, 174-332; *Penn v. Tel. Co.*, 159-306, and cases cited.

Mental anguish recognized as an element of damage in this state: *Young v. Tel. Co.*, 107-370; *Sherrill v. Tel. Co.*, 116-655; *Cashion v. Tel. Co.*, 123-267; *Green v. Tel. Co.*, 136-489; *Penn v. Tel. Co.*, 159-306, and cases cited; *Lawrence v. Tel. Co.*, 171-240, and cases cited. Allowed in interstate messages: *Young v. Tel. Co.*, 168-36; *Raiford v. Tel. Co.*, 160-489; *Penn v. Tel. Co.*, 159-306, and cases cited.

Since the act of congress, 1910, the federal rule applies in interstate messages, and restrictions of liability are recognized and mental anguish is not allowed: *Johnson v. Tel. Co.*, 175-588; s. c., 177-31; *Askew v. Tel. Co.*, 174-261; *Norris v. Tel. Co.*, 174-92; *Meadows v. Tel. Co.*, 173-240.

What is an interstate message: *R. R. Com. v. Tel. Co.*, 113-213; *Leavell v. Tel. Co.*, 116-211; *Penn v. Tel. Co.*, 159-306; *Bateman v. Tel. Co.*, 174-97.

CHAPTER 33

EMINENT DOMAIN

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ART. 1. RIGHT OF EMINENT DOMAIN

1705. **Corporation in this chapter defined.** For the purposes of this chapter, unless the context clearly indicates the contrary, the word "corporation" includes the bodies politic and natural persons, enumerated in the following section, which possess the power of eminent domain.

1706. **By whom right may be exercised.** The right of eminent domain may, under the provisions of this chapter, be exercised for the purpose of constructing their roads, canals, lines of wires, or other works, which are authorized by law and which involve a public use or benefit, by the bodies politic, corporations, or persons following:

1. Railroad, street railroad, plankroad, tramroad, turnpike, canal, telegraph, telephone, electric power or lighting, public water supply, flume, or incorporated bridge companies.

2. Municipalities operating water systems and sewer systems and all water companies operating under charter from the state or license from municipalities, which may maintain public water supplies, for the purpose of acquiring and maintaining such supplies.

3. Persons operating or desiring to operate electric light plants, for the purpose of constructing and erecting wires or other necessary things.

4. Public institutions of the state for the purpose of providing water supplies, or for other necessary purposes of such institutions.

5. School committees of public school districts, public school committees of townships, county boards of education, boards of trustees or of directors of any corporation holding title to real estate upon which any public school, private school, high school, academy, university or college is situated, in order to obtain a pure and adequate water supply for such school, college or university.

Rev., s. 2575; Code, s. 1698; R. C., c. 61, s. 9; 1852, c. 92, s. 1; 1874-5, c. 83; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132.

For power of municipalities to acquire property by eminent domain, see Municipal Corporations, ss. 2791, 2792.

For condemnation for water supply, see Public Health, ss. 7119, 7120.

For the right of eminent domain and the exercise of the right by electrical companies, see Electric, Telegraph and Power Companies.

For condemnation for street railroads operating by electricity, and owning one side of a stream, of land on the other side for a dam, see Railroads, s. 3535.

For power of municipal hospital to condemn land, see Public Hospitals, s. 7265.

For condemnation of land for roads, see Roads and Highways.

For condemnation for mill by owner of one bank of stream, see Mills, Art. 2.

Condemnation for mills, see sections 2535, 2536.

Condemnation for canals, see sections 5261-5264, 5269, 5301.

The provision of this section giving eminent domain to public institutions of the state supersedes older more limited provisions omitted.

Although there is no clause in state constitution which prohibits taking private property for public use without compensation, and although clause to that effect in constitution of United States applies only to acts by United States, yet principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina: *Johnston v. Rankin*, 70-550; *State v. Glen*, 52-321; *Cornelius v. Glen*, 52-512; *Railroad v. Davis*, 19-451; *Cozard v. Hardwood Co.*, 139-283; *Lloyd v. Venable*, 168-531.

Right of state to take private property under power of eminent domain rests upon ground that there is a public necessity for such taking, and can only be exercised when law provides means of giving adequate compensation to owner: *Dargan v. R. R.*, 113-596; *Jeffress v. Greenville*, 154-490; *Cozard v. Hardwood Co.*, 139-283.

Title to a right of way can only be acquired by condemnation and compensation in manner provided by law or by formal deed of conveyance from owner; or by performance of some act or payment of some consideration by virtue of an executory agreement enforceable in equity; or by completing road over lands, and thereby exposing corporation to liability for compensation, when such right and liability are provided by statute: *Beattie v. R. R.*, 108-425.

The power exists only when granted by the state: *Power Co. v. Power Co.*, 175-668; s. c., 171-248; *Lloyd v. Venable*, 168-531; *Comrs. v. Bonner*, 153-66. Right can be exercised only in mode pointed out in statute conferring it: *Allen v. R. R.*, 102-381; *Clinton v. Johnson*, 174-286. See annotations under section 1715.

Due process of law as applied to judicial proceedings, instituted for purpose of taking private property for public use, means such process as recognizes right of owner to just compensation for property taken, whether taken directly or indirectly: *Phillips v. Tel. Co.*, 130-513; *Dargan v. R. R.*, 113-596; *Staton v. R. R.*, 111-278—and such compensation must be full, measured by its actual market value, *Brown v. Power Co.*, 140-333.

Interest of landowner is preserved by payment into court of full assessed value of strip of land condemned, which is required before corporation can enter upon premises: *Railroad v. Newton*, 133-133.

LEGISLATIVE AUTHORITY. Method of taking land for public use is within exclusive control of legislature limited by organic law, and courts cannot help injured landowner, where statute has been strictly followed, until question of compensation is reached: *Durham v. Rigsbee*, 141-128; *Jeffress v. Greenville*, 154-490.

The question, what is a public use, is always one of law. Deference will be paid to legislative judgment as expressed in enactments providing for appropriation of property, but it will not be conclusive: *Cozard v. Hardwood Co.*, 139-283.

Whenever a power is given by statute, everything necessary to make it effective or requisite to attain the end is inferred: *Dewey v. R. R.*, 142-392.

In taking private property for use of public, as for public highway, legislature is not restricted to a mere easement in the property, but may take entire interest of individual if, in the opinion of legislature, public exigency requires it: *R. R. v. Davis*, 19-451. Legislature can authorize taking, levying assessment and payment of compensation to be made subsequently: *Ibid.*

Legislature may transfer land acquired for one public purpose to another public purpose, e. g., from waterworks to a park: *Torrence v. Charlotte*, 163-562.

TO WHOM GRANTED. While legislature has no power to authorize condemnation of private property for use of purely private corporations, nevertheless, where corporations, otherwise private, are clothed with powers and charged with duties which are in their nature public, they become quasi-public corporations, and may, with legislative permission, exercise right of eminent domain: *Power Co. v. Power Co.*, 171-248; *Land Co. v. Traction Co.*, 162-314; *Bass v. Navigation Co.*, 111-439; *R. R. v. C. C. R. R.*, 83-489; *R. R. v. Davis*, 10-451.

Land cannot be condemned for use of private lumbering railroad: *Lumber Co. v. Cedar Works*, 158-161; *Cozard v. Hardwood Co.*, 139-283; *Bass v. Navigation Co.*, 111-439.

Corporation organized for the transaction of business except railroad business, and empowered by its charter to build and operate "tramways or other roads, not meaning railway," has no power to build or operate a railroad, and has no capacity to take and use an easement for that purpose: *Beasley v. R. R.*, 145-272.

Powers conferred upon railroad company by its charter must be exercised "in a lawful way," that is, in respect to those who suffer damage, with due regard for their rights: *Thomason v. R. R.*, 142-300.

Railroad company has no right to enter on land for purpose of constructing its road until it has acquired right to do so by agreement with owner or by paying into court amount awarded by commissioners in condemnation proceedings duly had: *Street R. R. v. R. R.*, 142-423.

Right may be used to acquire land for public school: *School Trustees v. Hinton*, 165-12. See section 5416.

CORPORATIONS ENJOYING RIGHT, SUBJECT TO CONTROL. Where corporation has benefit of right of eminent domain, it is affected with a public use and must, to extent of public interest therein, submit to be controlled by public: *Griffin v. Water Co.*, 122-206.

Though railroad companies fall within classification of private corporations, they are quasi-public, and have no more authority to rid themselves of responsibility for performance of duties imposed upon them as inseparable from the privileges given them than they have to sell any property which is necessary for corporate purposes: *Logan v. R. R.*, 116-940.

NATURE OF RIGHT ACQUIRED. Public-service corporations acquiring right of way by condemnation obtain only an easement, and not the absolute title: *Beasley v. R. R.*, 145-272; *R. R. v. Olive*, 142-257; *Shepard v. R. R.*, 140-391; *Phillips v. Tel. Co.*, 130-513; *R. R. v. Sturgeon*, 120-225; *State v. Rives*, 27-297.

Where a railroad holds right of way under specific grant, it cannot extend this except by condemnation: *Tighe v. R. R.*, 176-239. Party granting right of way to railroad upon consideration of benefits, with provision that if failure or neglect for five years to construct line, it should revert to grantor, right of defendant is restricted to time fixed: *McDowell v. R. R.*, 144-721; *Thomas v. R. R.*, 144-729—and where time limit has expired, defendant is confined to condemnation proceedings under statute, *McDowell v. R. R.*, 144-721. Right of way granted in consideration of establishing a flag station, how enforced: *Parrott v. R. R.*, 165-295. Contract in this case does not convey an easement, but, at most, only constitutes an executory contract to convey an easement whenever road should be located on and completed through lands, provided that result was produced within reasonable time: *Beattie v. R. R.*, 108-425.

Grant of easement does not preclude grantor from such use of his land himself or permitting same to others, which is not in conflict therewith: *Lumber Co. v. Hines Bros.*, 126-254. Any use by owner of land condemned for right of way is subject to the necessity of the use of the land by company for purposes granted under charter: *Dargan v. R. R.*, 131-623; *Thomason v. R. R.*, 142-318; *Tighe v. R. R.*, 176-239; *Earnhardt v. R. R.*, 157-358; *Coit v.*

Owenby, 166-136; R. R. v. Bunting, 168-579. And the company may make such subsequent use of the land as may be necessary for the proper operation of the road: R. R. v. Olive, 142-257; Thomason v. R. R., 142-318. Allowing right of way to be used as street does not prevent the use of it by the railroad: *Muse v. R. R.*, 149-443.

Acquisition of right of way does not carry with it privilege of throwing stones or other material, by blasting, to a distance of two hundred yards or more on lands of adjacent proprietor, whereby family of latter is exposed to danger while engaged in domestic duties: *Blackwell v. R. R.*, 111-151.

Where railroad company constructed its road upon a street only by license of city, abutting property owner who is endangered thereby may maintain a common-law action for damages, to be assessed up to time of trial, or may sue for permanent damages inflicted by location and construction of road and, by so doing, confer upon defendant an easement to occupy street, as far as such abutter is concerned: *White v. R. R.*, 113-610. Where public-service corporation is authorized to take over a street with the consent of the city, compensation is due the city for the right: *R. R. v. Wilmington*, 154-331.

Railroad corporation having right to use land, or right of way over land, may maintain an action for its possession: *R. R. v. McCaskill*, 94-746.

A railroad company which has constructed its road over the land of another cannot be ousted or stayed in operating its road, when acting under authority in its charter or the general law: *Beasley v. R. R.*, 147-362.

On foreclosure of mortgage given by railroad company, purchaser takes right that company had acquired in relation to its rights of way under its charter: *Barker v. R. R.*, 137-214.

Title of railroad to right of way once acquired cannot be lost by occupancy as to any part of it by lapse of time: *Purifoy v. R. R.*, 108-100; *Railroad v. McCaskill*, 94-746. See section 434.

While mere nonuser of easement may not defeat or impair claim of railroad company to right of way for an unfinished line, yet, when such nonuser is accompanied by such acts of dominion for a long period by owner of servient lands as are inconsistent with nature of easement, and as indicate an intention to abandon it, easement will be lost and owner of fee will regain title: *Beattie v. R. R.*, 108-425.

Where railroad company allows the public to use its right of way for other purposes, it does not lose control, and a person entering upon the right of way, not for the company's business, is a licensee: *Muse v. R. R.*, 149-443.

GRANT OF EASEMENT PRESUMED. Railroad cannot acquire title to easement by prescription: *Narron v. R. R.*, 122-856. Where railroad company enters upon and constructs its track on land and owner does not institute an action therefor within two years, railroad will be presumed to have acquired an easement: *Earnhardt v. R. R.*, 157-358; *Barker v. R. R.*, 137-214; *R. R. v. Sturgeon*, 120-225; *R. R. v. McCaskill*, 94-746.

Presumption of grant to railroad raised by its charter cannot apply where deed from owner to railroad is executed within two years after location of road: *Hickory v. R. R.*, 137-189. Under statute raising presumption of grant to railroad two years after location of its track, burden of showing when track was located is upon defendant: *Ibid.*

When charter provides that, in absence of any contract, corporation acquires title to 100 feet on each side of track, and if no claim for damages is brought in two years from completion of that part of road it is barred, the corporation has a valid title to right of way as its track is completed: *Purifoy v. R. R.*, 108-100; *Railroad v. McCaskill*, 94-746—but when corporation took deed for less than 100 feet within two years after its completion, this prevented limitation in charter from applying, and corporation got no title to land lying outside of deed, but within 100 feet of track, by lapse of two years: *Dargan v. R. R.*, 113-596.

BURDEN ADDITIONAL TO ORIGINAL EASEMENT, OWNER COMPENSATED. Condemnation for the purpose of building and operating a railroad does not deprive owner of use of land except to extent that it was necessary for operation of road. For any additional burden he is entitled to compensation, to be measured with reference to limited easement of railroad: *Brown v. Power Co.*, 140-333, and cases cited on page 347.

Telegraph line along railroad and on right of way thereof is an additional burden upon land, for which landowner is entitled to just compensation: *Query v. Tel. Co.*, 178-639; *Hodges v. Tel. Co.*, 133-225; *Phillips v. Tel. Co.*, 130-513—and evidence that it was necessary to the operation of road is immaterial, *Hodges v. Tel. Co.*, 133-225. See annotations under section 1695.

A railroad company, owning an easement for trackage and similar purposes over plaintiff's lot, leased its entire road to defendant. Defendant had four other roads meeting at G, the town where plaintiff's lot was located: Held, that defendant was not entitled to use its easement for trackage or warehouse purposes for any traffic in which the lessor road had no part or interest without making compensation to plaintiff as for an additional burden on his land, but that additional traffic over lessor road, though originating on defendant's other roads, was not a subject of compensation: *McCulloch v. R. R.*, 146-316.

Running of street cars over a bridge already constructed by railroad company within city limits and sufficient for ordinary uses of public imposes an additional servitude upon bridge for which street railway company must render compensation by contributing to expense of maintenance and by providing necessary conveniences at intersection, as required by law: *Railroad v. Street R. R.*, 120-520.

Additional burden placed upon street, right of abutting owner: *Brown v. Electric Co.*, 138-533.

Construction of street car track does not impose any additional servitude upon property fronting on street so occupied so as to necessitate condemnation proceedings against the owners: *Hester v. Traction Co.*, 138-288; *Merrick v. Street R. R.*, 118-1081—provided the railway track is so constructed as not to shut abutter out or off with embankment, *Merrick v. Street R. R.*, 118-1081. A steam railroad on a street is an additional burden: *Caveness v. R. R.*, 172-305, and cases cited.

PRIORITY AS BETWEEN COMPANIES SEEKING SAME LOCATION. Property which has been appropriated to public use, railroad or other, may, under lawful authority and procedure, be condemned and so appropriated to another public use. But if such second appropriation is entirely inconsistent with first, or practically destroys it, such power can only be exercised by reason of legislative authority given in express terms or by necessary implication: *Street R. R. v. R. R.*, 142-423; *R. R. v. R. R.*, 83-489. One railroad may condemn a right of way across another railroad: *R. R. v. R. R.*, 161-531; s. e., 165-425; *R. R. v. R. R.*, 104-658. See section 3444.

Parol agreement to allow one railroad company to extend its track on right of way of another, for purpose of connecting therewith, is a mere license, revocable at will of licensor, and will not operate as an estoppel, although licensee has entered and made valuable improvement: *R. R. v. R. R.*, 104-658.

In conflicting rights of railroads as to right of way under grant or condemnation, in absence of statutory regulations to contrary, first location belongs to company which first defines and marks its route and adopts same for its permanent location by authoritative corporate action: *Street R. R. v. R. R.*, 142-423. Where priority of right has been secured by priority of location, it cannot be defeated by rival company agreeing with owners and purchasing property: *Ibid.* Making a preliminary survey by an engineer of railroad company, not reported to company or acted upon, will not prevent another company from locating on same line: *Ibid.* For conflicting rights under eminent domain in case of electric power companies, see *Power Co. v. Power Co.*, 171-248; s. e., 175-668.

Water-power not subject to condemnation if used or held to be used or developed for public purpose: *R. R. v. Light and Power Co.*, 169-471; *R. R. v. Oates*, 164-167; *R. R. v. Power Co.*, 171-314.

INJUNCTIVE RELIEF AGAINST INTERFERENCE WITH RIGHT OF WAY. A railroad company is entitled to injunctive relief against interference with right of way, without regard to solvency of persons interfering therewith: *R. R. v. Olive*, 142-257. It must show clearly that it has a right of way over lands in controversy, the extent of such right, and that defendants are obstructing or threaten to obstruct its use: *Ibid.*

Court will in this case protect plaintiff's right to exclusive use of roadbed, by injunctive relief, as against defendant's claim to appropriate it for its own right of way: *Street R. R. v. R. R.*, 142-423.

Fact that one railroad occupies land which is claimed by another road as its right of way is not in itself an irreparable tort which will justify restraining defendant from using land until question of title can be tried, especially when it is not alleged that defendant is insolvent, and where it appears that there is room on disputed territory for construction of both roads: *R. R. v. Mining Co.*, 112-661. See annotations under section 843.

1707. Right to enter on and purchase lands. Such bodies politic, corporation, or persons, may at any time enter upon the lands through which they may desire to conduct the roads or works authorized under the preceding section and lay out the same, and they may also enter upon such contiguous land along the route as may be necessary for depots, warehouses, engine sheds, workshops, water stations, tool-houses, and other buildings necessary for the accommodation of their officers, servants and agents, horses, mules and other cattle, and for the protection of their property; and shall pay to the proprietors of the land so entered on such sum as may be agreed on between them.

Rev., s. 2575; Code, s. 1698; R. C., c. 61, s. 9; 1852, c. 92; s. 1; 1874-5, c. 83.

Right of entry granted railroad company under this section is only for purpose of marking out route and designating building sites to end that parties may come to an intelligent agreement as to price: *State v. Wells*, 142-590. A railroad company having the power of eminent domain, entering upon and occupying land for building its track, is not a trespasser: *Abernathy v. R. R.*, 150-97.

Electric company may acquire the right to cut trees on or near the right of way: *Power Co. v. Wissler*, 160-269.

1708. Power of railroad companies to condemn land for union depots, double-tracking, etc. Any railroad company operating a line of railroad in North Carolina whenever it shall find it necessary to occupy any land for the purpose of getting to a union depot which has been ordered by the corporation commission, or for the purpose of maintaining, operating, improving, or of straightening its line, or of altering its location, or of constructing double tracks, or of enlarging its yard or terminal facilities, or of connecting two of its lines already in operation not more than six miles apart, shall have the power to condemn all lands needed for such purpose under the provisions of this chapter. More than two acres may be condemned for yard or terminal facilities if required for due operation of the railroad. No lands in any incorporated towns shall be condemned under this section until approved by the corporation commission, nor shall any yard, garden or dwelling-house be condemned, unless the corporation commission, upon petition filed by the railroad seeking to condemn, shall, after due inquiry, find that the railroad company cannot make the desired improvement without condemning the yard, garden or dwelling-house, except at an excessive cost. The power to condemn land under this section shall be enforceable and matters arising in regard thereto shall be tried only in the courts created by or under the constitution of this state. No rights granted or acquired under the provisions of this section shall in any way destroy or abridge the rights of the state to regulate or control such railroad company or to exclude foreign corporations from doing business in this state.

1907, c. 458, ss. 1, 2, 3.

Union depot statute (section 1042) was intended to apply to all cities and towns in state where, in legal discretion of commissioners, the move is practicable, etc.: *Dewey v. R. R.*, 142-392. It confers on railroads the incidental right to make such changes in their line and route as are necessary to accomplish purpose designed and to make depot available and accessible to traveling public as contemplated by act: *Ibid.*

Where corporation commission selects union depot site, railroads will not be enjoined, at instance of citizens and property owners, from erecting depot, either on ground that city is being sidetracked or that their property will be damaged by proposed change: *Ibid.*

Giving to railroads, subject to order of corporation commission to build union depot, the express power to condemn lands is a valid exercise of legislative power: *Ibid.*

1709. Condemning land for industrial sidings. Any railroad company doing business in this state, whether such railroad be a domestic or foreign corporation, which has been or shall be ordered by the corporation commission to construct an industrial siding as provided in chapter 21, section 1044, is empowered to exercise the right of eminent domain for such purpose, to condemn property as provided in this chapter, and to acquire such right of way as may be necessary to carry out the orders of the corporation commission. Whenever it is necessary for any railroad company doing business in this state to cross the street or streets in a town or city in order to carry out the orders of the corporation commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the state: Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city.

1911, c. 203.

1710. Condemnation by schools for water supply. If the school authorities mentioned in subsection 5 of section 1706 shall be unable to agree with the owners of any lands which, or the use of which, it is necessary to appropriate in obtaining a pure and adequate water supply for the school, they shall file a petition for the condemnation of such lands in conformity with the provisions of this chapter. In addition to the particulars required to be set out in section 1716, the petition shall state whether the water supply is desired to be obtained from a spring, from a stream, or by digging artesian wells. The proceedings for such condemnation shall conform to the requirements of this chapter. No greater amount of land in area or width shall be condemned under this section than is necessary to obtain a pure and adequate water supply.

Any person holding title to land upon which any school, public or private, is located is empowered to obtain water supplies from the springs, streams or artesian wells the use of which is acquired under this section by building intakes, reservoirs, digging ditches, laying pipes or doing such other things as may be needful to obtain the water supply.

1907, c. 671.

1711. Condemnation for steamboat wharves and warehouses. Upon the order of the corporation commission that any steamboat company provide wharf and warehouse facilities as may be deemed reasonable and just, at any particular point, such company shall have power to condemn land for such purpose in accordance with the provisions of this chapter.

Ex. Sess. 1913, c. 52.

1712. May take material from adjacent lands. For the purpose of constructing and operating its works and necessary appurtenances thereto, or of repairing them after they shall have been made, or of enlarging or otherwise altering them, the corporation entitled to exercise the powers of eminent domain may, at any time, enter on any adjacent lands, and cut, dig, and take therefrom any wood, stone, gravel, water or earth, which may be deemed necessary: Provided, that they shall not, without the consent of the owner, destroy or injure any ornamental or fruit trees.

Rev., s. 2576; Code, s. 1702; R. C., c. 61, s. 22; 1874-5, c. 83; 1907, c. 39, s. 2.

In constructing crossing, railroad company might use plank, timber, earth, etc., to make same such as statute allows and intends, and as public ease, convenience and safety require, and in forming and securing incline on each side of railroad track, so as to provide an easy and safe passway across it: *State v. Lumber Co.*, 109-862.

Owner of land is entitled to compensatory damages for cutting of crossties on land not included in right of way, and negligent filling of ditches, instead of building bridges over them, in constructing roads necessary to remove timber, and for breaking down fences: *Waters v. Lumber Co.*, 115-648.

Fact that railroad company supervised cutting of timber and issued orders which contractor was bound to obey showed affirmatively a state of subjection on contractor's part that made him, in law, servant of railroad: *Waters v. Lumber Co.*, 115-649.

In the case of electric companies this power may be extended to the cutting of trees near the right of way upon proper proceedings for condemnation: *Power Co. v. Wissler*, 160-269.

1713. How material paid for. If for the value of the damages done to the owner by reason of the acts in the preceding section mentioned the parties may be unable to agree, the same shall be valued in the manner hereinafter provided.

Rev., s. 2577; Code, s. 1703; R. C., c. 61, s. 23; 1874-5, c. 83.

1714. Dwelling-houses and burial grounds cannot be condemned. No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling-house, yard, kitchen, garden or burial ground, unless condemnation of such property is expressly authorized in its charter or by some provision of the Consolidated Statutes.

Rev., s. 2578.

For power of electric companies to take dwellings, etc., see *Electric Companies*, s. 1699.

In Ashe, Watauga, and Yancey counties, yards, gardens and orchards may be condemned when necessary by railroad companies proceeding in conformity with the provisions of this chapter. P. L. 1911, c. 584.

“Dwelling-house” means the dwelling or home of the owner, and does not include tenant houses: *R. R. v. Mfg. Co.*, 166-168.

Charter of Western N. C. Railroad Company does not give it right to enter upon and appropriate a yard, garden or dwelling-house for purposes of road; and when such entry or appropriation is made, owner may maintain civil action for trespass, and is not compelled to resort to statutory remedy provided for condemnation of lands; nor will a recovery in such action vest in the corporation any easement or property in the premises: *Fore v. R. R.*, 101-526.

When provision in charter or deed granting right of way prohibited it from entering upon yard, garden, burial ground, etc., of defendants, but no portion of right of way was so used at date of acquisition, right of company would not be interfered with by fact that it has been appropriated to such use since: *Railroad v. Olive*, 142-257; *Dargan v. Railroad*, 131-625.

A house located on the right of way does not become property of company: *Shields v. R. R.*, 129-1; *R. R. v. Mfg. Co.*, 166-168.

ART. 2. CONDEMNATION PROCEEDINGS

1715. Proceedings when parties cannot agree. If any corporation, enumerated in section 1706 of this chapter, possessing by law the right of eminent domain in this state, is unable to agree for the purchase of any real estate required for purposes of its incorporation or for the purposes specified in this chapter, it shall have the right to acquire title to the same in the manner and by the special proceedings herein prescribed.

Rev., s. 2579; Code, ss. 1943, 2009; 1885, c. 168; 1893, c. 63; 1901, cc. 6, 41, s. 2; 1899, c. 64; 1903, cc. 562, 159, s. 16; 1871-2, c. 138, s. 13.

That this proceeding has taken the place of the common-law remedy for trespass, and the owner of the land must have his damages assessed in the manner herein prescribed, see *McIntire v. R. R.*, 67-278; *Holloway v. R. R.*, 85-452; *R. R. v. McCaskill*, 94-746; *Allen v. R. R.*, 102-381; *Jones v. Comrs.*, 130-452; *Dargan v. R. R.*, 131-623.

More recent cases hold that the statutory remedy is not exclusive, but the owner may proceed by petition under this section or by civil action for permanent damages: *Fleming v. Congleton*, 177-186; *Keener v. Asheville*, 177-1; *Mason v. Durham*, 175-638; *Cavness v. R. R.*, 172-305; *McMahan v. R. R.*, 170-456; *Porter v. R. R.*, 148-563.

Statutory method of condemning right of way can be exercised only when parties are unable to agree upon terms of acquirement: *Allen v. R. R.*, 102-381. In case parties cannot agree, then company may proceed to condemn land, and company does not acquire the right to enter for purpose of constructing road until amount of appraisement has been paid into court: *State v. Wells*, 142-590; *Railroad v. Newton*, 133-133.

Where charter of railroad contains provision as to manner of condemning land for right of way, method pointed out by such provision, and not that prescribed by general law, must be followed: *R. R. v. Ely*, 95-77.

Railroad company may dispense with assessment of damages by commissioners for passing over land of proprietor, by promising to settle and to pay it without assessment, and landowner may recover upon special promise: *Plott v. R. R.*, 65-74.

Where land was conveyed to trustee for separate use of married woman, latter and her husband cannot convey to railroad company right of way over land: *Narron v. R. R.*, 122-856. No one can grant an easement in land who cannot convey fee simple: *Ibid.*

A covenant to grant a right of way does not entitle the covenantee to a conveyance of the land: *Mills v. Lumber Co.*, 150-114.

DECISIONS OF INTEREST UNDER SPECIAL ACTS. Statutory provision allowing private property to be taken under right of eminent domain must be strictly pursued, and right of owner to obtain compensation depends on whether corporation has obtained a vested right: *Dargan v. R. R.*, 113-596.

Stipulation in charter of railroad that all claims for damages for land taken by corporation must be made within two years is a positive statute of limitations, and bars all claims not made within that time, when parties are *sui juris*: *R. R. v. McCaskill*, 94-746.

Where corporation, having alone power to institute proceedings for assessment of damages and benefits resulting from its exercise of eminent domain, fails and refuses, on demand of owner, to do so, owner may treat corporation as a trespasser and sue in ejectment, if he elect to do so; otherwise appropriate remedy is by mandamus to compel corporation to assess damages as provided by its charter: *McDowell v. Asheville*, 112-747.

Railroad company has right to enter upon and take possession of land before payment to owner, which is needed in building of its road, when it is authorized by its charter to do so: *R. R. v. McCaskill*, 94-746.

Action against telegraph company for erection of poles on land of plaintiff, if brought within three years of trespass, is not barred by limitation: *Hodges v. Tel. Co.*, 133-225.

An interest in entire right of way does not vest in corporation unless it takes actual possession in exercise of privilege granted it; but it seems that, where corporation enters, its constructive possession extends to boundary of right of way given in charter: *Dargan v. R. R.*, 113-596.

Section limiting actions for damages for occupation of land by railroad company to five years and exempting from its operation companies chartered prior to 1868, is not in violation of fourteenth amendment of constitution of United States, prohibiting any state from denying to any person the equal protection of the laws: *Narron v. R. R.*, 122-856.

Where a company has constructed railroad between termini named in its charter and amendments thereto, fact that it is building sidetracks does not prevent bar of landowner's claim: *R. R. v. Olive*, 142-257.

Where enjoyment of easement by railroad in land has effect of injuring adjoining lands of owner, damages are recoverable for such injury: *Liverman v. R. R.*, 114-692.

Permanent damages may be awarded a landowner who is injured by putting of telegraph poles on his land: *Phillips v. Tel. Co.*, 130-513.

Fact that method prescribed for assessing damage caused by taking land for construction of sewage plant was illegal is not ground for restraining construction of plant: *Vickers v. Durham*, 132-880.

Provisions of general railroad act are applicable to Durham and Northern railroad company, notwithstanding its charter prescribes that it shall have power to condemn land under the "same rules and regulations as are prescribed for the North Carolina railroad company": *R. R. v. R. R.*, 106-16.

1716. **Petition filed; contains what; copy served.** For the purpose of acquiring such title the corporation, or the owner of the land sought to be condemned, may present a petition to the clerk of the superior court of the county in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal. Such petition shall be signed and verified according to the rules and practice of such court; and if filed by the corporation it must contain a description of the real estate which the corporation seeks to acquire; and it must, in effect, state that the corporation is duly incorporated, and that it is its intention in good faith to conduct and carry on the public business authorized by its charter, stating in detail the nature of such public business, and the specific use of such land; that the land described in the petition is required for the purpose of conducting the proposed business, and that the corporation has not been able to acquire title thereto, and the reason of such inability. The petition, whether filed by the corporation or the owner of the land, must also state the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have, estates or interests in the said real estate; and if any such persons are infants, their ages, as near as may be, must be stated; and if any such persons are idiots or persons of unsound mind or are unknown, that fact must be stated, together with such other allegations and statements of liens or encumbrances on said real estate as the corporation or the owner may see fit to make. A summons as in other cases of special proceedings, together with a copy of the petition, must be served on all persons whose interests are to be affected by the proceedings, at least ten days prior to the hearing of the same by the court.

Rev., s. 2580; Code, s. 1944; 1893, c. 396; 1871-2, c. 138, s. 14; 1907, c. 783, s. 3.

A special proceeding for purpose of condemning land for railroad purposes must be begun by issuance of summons: *R. R. v. Lumber Co.*, 132-644.

Requisites of petition hereunder must be strictly complied with: *R. R. v. R. R.*, 148-59. For map and profile, see section 3471.

Petition, whether filed by owner or by company, should state names of all persons interested, and all should be in court before commissioners are appointed: *Hill v. Mining Co.*, 113-259.

Where charter of railroad provided it might condemn land by proceeding before court of record having common-law jurisdiction: Held, that clerk of superior court has jurisdiction: *R. R. v. R. R.*, 106-16.

Petitioner must allege that it has "surveyed the line or route of its proposed road, and made a map or survey thereof, by which such route or line is designated, and that it has located its said road according to such survey, and filed certificates of such localities signed by a majority of its directors, in the clerk's office," etc., as required by this section; otherwise proceeding will be dismissed: *R. R. v. R. R.*, 106-16.

Allegations as to good faith and inability to acquire title are necessary, but when denied they are not issues of fact, but preliminary questions of fact to be determined by the court: *R. R. v. Gabagan*, 161-190; *R. R. v. R. R.*, 148-64; *Durham v. Riggsbee*, 141-128. It is not essential that the particular wording of the statute should be used: *Durham v. Riggsbee*, 141-128. Findings of clerk as to the preliminary facts are subject to review: *R. R. v. R. R.*, 148-59. Burden of showing that company intended in good faith to construct road and had complied with requirements prescribed by law for condemnation of rights of way, is on the petitioner: *R. R. v. Lumber Co.*, 132-644.

The court may allow an amendment to the complaint by the introduction of a better profile: *R. R. v. Newton*, 133-132.

Where one railroad obtains a final order giving possession and ejecting defendant railroad, it cannot then take a nonsuit: *R. R. v. R. R.*, 148-59.

Practice in proceeding for damages for taking land explained: *Abernathy v. R. R.*, 150-97; s. c., 159-340. Plaintiff asking for damages must show title: *Ibid.* Cannot join cause of action for compensation for easement and cause for damages for trespass: *Ibid.*

Not necessary that petition filed by landowner shall state that petitioners and company have failed to come to an agreement as to sum to be paid, such averment being necessary only when railroad company is actor in such proceedings: *Hill v. Mining Co.*, 113-259; *Allen v. R. R.*, 102-381.

Fact that cotenant of land has granted right of way to railroad company will not prevent another owner from instituting proceedings for assessment of damages sustained by him, nor will such fact prevent cotenant, who has made such grant, from becoming party to proceeding, and having his rights adjusted thereunder: *Hill v. Mining Co.*, 113-259.

Where petition in proceeding for assessment of damages for right of way of railroad enumerates various owners of land, and such owners voluntarily made themselves parties, a demurrer by defendant company that there was defect of parties when petition was first filed is untenable: *Ibid.*

1717. How process served. The summons and a copy of the petition shall be served in the same manner as in special proceedings.

Rev., s. 2581; Code, s. 1944; 1871-2, c. 138, s. 14.

Proceedings hereunder are special proceedings and must be commenced by summons: *R. R. v. Lumber Co.*, 132-644, overruling *Click v. R. R.*, 98-390.

Failure to serve a map and profile with the summons in condemnation proceedings as required by section 3471 may be cured by amendment: *State v. Wells*, 142-590.

Cases referring to section: *R. R. v. Newton*, 133-132; *R. R. v. Platt Land*, 133-266; *Phillips v. Tel. Co.*, 130-526; *Hill v. Mining Co.*, 113-261.

1718. Service where parties unknown. If the person on whom such service of summons and petition is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then such service may be made under the direction of the court, by publishing a notice, stating the time and place within which such person must appear and plead, the object thereof, with a description of the land to be affected by the proceedings, in a paper, if there be one, printed in the county where the land is situate, once in each week, for four weeks previous to the time fixed by the court, and if there be no paper printed in such county, then in a newspaper printed in the city of Raleigh.

Rev., s. 2582; Code, s. 1944, subsec. 5.

1719. When court may direct how papers to be served. In all cases not herein otherwise provided for, service of orders, notices, and other papers in the special proceedings authorized by this chapter may be made as in other special proceedings.

Rev., s. 2583; Code, s. 1944, subsec. 7.

1720. Answer to petition; hearing; commissioners appointed. On presenting such petition to the superior court, with proof of service of a copy thereof, and of the summons, all or any of the persons whose estates or interests are to be affected by the proceedings may answer such petition and show cause against granting the prayer of the same, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners.

Rev., s. 2584; Code, s. 1945; 1871-2, c. 138, s. 15.

Practice in proceeding explained: *Abernathy v. R. R.*, 150-97. Plaintiff asking for compensation must show title, and defendant railroad may show title in a stranger: *Ibid.*

Petitioning railroad must show the preliminary facts required, and a denial of the right of eminent domain in the answer does not relieve it of this burden: *R. R. v. R. R.*, 148-59.

Order appointing commissioners to assess damages is interlocutory, and no appeal to supreme court until after final judgment upon report of commissioners: *R. R. v. Bailey*, 143-380; *R. R. v. Newton*, 133-136; *Hendrick v. R. R.*, 98-431; *Comrs. v. Cook*, 86-18; *Tel. Co. v. R. R.*, 83-420; *R. R. v. Warren*, 92-620.

Judge of court may appoint appraisers either in term or vacation, while clerk can do so only in vacation, and then only as representing court: *Click v. R. R.*, 98-390.

A writ of prohibition will not be granted to prevent clerk of court from hearing application for condemnation of right of way for railroad: *R. R. v. Newton*, 133-136.

Where articles of incorporation of railroad company are upon their face void, trial court will so declare in proceeding to condemn land by right of eminent domain claimed thereunder: *R. R. v. Stroud*, 132-413.

Exceptions to order of clerk appointing commissioners may be general: *R. R. v. R. R.*, 148-59.

In fixing question of compensation to landowner for right of way condemned to use of railroad, commissioners do not invade province that, under the ancient law, belonged exclusively and peculiarly to jury: *R. R. v. Parker*, 105-246; *State v. Jones*, 139-613; *R. R. v. Davis*, 19-451.

As to trial by jury of issues raised before clerk, where same demanded before commissioners appointed, see *R. R. v. Parker*, 105-246; *R. R. v. Newton*, 133-133. See, also, section 1724.

1721. Powers and duties of commissioners. The commissioners, before entering upon the discharge of their duties, shall take and subscribe an oath that they will fairly and impartially appraise the lands mentioned in the petition. Any one of them may issue subpoenas, administer oaths to witnesses, and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet, except by the appointment of the court or pursuant to adjournment, they shall cause ten days notice of such meeting to be given to the parties who are to be affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the corporation to the party or parties owning or interested in the real estate appraised by them. They shall report the same to the court within ten days.

Rev., s. 2585; Code, s. 1946; 1871-2, c. 138, ss. 16-18; 1891, c. 160.

COMPENSATION DETERMINED. Owner of land condemned is entitled to the actual market value of the land taken, and compensation for injury to the remaining land, subject to deduction of special benefits: *Lanier v. Greenville*, 174-311; *Campbell v. Comrs.*, 173-500; *McMahan v. R. R.*, 170-456; *R. R. v. Armfield*, 167-464; *Waste Co. v. R. R.*, 167-340; *R. R. v. Mfg. Co.*, 166-168; s. c., 169-156; *Land Co. v. Traction Co.*, 162-503; s. c., 170-674; *R. R. v. McLean*, 158-498; *Lambeth v. Power Co.*, 152-371; *Abernathy v. R. R.*, 150-97; *Brown v. Power Co.*, 140-333; *R. R. v. Land Co.*, 137-330 (taking street).

Meaning of market value: *Brown v. Power Co.*, 140-333. All the capabilities of property and all the uses to which it may be applied or for which it is adapted may be considered, and not merely condition it is in at time and the use to which it is then applied by owner: *Ibid.* Water-power on the river must be considered as an element of value: *Ibid.* If a tract of which whole or part is taken for public use possesses a special value to owner, which can be measured by money, he is entitled to have that value considered: *Ibid.*

In considering benefits to be deducted, the owner is to have the advantages common to others, and only special benefits are to be deducted: *R. R. v. Platt Land*, 133-266; *Haislip v. R. R.*, 102-376; *R. R. v. Smith*, 99-131; *R. R. v. Wicker*, 74-220. No recovery for benefits,

but only a deduction from damages assessed: *R. R. v. Smith*, 99-131. Finding of commissioners that land received no special benefit is conclusive: *R. R. v. Platt Land*, 133-266.

Landowner will be entitled to have included in his assessment damages for injuries to lands adjoining those upon which railroad is constructed: *Hendrick v. R. R.*, 101-617. Owner is entitled to recover for expense of additional fencing of cultivated lands made necessary by reason of construction of road; but, as he is not required by law to fence uncleared or uncultivated land, and expense of fencing such, should it at any future time be cleared or cultivated, is too remote and uncertain to be estimated, same should not be taken into consideration: *R. R. v. Wicker*, 74-220.

Damages to land caused by erection of waterway by railroad company, if skillfully constructed, are included in compensation for, and pass by grant of, easement, but grantee of easement shall not inflict unnecessary injury upon servient owner: *Adams v. R. R.*, 110-325.

Tax list is not admissible to show the value of the land: *R. R. v. Land Co.*, 137-330.

As to how damages to church property assessed in condemnation proceedings, see *R. R. v. Church*, 104-525.

Evidence to show value of land by its location and surroundings is admissible: *R. R. v. Land Co.*, 137-330.

An injunction will not lie to restrain railroad company from entering upon land before appraisal of damages and payment thereof: *R. R. v. Newton*, 133-132.

This section has no reference to trespasses committed outside of the right of way in building the road, and for such trespasses the corporations are liable in civil action for damages: *Bridgers v. Dill*, 97-222.

In condemnation proceedings there can be no recovery of damages incident to entry, such as for destruction of crops and the like, nor for use and occupation before plaintiff acquired title: *Liverman v. R. R.*, 114-692; *Hodges v. Tel. Co.*, 133-225; but see *Haislip v. R. R.*, 102-376. Damages caused by diversion of water are not covered by statute providing for acquirement of right of way by railroad companies: *Ward v. R. R.*, 112-168.

Where land is taken under section 3444, commissioners are not only to fix amount of compensation, but they must determine, in event of disagreement, "the points and manner" of physical connection which is sought to be made: *R. R. v. R. R.*, 104-665; *R. R. v. Love*, 81-434.

1722. Form of commissioners' report. When the commissioners shall have assessed the damages, they shall forthwith make and subscribe a written report of their proceedings, in substance as follows:

To the Clerk of the Superior Court of _____ County:

We, _____, commissioners appointed by the court to assess the damages that have been and will be sustained by _____, the owner of certain land lying in the county of _____, which the _____ corporation proposes to condemn for its use, do hereby certify that we met on _____ (or the day to which we were regularly adjourned), and, having first been duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the land aforesaid, the additional fencing likely to be occasioned by the work of the corporation, and all other inconveniences likely to result to the owner, we have estimated and do assess the damages aforesaid at the sum of \$_____.

We have estimated the special benefits which the said owner will receive from the construction of said works to be the sum of \$_____.

Given under our hands, the _____ day of _____, A. D. 19_____.

Rev., s. 2586; Code, s. 1700; R. C., c. 61, s. 17; 1874-5, c. 83.

Not necessary that commissioners appointed to assess benefits and damages should set forth in their award particulars in which they consisted: *R. R. v. Smith*, 99-131.

Report of commissioners is not invalid because it does not contain description of land, as that can be ascertained by reference to location of roadbed and right of way: *Hanes v. R. R.*, 109-490; but see *R. R. v. Land Co.*, 137-336.

1723. Exceptions to report; hearing; appeal; when title vests; restitution. Within twenty days after filing the report the corporation or any person interested in the said land may file exceptions to said report, and upon the determina-

tion of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the supreme court. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. If the said corporation, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said corporation may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings shall be in favor of the corporation, and upon the payment by said corporation of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then and in that event all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such easement in such real estate during the corporate existence of the corporation aforesaid. A certified copy of such judgment under the seal of the court shall be registered in the county where the land is situated, and a copy of the same, or the original certified, may be given in evidence in all actions and proceedings as deeds for land are now allowed to be read in evidence. All real estate acquired by any corporation under and pursuant to the provisions of this chapter for its purposes shall be deemed to be acquired for the public use. But if the court shall refuse to condemn the land, or any portion thereof, to the use of such corporation, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to the corporation. And the corporation shall have no right to hold said land not condemned, but shall surrender the possession of the same, on demand, to the owner or owners, or his or their agent or attorney. And the court or judge shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings. If the amount adjudged to be paid the owner of any property condemned under this chapter shall not be paid within one year after final judgment in the proceeding, the right under the judgment to take the property or rights condemned shall ipso facto cease and determine, but the claimant under the judgment shall still remain liable for all amounts adjudged against him except the consideration for the property.

Rev., s. 2587; Code, s. 1946; 1893, c. 148; 1915, c. 207.

The appeal from clerk carries the whole record up for review upon questions of fact, and no jury trial is allowed until the report of commissioners has been received and confirmed: *R. R. v. R. R.*, 148-59. No appeal to the judge at chambers: *R. R. v. Stewart*, 132-248.

Finding of commissioners that land taken for railroad purposes received no special benefit is conclusive: *R. R. v. Platt Land*, 133-266.

Nothing to contrary appearing, it will be presumed that commissioners acted upon proper rules in estimating assessments: *R. R. v. Smith*, 99-131.

Where report excepted to and clerk sets aside appraisement it seems that he may fix the compensation: *Durham v. Rigsbee*, 141-128.

Motion to file exceptions to report nunc pro tunc may be allowed in discretion of court: *R. R. v. King*, 125-454—and an order allowing such motion is interlocutory, and an appeal is premature, *Ibid.*

On removal of proceeding before clerk to superior court, objections may be raised on trial in superior court that were not raised before clerk: *R. R. v. Stroud*, 132-413.

While judge cannot, upon exceptions filed to report of commissioners appointed to assess damages caused by location and construction of railway, alter report by inserting different

amount as damages, or annul order appointing commissioners and submit matter to a jury, yet he has discretionary power to confirm or set aside such report, and may recommit question to same or other commissioners, and in aid of this power he may hear affidavits: *Hanes v. R. R.*, 109-490; but see *Durham v. Rigsbee*, 141-128.

Nature of judgment to be rendered for the easement: *R. R. v. McLean*, 158-498. The judge may consider interest in estimating the amount of damage: *Abernathy v. R. R.*, 159-340. Judgment should definitely fix the land over which the road is located and width of right of way: *Beal v. R. R.*, 136-298.

Railroad company acquires, with lands condemned for purposes of construction and operation of road, all rights and privileges which appertain to it at time of condemnation: *Willey v. R. R.*, 98-263.

Counsel fees provided for herein include only counsel for unknown parties as required under section 1728: *Durham v. Davis*, 171-305.

A railroad company having obtained an order for possession and ejecting another railroad company, cannot then take a nonsuit: *R. R. v. R. R.*, 148-59.

Legislature has power to provide that neither party shall appeal from award of commissioners appointed under charter to assess damages to land for right of way, and if charter does provide for an appeal, it must be taken within time and in manner therein provided: *R. R. v. Ely*, 95-77.

Appeal in this case carries up only question of compensation, and defendant can go forward with improvements: *Johnston v. Rankin*, 70-550.

On appeal to supreme court the findings of fact by the lower court are conclusive, if supported by evidence: *R. R. v. R. R.*, 148-59.

Formerly payment of the compensation was not required before entry. Code, section 1946, changed this as to railroads, by requiring the company to pay into court sum assessed before entry on the right of way: *R. R. v. Newton*, 133-133; *State v. Wells*, 142-590. By special statute a railroad company may be authorized to enter upon lands before instituting condemnation proceedings: *State v. Jones*, 170-753; *R. R. v. Ferguson*, 169-70.

Indictment for wilful trespass will lie against employee of railroad company for entry after being forbidden on land which company is seeking to condemn, entry being for purpose of constructing road and before an appraisalment has been made, although restraining order against such trespass would be refused: *State v. Wells*, 142-590.

1724. Provision for jury trial on exceptions to report. In any action or proceeding by any railroad or other corporation to acquire rights of way or real estate for the use of such railroad or corporation, and in any action or proceeding by any city or town to acquire rights of way for streets, any person interested in the land, or the city, town, railroad or other corporation shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the superior court in term, if upon the hearing of such appeal a trial by a jury be demanded.

Rev., s. 2588; 1893, c. 148.

Jury trial is limited to the question of damages: *R. R. v. Oates*, 164-167; *R. R. v. Gahagan*, 161-190; *Lambeth v. Power Co.*, 152-371; *R. R. v. R. R.*, 148-59; *Durham v. Rigsbee*, 141-133; *R. R. v. Newton*, 133-134. Trial de novo: *Phifer v. R. R.*, 72-433.

1725. When benefits exceed damage, corporation pays costs. In any case where the benefits to the land caused by the erection of the railroad, street railway, telephone, telegraph, water supply, bridge, or electric power or lighting plant or other structure, are ascertained to exceed the damages to the land, then the corporation acquiring the same by right of eminent domain shall pay the costs of the proceeding except as provided by law, and shall not have a judgment for the excess of benefits over the damage.

Rev., s. 2589; 1891, c. 160.

For costs in such proceedings, see Costs, Art. 3.

See *R. R. v. Gahagan*, 161-190.

1726. Title of infants, persons non compos, and trustees without power of sale, acquired. In case any title or interest in real estate required by any corporation for its purposes shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot, or person of unsound mind, the superior court shall have power, by a special proceeding, on petition, to authorize and empower such trustee or the general guardian or committee of such infant, idiot, or person of unsound mind, to sell and convey the same to such corporation, on such terms as may be just; and in case any such infant, idiot, or person of unsound mind has no general guardian or committee, the said court may appoint a special guardian or committee for the purpose of making such sale, release or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath; and if the court is satisfied that such terms are just to the party interested in such real estate, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of said land having legal power to sell and convey the same.

Rev., s. 2590; Code, s. 1956; 1871-2, c. 138, s. 28.

See, also, sections 2180, 2182, 3238.

1727. Rights of claimants of fund determined. If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the corporation, and may determine who is entitled to the same and direct to whom the same shall be paid, and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made.

Rev., s. 2591; Code, s. 1947; 1871-2, c. 138, s. 19.

Where proceedings are *infra vires*, condemnation and appropriation to public use must stand, and the question as to who is entitled to damages awarded cannot be raised in an action for land itself: *Harkins v. Asheville*, 123-636.

1728. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed. The court shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent, and shall make an allowance to said attorney for his services, which shall be taxed in the bill of costs. The court shall also have power at any time to amend any defect or informality in any of the special proceedings authorized by this chapter as may be necessary, or to cause new parties to be added, and to direct such further notices to be given to any party in interest as it deems proper; and also to appoint other commissioners in place of any who shall die, refuse or neglect to serve or be incapable of serving.

Rev., s. 2592; Code, s. 1948; 1871-2, c. 138, s. 20.

Counsel fees to be taxed as costs include only fees of counsel for unknown parties: *Durham v. Davis*, 171-305; *R. R. v. Goodwin*, 110-175.

1729. Court may make rules of procedure in. In all cases of appraisal under this chapter where the mode or manner of conducting all or any of the proceed-

ings to the appraisal and the proceedings consequent thereon are not expressly provided for by the statute, the courts before whom such proceedings may be pending shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this chapter, and the practice in such cases shall conform as near as may be to the ordinary practice in such courts.

Rev., s. 2593; Code, s. 1949; 1871-2, c. 138, s. 21.

Section referred to in *Abernathy v. R. R.*, 150-97.

1730. Change of ownership pending proceeding. When any proceedings of appraisal shall have been commenced, no change of ownership by voluntary conveyance or transfer of the real estate or other subject-matter of the appraisal, or any interest therein, shall in any manner affect such proceeding, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made.

Rev., s. 2594; Code, s. 1950; 1871-2, c. 138, s. 22.

Conveyance made after proceeding commenced does not affect it: *Caveness v. R. R.*, 172-305; *Abernathy v. R. R.*, 159-340. A purchaser of land subsequent to taking as right of way may recover permanent damages for easement taken, and company thereby acquires easement and right to maintain its line thereon: *Phillips v. Tel. Co.*, 130-513; *Beal v. R. R.*, 136-298.

Until a purchase or condemnation, corporation's occupation is without title, and conveyance of land will pass to vendee right to compensation for damages: *Livermon v. R. R.*, 109-52. Damages incident to act of an unlawful entry upon land by a railway corporation are personal to owner of land and do not pass by his subsequent conveyance of premises: *Ibid.* Purchaser, at mortgage sale, of land over which railway has secured right of entry from mortgagor in possession, while not entitled to damages incident to act of entry, might recover compensation for land appropriated to use of company: *Ibid.*

If purchaser takes the land without notice of an executory contract by the vendor to convey right of way, or under circumstances indicating an abandonment of the right, the fact that grading had been done on the land would not preclude him from claiming damages when the grading is completed: *Beattie v. R. R.*, 108-425.

Where plaintiff owns lot subject to right of way conveyed to railroad company by plaintiff's grantor, railroad company holds only right to use so much of right of way as is necessary for its purpose, and, though company or its lessee cannot be barred by statute of limitations in case it should become necessary to occupy more of right of way for purposes incident to use of road, statute is no protection in occupying more land, though within limits of right of way, for trackage, etc., for other purposes: *McCulloch v. R. R.*, 146-316; s. e., 149-305.

1731. Defective title; how cured. If at any time after an attempt to acquire title by appraisal of damages or otherwise it shall be found that the title thereby attempted to be acquired is defective, the corporation may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the corporation, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency and until the final conclusion of such new proceedings, and may stay all actions or proceedings against the corporation on account thereof, on such corporation paying into court a sufficient sum or giving security as the court may direct to pay the compensation therefor when finally ascertained, and in every such case the party interested in such real estate may conduct the proceedings to a conclusion if the corporation delays or omits to prosecute the same.

Rev., s. 2595; Code, s. 1951; 1871-2, c. 138, s. 23.

1732. Title to state lands acquired. The secretary of state shall have power to grant to any railroad company any land belonging to the people of this state which may be required for the purposes of its road, on such terms as may be agreed on by them, or such company may acquire title thereto by appraisal, as in the case of lands owned by individuals; and if any land belonging to a county or town is required by any company for the purposes of the road, the county or town officers having the charge of such land may grant such land to such company for such compensation as may be agreed upon.

Rev., s. 2596; Code, s. 1955; 1871-2, c. 138, s. 27.

For condemnation for water supplies, see sections 7522, 7523.

1733. Quantity which may be condemned for certain purposes:

1. Right of way of railroad. The width of the land condemned for any railroad shall not be less than eighty feet nor more than one hundred, except where the road may run through a town, when it may be of less width; or where there may be deep cuts or high embankments, when it may be of greater width.

2. Plankroads, etc. No greater width of land than sixty feet shall be condemned for the use of any plankroad, tramroad, canal, street railway or turnpike; or greater width than sixteen feet for the use of any flume.

3. Depot or station. No greater quantity of land than two acres, contiguous to any railroad, plankroad, tramroad, turnpike, flume, or canal, shall be condemned at one place for a depot or station.

Rev., s. 2597; Code, ss. 1707, 1708, 1709; R. C., c. 61, ss. 27, 28, 29; 1852, c. 92; 1874-5, c. 83; 1907, c. 39.

For the condemnation by a railroad of more than two acres for yard or terminal facilities, see this chapter, s. 1708.

When railroad company acquires right of way it becomes invested with power to use it, not only to extent necessary to meet present needs, but such further demands as may arise from increase of its business and proper discharge of duty to public: *Tighe v. R. R.*, 176-239; *Coit v. Owenby*, 166-136; *R. R. v. Bunting*, 168-579; *R. R. v. Mfg. Co.*, 166-168; *Hendrix v. R. R.*, 162-9; *Earnhardt v. R. R.*, 157-358; *R. R. v. Olive*, 142-257; *Thomason v. R. R.*, 142-318; *R. R. v. Sturgeon*, 120-225; *Phillips v. Tel. Co.*, 130-513; *R. R. v. McCaskill*, 94-746.

Grant of easement does not preclude grantor from such use of his land himself or permitting same to others which is not in conflict therewith: *Lumber Co. v. Hines Bros.*, 126-254, and cases supra.

Right of way of specified width must be located and constructed in order to be exclusive: *Lumber Co. v. Hines Bros.*, 126-254.

Railroad company is not negligent in failing to cut down bushes or weeds on right of way beyond portion over which it is exercising actual control for corporate purposes; but it is required to keep right of way clear of such growth to outside of side ditches on either side of tracks: *Ward v. R. R.*, 109-358.

While land included in right of way of railroad company, not necessary for purposes of company, may be cultivated by servient owner, crop must not be of such inflammable or combustible nature, when matured or maturing, as to endanger safety of company's passengers or cause injury to adjoining lands in case of ignition of such crops by sparks from company's engines, for, in such case, company will have right to enter and remove such crops: *R. R. v. Sturgeon*, 120-225.

Where complaint in ejectment by railroad to recover right of way fails to allege that necessity for it exists, action should be dismissed: *R. R. v. Sturgeon*, 120-225; see *R. R. v. McCaskill*, 94-746.

Under charter of Wilmington and Weldon Railroad Company, upon payment of damages assessed for right of way, land covered by road, and sixty-five feet from base of road on each side, becomes vested in company in fee simple: *Haislip v. R. R.*, 102-376.

Negligence to permit inflammable material to remain near company's track and liable to ignite from emitted sparks: *Aycock v. R. R.*, 89-321.

CHAPTER 34

ESTATES

- 1734. Fee tail converted into fee simple.
- 1735. Survivorship in joint tenancy abolished; proviso as to partnerships.
- 1736. Survivorship among trustees.
- 1737. Limitations on failure of issue.
- 1738. Unborn infant may take by deed or writing.
- 1739. "Heirs" construed "children" in certain limitations.
- 1740. Possession transferred to use in certain conveyances.
- 1741. Collateral warranties abolished; warranties by life tenant deemed covenants.
- 1742. Spendthrift trusts.
- 1743. Titles quieted.
- 1744. Remainders to uncertain persons; procedure for sale; proceeds secured.
- 1745. Sales of contingent remainders validated.
- 1746. Freeholders in petition for special taxes defined.

1734. Fee tail converted into fee simple. Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple; and all sales and conveyances, made bona fide and for valuable consideration, since the first day of January, one thousand seven hundred and seventy-seven, by any tenant in tail in actual possession of any real estate where such estate has been conveyed in fee simple, shall be good and effectual in law to bar any tenant in tail and in remainder of and from all claim, action, and right of entry whatsoever, of, in, and to such entailed estate, against any purchaser, his heirs, or assigns, now in actual possession of such estate, in the same manner as if such tenant in tail had possessed the same in fee simple.

Rev., s. 1578; Code, s. 1325; R. C., c. 43, s. 1; 1784, c. 204, s. 5.

A fee tail converted into an estate in fee simple by this section: Parrish v. Hodge, 178-133; Sharpe v. Brown, 177-296; Cohoon v. Upton, 174-88; Keziah v. Medlin, 173-237; Blake v. Shields, 172-628; Revis v. Murphy, 172-579; Harrington v. Grimes, 163-76; Jones v. Ragsdale, 141-200; Sessoms v. Sessoms, 144-121; Marsh v. Griffin, 136-333; Whitfield v. Garris, 134-29, and cases cited; Leathers v. Gray, 101-165, and cases cited; Smith v. Brisson, 90-284; Ward v. Jones, 40-405; Folk v. Whitley, 30-133; Ross v. Toms, 15-376; Sanders v. Hyatt, 8-247—but section confirmed only such alienations in fee as had been made by tenants in tail in possession since 1777, Minge v. Gilmour, 2-279; Wells v. Newbolt, 1-538—and when tenant in tail had sold in fee simple before enactment of section and purchaser actually in possession of land at time of passage of same, he is entitled to fee simple, *Ibid.*; also Moore v. Bradley, 3-142.

This section will bar remainder dependent upon estate tail in possession of tenant in tail at time of passage of section: Lane v. Davis, 2-277.

This act of 1784, which subsequently converted estate tail into fee simple, did not change original form of the acquisition, which still continued to be by purchase: Ballard v. Griffin, 4-237.

Section does not affect principle of law decided in Shelley's case: Dawson v. Quinnerly, 118-188.

As bearing upon section, see Coon v. Rice, 29-217. Section merely referred to in Rogerson v. Lumber Co., 136-267; Hauser v. Craft, 134-328; Millsaps v. Estes, 134-492; Hodges v. Lipscomb, 133-203, 128-63; Starnes v. Hill, 112-1; Mills v. Thorne, 95-362; Patrick v. Morehead, 85-67; Holliday v. McMillan, 79-324; Ward v. Jones, 40-402; Jones v. Spaight, 4-159.

1735. Survivorship in joint tenancy abolished; proviso as to partnership. In all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, or assigns, respectively, of the

tenant so dying, in the same manner as estates held by tenancy in common: Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors, administrators and assigns respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners.

Rev., s. 1579; Code, s. 1326; R. C., c. 43, s. 2; 1784, c. 204, s. 6.

Section does not abolish joint tenancies: Rowland v. Rowland, 93-214, and cases cited—but only takes away right of survivorship from joint tenancies in fee, *Ibid.*; Blair v. Osborne, 84-417; Powell v. Morisey, 84-421—and has no application to joint tenancies for life, *Ibid.*; Powell v. Allen, 75-450.

Section does not prohibit contracts making rights of parties dependent upon survivorship: Taylor v. Smith, 116-531.

Word "estates," as used in section, defined: Bond v. Hilton, 51-180.

TENANCY OF HUSBAND AND WIFE. A conveyance to husband and wife does not create a joint tenancy, but an estate by entireties: Morton v. Lumber Co., 154-278; Spruill v. Mfg. Co., 130-42; Gray v. Bailey, 117-439; Harrison v. Ray, 108-215; Long v. Barnes, 87-329; Woodford v. Higly, 60-234; Todd v. Zachary, 45-286—and survivorship in such estates is not abolished, West v. R. R., 140-621; Gray v. Bailey, 117-439; Phillips v. Hodges, 109-250; Woodford v. Higly, 60-234—but, husband and wife being in law but one person, they have each the whole estate as one person, and on the death of either, the whole estate continues in survivor, Ray v. Long, 132-891; Phillips v. Hodges, 109-250, quoting from Long v. Barnes, 87-329; Simonton v. Cornelius, 98-433; Harrison v. Ray, 108-216; Motley v. White-more, 19-537; Woodford v. Higly, 60-234; Todd v. Zachary, 45-286.

General nature of estate by entireties explained: Moore v. Trust Co., 178-118; Freeman v. Belfer, 173-581. That it does not apply to personalty, see Gooch v. Bank, 176-213. Where husband and wife paid for the land, they will hold it by entireties: Ray v. Long, 132-891—and where deed was made to husband he will be declared a trustee for the wife, Murchison v. Fogleman, 165-397. Where father made conveyance of land to son in consideration of comfortable support of himself and wife during their natural lives, in default of which grantee covenanted to reconvey: Held, that grantor and wife had right to demand reconveyance, on breach of covenant, in entirety, with right of survivorship: Stamper v. Stamper, 121-251.

A conveyance of land to husband and wife may create a tenancy in common instead of an estate by entireties, if the intention so appears: White v. Goodwin, 174-723; Holloway v. Green, 167-91; Eason v. Eason, 159-539; Highsmith v. Page, 158-226; s. e., 161-356; Staleup v. Staleup, 137-305; Isley v. Sellars, 153-374. Where one of two tenants in common makes a conveyance to wife of cotenant, such cotenant and wife hold as tenants in common: Isley v. Sellars, 153-374.

Where a deed is made to husband and wife for partition of land owned by wife, an estate by entireties is not created, and the wife's title is not changed: Kilpatrick v. Kilpatrick, 176-182; Speas v. Woodhouse, 162-66; Sprinkle v. Spainhour, 149-223; Harrington v. Rawls, 136-65; s. e., 131-39; Harrison v. Ray, 108-215.

In an estate by entireties neither party can convey or encumber the estate without the assent of the other, nor is it subject to a lien or to be taken for the debt of either party without the assent of the other: Bank v. McEwen, 160-414; Hood v. Mercer, 150-699; Bruce v. Nicholson, 109-202. But a lease by the husband without joinder of wife is valid during coverture: Bank v. Gornto, 161-341; Dorsey v. Kirkland, 177-520. Neither party is entitled to partition: Jones v. Smith & Co., 149-318.

A sale of an estate by entireties by husband and wife and a division of the proceeds ends the estate: *Moore v. Trust Co.*, 178-118. But in a sale and payment to husband, who then dies, wife is entitled to the funds: *Isley v. Sellars*, 153-374. An absolute divorce converts the estate into a tenancy in common: *McKinnon v. Caulk*, 167-411; but a divorce a mensa does not destroy the estate, *Freeman v. Belfer*, 173-581. As to the rights and incidents attaching to estates by entireties generally, see *Ray v. Long*, 132-891; *West v. R. R.*, 140-621, and cases there cited; *Gray v. Bailey*, 117-439; *Johnson v. Edwards*, 109-466; *Phillips v. Hodges*, 109-248; *Bruce v. Nicholson*, 109-202; *Simonton v. Cornelius*, 98-433.

TENANCY OF COPARTNERS. Land purchased with partnership funds is held by partners in joint tenancy: *Baird v. Baird Heirs*, 21-524—and if, upon death of one partner and the winding up of the partnership, all the proceeds from sale of land is not needed to pay debts, the amount that would have gone to deceased partner descends to heir as real estate, *Summey v. Patton*, 60-601; *Stroud v. Stroud*, 61-526—and, accordingly, the widow is entitled to dower in such interest of deceased partner in partnership land not needed to pay partnership debts, *Patton v. Patton*, 60-572; *Stroud v. Stroud*, 61-526; see *Sparger v. Moore*, 117-449.

Claims of surviving partner upon proceeds of sale of deceased partner's half of real estate, to reimburse him to amount of one-half on expenditures incurred in conduct of firm business and improvements put upon property, constitute encumbrance prior to claims of creditors of deceased partner: *Mendenhall v. Benbow*, 84-646. Equitable right of partnership under contract to convey land to firm, upon death of one of partners, vests in surviving partner in order to enable him to wind up partnership and pay its debts: *McCaskill v. Lancashire*, 83-396.

Section merely referred to in *Brown v. Ward*, 103-173; *Pitt v. Moore*, 99-92; concurring opinion of Pearson, J., in *Allison v. Andrews*, 34-193; *Waugh v. Mitchell*, 21-522.

1736. Survivorship among trustees. In all cases where only a naked trust not coupled with a beneficial interest has been created or exists, or shall be created, and the conveyance is to two or more trustees, the right to perform the trust and make estates under the same shall be exercised by any one of such trustees, in the event of the death of his cotrustee or cotrustees or in the refusal or inability of the cotrustee or cotrustees to perform the trust; and in cases of trusts herein named the trustees shall hold as joint tenants, and in all respects as joint tenants held before the year one thousand seven hundred and eighty-four.

Rev., s. 1580; 1885, c. 327, s. 1.

As to statute of limitations, see section 419.

Executors and administrators hold as joint tenants, see section 172. Under provision of section that trustees shall hold as joint tenants in all respects as joint tenants held before 1784, where limitation had barred entry of one trustee, entry of cotrustees also barred: *Webb v. Borden*, 145-188; *Cameron v. Hicks*, 141-21.

Trustees are seized as joint tenants and not as tenants in common, *Webb v. Borden*, 145-188; *Cameron v. Hicks*, 141-21.

As to survivor of two or more mortgagees or trustees executing the power of sale in mortgage or deed of trust, see section 2582.

1737. Limitations on failure of issue. Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: Provided, that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight.

Rev., s. 1581; Code, s. 1327; R. C., c. 43, s. 3; 1827, c. 7.

It is the policy of the law to favor the early vesting of estates: *McDonald v. Howe*, 178-257; *Radford v. Rose*, 178-288. This section fixes a definite time when the estate of the first taker becomes absolute: *Bell v. Keesler*, 175-525. It applies only to instruments executed since January 15, 1828: *Sain v. Baker*, 128-258; *Weeks v. Weeks*, 40-111. For the old rule of construction, see *Hilliard v. Kearney*, 45-221; *Patterson v. McCormick*, 177-448.

“Dying without heirs or issue,” upon which a limitation over takes effect, is referable to the death of the first taker of the fee without issue living at the time of his death, and not to the death of any other person or to any intermediate period, unless it is clearly indicated otherwise in the instrument creating the estate: *Patterson v. McCormick*, 177-448 (discussing the rule and collecting the cases); *Sharpe v. Brown*, 177-294; *Williams v. Blizzard*, 176-146; *Smith v. Parks*, 176-406; *Robertson v. Andrews*, 175-492; *Bank v. Murray*, 175-62; *Whitfield v. Douglass*, 175-46; *Kirkman v. Smith*, 174-603; s. c., 175-579; *Bowden v. Lynch*, 173-203; *O’Neal v. Borders*, 170-483; *Hobgood v. Hobgood*, 169-485; *Burden v. Lipsitz*, 166-523; *Rees v. Williams*, 164-128; s. c., 165-201; *Smith v. Lumber Co.*, 155-389; *Perrett v. Bird*, 152-220; *Sessoms v. Sessoms*, 144-121; *Sain v. Baker*, 128-259; *Kornegay v. Morris*, 122-202; *Buchanan v. Buchanan*, 99-308; *Smith v. Brisson*, 90-284; *Hathaway v. Harris*, 84-98.

An estate to grantee for life, with remainder to the heirs of grantor, is construed to be an estate to the children of grantor: *Thompson v. Batts*, 168-333. The term “children” construed not to include “grandchildren”: s. c., 168-530. “Bodily heirs” and “lawful heirs of her body” construed to mean children: *Kornegay v. Cunningham*, 174-209; *Albright v. Albright*, 172-351.

A devise to a child “and the lawful heirs of his body lawfully begotten,” and a further provision that upon the death of either of testator’s children his share should go to the survivor, with other contingent limitations: Held, that the two items should be construed together, and constituted a defeasible fee: *Perrett v. Bird*, 152-220.

Section does not change application of doctrine of shifting uses and executory devises in determining nature and extent of precedent estate: *Sessoms v. Sessoms*, 144-121. Section does not interfere with application of rule in *Shelley’s case* in determining nature and extent of precedent estate: *King v. Utley*, 85-61.

For limitations held good under section, see *Sanderlin v. Deford*, 47-75; *Garland v. Watt*, 26-287; *Moore v. Barrow*, 24-436; *Tillman v. Sinclair*, 23-183.

For cases prior to enactment of section, see *Gibson v. Gibson*, 49-425; *Weatherly v. Armfield*, 30-25; *Hollowell v. Kornegay*, 29-261; *Brantley v. Whitaker*, 27-225; *Cox v. Marks*, 27-361; *State v. Skinner*, 26-57; *Robards v. Jones*, 26-54; *Brown v. Brown*, 25-134.

Section merely referred to in *Lockhart v. Covington*, 132-471; *Miller v. Churchill*, 78-374; *Lee v. Oates*, 171-717; *Springs v. Hopkins*, 171-486; *Staton v. Godard*, 148-434.

1738. Unborn infant may take by deed or writing. An infant unborn, but in esse, shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born.

Rev., s. 1582; Code, s. 1328; R. C., c. 43, s. 4.

Child en ventre sa mere at time of execution of deed to heirs of a living person takes as tenant in common with living children: *Powell v. Powell*, 168-561; *Campbell v. Everhart*, 139-503; *Graves v. Barrett*, 126-267—so also where deed made to a woman “and her children,” *Heath v. Heath*, 114-547—but child born more than a year after execution of instrument will not take, *Ibid*.

An estate to A. for life, remainder to his children in fee, will include those in existence at the time and those born afterward during the continuance of the particular estate: *Powell v. Powell*, 168-561.

For interesting case prior to enactment of section, see *Dupree v. Dupree*, 45-164.

Section merely referred to in *Deal v. Sexton*, 144-159.

1739. “Heirs” construed “children” in certain limitations. A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will.

Rev., s. 1583; Code, s. 1329; R. C., c. 43, s. 5.

Deed to heirs of living person construed to be limitation to children of such person, and includes after-born children: *Graves v. Barrett*, 126-267; *Campbell v. Everhart*, 139-503—applies to all who fill the description at the time the particular precedent estate terminates, *Cooley v. Lee*, 170-18—but where estate settled on one for life, with power of appointment in fee, by writing, to take effect after her death, and in case of a failure to appoint, then to heirs of donee for life, word “heirs” does not come within section so as to be interpreted “children,” *Graves v. Trueblood*, 96-495.

Words “and lawful heirs of her body” in instrument to be taken as implying children, nothing to contrary appearing: *Jarvis v. Davis*, 99-40; see, also, *Kornegay v. Cunningham*, 174-209; *Albright v. Albright*, 172-351.

Where bequest immediate, not dependent upon preceding limited estate, to heirs of living person, and children of such person are illegitimate, they are entitled to take under section: *Howell v. Tyler*, 91-207; see *Smith v. Brisson*, 90-284.

An estate granted to A. for life and then to the heirs of C., who is living, section applies: *Condor v. Seerest*, 149-201.

Where there is a conveyance to a living person, with a limitation to his heirs, section does not apply: *Thompson v. Batts*, 168-333; *Jones v. Ragsdale*, 141-200; *Marsh v. Griffin*, 136-334. This would come under the rule in *Shelley’s case*, which is not abolished by this section: *Nichols v. Gladden*, 117-499; *Starnes v. Hill*, 112-1; *Chamblee v. Broughton*, 120-170; but see *Howell v. Knight*, 100-254; *Jenkins v. Jenkins*, 96-254.

As distinguished from the rule stated in this section, the rule in *Shelley’s case* is recognized in this state; for explanation and applications of this rule, see *Nobles v. Nobles*, 177-243; *Byrd v. Byrd*, 176-113; *Daniel v. Harrison*, 175-120; *White v. Goodwin*, 174-723; *Cohoon v. Upton*, 174-88; *Smith v. Smith*, 173-124; *Ford v. McBrayer*, 171-420; *McSwain v. Washburn*, 170-363; *Robeson v. Moore*, 168-388; *Jones v. Whichard*, 163-243; *Cotten v. Moseley*, 159-1; *Puckett v. Morgan*, 158-345; *Price v. Griffin*, 150-523; *Smith v. Proctor*, 139-314; *Wool v. Fleetwood*, 136-460; *May v. Lewis*, 132-115; *Edgerton v. Aycock*, 123-134; *Chamblee v. Broughton*, 120-170; *Starnes v. Hill*, 112-1.

Cases in which the rule in *Shelley’s case* did not apply: *Smith v. Moore*, 178-370; *Radford v. Rose*, 178-288; *Kornegay v. Cunningham*, 174-209.

Section merely referred to in *Hodges v. Fleetwood*, 102-125; *King v. Utley*, 85-61; *Miller v. Churchhill*, 78-374.

1740. Possession transferred to use in certain conveyances. By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seized to use, or deed operating by way of covenant to stand seized to use, or otherwise, by any manner or means whatsoever it be, the possession of the bargainor, releasor, or covenantor shall be deemed to be transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest which such person shall have in the use, as perfectly as if the bargainee, releasee or person entitled to the use had been enfeoffed at common law with livery of seizin of the land intended to be conveyed by such deed or covenant.

Rev., s. 1584; Code, s. 1330; R. C., c. 43, s. 6; 27 Hen. VIII, c. 10.

Estate of freehold to commence in futuro can be conveyed by deed of bargain and sale operating under section: *Savage v. Lee*, 90-320.

As to necessity of consideration and effect of lack of consideration in conveyance to use, see *Pittman v. Pittman*, 107-163; *Ivey v. Granberry*, 66-227; *Springs v. Hawks*, 27-30. A fee simple may be limited after a fee simple either by deed or will by operation of statute of uses; if by deed, it is a conditional limitation; if by will, it is an executory devise: *Smith v. Brisson*, 90-284. As to whether a use can be executed upon a use, see *Rowland v. Rowland*, 93-221; *Jones v. Jones*, 164-320.

Where estate conveyed to trustee to preserve contingent remainders, this section will not execute the use: *Cameron v. Hicks*, 141-21.

In case of a passive trust the statute vests the estate in the cestui que trust: *Lee v. Oates*, 171-717; *Springs v. Hopkins*, 171-486; *McKenzie v. Kirby*, 114-425—the cestui que trust can call for legal title, and a court of equity will force trustee to convey it to him, *Perkins v. Brinkley*, 133-154; *McKenzie v. Sumner*, 114-425; *Jasper v. Maxwell*, 16-357; *Turnage v.*

Greene, 53-63; see, however, *Wilder v. Ireland*, 53-85; *Kirby v. Boyette*, 118-263—when there will be a merger of the legal and equitable estates, *Odom v. Morgan*, 177-367.

The words "for the sole and separate use," or equivalent language, qualifying estate of trustee for a married woman, must be construed as manifesting intent on part of grantor to limit her right of alienation to mode and manner expressly provided in instrument by which estate created: *Kirby v. Boyette*, 118-244.

Where one devised in 1828 to trustee to use and benefit of a woman for her life, remainder to use of all her children: Held, that by force of this section the legal estate for life was executed in woman, and that legal estate in remainder passed to children she had at time of devise, subject to participation of such as she might thereafter have: *Wilder v. Ireland*, 53-85.

A trust for the separate use of a married woman is a passive trust, if created since the constitution of 1868, unless there are active duties to be performed by the trustee: *Freeman v. Lide*, 176-434, citing *Perkins v. Brinkley*, 133-154, and distinguishing *Kirby v. Boyette*, 118-244, and *Hardy v. Holley*, 84-669.

A deed in trust to allow the daughter to enjoy the rents and profits during her life, with remainder over, conveys equitable life estate, but not the right to have the value of such life estate in money upon sale of the property: *Braddy v. Dail*, 156-30.

Cases bearing on subject of uses: *Hogan v. Strayhorn*, 65-279; *Bruce v. Faucett*, 49-391; *Davenport v. Wynne*, 28-128; *Harrison v. Battle*, 21-215.

1741. Collateral warranties abolished; warranties by life tenants deemed covenants. All collateral warranties are abolished; and all warranties made by any tenant for life of lands, tenements or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void; and all such warranties, as aforesaid, shall be deemed covenants only, and bind the covenanter in like manner as other obligations.

Rev., s. 1587; Code, s. 1334; R. C., c. 43, s. 10; 4 Anne, c. 16, s. 21; 1852, c. 16.

Title by estoppel and by rebutter explained: *Olds v. Cedar Works*, 173-161; *Weeks v. Wilkins*, 139-215.

Warranty has the effect of a personal covenant: *Hauser v. Craft*, 134-319; *Smith v. Ingram*, 130-102; see, also, *Wiggins v. Pender*, 132-628.

Where a father, having a life estate only, makes deed in fee for land, with warranty, his heir, with or without assets, is rebutted by warranty, except in cases where rule of common law changed by statute or where the heir can connect himself with outstanding remainder or reversion: *Southerland v. Stout*, 68-446. The warranty in the deed of the life tenant cannot defeat the remainder of the heirs by way of rebutter: *Starnes v. Hill*, 112-13, citing *Moore v. Parker*, 34-129. Where tenant by curtesy conveys land belonging to wife, in fee with general warranty, right of heirs of wife to land not rebutted by warranty: *Johnson v. Bradley*, 31-362. Where land devised to person for life and at death of life tenant to children thereof, such children not estopped by deed with covenant of warranty executed by life tenant: *Hauser v. Craft*, 134-319; *Starnes v. Hill*, 112-13; *Brown v. Ward*, 103-173; *Southerland v. Stout*, 68-446; *Moore v. Parker*, 34-129.

Section merely referred to in *Whitesides v. Cooper*, 115-577.

1742. Spendthrift trusts. It is lawful for any person by deed or will to convey any property, which does not yield at the time of the conveyance a clear annual income exceeding five hundred dollars, to any other person in trust to receive and pay the profits annually or oftener for the support and maintenance of any child, grandchild or other relation of the grantor, for the life of such child, grandchild or other relation, with remainder as the grantor shall provide; and the property so conveyed shall not be liable for or subject to be seized or taken in any manner for the debts of such child, grandchild or other relation, whether the same be contracted or incurred before or after the grant.

Rev., s. 1588; Code, s. 1335; 1871-2, c. 204, s. 1.

Provisions of section should be at least substantially complied with to create trust with incidents contemplated by same: *Gray v. Hawkins*, 133-1—and where no declaration of trust

in deed, nor any limitation of estate to life of child or grandchild, such deed inoperative under section, *Ibid.*; see, also, *Vaughan v. Wise*, 152-31.

This is an active trust, and no part of the income is vested in the beneficiary, but is only to be used for his benefit: *Fowler v. Webster*, 173-442.

1743. **Titles quieted.** An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims; and by any man or woman against his or her wife or husband or alleged wife or husband who have not lived together as man and wife within the two years preceding, and who at the death of such plaintiff might have or claim to have an interest in his or her estate, and a decree for the plaintiff shall debar all claims of the defendant in the property of the plaintiff then owned or afterwards acquired: Provided, that no such relief shall be granted against such husband or wife or alleged wife or husband, except in case the summons in said action is personally served on such defendant.

If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs. In any case in which judgment has been or shall be docketed, whether such judgment is in favor of or against the person bringing such action, or is claimed by him, or affects real estate claimed by him, or whether such judgment is in favor of or against the person against whom such action may be brought, or is claimed by him, or affects real estate claimed by him, the lien of said judgment shall be such claim of an estate or interest in real estate as is contemplated by this section.

Rev., s. 1589; 1893, c. 6; 1903, c. 763; 1907, c. 888.

Steps leading to the adoption of section explained: *Crockett v. Bray*, 151-615. It is in the nature of the equitable remedy to remove a cloud upon title, and is to be liberally construed: *Nobles v. Nobles*, 177-243; *Power Co. v. Power Co.*, 175-668; s. c., 171-248; *Satterwhite v. Gallagher*, 173-525; *Christman v. Hilliard*, 167-4; *Campbell v. Cronly*, 150-457.

Plaintiff need not be in possession to bring the action: *Speas v. Woodhouse*, 162-66; *Swindell v. Smaw*, 156-1; *Land Co. v. Lange*, 150-26; *McLean v. Shaw*, 125-492; *Daniels v. Fowler*, 120-14—and plaintiff can maintain such action without showing that defendant is an occupant or any more than claimant of land in controversy, *Burgess v. Burgess*, 117-447. Action to determine conflicting claims to land may be treated as action of ejectment, when complaint alleges ownership in plaintiff and possession in defendant: *Hines v. Moye*, 125-8; *Kerner v. Cottage Co.*, 123-294. Where plaintiff is in possession of lands, and court finds defendant's claim to be invalid, action should not be dismissed: *Rumbo v. Mfg. Co.*, 129-9—but decree should be entered removing the cloud from title, *Ibid.*

The action may be maintained to remove tax deed as cloud upon title: *Rexford v. Phillips*, 159-213; *Beck v. Meroney*, 135-532; *Edwards v. Lyman*, 122-741—to remove attachment lien, *Crockett v. Bray*, 151-615—by married woman to determine validity of contract, *Satterwhite v. Gallagher*, 173-525—by devisee to determine interest conveyed in a devise, *Nobles v. Nobles*, 177-243; *Smith v. Smith*, 173-124—to restrain the enforcement of a judgment for the sale of land, *Little v. Efrd*, 170-187—to have the record of will executed in another state and recorded here, removed, *McEwan v. Brown*, 176-249—to determine the validity of restrictive covenants in a deed, *Guilford v. Porter*, 167-366—by the grantor in a deed held in escrow, *Board of Ed. v. Development Co.*, 159-162—between parties claiming under the same deed, *Byrd v. Byrd*, 176-113—to remove a registered mortgage which appears to be valid, *McArthur v. Griffith*, 147-545—to correct a deed to convey a fee instead of a life estate, *McLamb v. McPhail*, 126-218—to have a deed under execution sale declared void as against a married woman, *Rutherford v. Ray*, 147-253.

Defendant may ask for affirmative relief under this section, and plaintiff cannot take non-suit: *McLean v. McDonald*, 173-429.

Should purchaser at execution sale delay to commence suit for possession, claimant to title, whether in or out of possession, could proceed under section against such purchaser: *McLean*

v. Shaw, 125-491. **Case rendered nugatory by amendment of 1903: Ibid. An injunction may be granted as proper remedy:** Power Co. v. Power Co., 175-668; Mortgage Co. v. Long, 113-123. **No defense bond required:** Timber Co. v. Butler, 134-50.

For cases prior to enactment of section, see Duncan v. Hall, 117-443; McNamee v. Alexander, 109-242; Peacock v. Stott, 104-154; Murray v. Hazell, 99-168; Byerly v. Humphrey, 95-151; Pearson v. Boyden, 86-585; Busbee v. Lewis, 85-332; Busbee v. Macy, 85-329; Thigpen v. Pitt, 54-49.

As bearing upon section, see Edwards v. Lyman, 122-741; Younger v. Ritchie, 116-782; Webster v. Williams, 153-309; Heptinstall v. Newsome, 146-503.

Section merely referred to in Jones v. Ballou, 139-527; Hill v. Gettys, 135-377; Olmsted v. Smith, 133-585; Treadaway v. Payne, 127-436; Cowles v. McNeill, 125-388.

1744. Remainders to uncertain persons; procedure for sale; proceeds secured.

In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale of the property by a proceeding in the superior court at term time, which proceeding shall be conducted in the manner pointed out in this section. Such proceedings may be commenced by summons by any person having a vested interest in the land, and all persons in esse who are interested in said land shall be made parties defendant and served with summons as in other civil actions, and upon nonresidents or persons whose names and residences are unknown, by publication as now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the judge of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem to represent such remaindermen, upon whom summons shall be served as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such actions, and when counsel is needed to represent him, to make this known to the judge, who shall by an order give instructions as to the employment of counsel and the payment of fees.

The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold. The court may authorize the loaning of such money subject to its approval until such time when it can be reinvested in real estate.

The court may authorize the temporary reinvestment, pending final investment in real estate, of funds derived from such sale in coupon bonds of the United States of America (commonly called Liberty Bonds) issued incident to the late war between the United States and the Imperial German Government; but in the event of such reinvestment, the commissioners, trustees or other officers appointed by the court to hold such funds shall hold the bonds in their possession and shall pay to the life tenant and owner of the vested interest in the lands sold only the interest accruing on and evidenced by the coupons attached to the

bonds, and the principal of the bonds shall be held subject to final reinvestment and to such expense only as is provided in this section. Temporary reinvestments, as aforesaid, in liberty bonds heretofore made with the approval of the court of all or a part of the funds derived from such sales are ratified and declared valid.

Rev., s. 1590; 1903, c. 99; 1905, c. 548; 1907, cc. 956, 980; 1919, c. 17.

See, also, sections 3235, 3245. This section is constitutional; it also applies to estates created prior to its enactment: *Springs v. Scott*, 132-548; *Anderson v. Wilkins*, 142-159; *Smith v. Miller*, 151-620.

Purpose of this enactment reviewed in *Hodges v. Lipscomb*, 133-202; *Springs v. Scott*, 132-548. Power of court to sell contingent interests: *Smith v. Witter*, 174-616; *Trust Co. v. Nicholson*, 162-257; *Smith v. Miller*, 155-242, 152-314, 151-620. Court may order public or private sale: *Sutton v. Craddock*, 174-274; *Ryder v. Oates*, 173-569; *McAfee v. Green*, 143-411.

Court has power hereunder where there is a vested interest in real estate and contingent remainder over to persons not in being, or when contingency has not happened which will determine who remaindermen are, to order sale by conforming to procedure prescribed by section: *Springs v. Scott*, 132-548; *Dunn v. Hines*, 164-113; *Vinson v. Wise*, 159-653.

Decree should provide for investment of fund in such way as court may deem best for protection of all persons who have or may have remote or contingent interests: *Springs v. Scott*, 132-548; *Thompson v. Rospigliosi*, 162-145; *Pendleton v. Williams*, 175-248; *Dawson v. Wood*, 177-158; *McLean v. Caldwell*, 178-424. The purchaser is not required to see to proper application of the funds: *McLean v. Caldwell*, 178-424.

Clerk of court has no jurisdiction of action to sell property for reinvestment, etc., under section: *Smith v. Witter*, 174-616; *Smith v. Gudger*, 133-627—though where case carried to superior court on appeal same will be retained for hearing, *Ibid*.

In action for sale of land for reinvestment in which are contingent interests, it is sufficient to make parties those who would, by happening of contingency, have estate therein at time of commencing action: *Bullock v. Oil Co.*, 165-63; *O'Hagan v. Johnson*, 163-197; *Hodges v. Lipscomb*, 133-199—and persons not in being, who may have interest in property invested, not necessary parties in action for sale thereof and reinvestment, *Smith v. Gudger*, 133-627—though where remainder may go to minors, or persons not in esse, or unknown, court may appoint guardian ad litem to represent such parties, *Hodges v. Lipscomb*, 133-199.

Contingent remaindermen, not represented either by guardian or attorney, and not named in process, pleadings or decree, not bound by proceedings for partition instituted by other remaindermen and life tenant: *Whitesides v. Cooper*, 115-570.

As to assignments of contingent remainders, see *Kornegay v. Miller*, 137-659.

For cases prior to enactment of section, see *Hodges v. Lipscomb*, 128-57; *Marsh v. Dellinger*, 127-360; *Hutchison v. Hutchison*, 126-671; *Yancey's case*, 124-151; *Smith v. Smith*, 118-735; *Overman v. Tate*, 114-571; *Aydlett v. Pendleton*, 111-28; *Young v. Young*, 97-132; *Justice v. Guion*, 76-442.

1745. Sales of contingent remainders validated. In all cases where property has been conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitation, where a judgment of a superior court has been rendered authorizing the sale of such property discharged of such contingent remainder, executory devise or other limitation in actions or special proceedings where all persons in being who would have taken such property if the contingency had then happened were parties, such judgment shall be valid and binding upon the parties thereto and upon all other persons not then in being: Provided, that nothing herein contained shall be construed to impair or destroy any vested right or estate.

Rev., s. 1591; 1905, c. 93.

For deeds of revocation of future interests made to persons not in esse, see *Conveyances*, Art. 1, s. 996.

The enactment of this section was a valid exercise of legislative power: *Anderson v. Wilkins*, 142-154; *Dunn v. Hines*, 164-113; *Bullock v. Oil Co.*, 165-63.

1746. **Freeholders in petition for special taxes defined.** In all cases where a petition by a specific number of freeholders is required as a condition precedent to ordering an election to provide for the assessment or levy of taxes upon realty, all residents of legal age owning realty for life or longer term, irrespective of sex, shall be deemed freeholders within the meaning of such requirement.

1915, c. 22.

The term "freeholders" in a petition for election under Revisal, sec. 4115 (now section 5526), was held not to include women: *Gill v. Comrs.*, 160-176. But women are included under the term for special purpose in this section: *Chitty v. Parker*, 172-126.

CHAPTER 35

EVIDENCE

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ART. 1. STATUTES

1747. **Printed statutes and certified copies evidence.** All statutes, or joint resolutions, passed by the general assembly may be read in evidence from the printed statute book; or a copy of any act of the general assembly certified by the secretary of state shall be received in evidence in every court.

Rev., ss. 1592, 1593; Code, ss. 1339, 1340; R. C., c. 44, ss. 4, 5; 1826, c. 7.

Where act published in printed public laws of state every person has right to read same in evidence as the law in any court of state: *Range Co. v. Carver*, 118-337.

Cases referring to section: *Wilson v. Markley*, 133-622; *Durham v. R. R.*, 108-403.

As to pleading private statutes, see section 541.

1748. **Martin's collection of private acts.** Any private act published by Francis X. Martin, in his collection of private acts, shall be received in evidence in every court.

Rev., s. 1593; Code, s. 1340; R. C., c. 44, s. 5; 1826, c. 7, s. 2.

1749. **Laws of other states or foreign countries.** A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the executive thereof, contained in a book or publication purporting or proved to have been

published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the judicial tribunals thereof, shall be evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of the reports of cases, adjudged in the courts thereof, shall also be admitted as evidence of the unwritten or common law thereof. And either party may also exhibit a copy of the law of such state, territory, or foreign country, duly certified by the secretary of state of this state as having been copied from a printed volume of the laws of such state, territory or country, on file in the state or supreme court library, or in the offices of the governor or secretary of state.

Rev., s. 1594; Code, s. 1338; R. C., c. 44, s. 3; 1823, c. 1193, ss. 1, 3; C. C. P., s. 360.

See, also, section 3252. Courts will not take judicial notice of statutes of another state: *Hall v. R. R.*, 146-345; *Coal and Ice Co. v. R. R.*, 144-732; *Waters v. R. R.*, 108-349; *Hilliard v. Outlaw*, 92-266; *Hooper v. Moore*, 50-130—or of a foreign country, *Waters v. R. R.*, 108-349; *Hooper v. Moore*, 50-130—but printed copy of statute of another state contained in book purporting to have been published by authority thereof admissible to prove existence of such statute, *Copeland v. Collins*, 122-619; *Balk v. Harris*, 122-64.

What is statute law of another state is question of fact to be proved like any other fact: *Miller v. R. R.*, 154-441; *Gooch v. Faucett*, 122-270; *Hilliard v. Outlaw*, 92-266; *Hooper v. Moore*, 50-130; *State v. Jackson*, 13-563; *Moore v. Gwynn*, 27-187. Semble, that unless pleaded and proven, presumption is that statutory law of another state same as this state: *Lassiter v. R. R.*, 136-89.

Regulations of United States department of agriculture made pursuant to statute, and intended to control conduct of general public, are not foreign laws within meaning of section when such regulations operate and take effect in this state: *State v. R. R.*, 141-846.

Transcript of statute, once duly certified by secretary of state according to law, evidence at all times of its being in force in conformity with terms, unless repeal shown: *State v. Cheek*, 35-114. Certificate of secretary of state as to statutes of another state, given in pursuance of section, is evidence in criminal as well as civil cases: *State v. Patterson*, 24-346. Section substantially complied with by certificate under hand and private seal of secretary of state, accompanied by certificate of governor, under seal of state, as to official character of secretary of state: *State v. Jackson*, 13-563.

Common law of foreign state is presumed to be same as this state: *Miller v. R. R.*, 154-441; *Carriage Co. v. Dowd*, 155-307; *Lassiter v. R. R.*, 136-89; *Hall v. R. R.*, 146-345; *Brown v. Pratt*, 56-202; *Griffin v. Carter*, 40-413. But if not admitted or presumed, it must be proved as any other fact: *Keesler v. Ins. Co.*, 177-394; *Harrison v. R. R.*, 168-382; s. c., 171-751; *Moore v. Gwynn*, 27-187.

Any person claiming to know common or unwritten laws of another state or foreign country may testify to and explain them before courts and juries: *State v. Behrman*, 114-797; *Temple v. Pasquotank Co.*, 111-36—and jury should consider not only veracity of witnesses who give legal opinions, but their reputation, character, learning and legal standing, and determine for themselves how much weight they will give opinions, *Hancock v. Tel. Co.*, 142-163.

When the law of another state has been proved, its construction is for the court: *Keesler v. Ins. Co.*, 177-394; *Harrison v. R. R.*, 168-382; s. c., 171-751; *Hooper v. Moore*, 50-130; *Moore v. Gwynn*, 27-187.

Laws of this state at time of cession of Tennessee must be taken to be laws of that state until shown that they have been altered or repealed: *State v. Patterson*, 24-346.

Where copy of statute of another state has been received in evidence in court below, upon insufficient proof, if it is made to appear to supreme court from official and proper source that copy so received was correct, a venire de novo will not be awarded for that error: *McDugald v. Smith*, 33-576.

A certificate of an act of South Carolina reciting the title of a prior act not sufficient as evidence of such prior act: *State v. Welsh*, 10-404.

As to the law concerning subject-matter of this section prior to 1823, see *State v. Behrman*, 114-804; *State v. Twitty*, 9-441.

1750. Town ordinances certified. In the trial of appeals from mayors' courts, when the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, certified by the mayor, shall be prima facie evidence of the existence of such ordinance.

Rev., s. 1595; 1899, c. 277, s. 2.

For pleading ordinances and printed ordinances as evidence, see *Municipal Corporations*, s. 2825; mayor's certificate, s. 2637.

ART. 2. GRANTS, DEEDS AND WILLS

1751. Copies certified by secretary of state. Copies of the plats and certificates of survey, or their accompanying warrants, and all abstracts of grants, which may be filed in the office of the secretary of state, certified by him as true copies, shall be as good evidence, in any court, as the original.

Rev., s. 1596; Code, s. 1341; R. C., c. 44, s. 6; 1822, c. 1154.

Abstracts of grants in usual form, duly certified as correct copies by secretary of state, and recorded in office of register of deeds, competent to show title out of state: *Marshall v. Corbett*, 137-555; *Ray v. Stewart*, 105-473; *Clarke v. Diggs*, 28-159; *McLenan v. Chisholm*, 64-323; *Candler v. Lunsford*, 20-142; *Osborne v. Ballew*, 29-415—though plats and certificates of survey, not being identified or explained, not competent evidence to show location of land, *Cowles v. Lovin*, 135-488. The copy or abstract is not any better evidence than the registration of the original: *Richards v. Lumber Co.*, 158-54.

Clerk of secretary of state has no power to certify and affix great seal of state to copies of grants and other papers from office of secretary of state to be used in evidence: *Beam v. Jennings*, 96-82 (but see section 1754 validating such acts).

As patents or grants from state are recorded in office of secretary of state, copies of them obtained from that office may be given in evidence without accounting for originals by all persons except patentees or grantees, or those claiming under them who would be entitled to possession of originals: *Candler v. Lunsford*, 20-142. But see section 1752.

1752. Certified copies of grants and abstracts. For the purpose of showing title from the state of North Carolina to the grantee or grantees therein named and for the lands therein described, duly certified copies of all grants and of all memoranda and abstracts of grants on record in the office of the secretary of state, given in abstract or in full, and with or without the signature of the governor and the great seal of the state appearing upon such record, shall be competent evidence in the courts of this state or of the United States or of any territory of the United States, and in the absence of the production of the original grant shall be conclusive evidence of a grant from the state to the grantee or grantees named and for the lands described therein.

1915, c. 249, s. 1.

Certified copies of abstracts of grants conclusive evidence of grants: *Herbert v. Development Co.*, 170-622; *Howell v. Hurley*, 170-401 (modifying same case in 170-798). This section is constitutional: *Howell v. Hurley*, 170-401.

1753. Certified copies of grants and abstracts recorded. Duly certified copies of such grants and of such memoranda and abstracts of grants may be recorded in the county where the lands therein described are situated, and the records thereof in such counties, or certified copies thereof, shall likewise be competent evidence for the purpose of showing title from the state of North Carolina to the grantee or grantees named and for the lands described therein.

1915, c. 249, s. 2.

See annotations under section 1752. Title presumed to be out of the state, see section 426.

1754. Copies of grants certified by clerk of secretary of state validated. All copies of grants heretofore issued from the office of the secretary of state, duly certified under the great seal of the state, and to which the name of the secretary has been written or affixed by the clerk of the said secretary of state, are hereby ratified and approved and declared to be good and valid copies of the original grants and admissible in evidence in all courts of this state when duly registered in the counties in which the land lies; all such copies heretofore registered in said counties are hereby declared to be lawful and regular in all respects as if the same had been signed by the secretary of state in person and duly registered.

Rev., s. 1597; 1901, c. 613.

1755. Copies of grants in Burke. Copies of grants issued by the state within the county of Burke prior to the destruction of the records of said county by General Stoneman in the year one thousand eight hundred and sixty-five, shall be admitted in evidence in all actions when the same are duly registered; and when the original grants are lost, destroyed or cannot be found after due search, it shall be presumed that the same were duly registered within the time prescribed by law, as provided upon the face of original grant.

Rev., s. 1610; 1901, c. 513.

1756. Copies of grants in Moore. Copies of grants for land situated in Moore county and the counties of which Moore was a part, entered in a book, and the book being certified under the seal of the secretary of state, shall have the force and effect of the originals and be evidence in all courts.

Rev., s. 1613; 1903, c. 214.

1757. Copies of grants in Onslow. The copies of grants made by the register of deeds of Onslow county under laws of 1907, chapter 434, of grants, abstracts of grants, and other documents pertaining to titles of land in Onslow county issued prior to the year one thousand eight hundred, and contained in a book called Book of Transcribed Grants Issued Prior to One Thousand Eight Hundred, duly authenticated as prescribed in said chapter 434 of the laws of one thousand nine hundred and seven, shall be received as evidence in all courts of the state, and certified copies therefrom shall be received as evidence.

1907, c. 434.

1758. Certain deeds dated before 1835 evidence of due execution. In all actions hereafter instituted in which the title or ownership of any lands situated in North Carolina is at issue or in dispute, any deed or release, or a duly certified copy thereof, in which the people of the state of North Carolina are grantees and bearing date prior to the year one thousand eight hundred and thirty-five and purporting to have been filed and recorded in the office of the secretary of state of North Carolina prior to said year and now on file and of record in said office, and executed or purporting to have been executed by any person or persons as the representatives or agents or for or on behalf of any society, tribe, nation or aggregation of persons, whether signed or executed individually or in their representative capacity, and any such deed or release having been authorized to be executed by an act of the general assembly of North Carolina by the properly authorized agents of such society, tribe, nation or aggregation

of persons, shall be *prima facie* evidence that the person or persons signing or executing any such deed or release were the properly authorized agent or agents of such society, tribe, nation or aggregation of persons. Any recitals or statements of fact in any such deed or release shall be *prima facie* evidence of the truth thereof in any such actions. But this shall not apply to actions pending on March 3, 1915.

1915, c. 75.

1759. **Certified copies of maps of Cherokee lands.** Certified copies by the secretary of state of the copies, or parts thereof, of the maps of the Cherokee lands and of the Cherokee Country, as provided for and described in chapter one hundred and seventy-five of the laws of one thousand nine hundred and eleven, shall have the same force and effect and be entitled to the same force and effect as evidence as certified copies of the whole or parts of the original maps.

1911, c. 175.

1760. **Certified copies of certain surveys and maps obtained from the state of Tennessee.** A certified copy of the report of the survey made by the North Carolina commissioners, McDowell, Vance and Matthews, of that portion of the state of Tennessee extending from a point on the Virginia line to a point on the Smoky Mountain west of the Pigeon River, as obtained and filed by the secretary of state under the provisions of chapter one hundred and sixty-two of the laws of one thousand nine hundred and thirteen, shall, when certified under the hand and seal of the secretary of state, be competent evidence in the trial of any action in the courts of the state.

1913, s. 162.

1761. **Evidence of title under H. E. McCulloch grants.** In all actions or suits, wherein it may be necessary for either party to prove title, by virtue of a grant or grants made by the king of Great Britain or Earl Granville to Henry McCulloch, or Henry Eustace McCulloch, it shall be sufficient for such party, in the usual manner, to give evidence of the grant or conveyance from the king of Great Britain or Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, and the mesne conveyances thereafter, without giving any evidence of the deed or deeds of release, relinquishment or confirmation of Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, or the power or powers of attorney by which the conveyances from the said Henry McCulloch, or Henry Eustace McCulloch, purport to have been made.

Rev., s. 1600; Code, s. 1336; R. C., c. 44, s. 1; 1819, c. 1021.

1762. **Conveyances or certified copies evidence of title under McCulloch.** In all trials where the title of either plaintiff or defendant shall be derived from Henry Eustace McCulloch, or Henry McCulloch, out of their tracts number one and three, it shall not be required of such party to produce, in support of his title, either the original grant from the crown to the proprietors, or a registered copy thereof; but in all such cases the grant or deed executed by such reputed proprietors, or by his or their lawful attorney, or a certified copy thereof, shall be deemed and held sufficient proof of the title of such proprietors, in the same manner as though the original grants were produced in evidence.

Rev., s. 1601; Code, s. 1337; R. C., c. 44, s. 2; 1807, c. 724.

1763. Certified copies of registered instruments evidence. A copy of the record of any deed, mortgage, power of attorney, or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of the county where the original or duly certified copy has been registered, may be given in evidence in any of the courts of the state where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court.

Rev., s. 1598; Code, s. 1251; 1893, c. 119, s. 2; R. C., c. 37, s. 16; 1846, c. 68, s. 1.

Record of registered deed competent evidence without producing original, where no rule of court for production of original issued: *Ratliff v. Ratliff*, 131-425—as is also certified copies of such registered deeds, *Hughes v. Debnam*, 53-127—and duly authenticated copy of record of bond to make title, under which deed made, is within spirit and meaning of section, and admissible without accounting for absence of original, *Bohanan v. Shelton*, 46-370—also, as register required to keep bond of clerk superior court, duly certified copy of record of such bond competent evidence of its provisions, *Battle v. Baird*, 118-854; *Short v. Currie*, 53-42.

Certificate of register of deeds, to the effect that copy of deed, with order of probate and registration, are of record in office, prima facie evidence of its execution and probate: *Love v. Harbin*, 87-249. Copy of grant from register's office, which affirmatively shows that same issued under great seal of state, admissible in evidence, though registry does not show impress of seal or scroll to indicate same: *Aycock v. R. R.*, 89-321. Where the record recites a private seal, but no seal is indicated with the name, a presumption arises that instrument was under seal: *Hopkins v. Lumber Co.*, 162-533; *Edwards v. Supply Co.*, 150-176; *Strain v. Fitzgerald*, 130-601; *Heath v. Cotton Mills*, 115-202. When the deed recites the names of the grantors and the probate recites their acknowledgment and signatures, but the names were omitted in recording, the record is sufficient: *Smith v. Lumber Co.*, 144-48.

The original may be used to show that the defect which appears upon the record did or did not exist: *Brown v. Hutchinson*, 155-205; *Patterson v. Galliher*, 122-511; *Strain v. Fitzgerald*, 128-396.

The copy of the record is not any better evidence than the original: *Richards v. Lumber Co.*, 158-54. If the instrument is not properly admitted to probate and registration, a copy of the record is not sufficient evidence: *Buchanan v. Hedden*, 169-222. Copy of abstract of grant dated in 1799, bearing signature of governor and certified by register, admissible in evidence to show land granted: *Strickland v. Draughan*, 88-315. Not proper to correct by parol testimony certified copy of deed, as recorded, by showing that original, which was lost, had different description: *Hopper v. Justice*, 111-418.

Party against whom registry of instrument, or copy thereof, introduced in evidence cannot then raise objection that there is variance between such registry, or copy, and original instrument: *Devereux v. McMahon*, 108-134—but if he desired to avail himself of the objection, he should have required the production of the original in manner provided by section, *Ibid.*; *Ratliff v. Ratliff*, 131-427.

For case prior to amendment of section (Acts 1893, c. 119, s. 2), providing seal for register of deeds, see *Thompson v. Justice*, 88-269.

Section merely referred to in *Griffith v. Richmond*, 126-378; *Ray v. Stewart*, 105-474; *Howell v. Ray*, 92-512; *Moore v. Hill*, 85-220; *Mauney v. Crowell*, 84-316; *Gudger v. Hensley*, 82-486.

1764. Common survey of contiguous tracts evidence. Whenever any person owns several tracts of land which are contiguous or adjoining, but held under different deeds and different surveys, it may be lawful for any such person to

have all such bodies of land included in one common survey by running around the lines of the outer tracts, and thereupon the possession of any part of said land covered by such common survey shall be deemed and held in law as a possession of the whole and every part thereof: Provided, that nothing in this section shall be construed to affect the rights or claims of persons which have already accrued to any part of said land. In all cases where such common surveys are made as directed by this section, the same may be recorded and registered as in cases of deeds, and shall be evidence in like manner.

Rev., s. 1505; Code, s. 1277; 1869-70, c. 34, ss. 1, 2.

By recording survey of outer lines of contiguous tracts, so as to exhibit outer boundaries, as if the whole had been covered by one tract, possession at any point on any one of the tracts will amount to possession of all the tracts: *McNamee v. Alexander*, 109-244. Surveyor's testimony that the map is correct is sufficient to make it competent: *Greenleaf v. Bartlett*, 146-495.

1765. Certified copies registered in another county and used in evidence. A copy from the office of the register of deeds of any county of the record of any deed, mortgage, power of attorney or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of such county, may, upon presentation to the register of deeds of any other county, be registered without further proof, and the record thereof, or a duly certified copy of the same, may be given in evidence in any court in the state where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court.

Rev., s. 1599; Code, s. 1253; 1893, c. 119, s. 3; R. C., c. 37, s. 16; 1846, c. 68.

See section 3319. For record of surveys as evidence, see section 7572. For registration of certificate of survey as evidence, see section 3559. Party against whom the registry of a deed or other instrument, or copy thereof, has been introduced in evidence cannot then raise objection that there is a variance between such registry, or copy, and the original instrument; if he desired to avail himself of such objection he should have required production of original in the way provided: *Devereux v. McMahon*, 108-134; *Ratliff v. Ratliff*, 131-427. Section cited in *Weston v. Lumber Co.*, 160-263.

1766. Deeds and records thereof lost, presumed to be in due form. Whenever it is shown in any judicial proceeding that a deed or conveyance of real estate has been lost or destroyed, and that the same had been registered, and that the register's book containing the copy has been destroyed by fire or other accident, so that a copy thereof cannot be had, it shall be presumed and held, unless the contents be shown to have been otherwise, that such deed or conveyance transferred an estate in fee simple, if the grantor was entitled to such an estate at the time of conveyance, and that it was made upon sufficient consideration.

Rev., s. 1602; Code, s. 1348; R. C., c. 44, s. 14; 1854, c. 17.

Probate of a deed in regular form is presumed from the fact of registration: *Cochran v. Imp. Co.*, 127-386. Registration of a deed is presumed to be correct: *Ibid.*

1767. Local: recitals in tax deeds in Haywood and Henderson. In all legal controversies touching lands in the counties of Haywood and Henderson, in which

either party shall claim title under any sale for taxes alleged to have been due and laid, in and for the year one thousand seven hundred and ninety-six, or any preceding year, the recital contained in the deed or assurance, made by the sheriff or other officer conveying or assuring the same, of the taxes having been laid and assessed, and of the same having remained due and unpaid, shall be held and taken to be prima facie evidence of the truth of each and every of the matters so recited.

Rev., s. 1606; Code, s. 1346; R. C., c. 44, s. 11.

See section 8034 and annotations.

1768. Local: copies of records from Tyrrell. Copies of records of the county of Tyrrell between the years one thousand seven hundred and thirty-five and one thousand seven hundred and ninety-nine, when copied in a book and certified to by the clerk of the superior court of Tyrrell county as to the records of his office and by the register of deeds as to the records of his office, and deposited in their respective offices in Washington county, shall be treated in all respects as original records and received as evidence in all courts of Washington county.

Rev., s. 1612; 1903, c. 199.

1769. Local: records of partition in Duplin. The transcripts made by the clerk of the superior court of Duplin county, in accordance with chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of the reports of committees relating to the partition of real estate on file in his office prior and up to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, A, and the reports of committees beginning with and subsequent to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, B, shall be as competent evidence as are the original reports of the committees.

1907, c. 395, ss. 3, 4.

1770. Local: records of wills in Duplin. The transcripts made by the clerk of the superior court of Duplin county, in accordance with chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of all wills and entries of probate and dates of registration appearing on the same, on file in his office prior and up to the January term of the county court of Duplin county, one thousand eight hundred and thirty, and entered in a book designated as Record of Wills, A, and duly indexed as provided by law, shall be as competent evidence in any court as are the originals of such wills.

1907, c. 395, ss. 1, 2.

1771. Local: records of deeds and wills in Anson. The copies of the deeds and deed books and of the wills and will books made in Anson county under the act of March second, one thousand nine hundred and five, shall have the same force and effect as the original deeds and deed books copied and as the original wills and will books copied, and shall take the place of said original deeds and deed books and wills and will books as evidence in all court procedure; and wherever said deed books or will books are ordered or directed to be produced in court by subpoena or other order of court, the copies made under such act shall

be produced, unless the court shall specially order the production of the original books, and the copies so produced in court shall have the same validity and effect and be used for the same purposes, with the same effect, as the original books.

Rev., s. 1615; 1905, c. 663, s. 3.

1772. Local: records of wills in Brunswick. Under the provisions of chapter one hundred and six of the laws of one thousand nine hundred and eight, authorizing and directing that all unrecorded wills, dated prior to January first, one thousand eight hundred and seventy-five, on file in the office of the clerk of the superior court of Brunswick county, and which have been duly proved in the form required by law, and bearing the adjudication certificate of the proper officer, shall be recorded in the book of wills in the said office and properly indexed; that all wills recorded in the minutes of the court of pleas and quarter sessions or other books of record in said office shall be transcribed and indexed in the book of wills in said office; and that all wills recorded in the office of the register of deeds of said county shall be properly indexed in the book kept for the purpose in the office of the clerk of the superior court of the county; the record of any instrument or certified copy thereof, recorded under the provisions of this article, shall be admitted in evidence in the trial of any cause, subject to the same rules upon which other wills are admitted.

1908, c. 106.

1773. Copies of wills. Copies of wills, duly certified by the proper officer, may be given in evidence in any proceeding wherein the contents of the will may be competent evidence.

Rev., s. 1603; Code, s. 2175; R. C., c. 119, s. 21; 1784, c. 225, s. 6.

See sections 368, 4148. Certified copy of a will competent evidence under section: Hampton v. Hardin, 88-592; Croom v. Dugg, 110-260, and cases cited.

A copy of will made in another state, with its probate certified by judge of court in which proved, and accompanied by testimonials of governor of that state that person who gave certificate was proper officer to take such probate and certify same, is sufficient authentication to admit it in evidence: Knight v. Wall, 19-125.

1774. Copies of wills in secretary of state's office. Copies of wills filed or recorded in the office of the secretary of state, attested by the secretary, may be given in evidence in any court, and shall be taken as sufficient proof of the devise of real estate, and are declared good and effectual to pass the estate therein devised: Provided, that no such will may be given in evidence in any court nor taken as sufficient proof of the devise unless a certificate of probate appear thereon.

Rev., s. 1607; Code, s. 2181; R. C., c. 44, s. 12; 1852, c. 172; 1856-7, c. 22.

For case prior to amendment of 1856-57, see Stephens v. French, 48-360.

1775. Copies of wills recorded in wrong county. Whereas, by reason of the uncertainty of the boundary lines of many of the counties of the state, wills have been proved, recorded and registered in the wrong county, whereby titles are insecure; for remedy whereof: The registry or duly certified copy of the record of any will, duly recorded, may be given in evidence in any of the courts of this state.

Rev., s. 1608; Code, s. 2182; 1858-9, c. 18.

1776. Copy of will proved and lost before recorded. When any will which has been proved and ordered to be recorded was destroyed during the war between the states, before it was recorded, a copy of such will, so entitled to be admitted to record, though not certified by any officer, shall, when the court shall be satisfied of the genuineness thereof, be ordered to be recorded, and shall be received in evidence whenever the original or duly certified exemplification would be; and such copies may be proved and admitted to record under the same rules, regulations and restrictions as are prescribed in the chapter entitled *Burnt and Lost Records*.

Rev., s. 1609; Code, s. 2183; 1866-7, c. 127.

1777. Certified copies of deeds and wills from other states. In cases where inhabitants of other states or territories, by will or deed, devise or convey property situated in this state, and the original will or deed cannot be obtained for registration in the county where the land lies, or where the property shall be in dispute, a copy of said will or deed (after the same has been proved and registered or deposited, agreeable to the laws of the state where the person died or made the same) being properly certified, either according to the act of congress or by the proper officer of the said state or territory, shall be read as evidence.

Rev., s. 1619; Code, s. 1344; R. C., c. 44, s. 9; 1802, c. 623.

See, also, sections 4148, 4149. Will proved in another state which bears certificate of clerk of court where probate had as to oath of attesting witnesses, but no other authentication, inadmissible in evidence; *Hunter v. Kelly*, 92-285—but copy of will made in another state, with probate certified by judge of court in which proved, accompanied by certificate of governor of state that person so certifying was proper officer to take probate and certify same, sufficient under section: *Knight v. Wall*, 19-125.

The certificate must be according to act of congress or by the proper officer of the state or territory: *Riley v. Carter*, 158-484; *Smathers v. Jennings*, 170-601. See section 4153.

As to authentication of records of other states generally, see *Kinsley v. Rumbough*, 96-193; see, also, in Appendix, Vol. 2, under Authentication of Records.

As bearing upon section, see *Miazza v. Calloway*, 74-31; *Warren v. Wade*, 52-494; *Ward v. Hearne*, 44-184.

1778. Copies of lost records in Bladen. The clerk of the superior court of Bladen county shall transcribe the judgment docket and index books and the will books in his office, and all other books in said office containing records made since the year one thousand eight hundred and sixty-eight, and the records so transcribed shall have the same force and effect as the original records would have, and shall be received in evidence as the original records and be *prim facie* evidence of their correctness and of the sufficiency of their probate, though the probates are lost and are not transcribed.

Rev., s. 1611; 1895, c. 415; 1903, c. 65.

ART. 3. PUBLIC RECORDS

1779. Copies of official writings. Copies of all official bonds, writings, papers, or documents, recorded or filed as records in any court, or public office, or lodged in the office of the governor, treasurer, auditor, secretary of state, attorney general or adjutant general, shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of his office when there is such seal, or under his hand when there is no such seal,

unless the court shall order the production of the original. Copies of the records of the board of county commissioners shall be evidence when certified by the clerk of the board under his hand and seal of the county.

Rev., s. 1616; Code, ss. 715, 1342; R. C., c. 44, s. 8; 1792, c. 368, s. 11; 1871-2, c. 91; 1869-9, c. 20, s. 21.

See next section for further annotations. Certified copy of original certificate of survey attached to land grant in office of secretary of state admissible in place of original: *Higdon v. Rice*, 119-623.

Certified statement by register of deeds of county as to how much property listed for taxation by person, incompetent under section, not being copy of such list, for section makes competent only "copies" of official records: *State v. Champion*, 116-987.

Certified copy of petition in suit, upon proof of loss of original record, is admissible as evidence: *Weeks v. McPhail*, 128-130.

Where superior court record lost, certified copy of transcript of same in supreme court sufficient evidence of record: *Aiken v. Lyon*, 127-171.

Copies of grants from sovereign, when enrolled in proper office, competent as evidence: *Clark v. Diggs*, 28-159—as are also certified copies of grants entered in Lord Granville's office, *Ibid.*; *Marshall v. Corbett*, 137-557—and copies of grants and abstracts of grants certified by secretary of state may be given in evidence without accounting for originals, *Marshall v. Corbett*, 137-555; *Candler v. Lunsford*, 20-142; see section 1751.

Contents of records of proceedings of municipal corporations may be proved by duly certified copy thereof: *Cheatham v. Young*, 113-161.

Copy of record not evidence as to matters de hors same: *Governor v. McAfee*, 13-18. Officer is to certify to the copy and not to the facts stated in the instrument: *Wiggins v. Rogers*, 175-67.

While regularly authenticated copies of records, and entries in nature of records, should be used as evidence, yet records themselves also competent: *Carolina Iron Co. v. Abernathy*, 94-545; *State v. Voight*, 90-741; *Leak v. Covington*, 99-559—and rule allowing properly certified copy of record to be admitted in evidence grounded upon inconvenience of obtaining original, *Carolina Iron Co. v. Abernathy*, 94-545; *State v. Voight*, 90-741.

Section merely referred to in *Jarvis v. Vanderford*, 116-152; *Darden v. Steamboat Co.*, 107-446; *Springs v. Schenck*, 106-166; *McLean v. Buchanan*, 53-446.

1780. Authenticated copies of public records. All copies of bonds, contracts, or other papers relating to or connected with the settlement of any account or any part thereof between the United States and an individual, or extracts therefrom when complete on any one subject, or copies from the books or papers on file, or records of any public office of the state or the United States, shall be received in evidence and entitled to full faith and credit in any of the courts of this state when certified to by the chief officer in said office or department to be true copies and authenticated under the seal of said office or department.

Rev., s. 1617; 1891, c. 501.

Certificate of collector of internal revenue, under his hand and seal, of a record of his office showing one to be licensed as a retail liquor dealer, is competent as evidence hereunder, and makes out a prima facie case of retailing in prohibition territory: *State v. Dowdy*, 145-432—also as to taxes assessed, *Surety Co. v. Brock*, 176-507.

Matters appearing in transcript of any paper on file, or records of any public office of state or United States, being relative to an account which a referee was directed to take, when properly authenticated, admissible in evidence: *Wallace v. Douglas*, 114-450. Certified copies of records in regard to use of public waters in connection with Dismal Swamp Canal: *Hinton v. Canal Co.*, 166-484.

Regulations of state board of agriculture, certified under hand of secretary with seal of department, are properly proved: *State v. R. R.*, 141-846—but papers purporting to be exemptions from treasury department of United States, but which not authenticated in any manner whatever, not admissible in evidence, *Mott v. Ramsay*, 92-152—and pamphlet purport-

ing to contain regulations of United States department of agriculture, not certified by any officer of department, with no seal attached, and not purporting to have been issued or published by authority thereof, not admissible as evidence, *State v. R. R.*, 141-846.

As to records of state of the weather made by one who is appointed for that purpose by United States Signal Service Bureau, see *Knott v. R. R.*, 98-73. A properly certified copy is to be used, and not parol evidence of the contents: *Surety Co. v. Brock*, 176-507.

1781. **Authenticated copy of record of administration.** When letters testamentary or of administration on the goods and chattels of any person deceased, being an inhabitant in another state or territory, have been granted, or a return or inventory of the estate has been made, a copy of the record of administration or of the letters testamentary, and a copy of an inventory or return of the effects of the deceased, after the same has been granted or made, agreeable to the laws of the state where the same has been done, being properly certified, either according to the act of congress or by the proper officer of such state or territory, shall be allowed as evidence.

Rev., s. 1618; Code, s. 1343; R. C., c. 44, s. 7; 1834, c. 4; U. S. Rev. Stat., ss. 905, 906.

Such copies are competent evidence when properly certified: *Riley v. Carter*, 153-484.

ART. 4. OTHER WRITINGS IN EVIDENCE

1782. **Proof by attesting witness not required.** It is not necessary to prove by the attesting witness instruments to the validity of which the attestation is not requisite, and such instruments may be proved by admission or otherwise as if there had been no attesting witness thereto: Provided, that this section shall not affect the method and manner of proving instruments for registration.

Rev., s. 1604; 1905, c. 204.

For proving instruments for registration, see section 3293 et seq.; as to execution of wills, see section 4144. Ancient documents admitted in evidence: *Nicholson v. Lumber Co.*, 156-59. For a statement of attesting witness rule, see *Bright v. Marcom*, 121-86.

1783. **Parol evidence to identify land described.** In all actions for the possession of or title to any real estate parol testimony may be introduced to identify the land sued for, and fit it to the description contained in the paper-writing offered as evidence of title or of the right of possession, and if from this evidence the jury is satisfied that the land in question is the identical land intended to be conveyed by the parties to such paper-writing, then such paper-writing shall be deemed and taken to be sufficient in law to pass such title to or interest in such land as it purports to pass: Provided, that such paper-writing is in all other respects sufficient to pass such title or interest.

Rev., s. 1605; 1891, c. 465, s. 1.

For vagueness of description in a deed, see *Conveyances*, s. 992.

Cases in which description was sufficiently definite to identify the land by parol evidence: *Stockard v. Warren*, 175-283; *Alston v. Savage*, 173-213; *Patton v. Sluder*, 167-500; *Speed v. Perry*, 167-122; *Hawes v. Lumber Co.*, 166-101; *Lumber Co. v. Pearce*, 166-588; *Pate v. Lumber Co.*, 165-184; *Johnson v. Mfg. Co.*, 165-105; *Hudson v. Morton*, 162-6; *Byrd v. Sexton*, 161-569; *Fulwood v. Fulwood*, 161-601; *Broadwell v. Morgan*, 142-475; *Janney v. Robbins*, 141-400; *Gudger v. White*, 141-507; *Moore v. Fowle*, 139-51; *Sherman v. Simpson*, 121-129; *Wilkins v. Jones*, 119-95; *Walker v. Moses*, 113-527; *Perry v. Scott*, 109-374 (overruling in part *Blow v. Vaughan*, 105-198; *Wilson v. Johnson*, 105-211); *Allen v. Sallinger*, 108-159; *Euliss v. McAdams*, 108-507; *Grubb v. Foust*, 99-286; *Edwards v. Bowden*, 99-80; *McGlawhorn v. Worthington*, 98-199; *Rollins v. Harris*, 96-557; *Hinton v. Roach*, 95-106; *Scull v.*

Pruden, 92-168; Warren v. Makely, 85-12—held to be too vague to admit parol evidence to identify land, Higdon v. Howell, 167-455; Harris v. Woodard, 130-581; Holmes v. Sapphire Co., 121-410; Hemphill v. Annis, 119-514; Lowe v. Harris, 112-472; McGlawhorn v. Worthington, 98-199; Harrison v. Hahn, 95-28; Harrell v. Butler, 92-20; Archibald v. Davis, 50-322; Mann v. Taylor, 49-272. Section does not act retrospectively: Hemphill v. Annis, 119-514; Lowe v. Harris, 112-472—but even if it did, word “description” used therein imports such description as can be aided by parol proof, Harris v. Woodard, 130-581; Holmes v. Sapphire Co., 121-410; Hemphill v. Annis, 119-514; concurring opinion of Shepherd, C. J., in Lowe v. Harris, 112-472.

While parol evidence competent to fit description to land intended to be conveyed by deed, yet it cannot add to or enlarge its scope: Holmes v. Sapphire Co., 121-410; Harrison v. Hahn, 95-28—and where descriptive words in deed so indefinite that in order to give it effect something must be added, conveyance inoperative, *Ibid*.

If deed, when applied to land, found to be ambiguous, parol evidence of surrounding circumstances and of acts of parties competent to aid in interpretation of deed: Ward v. Gay, 137-397. As to parol evidence to remove latent ambiguities as to boundaries, see Ward v. Gay, 137-397; Lewis v. Roper Lumber Co., 113-57; Wynne v. Alexander, 29-237; Bullard v. Barksdale, 33-461; Hurley v. Morgan, 18-425; Reed v. Schenck, 13-415; Lofton v. Heath, 3-347; Bustin v. Christie, 3-99; Archibald v. Davis, 50-322; Waters v. Simmons, 52-54; Slade v. Green, 9-218. Declarations of deceased persons to locate boundaries, see Singleton v. Roebuck, 178-201; Lumber Co. v. Hinton, 171-27; Byrd v. Spruce Co., 170-429; Sullivan v. Blount, 165-11; Lamb v. Copeland, 158-136; Hill v. Dalton, 140-9; Yow v. Hamilton, 136-357; Shaffer v. Gaynor, 117-15; Bethea v. Byrd, 95-311; Smith v. Headrick, 93-210; Mason v. McCormick, 85-226; Huffman v. Walker, 83-411; Caldwell v. Neely, 81-114; Hedrick v. Gabble, 63-48; Toole v. Peterson, 31-180; Dancy v. Sugg, 19-515; Hartzog v. Hubbard, 19-241; Sasser v. Herring, 14-340; Gervin v. Meredith, 4-439; Harris v. Powell, 3-349.

Parol evidence can be introduced to establish lost corners: Holmes v. Sapphire Co., 121-410; Caraway v. Chancy, 51-361; Addington v. Jones, 52-582; Topping v. Sadler, 50-357; Safret v. Hartman, 50-185; McNeill v. Massey, 10-91; Cherry v. Slade, 7-82; Den v. Green, 9-218. General reputation as evidence, see Corpeneing v. Westall, 167-684; Sullivan v. Blount, 165-11; Ricks v. Woodard, 159-647; Lamb v. Copeland, 158-136; Echerd v. Johnson, 126-409; Mendenhall v. Cassells, 20-43. Where one deed refers to another for a description, latter is to be taken as if embodied in deed referring to it: Gudger v. White, 141-507; Hemphill v. Annis, 119-514; Euliss v. McAdams, 108-507; Lumber Co. v. Swain, 161-566.

It is a question for court to decide as one of law what was the boundary and for jury to determine where it is actually located: Gudger v. White, 141-507, and cases cited on page 519 of case; Seull v. Pruden, 92-168; Echerd v. Johnson, 126-409.

Description by name, where lands have a known name, is sufficient, and a tract can be then located by its name by parol proof: Moore v. Fowle, 139-51; Euliss v. McAdams, 108-507; Seull v. Pruden, 92-168. Descriptive words in a deed must, with the aid of the evidence aliunde, to which they point, identify the boundaries of land conveyed: Blow v. Vaughan, 105-198. This section applies only where there is a description which can be aided by parol, but not when there is no description: Harris v. Woodard, 130-581, and cases there cited; Holmes v. Sapphire Co., 121-410—a deed which fails to describe land being as void now as it was before enactment of this section, Moore v. Fowle, 139-53. Parol evidence will be admitted to find a corner, but not to make a corner: Holmes v. Sapphire Co., 121-410. A description calling for a point or stake as a beginning, and course and distance for all the rest of the description of boundaries, will not permit parol evidence to locate: Archibald v. Davis, 50-322; Mann v. Taylor, 49-272; Massey v. Belisle, 24-170.

As bearing upon subject-matter of section, see Fry v. Currie, 91-436; Hinchney v. Nichols, 72-66; Waters v. Simmons, 52-541; Lofton v. Heath, 3-347.

1784. Proof of handwriting by comparison. In all trials in this state, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the

court and jury as evidence of the genuineness or otherwise of the writing in dispute: Provided, this shall not apply to actions pending on March 5, 1913.

1913, c. 52.

Handwriting may be proved by any one who knows the writing: *Oil Co. v. Burney*, 174-382; *Nicholson v. Lumber Co.*, 156-59, and cases cited. By comparison with other writings in the case and admitted to be genuine: *Tunstall v. Cobb*, 109-316; *Ratliff v. Ratliff*, 131-425. By comparison with other writings in the case proved to be genuine: *Tunstall v. Cobb*, 109-316; *Kornegay v. Kornegay*, 117-242. By comparison with other writings proved to be genuine and introduced only for a standard: *Tunstall v. Cobb*, 109-316 (old rule); *Boyd v. Leatherwood*, 165-614; *Bank v. McArthur*, 168-48. By whom comparison is to be made: *Fuller v. Fox*, 101-119; *Martin v. Knight*, 147-564; *Nicholson v. Lumber Co.*, 156-59; *Boyd v. Leatherwood*, 165-614; *Bank v. McArthur*, 168-48.

1785. Bills of lading in evidence. In all actions by or against common carriers in which it shall be thought necessary to introduce in evidence any bills of lading issued by said common carrier or by a connecting carrier, it shall be competent to introduce in evidence any paper-writing purporting to be the original bill of lading, or a duplicate thereof, upon proof that such paper purporting to be such bill of lading or duplicate was received in due course of mail from consignor or agent of said carrier or connecting carrier, or delivered by said common carrier to the consignee or other person entitled to the possession of the property for which said paper purports to be the bill of lading: Provided, that such purported bill of lading shall not be declared to be the bill of lading unless the said purported bill of lading is first exhibited by the plaintiff or his agent or attorney to the defendant or its attorney, or its agent upon whom process may be served, ten days before the trial where the point of shipment is in the state, and twenty days when the point of shipment is without the state. Upon such proof and introduction of the bill of lading, the due execution thereof shall be prima facie established.

1915, c. 287.

1786. Book accounts under sixty dollars. When any person shall bring an action upon a contract, or shall plead, or give notice of, a setoff or counterclaim for goods, wares and merchandise by him sold and delivered, or for work done and performed, he shall file his account with his complaint, or with his plea or notice of setoff or counterclaim, and if upon the trial of the issue, or executing a writ of inquiry of damages in such action, he shall declare upon his oath that the matter in dispute is a book account, and that he hath no means to prove the delivery of any of the articles which he then shall propose to prove by himself but by this book, in that case such book may be given in evidence, if he shall make out by his own oath that it doth contain a true account of all the dealings, or the last settlement of accounts between himself and the opposing party, and that all the articles therein contained, and by him so proved, were bona fide delivered, and that he hath given the opposing party all just credits; and such book and oath shall be received as evidence for the several articles so proved to be delivered within two years next before the commencement of the action, but not for any article of a longer standing, nor for any greater amount than sixty dollars.

Rev., s. 1622; Code, s. 591; R. C., c. 15, s. 1; 1756, c. 57, ss. 2, 6, 7; C. C. P., s. 343a.

Party is not excluded from testifying under book-debt law by section 1795: *Nall v. Kelly*, 169-717; *Armfield v. Colvert*, 103-156; *Leggett v. Glover*, 71-211. Defendant may prove book-debt as a set-off: *Webber v. Webber*, 79-575; *Thomegeux v. Bell*, 1-64.

Plaintiff may prove by own oath balance due him of sixty dollars or under, although account produced was for more than that amount, but reduced by credits below same: *McWilliams v. Cosby*, 26-110.

Competent for party to swear to price as well as to delivery of articles in account: *Colbert v. Piercy*, 25-77—but book and oath only evidence of articles delivered within two years, *Alexander v. Smoot*, 35-461—and not evidence that book contains all credits and full and true account of all dealings between such parties so as to show that nothing due to other party, and to disprove all his claim except such items as stated in book, *Ibid.*

Plaintiff under section may prove work and labor done by his slaves: *Mitchell v. Clarke*, 1-29—also goods sold and delivered for use of defendant by sundry persons and paid for by plaintiff, *Ibid.* Words “make out by own oath” construed: *Kitchen v. Tyson*, 7-314.

Plaintiff cannot remit certain items to give justice jurisdiction and prove account under this section, since oath must show that statement contains all dealings between the parties: *Waldo v. Jolly*, 49-173.

In action on contract for sawing timber, not necessary to set out items in pleading, as section only applicable to actions brought under book-debt law: *McPhail v. Johnson*, 115-298.

To entitle party to recover, he must swear not only that he sold, but also actually delivered, articles for price of which suit brought: *Adkinson v. Simmons*, 33-416.

Cases bearing on section: *Ins. Co. v. R. R.*, 138-53; *Pannell v. Scoggin*, 53-410; *Boggan v. Horne*, 97-268; *Morgan v. Hubbard*, 66-394.

1787. Book accounts proved by personal representative. In all actions where executors and administrators are parties, such book account for all articles delivered within two years previous to the death of the deceased may be proved under the like circumstances, rules and conditions; and in such case, the executor or administrator may prove by himself that he found the account so stated on the books of the deceased; that there are no witnesses, to his knowledge, capable of proving the delivery of the articles which he shall propose to prove by said book, and that he believes the same to be just, and doth not know of any other or further credit to be given than what is therein mentioned: Provided, that if two years shall not have elapsed previous to the death of the deceased, the executor or administrator may prove the said book account, if the suit shall be commenced within three years from the delivery of the articles: Provided further, that whenever by the aforesaid proviso the time of proving a book account in manner aforesaid is enlarged as to the one party, to the same extent shall be enlarged the time as to the other party.

Rev., s. 1623; Code, s. 592; R. C., c. 15, s. 2; 1756, c. 57, s. 2; 1796, c. 465; C. C. P., s. 343b.

Admissible for personal representative to offer book of accounts of decedent, containing charges against third persons made by deceased, up to amount of sixty dollars: *Bland v. Warren*, 65-372; *Charlton v. Lawry*, 1-30. Where administrator takes book-debt oath and swears that original entry is in handwriting of person who has not been heard of in seven years, and that he knows of no one who can prove such handwriting: held, account sufficiently proved: *Stevellie v. Greenlee*, 12-317.

1788. Copies of book accounts in evidence. A copy from the book of accounts proved in manner above directed may be given in evidence in any such action or setoff as aforesaid, and shall be as available as if such book had been produced, unless the party opposing such proof shall give notice to the adverse party or his attorney, at the joining of the issue, or ten days before the trial, that he will

require the book to be produced at the trial; and in that case no such copy shall be admitted as evidence.

Rev., s. 1624; Code, s. 593; R. C., c. 15, s. 3; 1756, c. 57, s. 3; C. C. P., s. 343c.

Duty of person to produce original account, when notice to that effect given him by other party: *Coxe v. Skeen*, 25-443—and voluntary destruction of original will not authorize introduction of copy, *Ibid.*

1789. Itemized and verified accounts. In any actions instituted in any court of this state upon an account for goods sold and delivered, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness.

Rev., s. 1625; 1897, c. 480; 1917, c. 32.

Account, to be prima facie evidence of its correctness, must be properly verified, and so itemized and stated as to show indebtedness: *Knight v. Taylor*, 131-84—and must also show relation of debtor and creditor, *Ibid.* For account held to be sufficient under section, see *Claus v. Lee*, 140-552; *Worthington v. Jolly*, 174-266.

Itemized account under this section makes a prima facie case: *Machine Co. v. Morrow*, 174-198; *Lipinsky v. Revell*, 167-508; *Carr v. Alexander*, 169-665. But the account must be verified by one who swears of his own knowledge, and who is not excluded by section 1795: *Nall v. Kelly*, 169-717.

Section applied only to accounts for goods sold and delivered until amended by act of 1917, c. 32: *Hospital Assn. v. Hobbs*, 153-188; *University v. Ogburn*, 174-427.

What is sufficient evidence to rebut prima facie case: *Mfg. Co. v. Sexton*, 161-501. Plaintiff's evidence may negative prima facie effect of verified account: *Kennedy v. Price*, 138-173.

ART. 5. LIFE TABLES

1790. Mortuary tables as evidence. Whenever it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age	Expectation	Completed Age	Expectation
10	43.7	25	38.8
11	48.1	26	38.1
12	47.4	27	37.4
13	46.8	28	36.7
14	46.2	29	36.0
15	45.5	30	35.3
16	44.9	31	34.6
17	44.2	32	33.9
18	43.5	33	33.2
19	42.9	34	32.5
20	42.2	35	31.8
21	41.5	36	31.1
22	40.9	37	30.4
23	40.2	38	29.6
24	39.5	39	28.9

<i>Completed Age</i>	<i>Expectation</i>	<i>Completed Age</i>	<i>Expectation</i>
40	28.2	68	9.5
41	27.5	69	9.0
42	26.7	70	8.5
43	26.0	71	8.0
44	25.3	72	7.6
45	24.5	73	7.1
46	23.8	74	6.7
47	23.1	75	6.3
48	22.4	76	5.9
49	21.6	77	5.5
50	20.9	78	5.1
51	20.2	79	4.8
52	19.5	80	4.4
53	18.8	81	4.1
54	18.1	82	3.7
55	17.4	83	3.4
56	16.7	84	3.1
57	16.1	85	2.8
58	15.4	86	2.5
59	14.7	87	2.2
60	14.1	88	1.9
61	13.5	89	1.7
62	12.9	90	1.4
63	12.3	91	1.2
64	11.7	92	1.0
65	11.1	93	.8
66	10.5	94	.6
67	10.0	95	.5

Rev., s. 1626; Code, s. 1352; 1883, c. 225.

Table in this section competent as evidence without being specially introduced in evidence on trial: *Coley v. Statesville*, 121-301—but not conclusive evidence, and is to be considered with all other testimony relevant to issue, *Sledge v. Lumber Co.*, 140-461; *Odom v. Lumber Co.*, 173-134—and in estimating value of life of decedent it is proper for jury to consider health and habits of deceased at time of death, *Russell v. Steamboat Co.*, 126-967; *Coley v. Statesville*, 121-301.

For example of estimation of value of life estate of deceased in fund according to section, see *Miller v. Asheville*, 112-759.

For proper mode of estimating value of life of decedent according to above table, see *Pickett v. R. R.*, 117-616; *Poe v. R. R.*, 141-525; *Mendenhall v. R. R.*, 123-275; *Benton v. R. R.*, 122-1007; *Carter v. R. R.*, 139-501, and cases cited; see, also, section 161.

For general discussion of the table in section, see *Russell v. Steamboat Co.*, 126-967.

1791. Present worth of annuities. Whenever it is necessary to establish the present worth or cash value of an annuity to a person, payable annually during his life, such present worth or cash value may be ascertained by the use of the following table in connection with the mortuary tables established by law, the first column representing the number of years the annuity is to run and the second column representing the present cash value of an annuity of one dollar for such number of years, respectively:

<i>No. of Years Annuity is to Run</i>	<i>Cash Value of the An- nuity of \$1</i>	<i>No. of Years Annuity is to Run</i>	<i>Cash Value of the An- nuity of \$1</i>
1	\$ 0.943	26	\$13.003
2	1.833	27	13.211
3	2.673	28	13.406
4	3.465	29	13.591
5	4.212	30	13.765
6	4.917	31	13.929
7	5.582	32	14.084
8	6.209	33	14.230
9	6.801	34	14.368
10	7.360	35	14.498
11	7.886	36	14.621
12	8.383	37	14.737
13	8.852	38	14.846
14	9.295	39	14.949
15	9.712	40	15.046
16	10.106	41	15.135
17	10.477	42	15.219
18	10.827	43	15.299
19	11.158	44	15.374
20	11.469	45	15.445
21	11.764	46	15.514
22	12.042	47	15.579
23	12.304	48	15.641
24	12.550	49	15.699
25	12.783	50	15.754

The present cash value of the annuity for a fraction of a year may be ascertained as follows: Multiply the difference between the cash value of the annuities for the preceding and succeeding full years by the fraction of the year in decimals and add the sum to the present cash value for the preceding full year. When a person is entitled to the use of a sum of money for life, or for a given time, the interest thereon for one year may be considered as an annuity and the present cash value be ascertained as herein provided.

Rev., s. 1627; 1905, c. 347.

Word "annuity" defined: *Poe v. R. R.*, 141-526. In action to recover damages for injuries causing death, court should not permit jury to consider section for purpose of ascertaining present value of intestate's life: *Poe v. R. R.*, 141-525. For discussion of section, see *Ibid.* As bearing incidentally on section, see *Ex parte Williams*, 74-68.

In estimating present value of annuity during widowhood, it is considered as for life: *In re Inheritance Tax*, 172-170.

ART. 6. COMPETENCY OF WITNESSES

1792. Witness not excluded by interest or crime. No person offered as a witness shall be excluded, by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or

before any judge, justice, jury or other person having, by law, authority to hear, receive and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills.

Rev., ss. 1628, 1629; Code, ss. 589, 1350; C. C. P., c. 342; 1866, c. 43, ss. 1, 4; 1869-70, c. 177; 1871-2, c. 4.

This section qualified by section 1795: *Fertilizer Co. v. Rippy*, 124-643—also by sections 1794 and 1799, *Bunn v. Todd*, 107-266.

Section removes all disabilities on account of interest: *Fertilizer Co. v. Rippy*, 124-645; *Clark v. Hodge*, 116-761; *Bunn v. Todd*, 107-266; *Hampton v. Hardin*, 88-592; *Lewis v. Fort*, 75-253. Party to action may testify in his own behalf: *Sumner v. Candler*, 92-637; *Autry v. Floyd*, 127-187; *State v. McIntosh*, 64-607. This changes common-law rule of exclusion on account of interest: *Gidney v. Logan*, 79-216.

This section construed with reference to section 1793 in determining competency of husband and wife to testify: *Powell v. Strickland*, 163-393; *Taylor v. Taylor*, 76-433. See, also, sections 1801, 1802.

Where not excluded under section 1795 mortgagee in chattel mortgage competent, as subscribing witness thereto, to prove execution thereof: *Clark v. Hodge*, 116-761; *LeRoy v. Jacobosky*, 136-443.

In indictment for affray, one defendant may be examined as witness by state against other defendant: *State v. Weaver*, 93-595; see section 1799.

Last clause of section applicable only to attesting witnesses to execution of will: *Cornelius v. Brawley*, 109-548; *Hampton v. Hardin*, 88-592. An attesting witness to a will is not made incompetent to testify to execution thereof because a devisee or legatee: *Vester v. Collins*, 101-114; *Cornelius v. Brawley*, 109-542. See sections 4131, 4137, 4138.

Widow and devisee of testator competent witness to prove that script propounded was found among valuable papers of deceased: *Cornelius v. Brawley*, 109-542.

Devisee under holograph will competent witness to prove same: *Hampton v. Hardin*, 88-592—and executor may testify as to existence and contents of will destroyed by fire, its probate and registration, and also as to qualification of executor, *Cox v. Lumber Co.*, 124-78—notwithstanding he is devisee under whom some of parties to action claim, *Ibid.*

For religious belief of witness as affecting his competency, see *Shaw v. Moore*, 49-25; *State v. Pitt*, 166-268.

Section merely referred to in *McGowan v. Davenport*, 134-535 (concurring opinion of Clark, J.); *Little v. Ratliff*, 126-263; *Mason v. McCormick*, 75-265; *Ballard v. Ballard*, 75-190; *Lewis v. Fort*, 75-253; *Gray v. Cooper*, 65-183; *Rice v. Keith*, 63-319.

Cases prior to enactment: *Wilson v. Allen*, 54-24; *Sanderlin v. Shaw*, 51-225; *Wetmore v. Click*, 50-155; *Blum v. Stafford*, 49-94; *Forbes v. Williams*, 46-393; *Cowles v. Rowland*, 47-219; *Ward v. Griffin*, 38-150; *State v. Poteet*, 29-356; *Freeman v. Lewis*, 27-91; *Hafner v. Irwin*, 26-533; *Walton v. Tomlin*, 23-593; *Moffitt v. Gaines*, 23-158; *Cox v. Wilson*, 24-234; *Norwood v. Marrow*, 20-578; *Kaywood v. Barnett*, 20-88; *Jones v. Sasser*, 18-452; *Jackson v. Comrs.*, 18-177; *Waller v. Mills*, 14-513; *Rhem v. Jackson*, 13-187; *McKinna v. Hayer*, 9-422; *Learey v. Littlejohn*, 5-406; *Alston v. Jones*, 5-45; *Hawkins v. Hawkins*, 4-431; *State v. Fellows*, 3-340; *Murray v. Marsh*, 3-290.

1793. Parties competent as witnesses. On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit or other proceeding in court, or before any judge, justice, jury or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose behalf any suit or other proceeding may be brought or defended, shall, except as otherwise provided, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, in behalf of either or any of the parties to said action, suit or other proceeding. Nothing in this section shall be construed to apply to any action or other pro-

ceeding in any court instituted in consequence of adultery, or to any action for criminal conversation.

Rev., s. 1630; Code, s. 1351; 1866, c. 43, ss. 2, 3.

Neither husband nor wife allowed to prove fact of access or nonaccess: *Boykin v. Boykin*, 70-262; *West v. Redmond*, 171-742—though in action for divorce a vinculo husband competent witness to prove impotence of wife, *Barringer v. Barringer*, 69-179—but in action for divorce on ground of alleged adultery neither husband nor wife competent witness to prove adultery of other, *Perkins v. Perkins*, 88-41; *Hooper v. Hooper*, 165-605; see section 1801.

Person entitled to reward upon conviction of offender is competent witness against such offender: *State v. Coulter*, 2-3.

In case of perjury for swearing to attendance as witness, prosecutor competent, though liable to cost: *State v. Wyatt*, 3-56.

Where two or more persons on trial under one indictment for same offense, they are competent and compellable to give evidence for or against each other: *State v. Frizell*, 111-722; *State v. Weaver*, 93-595; *State v. Rose*, 61-406; *State v. Smith*, 86-705; see section 1799—provided evidence of person so testifying does not incriminate himself, *State v. Smith*, 86-705; *State v. Medley*, 178-710.

1794. Parties not competent witnesses in certain cases. No person who is or shall be a party to an action founded on a judgment rendered before the first day of August, one thousand eight hundred and sixty-eight, or on any bond executed prior to said date, or the assignor, endorser or any person who has at the time of the trial, or ever has had, any interest in such judgment or bond, shall be a competent witness on the trial of such action; but this section shall not apply to the trial of any action commenced before the first day of August, one thousand eight hundred and sixty-eight, nor to the trial of any action in which the defendant therein relies upon the plea of payment in fact, or pleads a counterclaim and also introduces himself as a witness to establish the truth of such plea, but in all such cases the rules of evidence shall prevail as in other cases.

Rev., s. 1633; Code, s. 580; C. C. P., s. 333; 1879, c. 183; 1883, c. 310, ss. 1, 2.

Cases construing section and amendments thereto: *Coggins v. Flythe*, 113-102; *Alston v. Hawkins*, 105-9; *Smith v. Smith*, 97-27; *Grant v. Hughes*, 96-177; *Borden v. Gully*, 92-127; *Waddell v. Swann*, 91-105; *Clanton v. Price*, 90-96; *Brown v. Cooper*, 89-237; *Johnston v. Jones*, 87-394; *Morgan v. Bunting*, 86-67; *Pugh v. Grant*, 86-40; *Jones v. Henry*, 84-320; *Macay*, ex parte, 84-63; *Tabor v. Ward*, 83-291; *Wilkerson v. Buchanan*, 83-296; *Strudwick v. Broadnax*, 83-403; *Smith v. Hayes*, 82-448; *Cannon v. Morris*, 81-139.

1795. A party to a transaction excluded, when the other party is dead. Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication.

Rev., s. 1631; Code, s. 590; C. C. P., s. 343.

For analysis of section, see *Bunn v. Todd*, 107-266; *Sorrell v. McGehee*, 178-279; *Irvin v. R. R.*, 164-6; see, also, *Deaver v. Deaver*, 137-245; *Isler v. Dewey*, 67-93. For a general rule as to competency hereunder, see *Peebles v. Stanley*, 77-243.

The reason of the rule against testifying to transaction with deceased is the mouth of the deceased is forever closed: *Smith v. Moore*, 142-277; *Bonner v. Stotesbury*, 139-6; *Halliburton v. Carson*, 100-106; *Pittman v. Camp*, 94-285; *Watts v. Warren*, 108-514; *Andrews v. McDaniel*, 68-386.

Section applicable only to witnesses examined on commission, or on trial or hearing of action or special proceeding: *Latham v. Dixon*, 82-55—and has no reference to such affidavits as may be needed in progress of cause, *Ibid.*—nor to examination of a party under section 900, when other party has since died, *Phillips v. Land Co.*, 174-542.

This section does not render witnesses to will incompetent, having no application to them: *Cox v. Lumber Co.*, 124-78; *Young's Will*, 123-358; *Vester v. Collins*, 101-114.

This section has no application to transactions with the living: *Lehew v. Hewett*, 138-8—nor does it apply when there are associates of the deceased in the transaction who are living and are parties to action, *Johnson v. Townsend*, 117-338; *Peacock v. Stott*, 90-518; *In re Peterson*, 136-13; *Highsmith v. Page*, 161-355.

Section applies in dealings with lunatics: *Nall v. Kelly*, 169-717; *Coltrain v. Lumber Co.*, 165-42.

Objection to evidence of conversation or transaction of witness with intestate must be taken in apt time: *Norris v. Stewart*, 105-455; *Quinn v. Lattimore*, 120-432; *Armfield v. Colvert*, 103-147; *Meroney v. Overy*, 64-312—otherwise same waived, *Ibid.* When the error in admitting such evidence is harmless, it will be disregarded: *Quelch v. Futch*, 175-694; *Ray v. Ray*, 175-290.

To enable court to pass on competency, witness must be permitted to testify to court whether transaction was between him and deceased or not: *Lockhart v. Bell*, 90-499.

Exclusion does not apply when witness has no interest in the result of the action; nor when he testifies to the contents of a lost paper; nor when he testifies in favor of administrator: *In re Gorham*, 177-271.

Although defendant, called by plaintiff, may be competent to testify as to transactions and conversation with deceased which are against interest of witness, he cannot be examined thereof against interest of other defendants: *Weinstein v. Patrick*, 75-344.

Where trustee of deed of trust dead and property conveyed by substituted trustee to defendant, trustor not excluded from being witness for plaintiff who also claimed title through him: *Isler v. Dewey*, 67-93.

Notwithstanding restrictions contained in section, person may as heretofore testify under book-debt law: *Leggett v. Glover*, 71-211. But cannot swear to itemized account under section 1789: *Nall v. Kelly*, 169-717.

Feme plaintiff in action to recover land against defendants who claimed land under deed alleged to have been executed by her and husband to ancestor of defendant, is not disqualified under section to prove that she was never privately examined by officer taking probate, such officer being dead and representative being party to action: *Spivey v. Rose*, 120-163.

Where witness incompetent under section to testify as to transaction between himself and deceased person, error to receive witness's testimony of subsequent unsworn declarations made to others in regard to same transaction: *Perry v. Jackson*, 84-230. Defendant not permitted to testify in own behalf for purpose of contradicting former witness whose evidence tended to show that defendant fraudulently procured assignment from person deceased: *Bushee v. Surles*, 77-62.

Administrator of deceased guardian is competent to show execution of bond by debtor to his intestate, evidence being offered to affect interest of a living person: *Thompson v. Humphrey*, 83-416; *Williams v. Cooper*, 113-286.

In proceeding by administrator to sell land for assets to pay debts, competent for widow to prove declarations of intestate husband (while in possession of land) that he paid for it with funds belonging to her: *Gidney v. Moore*, 86-485.

Neither of parties, plaintiff nor defendant, whether claiming as original parties or as assignees, is competent witness in regard to conversations and transactions between himself and assignees of deceased: *McCanless v. Reynolds*, 74-301.

This section is intended to exclude even indirect testimony of interested witness as to transaction or communication with deceased: *Stocks v. Cannon*, 139-60. The exclusion applies when the party testifying and the administrator are both defendants but their interests are in conflict: *Sutton v. Wells*, 175-1.

Though direct evidence of conversation with person deceased may be incompetent, yet rehearsal of same in conversation with son of deceased competent under the facts of this case, as part of *res gestæ*: *Tredwell v. Graham*, 88-208.

Notwithstanding section, one may testify to transaction by opposite party when against own interest: *Sorrell v. McGehee*, 178-279; *Price v. Edwards*, 178-493; *Seals v. Seals*, 165-409; *In re Fowler*, 159-203; *Tredwell v. Graham*, 88-208.

Section 1794 does not interfere with operation of this section: *Waddell v. Swann*, 91-105.

Executor competent to testify to transactions between intestate and defendant of which he has knowledge, which are in favor of estate of intestate and adverse to defendant: *Pittman v. Camp*, 94-283.

Testimony of executor, defendant in action to collect debt due by decedent, as to statements of testator that he owed debt and wanted same paid, not incompetent: *Halliburton v. Carson*, 100-99.

Defendant administrator incompetent to testify in reference to land transaction between intestate and himself in suit against him by creditors of estate to subject land which alleged to have been fraudulently conveyed by intestate to defendant: *Grier v. Cagle*, 87-377.

In action by administrator of deceased surety on note on which judgment secured, defendant surety cannot testify that intestate was coprincipal on note, so as to entitle him to contribution: *Robinson v. McDowell*, 130-246.

Where decedent mortgaged land alleged by plaintiff to have been purchased jointly by himself and deceased, neither vendor nor mortgagee competent witness for plaintiff in action against heirs to prove transaction with deceased: *Carey v. Carey*, 104-171.

Sons of grantor in deed, which grantor is suing heirs of grantee to have deed declared mortgage, are competent witnesses to show transactions between grantor and grantee: *Porter v. White*, 128-42.

A party may testify to any independent fact not derived from a transaction or communication with deceased: *In re Will of Saunders*, 177-156.

WITNESS IS INCOMPETENT HEREUNDER, WHEN. The witness, to be incompetent, must offer to testify as to a personal transaction or communication between himself and the person deceased: *Bunn v. Todd*, 107-266; *Poston v. Jones*, 122-536; *Gupton v. Hawkins*, 126-81; *Williams v. Cooper*, 113-286; *Armfield v. Colvert*, 103-147; *Loftin v. Loftin*, 96-94; *McRae v. Malloy*, 90-521; *Lockhart v. Bell*, 86-443; *Bushee v. Surles*, 77-64; *Ballard v. Ballard*, 75-190; *Kirk v. Barnhart*, 74-653; *Jackson v. Evans*, 73-128; *Andrews v. McDaniel*, 68-386, and numerous other cases—on behalf of himself or of some one succeeding to his title or interest, *Wetherington v. Williams*, 134-280; *In re Worth's Will*, 129-223; *Sumner v. Candler*, 92-634—against the executor, administrator, survivor, etc., who must be party to action, *Ledbetter v. Graham*, 122-753; *Spivey v. Rose*, 120-163; *Sumner v. Candler*, 92-634; *Hawkins v. Carpenter*, 85-482; *Shields v. Smith*, 79-517; *Thomas v. Kelly*, 74-416; *Howerton v. Lattimer*, 68-370—or against a surety for deceased, where it may eventually charge deceased, *McCowan v. Davenport*, 134-528; *Hawkins v. Carpenter*, 85-484; *Bryant v. Morris*, 69-444; *Lewis v. Fort*, 75-251; but see *Shields v. Smith*, 79-517.

AS TO WHO IS "A PARTY" HEREUNDER. Member of a church congregation, the trustee of which is party on behalf of congregation, is not a party in interest hereunder: *Lawrence v. Hyman*, 79-209. Member of board of county commissioners is a party hereunder in action brought by board on behalf of county: *Comrs. v. Lash*, 89-159. A witness, whose interest is really that of a plaintiff, is treated as a plaintiff hereunder: *Barlow v. Norfleet*, 72-535—and a defendant, who is in substance a plaintiff, is so treated, and is not allowed to testify as to personal transaction with deceased against the administrator, etc., *Weinstein v. Patrick*, 75-344; *Owens v. Phelps*, 92-235, and cases cited. In trial of action on note against administrator of deceased maker, cashier of plaintiff bank, payee of note, is party in interest and disqualified to testify as to conversations with defendant's intestate: *Banking Co. v. Walker*, 121-115. Party must be named as such in process: *Mason v. McCormick*, 75-263—and no person proper party who has no interest in subject of action, *Ibid.* Propounders and caveaters to contested will are parties to proceeding within spirit and meaning of section: *Pepper v. Broughton*, 80-251.

AS TO PERSONS "INTERESTED IN THE EVENT." Interest disqualifying person other than party as witness under section is interest in event of action: *Fertilizer Co. v. Rippy*, 124-643; *Ledbetter v. Graham*, 122-753; *Bunn v. Todd*, 107-266; *Mull v. Martin*,

85-406; *Condor v. Secrest*, 149-201. The interest in the event hereunder must be a legal and pecuniary interest: *Helsabeck v. Doub*, 167-205; *Jones v. Emory*, 115-163; *Sutton v. Walters*, 118-495—not a sentimental interest, *Ibid.*; *Henderson v. McLain*, 146-329. Interest in subject-matter of the action will not disqualify; it must be interest "in the event": *Lemly v. Ellis*, 143-200; *Bunn v. Todd*, 107-266; *Mull v. Martin*, 85-406. The test is whether witness bears such relation to controversy that verdict and judgment can be used against him in another action: *Jones v. Emory*, 115-158; *Mull v. Martin*, 85-406—or where verdict can be used for him, *Williams v. Johnston*, 82-288.

A person is considered to be "interested in the event" hereunder where he is a surviving partner and his deceased partner's representative is being sued on a firm obligation: *Moore v. Palmer*, 132-969; *Fertilizer Co. v. Rippey*, 124-643, 123-656; *Lyon v. Pender*, 118-147; *Sikes v. Parker*, 95-232—or where he is a surety on the prosecution bond, *Carson v. Ins. Co.*, 171-135; *McGowan v. Davenport*, 134-352; *McLeary v. Norment*, 84-236; *Mason v. McCormick*, 75-262—or where he is a member of a corporation which is a party in interest, *Comrs. v. Lash*, 89-159; but see *Lawrence v. Hyman*, 79-209—or where he is assignor of bond sued upon, *Jackson v. Evans*, 73-128; *Woodhouse v. Simmons*, 73-30—or where he is to be paid \$200 if plaintiff recovers, *Williams v. Johnston*, 82-288—or where he has contracted to buy the land involved in suit, *Love v. Harbin*, 87-249—or where he is devisee under will and a subsequent will is sought to be impeached, *Hathaway v. Hathaway*, 91-139—or where he is to receive benefit from a rescission of contract, which rescission is attempted to be set aside, *Owens v. Phelps*, 92-231—or where he is assignor of a contract to convey land and issue is between assignee and those claiming under deceased vendee in respect of payments made to him by such vendee, *Shields v. Smith*, 104-57—or where he is a codefendant with other heirs in partition proceeding, and it is sought to establish contract between father and children that certain owely should be paid by each, *Barbee v. Barbee*, 108-581—or where he is assignee of deceased and assignment attacked for fraud by creditors in action against administrator, *Watts v. Warren*, 108-514—or where witness's husband is caveator in contest over will and is heir at law of testator, *Linebarger v. Linebarger*, 143-229.

In an action to set aside a deed, the grantee is incompetent to testify as to conversation with grantor: *Linker v. Linker*, 167-651—so as between grantor and heirs of grantee, *Boney v. Boney*, 161-615; *Pope v. Pope*, 176-283.

In an action by the husband or wife against representative of deceased, the one not a party may testify: *McCurry v. Purgason*, 170-463; *Helsabeck v. Doub*, 167-205; *Little v. Ratliff*, 126-262; *Hopkins v. Bowers*, 108-298; *Norris v. Stewart*, 105-455; *Bradsher v. Brooks*, 71-322.

In action to foreclose mortgage, where defendant pleads usury, testimony of son of defendant, who resides on mortgaged land without payment of rent, as to transaction with plaintiff's intestate, not incompetent under section: *Bennett v. Best*, 142-168. Testimony of sister of plaintiff, to whom note similar to that sued upon was executed, that before and after date of note father "was very bright," not objectionable under section: *Ducker v. Whitson*, 112-44.

Attorney who acted for plaintiff in transaction with person who has since become insane is competent to testify in behalf of plaintiff as to such transaction, insane person being represented by guardian, and attorney having interest in action: *Propst v. Fisher*, 104-214. Where note given attorney for collection against person since deceased and attorney was to receive portion of amount thereof for services, but never collected anything and returned same to executor of client, he is competent witness as to transaction: *Wise v. Beaman*, 96-122. Fact that attorney had interest in event of suit on account of tax fee does not disqualify him from testifying as to transaction or communication with person deceased: *Syme v. Broughton*, 85-367. Declarations of deceased attorney contained in affidavit of defendant admissible in evidence where it appears that neither estate of attorney nor interest of any one claiming from him can be affected by event of action: *Molyneux v. Huey*, 81-106.

In action against person for damages for breach of warranty in deed, witness not interested in recovery not disqualified by section, though he may have interest in land: *Lemly v. Ellis*, 143-200. Fact of payment to deceased person for land purchased of him can be proved when neither witness nor estate of deceased vendor interested in result of action: *Cade v. Davis*, 96-139. Mortgagee competent witness as against deceased mortgagor to fact of payment of debt and cancellation of mortgage to secure it, where it appears that witness has no interest in controversy: *Carey v. Carey*, 108-267.

In action on bond against executor of deceased surety, principal obligor competent witness to prove execution of bond by defendant's testator: *Peebles v. Stanley*, 77-243. Surety on

guardian bond, principal being dead, competent witness to prove insolvency of bond: *Topping v. Windley*, 99-4.

In suit by deputy sheriff against administrator of intestate to recover sum of money which deputy had been compelled to pay sheriff by reason of default of intestate, sheriff had no interest in event of action, and competent witness under section: *Allen v. Gilkey*, 86-65.

Testimony of witness interested in event of action, as to transaction or communications between himself and deceased, from whom defendants derive title, not competent against them; extent of interest not being material: *Campbell v. Everhart*, 139-504. In controversy as to which of two parties was grantee of lost deed, grantor, when he stands between the litigants, is competent to testify that he made deed to person since deceased: *Gregg v. Hill*, 80-255. Witness interested in result of action may testify as to transaction between deceased, under whom she claims her interest, and adverse party: *Johnson v. Cameron*, 136-243.

In an action to declare a trust as to land bought by one person for another, both persons being dead, witnesses interested in the result of the action cannot testify: *Harrell v. Hagan*, 150-242. See, also, *Grissom v. Grissom*, 170-97.

AS TO "PERSONAL TRANSACTION OR COMMUNICATION" WITH DECEASED. Term "personal transaction" in section intended to describe whole of negotiation or treaty between original parties to it out of which cause of action arose: *Cheatham v. Bobbitt*, 118-343. The transaction or communication, to be incompetent, must be between witness and deceased: *Bunn v. Todd*, 107-266; *Gupton v. Hawkins*, 126-81; *Zollicoffer v. Zollicoffer*, 168-326; *Poston v. Jones*, 122-536; *Williams v. Cooper*, 113-286; *Armfield v. Colvert*, 103-147; *Loftin v. Loftin*, 96-94; *McRae v. Malloy*, 90-521; *Lockhart v. Bell*, 86-443; *Ballard v. Ballard*, 75-190; *Bushee v. Surlles*, 77-64; *Kirk v. Barnhart*, 74-653; *Andrews v. McDaniel*, 68-386; *Jaekson v. Evans*, 73-128—and it must appear that knowledge of witness derived from personal transaction with deceased, *Thompson v. Onley*, 96-9.

Testimony of a representation to grantee, the witness, by grantor, now deceased, that deed grantee was about to sign in grantor's favor was really a will, is evidence of personal transaction with deceased hereunder: *Smith v. Moore*, 142-277—as is also testimony tending to show services rendered by witness which were accepted by deceased upon implied promise to pay, *Witty v. Barham*, 147-479; *Dunn v. Currie*, 141-125; *Davidson v. Bardin*, 139-1; *Stocks v. Cannon*, 139-60; *Kirk v. Barnhart*, 74-653—as is also testimony that deceased had or had not made demand upon witness for payment, *Davis v. Evans*, 139-440—as also testimony by mortgagee in an action to foreclose mortgage given by feme covert to secure debt of husband, that debt had not been paid, *McGowan v. Davenport*, 134-526—as also testimony by defendant as to parol contract between plaintiff's intestate and himself under which intestate placed improvements on land, *Luton v. Badham*, 129-7—as also testimony by defendant claiming a set-off for goods sold plaintiff's intestate that no one had paid him for the articles, *Angel v. Angel*, 127-451—as also testimony by plaintiff to repel the bar of the statute that payments were made by defendant's intestate at certain times upon note due by intestate, *Gupton v. Hawkins*, 126-81.

Testimony of plaintiff, claiming under deceased mortgagor, that payments had been made by mortgagor on mortgage note, is not admissible, *Simpson v. Simpson*, 107-552—as also testimony that witness handed a certain book to deceased on day of marriage, *Lane v. Rogers*, 113-171—as also testimony by plaintiff that deceased executed certain partnership agreement with him, *Sawyer v. Grandy*, 113-42—as also testimony of a partner that he signed a certain partnership agreement to which name of deceased partner also attached, *Ibid.*—as also testimony of alleged widow to fact of marriage and having lived with deceased husband, when marriage is an issue in action to which heirs of supposed husband are parties, *Hopkins v. Bowers*, 111-175; *Woodward v. Blue*, 107-409—as also testimony of plaintiff in action on note, where maker dead, that one who purports to have made cross-marks to paper, as witness, did in fact make marks thereto: *Bright v. Mareom*, 121-86—as also testimony of children who hold claim against deceased father, that same has not been paid and that he never informed them of his indebtedness to them, *Dunn v. Beaman*, No. 2, 126-768—as also testimony of plaintiff that deed alleged to have been made to deceased ancestor of defendant by him was a forgery, *Spivey v. Rose*, 120-163.

Testimony of brother to whom assignment made by defendant's intestate of certain insurance policies, as to such assignment, in action to set it aside brought by creditors, is not admissible: *Watts v. Warren*, 108-514—as also testimony by plaintiff, in action against defendant who claims under deceased, as to date of debt against deceased on which judgment

was taken, *Buie v. Scott*, 107-181; see *Sumner v. Candler*, 86-71—as also testimony of surviving partner that defendant's intestate was a member of partnership, *Moore v. Palmer*, 132-969; *Fertilizer Co. v. Rippy*, 124-643, 123-656; *Lyon v. Pender*, 118-147; *Sikes v. Parker*, 95-232—as also testimony by plaintiff of the contents of written agreement with deceased, *Hussey v. Kirkman*, 95-63; *Sawyer v. Grandy*, 113-42—as also testimony of defendant, in action on debt due plaintiff's intestate, as to time and place of the signing of receipt by said intestate, *Sumner v. Candler*, 86-71—as also testimony of maker of note payable to guardian, since deceased, to prove payment thereof before his assignment to plaintiff, *Lewis v. Fort*, 75-251—as also testimony of assignee of defendant's intestate of certain bonds, subject of action, as to the real transaction, assignee having assigned same to plaintiff, *Jackson v. Evans*, 73-128—as also testimony by obligee of bond to prove transaction between himself and deceased, although he may have previously assigned the bond, *Woodhouse v. Simmons*, 73-30—as also testimony by administrator, upon issue as to assets, tending to prove discharge of his prima facie indebtedness to estate, *Whitesides v. Green*, 64-307.

Interested witness may testify to mental capacity of deceased, and give the circumstances upon which he bases his opinion: *Bissett v. Bailey*, 176-43; *Plemmons v. Murphey*, 176-671; *In re Chrisman's Will*, 175-420; *In re Will of Stocks*, 175-224; *State v. Cooper*, 170-719; *Rakestraw v. Pratt*, 160-436; *Ducker v. Whitson*, 112-44.

Plaintiff suing in her own right and as administratrix of her mother for services rendered defendant's intestate cannot testify: *Brown v. Adams*, 174-490.

TRANSACTIONS WITH OTHERS THAN DECEASED, OR WITH DECEASED IN PRESENCE OF OTHERS, AFFECTING HIS PROPERTY. Transaction with attorneys of deceased, before his death and in his presence, is a transaction with deceased hereunder: *Smith v. Moore*, 142-277.

In action to correct deed to plaintiff's wife, who is dead, plaintiff can testify as to what took place between him and grantor, who is living: *Lehew v. Hewitt*, 138-6—and fact that his wife's estate affected by evidence does not render same incompetent, *Ibid*.

On issue *devisavit vel non* it is not competent to show by caveator's conversation with testator, though same was in presence of person interested in action at time of trial, but not at time of conversation: *In re Peterson*, 136-13.

Plaintiff is competent witness to testify as to contract with agent now deceased: *Roberts v. R. R.*, 109-670; see *Howerton v. Lattimer*, 68-370; *Walker v. Cooper*, 159-536; *Bank v. Wysong & Miles Co.*, 177-284; *Morgan v. Bunting*, 86-67; *Gwaltney v. Assurance Co.*, 132-925.

Conversation and understanding with plaintiff's testator is incompetent hereunder, but a rehearsal of conversation with agent of testator is competent as part of *res gestæ*: *Gilmer v. McNairy*, 69-335. Defendant cannot testify as to conversation between third person, now deceased, and plaintiff's testator in regard to subject of controversy: *Halyburton v. Dobson*, 65-88.

In action by widow against administratrix to compel payment of plaintiff's share in estate, testimony of defendant incompetent to prove conversation between decedent and third person: *Wilson v. Featherston*, 122-747—and testimony of such third person, who was a bailee of property in controversy at the time of the conversation, and is a party defendant to the action, is also incompetent, *Ibid*.

Mere fact of interest of witness does not exclude him from testifying of transactions with third persons which affect property of deceased: *Watts v. Warren*, 108-514. Witness party to action not prohibited by section from testifying as to communications made to other witnesses: *Waddell v. Swann*, 91-105.

Party to action by administrator of deceased to enforce contract entered into between such party and deceased not competent to testify to conversation in presence of deceased with his agents and attorneys as to execution of contract: *McRae v. Malloy*, 90-521; *Smith v. Moore*, 142-277—for though conversation was with attorneys, yet they were acting for the deceased, in his presence and under his direction, and the substance of the transaction was the making of the contract and personal to the deceased, and though agents or attorneys may be examined by either party to the suit, yet the disqualification of the party to the cause is not removed, as the statute makes no exception where others were present, *McRae v. Malloy*, 90-521.

Physician cannot testify as to professional visits to deceased: *Knight v. Everett*, 152-118.

Mother, as administratrix, suing for wrongful death of son, may testify as to son's contributing to her support: *Irvin v. R. R.*, 164-6.

DECISIONS HOLDING THAT CERTAIN FACTS NOT AMOUNTING TO TRANSACTIONS HEREUNDER MAY BE TESTIFIED TO. A witness who is excluded under this section from testifying to any personal communication or transaction with deceased person may, nevertheless, be competent to testify as to what he saw deceased do, or to any fact which does not include a personal transaction or communication: *McCall v. Wilson*, 101-598.

Interested witness cannot testify that deceased signed certain papers, but he can testify as to whether signature is in handwriting of deceased: *McEwan v. Brown*, 176-249; *Sawyer v. Grandy*, 113-42; *Ferebee v. Pritchard*, 112-83; *Peoples v. Maxwell*, 64-313—and that entries on books are in handwriting of deceased, *Armfield v. Colvert*, 103-147—and that certain paper-writing is in handwriting of deceased, *Hussey v. Kirkman*, 95-63; *Brush v. Steed*, 91-226; *Buie v. Scott*, 107-181; *Sumner v. Candler*, 86-71; *Peoples v. Maxwell*, 64-313.

Though plaintiff cannot prove special contract with defendant's intestate for services of slaves before emancipation, yet competent to prove that intestate had slaves in possession and enjoyed their services: *Gray v. Cooper*, 65-183.

Defendant may testify that bond given to person deceased, the subject-matter of suit, was in blank as to amount payable when executed by him, having been filled up without authority in his absence: *Isenhour v. Isenhour*, 64-640; *Brower v. Hughes*, 64-642; *Wester v. Bailey*, 118-195.

Whether plaintiff left husband's home of her own volition, or by compulsion, is an inquiry not necessarily involving transaction or communication with husband: *Hicks v. Hicks*, 142-231.

Executor who is a devisee not disqualified to testify as to transactions occurring after death of testator, they not being transactions with deceased: *Cox v. Lumber Co.*, 124-78.

Testimony of plaintiff, in action against administrator for money loaned his intestate, as to mark on almanac and when placed there, is competent when it appeared from the other testimony that mark not placed on almanac at time money was loaned, and was therefore not a transaction with deceased: *McArter v. Rhea*, 122-614. In action against administrator for fees incurred as witness for his intestate, plaintiff not precluded from testifying that he was a witness and as to number of days he attended, where witness tickets lost by burning of courthouse, for the reason that these are facts of which others equally with intestate have knowledge: *Johnson v. Rieh*, 118-268.

Testimony that witness carried supplies to decedent during sickness not such evidence of conversation or transaction as to make witness incompetent under section: *Cowan v. Layburn*, 116-526. Competent for assignee of judgment against decedent to prove by own oath that judgment not paid, in proceeding to revive it and issue to execution, *Latham v. Dixon*, 82-55.

Widow and devisee of testator competent witness to prove that script propounded was found among valuable papers of deceased, as she does not testify as to any personal transaction or communication: *Cornelius v. Brawley*, 109-542. Widow may testify that she saw deceased place a deed in his trunk: *Carroll v. Smith*, 163-204. Interested witness may testify that he saw a book in hands of intestate, but not that intestate handed him the book: *Lane v. Rogers*, 113-171. Nor can persons interested in a will testify that testator deposited the will with them: *McEwan v. Brown*, 176-249, overruling *Hampton v. Hardin*, 88-592.

Evidence of statements of deceased witness made during trial not inhibited under section as transactions with deceased persons: *Costen v. McDowell*, 107-546. Fact in no way involving transaction or communication does not come within inhibition of section: *Hughes v. Boone*, 102-137.

Plaintiff competent to testify that her father, since deceased, gave her money to purchase land in controversy, when none of parties to action claimed any interest under father: *Lofitin v. Lofitin*, 96-94.

Mere entry of credit on bond due intestate's estate not sufficient to raise presumption of fact that intestate present at time credit entered, where it is proved that intestate's business was conducted by agent: *Lockhart v. Bell*, 90-499—but to raise presumption, nature of transaction must be such as to require presence of deceased person in respect to it, *Ibid*.

Witness, principal debtor in action by plaintiff against estate of deceased surety, not disabled by section from testifying for defendant administrator as to what occurred in transaction between plaintiff and deceased: *Kesler v. Mauney*, 89-369.

Witness offered to prove fact which occurred out of presence of and in no sense a transaction with deceased person, held competent under section: *Lockhart v. Bell*, 86-443.

Where plaintiff sues defendant's intestate for value of an animal, competent for plaintiff to testify as to value of such animal, and that he had owned but one such animal since the

war, as this is not evidence of communication with deceased person, but of substantive and independent fact: *March v. Verble*, 79-19.

In action of ejectment, vice-president of defendant company competent to prove where person said certain corner of land was located, it not being a transaction or communication between him and any one under whom plaintiff claimed title to land: *McNeely v. Lumber Co.*, 130-637.

EFFECT OF ADMINISTRATOR OR SURVIVOR, ETC., TESTIFYING AS TO TRANSACTION. Where executor or administrator examined in own behalf concerning transaction or communication with decedent, other party to action competent to testify concerning same transaction or communication: *Burnett v. Savage*, 92-10; *Davison v. Land Co.*, 126-704; *Cheatham v. Bobbitt*, 118-343; *Hughes v. Boone*, 102-137; *Hawkins v. Carpenter*, 85-482; *Knight v. Killebrew*, 86-402; *Murphy v. Ray*, 73-588—and other party or witness interested in the event is restricted in reply to those particular transactions and communications to which testimony of deceased person or his representative was pertinent, *Pope v. Pope*, 176-283; *Armfield v. Colvert*, 103-147; *Hughes v. Boone*, 102-137; *Smith v. Smith*, 101-461; *Burnett v. Savage*, 92-11; *Sumner v. Candler*, 92-634; *Hopkins v. Bowers*, 108-298; *Kesler v. Mauney*, 89-369; *Redman v. Redman*, 70-257.

The personal representative "opens the door" only when he is a voluntary witness: *Sorrell v. McGehee*, 178-279. When personal representative opens door by testifying to transaction or communication with decedent it is not his province, but that of court, to decide what testimony of adverse party may come in: *Cheatham v. Bobbitt*, 118-343.

Where husband of administratrix, not being party to action and having no interest in event thereof, testified, same does not render admissible testimony of defendant as to transaction between deceased and defendant: *Hall v. Holloman*, 136-34.

Where plaintiff introduced defendants before jury for inspection to show they were of negro blood, but did not examine them as witnesses, this did not open door for defendants to testify as to any communication or transaction with deceased ancestor: *Hopkins v. Bowers*, 108-233.

Administrator can testify that intestate delivered goods to defendant without "opening the door," as delivery is an independent fact: *Cheatham v. Bobbitt*, 118-343—but if he testifies that defendant purchased goods of intestate he "opens the door" for defendant to negative same with his own version of the transaction, *Ibid.* Where plaintiff, administrator of decedent, testified only to execution of bond, this did not confer upon defendant right to testify as to payments made by him on bond, nor to cross-examine plaintiff administrator in regard to such alleged payments: *Williams v. Cooper*, 113-286. Where executor who was subscribing witness to receipt given by defendant to his intestate proves execution of same on trial, he thereby opens door, and defendant can testify as to transaction between himself and deceased connected with execution of receipt: *Hughes v. Boone*, 102-137.

Evidence of defendant as witness for plaintiff that plaintiff's testator contributed certain sum to partnership capital did not open door so as to permit defendants to testify as to other transactions between themselves and plaintiff's intestate: *Armfield v. Colvert*, 103-147.

When plaintiff examines defendant as to a matter not within inhibition of section, defendant is not thereby at liberty to discharge the prohibition and testify to any and all transactions with deceased: *Hopkins v. Bowers*, 108-298.

Incompetent for defendant claiming under deceased mother to testify as to alleged agreement regarding the land in controversy on part of decedent plaintiff, who claimed as devisee of mother, not having offered to give evidence concerning matter: *Blake v. Blake*, 120-77.

GIVING IN EVIDENCE THE TESTIMONY OF DECEASED. Where deposition of decedent introduced in behalf of defendant, both parties claiming under deceased, defendant may testify in own behalf in respect to same transaction: *Nixon v. McKinney*, 105-23. Competent for plaintiff's witness to testify to what deceased maker of note sued upon testified on former trial as to its payment, as same does not come within section: *Worth v. Wrenn*, 144-656. Testimony of deceased person given in evidence regarding transaction opens door for living party interested to give evidence concerning same: *Sumner v. Candler*, 92-634.

AS TO DECLARATIONS OF, AND CONVERSATIONS HAD WITH, DECEASED OR HIS AGENT. In action involving validity of deed of trust, where trustor dead and estate insolvent, son of trustor competent witness as to decedent's declarations concerning trust: *Gidney v. Logan*, 79-214.

Executor may testify as to declarations made by deceased legatee in her own favor in presence of deviser: *Medlin v. Simpson*, 144-397.

An interested witness may testify to declarations of deceased person relative to boundary lines: *Yow v. Hamilton*, 136-357.

Rehearsal of conversation with deceased in a subsequent conversation with his agent is competent as part of *res gestæ*: *Gilmer v. McNairy*, 69-335.

Where agent sent to notify person to go to see principal, such person cannot after death of principal testify to declarations of agent as to statements made to him by principal: *Holt v. Johnson*, 129-138.

Personal representative cannot introduce declarations of deceased unless same are part of some conversation or statements proven by opposite party: *Johnson v. Armfield*, 130-575.

Declarations of deceased attorney contained in affidavit supporting motion to vacate a judgment are not barred by this section: *Molyneux v. Huey*, 81-106.

In action by executor against husband, the wife, who is not party to action, is competent to prove a declaration made by deceased to her husband: *Bradsher v. Brooks*, 71-322. Plaintiff is competent to testify to conversation with an agent now deceased: *Roberts v. R. R.*, 109-670; *Howerton v. Lattimer*, 68-370; *Walker v. Cooper*, 159-536; *Bank v. Wysong & Miles Co.*, 177-284.

Section merely referred to in *McKee v. Lineberger*, 87-186; *Macey, ex parte*, 84-65; *Henry v. Willard*, 73-43; *Meroney v. Avery*, 64-313; *Presnell v. Garrison*, 121-366, 122-596; *Autry v. Floyd*, 127-187; *State v. Raby*, 121-683; *Crenshaw v. Johnson*, 120-270; *Quinn v. Lattimore*, 120-433; *Clark v. Hodge*, 116-761; *Coggins v. Flythe*, 113-105; *Perkins v. Berry*, 103-143; *Roberts v. Preston*, 100-248; *Smith v. Smith*, 97-28; *Long v. Miller*, 93-233; *Wilson v. Lineberger*, 88-424.

1796. Executors may testify as to estates in their hands. In all actions now pending or which may be hereafter instituted upon judgments rendered before the first day of August, one thousand eight hundred and sixty-eight, or upon any bond or promissory note under seal executed prior to said date, wherein a reference has been or may be ordered by the court to ascertain the condition or state of the assets belonging to the estate of any deceased debtor in the hands of his administrator or executor, who is or may be defendant in such actions, it shall be competent for the defendant administrator or executor of such deceased debtor to testify and be examined as a witness in his own behalf concerning his administration upon the estate of his intestate or decedent. When in such cases the defendant administrator or executor testifies or is examined as a witness in his own behalf, it shall also be competent for the plaintiff to testify and be examined in the same in regard to such administration.

Rev., s. 1632; 1885, c. 361.

Purpose of section stated in *Coggins v. Flythe*, 113-106.

1797. Communications between attorney and client. In cases where fraud upon the state is charged it shall not be a sufficient cause to excuse any one from imparting any evidence or information legally required of him, because he came into the possession of such evidence or information by his position as counsel or attorney before the consummation of such fraud, and any person refusing for such cause to answer any question when legally required so to do shall be guilty of contempt, and punished at the discretion of the court or other body demanding such information: Provided, that it shall not be competent to introduce any admissions thus made on the trial of any persons making the same.

Rev., s. 1620; Code, s. 1349; 1874-5, c. 213.

Communications to counsel in case of fraud, where state concerned, not privileged: *Hughes v. Boone*, 102-137. What is privileged communication: *Allen v. Shiffman*, 172-578.

1798. Communications between physician and patient. No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

Rev., s. 1621; 1885, c. 159.

Person in application for insurance may waive right to object to evidence of the physician acquired while attending him, and physician may be compelled to testify: *Fuller v. Knights of Pythias*, 129-318. Construction of words, "which information was necessary to enable him to prescribe": *Smith v. Lumber Co.*, 147-62.

1799. Defendant in criminal action competent but not compellable to testify. In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself.

Rev., ss. 1634, 1635; Code, ss. 1353, 1354; 1881, c. 89, s. 3; 1881, c. 110, ss. 2, 3; 1856-7, c. 23; 1866, c. 43, s. 3; 1868-9, c. 209, s. 4.

Defendant in criminal action can only be examined as witness at own request: *State v. Ellis*, 97-447—but if he does make request and is examined his statements can be held as evidence against him, *Ibid.* He then goes before the jury, both as witness and defendant: *State v. Atwood*, 176-704. He is subject to cross-examination: *State v. Cloninger*, 149-567; *State v. Simonds*, 154-197; *State v. Allen*, 107-805. His general character can be proved as in case of other witnesses: *State v. Spurling*, 118-1250; *State v. Goff*, 117-761; *State v. Johnson*, 100-494; *State v. Davis*, 92-767; *State v. Lawhorn*, 88-637; *State v. Spier*, 86-602; *State v. Efler*, 85-585. And he waives the privilege not to answer questions which tend to criminate him: *State v. Simonds*, 154-197; *State v. Allen*, 107-805; *State v. Thomas*, 98-599; *State v. Lawhorn*, 88-634.

Defendant may introduce evidence of good character without becoming a witness: *State v. Hice*, 117-782. This opens the way for the state to prove his character bad: *Ibid.* When he becomes a witness in his own behalf, he may introduce evidence of good character to support his testimony and as substantive evidence: *State v. Cloninger*, 149-567—and the state may attack his character, *Ibid.* The effect of state's evidence of bad character was to impeach his credibility or rebut evidence of good character: *State v. Traylor*, 121-674; but his character is also to be considered in determining his guilt or innocence, *State v. Atwood*, 176-704; *State v. Wentz*, 176-745.

Where defendant, in prosecution for another crime, testifies in own behalf after being informed of privilege not to testify, admission so made competent evidence against him in subsequent trial, *State v. Simpson*, 133-676. Where person charged with offense before mayor of town is called to the stand by his counsel and testifies in own behalf, caution prescribed by section 4561 not being given, defendant deemed to be testifying under this section: *State v. Hawkins*, 115-712. Evidence of defendant testifying in his own behalf is to be considered by jury, and he has right to have jury instructed as to effect of his evidence if believed by them: *State v. Gilmer*, 97-429; see *State v. Holloway*, 117-730. Defendant can testify as to any fact which would be competent to prove by any other witness: *State v. Bethel*, 97-459.

Declarations of one defendant are not admissible as against codefendant: *State v. Collins*, 121-667.

As to instructing jury on credibility of defendant's testimony, see *State v. Holloway*, 117-730; *State v. Gilmer*, 97-429.

Defendant can be made to testify for or against codefendant if testimony does not tend to incriminate himself: *State v. Medley*, 178-710; *State v. Smith*, 86-705; *State v. Weaver*, 93-595; *State v. Rose*, 61-406.

Failure to testify for himself raises no presumption against him: *State v. Bynum*, 175-777. Section prohibits comment upon fact that defendant does not go upon stand to testify: *State v. Harrison*, 145-414; *Hudson v. Jordan*, 108-12; *Goodman v. Sapp*, 102-477—but does not forbid prosecuting attorney making such comments upon testimony as would have been legitimate before enactment of section, for while section enlarges privileges of prisoner, it does not abridge rights of state's officers: *State v. Weddington*, 103-364.

One charged with crime, who turns state's witness against associates under assurance that his disclosures shall not be used against him, may be cross-examined as to what he told counsel about the offense while he was himself charged: *State v. Condry*, 50-418.

The privilege of refusing to answer an incriminating question is personal to the witness and to him only: *State v. Morgan*, 133-743—and not error for judge to caution witness that he need tell nothing to incriminate himself, *State v. Weaver*, 93-595. What is sufficient protection against self-crimination: *State v. Medley*, 178-710; *Smith v. Smith*, 116-386.

Defendant can be required to furnish evidence (sometimes resulting in being against himself) by making him fit his shoes to tracks: *State v. Mallett*, 125-725; *State v. Graham*, 74-646; *State v. Lindsey*, 78-501. See, also, *State v. Neville*, 175-731; *State v. Thompson*, 161-238. Private papers taken from defendant against his will are admissible: *State v. Fowler*, 172-905; *State v. Wallace*, 162-623.

1800. Testimony enforced in certain criminal investigations; immunity. If any justice of the peace, magistrate of police, mayor of a town, or judge of the supreme or superior courts shall have good reason to believe that any person within his jurisdiction has knowledge of the existence and establishment of any faro-bank, faro-table or other gaming table prohibited by law, or of any place where intoxicating liquors are sold contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice of the peace, magistrate, mayor, or judge to issue to the sheriff of the county or to any constable of the town or township in which such faro-bank, faro-table, gaming table, or place where intoxicating liquors are sold contrary to law is supposed to be, a subpoena, *capias ad testificandum*, or other summons in writing, commanding such person to appear immediately before such justice of the peace, magistrate, mayor or judge and give evidence on oath as to what he may know touching the existence, establishment and whereabouts of such faro-bank, faro-table or other gaming table, or place where intoxicating liquors are sold contrary to law, and the name and personal description of the keeper thereof. Such evidence, when obtained, shall be considered and held in law as an information on oath, and the justice, magistrate, mayor or judge may thereupon proceed to seize and arrest such keeper and destroy such table, or issue process therefor as provided by law. No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offenses so done or participated in by him.

Rev., ss. 3721, 1637; Code, ss. 1215, 1050; R. C., c. 35, s. 50; 1858-9, c. 34, s. 1; 1889, c. 355; 1913, c. 141.

See section 2143. Section not in violation of either state or federal constitution: In *re Briggs*, 135-118—and witness may be compelled to testify under section, although answer tends to criminate him, *State v. Morgan*, 133-743; In *re Briggs*, 135-118. Word "gaming" defined: *State v. Morgan*, 133-745.

1801. Husband and wife as witnesses in civil actions. In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage); or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

Rev., s. 1636; Code, s. 588; C. C. P., s. 341; 1866, c. 43, ss. 3, 4; 1919, c. 18.

In action for divorce on ground of adultery neither husband nor wife competent as witness to adulterous acts of other: Hooper v. Hooper, 165-605; Toole v. Toole, 112-150; Perkins v. Perkins, 88-41—nor shall admissions of either be received in evidence to prove such fact, Perkins v. Perkins, 88-41—but wife sued for divorce on ground of adultery is competent to deny the acts testified to against her, Broom v. Broom, 130-562. **In a suit for divorce for impotency of wife, husband is competent witness:** Barringer v. Barringer, 69-179.

Husband is competent to testify as to misconduct of wife in an action for criminal conversation: Powell v. Strickland, 163-393—and wife was not competent witness to rebut such evidence, Grant v. Mitchell, 156-15; McCall v. Galloway, 162-353; but she may testify under this section as amended by act of 1919, c. 18.

Neither husband nor wife competent to prove nonaccess to render offspring illegitimate, nor would declarations of either be admissible: Croom v. Whitehead, 174-305; West v. Redmond, 171-742; Ewell v. Ewell, 163-236.

Meaning of confidential communications which are privileged under this section: Whitford v. Ins. Co., 163-223; Toole v. Toole, 112-152. See, also, annotations under section 1802.

Section merely referred to in State v. Wiseman, 130-727; Little v. Ratliff, 126-264; Toole v. Toole, 109-615; Bunn v. Todd, 107-266; Taylor v. Taylor, 76-439; Horne v. Horne, 75-103; Boykin v. Boykin, 70-266.

1802. Husband and wife as witnesses in criminal actions. The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any husband or wife competent or compellable to give evidence against each other in any criminal action or proceeding, except to prove the fact of marriage in case of bigamy, and except that in all criminal prosecutions of a husband for an assault and battery upon his wife, or for abandoning his wife, or for neglecting to provide for her support, it shall be lawful to examine the wife in behalf of the state against the husband.

Rev., ss. 1634, 1635, 1636; Code, ss. 588, 1353, 1354; 1856-7, c. 23; 1866, c. 43; 1868-9, c. 209; 1881, c. 110.

Husband or wife of defendant competent witness for defendant in all criminal actions or proceedings: *State v. Harbison*, 94-885; *State v. Jones*, 89-559—but in fornication and adultery husband of feme defendant not competent to testify against her as to such acts committed while marital relation existed, *State v. Raby*, 121-682; *State v. Jones*, 89-559; *State v. Jolly*, 20-108—though he may have obtained divorce a vinculo before trial, *Ibid.* When man and woman indicted for fornication and adultery, husband of feme defendant, as to whom nol. pros. entered, competent witness to show adultery between defendants before marriage of witness and feme defendant, *State v. Wiseman*, 130-726.

On indictment for bigamy, second wife of defendant admissible as witness either for or against him: *State v. Patterson*, 24-346. When two indicted in same bill for affray and mutual assaults, wife of neither competent witness for state or other defendant: *State v. Harbison*, 94-885—though freedwoman competent witness against freedman who claimed her as wife while they were slaves, but since emancipated he had refused to marry her, *State v. Taylor*, 61-508. As to evidence of slaves cohabiting together as man and wife prior to emancipation, see *State v. Samuel*, 19-177.

Neither husband nor wife competent or compellable to give evidence against the other in criminal proceeding: *State v. Harbison*, 94-885—and where two indicted in same bill for affray and mutual assaults, wife of neither is competent witness for state or other defendant, *State v. Weaver*, 93-595. Neither wife nor husband is a competent witness against the other upon the trial of an indictment for assault and battery when no lasting injury is inflicted or threatened: *State v. Davidson*, 77-522, and cases cited—but where wife indicted for assault and battery in striking her husband with an axe, husband is competent witness against her: *Ibid.* In an action against husband for slandering wife, for competency of either as witness, see *State v. Fulton*, 149-485.

Where two are indicted for a battery, the one for the act and the other for using encouraging language at the time, the wife of the one who encouraged the beating is a competent witness for the other party: *State v. Mooney*, 64-54.

Wife is competent to prove fact of marriage in action against the husband for abandonment: *State v. Chester*, 172-946—in an action for bigamy, *State v. Long*, 143-672; *State v. Melton*, 120-591—in an action for fornication and adultery, *State v. McDuffie*, 107-885.

Rule disqualifying wife from testifying against husband applies only where husband has legal interest in result, *State v. Parrott*, 79-615—and does not render her incompetent to contradict his testimony for state upon indictment against third person for assault and battery upon husband, *Ibid.*

Confidential communications between husband and wife cannot be received in evidence, *State v. Brittain*, 117-783; *Toole v. Toole*, 112-156. Conversations between husband and wife in presence of third persons are not privileged: *State v. McKinney*, 175-784; *State v. Randall*, 170-757. A letter written by husband to wife is admissible, when in hands of third person: *State v. Wallace*, 162-622. See, also, under section 1801.

Declarations of the wife in the presence of the husband, which naturally call for a reply, are admissible, though wife is not competent witness: *State v. Record*, 151-695.

Failure of wife to testify for husband not subject of comment; and solicitor cannot tender the wife as a witness: *State v. Spivey*, 151-676; *State v. Cox*, 150-846.

Section referred to in *State v. McDowell*, 101-737; *State v. Lemon*, 92-793.

ART. 7. ATTENDANCE OF WITNESS

1803. **Issue and service of subpœna.** In obtaining the testimony of witnesses in causes depending in the superior, criminal and inferior courts, the following rules shall be observed in practice, to wit:

In suits where witnesses are to appear at any court, the clerk at the instance of a party shall issue a subpœna, directed to the sheriff or other officer of the county where such witnesses reside, naming the time and place for their appearance, the names of the parties to the suit wherein the testimony is to be given, and the party at whose instance they are summoned. Every subpœna made returnable immediately shall be issued only in term time, and shall be personally served on the witness therein named. A copy of every subpœna issued

by the clerk in vacation, in case any witness therein named is not to be found, may be left at his usual place of residence; and such copy certified by the sheriff or other officer, and left as aforesaid, shall be deemed a legal summons, and the person therein named shall be bound to appear in the same manner as if personally summoned.

Rev., s. 1639; Code, s. 1355; R. C., c. 31, s. 59; 1777, c. 115, s. 36.

For subpoena issued by party or attorney, see Civil Procedure, s. 919.

1804. Attendance before referee or commissioners. In all cases not otherwise provided for, when witnesses are required to attend any court, commission, referee, order of survey, or jury of view, a summons shall be issued by the clerk of the court, at the request of either party, naming the day and place when and where they are to appear, the names of the parties to the suit, and in whose behalf summoned.

Rev., s. 1640; Code, s. 1366; R. C., c. 31, s. 68; 1805, c. 685, ss. 1, 2.

1805. Subpœna duces tecum issued. In all causes depending in any court, in which the production of an original paper, lodged in any of the public offices of the state, or in any office of any court, shall become necessary, the court may issue the process of subpœna duces tecum, requiring such persons who hold said offices to attend the court with such original paper, in like manner and under the same penalties as witnesses are required in cases of subpœna to testify.

Rev., s. 1641; Code, s. 1372; R. C., c. 31, s. 81; 1797, c. 476.

1806. Subpœnas and depositions upon removal of cause. When any cause shall be removed from the superior court of one county to that of another, after the order of removal, depositions may be taken in the cause, and subpœnas for the attendance of witnesses and commissions to take depositions may issue from either of the said courts, under the same rules as if the cause had been originally commenced in the court from which the subpœnas or commissions issued.

Rev., s. 1642; Code, s. 1371; R. C., c. 31, s. 72; 1810, c. 787; 1832, c. 8.

Upon removal of cause, jurisdiction of court from which removed ceased, unless otherwise provided in order of removal, or by consent of parties in writing duly filed: *Fisher v. Mining Co.*, 105-124—but section makes exception to rule by provision that after removal subpœnas for witnesses and commissions to take depositions may issue from either court, *Ibid.*—and pending removal of cause from one county to another, and before deposit of transcript, competent for clerk of former county to take examination of parties, *Comrs. v. Lemly*, 85-341.

1807. Witnesses attend until discharged; effect of nonattendance. Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and continue to attend from term to term until discharged, when summoned in a civil action or special proceeding, by the court or the party at whose instance such witness shall be summoned, or, when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned; and in default thereof shall forfeit and pay, in civil actions or special proceedings, to the party at whose instance the subpœna issued, the sum of forty dollars, to be recovered by motion in the cause, and shall be further liable to his action for the full damages which may be sustained for the want of such witness's testimony; or if summoned in a criminal prosecution shall forfeit and pay eighty dollars for the use of the state, or the party summoning him. If the civil action or special

proceeding shall, in the vacation, be compromised and settled between the parties, and the party at whose instance such witness was summoned should omit to discharge him from further attendance, and for want of such discharge he shall attend the next term, in that case the witness, upon oath made of the facts, shall be entitled to a ticket from the clerk in the same manner as other witnesses, and shall recover from the party at whose instance he was summoned the allowance which is given to witnesses for their attendance, with costs.

No execution shall issue against any defaulting witness for the forfeiture aforesaid but after notice made known to him to show cause against the issuing thereof; and if sufficient cause be shown of his incapacity to attend, execution shall not issue, and the witness shall be discharged of the forfeiture without costs; but otherwise the court shall, on motion, award execution for the forfeiture against the defaulting witness.

Rev., s. 1643; Code, s. 1356; R. C., c. 31, ss. 60, 61, 62; 1777, c. 115, ss. 37, 38, 43; 1799, c. 528; 1801, c. 591.

When subpoena has been served on witness, he is required to attend from term to term until discharged: *State v. Gwynn*, 61-446; *Sweany v. Hunter*, 5-182.

Where two subpoenas served upon witness requiring attendance on same day at different places distant from each other, he may make election between them: *Leehour v. Martin*, 44-478—for he is not compelled to obey subpoena first served, *Ibid*.

Witness summoned in this state while casually here, but who resides in another state, cannot be amerced for nonattendance where he has returned to own state and was there at time when presence required as witness: *Kinzey v. King*, 28-76.

If witness allege that he was unable to attend court, such inability must be decided with reference to mode of travel which is in use in community: *Eller v. Roberts*, 25-11—and if practicable modes of conveyance to court exist, and it is not shown by witness that same was not within his power, nonattendance cannot be attributed to inability, *Ibid*. An attorney at law is not exempt from liability for failure to attend as a witness: *In re Pierce*, 163-247.

Issue in bastardy is not "criminal prosecution" so as to subject defaulting witness to fine of eighty dollars prescribed by section: *Ward v. Bell*, 52-79; see *State v. Giles*, 134-735.

For fees of witnesses, see section 3893. For right to demand and recover fees, see sections 1273, 1274.

Section referred to in *Fite v. Lander*, 52-249.

1808. Witnesses exempt from civil arrest. Every witness shall be exempt from arrest in civil actions or special proceedings during his attendance at any court, or before a commissioner, arbitrator, referee or other person authorized to command the attendance of such witness, and during the time such witness is going to and returning from the place of such attendance, allowing one day for every thirty miles such witness has to travel to and from his place of residence.

Rev., s. 1644; Code, s. 1367; R. C., c. 31, s. 70; 1777, c. 115, s. 44.

Citizen of another state voluntarily attending court here as witness is privileged from arrest in civil cases, though no subpoena served upon him: *Ballinger v. Elliott*, 72-596; *Fentress v. Brown*, 61-374.

Section does not repeal by implication the common-law privilege of exemption of nonresidents from service of civil process while attending as suitor or witness in this state: *Cooper v. Wyman*, 122-784; *Hammerskold v. Rose*, 52-629; see, also, *Greenleaf v. Bank*, 133-292. Exemption of witnesses from arrest not applicable to persons arrested in criminal proceedings: *White v. Underwood*, 125-25. How privilege may be claimed: *School v. Pierce*, 163-424. How far this privilege extended to attorneys at law: *Greenleaf v. Bank*, 133-292.

ART. 8. DEPOSITIONS

1809. Manner of taking depositions in civil actions. Any party in a civil action or special proceeding, upon giving notice to the adverse party or his

attorney as provided by law, may take the depositions of persons whose evidence he may desire to use, without any special order therefor, unless the witness shall be beyond the limits of the United States.

Depositions shall be taken on commission, issuing from the court and under the seal thereof, by one or more commissioners, who shall be of kin to neither party, and shall be appointed by the clerk; or depositions may be taken by a notary public of this state or of any other state or foreign country, without a commission issuing from the court.

Depositions shall be subscribed and sealed up by the commissioners or notary public, and returned to the court, the clerk whereof or the judge holding the court, if the clerk is a party to the action, shall open and pass upon the same, after having first given the parties or their attorneys not less than one day's notice; and all such depositions, when passed upon and allowed by the clerk, without appeal, or by the judge upon appeal from the clerk's order, or by the judge holding the court, when the clerk is a party to the action, shall be deemed legal evidence, if the witness be competent.

Rev., s. 1652; Code, s. 1357; 1911, c. 158; R. C., c. 31, s. 63; 1893, c. 360; 1881, c. 279.

Discretionary with trial judge whether or not answers to leading questions shall be stricken out of deposition: *Bank v. Carr*, 130-479.

Depositions of witnesses never taken by court while engaged in trial of cause: *Worthy v. Shields*, 90-192.

Depositions are admissible in evidence on trial of issue in bastardy as in other civil cases: *Tidline v. Hickerson*, 72-421.

Error to permit deposition taken out of state on Monday of term at which cause tried to be read in evidence: *Taylor v. Gooch*, 50-404.

Part of deposition cannot be offered to contradict witness: *Barton v. Morphis*, 15-240.

Irrelevant facts in deposition are incompetent: *Downey v. Murphey*, 18-82.

Failure to take in time for trial, where laches, no ground for continuance: *Duncan v. Hill*, 19-291.

Plaintiff need not wait for answer filed before taking deposition: *Freeman v. Brown*, 151-111.

AS TO APPOINTMENT OF COMMISSIONER. Commissioner should not be related to either of the parties: *Younce v. Lumber Co.*, 155-239; *Kerr v. Hicks*, 131-90. Where commission to take deposition is issued to be executed within county where issued, no seal required to be affixed thereto: *McArter v. Rhea*, 122-614—otherwise where a deposition is to be executed outside of such county, for without such seal it is void, *Freeman v. Lewis*, 27-91. Appearance before commissioner waives irregularity in commission: *Willeford v. Bailey*, 132-402; *Womack v. Gross*, 135-378; *McArter v. Rhea*, 122-614; *Davison v. Land Co.*, 118-368; *Barnhardt v. Smith*, 86-473. Commissions to take depositions may be made returnable to any subsequent term of court from which issued: *Duncan v. Hill*, 19-291. Surplusage in stating title of court does not invalidate commission: *Armstrong v. Dalton*, 15-568. A mistake in issuing commission as from "supreme court" when it appears to be from the superior court, does not invalidate: *Dobson v. Finley*, 53-495. Commissioner to take depositions presumed to be properly qualified until contrary shown: *Gregg v. Mallett*, 111-74.

A mistake in the initials of the commissioner is immaterial if there is sufficient in the notice to designate the time and place and the commissioner: *Hardy v. Ins. Co.*, 167-22. The names of the witnesses need not be in the commission; it is sufficient if given in the notice: *Jeffords v. Waterworks Co.*, 157-10.

THE TAKING OF THE DEPOSITION. Not error to take deposition in place of business of one of parties if such place named in notice and no suggestion that other party suffered any prejudice thereby: *Bank v. Carr*, 130-479. Deposition will be rejected where written down by attorney of party taking deposition: *Mosely v. Mosely*, 1-631. Interrogatories need not be in writing: *Bank v. Bank of Asheville*, 116-815—and answers need not be inserted after each interrogatory, where both interrogatories and answers are above the signature of commissioner: *Street v. Andrews*, 115-417. Name of commissioner should be inserted, inferred

from *Womack v. Gross*, 135-378. Duty of witness to answer proper questions just as he would before judge or clerk: *Fertilizer Co. v. Taylor*, 112-146. Deposition unsigned by witness may be read in evidence: *Boggs v. Mining Co.*, 162-393; *Rutherford v. Nelson*, 2-105; *Murphy v. Work*, 2-105. Adjournments by commissioner must be from day to day: *Rutledge v. Read*, 3-242. That witness was sworn only to the truth of the deposition does not render it inadmissible: *Welborn v. Younger*, 10-205. Where papers are referred to in a deposition they may be attached to it or identified by parol evidence: *In re Clodfelter's Will*, 171-528.

THE RETURN OF THE DEPOSITION. Deposition must be sealed up by commissioner: *Ward v. Ely*, 12-372. Deposition certified to have been taken on day and in county in another state, as specified in notice, but without stating particular place, not admissible in evidence: *English v. Camp*, 2-358. Deposition must show names of parties to action either in caption or body of it: *Murray v. Marsh*, 3-290. One commissioner cannot amend return made by himself and another: *Collier v. Jeffries*, 3-400. The deposition is not returnable to a particular term, but should be returned promptly when taken: *Askew v. Matthews*, 175-187.

OPENING THE DEPOSITION. Provisions of section allowing clerk to pass upon depositions are only applicable to depositions of competent witnesses: *Sehorn v. Williams*, 51-575—and where clerk passed upon and allowed one to be read which was taken out of county, under commission without seal, court may disregard such action, *Ibid*.

Custom, when opening deposition, to reserve the right to file exceptions as to its regularity, disapproved of in *Ivey v. Cotton Mills*, 143-197. Objection that commissioner related to one of parties must be made at time of opening before clerk: *Kerr v. Hicks*, 131-90. Party offering to read deposition as evidence must prove that he has given notice of opening of deposition before clerk as prescribed by section or show facts that would amount to waiver by opposite party of statutory requirement: *Berry v. Hall*, 105-154. Where it appeared that no notice was given adverse party of taking deposition and that same had not been passed upon by clerk, objection to its reception might be taken on trial of action: *Bryan v. Jeffreys*, 104-242. For objections to deposition which must be taken before trial, see sections 1819, 1820.

Section merely referred to in *Stern v. Herren*, 101-518; *Carroll v. Hodges*, 98-420; *Branton v. O'Briant*, 93-99; *Hill v. Bell*, 61-122.

1810. Notice required for taking depositions. In taking depositions in civil actions or special proceedings, written notice of the time and place of taking a deposition, specifying the name of the witness, must be served by the party at whose instance it is taken upon the adverse party or his attorney. The time for serving such notice shall be as follows: Three entire days when the party notified resides within ten miles of the place where the deposition is to be taken; in other cases, where the party notified resides in the state, one day more for every additional twenty miles, except where the deposition is to be taken within ten miles of a railway in running operation in the state, when one day only shall be given for every hundred miles of railway to the place where the deposition is to be taken. When a deposition is to be taken beyond the state, ten days notice of the taking thereof shall be given, when the person whose deposition is to be taken resides within ten miles of a railway connecting with a line of railway within twenty miles of the place where the person notified resides. In other cases, where there are no railways running as above specified, twenty days notice shall be given. When objection is taken to the reading of any such deposition, upon the ground that there are no railways or connecting railways to and from the points specified in this section, or that the notice given had otherwise been actually insufficient, it shall devolve upon the party objecting to satisfy the court of the truth of his allegation.

Rev., s. 1652; Code, s. 1357; 1881, c. 279.

CONTENTS OF NOTICE. The notice must be properly entitled, inferred from *Erwin v. Bailey*, 123-628. Where notice specifies that deposition will be taken between certain hours of day same cannot be read unless appears to have been taken between hours specified: *Farrar*

v. Hamilton, 1-105; Harris v. Yarborough, 15-166. Where irregularity in notice, it is waived by attendance and cross-examination of witness: Erwin v. Bailey, 123-628. As to immaterial variance between notice and deposition, see Ridge v. Lewis, 1-599; Ellmore v. Mills, 2-359. Notice to take a number of depositions on the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, and 10th of a particular month does not, of itself, furnish ground for suppressing depositions: Kea v. Robeson, 39-427—for if adverse party attended, his action cured all indefiniteness, *Ibid.*

No ground of exception to deposition that notice was given to take “deposition of A, B, C, and others,” and deposition of neither A, B, nor C was taken: McDugald v. Smith, 33-576.

Notice to take deposition on Sunday is not good, and deposition taken under such notice must be rejected: Sloan v. Willeford, 25-307.

Notice to take deposition on a particular day of every week, for three successive months, is insufficient: Bedell v. State Bank, 12-483—while notice to take deposition of witness in Georgia on one of three successive specified days is sufficient: Harris v. Peterson, 4-358.

Notice must specify in what house deposition is to be taken: McNaughton v. Lester, 2-423—and it must be taken at house specified, Alston v. Taylor, 2-381—and where slight inaccuracy in description of house, it will be sufficient if it can be identified, Pursell v. Long, 52-102.

Notice to a particular agent is not sufficient: Lindsey v. Lee, 12-464. Where time not definitely stated notice is sufficient: Bedell v. State Bank, 12-483.

Where notice served that depositions will be taken at same time in two different places party notified may attend at either place designated and disregard notice as to other, and depositions taken in his absence at other place will on motion be quashed or suppressed, but where he elects to appear by counsel and cross-examine witness without making objection at time, this is waiver as to any defect in notice: Ivey v. Cotton Mills, 143-189.

A mistake in the name of the commissioner is immaterial if there is sufficient in the notice to designate the time and place and commissioner: Hardy v. Ins. Co., 167-22. The names of the witnesses need not be in the commission; it is sufficient if they are given in the notice: Jeffords v. Waterworks Co., 157-10. The names of several witnesses “and others” in the notice is sufficient: *In re Rawlings’ Will*, 170-58.

SERVICE OF NOTICE. Town constable cannot serve notice in action pending in superior court: Cullen v. Absher, 119-441. For method of computing time of service of notice, see Beasley v. Downey, 32-284. Depositions taken by one party and filed in court, they may be read by other party without proof of notice, and on second trial they may be read by party who took same without proof of notice: Collier v. Jeffries, 3-400.

1811. Publication of notice in case of nonresident. Instead of the notice served upon the adverse party or his attorney in taking depositions in civil actions or special proceedings, when the adverse party is a nonresident and has no attorney of record, it shall be sufficient to publish notice to the adverse party in some newspaper published in the county where the action is pending, or if no newspaper is published in such county, then in some newspaper in the judicial district, for three consecutive weeks, giving the time and place of taking the deposition and specifying the name of the witness. And when the adverse party is a nonresident and service of notice cannot be had upon him or his attorney in this state, then one publication of notice to open such deposition shall be sufficient notice.

1913, c. 137.

Notice by advertisement, party being a nonresident and his attorney having died, held good in Maxwell v. Holland, 2-302.

1812. Depositions for defendant in criminal actions. In all criminal actions, hearings and investigations it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court of the county in which said action is pending, that it is important for the defense that he have the testimony of any person, whose name must be given, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this state, that

he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: Provided, that the solicitor or prosecuting attorney of the district, county or town in which such action is pending have ten days notice of the taking of such deposition, who may appear in person or by representative to conduct the cross-examination of such witness. This section shall not apply to the taking of depositions in courts of justices of the peace.

Rev., s. 1652; Code, s. 1357; 1891, c. 522; 1893, c. 80; 1915, c. 251.

When there are several defendants in a criminal action and one wishes a deposition on his behalf, it is not necessary to notify the other defendants: *State v. Finley*, 118-1161.

Depositions not used against defendant in criminal action, see *State v. Mitchell*, 119-784; *State v. Thomas*, 64-74.

1813. Depositions in justices' courts. Any party in a civil action before a justice of the peace may take the depositions of all persons whose evidence he may desire to use in the action; and to do so he may apply to the clerk of the superior court for a commission to take the same, and shall proceed in all things in taking such depositions as if such action was pending in the superior court. When any such depositions are returned to the clerk, they shall be opened and passed upon by the clerk, and delivered to the justice of the peace before whom the trial is to be had; and the reading and using of said depositions shall conform to the rules of the superior court.

Rev., s. 1646; Code, s. 1359; 1872-3, c. 33.

1814. Depositions before municipal authorities. Any board of aldermen, board of town or county commissioners or any person interested in any proceeding, investigation, hearing or trial before such board, may take the depositions of all persons whose evidence may be desired for use in said proceeding, investigation, hearing or trial; and to do so, the chairman of such board or such person may apply in person or by attorney to the superior court clerk of that county in which such proceeding, investigation, hearing or trial is pending, for a commission to take the same, and said clerk, upon such application, shall issue such commission; and the notice and proceedings upon the taking of said depositions shall be the same as provided for in civil actions; and if the person upon whom the notice of the taking of such deposition is to be served is absent from or cannot after due diligence be found within this state, but can be found within the county in which the deposition is to be taken, then, and in that case, said notice shall be personally served on such person by the commissioner appointed to take such deposition; and when any such deposition is returned to the clerk it shall be opened and passed upon by him and delivered to such board, and the reading and using of such deposition shall conform to the rules of the superior court.

Rev., s. 1653; 1889, c. 151.

1815. Depositions in quo warranto proceedings. In all actions for the purpose of trying the title to the office of clerk of the superior court, register of deeds, county treasurer or sheriff of any county, it shall be competent and lawful to take the deposition of witnesses before a commissioner or commissioners to be appointed by the judge of the district wherein the case is to be tried, or the judge holding the court of said district, or the clerk of the court

wherein the case is pending, under the same rules as to time of notice and as to the manner of taking and filing the same as is now provided by law for the taking of depositions in other cases; and such depositions, when so taken, shall be competent to be read on the trial of such action, without regard to the place of residence of such witness or distance of residence from said place of trial: Provided, that the provisions of this section shall not be construed to prevent the oral examination, by either party on the trial, of such witnesses as they may summon in their behalf.

Rev., s. 1654; 1889, c. 428.

1816. Commissioner may subpoena witness and punish for contempt. Commissioners to take depositions appointed by the courts of this state, or by the courts of the states or territories of the United States, arbitrators, referees, and all persons acting under a commission issuing from any court of record in this state, are hereby empowered, they or the clerks of the courts respectively in this state, to which such commission shall be returnable, to issue subpoenas, specifying the time and place for the attendance of witnesses before them, and to administer oaths to said witnesses, to the end that they may give their testimony. And any witness appearing before any of the said persons and refusing to give his testimony on oath touching such matters as he may be lawfully examined unto shall be committed, by warrant of the person before whom he shall so refuse, to the common jail of the county, there to remain until he may be willing to give his evidence; which warrant of commitment shall recite what authority the person has to take the testimony of such witness, and the refusal of the witness to give it.

Rev., s. 1649; Code, s. 1362; R. C., c. 31, s. 64; 1777, c. 115, s. 42; 1805, c. 685, ss. 1, 2; 1848, c. 66; 1850, c. 188.

Commissioner to take deposition presumed to be properly qualified until contrary shown: *Gregg v. Mallett*, 111-74. Duty of witness to answer proper question propounded by him just as though examination conducted before judge or clerk: *Fertilizer Co. v. Taylor*, 112-146. Power to commit to common jail person refusing to testify before commissioner not given exclusively, if at all, to commissioner, but he may invoke aid of judge from whom he derived his appointment: *Fertilizer Co. v. Haylor*, 112-141. Deposition will be rejected if witness refuses to answer proper questions on cross-examination, *Mosely v. Mosely*, 1-631.

1817. Attendance before commissioner enforced. The sheriff of the county where the witness may be shall execute all such subpoenas, and make due return thereof before the commissioner, or other person, before whom the witness is to appear, in the same manner, and under the same penalties, as in case of process of a like kind returnable to court; and when the witness shall be subpoenaed five days before the time of his required attendance, and shall fail to appear according to the subpoena and give evidence, the default shall be noted by the commissioner, arbitrator, or other person aforesaid; and in case the default be made before a commissioner acting under authority from courts without the state, the defaulting witness shall forfeit and pay to the party at whose instance he may be subpoenaed fifty dollars, and on the trial for such penalty the subpoena issued by the commissioner, or other person, as aforesaid, with the indorsement thereon of due service by the officer serving the same, together with the default noted as aforesaid and indorsed on the subpoena, shall be prima facie evidence of the forfeiture, and sufficient to entitle the plaintiff to judgment for the same, unless the witness may show his incapacity to have attended.

Rev., s. 1650; Code, s. 1363; R. C., c. 31, s. 65; 1848, c. 66, s. 2; 1850, c. 188, ss. 1, 2.

1818. Remedies against defaulting witness before commissioner. But in case the default be made before a commissioner, arbitrator, referee or other person, acting under a commission or authority from any of the courts of this state, then the same shall be certified under his hand, and returned with the subpoena to the court by which he was commissioned or empowered to take the evidence of such witness; and thereupon the court shall adjudge the defaulting witness to pay to the party at whose instance he was summoned the sum of forty dollars; but execution shall not issue therefor until the same be ordered by the court, after such proceedings had as shall give said witness an opportunity to show cause, if he can, against the issuing thereof.

Rev., s. 1651; Code, s. 1364; R. C., c. 31, s. 66; 1850, c. 188, s. 2.

1819. Objection to deposition before trial. At any time before the trial, or hearing of an action or proceeding, any party may make a motion to the judge or court to reject a deposition for irregularity in the taking of it, either in whole or in part, for scandal, impertinence, the incompetency of the testimony, for insufficient notice, or for any other good cause. The objecting party shall state his exceptions in writing.

Rev., s. 1648; Code, s. 1361; 1895, c. 312; 1903, c. 132; 1869-70, c. 227, ss. 13, 17.

Objection to irregularities in taking of depositions must be made in writing: Willeford v. Bailey, 132-402; Brittain v. Hitchcock, 127-400; Davenport v. McKee, 98-507; Woodley v. Hassell, 94-157—and passed on before trial, Ivey v. Cotton Mills, 143-189; Willeford v. Bailey, 132-402; Brittain v. Hitchcock, 127-400; Glover v. Flowers, 101-134; Woodley v. Hassell, 94-157; Katzenstein v. R. R., 78-286—for, unless same so made, objection to deposition is waived, Woodley v. Hassell, 94-157; Kerchner v. Reilly, 72-171; Mfg. Co. v. Townsend, 153-244; Askew v. Matthews, 175-187.

Where a deposition had been on file for six years without objection, it is not subject to objection on the trial: Wasson v. Linster, 83-575.

Where deposition objected to on ground that testimony contained therein was incompetent, though no particular point so indicated and no error assigned, objection will not be considered: Smith v. McGregor, 96-101. A deposition will not be quashed for incompetent questions, since these are subject to exceptions: Jeffords v. Waterworks Co., 157-10.

Objection that commissioner to take deposition was related to one of parties must be taken at time of opening same before clerk: Kerr v. Hicks, 131-90.

Appearance before commissioner waives irregularity in commission: Willeford v. Bailey, 132-402; Womack v. Gross, 135-378; Davison v. Land Co., 118-368; Barnhardt v. Smith, 86-473.

For case prior to enactment of section, see Hix v. Fisher, 60-474. Section merely referred to in Sparrow v. Blount, 90-517; Street v. Bryan, 65-622. See, also, annotations under section 1820.

1820. Deposition not quashed after trial begun. No deposition shall be quashed, or rejected, on objection first made after a trial has begun, merely because of an irregularity in taking the same, provided it shall appear that the party objecting had notice that it had been taken, and it was on file long enough before the trial to enable him to present his objection.

Rev., s. 1647; Code, s. 1360; 1869-70, c. 227, s. 12.

See annotations under section 1819. Exceptions to depositions, especially those which relate to its regularity, should be disposed of at latest before trial entered upon: Ivey v. Cotton Mills, 143-189—and where adverse party had notice of taking of deposition long enough for him to file objections, same will not be quashed for irregularity in manner of taking after trial begun, Davenport v. McKee, 98-500; Katzenstein v. R. R., 78-286; Carson v. Mills, 69-32.

Objection must be made before trial if reasonable opportunity given: Steel Co. v. Ford, 173-195. Deposition will not be quashed on oral objection made at trial where same has been

on file in clerk's office two or three months before trial, and opened by clerk in presence of counsel for both parties: *Carroll v. Hodges*, 98-418—but where it appears that no notice given adverse party of taking of deposition, and same not passed upon by clerk as provided by section 1809, objection to reception of deposition may be taken on trial of action, *Bryan v. Jeffreys*, 104-242. Where notice served that depositions will be taken at same time in two different places, person notified may attend at either place designated, and disregard notice as to other: *Ivey v. Cotton Mills*, 143-189—and depositions taken in his absence at other place will on motion be quashed or suppressed, *Ibid.*—but where he elects to appear by counsel and cross-examine witness without making objection at time, this is waiver as to any defect in notice, *Ibid.*

Failure to insert name of commissioner in commission is waived by objecting party appearing at taking of deposition and making no objection thereto until after trial begun: *Womack v. Gross*, 135-378.

Exceptions on trial to deposition offered on two former trials without objection, and to which no objection made either at time of taking or opening same, are properly overruled: *Bank v. Burgwyn*, 116-122.

Objection that answers were on separate sheet attached to interrogatories, but not inserted at end of such interrogatory, whole, however, being above commissioner's signature, is untenable: *Street v. Andrews*, 115-417.

Custom of reserving right to have exceptions, especially those relating to regularity of deposition, passed upon when deposition offered in evidence disapproved by court: *Ivey v. Cotton Mills*, 143-197. See, also, *Hudson v. R. R.*, 176-488.

Section merely referred to in *Sparrow v. Blount*, 90-517; *Barnhardt v. Smith*, 86-480.

1821. When deposition may be read on the trial. Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

1. If the witness is dead, or has become insane since the deposition was taken.
2. If the witness is a resident of a foreign country, or of another state, and is not present at the trial.
3. If the witness is confined in a prison outside the county in which the trial takes place.
4. If the witness is so old, sick or infirm as to be unable to attend court.
5. If the witness is the president of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.
6. If the witness is the governor of the state, or the head of any department of the state government, or the president of the university, or the head of any other incorporated college in the state, or the superintendent or any physician in the employ of any of the hospitals for the insane for the state.
7. If the witness is a justice of the supreme court, or a judge, presiding officer, clerk or solicitor of any court of record, and the trial shall take place during the term of such court.
8. If the witness is a member of the congress of the United States, or a member of the general assembly, and the trial shall take place during a session of the body of which he is a member.
9. If the witness has been duly summoned, and at the time of the trial is out of the state, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition.

10. If the action is pending in a justice's court the deposition may be read on the trial of the action, provided the witness is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting.

Rev., s. 1645; Code, s. 1358; R. C., c. 31, s. 63; 1777, c. 115, ss. 39, 40, 41; 1803, c. 633; 1828, c. 24, ss. 1, 2; 1836, c. 30; 1869-70, c. 227, s. 11; 1881, c. 279, ss. 1, 3; 1905, c. 366; 1919, c. 324.

It is admissible to use a deposition taken in another action or proceeding between the same parties and in relation to the same subject-matter, where the adverse party had an opportunity for cross-examination: *Hartis v. Electric R. R.*, 162-236; *Mabe v. Mabe*, 122-552; *Stewart v. Register*, 108-508; *Bryan v. Malloy*, 90-508. It must be shown that there was an action pending and properly constituted in which deposition taken: *Ibid.* Deposition may be introduced whether deponent examined as witness in case being tried or not: *Mabe v. Mabe*, 122-552.

Deposition may be read when witness is nonresident and not present at trial: *Jeffords v. Waterworks Co.*, 157-10—when witness is more than seventy-five miles away, *Mfg. Co. v. Townsend*, 153-244. Deposition of witness adjudged to be unable to talk or remain in court admissible in evidence: *Willeford v. Bailey*, 132-402. Deposition of witness residing in another state may be read in evidence, though witness be in state at time of trial: *Meredith v. Kent*, 1-52. Where deposition of resident taken *de bene esse*, and he leaves state before opening of court and is absent at trial, deposition may be read under section, it being shown that he was out of state and more than 75 miles from place of trial: *Barnhardt v. Smith*, 86-473—and finding by trial judge that witness whose deposition offered was not in state, there being some evidence of such fact, will not be reviewed in supreme court, *Branton v. O'Bryant*, 93-99; *Sparrow v. Blount*, 90-514.

Party does not make person his witness by taking his deposition which he declines to read: *Neil v. Childs*, 32-195. A party offering a deposition in evidence must introduce the whole of it, including cross-examination: *Savings Club v. Bank*, 178-403; *Boney v. Boney*, 161-622.

Where deposition read, opposite party may contradict witness by showing that he had subsequently made different statements: *Roberts v. Collins*, 28-223.

Depositions are admissible in bastardy as in other civil cases: *State v. Hickerson*, 72-421. Deposition in criminal action is competent to be read in favor of one prisoner, though it contains evidence against his codefendant, but judge should instruct jury not to consider latter evidence: *State v. Finley*, 118-1161.

The deposition of an attorney at law cannot be read in evidence except as in the case of other witnesses: *In re Pierce*, 163-247.

Where deposition rejected in limine because name of commissioner not inserted in commission, not incumbent upon party offering deposition to show why same should be admitted: *Womack v. Gross*, 135-378.

In taking deposition, interrogatories not required to be in writing: *Bank v. Bank of Asheville*, 116-815—and where nothing to indicate that deposition does not contain whole of deponent's testimony or that it was not written down at time and in presence of witness, motion to quash should be refused, *Ibid.*

Where it appears from the return of a deposition that it was taken on the day, at the time, and by the person designated, it will be presumed, in the absence of evidence to the contrary, that all things were done rightly, and that it was taken between the hours appointed for taking the same: *Street v. Andrews*, 115-417—and an objection that answers were on a separate sheet attached to the interrogatories, but not inserted at the end of each interrogatory, the whole, however, being above the signature of the commissioner, is untenable, *Ibid.*

For case before amendments to subsection 9, see *Sparrow v. Blount*, 90-514. As bearing upon subsection 9, see *Cunningham v. Cunningham*, 121-413. Subsection merely referred to in *Davenport v. McKee*, 98-506.

1822. Depositions taken in the state to be used in another state:

1. *By whom obtained.* In addition to the other remedies prescribed by law, a party to an action, suit or special proceeding, civil or criminal, pending in a court without the state, either in the United States or any of the possessions thereof, or any foreign country, may obtain, by the proceedings prescribed

by this section, the testimony of a witness and in connection therewith the production of books and papers within the state to be used in the action, suit or special proceeding.

2. *Application filed.* Where a commission to take testimony within the state has been issued from the court in which the action, suit or special proceeding is pending, or where a notice has been given, or any other proceeding has been taken for the purpose of taking the testimony within the state pursuant to the laws of the state or country wherein the court is located, or pursuant to the laws of the United States or any of the possessions thereof, if it is a court of the United States, the person desiring such testimony, or the production of papers and documents, may present a verified petition to any justice of the supreme court or judge of the superior court, stating generally the nature of the action or proceeding in which the testimony is sought to be taken, and that the testimony of the witness is material to the issue presented in such action or proceeding, and he shall set forth the substance of or have annexed to his petition a copy of the commission, order, notice, consent or other authority under which the deposition is taken. In case of an application for a subpoena to compel the production of books or papers, the petition shall specify the particular books or papers, the production of which is sought, and show that such books or papers are in the possession of or under the control of the witness and are material upon the issues presented in the action or special proceeding in which the deposition of the witness is sought to be taken.

3. *Subpœna issued.* Upon the filing of such petition, if the justice of the supreme court or judge of the superior court is satisfied that the application is made in good faith to obtain testimony within the provisions of this section, he shall issue a subpoena to the witness, commanding him to appear before the commissioner named in the commission, or before a commissioner within the state, for the state, territory or foreign country in which the notice was given or the proceeding taken, or before the officer designated in the commission, notice or other paper, by his title or office, at a time and place specified in the subpoena, to testify in the action, suit or special proceeding. Where the subpoena directs the production of books or papers, it shall specify the particular books or papers to be produced, and shall specify whether the witness is required to deliver sworn copies of such books or papers to the commissioner or to produce the original thereof for inspection, but such books and original papers shall not be taken from the witness. This subpoena must be served upon the witness at least two days, or, in case of a subpoena requiring the production of books or papers, at least five days before the day on which the witness is commanded to appear. A party to an action or proceeding in which a deposition is sought to be taken, or a witness subpoenaed to attend and give his testimony, may apply to the court issuing such subpoena to vacate or modify the same.

4. *Witness compelled to attend and testify.* If the witness shall fail to obey the subpoena, or refuse to have an oath administered, or to testify or to produce a book or paper pursuant to a subpoena, or to subscribe his deposition, the justice or judge issuing the subpoena shall, if it is determined that a contempt has been committed, prescribe punishment as in case of a recalcitrant witness. Upon proof by affidavit that a person to whom a subpoena was issued has failed or refused to obey such subpoena, to be duly sworn or affirmed, to testify or

answer a question propounded to him, to produce a book or paper which he has been subpoenaed to produce, or to subscribe to his deposition when correctly taken down, the justice or judge shall grant an order requiring such person to show cause before him, at a time and place specified, why he should not appear, be sworn or affirmed, testify, answer a question propounded, produce a book or paper, or subscribe to the deposition, as the case may be. Such affidavit shall set forth the nature of the action or special proceeding in which the testimony is sought to be taken, and a copy of the pleadings or other papers defining the issues in such action or special proceeding, or the facts to be proved therein. Upon the return of such order to show cause, the justice or judge shall, upon such affidavit and upon the original petition and upon such other facts as shall appear, determine whether such person should be required to appear, be sworn or affirmed, testify, answer the question propounded, produce the books or papers, or subscribe to his deposition, as the case may be, and may prescribe such terms and conditions as shall seem proper. Upon proof of a failure or refusal on the part of any person to comply with any order of the court made upon such determination, the justice or judge shall make an order requiring such person to show cause before him, at a time and place therein specified, why such person should not be punished for the offense as for a contempt. Upon the return of the order to show cause, the questions which arise must be determined as upon a motion. If such failure or refusal is established to the satisfaction of the justice or judge before whom the order to show cause is made returnable, he shall enforce the order and prescribe the punishment as hereinbefore provided.

5. *Deposit for costs required.* The commissioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to cover all costs and charges incident to the taking of the deposition, including such witness fees as are allowed to witnesses in this state for attendance upon the superior courts. From such deposit the commissioner shall retain whatever amount may be due him for services, pay the witness fees and other costs that may have been incurred by reason of taking such deposition, and if any balance remains in his hands, he shall pay the same to the party by whom it was advanced.

Rev., s. 1655; 1903, c. 608.

ART. 9. INSPECTION AND PRODUCTION OF WRITINGS

1823. *Inspection of writings.* The court before which an action is pending, or a judge thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both.

Rev., s. 1656; Code, s. 578; R. C., c. 31, s. 82; R. S., c. 31, s. 86; 1821, c. 1095; C. C. P., s. 331; 1828, c. 7.

Court has power to order production of paper which contains evidence pertinent to issue, and which is in possession or control of adverse party: *Whitten v. Tel. Co.*, 141-361; *Mc-*

Donald v. Carson, 94-497; Austin v. Secrest, 91-214; McLeod v. Bullard, 84-515; Linker v. Benson, 67-150; McGibboney v. Mills, 35-163. Such order is within the discretion of the court: Evans v. R. R., 167-415; Bank v. Newton, 165-363.

The application, supported by affidavit, must show that the writing is pertinent and that an inspection is necessary: Evans v. R. R., 167-415; Justice v. Bank, 83-8. It may be granted before complaint filed when necessary to enable plaintiff to frame complaint: Holt v. Warehouse Co., 116-480; Justice v. Bank, 83-8; but see Branson v. Fentress, 35-165.

An inspection and privilege to photograph a note may be allowed: Bank v. McArthur, 165-374. Order for administrator, who as bank cashier kept intestate's accounts, to produce books of bank and also such bonds as belong to intestate, for inspection of plaintiffs, is valid under section: Comrs. v. Lemly, 85-341. Person will not be ordered to allow inspection of paper-writing if party making request knows contents thereof: Sheek v. Sain, 127-266—and an order allowing others than defendant to inspect paper-writing in possession of plaintiff is erroneous, *Ibid.*

Section does not authorize order that respondent be required to deposit papers in clerk's office: Mills v. Lumber Co., 139-524. Order of judge reversing order of clerk with reference to production of papers is discretionary matter, but motion may be renewed and new order obtained, *Ibid.* Supreme court will not pass upon propriety of discharging rule under section unless facts stated upon which application based: Maxwell v. McDowell, 50-391.

Motion to nonsuit plaintiff for not producing books or papers under section cannot be made unless previous order of court obtained for production of same: Graham v. Hamilton, 25-381.

Due notice is notice sufficient to enable a party to have document present when called for: McDonald v. Carson, 95-377. As to answer to the rule to produce papers, see Ward v. Simmons, 46-404; Fuller v. McMillan, 44-206. Appeal lies from order requiring person to allow inspection of paper-writings: Sheek v. Sain, 127-266. Notice hereunder to party in action is in law notice to his attorney: Banking Co. v. Walker, 121-115.

Section merely referred to in Bernhardt v. Brown, 122-587; Coates Bros. v. Wilkes, 92-387; Morrow v. Allman, 65-510; Murchison v. McLeod, 47-241.

1824. Production of writings. The courts have full power, on motion and due notice thereof given, to require the parties to produce books or writings in their possession or control which contain evidence pertinent to the issue, and if a plaintiff shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion, may give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion as aforesaid, may give judgment against him by default.

Rev., s. 1657; Code, s. 1373; R. C., c. 31, s. 25; 1821, c. 1095; 1828, c. 7.

Court has power to order production of papers which contain evidence pertinent to issue and which are in possession or control of adverse party: Whitten v. Tel. Co., 141-361; McDonald v. Carson, 94-497; McLeod v. Bullard, 84-515; McGibboney v. Mills, 35-163; Scarborough v. Tunnell, 41-103. No affidavit is required, but the order is made upon motion and due notice: McDonald v. Carson, 95-377. Due notice is that which is sufficient to enable the party to have the document present when called for: *Ibid.* Generally if party dwells in another town than that in which trial had, service of notice upon him at place where trial had, or after he has left home to attend court, to produce papers, not sufficient: Beard v. R. R., 143-136.

Contents of paper-writing cannot be proved by parol unless notice has been given to adverse party who has same in possession to produce it on trial: Murchison v. McLeod, 47-239; Ivey v. Cotton Mills, 143-198. As to sufficiency of affidavit accounting for nonproduction of paper ordered to be produced upon trial, see Fuller v. McMillan, 44-206. Court cannot, under this section, order production of papers by defendant on application of plaintiff where no complaint filed: Branson v. Fentress, 35-165.

When papers are produced hereunder they are competent evidence for all legitimate purposes: Austin v. Secrest, 91-214; Fertilizer Co. v. Taylor, 112-141. Court below excluded paper-writing which plaintiff "alleged was a substantial copy of the greater part of his letter to defendant," when defendant was not notified to produce original: Ivey v. Cotton Mills, 143-189.

1825. Admission of genuineness. Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal.

Rev., s. 1658; Code, s. 578; R. C., c. 31, s. 82; R. S., c. 31, s. 86; 1821, c. 1095; 1828, c. 7; C. C. P., s. 331.

Admission in writing under section that instrument is genuine does not preclude comments by counsel as to truth of contents suggested by its appearance, fact of being written by amanuensis, etc.: *Knight v. Houghtalling*, 85-17.

ART. 10. CONFEDERATE CURRENCY

1826. Scale of depreciation. Contracts solvable in Confederate currency may be discharged according to the following scale of depreciation of Confederate currency, the gold dollar being the unit and measure of value, from November first, one thousand eight hundred and sixty-one, to May first, one thousand eight hundred and sixty-five:

<i>Months</i>	1861	1862	1863	1864	1865
January -----	\$----	\$ 1.20	\$ 3.00	\$21.00	\$ 50.00
February -----	----	1.30	3.00	21.00	50.00
March -----	----	1.50	4.00	23.00	60.00
April -----	----	1.50	5.00	20.00	100.00
May -----	----	1.50	5.50	19.00	
June -----	----	1.50	6.50	18.00	
July -----	----	1.50	9.00	21.00	
August -----	----	1.50	14.00	23.00	
September -----	----	2.00	14.00	25.00	
October -----	----	2.00	14.00	26.00	
November -----	1.10	2.50	15.00	30.00	
December -----	1.15	2.50	20.00	----	
December 1st to 10th, inclusive -----	----	----	----	35.00	
December 10th to 20th, inclusive -----	----	----	----	42.00	
December 20th to 30th, inclusive -----	----	----	----	49.00	

This scale applies to the time of contracting and not to the times said debts become due.

Rev., s. 1659; Code, ss. 2495, 2496; 1866, c. 39, s. 1; 1866-7, c. 44.

Cases construing section and amendments thereto: *Coggins v. Flythe*, 113-102; *Young v. Kennedy*, 95-265; *Grant v. Reese*, 94-720; *Depriest v. Patterson*, 92-402; *Jennings v. Copeland*, 90-572; *White v. Jones*, 88-166; *Wilson v. Powell*, 86-230; *Brickell v. Bell*, 84-82; *Melvin v. Stevens*, 84-78; *Derr v. Stubbs*, 83-539; *Green v. Barbee*, 84-69; *Drake v. Drake*, 82-443; *Palmer v. Love*, 82-478; *Boykin v. Barnes*, 76-318; *Holt v. Patterson*, 74-650; *Farmer v. Willard*, 71-284; *Wooten v. Sherrard*, 71-374; *Bryan v. Harrison*, 69-151; *Cable v. Hardin*, 67-472.

NOTE. For evidence in indictment for enticing minors from state, see *Crimes*, s. 4222.

For evidence in cases of hunting by night, see *Game Law*, s. 2125.

For evidence necessary in cases of disposing of mortgaged property, see *Crimes*, s. 4287.

For evidence in indictments for secreting seamen, see *Crimes*, s. 4472.

For students as witnesses against lewd women, see *Crimes*, s. 4353.

For evidence to convict of seduction, see *Crimes*, s. 4339.

For what necessary to allege and prove in prosecutions for selling seed cotton, see Commerce in State, s. 5083.

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CHAPTER 36

FENCES AND STOCK LAW

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ART. 1. LAWFUL FENCES

1827. **Fences to be five feet high.** Every planter shall make a sufficient fence about his cleared ground under cultivation, at least five feet high, unless otherwise provided in this chapter, unless there shall be some navigable stream or deep watercourse that shall be sufficient, instead of such fence, and unless his lands shall be situated within the limits of a county, township or district wherein the stock law may be in force.

Rev., s. 1660; Code, s. 2799; R. C., c. 48, s. 1; 1777, c. 121, s. 2; 1791, c. 354, s. 1.

Proof that plaintiff's fence is a "good, ordinary" one, such as his neighbors have, does not dispense with statutory obligations: *Runyan v. Patterson*, 87-343.

Plaintiff whose fence is insufficient not entitled to damages for defendant's stock breaking through it: *Ibid.*; *Jones v. Witherspoon*, 52-555. What is a sufficient lawful fence, or proper

substitute therefor, is a question of law: *State v. Lamb*, 30-229. Whom the word "planter" herein comprehends, see *State v. Taylor*, 69-543; see *State v. Bell*, 25-506. A pasture field is not "cleared ground under cultivation": *State v. Perry*, 64-305.

Cases referring to section: *State v. Anderson*, 123-708; *State v. Bloodworth*, 94-918; *Farmer v. R. R.*, 88-564; *Roberts v. R. R.*, 88-560; *State v. Staton*, 66-640; *State v. Waters*, 51-276.

1828. Local: Four and a half feet in certain counties. A fence four and one-half feet high is a lawful fence in the counties of Alleghany, Bladen, Brunswick, Burke, Caldwell, Cherokee, Craven, Cumberland, Currituck, Davie, Davidson, Duplin, Harnett, Henderson, Jackson, Lenoir, Perquimans, Randolph, Richmond, Robeson, Rutherford, Sampson, Tyrrell, Yancey, Wake, Washington and Wilkes. This section does not apply to stock-law fences, nor in Tyrrell county to wire fences which are lawful fences if four feet high.

Rev., s. 1661; 1889, c. 175; 1891, c. 36; 1905, c. 333; 1909, cc. 55, 94; P. L. 1911, c. 15.

1829. Local: Four feet in certain counties. A fence four feet high is a lawful fence in the counties of Bertie, Buncombe, Carteret, Hyde, Madison, McDowell, New Hanover, Northampton and Pamlico.

Rev., s. 1662; 1885, c. 304; 1887, c. 66; 1889, c. 390; 1903, cc. 66, 211; 1909, c. 178, s. 2; P. L. Ex. Sess. 1913, c. 48.

1830. Watercourse made lawful fence by county commissioners. Any five electors, residents of the same county, may apply to the board of commissioners of the county, at any regular meeting of the same, by written petition praying that any watercourse, or any part of any watercourse, in the county, may be made a lawful fence. Notice of such petition shall be posted forty days at the courthouse door, by the clerk of the board, before such petition shall be acted upon. Upon the hearing of such petition, the board of county commissioners is authorized to declare any watercourse, or any part of any watercourse to which the petition applies, a lawful fence. And the several acts of the general assembly, declaring certain watercourses, in part or in whole, lawful fences, are so far repealed as to enable the board of commissioners of any county to declare any of such acts, or parts thereof, to be null and void in said county. Any order made under this section shall be of record and signed by the chairman, and may be rescinded by the board of commissioners at any regular meeting.

Rev., s. 1663; Code, ss. 2808, 2809, 2810; 1872-3, c. 98.

See section 1827.

1831. Injury to wire fence forbidden. If any person shall willfully destroy, cut or injure any part of a wire fence or a fence composed partly of wire and partly of wood situated on the land of another, he shall be guilty of a misdemeanor, and upon conviction shall be imprisoned not exceeding thirty days or fined not exceeding fifty dollars.

Rev., s. 3413; 1889, c. 516.

Section not in conflict with section 4317: *State v. Biggers*, 108-760.

ART. 2. DIVISION FENCES

1832. Division fences maintainable jointly. Where two or more persons have lands adjoining, which are either cultivated or used as a pasture for stock, the respective owners of each piece of land shall make and maintain one-half of the fence upon the dividing line.

Rev., s. 1664; Code, s. 2800; 1868-9, c. 275, s. 1.

1833. Remedy against delinquent owner. If any person who is liable to build or keep up a part of any division fence fails at any time to do so, the owner of the adjoining land, after notice, may build or repair the whole, and recover of the delinquent one-half of the cost before any court having jurisdiction.

Rev., s. 1670; Code, s. 2807; 1868-9, c. 275, s. 7.

1834. Fence erected because of changed use of land. If the owner of a tract of land, who chooses neither to cultivate it, to use it as a pasture, nor to permit his stock to run on it, afterwards uses it in either of these ways and does not so enclose his stock that they cannot enter on the lands of an adjoining owner, he shall refund to such owner one-half the value of any fence erected by the latter on the dividing line.

Rev., s. 1665; Code, s. 2801; 1868-9, c. 275, s. 2.

1835. When owner may remove his part of division fence. If any owner of land liable to contribute for the keeping up of a division fence determines neither to cultivate his land nor permit his stock to run thereon, he may give the adjoining owner three months notice of his determination; and in that case, at any time after the expiration of such notice and between the first day of January and the first day of March, but at no other time, he may remove the half of the fence kept up by himself, and shall be no longer liable to keep up the same.

Rev., s. 1671; Code, s. 2802; 1903, c. 20; 1868-9, c. 275, s. 8; 1883, c. 111.

In stock-law territory, landowner may remove his part of division fence without notice: State v. Edmonds, 121-679. **One may remove division fence entirely on his own land:** State v. Watson, 86-626.

1836. Proceeding to value division fence. The value of such fence shall be ascertained as follows: Either owner may summon the other to appear before any justice of the peace of the township in which the dividing line is situate; or if it be situate in more than one township, then before any justice of the peace of any township in which any part of it is situate. In his summons he shall name a certain day, not less than five days after the summons, for the appearance of the defendant; he shall also state the purpose of the summons to be the adjustment of all matters in controversy respecting the dividing fence between the parties. The justice shall hear the complaint and defense. If the facts be found such as entitle either party to demand contribution of the other, the justice shall call on the complainant to name an indifferent person, qualified to act as a juror of the township, and if the complainant refuses the justice shall name one for him. The justice shall then call on the defendant to name an indifferent person, qualified to act as a juror of the township, and if the defendant refuses the justice shall name one for him. The justice shall then name a third indifferent person. These three persons, or any two of them, shall view the premises and decide all matters in controversy between the parties, relating to a fence on the dividing line. They shall make a written report to the justice, who shall give judgment thereon, and for the costs, which shall be paid by the owners of the several pieces of land equally. The jurors shall each receive one dollar per day. The fees of the justice and constable shall be as in other cases. Either party may appeal as provided in other cases of justices' judgments.

Rev., s. 1666; Code, s. 2803; 1868-9, c. 275, s. 3.

1837. Contents of jurors' report. The report of the jurors shall also state the kind of fence which ought to be kept up, and assign to each owner, in such manner as that it may be identified, the part which he shall keep up.

Rev., s. 1667; Code, s. 2804; 1868-9, c. 275, s. 4.

1838. Register to record report. The justice shall return the report, together with a transcript of the proceedings, to the register of deeds of his county for registration. The justice shall collect from the parties the fees of the register, and pay the same to him.

Rev., s. 1668; Code, s. 2805; 1868-9, c. 275, s. 5.

1839. Final judgment on report; effect. The final judgment upon the report of the jurors shall be binding on the owners of the respective lands and their assigns, so long as such ownership shall continue, or until the same shall be set aside, modified or reversed.

Rev., s. 1669; Code, s. 2806; 1868-9, c. 275, s. 6.

1840. Removal of common fence misdemeanor. If any person owning, occupying, cultivating or being in possession of any lands under a common fence protecting the lands, crops or property of others, shall remove such fence or any part thereof during the time in which any crops are growing or being actually cultivated thereon, or property is protected by such fence, and before such crops are harvested, without the consent and permission of such person or persons whose crop or property is protected by such common fence, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, that the provisions of this section shall not apply when ninety days notice of such removal shall have been given to all persons owning, cultivating or in possession of lands surrounded by such common fence, or having property protected thereby, and when thereafter such fence shall be removed between the first day of January and the first day of March following such notice of intended removal.

Rev., s. 3412; Code, s. 2820; 1903, c. 20.

Section cited in *State v. Higgs*, 126-1023; *State v. Dunn*, 95-698.

ART. 3. STOCK LAW

1841. Term "stock" defined. The word "stock" in this chapter shall be construed to mean horses, mules, colts, cows, calves, sheep, goats, jennets, and all neat cattle, swine and geese.

Rev., s. 1681; Code, s. 2822.

1842. County elections. Upon the written application of one-fifth of the qualified voters of any county made to the board of commissioners thereof, it shall be the duty of the commissioners from time to time to submit the question of "stock law" or "no stock law" to the qualified voters of said county. And if at any such election a majority of the votes cast is in favor of "stock law," then the provisions of this chapter relating to the stock law shall be in force over the whole of said county.

Rev., s. 1672; Code, s. 2812.

Local law as to Macon county, see P. L. 1911, c. 41.

The provisions of this article are not in conflict with the principle of local self-government: *Smalley v. Comrs.*, 122-607. Adoption of stock law does not abrogate a general statute or

rule of law: *Shepard v. R. R.*, 140-391. Power of legislature to fix stock-law territory with or without a fence: *Archer v. Joyner*, 173-75. Persons already in stock-law territory may petition in new territory: *Perry v. Comrs.*, 130-558; *Smalley v. Comrs.*, 122-607. Fences in stock-law territory are not a necessary expense, and require popular vote: *Faison v. Comrs.*, 171-411; *Keith v. Lockhart*, 171-451. "Qualified voters" hereunder are those who have lawfully registered and paid their poll tax: *Pace v. Raleigh*, 140-65; see *Clark v. Statesville*, 139-490; *Harris v. Scarborough*, 110-232; *Smith v. Wilmington*, 98-343; *Wood v. Oxford*, 97-233; *McDowell v. Construction Co.*, 96-514; *Markham v. Manning*, 96-132; *Duke v. Brown*, 96-127; *Southerland v. Goldsboro*, 96-49.

Commissioners must do all things necessary to carry this chapter into effect, but need not personally superintend work: *State v. Comrs.*, 97-388; *Coor v. Rogers*, 97-146.

Findings by commissioners of result of election is final: *Cain v. Comrs.*, 86-8; *Norment v. Charlotte*, 85-387; *Simpson v. Comrs.*, 84-158.

1843. Township elections. Upon the written application of one-fifth of the qualified voters in any township, made to the board of commissioners of the county wherein the township is situated, it shall be the duty of the commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of the township; and if at any such township election a majority of the votes cast is in favor of "stock law," then the stock law shall be in force in said township.

Rev., s. 1673; Code, s. 2813.

See section 1842.

1844. District elections. Upon the written application of one-fifth of the qualified voters of any district or territory, whether the boundaries of said district follow township lines or not, made to the board of county commissioners at any time, and setting forth well-defined boundaries of the district, it shall be the duty of the commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of the district, and if at any such election a majority of the votes cast is in favor of "stock law," then the stock law shall be in force over the whole of said district.

Rev., s. 1674; Code, s. 2814.

For local law as to Moore county, see 1907, c. 659.

See annotations under section 1842. Commissioners cannot consolidate several adjoining districts and provide for one boundary fence and assess uniform tax on all real property within boundary to pay for fence: *Bradshaw v. Comrs.*, 92-278.

As to boundaries being sufficiently defined in application, see *Newsom v. Earnheart*, 86-391.

1845. Local: How territory released from stock law. Upon the written application of a majority of the qualified voters in any district, territory or well-defined boundary, made to the board of county commissioners, at any time, setting forth that the citizens of said district, territory or boundary are within the stock-law boundary, and are desirous of being released from the laws governing stock-law territory, it shall be the duty of the commissioners to submit the question of "no stock law" or "stock law" to the qualified voters of said district or territory, and if at any such election a majority of the votes cast is against stock law, then the said district or territory shall be released and free from the operation of the stock law: Provided, the expense incurred in changing the fence in such boundary, district or territory so released be paid by the property holders in such boundary, district or territory, and that the commissioners of the county levy the tax to pay the same on the property holders of such boundary, district or territory so released, but they shall not be further liable for keeping up said stock-law fence: Provided, that in any territory where stock law

now prevails no election against stock law shall be held in less than two years from the date of the election adopting stock law in said territory: Provided further, that if "no stock law" should carry, it shall not take effect until six months from the date of its ratification: Provided still further, that neither "stock law" nor "no stock law" shall take effect during crop season.

This section applies only to the counties of Cherokee, Clay, Graham, Jackson, Macon, Mitchell, Pender, Randolph, Swain, and to Hogback Township in Transylvania County.

Rev., s. 1675; 1895, c. 35; 1897, cc. 461, 516; 1903, c. 60; 1907, c. 874, s. 3; P. L. 1911, cc. 265, 469; P. L. 1915, c. 379; P. L. 1917, c. 662.

Does not provide for an assessment, but for a tax, to pay expense of changing fence: *Hawes v. Comrs.*, 175-268. Persons withdrawing from stock-law territory must build a fence to protect the territory remaining: *Marshburn v. Jones*, 176-516.

1846. How election conducted. Every election under this chapter shall be held and conducted under the same rules and regulations and according to the same penalties provided by law for the election of members of the general assembly: Provided, no such county, township or district election shall be held oftener than once in any one year, although the boundaries of such district may not be the same.

Rev., s. 1676; Code, s. 2815.

1847. Powers and duties of county commissioners. The board of commissioners of the county may provide for a new registration of voters, designate places for holding elections, and make all regulations, and do all other things necessary to carry into effect the provisions of this chapter relating to the stock law.

Rev., s. 1677; Code, s. 2826.

See chapter Elections. See, also, *Coor v. Rogers*, 97-146; *State v. Comrs.*, 97-391.

1848. Admission of lands adjoining stock-law territory. Any person, or any number of persons, owning land in a county, district or township which shall not adopt the stock law, or adjoining any county, township or district where a stock law prevails, may have his or their lands enclosed within any fence built in pursuance of this chapter. All such adjacent lands, when so enclosed, shall be subject to all the provisions of law with respect to livestock running at large within the original district so enclosed, as if it were a part of the township, county or district with which it is hereby authorized to be enclosed. Any number of landowners, whose lands are contiguous, may at any time build a common fence around all their lands, with gates across all public highways; and no livestock shall run at large within any such enclosure, under the pains and penalties prescribed in this chapter.

Rev., s. 1678; Code, s. 2821.

Referred to in *Edwards v. Supervisors*, 127-63.

1849. Allowing stock at large in stock-law territory forbidden. If any person shall allow his livestock to run at large within the limits of any county, township or district in which a stock law prevails or shall prevail pursuant to law, he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., s. 3319; Code, s. 2811; 1889, c. 504.

Section cited in *Daniels v. Homer*, 139-252; *State v. Brigman*, 94-888; compare *Newsom v. Earnheart*, 86-391.

1850. Impounding stock at large in territory. Any person may take up any livestock running at large within any township or district wherein the stock law shall be in force and impound the same; and such impounder may demand fifty cents for each animal so taken up, and twenty-five cents for each animal for every day such stock is kept impounded, and may retain the same, with the right to use it under proper care, until all legal charges for impounding said stock and for damages caused by the same are paid, the damages to be ascertained by two disinterested freeholders, to be selected by the owner and the impounder, the freeholders to select an umpire, if they cannot agree, and their decision to be final.

Rev., s. 1679; Code, s. 2816.

For local laws as to stock or fowls at large, see Ashe. 1909, c. 132 (livestock, geese and turkeys).

This section is constitutional: *Hogan v. Brown*, 125-251—and it relieves planter from keeping lawful fence, *State v. Anderson*, 123-705. Resident owners may be required to pay more than nonresident owners for stock running at large: *Broadfoot v. Fayetteville*, 121-418. A town ordinance may apply to stock of nonresidents: *Rose v. Hardie*, 98-44. Stock law does not justify wilful injury to stock running at large: *State v. Brigman*, 94-888. Whether stock can be impounded when owner is in pursuit: *State v. Hunter*, 118-1196.

1851. Owner notified; sale of stock; application of proceeds. If the owner of such stock be known to the impounder he shall immediately inform the owner where his stock is impounded, and if the owner shall for two days after such notice willfully refuse or neglect to redeem his stock, then the impounder, after ten days written notice posted at three or more public places within the township where the stock is impounded, and describing the stock and stating place, day and hour of sale, or if the owner be unknown, after twenty days notice in the same manner, and also at the courthouse door, shall sell the stock at public auction, and apply the proceeds in accordance with the preceding and succeeding sections, and the balance he shall turn over to the owner if known, and if the owner be not known, to the county commissioners for the use of the school fund of the district wherein said stock was taken up and impounded, subject in their hands for six months to the call of the legally entitled owner.

Rev., s. 1680; Code, s. 2817.

Section constitutional: *Hogan v. Brown*, 125-251. Proceeding hereunder is in rem: *Ibid.* No sale without notice: *Daniels v. Homer*, 139-252.

1852. Impounding unlawfully misdemeanor. If any person shall willfully and unlawfully toll, drive, or in any way move any other person's horse, mule, ass, neat cattle, sheep, hog, goat, or dog, from the range or elsewhere, into any stock-law district, or into the limits of any city or town having the right to impound or destroy the same, with intent to secure the poundage or other penalty, or with intent to injure the owner of such animal, or to require him to pay any poundage or penalty on account of such animal, or for hire or reward, he shall be guilty of a misdemeanor. If any person shall unlawfully and willfully remove any animal above named from any lawful inclosure, with intent to injure the owner, he shall be guilty of a misdemeanor.

Rev., s. 3309; 1895, c. 141, s. 1.

1853. Illegally releasing or receiving impounded stock misdemeanor. If any person unlawfully receives or releases any impounded stock, or unlawfully

attempts to do so, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 3310; Code, s. 2819; 1889, c. 504.

See generally: *State v. Hunter*, 118-1196.

1854. Impounded stock to be fed and watered. If any person shall impound, or cause to be impounded in any pound or other place, any animal, and shall fail to supply to the same during such confinement a sufficient quantity of good and wholesome food and water, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 3311; Code, s. 2484; 1891, c. 65; 1881, c. 368, s. 3.

1855. Right to feed impounded stock; owner liable. In case any animal is at any time impounded as aforesaid, and shall continue to be without necessary food and water for more than twelve successive hours, it shall be lawful for any person from time to time, and as often as it shall be necessary, to enter into and upon any such pound or other place in which any animal shall be so confined, and to supply it with necessary food and water so long as it shall remain so confined. Such person shall not be liable to any action for such entry, and the reasonable cost of such food and water may be collected by him of the owner of such animal.

Rev., s. 1682; Code, s. 2485; 1881, c. 368, s. 4.

1856. Injuring lands in stock-law territory by riding or driving. If any person, by riding or driving upon the lands of another without permission, or while driving livestock along any roadway, public or private, shall willfully, deliberately or recklessly do or permit to be done any actual injury to said land, or to the crops or other property growing or being thereon, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. But no such offender shall be proceeded against unless the party injured, or some one in his behalf, shall cause a warrant to be issued or an indictment to be found against the party offending, within fifteen days after the commission of the offense.

Rev., s. 3321; Code, s. 2828; 1889, c. 118.

1857. Owner in stock-law territory allowing stock outside. If any person having stock within the limits of a stock-law territory shall allow the same to run at large beyond the boundaries of said territory, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that a person owning or renting land outside of the stock-law territory may turn his stock upon the said land outside of the stock-law district.

Rev., s. 3322; Code, s. 2827; 1889, c. 266; 1885, c. 371.

Compare *Roberts v. R. R.*, 88-560; *State v. Comrs.*, 97-388.

1858. Stock-law territory to be fenced around. The stock law authorized by this chapter shall not be enforced until a fence has been erected around any territory proposed to be enclosed, with gates on all the public roads passing into and going out of said territory: Provided, all streams which are or may be

declared to be lawful fences shall be sufficient boundaries, in lieu of fences: Provided further, no fence shall be erected along the boundary lines of any county, township or district where a stock law prevails.

Rev., s. 1683; Code, s. 2823.

1859. Commissioners may declare natural barrier sufficient fence. In any county in the state in which or in any portion of which the stock law is now in force or may hereafter be adopted, the county commissioners of said county in their discretion may declare any watercourse, mountain, mountain range or parts of same, and also other natural and sufficient obstruction along the line of said stock-law territory to be and constitute a sufficient stock-law fence, and in that event such watercourse, mountain, mountain range or part thereof and obstructions so declared by said commissioners shall be and constitute a lawful fence to all intents and purposes.

Rev., s. 1684; 1901, c. 542.

The county commissioners can declare a mountain range, a creek or other natural line as the limit within which the law shall operate: *State v. Mathis*, 149-546.

1860. Assessment of landowners for fence. For the purpose of building stock-law fences, the board of commissioners of the county may levy and collect a special assessment upon all real property, taxable by the state and county, within the county, township or district which may adopt the stock law, but no such assessment shall be greater than one-fourth of one per centum on the value of said property.

Rev., s. 1685; Code, s. 2824.

Excepted district cannot be taxed for a common county fence: *Harper v. Comrs.*, 133-106. Local assessments for local improvements are constitutional: *Harper v. Comrs.*, 133-110; *Comrs. v. R. R.*, 133-216; *Hilliard v. Asheville*, 118-845; *Raleigh v. Peace*, 110-32; *Putt v. Comrs.*, 94-709; *Busbee v. Comrs.*, 93-143; *Comrs. v. Comrs.*, 92-180; *Shuford v. Comrs.*, 86-552; *Cain v. Comrs.*, 86-8. This is not a tax within the constitutional prohibition as to uniformity: *Harper v. Comrs.*, 133-110; *Shuford v. Comrs.*, 86-552.

The provision of this section applies both to cases where adoption of stock law is dependent on popular vote and where it is made absolute by act of general assembly: *Busbee v. Comrs.*, 93-143. This assessment is limited to the territory adopting the stock law: *Hawes v. Comrs.*, 175-268.

1861. Condemnation of land for fence. If the owner of any land objects to the building of any fence herein allowed, his land, not exceeding twenty feet in width, shall be condemned for the fenceway in accordance with the procedure specified in the article Condemnation Proceedings under the chapter Eminent Domain.

Rev., s. 1686; Code, s. 2825.

No appeal lies from order appointing commissioners: *Comrs. v. Cook*, 86-18.

1862. Injury to stock-law fences misdemeanor in stock-law territory. If any person willfully tears down, or in any manner breaks a fence or gate, or leaves open a gate erected around a stock-law territory, or willfully breaks any enclosure within any township, district or county where a stock law is in force, and wherein any stock is confined, so that the same may escape therefrom, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 3411; Code, s. 2820; 1889, c. 504.

Section cited in *State v. Dunn*, 95-698; *State v. Higgs*, 126-1023.

1863. Impounder violating stock law misdemeanor. If any impounder willfully misappropriates money that he may receive from sale of stock impounded, or in any manner willfully violates any provisions of the law in regard thereto, he shall be guilty of a misdemeanor, and on conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 3312; Code, s. 2820; 1889, c. 504.

Section cited in *State v. Higgs*, 126-1023; *State v. Dunn*, 95-698.

1864. Local: Depredations of domestic fowls in certain counties. In the counties and parts of counties hereinafter enumerated, where the stock law prevails, it shall be unlawful for any person to permit any turkeys, geese, chickens, ducks or other domestic fowls to run at large, after being notified as provided in this section, on the lands of any other person while such lands are under cultivation in any kind of grain or feedstuff, or while being used for gardens or ornamental purposes.

Any person so permitting his fowls to run at large, after having been notified to keep them up, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding five dollars or imprisoned not exceeding five days, or if it shall appear to any justice of the peace that after two days notice any person persists in allowing his fowls to run at large and fails or refuses to keep them upon his own premises, then the said justice of the peace may, in his discretion, order any sheriff, constable or other officer to kill said fowls when so depredating.

Alamance, 1901, c. 645.

Bladen, 1901, c. 645.

Buncombe, 1907, c. 508.

Burke, 1907, c. 508.

Cabarrus, 1901, c. 645.

Caldwell, P. L. 1911, c. 244.

Cleveland, 1901, c. 645.

Currituck, 1901, c. 645.

Davidson, P. L. 1911, c. 244.

Duplin, 1908, c. 73.

Edgecombe, 1901, c. 645.

Gaston, P. L. 1919, c. 31.

Graham, 1901, c. 645.

Granville, P. L. 1911, c. 244.

Guilford, 1901, c. 645.

Henderson, P. L. 1911, c. 636.

Iredell, in Turnersburg Township, 1901, c. 645; in town of Statesville, 1903, c. 470.

Jackson, P. L. 1919, c. 31.

Lee, P. L. 1913, c. 725.

Lenoir, P. L. 1911, c. 244.

Macon, P. L. 1919, c. 31.

Mecklenburg, 1901, c. 645.

Onslow, P. L. 1911, c. 244.

Orange, 1903, c. 115.

Pasquotank, 1901, c. 645.

Rowan, 1909, c. 847.

Surry, 1901, c. 645.

Swain, P. L. 1911, c. 244.

Transylvania, P. L. 1911, c. 244.

Vance, 1909, c. 619.

Wayne, P. L. 1911, c. 244.

NOTE.—Statutes more or less similar to the above exist in the following counties:

Catawba, 1903, c. 482.

Chatham, 1903, c. 482.

Davie, P. L. 1915, c. 167.

Forsyth, P. L. 1915, c. 39.

Greene, 1907, c. 917; 1908, c. 78.

Lincoln, P. L. 1915, c. 312.

McDowell, P. L. 1917, c. 328.

Pitt, P. L. 1915, c. 462.

Randolph, P. L. 1913, c. 645.

Robeson, P. L. 1917, c. 662.

Scotland, P. L. 1915, c. 714.

Wake, P. L. 1915, c. 378.

Yadkin, P. L. 1915, c. 39; P. L. 1917, c. 321 (Deep Creek Township excepted).

Yancey, P. L. 1913, c. 739.

CHAPTER 37

FISH AND FISHERIES

SUBCHAPTER I. FISHERIES COMMISSION BOARD ACT

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- 1865. Fish, fishing, fisheries defined.
- 1866. Administrative agencies under former laws conformed to present laws.
- 1867. State jurisdiction over fisheries.
- 1868. Edible fish used only as food.

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- 1869. Creation and organization of board.
- 1870. Fish commissioners and assistant commissioners.
- 1871. Fish inspectors.
- 1872. Board and officers to be free from financial interests in fisheries.
- 1873. Clerical force and office.
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- 1879. Regulations affecting existing interests not effective for two years.
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- 1892. License tax on dealers and packers.
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- 1894. Printed regulations furnished dealers.
- 1895. Dealers to keep and furnish statistics.
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- 1897. Explosives, drugs, and poisons prohibited.
- 1898. Possession of fish killed by explosives as evidence.
- 1899. Discharge of deleterious matter into waters prohibited.
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- 1901. Violation of fisheries law misdemeanor; licenses forfeited.

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ART. 5. SHELLFISH; GENERAL LAWS.

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- 1902. Oyster bed defined.

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- 1903. Fisheries commissioner to lease.
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- 1905. Areas leased in different waters.
- 1906. Prerequisites for lease; application; deposit; survey; location.
- 1907. Execution of lease; notice and filing; marking and planting.
- 1908. Term and rental.

- 1909. Nature of lessee's rights; assignment and inheritance.
- 1910. Renewal of lease.
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- 1912. Contest over grant of lease; time for contest; decision; appeal.

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- 1913. License to catch oysters; oath of applicant.
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- 1915. Licensee to be resident, not interested in oyster boat.
- 1916. Tax on oysters exported from state.
- 1917. Oyster dealer's license.
- 1918. Monthly report of licenses to be filed.
- 1919. Oyster beds real property for taxation, etc.

Part 4. Catching and Dealing in Oysters Regulated.

- 1920. Close season for oysters; exceptions.
- 1921. Oyster dealers to keep records.
- 1922. Oyster measure.
- 1923. Local modification as to oyster measure in New Hanover, Onslow, and Pender counties.
- 1924. Illegal measures prohibited.
- 1925. Dredging regulated as to territory and season.
- 1926. Illegal dredging prohibited; evidence.
- 1927. Dredging prohibited in certain waters of Pamlico sound; exception.
- 1928. Culling required; size limit.
- 1929. Local modification as to culling oysters in New Hanover, Onslow, and Pender counties.
- 1930. Taking uncultured oysters for planting permitted to residents.
- 1931. Uncultured oysters seized and scattered on public grounds.
- 1932. Shells to be bought and scattered on public beds.

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- 1933. Perjury in application for oyster license.
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- 1936. Use of unlicensed boat in catching oysters.
- 1937. Failure to stop and show license.
- 1938. Displaying false number on boat.
- 1939. Catching oysters for lime.
- 1940. Catching oysters Sunday or at night.
- 1941. Unloading at factory Sunday or at night.
- 1942. Oyster-laden boats in canals regulated.
- 1943. Sale or purchase of uncultured oysters.
- 1944. Boat captain's purchase of uncultured oysters.
- 1945. Larceny from private grounds.
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- 1947. New Hanover, Onslow, and Pender: Close season for oysters.
- 1948. Brunswick, New Hanover, and Pender: Clams protected.
- 1949. Brunswick: Clams; size limit.
- 1950. Brunswick: Fire on oyster beds; raking.
- 1951. Carteret: Clams in Newport river.
- 1952. New Hanover: Catching oysters in Myrtle Grove sound.
- 1953. New Hanover: Clams in Masonboro sound.
- 1954. Onslow: Catching oysters and clams in certain waters.
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- 1958. Diamond-back terrapin protected.
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- 1961. Salt fish sold by weight; marked on package.

- 1962. Salt mullet; special marking.
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- 1964. Right of fishing in grantee of land under water.
- 1965. Seines prohibited to nonresidents; exceptions.
- 1966. Menhaden fishing forbidden to nonresidents.
- 1967. Menhaden fishing with nets regulated.
- 1968. Poisoning streams.
- 1969. Fishing offal in navigable waters.
- 1970. Sunday fishing.
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- 1974. Obstructing passage of fish in streams.
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ART. 10. COMMERCIAL FISHING; LOCAL REGULATIONS.

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- 1977. Inlets; nets in, regulated.
- 1978. Pamlico and sounds to the north: Net stakes to be removed.
- 1979. Pamlico, Croatan, and Albemarle sounds and inlets: Fishing regulated.
- 1980. Albemarle and Coatan sounds and inlets: Drift nets.
- 1981. Albemarle sound and tributaries: Nets and net stakes.
- 1982. Albemarle sound in certain parts: Gill nets.
- 1983. Albemarle sound off Tyrrell county: Gill nets.
- 1984. Albemarle sound in certain parts: Anchor, drift, and stake nets.
- 1985. Albemarle sound: Nets near wharves of Norfolk and Southern railroad bridge.
- 1986. Croatan marshes: Nets and fishing apparatus near.
- 1987. Currituck sound: Nets used regulated.
- 1988. Pamlico sound: Nets to be set north and south.
- 1989. Pamlico sound—tributaries, rivers, and waters of Carteret county: Nets regulated.
- 1990. Pamlico sound—waters of Pamlico county: Nets regulated.
- 1991. Roanoke sound: Nets in.

Part 2. Streams.

- 1992. Black river: Fishing regulated.
- 1993. Black river and Mingo creek: Only hook and line.
- 1994. Black river in Bladen, Cumberland, and Sampson: Close season.
- 1995. Black river and Six runs: Obstructing channel; lay days.
- 1996. Cape Fear river: Nonresidents may not fish.
- 1997. Cape Fear river: Nets and seines regulated.
- 1998. Cape Fear river: Fish traps regulated.
- 1999. Cape Fear and Northeast rivers: Nets in.
- 2000. Cape Fear, Northeast, and Black rivers: Obstructing fish; fishing between Saturday evening and Monday evening.
- 2001. Cape Fear river, northeast branch: Seines, nets, and traps.
- 2002. Goose and Oyster creeks: Drag or haul nets unlawful.
- 2003. Little river: Obstructions in.
- 2004. Lumber river: Close season for traps in.
- 2005. Lumber river and waters of Robeson, Columbus, Hoke, and Scotland: Fishing regulated.
- 2006. Moccasin river and Big and Little Contentnea creeks: Obstructions and nets in.
- 2007. Neuse and Trent rivers: Stationary, set, or dutch nets.
- 2008. Neuse and Trent rivers: Size of seine bars regulated.
- 2009. Neuse river: Obstructions in, by dams, nets, etc.
- 2010. Neuse river: Certain nets regulated.
- 2011. Pamlico and Tar rivers: Dutch, etc., nets prohibited generally.
- 2012. Pamlico and Tar rivers: Lay days.
- 2013. Pamlico river: Dutch, etc., nets allowed under regulation.
- 2014. Perquimans river: Nets in, regulated.
- 2015. Roanoke river: Drift nets in, regulated.
- 2016. Scuppernong river and Lake Phelps: Nets in, regulated.
- 2017. Scuppernong river: Nets obstructing channel or near bridges.

2018. Scuppernong river and tributaries: Obstructions and nets in.
 2019. Scuppernong river: Nets near Norfolk and Southern railroad bridge.
 2020. Trent river: Use of nets regulated.

Part 3. Counties.

2021. Counties on Pamlico sound: Size of fish caught or sold.
 2022. Brunswick, New Hanover, and Pender: Size of bars in nets.
 2023. Brunswick, Cumberland, New Hanover, Sampson, and Harnett: Close season for fish.
 2024. New Hanover, Onslow, and Pender: Purse nets and seines for food fish.
 2025. Beaufort: Nets regulated in certain creeks.
 2026. Beaufort: Fishing by residents in Bath creek.
 2027. Beaufort: Certain nets in Blount's creek.
 2028. Beaufort: Certain nets in Durham and Lee's creeks.
 2029. Beaufort: Certain nets in Nixon's creek.
 2030. Beaufort: Certain nets in North creek.
 2031. Bladen: Manner of fishing in Brown marsh and Horseshoe swamps.
 2032. Bladen: White lake; hook and line only.
 2033. Brunswick: Mullet fishing; purse nets.
 2034. Brunswick: Nonresidents must have license.
 2035. Carteret: Cedar Island township; hauling nets with power.
 2036. Carteret: Use of dutch nets.
 2037. Carteret: Size of seine mesh.
 2038. Carteret: Length of nets.
 2039. Carteret: Joining nets together.
 2040. Carteret: Obstructions to fishing prohibited.
 2041. Carteret: Pound nets in Neuse river.
 2042. Carteret: Purse nets for mullet prohibited.
 2043. Carteret and Onslow: Purse nets prohibited for food fish.
 2044. Chatham: Fishways in Haw river.
 2045. Clay: Fishing regulated.
 2046. Columbus: Lumber river; fishing regulated.
 2047. Columbus: Traps and nets in Porter swamp.
 2048. Currituck county: Fishing in Atlantic township.
 2049. Currituck county: Dutch nets in Currituck sound.
 2050. Currituck county: Shipping or selling fish.
 2051. Currituck county: Right of search.
 2052. Dare: Dutch and pound nets prohibited.
 2053. Dare: Fishing in Kitty Hawk bay regulated.
 2054. Greene: Size of mesh; fishing on another's land.
 2055. Hertford and Northampton: Fish in Potecasi creek protected.
 2056. Hyde: Pound and dutch nets prohibited.
 2057. Hyde: Drag nets prohibited in Rose bay.
 2058. Hyde: Drag nets prohibited in Slade's river and Fortescue creek.
 2059. Hyde: Slade's river; nets in.
 2060. New Hanover: Certain hand nets allowed.
 2061. New Hanover: Nets in Masonboro and Myrtle Grove sounds.
 2062. New Hanover: Seines in Atlantic ocean.
 2063. Onslow: Obstructions in Cypress swamp and Haw's run.
 2064. Onslow: Stop nets prohibited.
 2065. Onslow: Nets and seines in ocean regulated.
 2066. Onslow: Seines and nets in New river.
 2067. Pamlico county: Use of nets regulated.
 2068. Pamlico county: Nets in Dawson's creek.
 2069. Pamlico county: Drag nets prohibited in certain streams.
 2070. Pasquotank county: Pound or fyke nets in Pasquotank river.
 2071. Pasquotank county: Nets in Hatley creek.
 2072. Pasquotank and Perquimans: Gill nets allowed.
 2073. Robeson: Fishing in Lumber river.
 2074. Robeson: Nets and traps; closed season; limit catch.
 2075. Sampson: Fishing regulated.
 2076. Tyrrell: Alligator river and Frying Pan creek; nets in.
 2077. Wayne: Nets and traps in Neuse and Little rivers.

SUBCHAPTER IV. NONCOMMERCIAL FISHING

ART. 11. GENERAL REGULATIONS.

2078. Trout protected; close season.

SUBCHAPTER I. FISHERIES COMMISSION BOARD ACT

ART. 1. DEFINITIONS AND GENERAL PROVISIONS

1865. Fish, fishing, fisheries, defined. Wherever the word "fish" or "fishes," as a substantive, occurs in this subchapter, it shall be construed to include porpoises and other marine mammals, fishes, mollusca, and crustaceans, and wherever the word "fishing," or "fisheries" occurs it shall be construed to include all operations involved in using, setting or operating apparatus employed in killing or taking the said animals or in transporting and preparing them for market.

1915, c. 84, s. 24.

1866. Administrative agencies under former laws conformed to present law. All acts relating to the fisheries of North Carolina are hereby amended so that the words "shellfish commissioner," "oyster commissioner," or "fish commissioner" shall read "fisheries commissioner," and the words "shellfish commission" shall read "fisheries commission."

1915, c. 84, s. 25; 1917, c. 290, s. 9.

1867. State jurisdiction over fisheries. The state of North Carolina shall have exclusive jurisdiction and control over all the fisheries of the state wherever located.

1915, c. 84, s. 18; 1917, c. 290, s. 9.

For legislative consent to federal regulation of fish on certain federal lands, see chapter Game Laws, s. 2099.

1868. Edible fish used only as food. Any person, firm or corporation who catches or causes to be caught any edible fish in the waters of the state of North Carolina for any other purpose than as food, and any person, firm or corporation who shall use any edible fish for fertilizing purposes shall be guilty of a misdemeanor and fined not less than fifty dollars or imprisoned not less than thirty days.

1915, c. 84, s. 23.

ART. 2. FISHERIES COMMISSION BOARD; ORGANIZATION,
OFFICERS, SUPPORT

1869. Creation and organization of board. For the purpose of enforcing the laws relating to all fish, there is hereby created a fisheries commission, which shall consist of five members appointed by the governor, at least three of whom shall be from the several fishing districts of the state, and shall have a practical knowledge or be familiar with the fishing industry, who shall be denominated the "fisheries commission board."

The members shall be appointed as follows: two, whose terms of office shall expire on the first day of June, nineteen hundred and seventeen; and three, one of whom shall be a member of the minority party, whose term of office shall expire on the first day of June, nineteen hundred and nineteen; and their successors shall be appointed by the governor for a term of four years each thereafter.

The five members shall receive four dollars per day each and traveling expenses while attending meetings of the board: Provided, the per diem and expenses shall not exceed two hundred and fifty dollars each per annum.

1915, c. 84, s. 1; 1917, c. 290, s. 1.

1870. Fish commissioner and assistant commissioners. Said board shall appoint a fisheries commissioner within thirty days after the passage of this act, and the said commissioner shall be responsible to the fisheries commission board for carrying out the duties of his office, and shall make semiannual reports to them at such time as they may require. The term of office of said commissioner and his successor in office shall be four years or until his successor is appointed and qualified, and in case of vacancy in the office the appointment shall be to fill the vacancy. The said commissioner may appoint two assistants by and with the consent of the fisheries commission board, who shall hold said offices at the pleasure of the fisheries commissioner and the board, whose duties shall be prescribed by the fisheries commissioner. The aforesaid commissioner and assistant commissioners shall receive such pay as the fisheries commission board shall determine. During the absence of the commissioner, or his inability to act, the fisheries commission board shall appoint one of the assistant commissioners to have and exercise all the powers of the commissioner. The commissioner and assistant commissioners shall each execute and file with the secretary of state a bond, payable to the state of North Carolina, in the sum of five thousand dollars for the commissioner and twenty-five hundred dollars each for each of the assistant commissioners, with sureties to be approved by the secretary of state, conditioned for the faithful performance of their duties and to account for and pay over, pursuant to law, all moneys received by them in their office. The fisheries commissioner and assistant commissioners shall take and subscribe an oath to support the constitution, and for the faithful performance of the duties of his office, which oaths shall be filed with their bonds. The assistant commissioners may be removed for cause by the commissioner, who may appoint their successors.

1915, c. 84, s. 1; 1917, c. 290, s. 1.

1871. Fish inspectors. The fisheries commissioner may appoint, with the approval of the fisheries commission board, inspectors in each county having fisheries under his jurisdiction, who will assist him at such times as he may require. The said inspector shall serve under the direction of the commissioner, receiving compensation not to exceed three dollars per day and necessary expenses while in actual service.

1915, c. 84, s. 2.

1872. Board and officers to be free from financial interest in fisheries. The members of the fisheries commission board, the fisheries commissioner, assistant commissioners, and inspectors shall not be financially interested in any fishing industry in North Carolina.

1915, c. 84, s. 8.

1873. Clerical force and office. The fisheries commissioner shall rent and equip an office, which will be adequate for the business of the commission, in some town conveniently located to the maritime fisheries, and he is authorized to

employ such clerks and other employees as may be necessary for the proper carrying on of the work of his office, by and with the consent of the fisheries commission board.

1915, c. 84, s. 3.

1874. Boats and equipment. The fisheries commissioner is authorized, by and with the consent of the fisheries commission board, to purchase or rent such boats, nets, and other equipment as may be necessary to enable him and his assistants to fulfill the duties specified in this chapter.

1915, c. 84, s. 4.

1875. "Fisheries commission fund" derived from imposts. All license fees, taxes, rentals of bottoms for oyster or clam cultivation and other imposts upon the fisheries, in whatever manner collected, shall, except as otherwise provided in this chapter, be deposited with the state treasurer to the credit of the fisheries commission fund, to be drawn upon as directed by the fisheries commission board.

1915, c. 84, s. 9.

1876. Temporary and annual appropriations. There is hereby appropriated out of the general treasury as a supplementary fund the sum of ten thousand dollars annually for two years, or as much thereof as may be needed, to the fisheries commission to carry out the work of the commission in the protection and promotion of the fisheries of the state, this sum to be repaid to the general treasury by the fisheries commission when it shall be on a self-sustaining basis; said sum to be used and expended as directed by the fisheries commission board, and any part of it that may be required may be used for purchasing boats and other equipment necessary to carry out the work of the commission.

The sum of ten thousand dollars is appropriated annually for the support and maintenance of the fisheries commission.

1915, c. 84, s. 16; 1917, c. 193, s. 26.

1877. Succeeds fish commission and oyster commission as to funds, property, and debts. Any money that may be in the state treasury to the credit of the fish commission and oyster commission fund on May first, 1915, shall be transferred by the state treasurer to the credit of the fisheries commission fund, and the fisheries commission board is authorized to pay out of the fisheries commission fund all just claims that may be outstanding against the fish or oyster commissions.

All boats, fishing and oyster tackle, office supplies, stationery, and all other supplies of whatever character belonging to the fish commission and oyster commission shall be transferred to the fisheries commissioner for the use of the fisheries commission.

1915, c. 84, ss. 16, 17.

ART. 3. POWERS AND DUTIES OF BOARD AND OFFICERS

1878. Regulations as to fish, fishing, and fisheries made by board. The fisheries commission board is hereby authorized to regulate, prohibit, or restrict in time, place, character, or dimensions, the use of nets, appliances, apparatus, or means employed in taking or killing fish; to regulate the seasons at which the various species of fish may be taken in the several waters of the state, and to

prescribe the minimum sizes of fish which may be taken in the said several waters of the state, or which may be bought, sold, or held in possession by any person, firm, or corporation in the state; and such regulations, prohibitions, restrictions and prescriptions, after due publication, which shall be construed to be once a week for four consecutive weeks in some newspaper in North Carolina, shall be of equal force and effect with the provisions of this act; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, shall be fined or imprisoned, at the discretion of the court.

1915, c. 84, s. 21; 1917, c. 290, s. 7.

For legislative consent to federal regulation of fish on certain lands, see Game Laws, s. 2099.

1879. Regulations affecting existing interests not effective for two years. In making regulations the fisheries commission board shall give due weight and consideration to all factors which will affect the value of the present investment in the fisheries, and no changes in the existing laws which, if they should go into effect immediately, would tend to cause fishermen to lose their property shall go into effect until two years from the date that the change has been made by the fisheries commission board.

1915, c. 84, s. 21; 1917, c. 290, s. 7.

1880. Hearing before changes as to certain regulations. If, however, a petition signed by five or more voters of the district or community which will be affected by the proposed changes is filed with the fisheries commission board through the fisheries commissioner, assistant commissioners or inspectors, asking that they have a hearing before any proposed change in the territory, size of mesh, length of net, or time of fishing shall go into effect, petitioning that they be heard regarding such change, the fisheries commission board shall in that event designate by advertisement for a period of thirty days at the courthouse and three other public places in the county affected, and also by publication in a newspaper of the county, if such is published in said county, once a week for two consecutive weeks, a place at which said board will meet and hear argument for and against said change, and may ratify, rescind, or alter this previous order of change as may seem just in the premises.

1915, c. 84, s. 21; 1917, c. 290, s. 7.

1881. Regulation of shipment of water products. The fisheries commission board shall have power and authority to make such rules regulating the shipment and transportation of fish, oysters, clams, crabs, escallops, and other water products as it may deem necessary.

1919, c. 333, s. 4.

1882. Reports of board to legislature; publication. The fisheries commission board shall cause to be prepared and submitted to each legislature a report showing the operations, collections and expenditures of the fisheries commission; and it shall also cause to be prepared for publication such other reports, with necessary illustrations and maps, as will adequately set forth the results of the work and the investigations of the fisheries commission, all such reports, illustrations, and maps to be printed and distributed at the expense of the state, as are other public documents, as the fisheries commission board may direct.

1915, c. 84, s. 15.

1883. Duties of commissioner. It is the duty of the commissioner: To enforce all acts relating to the fish and fisheries of North Carolina.

By and with the advice and consent of the fisheries commission board, to make such regulations as shall maintain open for the passage of fishes all inlets and not less than one-third of the width of all sounds and streams, or such greater proportions of their width as may be necessary.

To collect and compile statistics showing the annual product of the fisheries of the state, the capital invested, and the apparatus employed, and any fisherman refusing to give these statistics shall be refused a license for the next year.

To prepare and have on file in his office maps based on the charts of the United States coast and geodetic survey, of the largest scale published, showing as closely as may be the location of all fixed apparatus employed during each fishing season.

To have surveyed and marked in a prominent manner those areas of waters of the state in which the use of any or all fishing appliances are prohibited by law or regulation, and those areas of waters in the state in which oyster tonging or dredging is prohibited by law.

To prosecute all violations of the fish laws, and wherever necessary he may employ counsel for this purpose.

To remove pending trial nets or other appliances he finds being fished or used in violation of the fisheries laws of the state.

To carry on investigations relating to the migrations and habits of the fish in the waters of the state, also investigations relating to the cultivation of the oyster, clam and other mollusca, and of the terrapin and crab, and for this purpose he may employ such scientific assistance as may be authorized by the fisheries commission board.

The commissioner shall be responsible for the collection of all license taxes, fees, rentals, or other imposts on the fisheries, and shall pay same into the state treasury to the credit of the fisheries commission fund. He shall on or before the twenty-fifth day of each month mail to the treasurer of the state a consolidated statement showing the amount of taxes and license fees collected during the preceding month, and by and from whom collected.

He shall, in an official capacity, have power to administer oaths and to send for and examine persons and papers.

If any fisherman fail or refuse to give statistics as required in this section, the board may extend the time of his operations, and the fisheries commission board is empowered to make such rules and regulations as they think proper to procure statistics as to the annual products of the fisheries of the state.

1915, c. 84, s. 5; 1917, c. 290, s. 10.

1884. Violations of law to be investigated; nets seized and sold; bond of commissioner liable. It is the duty of the fisheries commissioner, or any of his assistants or deputies, whenever a complaint is made to him, either orally or in writing, stating that any of the laws relating to fish or fisheries are being violated at any particular place, to go himself or send a deputy to such place and investigate same, and he shall seize and remove all nets or other appliances set or being used in violation of the fisheries laws of the state, sell same at public auction after advertisement for twenty days at the courthouse and three other public places in the county in which the seizure was made, and apply the proceeds of sale to the pay-

ment of costs and expenses of such removal, and pay any balance remaining to the school fund of the county nearest to where the offense is committed. And the failure of the fisheries commissioner or his deputies to perform the above prescribed duty shall render his bond liable to a penalty of five hundred dollars, one-half to go to the informant and the other half to be paid to the school fund of the county in which the action is brought.

1911, c. 18.

For construction and application of similar provision, see *Daniels v. Homer*, 139-219.

1885. Arrests without warrant. The fisheries commissioner, assistant commissioners and inspectors shall have power, without warrant, to arrest any person or persons violating any of the fishery laws in their presence, who shall be carried before a magistrate for trial as is required by law in case of persons arrested without warrant.

1915, c. 84, s. 6; 1917, c. 290, s. 2.

1886. Taking fish for scientific purposes. The fisheries commissioner and the United States bureau of fisheries may take and cause to be taken for scientific purposes or for fish culture any fish or other marine organism at any time from the waters of North Carolina, any law to the contrary notwithstanding; and may cause or permit to be sold such fishes or parts of fishes so taken as may not be necessary for purposes of scientific investigations or fish culture: Provided, that in taking fish for fish culture in the hatcheries of this state the fish shall only be taken while the hatcheries are in operation and only between the hours of four and eleven p.m.

1915, c. 84, s. 7.

ART. 4. TAXES AND REGULATIONS

1887. Licenses to fish; issuance, terms, and enforcement. Each and every person, firm, or corporation, before commencing or engaging in any kind of fishing in the state, shall file with an inspector of the county in which he desires to fish, or with the fisheries commissioner or any of his assistant commissioners, a sworn statement as to the number and kind of nets, seines, or other apparatus intended to be used in fishing. Upon filing this sworn statement on oath the fisheries commissioner shall issue or cause to be issued to the said party or parties a license as prescribed by law; said applicant shall pay a license fee equal in amount to the fee or tax prescribed by law for fishing different kinds of apparatus in the waters of the state of North Carolina, or for tonging or dredging for oysters, as the case may be. The fisheries commissioner shall keep in a book especially prepared for the purpose an exact record of all licenses, to whom issued, the number and kinds of nets, boats, and other apparatus licensed, and the license fees received. He shall furnish to each person, firm, or corporation in whose favor a license is issued a special tag which will show the license number and number of pound nets, or yards of seine, or yards of gill net that the licensee is authorized to use, and the licensee shall attach said tag to the net in a conspicuous manner satisfactory to the fisheries commissioner. All boats or vessels licensed to scoop, scrape, or dredge oysters shall display on the port side of the jib, above the reef and bonnet and on the opposite side of mainsail, above all reef points, in black letters not less than twenty inches long, the initial letter of the county

granting the license and the number of said license, the number to be painted on canvas and furnished by the fisheries commissioner, for which he shall receive the sum of fifty cents. Any boat or vessel used in catching oysters without having complied with the provisions of this section may be seized, forfeited, advertised for twenty days at the courthouse and two other public places in the county where seized, and sold at some public place designated in the advertisement, and the proceeds, less the cost of the proceedings, shall be paid into the school fund. The licenses to fish with nets shall all terminate on December thirty-first. Any person who shall willfully use for fishing purposes any kind of net whatever, without having first complied with the provisions of this section, shall be guilty of a misdemeanor and, upon conviction, shall be fined twenty-five dollars for each and every offense.

1915, c. 84, s. 10; 1917, c. 290, s. 9.

Power of legislature to restrict the right of fishing: Daniels v. Homer, 139-219; State v. Gallop, 126-979.

1888. Resident may catch shellfish for own use. No tax shall be levied or collected from bona fide residents or citizens of this state who take fish, oysters, clams, escallops, or crabs other than with dredges for his own personal or family's use and consumption. But if any person shall sell or offer for sale any such products without having first procured a license, he shall be guilty of a misdemeanor and shall be fined not less than five dollars or imprisoned not exceeding thirty days.

1917, c. 290, s. 6.

1889. Licenses for oyster boats; schedule. The fisheries commissioner, assistant commissioner, or inspector, may grant license for a boat to be used in catching oysters upon application made, according to law, and the payment of a license tax as follows: On any boat or vessel without cabin or deck, and under custom-house tonnage, using scrapes or dredges, measuring over all twenty-five feet and under thirty, a tax of three dollars; fifteen feet and under twenty-five feet, a tax of two dollars; on any boat or vessel with cabin or deck and under custom-house tonnage, using scrapes or dredges, measuring over all thirty feet or under, a tax of five dollars; over thirty feet, a tax of six dollars; on any boat or vessel using scoops, scrapes, or dredges required to be registered or enrolled in the custom house, a tax of one dollar and fifty cents a ton on gross tonnage. No vessel propelled by steam, gas or electricity, and no boat or vessel not the property absolutely of a citizen or citizens of this state, shall receive license or be permitted in any manner to engage in the catching of oysters anywhere in the waters of this state.

1915, c. 84, s. 11.

1890. Boats using purse seines or shirred nets; tax. All boats or vessels of any kind used in operating purse seines or shirred nets shall pay a license fee of two dollars per ton on gross tonnage, custom-house measurement, which shall be independent of and separate from the seine or net tax on the seines or nets used on said boats. This license fee shall be for one year from January 1st, and shall not be issued for any period less than one year. It shall be issued by the fisheries commission.

1915, c. 84, s. 12; 1917, c. 290, s. 3; 1919, c. 333, s. 3.

1891. Licenses for various appliances and their users; schedule. The following license tax is hereby levied annually upon the different fishing appliances used in the waters of North Carolina:

Anchor gill nets, twenty-five cents for one hundred yards or fraction thereof.

Stake gill nets, twenty-five cents for each hundred yards or fraction thereof.

Drift gill nets, twenty-five cents for each hundred yards or fraction thereof.

Pound nets, one dollar and twenty-five cents on each pound; the pound is construed to apply to that part of net which holds and from which the fish are taken. No pound net shall be set in the waters of the Atlantic ocean within the three-mile limit.

Submarine pounds, or submerged trap nets, two dollars for each trap or pound.

Shrimp trawl nets, twenty-five cents each.

Seines, drag nets and mullet nets under one hundred yards, one dollar each.

Seines, drag nets and mullet nets over one hundred yards and under three hundred yards, one dollar per hundred yards or fraction thereof.

Seines, drag nets and mullet nets over three hundred yards and under one thousand yards, one dollar and twenty-five cents per one hundred yards or fraction thereof.

Seines, drag nets and mullet nets over one thousand yards, one dollar and seventy-five cents per one hundred yards or fraction thereof.

Fyke nets, twenty-five cents each.

Tonging for oysters, the license tax shall be one dollar for each tonger.

For taking escallops with rakes, tongs, scoops, or scrapes, one dollar for each person and for every person assisting or employed.

For taking clams with rakes, tongs, scoops, or scrapes, one dollar for each person and for every person assisting or employed.

And for other apparatus used in fishing, the license shall be the same as that for the apparatus or appliance which it most resembles for the purpose used.

1915, c. 84, s. 14; 1917, c. 290, s. 5; 1919, c. 333, s. 3.

1892. License tax on dealers and packers. An annual license tax, for the year beginning January 1st in each year, to be collected by the fisheries commission board, is imposed on all persons or dealers who purchase or carry on the business of canning, packing, shucking, or shipping the sea products enumerated below, as follows: On—

oysters, five dollars;

escallops, five dollars;

clams, five dollars;

crabs, for shipment out of the state, five dollars;

fish, two dollars and fifty cents;

shrimp, two dollars and fifty cents: Provided, that (1) the license tax for shucking or selling oysters and clams on local market by retail shall be fifty cents a year; (2) no license tax shall be imposed on fishermen who pay a license on nets to catch fish or shrimp, and who ship only the fish or shrimp caught in such licensed nets.

1917, c. 290, s. 5; 1919, c. 333, ss. 1, 2.

1893. Purchase tax on dealers; schedule; collection. All dealers in and all persons who purchase, catch, or take for canning, packing, shucking, or shipping

the sea products enumerated below shall be liable to a tax to be collected by the fisheries commission board as follows: On—

oysters, two cents a bushel, except coon oysters, three-quarters of a cent a bushel;

escallops, ten cents a gallon;

clams, ten cents a bushel;

soft crabs, five cents a dozen;

hard crabs, ten cents a bushel;

crab meat, ten cents a gallon;

shrimps, one-fourth of a cent a pound.

But none of these products shall be twice taxed, and no tax shall be imposed on oysters, escallops, or clams taken from private beds or gardens. Upon failure to pay said tax, the license provided in the preceding section shall at once be null and void and no further license shall be granted during the current year; and it shall be the duty of the commissioner, assistant commissioner, or inspector to institute suit for the collection of said tax. Such suit shall be in the name of the state of North Carolina on relation of the commissioner or inspector at whose instance such suit is instituted, and the recovery shall be for the benefit and for the use of the general fisheries commission fund. Any person failing or refusing to pay said tax shall be guilty of a misdemeanor.

1915, c. 84, s. 13; 1917, c. 290, s. 4; 1919, c. 333, s. 1.

1894. Printed regulations furnished dealers. It is the duty of the fisheries commission board, upon issuing any license under the provisions of this subchapter to furnish with said license the printed regulations controlling the waters in which such fisherman applying therefor proposes to fish.

1917, c. 290, s. 12.

1895. Dealers to keep and furnish statistics. All persons, firms, or corporations engaged in buying, packing, canning, or shipping oysters, escallops, clams, crabs, shrimp, and fish taken from the public grounds or natural beds of the state, or the natural waters or streams of the state, shall keep a permanent record of all such products, showing the quantity of each of said products so purchased, packed, canned, or shipped, the kind of fish, from whom each of said species of fish, mollusca, or crustaceans were purchased, that a statement of all these facts shall be made whenever required by the fisheries commissioner, but shall be at least at the end of each month. That all such records shall be open at all times to the fisheries commissioner, assistant commissioner, or any one under the direction of the fisheries commissioner.

1917, c. 290, s. 11.

1896. Disturbing marks or property of commission prohibited. Any person or persons removing, injuring, defacing, or in any way disturbing the posts, buoys, or any other appliances used by the fisheries commission in marking the restricted areas relating to any and all fishing, or marking other areas in which oyster tonging or dredging is prohibited by law, and those marking oyster bottoms that are leased for oyster cultivation, or shall injure or destroy any boat or other property of any kind used by the fisheries commission board or any officer or employee thereof, shall be guilty of a misdemeanor, and upon con-

viction shall be fined or imprisoned, at the discretion of the court; and any person anchoring or mooring a boat to any of these buoys or posts shall, upon conviction, be fined not less than twenty-five dollars nor more than one hundred dollars and imprisoned thirty days in jail, at the discretion of the court.

1915, c. 84, s. 22; 1917, c. 290, s. 8.

1897. Explosives, drugs, and poisons prohibited. It shall be unlawful to place in any of the waters of this state any dynamite, giant or electric powder, or any explosive substance whatever, or any drug or poisoned bait, for the purpose of taking, killing or injuring fish. And any one violating this section shall, upon conviction, be fined not less than one hundred dollars and imprisoned not less than thirty days.

1915, c. 84, s. 19.

1898. Possession of fish killed by explosives as evidence. The possession of fish killed by explosive agencies shall be prima facie evidence that explosives were used for the purpose of killing fish.

Rev., s. 2466; Code, s. 3405; 1889, c. 312; 1911, c. 170.

1899. Discharge of deleterious matter into waters prohibited. It shall be unlawful to discharge or to cause or permit to be discharged into the waters of the state any deleterious or poisonous substance or substances inimical to the fishes inhabiting the said water; and any person, persons or corporation violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, be fined or imprisoned in the discretion of the court: Provided, this section shall not apply to corporations chartered either by general law or special act before the 4th day of March, 1915.

1915, c. 84, s. 20.

1900. Operation of boats in violation of rules and laws forfeits boats and apparatus. If any person, firm, or corporation shall use or operate any boat or vessel of any kind, in violation of any rule of the fisheries commission board, or any of the fish laws, it shall be the duty of the fisheries commissioner to revoke any license issued and seize such boat or vessel and any apparatus or appliance so used or operated; but the fisheries commission board shall have authority to compromise by agreement with the owner of such boat or appliance for any such violation, and may return such boat or appliance so seized to the owner and reinstate license.

1919, c. 333, s. 5.

For revocation of license and forfeiture of oyster boats. see s. 1887.

1901. Violations of fisheries law misdemeanor; licenses forfeited. Upon failure of any person, firm or corporation to comply with any of the provisions of this article, or any of the fisheries laws, any license issued to any such person, firm or corporation may be revoked by the fisheries commission, and upon satisfactory settlement may be reinstated, with the consent of the board. All such persons violating the provisions of this article or of the fisheries law shall be guilty of a misdemeanor.

1917, c. 290, s. 11; 1919, c. 333, s. 4.

SUBCHAPTER II. SHELLFISH

ART. 5. SHELLFISH; GENERAL LAWS

Part 1. Definition of Natural Oyster Bed

1902. Oyster bed defined. A natural oyster or clam bed, as distinguished from an artificial oyster or clam bed, shall be one not planted by man, and is any shoal, reef or bottom where oysters are to be found growing in sufficient quantities to be valuable to the public.

Rev., s. 2371; 1893, c. 287, s. 1.

This definition very nearly in the words of *State v. Willis*, 104-764.

Part 2. Leases of Bottoms

1903. Fisheries commissioner to lease. The fisheries commissioner shall have power to lease to any duly qualified person, firm or corporation, for purposes of oyster or clam culture, any bottom of the waters of the state not a natural oyster bed, as defined in this article, nor a clam reservation, as defined in this article, in accordance with the provisions of this part of this article.

1909, c. 871, ss. 1, 9; 1919, c. 333, s. 6.

1904. Lessee to be citizen. Any citizen of North Carolina, or firm or corporation organized under the laws of the state and doing business within its limits, shall be granted the privilege of taking up bottoms for purposes of oyster or clam culture, under the provisions of this article.

1909, c. 871, ss. 2, 9; 1919, c. 333, s. 6.

1905. Areas leased in different waters. The area which may be taken up for purposes of oyster or clam culture shall be not less than one acre nor more than fifty acres, with the exception of the open waters of Pamlico sound (and for the purposes of this article open waters of Pamlico sound shall mean the waters that are outside of two miles of the shore line), in which the minimum limit shall be five acres and the maximum shall be two hundred acres: Provided, that the limit of entry in Core sound, North river, Newport river, Bogue sound, and all bays and creeks bordering on these waters, and in Jones bay, Rose bay, Abels bay, Swan Quarter bay, Middle bay, Bay river, Deep bay, Juniper bay, West and East Bluff bays, Wysocking bay, Fire creek, Stumpy Point bay, Mouse Harbor bay, Maw bay and Broad creek, tributaries of Pamlico sound, shall be one acre as a minimum and ten acres as a maximum: Provided further, however, that after March 9, 1910, the minimum area in Core sound, North river, Newport river, Bogue sound, and all bays and creeks bordering on these waters, and in Jones bay, Rose bay, Abels bay, Swan Quarter bay, Middle bay, Bay river, Deep bay, Juniper bay, West and East Bluff bays, Wysocking bay, Fire creek, Stumpy Point bay, Mouse Harbor bay, Maw bay and Broad creek, tributaries of Pamlico sound, shall be one acre and the minimum fifty acres; but no person, firm, corporation or association shall severally or collectively hold any interest in any lease or leases aggregating an area of greater than fifty acres, except in the open waters of Pamlico sound, where the aggregate area shall be two hundred acres.

The fisheries commission board shall have authority to specify the acreage any one person may lease in the counties of Pender, New Hanover and Brunswick.

1909, c. 871, ss. 2, 9; 1919, c. 333, s. 6.

1906. Prerequisites for lease; application; deposit; survey; location. Such persons, firms or corporations desiring to avail themselves of the privileges of this article shall make written application, on a form to be prepared by the fisheries commissioner, setting forth the name and address of the applicant, describing as definitely as may be the location and extent of the bottom for which application is made, and requesting the survey and leasing to the applicant of said bottom. As soon as possible after the application is received, the fisheries commissioner shall cause to be made a survey and map of said bottom, at the expense of the applicant. The fisheries commissioner shall also thoroughly examine said bottoms by sounding and by dragging thereover a chain to detect the presence of natural oysters. Should any natural oysters be found, the commissioner shall cause examination to be made to ascertain the area and density of oysters on said bottom or bed, to determine whether the same is a natural bed, under the definition contained in this article. He shall be assisted in this examination on tonging ground by an expert tonger, to be appointed by the board of county commissioners of the county in which said bottom or the greater portion thereof is located, and the question as to whether the oyster growth is sufficiently dense to fall within the definition of the natural bed shall be determined by the quantity of oysters which the said expert tonger may be able to take in a specified time; and on dredging ground the commissioner shall be assisted by an expert dredger, appointed by the board of county commissioners of the county in which said bottom or the greater portion thereof is located, and the question as to whether the oyster growth is sufficiently dense to fall within the definition of the natural bed shall be determined by the quantity of oysters which the said expert dredger may be able to take in a specified time. The fisheries commissioner shall require the bodies of bottoms applied for to be as compact as possible, taking into consideration the shape of the body of water and the consistency of the bottom. No application shall be entertained nor lease granted for a piece of bottom within two hundred yards of a known natural bottom, bed or reef. A deposit of ten dollars will be required of each applicant at the time of making his application, said sum to be credited to the cost of the survey of the bottom applied for.

1909, c. 871, ss. 3, 9; 1919, c. 333, s. 6.

1907. Execution of lease; notice and filing; marking and planting. Immediately upon the completion of the survey and the mapping thereof, and the payment by the applicant of the cost of said survey and map, the fisheries commissioner shall execute to the applicant, upon a form approved by the attorney-general of the state, a lease for the bottoms applied for. A copy of the lease, map of the survey and a description of the bottom, defining its position, shall be filed in the office of the fisheries commissioner. After the execution of said lease, the lessee shall have the sole right and use of said bottoms, and all shells, oysters and culls thereon or placed thereon shall be his exclusive property so long as he complies with the provisions of this law. The lessee shall stake off and mark the bottoms leased in the manner prescribed by the fisheries commissioner, and failure to do so within a period of thirty days of an order so to do issued by the

commissioner shall subject said lessee to a fine of five dollars per acre for each sixty days default in compliance with said order. The corner stakes, at least, of each lease shall be marked with signs plainly displaying the number of the lease and the name of the lessee. The lessee shall, within two years of the commencement of his lease, have planted upon his holdings a quantity of shells equal to an average of fifty bushels of seed oysters or shells per acre of holdings, and within four years from the commencement of his lease a quantity of oysters or shells equal to an average of not less than one hundred and twenty-five bushels per acre. The fisheries commissioner shall, upon granting any lease, publish a notice of the granting of same in a newspaper of general circulation in the county wherein the bottom leased is located.

1909, c. 871, ss. 4, 9; 1919, c. 333, s. 6.

1908. Term and rental. All leases made under the provisions of this article shall begin upon the issuance of the lease, and shall expire on the first day of April of the twentieth year thereafter. The rental shall be at the rate of one dollar per acre for the first ten years and two dollars per acre per year for the next ten years of the lease, payable annually in advance on the first day of April of each year: Provided, that in the open waters of Pamlico Sound (and for the purposes of this article the open waters of Pamlico Sound shall mean the waters that are outside the four miles of the shore line) the rental shall be at the rate of fifty cents per acre per year for the first three years, one dollar per acre per year for the next seven years, and two dollars per acre per year for the next ten years of the lease. This rental shall be in lieu of all other taxes and imposts whatever, and shall be considered as all and the only taxation which can be imposed by the state, counties, municipalities or other subordinate political bodies. The rental for the first year shall be paid in advance, to an amount proportional to the unexpired part of the year to the first of April next succeeding.

1909, c. 871, ss. 5, 9; 1919, c. 333, s. 6.

1909. Nature of lessee's rights; assignment and inheritance. The said lease shall be heritable and transferable, in whole or in part, provided the qualifications of the heirs and transferees are such as are described by this article. Non-residents, acquiring by inheritance or process sale, or persons already holding the maximum area permitted by this article, shall within a period of twelve months from the time of acquisition dispose of said prohibited or excess of holding to some qualified person, firm or corporation, under penalty of forfeiture. The lease shall be subject to mortgage, pledge, seizure for debt and the same other transactions as are other property rights in North Carolina. No transfer shall be of effect unless of court record, until entered on the books of the fisheries commissioner.

1909, c. 871, ss. 6, 9; 1919, c. 333, s. 6.

1910. Renewal of lease. The term of each lease granted under the provisions of this article shall be for a period of twenty years from the first day of April preceding the date of granting of said lease. At the expiration of the first lease, the lessee, upon making written application on the prescribed form, shall be entitled to successive leases on the same terms as applied to the last ten years of the first lease, for a period not exceeding ten years each.

1909, c. 871, ss. 7, 9; 1919, c. 333, s. 6.

1911. Forfeiture of lease for nonpayment. The failure to pay the rental of bottoms leased for each year in advance on or before the first day of April, or within thirty days thereafter, shall ipso facto cancel said lease and shall forfeit to the state the said leased bottoms and all oysters thereon, and upon said forfeiture the fisheries commissioner is hereby authorized to lease the said bottoms to any qualified applicant therefor: Provided, that no forfeiture shall be valid, however, under the provisions of this section, unless there shall have been mailed by the fisheries commissioner to the last address of the lessee upon the books of the commissioner a thirty days notice of the maturity of said rental.

1909, c. 871, ss. 8, 9; 1919, c. 333, s. 6.

1912. Contest over grant of lease; time for contest; decision; appeal. If any person, within four months of the publication of the notice of granting of any lease, make claim that a natural oyster bottom, bed or reef exists within the boundaries of said lease, he shall, under oath, state his claim, and request the fisheries commissioner to cancel said lease: Provided, however, that each such claim and petition shall be accompanied by a deposit of twenty-five dollars. No petition unaccompanied by said deposit shall be considered by the commissioner. The fisheries commissioner shall, in person, examine into said claim, and, if the decision should be against the claimant, the deposit of twenty-five dollars shall be forfeited to the state and deposited to the credit of the fisheries commission fund. Should, however, the claim be sustained and a natural bed be found within the boundary of the lease, the said natural bed shall be surveyed and marked with stakes or buoys, at the expense of the lessee, and the said natural bed be thrown open to the public fishery. If no such claim be presented within a period of four months, or if when so presented it fail of substantiation, as provided, the lessee shall thereafter be secure from attack on such account, and his lease shall be incontestable so long as he complies with the other provisions of this article. In each and every such case the decision of the fisheries commissioner shall be subject to review and appeal before a judge of the superior court, who shall render a decision without the aid of a jury, and his decision shall be final.

1909, c. 871, s. 9; 1919, c. 333, s. 6.

Part 3. Licenses and Taxes

1913. License to catch oysters; oath of applicant. Any person desiring to catch oysters from the public grounds and natural oyster beds shall make and subscribe to the following oath, before some officer qualified to administer oaths:

I, ----- (state if owner, lessee, master, captain, mate, foreman, or agent of any boat used, or that may be used, in dredging oysters from the public grounds of the state), being an applicant for oyster license, do solemnly swear that I am a citizen of North Carolina, and have been a resident of the state for the two years next preceding this day; that my place of residence is now in ----- County; that I will not, if granted license, employ any nonresident or unlicensed person as an assistant or serve as an assistant to any nonresident who is owner, lessee, master, captain, mate or foreman, or who has any interest in, or in the profits derived from, any boat that is used or that may be used in dredging oysters from the public grounds of the state, or unlicensed person, nor will I transfer, assign, or otherwise dispose of my license to any person, firm or corporation; that I will not knowingly or willfully violate or evade any of the laws or regulations of the state relating to oyster industry: so help me, God.

He shall then present to and file said oath with the fisheries commissioner, assistant commissioner or inspector, who, if satisfied with the truth of the statement made in the oath of application, shall issue to him an oysterman's license in the following form:

State of North Carolina, ----- County.

-----, a resident of ----- County, having this day made application to me for an oysterman's license, and having filed with me the oath prescribed by law, I do hereby grant to him license to catch oysters from the public grounds of this state from the fifteenth day of October, -----, until the first day of next April.

Witness my hand and official seal, this the ----- day of -----, 19-----

-----,
Fisheries Commissioner, Assistant Fisheries Commissioner, or
Inspector (as the case may be).

Rev., s. 2409; 1903, c. 516, s. 7; 1905, c. 525, ss. 4, 6.

For making false affidavits, see this chapter, s. 1933.

1914. Filing oath; recording license; fees. The oath and a record of the license shall be kept by the fisheries commissioner, assistant commissioner or inspector, and for issuing and recording the same he shall receive from the applicant a fee of twenty-five cents, which, together with all other license fees collected under this chapter, shall be paid over to the state treasurer and constitute part of the fisheries commission fund. No fee shall be charged by the clerk for administering the oath.

Rev., s. 2409; 1903, c. 516, s. 7; 1905, c. 525, ss. 4, 6.

1915. Licensee to be resident, not interested in oyster boat. No person shall be licensed to catch oysters from the public grounds of the state who is owner, lessee, master, captain, mate or foreman, or who owns an interest in or who is an agent for any boat that is used or that may be used in dredging oysters from the public grounds of the state, who is not a bona fide resident of this state and who has not continuously resided therein for two years next preceding the date of his application for license, and no nonresident shall be employed as a laborer on any boat licensed to dredge oysters under this subchapter who has an interest in or who receives any profit from the oysters caught by any boat permitted to dredge oysters on the public grounds of the state. Any person, firm or corporation employing any nonresident laborer forbidden by this section, upon conviction shall be fined not less than fifty dollars nor more than five hundred dollars.

Rev., s. 2408; 1903, c. 516, s. 6; 1905, c. 525, s. 3.

1916. Tax on oysters exported from state. All oysters going out of the state in any boat or vessel shall pay a tax of two cents per tub.

1907, c. 969, s. 11; Ex. Sess. 1913, c. 42, s. 3.

An act levying a tax upon clams and oysters shipped out of county is constitutional: Brooks v. Tripp, 135-159.

1917. Oyster dealer's license. The fisheries commissioner, assistant commissioner or inspector shall, upon application and the payment of a fee of fifty cents, grant to the applicant a dealer's license, authorizing the applicant to engage in the business of buying, purchasing, canning, packing, shucking or shipping oysters. Such license shall not be issued prior to the fifteenth day of November of any year and shall expire on the fifteenth day of March following.

The assistant fisheries commissioner or inspector granting the license shall at once mail a duplicate to the fisheries commissioner. Nothing contained in this section (except as to New Hanover, Onslow and Pender counties) shall be deemed to require any license of persons engaged in the business of buying, purchasing; canning, packing, shucking or shipping oysters which were not taken or caught from the public grounds or natural oyster beds of the state: Provided, that in New Hanover, Onslow and Pender counties such license shall not be issued prior to the fifteenth day of October in any year and shall expire on the first day of April following.

Rev., s. 2411; 1903, c. 516, s. 9; 1905, c. 525, s. 6; 1907, c. 969, ss. 7, 13; 1915, c. 136, s. 3.

Fish and oysters, being food supply, come within the police regulation of the state: State v. Sermons, 169-285. **Failure to obtain a license applied for at an improper time will not excuse a dealer when buying from owner of private oyster bed:** State v. Sermons, 169-285.

1918. Monthly report of licenses to be filed. The fisheries commissioner, assistant commissioner or inspector who are authorized to issue license or to collect a license tax shall, on or before the fifteenth day of each month, mail to the fisheries commissioner a statement, showing all licenses issued during the preceding month, to whom issued and for what purpose, and the amount of tax collected by them from all sources under the oyster laws, and shall at the same time remit said amount direct to the state treasurer. They shall at the same time mail to each inspector asking for the same a list of all persons to whom license has been issued and of all boats or vessels licensed, and for what purpose.

Rev., s. 2412; 1903, c. 516, s. 4; 1905, c. 525, s. 6.

1919. Oyster beds real property for taxation, etc. All grounds taken up or held for the purpose of cultivating shellfish shall be subject to taxation as real estate, and shall be so considered in the settlement of the estates of deceased or insolvent persons.

Rev., s. 2380; 1887, c. 119, s. 9.

Part 4. Catching and Dealing in Oysters Regulated

1920. Close season for oysters; exceptions. If any person shall buy or sell oysters in the shell which have been taken from the public grounds or natural oyster beds of this state between the fifteenth day of April and the fifteenth day of October in any year, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that oysters may be taken with hand-tongs from March fifteenth to May first and with dredges from March fifteenth to April fifth, in any year, to be used for planting on private grounds entered and held under the laws of this state, upon the condition further that they shall not be removed from said private grounds within a period of three months from time of planting: Provided further, that oysters may be taken with hand-tongs only for home consumption: Provided further, that coon oysters may be taken from November first to May first of each year in the waters of Onslow and Carteret counties.

This section, except as specifically provided, is inapplicable to New Hanover, Onslow and Pender counties.

Rev., s. 2383; 1907, c. 969, ss. 4, 13; 1913, c. 85; 1915, c. 120.

Section referred to in State v. Sermons, 169-285.

1921. Oyster dealers to keep records. All persons engaged in buying, packing, canning, shucking or shipping oysters shall keep a permanent record of all oysters either bought or caught by them, or by persons for them, when and from whom bought, the number of bushels and the price paid therefor. All these records shall at all times be open to the examination and inspection of the fisheries commissioner, assistant commissioner and inspector, and upon request shall be verified by the parties making them. If any person engaged in buying, packing, canning, shucking or shipping oysters taken or caught from the public grounds or natural oyster beds of the state shall fail to keep a permanent record of all oysters bought by him or caught by him, or by persons for him, when and from whom bought, the number of bushels and the price paid therefor, or shall fail upon demand to exhibit such record as required by law, or shall fail to verify the same, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., ss. 2396, 2418; 1903, c. 516, s. 5; 1915, c. 136, s. 2.

1922. Oyster measure. All oysters measured in the shell shall be measured in a circular tub with straight sides and straight, solid bottom, with holes in the bottom not more than one-half inch in diameter. The said measures shall have the following dimensions: A bushel tub shall measure eighteen inches from inside to inside across the top, sixteen inches from inside to inside chimb to the bottom and twenty-one inches diagonal from inside chimb to top. All measures found in the possession of any dealer not meeting the requirements of this section shall be destroyed by said fisheries commissioner, assistant commissioner or inspector. Any person using an unlawful measure for the sale or purchase of oysters shall be guilty of a misdemeanor.

Rev., s. 2417; 1903, c. 510, s. 12; 1907, c. 969, s. 10; Ex. Sess. 1913, c. 42, s. 2.

1923. Local modification as to oyster measures in New Hanover, Onslow and Pender counties. In New Hanover, Onslow and Pender counties all measures used for buying or selling oysters shall have a brand, to be adopted by the fisheries commissioner, stamped therein by said commissioner, assistant commissioner, or his lawful inspectors.

Rev., s. 2417; 1903, c. 516, s. 12; 1907, c. 969, s. 13.

1924. Illegal measures prohibited. If any person shall in buying or selling oysters use any measure other than that prescribed by law for the measurement of oysters, or if any dealer in oysters shall have in his possession any measure for measuring oysters other than that prescribed by law, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., s. 2399; 1903, c. 516, s. 12.

1925. Dredging regulated as to territory and season. Any bona fide resident of the state duly licensed according to law and using a licensed boat or vessel may use scoops, scrapes or dredges in catching or taking oysters from the fifteenth day of November in each year to the first day of April following, from the public grounds and natural oyster beds in the broad open waters of Pamlico sound, Pamlico river, Neuse river and Shoal river, except in those portions of said sound and rivers in which the use of such instruments and implements is

prohibited as herein provided. No person shall use any implement or instrument except hand-tongs in catching oysters in any bay, river, creek, strait, or any tributary of such, which borders upon or empties into Pamlico sound, Pamlico river, or Long Shoal river, except as hereinafter provided; and any point inside of a line drawn from the farthest or extreme outward point of land or marsh on the one side to the farthest or extreme outward point of land or marsh on the opposite side of any creek, strait or bay shall be construed to be within the said creek, strait or bay for the purpose of this section. Nor shall any person use any implement or instrument except hand-tongs in the waters of Pamlico sound from what is known as the reef or reefs in the eastern portion of said sound to the line of banks bordering its eastern shores; nor along the shores of Pamlico county inside of a line beginning at Maw point and running to the west end of Brant island, thence to Pamlico point; nor in the waters of Pamlico sound north of a line running from Long Shoal light to Gull Shoal life-saving station, from the first day of February of each year to the fifteenth day of November, nor in any of the waters of Carteret county. And for the purpose of this section, the northern boundary of said county shall be a line extending from Swan point to Harbor island light, thence a line to Southwest Straddle light, thence a line to Northwest point light, thence a line to the middle of Ocracoke inlet; nor in the waters of Neuse river above a line in said river running from Carbacon buoy to the western point of land at Pierce's creek.

Rev., 2413; 1903, c. 516, ss. 13, 14, 15; 1905, c. 507, s. 2.

1926. Illegal dredging prohibited; evidence. If any person shall use any scoops, scrapes or dredges for catching oysters except at the times and in the places in this chapter expressly authorized, or shall between the fifth day of April and the fifteenth day of November of any year carry on any boat or vessel any scoops, scrapes, dredges or winders, such as are usually or can be used for taking oysters, he shall be guilty of a misdemeanor.

If any boat or vessel shall be seen sailing on any of the waters of this state during the season when the dredging of oysters is prohibited by law in the same manner in which they sail to take or catch oysters with scoops, scrapes or dredges, the said boat or vessel shall be pursued by any officer authorized to make arrests, and if said boat or vessel apprehended by said officer shall be found to have on board any wet oysters or the scoops, scrapes, dredges or lines, or deck wet, indicating the taking or catching of oysters at said time, and properly equipped for catching or taking oysters with scoops, scrapes or dredges, such facts shall be prima facie evidence that said boat or vessel has been used in violation of the provisions of the law prohibiting the taking or catching of oysters with scoops, scrapes or dredges in prohibited territory, or at a season when the taking or catching of oysters with scoops, scrapes or dredges is prohibited by law, as the case may be.

Rev., ss. 2385, 2397; 1903, c. 516, ss. 13, 14, 15, 28.

1927. Dredging prohibited in certain waters of Pamlico sound; exception. It shall be unlawful for any person to use any rakes, scrapes, scoops or dredges, or any other instrument or implement other than ordinary hand-tongs, for the purpose of taking or catching oysters from the public oyster grounds or natural oyster beds in any of the waters of Pamlico sound or its tributaries north of a line running from West Bluff bay to the center of Ocracoke inlet; any person

found guilty of the violation of this prohibition shall be punished by a fine not less than twenty-five dollars or imprisoned not less than thirty days.

1909, c. 559.

1928. Culling required; size limit. All oysters taken from the public grounds of this state, with whatsoever instrument or implement, shall be culled, and all oysters whose shells measure less than two and one-half inches in longest diameter, except such as are attached to a large oyster and cannot be removed without destroying the small oyster, and all shells taken with the said oysters shall be returned to the public ground when and where taken, and no oysters shall be allowed by the inspectors to be marketed which shall consist of more than ten per cent of such small oysters and shells, except "coon" oysters and oysters largely covered with mussels: Provided, these musselled oysters must not contain more than five per cent of shells or small oysters under regulation size.

Rev., s. 2415; 1903, c. 516, s. 11; 1905, c. 525; 1907, c. 969, s. 8; Ex. Sess. 1913, c. 42, s. 1.

1929. Local modification as to culling oysters in New Hanover, Onslow and Pender counties. In New Hanover, Onslow and Pender counties the preceding section is in force, except that the oysters shall be measured "from hinge to mouth," instead of in longest diameter.

Rev., s. 2415; 1903, c. 516, s. 11; 1905, c. 525; 1907, c. 969, s. 13.

1930. Taking uncultured oysters for planting permitted to residents. Residents of the state of North Carolina shall be permitted to take oysters without culling from natural rocks at any time during the year for planting purposes only, in the waters of North Carolina.

1917, c. 153.

1931. Uncultured oysters seized and scattered on public grounds. Whenever oysters are offered for sale or loaded upon any vessel, car or train, without having been properly culled according to law, the commissioner, assistant commissioner, or inspector shall seize the boat, vessel, car or train containing the same and shall cause the said oysters to be scattered upon the public grounds, and the costs and expenses of said seizure and transportation shall be a prior lien to all liens on said boat, vessel, car or train, and if not paid on demand the officers making the seizure shall, after advertisement for twenty days, sell the same and make title to the purchaser, and after paying expenses as aforesaid pay the balance, if any, into the oyster fund. For the towing of said boat, a charge of three dollars and fifty cents per hour shall be charged against said boat for towage.

The last sentence is not applicable in New Hanover, Onslow, and Pender counties.

Rev., s. 2416; 1903, c. 516, s. 3; 1907, c. 969, ss. 9, 13.

See section 1943.

1932. Shells to be bought and scattered on public beds. The fisheries commissioner is hereby empowered to expend one-half of the balance to the credit of the oyster fund on the fifteenth day of April in each year for the purpose of buying oyster shells and scattering the same on the natural oyster grounds of the state during the months of April and May.

Rev., s. 2421; 1903, c. 516, s. 20.

Part 5. Criminal Offenses Connected With Oyster Industry

1933. Perjury in application for oyster license. If any person shall make any false statement for the purpose of procuring any license, which may be required by law, to catch oysters, or to engage in the oyster industry, he shall be guilty of perjury and punished as provided by law.

Rev., s. 2390; 1903, c. 516, s. 17.

1934. Catching oysters without license. If any person shall catch oysters from the public grounds of the state without having first obtained a license according to law, or shall employ any person as agent or assistant, or shall as the agent or assistant of any person catch oysters from the public grounds, without all of said persons having first obtained a license according to law, he shall be guilty of a misdemeanor, and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., s. 2386; 1903, c. 516, s. 6.

1935. Oyster dealing without license. If any person shall engage in the business of buying, canning, packing, shipping or shucking oysters taken or caught from the public grounds, or natural oyster beds of the state, without having first obtained a license as required by law, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., s. 2395; 1903, c. 516, s. 9; 1915, c. 136, s. 1.

This is valid exercise of the police power, and applies to a dealer buying from the owner of a private oyster bed: *State v. Sermons*, 169-285.

1936. Use of unlicensed boat in catching oysters. If any person shall use any boat or vessel in catching oysters, which boat has not been licensed according to law, and which is not in all respects complying with the law regulating the use of such vessels, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars nor less than ten dollars or imprisoned not more than thirty nor less than ten days for the first offense, but for the second or subsequent offense he shall be guilty of a misdemeanor and punished at the discretion of the court.

Rev., s. 2387; 1903, c. 516, s. 8.

1937. Failure to stop and show license. If any person using a boat or vessel for the purpose of catching oysters shall refuse to stop and exhibit his license when commanded to do so by the fisheries commissioner, assistant commissioner or any inspector, he shall be guilty of a misdemeanor and be fined not less than twenty-five dollars nor more than fifty dollars.

Rev., s. 2389; 1903, c. 516, s. 26.

1938. Displaying false number on boat. If any person shall display any other number on the sail than the one specified in their license or display a number when the boat or vessel has not been licensed, he shall be guilty of a misdemeanor and shall be fined not less than twenty-five dollars.

Rev., s. 2388; 1903, c. 516, s. 27.

1939. Catching oysters for lime. If any person shall take or catch any live oysters to be burned for lime or for any agricultural or mechanical purpose, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, that shells may be taken which do not contain more than five per cent of live oysters.

In New Hanover, Onslow and Pender counties the proviso to this section is not in force.

Rev., s. 2400; Code, s. 3389; 1885, c. 182; 1907, c. 969, ss. 12, 13.

1940. Catching oysters Sunday or at night. If any person shall catch or take any oysters from any of the public grounds or natural oyster beds of the state at night or on Sunday, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., s. 2384; 1903, c. 516, s. 16.

1941. Unloading at factory Sunday or at night. If any person shall unload any oysters from any boat, vessel or car at any factory or house for shipping, shucking or canning oysters on Sunday, or after sunset or before sunrise, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, whenever any boat or vessel shall have partially unloaded or discharged its cargo before sunset, the remainder of said load or cargo may be discharged in the presence of an inspector.

Rev., s. 2394; 1903, c. 516, s. 16.

1942. Oyster-laden boats in canals regulated. No boat or vessel loaded with oysters shall be permitted by the inspectors of South Mills and Coinjock to pass through the canals, which does not have a certificate showing that the cargo has been inspected and the tax paid thereon.

Rev., s. 2420; 1903, c. 516, s. 17.

1943. Sale or purchase of unculled oysters. If any person shall sell or offer for sale, transport or offer to transport out of the state, or from one point in the state to another, or have in his possession any oysters which have not been properly culled according to law, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. It is unlawful for any person, firm or corporation to purchase oysters which have not been properly culled according to law, and for each violation shall upon conviction be fined two hundred dollars or be imprisoned in the discretion of the court.

In New Hanover, Onslow and Pender counties the purchase of unculled oysters is not forbidden.

Rev., s. 2392; 1903, c. 516, s. 3; 1907, c. 969, ss. 5, 13.

1944. Boat captain's purchase of unculled oysters. The captain of any run or buy boat who shall purchase oysters which have not been properly culled according to law shall upon conviction be fined two hundred dollars or imprisoned in the discretion of the court, and the having of unculled oysters aboard of his boat shall be prima facie evidence of his having purchased them. When any person, firm or corporation shall furnish the captain of any run or buy boat

with funds with which to purchase oysters, they shall not be held responsible for his acts and shall not be deemed the purchaser of such oysters.

This section is inapplicable to New Hanover, Onslow and Pender counties.

1907, c. 969, ss. 5, 13.

1945. Larceny from private grounds. Any person who shall feloniously take, catch or capture or carry away any shellfish from the bed or ground of another shall be guilty of larceny and punished accordingly.

Rev., s. 2401; 1887, c. 119, s. 15.

As to venue in an action for wrongful conversion of oysters taken from oyster bed of plaintiff, see *Makely v. Boothe*, 129-11.

1946. Injury to private grounds; work at night. If any person shall willfully commit any trespass or injury with any instrument or implement upon any ground upon which shellfish are being raised or cultivated, or shall remove, destroy or deface any mark or monument lawfully set up for the purpose of marking any grounds, or who shall work on any oyster ground at night, he shall be guilty of a misdemeanor. But nothing in the provisions of this section shall be construed as authorizing interference with the capture of migratory fishes or free navigation or the right to use on any private grounds any method or implement for the taking, growing or cultivation of shellfish.

Rev., s. 2402; 1887, c. 119, s. 11.

ART. 6. SHELLFISH; LOCAL LAWS

1947. New Hanover, Onslow and Pender: Close season for oysters. If any person shall buy or sell oysters in the shell which have been taken from the public grounds or natural oyster beds of this state between the first day of April and the first day of October in any year, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that oysters may be taken with hand-tongs only during the month of April in any year, to be used for planting on private grounds, entered and held under the laws of this state: Provided further, that oysters may be taken with hand-tongs only for home consumption: Provided further, that coon oysters may be taken from October first to May first of each year in the waters of Onslow and Carteret counties: Provided also, that it shall be lawful to take or catch oysters on public oyster grounds north of the line running from Point Peter to Duck island, except between a line running from the east end of Hog island to the beach and from Ballast point to the beach in Dare county, to be sold to residents or nonresidents, from April first to May fifteenth of each year, upon the payment by the purchaser of a tax of one and one-half cents per tub.

This section applies only to the counties of New Hanover, Onslow and Pender.

Rev., s. 2383; 1903, c. 516, s. 22; 1905, c. 525, ss. 5, 8; 1907, c. 936, s. 4.

See s. 1920.

Referred to in *State v. Sermons*, 169-285.

1948. Brunswick, New Hanover and Pender: Clams protected. It shall be unlawful for any person, firm or corporation to take clams in the counties of Brunswick, New Hanover or Pender, from any of the waters thereof, for the

purpose of bedding, for market, or for shipment from the said counties, from the twenty-fifth day of March to the fifteenth day of December of each year: Provided, however, that citizens of the said counties shall have the privilege at all times of the year to catch clams for selling in any of the said counties, in small quantities, for table use only. It shall be unlawful for any person, firm or corporation to purchase clams in the counties of New Hanover or Pender for the purpose of shipping from the said counties, or for any person, firm or corporation to ship from the said counties of Brunswick, New Hanover or Pender any clams at any time from the twenty-fifth day of March to the fifteenth day of December of every year, and in Brunswick county from the first day of March to the first day of December of every year. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined for each offense not exceeding fifty dollars or imprisoned not more than thirty days, in the discretion of the court.

1909, c. 879; P. L. 1913, c. 805.

1949. Brunswick: Clams; size limit. It shall be unlawful for any person or persons to catch any clams for use or for sale under one and one-half inches in diameter in the waters of Brunswick county; and upon conviction shall be guilty of a misdemeanor.

P. L. 1913, c. 805.

1950. Brunswick: Fire on oyster beds; raking. In Brunswick county it shall be unlawful for any person or persons to build a fire upon any natural oyster bed or rock at a place where oysters are in a state of growth. It shall be unlawful for any person or persons to rake with clam rake any oyster bed or oyster rock. Any person violating the provisions of this section shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

1915, c. 138.

1951. Carteret: Clams in Newport River. It shall be unlawful for any person or persons, firm or corporation, between the fifteenth day of April and the fifteenth day of October of any year, to take any clams from the waters of Newport river and its tributaries, for the purpose of shipping, selling, marketing or bedding the same. Any person or persons, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars for each offense, or imprisoned not exceeding thirty days, or both, in the discretion of the court.

1907, c. 840.

1952. New Hanover: Catching oysters in Myrtle Grove Sound. If any person shall take or catch any oysters from Myrtle Grove sound, from Perrine's or Whitaker's creek to the headwaters of said sound in New Hanover county, from the first day of May until the first day of September, except for his own consumption, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than twenty days.

Rev., s. 2426; Code, s. 3423; 1883, c. 358, ss. 1, 2.

1953. **New Hanover: Clams in Masonboro sound.** It shall be unlawful for any person or persons to use any rake or other instrument with more than two prongs for the purpose of taking clams from any natural oyster rock or the others waters of Masonboro sound, in the county of New Hanover, between what is known as Fowler's landing to Cockle Shell point, in said county, a distance of about one mile. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

1909, c. 521.

1954. **Onslow: Catching oysters and clams in certain waters.** It shall be unlawful for any person to take or catch any oysters or clams from the natural oyster beds heretofore staked off and defined by the shellfish commissioners of Onslow county, or from any ground, between the first days of April and October of each year, lying north of the following lines, to wit: Beginning at triangulation point "Mount Millow," on the western shore of New river, and running thence eastwardly to triangulation point "pond," the eastern shore of New river: It shall be unlawful for any person during the months of May, June and July of each year to take or catch oysters or clams from the natural oyster beds within the grounds lying south of the line mentioned above. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction or confession in open court shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. It shall be the duty of the fisheries commissioner to keep the lines marking the natural oyster beds in said waters properly marked and staked off.

1907, c. 949.

1955. **Onslow: Catching oysters in Stump sound.** It shall be unlawful for any person, firm or corporation to catch, take or carry away from the oyster beds in the waters of Stump sound, in Onslow county, between Alligator bay and the Pender county line, any oysters except for home consumption between the first day of March and the twenty-fifth day of October in any year. Any person, firm or corporation violating this section shall, upon conviction, be fined not less than fifty dollars or imprisoned not less than thirty days, in the discretion of the court.

1915, c. 130.

1956. **Onslow: Clams in Brown sound and Queen's creek.** It shall be unlawful for any person, firm or corporation to catch or take any clams from the waters herein described between the first day of April and the first day of October. Said territory shall be as follows: Beginning at the mouth of Queen's creek, in Onslow county, and running the various courses of the said Queen's creek channel to Bogue inlet, including all the waters south of said channel to the Horse ford, between Brown sound and New river: Provided, this shall not be so construed as to prohibit any one from catching clams for their own table use only. Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

1909, c. 514.

ART. 7. TERRAPIN

1957. Drag-nets prohibited to nonresidents. If any person who is not a citizen and who has not resided in the state continuously for the preceding two years shall use any drag-net or other instrument for catching terrapin he shall be guilty of a misdemeanor.

Rev., s. 2369; Code, ss. 3375, 3376.

Nonresident using drag-nets or other instrument not guilty if in the bona fide employ of one who has the right to take terrapin that way: State v. Conner, 107-932.

1958. Diamond-back terrapin protected. If any person shall take or catch any diamond-back terrapin between the fifteenth day of April and the fifteenth day of August of any year, or any diamond-back terrapin at any time, of less size than five inches in length upon the bottom shell, or shall interfere with, or in any manner destroy any eggs of the diamond-back terrapin, he shall be guilty of a misdemeanor, and shall be fined not less than five dollars nor more than ten dollars for each and every diamond-back terrapin so taken or caught, and a like sum for each and every egg interfered with or destroyed: Provided, this section shall not apply to parties empowered by the state to propagate the said diamond-back terrapin; and the possession of any diamond-back terrapin between the fifteenth days of April and August shall be prima facie evidence that the person having the same has violated this section. It shall be the duty of all sheriffs and constables to give immediate information to some justice of the peace of any violation of this section.

Rev., s. 2370; Code, s. 3377; 1899, c. 582; 1881, c. 115, ss. 1, 6.

1959. Local—Carteret: Diamond back terrapin. Any bona fide citizen of Carteret county is empowered to cultivate and propagate the diamond-back terrapin at one place in the waters of Carteret county: Provided, that he shall not interfere with the eggs laid by the wild diamond-back terrapin in its natural haunts, and that no undersized terrapin shall be taken for any purpose during the closed season prescribed by law in regard to catching terrapin.

The grantee of the privilege conferred by this section shall cultivate and propagate the diamond-back terrapin in a manner approved by the United States bureau of fisheries. If at any time the said grantee violates any of the laws of North Carolina regarding diamond-back terrapin the privilege hereby conferred shall cease and he shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court.

Pr. 1913, c. 402; P. L. Ex. Sess. 1913, c. 58.

SUBCHAPTER III. FISH OTHER THAN SHELLFISH

ART. 8. SALT FISH AND FISH SCRAP

1960. Inspectors for salt fish; duties; fees. The board of county commissioners of every county where fish are packed for sale or shipment shall appoint and qualify one or more sworn inspectors of fish at or near all packing localities, whose duty it shall be to inspect all salt fish packed for sale or shipment; and all barrels, half-barrels and packages of fish inspected and approved by them shall be branded with the word "inspected" and the name of the inspector. Said

board shall regulate and prescribe the duties, powers and fees of said inspector, which fees shall not exceed five cents per barrel of two hundred pounds net and two and one-half cents per half-barrel of one hundred pounds net and smaller packages, to be paid by the shipper. This section shall not apply to fishermen who may sell their fish to packers and shippers by weight or otherwise, as they may agree: Provided, that in any county where the board of county commissioners have not already appointed an inspector as is provided in this section, upon a petition of two or more persons it shall be mandatory upon the said board of county commissioners to immediately appoint an inspector in accordance with the provisions above. Upon failure to do so for five days after said petition has been filed, said board shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five nor more than fifty dollars for each member or be imprisoned not more than thirty days: Provided, said petition be filed with the clerk of the board of commissioners five days before regular meeting of said board.

1909, c. 663, s. 1; 1911, c. 171.

1961. Salt fish sold by weight; marked on package. All salt fish packed for market shall be sold at their net weight, which shall be marked on every package; and any person packing or offering for sale salt fish, fraudulently marking the net weight on the package, shall for each offense be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned not more than thirty days, or both, at the discretion of the court.

1909, c. 663, s. 2.

1962. Salt mullet; special marking. Each package of salt mullets packed and offered for sale shall be marked or stamped "large," "medium" or "small," and all packages containing any other kind of fish shall be marked plainly the name of the fish contained, and any person who shall pack as principal or shall have the same done by others for him shall be deemed the packer and shall stamp his name and place of packing, together with net weight and size of fish, as prescribed in this section, on the head of each package before offering for sale or shipment, and on failure to pack and stamp as herein prescribed, or to pack or stamp said package falsely, so as to misrepresent the weight or size of the fish in said package, shall be guilty of a misdemeanor and fined not less than five nor more than fifty dollars for each offense, and may be imprisoned at the discretion of the court, not to exceed thirty days: Provided, this section shall not apply to packages containing less than fifty pounds net fish: Provided further, this section shall not apply to fishermen themselves, but shall apply only to merchants and others who may be classed as packers or brokers, within the proper meaning of the term.

1909, c. 663, s. 3.

1963. Measures for fish scrap and oil. For the purpose of uniformity in the trade of manufacturing fish scrap and oil in the state of North Carolina, there is hereby established a standard measure of twenty-two thousand cubic inches for every one thousand fish. Any person, firm, corporation or syndicate buying or selling menhaden fish for the purpose of manufacturing within the borders of this state, who shall measure the fish by any other standard (more or less) than is prescribed in this section, shall be guilty of a misdemeanor, and upon

conviction shall be fined not more than fifty dollars or imprisoned not to exceed thirty days. Each day said measure is unlawfully used shall constitute a separate and distinct offense.

1911, c. 101.

ART. 9. COMMERCIAL FISHING; GENERAL REGULATIONS

1964. Right of fishing in grantee of land under water. Whenever any person acquires title to lands covered by navigable water under the subchapter Entries and Grants of the chapter entitled State Lands, the owner or person so acquiring title has the right to establish fisheries upon said lands; and whenever the owner of such lands improves the same by clearing off and cutting therefrom logs, roots, stumps or other obstructions, so that the said land may be used for the purpose of drawing or hauling nets or seines thereon for the purpose of taking or catching fish, the person who makes or causes to be made the said improvements, his heirs and assigns, shall have prior right to the use of the land so improved, in drawing, hauling, drifting or setting nets or seines thereon, and it shall be unlawful for any person, without the consent of such owner, to draw or haul nets or seines upon the land so improved by the owner thereof for the purpose of drawing or hauling nets or seines thereon. This section shall apply where the owner of such lands shall erect platforms or structures of any kind thereon to be used in fishing with nets and seines. Every person who shall willfully destroy or injure the said platforms or structures, or shall interfere with or molest the owner in the use of such lands as aforesaid, or in any other manner shall violate this section, shall be guilty of a misdemeanor. This section shall not relieve any person from punishment for the obstruction of navigation.

Rev., s. 2460; Code, s. 3384; 1874-5, c. 183, ss. 1-6.

The right of fishery rests in the state, and is subject to absolute control by the general assembly: *State v. Sermons*, 169-285; *Daniels v. Homer*, 139-219; *Brooks v. Tripp*, 135-159; *State v. Gallop*, 126-979; *State v. Woodward*, 123-710; *State v. Conner*, 107-932; *Rea v. Hampton*, 101-51. For additional annotations as to entries on land covered with water, see section 7543.

There is no individual or property right of fishery in navigable waters: *Bell v. Smith*, 171-116; *Daniels v. Homer*, 139-219—unless acquired in some way from the state, *Collins v. Benbury*, 27-118. The right of fishing in navigable waters is subordinate to the right of navigation: *Lewis v. Keeling*, 46-299; *Daniels v. Homer*, 139-219.

Persons owning land on navigable streams may erect wharves next to their land up to deep water, may make entry and obtain title as in other cases, but they cannot obstruct navigation and they are confined to straight lines from their water fronts: *Bond v. Wool*, 107-139. The right to wharves on water fronts is subject to legislative control and to the regulation of adjoining incorporated towns: *Ibid.*

What is a navigable stream is a question for the jury: *State v. Twiford*, 136-603. The test is the capability of use in the ordinary way, and not the extent of use: *Ibid.*; *State v. Baum*, 128-600; *State v. Club*, 100-477. The effect of the ebb and flow of the tide as affecting the right to fishery: *Ingram v. Threadgill*, 14-59.

1965. Seines prohibited to nonresidents; exceptions. If any person who has not resided in the state continuously for at least twelve months next preceding the day on which he shall begin to take fish shall use, or cause to be used, in any of the waters of the state, any weir, hedge, net, or seine, for the purpose of taking fish for sale or exportation, or if any person shall assist in using, or be interested in using or causing to be used, in any such waters for the purpose

aforesaid, any weir, hedge, net, seine or tongs in the use of which any such non-resident person may have an interest, he shall be guilty of a misdemeanor. Nothing herein shall prevent any person from fishing with seines hauled to the shore at any fishery, the title to which fishery or any interest therein having been acquired by such person by purchase or inheritance. This section shall not extend to servants employed to fish by any persons allowed to fish in the navigable waters of the state. No nonresident of the state shall make any sale, assignment or transfer of any fishery, weir, or other fishing apparatus, or privilege mentioned in this section, to any citizen of the state for the purpose of operating and working said fishery, weir, or other fishing apparatus as aforesaid, under the name and ownership of such citizen, or as the servant or employee of any citizen; and any sale, transfer or assignment not made bona fide and for a full consideration shall be null and void.

Upon affidavit founded upon information and belief that any nonresident of the state is operating any such fishery, weir, or other fishing apparatus as aforesaid in the waters of the state, under such sale, assignment or transfer, as the pretended servant or employee of any citizen of the state, it shall be the duty of the justice of the peace before whom said affidavit is made to issue a warrant against the said nonresident and citizen under whose name said fishery is operated, and upon conviction the said offenders shall be guilty of a misdemeanor, and shall, for every offense, be fined not more than fifty dollars, or imprisoned not more than thirty days. Upon the said trial, the burden of proof shall be on the defendants to prove the bona fides and full consideration of said sale or transfer.

Rev., s. 2467; Code, ss. 3379, 3380; R. C., c. 81, s. 5; 1844, c. 40, s. 1; 1876-7, c. 33; 1883, c. 171.

Nonresident using drag-net or other instrument not guilty if in the bona fide employ of one who has the right to take terrapin that way: *State v. Conner*, 107-932.

1966. Menhaden fishing forbidden to nonresidents. It is unlawful for any person, firm, or corporation, not a citizen or resident of the state of North Carolina, to catch, capture, or otherwise take any menhaden or fatbacks within the waters of the state of North Carolina to the extreme limits of the state's jurisdiction in and over said waters; and for the purposes of this act the following boundaries are hereby declared to be the boundaries to which the waters of the said state extend, to wit: a distance of three nautical miles, measured from the outer beach or shores of the state of North Carolina out and into the waters of the Atlantic ocean; and any portions or portion of any water within a distance of three nautical miles from said waters of the Atlantic ocean to any beach or shore of said state shall be deemed, for the purposes of this act, within the waters of said state: Provided, that any citizen or resident of the state of North Carolina, whether person, firm, or corporation, may take, capture, or catch any menhaden or fatbacks at any time, subject to existing laws.

It is unlawful for any nonresident person, persons, firm, or corporation knowingly to buy, cook, or manufacture into fertilizer any menhaden or fatbacks caught, taken, or captured contrary to the provisions of the above.

Any person, persons, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction in any county opposite the place at which said act is done, shall be fined not less than twenty-

five hundred dollars or imprisoned for two years, or both, in the discretion of the court: Provided, that each catch, or taking, or purchase, or act of manufacture, shall constitute a distinct and separate offense.

It is the duty of the fisheries commissioner or assistant commissioner, whenever an affidavit is delivered to him stating that the affiant is informed and believes that said act is being violated at any particular place, to go himself or send a duly authorized deputy to such place, investigate the same, and such officer shall seize and remove all nets, machinery, or other appliances and paraphernalia setting or being used in violation of this section, sell same at public auction and apply the proceeds of such sale to the payment of costs and expenses of such removal, and pay any balance remaining into the school fund of the county nearest to the place where the offense is committed.

1911, c. 102.

1967. Menhaden fishing with nets regulated. If any person shall catch any menhaden or fatbacks within the waters of the state of North Carolina, to the extreme limits of the state's jurisdiction as defined in the preceding section, in any purse net or purse seine with a bar of less than one inch and with a mesh of less than two inches, or shall knowingly cook or manufacture for fertilizer any menhaden or fatbacks caught in any net or seine having bars of less than one inch or having meshes of less than two inches, at any place within the state of North Carolina, he shall be guilty of a misdemeanor, and for each and every offense shall be fined not less than five hundred dollars or imprisoned for one year, or both, in the discretion of the court. Every person found fishing for menhaden or fatbacks within three miles of the shore of any county shall be presumed to have violated this section. And all such persons, firms or corporations shall be subject to all the pains and penalties denounced in this section, and they may be prosecuted in the courts of any county in this state. All persons aiding and abetting shall be guilty as principals.

This section is inapplicable to the counties of Dare, Brunswick, Pender, and New Hanover.

Rev., s. 2438; 1905, cc. 274, 508.

1968. Poisoning streams. If any person shall put any poisonous substance for the purpose of catching, killing or driving off any fish in any of the waters of a creek or river, he shall be guilty of a misdemeanor.

Rev., s. 3417; Code, s. 1094; 1883, c. 290.

1969. Fish offal in navigable waters. If any person shall throw, or cause to be thrown, into the channel of any of the navigable waters of the state, any fish offal, in any quantity that shall be likely to hinder or prevent the passage of fish along such channel, or if any person shall throw or cause to be thrown into the waters known as the Frying Pan, tributary to the Great Alligator river, in Tyrrell county, any fish offal in any quantities whatsoever, he shall be guilty of a misdemeanor.

Rev., s. 2444; Code, ss. 3386, 3389, 3407.

Navigable waters defined in annotations under section 1964.

1970. Sunday fishing. If any person fish on Sunday with a seine, drag-net or other kind of net, except such as is fastened to stakes, he shall be guilty of

a misdemeanor, and fined not less than two hundred nor more than five hundred dollars or imprisoned not more than twelve months.

Rev., s. 3841; Code, s. 1116; 1883, c. 338.

This section does not apply to Onslow county so far as established seines are concerned. 1885, c. 171; 1889, c. 23.

1971. Robbing nets. If any person shall, without authority of the owner, take any fish from any nets of any kind, he shall be guilty of a misdemeanor.

Rev., s. 2478; Code, s. 3418; 1883, c. 137, s. 5.

Fish in the public waters of the state do not become private property until reduced to possession: State v. Gallop, 126-979.

1972. Vessel injuring nets. If any master or other person having the management or control of a vessel or boat of any kind, in the navigable waters of the state, shall willfully, wantonly, and unnecessarily do injury to any seine or net which may be lawfully hauled, set or fixed in said waters for the purpose of taking fish, he shall forfeit and pay to the owner of such seine or net, or other person injured by such act, one hundred dollars, and shall be guilty of a misdemeanor.

Rev., s. 2465; Code, ss. 3385, 3389.

Fishing without permission. see Game Laws, s. 2127.

A company injuring fishing nets in a navigable stream by unnecessarily and wantonly running its boats into same is liable for damages: Hopkins v. R. R., 131-463.

1973. Injury to fishing structures. If any person shall willfully destroy or injure any platform or structure on any land covered by navigable waters, which land has been duly entered and granted and over which the owner has, according to law, acquired a prior right of fishery, or shall interfere with or molest the owner in the use thereof or of said prior right of fishery, he shall be guilty of a misdemeanor. If any person shall willfully destroy or injure any platform or structure erected in any navigable water by the owner of the adjoining land for the purpose of drawing or hauling nets or seines thereon, or shall interfere with or molest the owner in the use of any such lands, he shall be guilty of a misdemeanor.

Rev., ss. 3414, 3415; Code, s. 2753; 1874-5, c. 183, ss. 2-4.

1974. Obstructing passage of fish in streams. If any person shall set a net of any description across the main channel of any river or creek, or shall erect, so as to extend more than three-fourths of the distance, across any such river or creek any stand, dam, weir, hedge or other obstruction to the passage of fish, or shall erect any stand, dam, weir, or hedge, in any part of any river or creek that may be left open for the passage of fish, or who, having erected any dam where the same was allowed, and shall not make and keep open such slope or fishway as may be required by law to be kept open for the free passage of fish, he shall be guilty of a misdemeanor: Provided, that this section shall not apply to the creeks in the sound between Bogue inlet and Brown inlet, in Onslow county, except the main channel thereof.

Rev., s. 2457; Code, ss. 3387, 3388, 3389; 1909, c. 466, s. 1.

As to obstructing passage of fish in water-courses, see State v. Glenn, 52-321; McLaughlin v. Mfg. Co., 103-100.

General assembly has complete authority to make provision for removal of any obstruction and nuisance to fishing in the waters of this state: Rea v. Hampton, 101-51.

Obstructions may be removed by private party under certain circumstances: Daniels v. Homer, 139-219; Hettrick v. Page, 82-65; Rea v. Hampton, 101-51.

1975. Dams for mills and factories regulated; sluiceways. No person shall place or allow to remain any dam for mill or factory purposes in the Chowan river between Holliday's island and the Virginia line; in the Meherrin river between its mouth and the Virginia line; in the Roanoke river from the mouth of the Cashie river to the Virginia line; in the Dan river from the crossing of the state line to a point nearest Danbury; in the Neuse river from New Bern to Neuse station in Wake county; in Contentnea creek from its junction with the Neuse to the junction of Turkey and Moccasin creeks; in the Cape Fear river from Wilmington to the junction of Haw and Deep rivers and thence in Haw river to the line of Chatham and Alamance counties, and also in Deep river to the Randolph and Chatham line; in Rocky river from its mouth to the crossing of the Pittsboro and Ashboro road; in the New Hope river from its mouth to the Orange county line; in Northeast Cape Fear river from Wilmington to South Washington; in Black river from its mouth to the junction of the Coharie; in the South river from its junction with the Black river to the crossing of the Fayetteville and Warsaw public road; in Lumber river from the state line to the northern boundary of Robeson county; in the Yadkin river from the state line to Patterson's factory; in Elk creek, a tributary of the Yadkin river, from its mouth to Daniel Wheeler's in Watauga county; in Stony Fork creek, a tributary of the Yadkin river, from its mouth to John Jones's old store; in Ararat river from its mouth to the bridge at Mount Airy; in North Fork of Catawba from its mouth to Turkey Cove; in Broad river from the state line to Reedy Patch creek; in Green river from its mouth to its junction with North Paolet; in the Tennessee river from the state line to its junction with the Nantahala; in Pigeon river from the state line to the Forks of Pigeon; in the French Broad river from the state line to Brevard and in the Swannanoa river; in Toe river from the state line to the confluence of the North and South Forks of Toe; in New River from the state line to the point of divergence from the western boundary line of Alleghany county; in Little river in Johnston county from its junction with Neuse river in Wayne county to the Wake county line; in Cane river from the mouth of same to mouth of Bolling creek in Yancey county, also Old Fields of Toe on North Toe river in Mitchell county; Johns river from its mouth to the forks of said river near Carrell Moore's in Caldwell county; Catawba river from the South Carolina line to the town of Old Fort in McDowell county, unless the owner thereof shall construct thereon at his own expense a sluiceway for the free passage of fish, of a width not less than three feet nor more than ten feet: Provided, such sluiceway shall be constructed according to plans and specifications to be furnished by the board of agriculture, and shall not injure the water-power of such owner: Provided further, in order to ascertain whether sluiceways will or will not injure the water-power aforesaid, the owner of such dam may select two disinterested persons and the board of agriculture two others, who may select the fifth person to aid in the arbitration and settlement of such complaint: Provided further, this section shall not apply to Pigeon river in Haywood county: Pro-

vided also, it shall be lawful for any person to remove any obstruction in the main channel of the Cape Fear river to the width of one hundred feet, for the free passage of fish in the county of Harnett. This proviso, however, shall not apply to any dam or obstruction placed or kept upon said river by the Cape Fear iron and steel company.

Rev., s. 2462; Code, s. 3410; 1901, c. 208; 1880, c. 34; 1881, cc. 21, 32, 250, 320; 1905, c. 278; P. L. 1913, c. 758.

Section merely referred to, in the case of the obstruction in French Broad River, in *Gwaltney v. Land Co.*, 111-566.

1976. Sluiceways and fish passages; regulation and enforcement. The sluiceways referred to in the preceding section shall be so constructed and placed upon such dams by the owner thereof within sixty days after notice has been given by the board of agriculture, under a penalty of one hundred dollars per day for each day thereafter that such dam shall remain without such sluiceway, and shall be kept open by him during the months of February, March, April, May, June, October and November, and at all other times when there is sufficient water to supply both the water-power and the sluiceway, a fine of fifty dollars per day for each day said sluiceway shall be allowed to remain closed, and any person who shall fish with net, trap, hook and line, or who shall take in any way whatsoever any fish within two hundred feet of said sluiceway, shall be subject to a fine of one dollar for each fish so taken, or a fine of fifty dollars for each offense, or imprisonment for thirty days.

No other obstruction to the passage of fish shall exist or be built between the designated points in the streams mentioned in this and the preceding section unless an opening of not less than twenty-five feet, and not more than seventy-five feet, embracing the main channel of said streams, shall be made by the owner of such obstructions within twenty days after notice from the board of agriculture to make such opening under penalty of fifty dollars per day for each day such obstruction shall remain unopened. Said notice shall be served by the sheriff of the county, and his return shall be prima facie evidence of notice in any suit for such penalty.

Rev., ss. 2463, 2464; Code, ss. 3411, 3412; 1880, c. 34, ss. 2, 3.

See further as to obstructing streams and fish passages, *Rivers and Creeks*, ss. 7367, 7377.

General assembly has complete authority to make provision for the removal of any obstruction and nuisance to fishing in the waters of this state: *Rea v. Hampton*, 101-51.

ART. 10. COMMERCIAL FISHING; LOCAL REGULATIONS

Part 1. Sounds and Inlets

1977. Inlets; nets in, regulated. If any person shall set any pound net, dutch net or hedge net within two miles of Oregon inlet or Hatteras inlet or within ten miles of New inlet in Dare county, or shall between the first day of January and the first day of May following of any year, set or operate any seine or stationary nets of any kind in the main channels within three miles of the inside mouths of Ocracoke, Hatteras, Oregon, or any other inlet north of Ocracoke inlet, connecting the waters of the Atlantic ocean with any of the sounds or other inland waters, or shall fish with seines or nets of any description

in the waters of Bear inlet or Brown's inlet or within one mile of Bear inlet or Brown's inlet, on the eastern or western beach of said inlets, except as regularly established fisheries on said Bear or Brown's inlet beaches, or shall fish with seines or nets on the inside of said Bear or Brown's inlet within one-fourth mile of said inlets between the first day of October and the first day of April, he shall be guilty of a misdemeanor.

Rev., s. 2450; 1893, c. 216; 1903, c. 724; 1903, c. 416.

1978. Pamlico and sounds to the north: Net stakes to be removed. Every person who shall set or use any net in the waters of Pamlico, Croatan, Currituck or Albemarle sounds or their tributaries, except Perquimans river, shall be required to pull up and remove their broken, decayed and abandoned net stakes within thirty days from the day the nets were taken from them, and not later than the first day of June, and any person failing to pull up and remove their stakes, as required by this section, shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 2448; Code, ss. 3382, 3414; 1883, c. 69; R. C., c. 81, s. 8; 1844, c. 40, s. 7; 1852, c. 13; 1893, c. 147; Ex. Sess. 1908, c. 19, s. 1.

For Currituck county, the above section is applicable, except that the words "broken, decayed and abandoned" before "net stakes" are omitted. Ex. Sess. 1908, c. 19.

One engaged in seine fishing on the shores of Albemarle sound has the right to remove stakes put up to operate a pod-net, when his seine fishery is interfered with by them: Hettrick v. Page, 82-65.

1979. Pamlico, Croatan, and Albemarle sounds and inlets: Fishing regulated. If any person shall set or fish any net, seine or appliance of any kind for catching fish at any place within a radius of two and one-half miles either way from Roanoke marshes lighthouse, at a distance more than five hundred yards from the shore of Roanoke island or the mainland on the western side of Croatan and Pamlico sounds, except that on the western side of Pamlico and Croatan sounds fishing shall be permitted in that territory extending one thousand yards from the shore, beginning at the two-and-one-half-mile limit heretofore defined and extending to the southern end of the Roanoke marshes, on the Pamlico sound side, and to the north end of the same marshes of the Croatan side, but in neither case shall the nets within this one-thousand-yard limit be within one and one-quarter miles in any direction from the Roanoke marshes lighthouse; or shall set or fish any pound or dutch net on the eastern side of Pamlico sound within ten miles of the Roanoke marshes lighthouse, except such as shall be fished within one thousand yards of Roanoke island or Hog island shores; or shall set or fish any dutch or pound net on the eastern side of Pamlico sound more than two thousand yards west of a line running south-southeast (magnetic) from Big island to a point on the twelve-foot curve westerly of Chicamacomico or south of said point more than two thousand yards from the twelve-foot curve, as marked on the chart of the coast and geodetic survey, corrected from data obtained to November twenty-second, one thousand nine hundred and four; or shall set or fish any dutch or pound net on the west side of Pamlico sound, in said sound, extending into the water more than two thousand yards from the shore; or shall set or fish any pound or dutch net in Croatan sound farther from the shore than one-fifth of the width of said sound at that point; or shall set or fish any net, seine or appliance of any kind for catching fish at any place within the area of

one-sixth the width of the sound or river on either side of a line passing through the middle of the channel of Croatan sound and the middle of Albemarle sound, up Chowan river as far as Cannon's ferry, and other tributaries of Albemarle sound (provided, this clause does not apply to seines used on the rivers); or shall set or fish any pound or dutch net in the Albemarle sound more than two thousand yards from the shore of the mainland, or in Chowan river farther from the shore than one-third of the width of said river, at the place where said nets are fished or set, or within one-fourth mile of any wharf used by a steamer on said river; or shall set or fish any net or appliance of any kind for catching fish within one mile on either side of a line running westerly or southwesterly from the center of New inlet to an intersection with the line extending from Big island southwest (magnetic), or within one mile on either side of a line six miles long running southwesterly from the center of Oregon inlet to a point two thousand yards west of the continuation of the said line running from Big island south-southeast (magnetic), or within one mile on either side of a line six miles long running from the center of Hatteras inlet in a northwesterly direction, these restricted areas to include the channels extending from Oregon, New and Hatteras inlets, respectively, he shall be guilty of a misdemeanor and be fined not less than fifty dollars or imprisoned not less than thirty days, in the discretion of the court. The provisions of this section shall apply only to that part of each year in which shad and herring fishing are permitted by law in the several waters, except that in Albemarle and Croatan sounds the provisions of this section shall apply for the entire year, as far as it relates to pound nets. The fisheries commissioner is authorized, in determining the boundaries of the restricted areas on either side of Roanoke marshes, to run straight lines from the stake two thousand yards from the shore in the two-and-one-half-mile radius from Roanoke marshes lighthouse to the stake five hundred yards eastward from the point of Roanoke marshes, and shall run straight lines from the stake one-fifth the width of Croatan sound in the two-and-one-half-mile radius from Roanoke marshes lighthouse south to the stake five hundred yards from the eastward point of Roanoke marshes; that the boundary lines marking the restricted areas in these sounds shall be run in straight lines from stake to stake, located at certain points, but said stakes not to be in any case more than three miles apart. The place of trial for offenses under this section shall be the county opposite where the act was committed.

1909, c. 540, s. 3.

Fishing in prohibited waters is a public nuisance, and any person injured thereby may abate it without unnecessary damage to the property: Daniels v. Homer, 139-219; Rea v. Hampton, 101-51; Hettrick v. Page, 82-65.

1980. Albemarle and Croatan sounds and inlets: Drift nets. If any person shall drift or fish any drift nets between the first day of February and the first day of May of any year, within two miles of the mouth of any river emptying into Albemarle sound, or within three miles of any seine-beach on the Albemarle or Croatan sounds while being fished, or within ten miles of Ocracoke, Hatteras, Oregon or New inlets, or within ten miles of the Roanoke marshes, he shall be guilty of a misdemeanor, and be fined not less than fifty dollars or imprisoned not less than thirty days: Provided, the people of Dare county shall be allowed to use drift nets for herring.

Rev., s. 2446; Code, s. 3396; 1881, c. 274, ss. 1, 2; 1883, c. 145.

1981. Albemarle sound and tributaries: Nets and net stakes. No person shall set or fish any dutch net or pound net in Roanoke river, Cashie or Middle and Eastmost rivers, or within two miles of the mouth of said rivers, or within one mile of the mouth of any other river emptying into Albemarle sound, or less than two miles in width at its mouth, and any such net set within one mile of the mouth of any other river emptying into said sound shall not extend into the main channel at its mouth. No person shall set or fish with a dutch net or pod net within half a mile to the eastward or westward of the outside windlasses or snatch-blocks of any seine fishery in operation on said sound; and any such net set or fished within one mile of such windlasses or snatch-blocks of any seine fishery in operation shall run at right angles to the shore from the shore, and shall not extend farther into the sound from the water's edge than the distance from such windlasses or snatch-blocks to the line of such net; and all persons who shall set or fish any such net in said sound shall pull up and remove the stakes used for the same by the first day of June next succeeding the fishing season, and if any person shall set or fish any dutch net or pod net in said sound in violation of this section he shall be guilty of a misdemeanor, and be subject to a penalty of three hundred dollars: Provided, that dutch nets may be used in Cashie river two and one-half miles from its mouth, if they do not extend more than one-third the width of said river from the shore, and such nets may be along the sound shore on the Bertie county side between the following points along said shore, to wit: commencing at the mouth of Cherry Tree Cut branch, Kentrock field and Landing field, and running around the shore to the mouth of Morgan swamp, thence to Rock Spring branch, and that any nets set or fished within that line shall not extend from the shore in any direction a greater distance than six hundred and fifty yards measured at high water, and within this distance of six hundred and fifty yards is to be included the nets, hedges and all parts thereof.

Rev., s. 2439; Code, s. 3333; 1889, c. 122; 1891, c. 322; 1895, c. 245; 1899, c. 310; 1899, c. 412; 1909, c. 540, s. 2; 1911, c. 23.

One engaged in seine fishing on the shores of Albemarle sound has the right to remove stakes put up to operate a pod-net, when his seine fishery is interfered with by them: *Hettrick v. Page*, 82-65.

1982. Albemarle sound in certain parts: Gill nets. It is unlawful to set, fish or use any gill nets of any description, either stake, anchor or drift, for commercial purposes in the Albemarle sound west of a line drawn straight from Batt's island on northern side of Albemarle sound to mouth of Scuppernong river on south side of said sound, except between the hours of four o'clock and eleven o'clock p. m., and then said nets or combinations of such nets shall not be more than six hundred yards in length, and there shall not be allowed to any boat more than six hundred yards of such gill nets.

It is the duty of the fisheries commissioner or other persons entrusted with the enforcement of the fishery laws of the state to seize and remove any gill net of any description being set, setting or being used in violation of this article, or which is more than six hundred yards in length, and to dispose of the same as provided by law.

It is the duty of the fisheries commissioner to keep a deputy, assistant or inspector on the waters of Albemarle sound to enforce this section and the other fish laws applicable to Albemarle sound, and the failure of the fisheries commis-

sioner to perform this duty shall render his official bond liable to the penalty prescribed in the third preceding section which regulates fishing in Pamlico, Croatan and Albemarle sounds and inlets.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than two hundred dollars (one-half to go to the informant and the other half to the school fund), or imprisoned in the discretion of the court.

1911, c. 18; 1913, c. 43.

1983. Albemarle sound off Tyrrell county: Gill nets. It is unlawful for any person, firm or corporation to set or use for catching fish any anchor gill net within fourteen hundred yards of any stake gill net of from four and one-half inch to five and one-half inch mesh in that part of the Albemarle sound embraced in the following area: Commencing on the east shore of the Scuppernong river where said river empties into the Albemarle sound, thence north to the middle of the Albemarle sound, thence along the middle of the Albemarle sound to a point in the sound opposite Newberry pier, thence to the shore at Newberry pier, and along the sound shore to the beginning. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or be imprisoned for not more than thirty days.

1915, c. 112.

1984. Albemarle sound in certain parts: Anchor, drift, and stake nets. If any person shall set or fish an anchor, drift or staked gill net in the waters of Albemarle sound or its tributaries west of a line running from Skinner's point buoy to Roanoke lighthouse, or if any person shall east of said line set or fish in the waters of said sound or its tributaries any anchor, drift or staked gill net longer than one thousand yards, or combination of such nets longer than one thousand yards; or shall set or fish any anchor, drift or staked gill nets within one and one-half miles of any seine grounds on the said sound or rivers emptying therein or within one-half mile of any dutch-net stand where the same is now located in said sound or rivers, unless said seine ground or dutch-net stand is owned by the person setting such nets; or shall set or fish any line or row of anchor, drift or staked gill nets anywhere in said sound or rivers nearer to any other row of such nets than half the length of the longer of said row he shall be guilty of a misdemeanor and shall be fined not exceeding one hundred dollars or be imprisoned not more than thirty days. And any person who shall willfully violate the provisions of this section shall forfeit and pay for each violation of the same the sum of one hundred dollars, to be recovered in a civil action by any one who will sue therefor; one-half of said recovery shall inure to the benefit of the public school fund: Provided, that nothing in this section shall prevent the setting of gill nets in the Chowan river or its tributaries above Holliday's island: Provided further, that one-third of said stream, along the channel, shall be kept free from any class of net: Provided further, that no pound net shall be set within one hundred yards of any other pound net set by another person in Chowan river, north of Holliday's island.

Rev., s. 2451; 1897, c. 51; 1899, c. 41; 1899, c. 130; 1911, c. 104.

1985. Albemarle sound: Nets near wharves or Norfolk Southern railroad bridge. It is unlawful to set any pound or dutch nets in Albemarle sound

nearer to either side of the Norfolk Southern railroad bridge across said sound than three hundred yards, or to set any stake, drift, or anchor gill nets nearer to either side of said bridge than one-half mile. It is unlawful to set any net of any description in front of a wharf, that is, between the pier of any wharf now used as a landing for any steamboat and the middle of the stream on which the wharf is built. Any person violating the provisions of this section shall be guilty of a misdemeanor and fined not less than one hundred dollars or imprisoned in the discretion of the court.

1911, c. 163.

1986. Croatan marshes: Nets and fishing apparatus near. If any person, for the purpose of taking fish, shall between the first day of February and the first day of May, of the same year, use or cause to be used, at or within half a mile of the marshes separating the waters of Croatan and Pamlico sounds, any weir, hedge, net or seine, he shall be guilty of a misdemeanor.

Rev., s. 2424; Code, s. 3378; R. C., c. 81, s. 4; 1844, c. 40, s. 3.

1987. Currituck sound: Nets used regulated. It is unlawful for any person or persons, firm or corporation to fish in the waters of Currituck sound with a drag, haul, seine or any other kind of net of whatsoever kind with a bar of less than one and three-eighths inches, or a mesh of less than two and three-quarters inches. Any person or persons, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned more than thirty days, in the discretion of the court.

1913, c. 29.

1988. Pamlico sound: Nets to be set north and south. Every net (unless the same be a drag-net and hauled to the shore) which may be used for catching shad in that portion of the waters of Pamlico sound lying between a line drawn eastwardly from Stumpy Point and Mount Pleasant in Hyde county to a point ten miles south of Hatteras inlet in said sound, shall be set and fixed in said waters in a direction from north to south, and shall not be used in any other manner; and any person offending against this section shall, for every offense, forfeit five dollars.

Rev., s. 2433; Code, s. 3381; 1889, c. 261; R. C., c. 81, s. 7; 1844, c. 40, s. 6.

1989. Pamlico sound; tributaries, rivers, and waters of Carteret county: Nets regulated. There shall be no pound or other tarred nets with a mesh smaller than one and one-half inches bar, before tarring, fished in Pamlico, Tar, and Neuse rivers, Pamlico sound and the waters of Carteret county, and there shall be no pound or stake nets fished within three miles of the inside mouths of Ocracoke inlet nor in the principal channel or channels of said inlet nor within one mile of said channel or channels until the said channel or channels reach deep water, at any time, and the other inlets north of it shall be left under section 1979 of this chapter. No stake or pound net which shall be fished in any of the waters mentioned in this section, without being tarred, shall have a mesh of less than one and three-eighths inches bar. The bunt, which must not be longer than thirty yards, of all seines and haul-nets fished in the waters of Pamlico, Tar and Neuse rivers and Pamlico sound shall not be smaller than one and one-eighth inches bar net, but nothing herein shall apply to nets fishing for menhaden. Any person violating any of the provisions of this section shall be

guilty of a misdemeanor, and shall be fined not less than one hundred dollars and imprisoned at the discretion of the court: Provided, this section shall apply only to that part of the year beginning January fifteenth and ending May fifteenth.

1907, c. 948, ss. 1-4; 1909, c. 540, s. 4.

1990. Pamlico sound; waters of Pamlico county: Nets regulated. It is unlawful for any person or association of persons or corporation to set or cause to be set, fish or cause to be fished in Pamlico sound from the mouth of Bay river to Neuse river and in Neuse river, more than four pound, pod or dutch nets in any one string, with leads of more than two hundred yards in length for each pound or net, or at a greater distance than one and one-half miles from the shore at right angles or thereabouts from the place opposite where such net may be set; and it is unlawful for any person, association of persons or corporation to set or cause to be set any pound, pod, or dutch net or string of nets of any kind, or fish any such nets nearer to a net or string of nets already set and being fished than five hundred yards, and no pound, pod, or dutch net nor any lead thereto shall be set other than at right angles or thereabouts from the shore. It is unlawful for any person or persons, firm or corporation to use, set or fish any drag or haul net in the waters of Smith's creek or its tributaries in Pamlico county.

It is unlawful for any person or persons or corporation to set or fish or cause to be set or fished any pound, pod, or dutch net in the waters of Pamlico county on the south or east side thereof, or in Neuse river, of a size smaller than one and one-quarter mesh or bar measure or two and one-half inches string measure.

Any person, persons or corporation who shall violate any of the above provisions shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, in the discretion of the court, and shall also forfeit such net or nets any portion of which may be set beyond such distance from the shore or set in any manner or place forbidden in this section.

It is the duty of the sheriff of Pamlico county, upon reliable information that any person or persons or corporation has set or caused to be set any pound or dutch net, or that any portion of any such net has been set at a greater distance than one and one-half miles from the shore from the mouth of Bay river to Neuse river and from Neuse river to Baird's creek, or nearer than five hundred yards to any nets already set, to ascertain the truth thereof, and if such report be correct, take into possession at once any such net so set, and after ten days public notice at three public places in his county sell the same at public sale, and from the proceeds he shall retain the actual cost of taking such net, and a fee for services of two and one-half dollars and the remainder of said proceeds he shall pay one-half to the informer and the other to be paid to the county treasurer, who shall place the same to the credit of the public school fund of the county.

It is lawful for any person or persons to set pound, pod, or dutch nets in the manner prescribed in this section in the waters of Pamlico county and in Neuse river upon the north side thereof from its mouth to Baird's creek, at any time during the year, and from the northern end of outer Swan island to Adams creek on the south side of Neuse river, from the first day of January to the first day of May.

P. L. 1913, c. 752, s. 5.

1991. Roanoke sound: Nets in. It is unlawful for any person or persons to set any pound nets or any other kind of nets east of a line beginning at a point one thousand yards east of Hog Island point and running direct to a point two hundred yards east of Broad Creek point; thence following the east shore of Roanoke island to Ballast point; or set or fish any pound or dutch nets or any other kind of net in that portion of Roanoke sound north of a line extending from Ballast point east ten degrees north farther from the shore than one-fifth of the width of said sound. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned at the discretion of the court. This section shall not prevent the setting of pound nets inside of Shallow Bag bay, and shall apply only to that part of each year in which shad and herring fishing is permitted by law in the several waters.

1911, c. 26.

Part 2. Streams

1992. Black river: Fishing regulated. It is unlawful for any person or persons to catch or take fish, either by rod or hook, seines, nets, striking, muddying the pools or lagoons, feeling by hand, gigging or in any other method or in any manner whatsoever, during the months of May, June, July and August, excepting Tuesday and Friday of each week in each year, in the waters of Black river and its tributaries, in the counties of Pender and Bladen. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction fined not less than five dollars nor more than ten dollars or imprisoned not more than thirty days, one-half of the fine to be paid to the informer and one-half to the school fund.

1909, c. 478.

1993. Black river and Mingo creek: Only hook and line. If any person shall fish in that part of Black river in Sampson and Cumberland counties and below the Atlantic coast line railway bridge, or Mingo creek in said counties below the Aversboro and Clinton road otherwise than with a hook and line, he shall be guilty of a misdemeanor.

Rev., s. 2471; 1895, c. 276.

1994. Black river in Bladen, Cumberland and Sampson: Close season. It is unlawful for any person to catch with hook and line, seine, or destroy with gun or any gig or striking iron the fish in the waters of Black river and its tributaries in the counties of Bladen, Cumberland and Sampson from the fifteenth of May until the fifteenth of August in each year. Any person violating this section shall be guilty of a misdemeanor and shall be fined not less than ten dollars nor more than twenty-five dollars, or imprisoned in the county jail not more than thirty days, for each and every offense.

P. L. 1913, c. 623, s. 1.

1995. Black river and Six Runs: Obstructing channel; lay days. It is unlawful for any person or persons to fish in that part of Black river from the Cape Fear river to the mouth of Great Coharie, and in that part of Six Runs river from its mouth to where it is crossed by the Atlantic coast line railroad, with any wire trap, net or contrivance whatever that will obstruct the free passage of fish in said waters, from the first day of March to the fifteenth day of June

of each year, except from six o'clock p.m. to six o'clock a.m. on Tuesday, Thursday and Saturday nights. It is unlawful for any person or persons fishing as permitted in the foregoing to leave, or permit being left, in the parts of the said streams defined in the foregoing, any wire trap, net or contrivance whatever that will obstruct the free passage of fish, or any parts of any such wire trap, net or contrivance, at any time during which such fishing is prohibited. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and be fined not more than fifty dollars or imprisoned not more than thirty days.

1907, c. 169.

1996. Cape Fear river: Nonresidents may not fish. If any person who is a nonresident of the state shall catch fish, for marketable purposes, in the waters of the Cape Fear river, or any of its tributaries, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned at the discretion of the court.

Rev., s. 3416; 1895, c. 230.

1997. Cape Fear river: Nets and seines regulated. If any person shall use any net for catching sturgeon in the waters of New Hanover county, the bars of the meshes of which net shall be less than ten inches in the diamond; or shall haul a seine or nets or pod fish within three hundred yards of any established fishery, except with the nets of such fishery; or shall set or fish any stationary nets in the waters of the Cape Fear river, except on the east side thereof and in New Hanover county; or shall set any net in said river otherwise than east or west; or shall own or control more than one line of nets; or shall operate or fish any shad nets in Cape Fear river below the mouth of Brunswick river between the twentieth day of April and the fifteenth day of January; or shall set any set net or stationary net of any kind in the Cape Fear river north of the mouth of the Brunswick river, or in the Brunswick river; or shall operate any drift net in the Cape Fear river of more than three hundred yards in length, or shall catch shad in said river with seines or nets from the twentieth of April to the fifteenth of January, he shall be guilty of a misdemeanor. The possession of a sturgeon net with meshes of a size smaller than allowed by this section shall be prima facie evidence of having fished the same. In setting nets in Cape Fear river as allowed by this section the following rules shall prevail: They shall begin at a point one hundred yards from the edge of the channel on the east side of said river and running thence due east one hundred and twenty yards, then leaving a gap of one hundred and twenty yards. Then from the east end of said gap another net may be set one hundred and twenty yards only, and to continue in the same proportion, always requiring a gap of one hundred and twenty yards to intervene between each one hundred and twenty yards of nets so set, and no net or sets of nets of any kind shall be placed opposite said gaps, within a distance of a half mile of same, and none of the nets so set shall be nearer than a half-mile of the west shore of said Cape Fear river. An established fishery in the meaning of this section is one where there is a camp for the use of the hands, and where the seine or nets and boats used by the said fishery are kept, and where the said fishery was established prior to the first day of January, one thousand eight hundred and ninety-nine.

Rev., s. 2468; Code, s. 3403; 1901, c. 173; 1899, c. 440; 1881, c. 280; 1907, c. 752.

1998. Cape Fear river: Fish traps regulated. If any person shall construct, operate or maintain any fish traps in the Cape Fear river, or shall fail to remove all traps now in the channel of said river within sixty days from the first day of March, one thousand nine hundred and five; or shall fail on the first day of June of each year to remove the slats or fingers from any fish trap allowed to be operated in said river under this section, he shall be guilty of a misdemeanor. This section shall not apply to Brunswick or New Hanover counties or to a fish trap which extends to not more than one-third the channel of said river.

Rev., s. 2483; 1905, c. 500.

1999. Cape Fear and Northeast rivers: Nets in. It is unlawful to fish with dutch, pod, fyke or other pound nets, or stake or stationary nets, or nets of like kind, in the waters of the Cape Fear river below the mouth of Black river, twelve miles above Wilmington, or in the waters of Northeast river below the Castle Hayne bridge. Drift nets shall be permitted in the waters of the Cape Fear river within the territory as above described in this section, and its tributaries, between February first and May first of each year. Any person violating the provisions of this section shall be guilty of a misdemeanor and fined not less than fifty dollars or imprisoned not less than thirty days.

1909, c. 841; P. L. 1911, c. 278.

2000. Cape Fear, Northeast, and Black rivers: Obstructing fish; fishing between Saturday evening and Monday evening. If any person shall with seines or nets of any kind catch any fish in the waters of the Cape Fear river from its mouth to the Bladen county line, or in the waters of the Northeast Cape Fear or Black rivers in Pender county between six o'clock p. m. on Saturday and six o'clock p.m. on Monday, or shall obstruct the free passage of fish in the waters of said rivers, he shall be guilty of a misdemeanor.

Rev., s. 2470; 1885, c. 226; 1887, c. 71; 1907, c. 811.

2001. Cape Fear river, northeast branch: Seines, nets and traps. If any person shall fish in the northeast branch of the Cape Fear river with seine, net or trap, from the twenty-third day of February to the first day of July of any year, between the hours of six o'clock p.m. on Saturday and six o'clock p.m. on Monday of each week, or shall at any time use more than one seine at a time in any fishing hole in said river, or use, set or place in said river any hedge, trap or other obstruction which will prevent the free passage of fish up said river, which said hedge, trap or other obstruction shall extend more than one-third across the main channel of the said river, he shall be guilty of a misdemeanor. This section shall not apply to that portion of said river which lies between the city of Wilmington and a point on said river known as The Three Cypresses, twelve miles distant from said city of Wilmington.

Rev., s. 2469; 1889, c. 182; 1891, c. 198.

2002. Goose and Oyster creeks: Drag or haul nets unlawful. It is unlawful for any person or persons to fish with a drag or haul net of any description in the waters of Oyster creek and its tributaries and Goose creek or its tributaries (said creek being a dividing line between the counties of Pamlico and Beaufort). Any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court.

1907, c. 222; P. L. 1911, c. 381.

2003. Little river: Obstructions in. If any person shall place any obstruction in Little river, dividing the counties of Pasquotank and Perquimans, and allow it to remain for a longer time than ten days, he shall be guilty of a misdemeanor, and fined not less than five dollars nor more than ten dollars: Provided, nothing in this section shall be so construed as to prohibit citizens from fishing with dip-nets in said river during the months of March and April in each year.

Rev., s. 2443; Code, s. 3400; 1881, c. 18.

2004. Lumber river: Close season for traps in. It is unlawful for any person to set any trap for the purpose of catching fish in Lumber river or its tributaries in Columbus and Robeson counties, between the first day of April and the first day of September in any year. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

1907, c. 608.

2005. Lumber river and waters of Robeson, Columbus, Hoke, and Scotland: Fishing regulated. It is unlawful for any person, firm or corporation to fish with seine, trap, nets, or by gigging, muddying, striking, dynamiting, shooting, or using lime or other chemicals by which fish may be killed, in Lumber river or any of its tributaries, or other rivers, lakes, ponds, or swamps of Robeson, Columbus, Hoke and Scotland counties: Provided, that gill nets may be set in these waters during six months in each year, beginning with October and ending with March: and Provided further, that in Robeson and Hoke counties owners of private lakes and ponds may fish therein with seines, nets or traps from July first to September thirtieth.

Any person, firm, or corporation violating this section shall be guilty of a misdemeanor, and on conviction shall be fined not more than fifty dollars nor less than ten dollars, the fine to be paid to the school fund of the county in which the offense was committed, or imprisoned not more than thirty days nor less than ten days in the county jail, the county commissioners of said counties having the privilege of sending the said person or persons so convicted to the chain-gang of their respective counties or to hire them out in case there is no chain-gang. The police force of said counties have full power and authority to arrest, without warrant, any and all persons violating this section.

P. L. 1915, c. 358; P. L. 1917, cc. 368, 415.

2006. Moccasin river and Big and Little Contentnea creeks: Obstructions and nets in. It is unlawful for any person or persons to hedge or otherwise obstruct the free passage of water, fish, timber, rafts or boats in the run of Moccasin river or Big Contentnea creek, from Rountree's bridge in Wilson county to the mouth of said river or creek, or to make any like obstruction in the run of Little Contentnea creek. It is unlawful for any person or persons to fish with traps of any description in the waters of either of said streams, except from Rountree's bridge to Barefoot's mill: Provided, no hedge or trap shall obstruct more than one-third of the waters of Contentnea creek. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars and not more than fifty dollars or imprisoned not more than thirty days; and one-half of the fine

so imposed shall be paid to the person who reports such offenses to the proper lawful officer, and the other half to the common school fund of the county in which the misdemeanor is committed.

1907, c. 615; Ex. Sess., P. L. 1913, c. 252.

2007. Neuse and Trent rivers: Stationary, set, or dutch nets. No person or association of persons shall set or place or cause to be set or placed any stationary, set or dutch nets in either Neuse or Trent rivers above the point of conflux of the said Neuse and Trent rivers. That no person or association of persons or corporation shall set, cause to be set, fish or cause to be fished, use or cause to be used any dutch net, pound net or other stationary trap net or seine of similar description, by whatever name known, in the waters of Neuse river above Wilkinson's point, on Pamlico side. Any person or association of persons setting or placing any nets, as described above, on any day or part of a day, above the point of conflux of the said Neuse and Trent rivers, shall be guilty of a misdemeanor. Any person or association of persons or corporation setting or placing or causing to be set or placed any nets, as described above, on any day or part of a day, above Wilkinson's point, in Neuse river, shall be guilty of a misdemeanor. Any person or association of persons or corporation violating the provisions of this section shall upon conviction be fined fifty dollars or imprisoned thirty days for each and every violation. Any party who is the informant against any one violating this section shall, upon conviction of such person so violating the section, receive one-half of the fine prescribed.

1909, c. 801; P. L. 1911, c. 616.

2008. Neuse and Trent rivers: Size of seine bars regulated. If any person shall use any drag-net or seine with bars of less size than one and a quarter inch in the Neuse and Trent rivers, or in any of the tributaries thereof, except for the purpose of catching herring, from the fifteenth day of January to the fifteenth day of May of each year, he shall be guilty of a misdemeanor, and fined not less than five nor more than fifty dollars for every offense. This section shall not apply to the waters of the Neuse and its tributaries above the Wayne and Johnston county line.

Rev., s. 2454; Code, s. 3395; 1881, c. 146, ss. 1, 2.

2009. Neuse river: Obstructions in, by dams, nets, etc. Any person who shall construct a dam, put in traps, dutch net, wire seine, or anything else in Neuse river between its mouth and the Falls of Neuse in Wake county, for the purpose of obstructing the passage of fish in said river, shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, this section shall not apply to seines, set nets, running or skimming nets: Provided, this section shall not prevent the use of traps in Wayne county, where the trap and its wings do not extend more than one-third across the stream.

Rev., s. 2474; Code, s. 3422; 1885, c. 391; 1893, c. 354; 1883, c. 301, ss. 1, 2; 1895, c. 403; 1901, c. 395.

2010. Neuse river: Certain nets regulated. If any person shall use or cause to be used any dutch net, pound net, or other stationary trap net, or seine of similar description, by whatever name known, in the waters of Neuse river for

the purpose of taking fish therefrom, except the ordinary set net in use in said river prior to the first day of January, one thousand eight hundred and ninety-seven, he shall for each day's use thereof as aforesaid forfeit and pay the sum of fifty dollars. The penalties herein created shall be recovered by warrant before any justice of the peace in the counties of Carteret, Craven and Pamlico or Lenoir, and shall be applied to the use of the public schools of said counties, and such offender, in addition to the penalties contained in this section, shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail not less than six months nor more than twelve months: Provided, that a resident and citizen of the state may fish with dutch, trap or pound nets in the waters of Neuse river on the Pamlico side of said river between the mouth of said river and Upper Broad creek not more than five hundred yards from the shore.

Rev., s. 2453; Code, s. 3397; 1897, c. 145; 1899, cc. 299, 422, 435; 1901, c. 74; 1903, c. 704; 1905, c. 817.

2011. Pamlico and Tar rivers: Dutch, etc., nets prohibited. If any person shall set down or fish any dutch, pod, fyke or pound net or net of like kind in the waters of Pamlico or Tar rivers or their tributaries except in the manner, and in the part, and during the time, which such nets are by law allowed to be fished, he shall be guilty of a misdemeanor, and shall be fined not less than fifty dollars nor more than one hundred dollars, and shall be imprisoned in the county jail not less than thirty and not more than sixty days.

Rev., s. 2428; Code, s. 3417; 1903, c. 52.

2012. Pamlico and Tar rivers: Lay days. If any person, from the fifteenth day of February to the tenth day of May of every year, from twelve o'clock meridian of Saturday until sunrise Monday morning of each week, shall fish any seine, set net, drift net, or any other net of any name or kind whatever, in the waters of Pamlico or Tar rivers and tributaries, except bow or skim nets, he shall be guilty of a misdemeanor.

Rev., s. 2427; Code, s. 3416; 1883, c. 137, s. 3.

2013. Pamlico river: Dutch, etc., nets allowed under regulation. It shall be lawful to fish with dutch, pod, fyke or other pound nets, or nets of like kind, in the waters of Pamlico river below a line beginning on the southern shore of Pamlico river at Maule's point, and running due north to a point on the northern shore of said river: Provided, that no dutch, pod, fyke or pound net, or other net of like kind, shall extend out in said river more than one-fourth of the distance across said river from the shore, and that none of said dutch, pod, fyke or pound nets shall be set, placed down or fished nearer to each other than five hundred yards, measuring up and down the river; nor shall they be placed, set down or fished within five hundred yards of any seine beach in actual use for hauling a seine, nor within one mile of the mouth of Bath creek: Provided, no nets of the kind enumerated in this section, or other nets of like kind, shall be placed down, set or fished in said rivers between the tenth day of May and the first day of July in any year. Any person violating the provisions of this section shall be guilty of a misdemeanor, and shall be fined not less than fifty dollars nor more than one hundred dollars, in the discretion of the court.

Rev., s. 2429; Code, s. 3417; 1903, c. 52; 1909, c. 540, s. 1; 1909, c. 700.

2014. Perquimans river: Nets in, regulated. If any person shall fish with any seine, or set any dutch net or hedge within one mile of a straight line commencing at Stephenson's point on the north side of Perquimans river and running in a southwesterly direction to the nearest point of land on the south side of said river known as Belgrade bluff, or shall haul any seine or set any dutch net or other kind of net so as to extend beyond the middle of said river at any part thereof, he shall be guilty of a misdemeanor.

Rev., s. 2441; 1893, c. 147, ss. 1, 2, 4.

2015. Roanoke river: Drift nets in, regulated. It is unlawful to fish any drift nets in the Roanoke river over twenty yards in length, and no net shall drift within three hundred yards of another net and no two nets shall drift abreast of each other. Any person violating the provisions of this section shall be guilty of a misdemeanor and fined not less than one hundred dollars or imprisoned in the discretion of the court.

1911, c. 163, s. 3.

2016. Scuppernong river and Lake Phelps: Nets in, regulated. It is unlawful for any person, firm or corporation to set or in any manner fish with more than one hundred yards of gill nets within the waters of Lake Phelps or Scuppernong in Tyrrell and Washington counties, or to set or in any manner fish with more than one pound, pod, or dutch net, and shall be restricted to the months of February, March, and April of each year. Any person, firm, or corporation violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars or imprisoned not more than thirty days.

1909, c. 378; 1911, c. 129.

2017. Scuppernong river: Nets obstructing channel or near bridges. If any person shall set any kind of a fish weir or pod net, gill net or net of any kind in the Scuppernong river using more than one-half of the channel of said river, or within one hundred yards of the public bridges at Columbia and the Cross landing, crossing said river, he shall be guilty of a misdemeanor, and fined a sum not to exceed fifty dollars, or imprisoned not to exceed thirty days: Provided, this section shall not apply to the hauling of seines.

Rev., s. 2445; Code, s. 3408; 1885, c. 18; 1903, c. 91.

2018. Scuppernong river and tributaries: Obstructions and nets in. It shall be unlawful for any person, firm or corporation to set or fish any net or place any other obstruction of any kind within one hundred and fifty yards of the mouth of any creek or drainway emptying into Scuppernong river; or for any person, firm or corporation to set or fish any net or place any obstruction more than one-third of the total width of Scuppernong river at the point of setting the same: Provided, this section shall not apply below Cross Landing bridge. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor.

P. L. 1919, c. 88.

2019. Scuppernong river: Nets near Norfolk and Southern railroad bridge. It is unlawful for any person to fish any pound or dutch nets within fifty yards of the Norfolk and Southern railroad bridge across Scuppernong river. Any

person violating this section shall be guilty of a misdemeanor and punished by a fine of not more than one hundred dollars nor less than twenty-five dollars, in the discretion of the court.

Ex. Sess. 1908, c. 82; 1909, c. 119.

2020. Trent river: Use of nets regulated. If any person shall set any trap, dutch, pound or pod net of any description whatever in Trent river, or shall at any time extend his set nets more than one-third the distance across the Trent river from either side, or shall set any net nearer to any other net than one hundred yards either on the same or on the opposite side of the river, or shall fish with seines or set nets of any description in Trent river from its mouth to upper Tucker bridge, between the hours of twelve o'clock noon on Saturday and twelve o'clock noon on Monday of each week, or shall set or haul a net or seine of any description between the town of Trenton and Brown's mill on said river from the sixteenth day of May to the first day of August in each year, he shall be guilty of a misdemeanor and shall be fined not less than five dollars nor more than ten dollars or be imprisoned not less than ten nor more than thirty days.

Rev., s. 2455; Code, s. 3397; 1893, c. 447; 1897, c. 294.

Part 3. Counties

2021. Counties on Pamlico sound: Size of fish caught or sold. It is unlawful for any person to buy, sell, offer for sale, or to have in his possession any bluefish, trout or drum under eight inches in length, or any mullet under six inches in length, or any croakers, spots and hogfish under five inches in length, or sea mullet, flounders, mackerel and hickory shad less than eight inches long, or butterfish and steerfish less than four and one-half inches long, at any time during the year. Any person or persons violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than fifty dollars. This section shall only apply to the counties of Beaufort, Carteret, Dare, Hyde, and Pamlico.

1909, c. 474, ss. 3, 4; 1909, c. 906.

2022. Brunswick, New Hanover and Pender: Size of bars in nets. If any person shall use in any of the waters of Brunswick, New Hanover and Pender counties any nets, seines, set-downs, fish traps or any other nets of any description for the purpose of taking fish, the bars of the meshes of which nets, seines, set-downs, or fish traps shall be less than one and one-eighth inches in length, he shall be guilty of a misdemeanor.

Rev., s. 2470; 1885, c. 226; 1887, c. 71.

2023. Brunswick, Cumberland, New Hanover, Sampson, and Harnett: Close season for fish. If any person shall catch or destroy with seines, nets, firearms, bows and arrows, or by muddying or stirring the waters, or by striking any fish of any kind in the waters of Black or South rivers, or the waters of Big Coharie, Little Coharie, Bear Skin and Big swamps in the counties of New Hanover, Sampson, Cumberland and Harnett, and of the waters of Six Runs in the counties of New Hanover and Sampson, and of the waters of the Cape Fear river in the counties of New Hanover and Brunswick, and of the northeast branch of the Cape Fear river in the county of New Hanover, between the

fifteenth days of May and August of each year, he shall be guilty of a misdemeanor, and fined not to exceed five dollars.

Rev., s. 2472; Code, s. 3409; 1889, c. 414; 1871-2, c. 152; 1879, c. 283; 1881, c. 369.

2024. New Hanover, Onslow, and Pender: Purse nets and seines for food fish. It is unlawful for any person, firm, or corporation to catch any food fish in a purse seine or purse net in any waters within the limits of New Hanover, Onslow and Pender counties, extending to the extreme limits of the state's jurisdiction in and over such waters, making the boundaries of said counties to which said waters shall extend to be the distance of three nautical miles, measured from the outer beach or shores of said counties out into the waters of the Atlantic ocean. Any waters within a distance of three miles of any beach or shore of said counties shall be deemed the waters of said counties for the purpose of this section. It is unlawful for any person, firm, or corporation to purchase, trade for, or deal in, or sell any food fish caught as is set forth above. Any person, firm, corporation, partnership, or association who knowingly rents, leases or permits to be used any purse seine or purse net, rents or leases any vessel, boat or steamer upon which is used a purse seine or purse net in the catching of food fish in the waters of said counties shall be guilty of a misdemeanor. Any person who furnishes information upon which any person, firm, or corporation shall be convicted of a violation of any of the provisions of this section shall be entitled to one-half of the fine imposed therefor.

P. L. 1913, c. 717.

2025. Beaufort: Nets regulated in certain creeks. It is unlawful for any person or persons to use or fish with any drag nets, purse nets, drop nets, fyke nets, thrash nets or any set or gill nets longer than thirty yards on top line, in the waters of Bath creek, Blount's creek, Jordan's creek, Pungo creek, Wright's creek, or their tributaries, in Beaufort county, during the months of March, April, May, June and July of each and every year. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction fined not exceeding fifty dollars or imprisoned not more than thirty days for each offense.

1909, c. 586.

2026. Beaufort: Fishing by residents in Bath creek. It is lawful for any person or persons who are resident citizens of Beaufort county to fish with any kind of nets, except pound nets or purse nets, in the waters of Bath creek from Bath creek bridge to the mouth of said creek.

P. L. 1911, c. 547.

2027. Beaufort: Certain nets in Blount's creek. It is unlawful for any person or persons to use or fish with any drag net or slash net in the waters of Blount's creek or its tributaries. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days for each offense.

P. L. 1911, c. 120.

2028. Beaufort: Certain nets in Durham and Lee's creeks. It is unlawful for any person to catch fish with seine, drag nets, purse nets, thrash nets or haul-

ing nets of any description in the waters of Durham creek, Lee's creek, or their tributaries, in Beaufort county. Any person violating this section shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than five nor more than ten dollars for each and every offense.

1907, c. 439.

2029. Beaufort: Certain nets in Nixon's creek. It is unlawful for any person or persons to use or fish with any drag nets, purse nets, or pound nets in the waters of Nixon's creek in Beaufort county. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction fined not exceeding thirty dollars or imprisoned not more than twenty days for each offense.

P. L. 1911, c. 525.

2030. Beaufort: Certain nets in North creek. It is unlawful for any person or persons to use or fish with any drag nets, purse nets, drop nets or fyke nets in the waters of North creek and its tributaries in Beaufort county. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor and fined not exceeding fifty dollars or imprisoned not more than thirty days for each offense.

1907, c. 629.

2031. Bladen: Manner of fishing in Brown marsh and Horseshoe swamps. It is unlawful for any person to fish with a seine or by muddying the water or by means of any lime, dynamite, or any other such material or substance in Brown marsh and Horseshoe swamps in Bladen county. Any person violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned for thirty days. This section shall apply only to Brown Marsh township in Bladen county.

P. L. 1915, c. 187.

2032. Bladen: White lake; hook and line only. It is unlawful to catch, kill, or destroy fish in White lake in Bladen county by means of nets, traps, by gigging, by shooting, or by any other means or methods, except by hook and line: Provided, that set hooks, bobs, and trolls shall be construed as being hooks and lines. Any person violating the provisions of this section shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

P. L. 1913, c. 295.

2033. Brunswick: Mullet fishing; purse nets. If any person, firm or corporation shall fish for and catch any mullets with any purse seine or purse net in the waters within the limits of Brunswick county, extending to the extreme limits of the state's jurisdiction in and over said waters—and for the purpose of this section, any portion of any water within a distance of three nautical miles from the outer shores of said county shall be deemed the waters of said county—or if the master or any employee on any steamboat engaged in fishing for menhaden or fatbacks shall discharge from said boat fish offal, blood or slime within a distance of one-half of a mile of any established mullet fishery on the Brunswick county coast between the first of August and the thirty-first of December of each year, he shall be guilty of a misdemeanor, and upon conviction

shall be fined or imprisoned at the discretion of the court. For the purposes of this section an established fishery is declared to be that point on the beach occupied by the surfboat and seine in regular use.

Rev., s. 2481; 1905, c. 748.

2034. Brunswick: Nonresidents must have license. It is unlawful for any nonresident of this state to engage in the business of gathering oysters, clams and terrapins for gain, or for market, within the limits of Brunswick county without first obtaining from the county commissioners of said county a license to carry on such business, which license may be granted by the county commissioners of said county upon paying to the treasurer of said county, to be used for county purposes, the sum of fifty dollars for each nonresident engaged in such business, and twenty-five dollars for each nonresident hand employed: Provided, that such license so granted shall be for one year and shall expire on the first day of October of each year. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor.

1907, c. 68.

2035. Carteret: Cedar Island township; hauling nets with power. It is unlawful for any person or persons, firm or corporation to pull any haul net within the waters of Cedar Island township, Carteret county, with steam, gasoline or any other motor power. Any person or persons, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and be fined or imprisoned, or both, in the discretion of the court.

1915, c. 281.

2036. Carteret: Use of dutch nets. If any person shall use or cause to be used any dutch net, pound net or other stationary trap, net or seine of similar description, by whatever name known, in the waters of Carteret county for the purpose of taking fish therefrom, he shall for each day's use thereof forfeit and pay the sum of fifty dollars. The penalties herein created shall be recovered by a warrant before any justice of the peace in the county of Carteret, and shall be applied to the use of the public schools of said county; and such offender, in addition to the penalties contained in this section, shall be guilty of a misdemeanor, and fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail not less than six months nor more than twelve months: Provided, this section shall not apply to the ordinary set nets heretofore in use in the waters of said county.

Rev., s. 2435; Code, s. 3420; 1883, c. 199.

2037. Carteret: Size of seine mesh. If any person shall catch mullets in the waters of Carteret county with a seine or net having a mesh of less than one and one-eighth inch, he shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 2434; 1895, c. 25; 1903, c. 508.

2038. Carteret: Length of nets; joining together. It is unlawful for any person, firm, corporation, or syndicate, to fish any net or seine in the waters of the state of North Carolina within the boundaries of Carteret county more than two hundred and seventy-five yards in length: Provided, this length shall not apply to purse seines used for the purpose of catching menhaden (fatbacks)

only. Any person, firm, corporation, or syndicate violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or be imprisoned not more than thirty days, in the discretion of the court. Each day said nets or seines are fished shall constitute a separate offense under this section.

1911, c. 130, s. 1.

2039. Carteret: Joining nets together. When a condition arises that a crew of fishermen find it advantageous to join two or three nets together for the purpose of temporary fishing, it shall be lawful under this section to do so under the following rules and regulations, namely: Provided: (a) The total length of nets joined together shall not exceed eight hundred and twenty-five yards. (b) That not more than one of the nets, whose length shall not exceed two hundred and seventy-five yards, as provided in the preceding section, shall be owned by any one person, firm, corporation, or syndicate thus fishing. (c) That not less than two men shall be permitted to fish with each net thus joined together. (d) That no position or haul shall be held by anchoring boat (except when occupied by men fishing same), buoys, stakes, or any other device. (e) That no seines or nets shall be hauled by capstans. (f) That no nets of smaller mesh than $1\frac{3}{8}$ inch bar or $2\frac{6}{8}$ inch stretched measure shall be joined together for the purpose of fishing under this section. (g) That each net thus joined shall have two staffs. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than two hundred dollars or imprisoned not less than six months.

This section applies only to the waters of the state within the boundaries of Carteret county, and within such waters it does not authorize the fishing of nets joined as specified at any stationary fishery, or where the said waters are of less width than one and one-fourth miles.

1911, c. 130, s. 2.

2040. Carteret: Obstructions to fish prohibited. If any person shall obstruct any navigable water or passageway for fish in Carteret county by placing bushes, posts or any stationary material or fixtures in such a manner as to prevent the free passage of fish, he shall be guilty of a misdemeanor and fined not less than one hundred dollars. Nothing in this section shall be construed to prohibit any person from using a lawful net or seine in any way or manner except as a stop net or seine. This section shall not apply to any net that the fish can pass freely by one end.

Rev., s. 2436; 1903, c. 520.

2041. Carteret: Pound nets in Neuse river. It is lawful to fish pound nets from January first to May fifteenth of each year within the waters of that portion of Carteret county with a line beginning at the northwest point of outward Swan island, running a due north course; from such line running up the Neuse river to the spar buoy at the entrance of Adams creek: Provided, that not more than five nets shall be set in any one stand: Provided further, that not more than one-fourth of the river in width shall be used for the purpose of fishing under this section. Any person, firm, corporation, or syndicate fishing with pound nets in the waters of Carteret county at any other time except as prescribed in this section shall be guilty of a misdemeanor, and upon conviction

shall be fined not less than two hundred dollars or imprisoned not less than six months, in the discretion of the court. It is expressly enacted that every day such fishing is done in violation of this section shall constitute a separate offense.

1911, c. 128.

2042. Carteret: Purse nets for mullet prohibited. If any person shall fish for or catch any mullets with any purse seine or purse net in any waters within the limits of Carteret county, extending to the extreme limits of the state's jurisdiction in and over such waters, he shall be guilty of a misdemeanor and be fined not less than five hundred dollars or imprisoned not less than one year. For the purposes of this section the following boundaries are hereby declared to be the boundaries to which the waters of said county extend, to wit: A distance of three nautical miles, measured from the outer beach or shores of Carteret county out and into the waters of the Atlantic ocean; and any portions of any water within a distance of three miles from said waters of the Atlantic ocean to any beach or shore of said county shall be deemed the waters of said county for the purposes of this section.

Rev., s. 2437; 1903, c. 583; 1905, cc. 274, 508.

2043. Carteret and Onslow: Purse nets prohibited for food fish. It is unlawful for any person, firm or corporation to catch any food fish in a purse seine or purse net in any waters within the limits of Carteret and Onslow counties extending to the extreme limits of the state's jurisdiction in and over such waters, making the boundaries of said county to which said waters shall extend to be the distance of three nautical miles, measured from the outer beach or shores of Carteret and Onslow counties out into the waters of the Atlantic ocean. Any waters within a distance of three miles of any beach or shore of said counties shall be deemed the waters of said county for the purposes of this section. It is unlawful for any person, firm or corporation to purchase, buy, or trade for, or deal in, or sell any food fish caught as is set forth in this section. Any person, firm or corporation violating any provision of this section shall be deemed guilty of a misdemeanor, and shall be fined not less than three hundred dollars nor more than five hundred dollars, or imprisoned, in the discretion of the court. Any person who shall furnish information upon which any person, firm or corporation shall be convicted of a violation of any of the provisions of this section shall be entitled to one-half of the fine imposed therefor.

1907, c. 857; 1911, cc. 126, 204.

2044. Chatham: Fishways in Haw river. All persons maintaining dams across Haw river in the county of Chatham shall, upon thirty days notice from the board of commissioners of said county, establish fishways in said dams; and if said fishways shall not be made within three months from the service of the notice, said persons so offending shall be guilty of a misdemeanor, and fined at the discretion of the court.

Rev., s. 2476; Code, s. 3402; 1881, c. 343, ss. 1, 2.

2045. Clay: Fishing regulated. It is unlawful for any person or persons to fish the waters of Clay county in any other manner than hook and line. Any violator of this section shall be guilty of a misdemeanor and fined not less than twenty-five dollars, or imprisoned not less than thirty days.

P. L. 1919, c. 407.

2046. Columbus: Lumber river; fishing regulated. It is unlawful for any person, firm or corporation to fish with seine, traps, gigging, striking, or dynamiting, by shooting with gun or rifle in Lumber river or its tributaries in Columbus county: Provided, this section shall not apply to any person fishing on his own lands or those who may have written consent of the owner of the land where fishing. It is unlawful for any person, firm or corporation to fish with gill net in Lumber river or its tributaries in Columbus county, except during the months of October, November, December, January and February. Any person violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars nor less than ten dollars, one-half to go to the informant, or imprisoned not more than thirty days nor less than ten days in jail, with authority to the county commissioners of Columbus county to hire out such convict.

P. L. 1913, c. 740.

2047. Columbus: Traps and nets in Porter swamp. It is unlawful for any person or persons to set any fish traps or nets in the waters of Porter swamp in Columbus county in such manner as to prevent the free passage of fish. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than ten dollars nor more than twenty-five dollars, or imprisoned not less than ten days nor more than thirty days for each offense.

P. L. 1911, c. 748.

2048. Currituck county: Fishing in Atlantic township. It is unlawful for any person or persons to catch fish with seine or set net, or nets of any kind, in the waters of Atlantic township between the fifteenth day of April and the twentieth day of October in each year, within the following boundaries in said township: Beginning at a cedar stump standing on the beach north of Caffie's inlet life-saving station and extending a west course five hundred yards from the shore; thence paralleling the shore a southerly course to the Dare county line. It is unlawful to set any pound or dutch nets in the waters of said township. Nothing herein shall prevent the catching or selling of twenty-five pounds of fish on any one day for home consumption; nor prevent the catching of eels, mullets and herrings at any time during each year; nor prohibit fishing at night. Any person violating the provisions of this section or any part thereof shall be guilty of a misdemeanor for each and every offense, and upon conviction shall be fined not more than fifty dollars nor less than twenty dollars or imprisoned not more than thirty days.

1909, c. 619.

2049. Currituck county: Dutch nets in Currituck sound. If any firm, company or corporation shall operate or cause to be operated in the waters of Currituck county, or be interested in any manner whatsoever in more than six pound or dutch nets, or use more than one hundred yards of hedging to a net, or set a stand of such nets exceeding eight hundred yards in length from land to the extreme outward end; or if any person shall set any pound or dutch nets to the east of the center of Currituck sound, except that part from the west point of Mackey's island north of the Virginia line; or if any person shall leave any

landing or anchorage before sunrise for the purpose of fishing in Currituck sound or tributaries, or shall continue to fish after dark, he shall be guilty of a misdemeanor and be fined not less than twenty-five nor more than fifty dollars. This section shall not prohibit fishing after dark in that part of said sound west of a line beginning at the north point of Bell's island, thence north not more than one thousand yards from the mainland to the mouth or entrance of Tull's creek, nor night fishing between the thirty-first day of March and the twentieth day of October five hundred yards from the shore from Martin's point to Kitty Hawk bay.

Rev., s. 2430; 1905, c. 273, ss. 3-7.

2050. Currituck county: Shipping or selling fish. If any person shall catch or capture any fish with nets or other appliances in the waters of Currituck county between the fifteenth day of April and the twentieth day of October of each year, or shall sell or ship out of the county or state any fresh fish between said dates; or if any person shall be found with more than twenty-five pounds of freshwater fish in his possession between the thirty-first day of March and the twentieth day of October of each year, herrings, mullets, shad and eels excepted; or if any person shall in said county catch eels for market between the thirtieth day of April and the twentieth day of September following in each year, he shall be guilty of a misdemeanor and be fined not more than fifty dollars and not less than twenty-five dollars. Any citizen may catch not to exceed twenty-five pounds at any time for home consumption, and sell or give not more than ten pounds to any one person in one day.

Rev., s. 2431; 1905, c. 273, s. 1; 1907, c. 520.

2051. Currituck county: Right of search. If any constable, game warden or justice of the peace of Currituck county shall be informed, or have cause to suspect, that either of the two preceding sections is being violated, he is hereby authorized and empowered to examine the contents of any fishing boat, or packages in transit, and any person or common carrier refusing to exhibit the contents of any fishing boat or package to such officer shall be guilty of a misdemeanor, and shall be fined not less than twenty-five and not more than fifty dollars.

Rev., s. 2432; 1905, c. 273, ss. 2, 7.

2052. Dare: Dutch and pound nets prohibited. It is unlawful for any person, firm or corporation to set any dutch or pound net within the space or area of water bounded and described as follows: Beginning at Hollowell's wharf, at Nag's Head, and running thence a due west course to the channel in Roanoke sound; thence northwest to the Currituck county line; thence with said Currituck county line to the shore.

Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined fifty dollars or imprisoned thirty days in the discretion of the court.

1913, c. 113.

2053. Dare: Fishing in Kitty Hawk bay regulated. If any person shall take, catch or capture any fish with nets or other appliances in that part of the waters of Kitty Hawk bay and its tributaries lying in Dare county, between

the thirtieth day of April and the fifteenth day of October of each year, or shall sell or ship out of the county any chub or perch between said dates, he shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned not more than thirty days. Nothing in this section shall prevent any citizen from catching fish at any time for home consumption.

Rev., s. 2484; 1905, c. 363.

2054. Greene: Size of mesh; fishing on another's land. It is unlawful for any person or persons to fish with or set any nets with less meshes than one and one-fourth inches square. No person or persons shall fish with nets of any kind on another person's land without first getting permission from the owner of the lands to do so, except in navigable streams, as rivers or large creeks. Any person or persons violating this section shall be guilty of a misdemeanor and upon conviction thereof shall pay a fine of not less than five dollars nor more than twenty dollars for each offense. This section shall apply to Greene county only.

P. L. 1915, c. 494.

2055. Hertford and Northampton: Fish in Potecasi creek protected. It is unlawful for any person to use, set or in any manner to fish with any fish trap, fyke net, seine or drag net in the waters of Potecasi creek, in Hertford and Northampton counties, from its mouth to the Creeksville mill, in Northampton county. Any person violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars or imprisoned not more than thirty days.

1909, c. 662.

2056. Hyde: Pound and dutch nets prohibited. It is unlawful for any person to set or use any pound or dutch net south of the dividing line between Dare and Hyde counties on the west side of Pamlico sound along the shores of Hyde county, more than two thousand yards from a line drawn from point to point along said shore. Any person violating this section shall be deemed guilty of a misdemeanor and upon conviction shall remove said nets at once: Provided, that any person failing to remove said nets after conviction shall be subject to a fine of not less than ten nor more than fifty dollars.

1915, c. 59.

2057. Hyde: Drag nets prohibited in Rose bay. It is unlawful for any person to use or take fish from the waters of Rose bay, or any of its tributaries, in Hyde county, with drag nets or drop nets. Any person violating this section shall be guilty of a misdemeanor and fined not less than twenty-five dollars nor more than fifty dollars.

P. L. Ex. Sess. 1913, c. 264; P. L. 1915, c. 349.

2058. Hyde: Drag nets prohibited in Slade's river and Fortescue creek. The name of Slade's creek in Hyde county is hereby changed to Slade's river, and by such name the said water-course shall in future be designated in all official maps, records, laws and other official documents authorized by the state of North Carolina. Fishing with drag nets is prohibited in said river and tributaries and in the waters of Fortescue's creek, in said county. Any violation of the provi-

sions of this section relating to the manner of fishing shall be a misdemeanor, and shall be punished by a fine not exceeding fifty dollars or imprisonment not exceeding thirty days, in the discretion of the court.

1909, c. 520.

2059. Hyde: Slade's river; nets in. The mouth of Slade's river in Hyde county is hereby fixed and located by running a straight line from Aquillas point on Pungo river to Sandy point on said Pungo river. It is unlawful for any person, firm or corporation to set, fish, or use any kind of net except stake gill nets on the east of said line. Any one violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than fifty dollars, or imprisoned not more than thirty days, in the discretion of the court.

1911, c. 59.

2060. New Hanover: Certain handnets allowed. Handnets of not less than one and one-eighth inch bar mesh may be used in New Hanover county, and no order shall be made by the fisheries commission derogatory of this section.

1917, c. 290, s. 5.

2061. New Hanover: Nets in Masonboro and Myrtle Grove sounds. If any person shall use any fyke nets or set down seines, or place any fish trap for the purpose of catching fish in the waters of Masonboro and Myrtle Grove sounds in New Hanover county, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than twenty days.

Rev., s. 2425; Code, s. 3421; 1883, c. 288, ss. 1, 2.

2062. New Hanover: Seines in Atlantic ocean. It is unlawful for any person, firm or corporation to fish with seines, purse, pod or pound nets, or with any kind of nets, except cast nets, in the waters of the Atlantic ocean in New Hanover county within the following limits:

Beginning at a point on the beach on the north side of the mouth of Moore's inlet and extending southwardly along the strand of the Atlantic ocean to a point on the north of the mouth of Masonboro inlet, and extending one mile out from the shore line. The above shall not apply to the use of set nets between the first day of November and the first day of May next following. Any person violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than one hundred dollars and imprisoned not more than sixty days.

1915, c. 104.

2063. Onslow: Obstructions in Cypress swamp and Haws run. It is unlawful for any person, firm or corporation to fell any trees in or in any way obstruct the natural flow of the waters of Cypress swamp and Haws run in Onslow county. Any person, firm or corporation violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

1907, c. 772.

2064. Onslow: Stop nets prohibited. It is unlawful for any person, firm or corporation to set, place, fix, establish or operate any stop net that will prevent

or interrupt the passage of any fish in the water of any creek or sound in Onslow county, between New river and the Carteret county line in said county. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and on conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

1915, c. 133.

2065. Onslow: Nets and seines in ocean regulated. It is unlawful for any person, firm or corporation to set any net or seine on the coast of Onslow county for a longer time than one hour at any one time. Any person violating this provision shall, upon conviction, be fined not less than one hundred dollars or imprisoned not less than three months. One-half of said fine shall go to the party or parties reporting such offenses and furnishing sufficient evidence to convict. In the event any offender shall be unable to pay fine, that his boats, nets and other fishing paraphernalia shall be forfeited and sold to the highest bidder for cash at courthouse door after twenty days notice, and proceeds of said sale be applied to cost and fine and any surplus paid to the defendant: Provided, however, this section shall not tend to convict any party who shall catch more fish than can be taken up in one hour.

1915, c. 184.

2066. Onslow: Seines and nets in New river. It is unlawful for any person, firm, corporation or association to catch fish with haul seine, purse net, or drop net in the waters of New river in the main channel between Hache's Rock and New River inlet, or within one-half mile of said inlet in the Atlantic ocean. Any person, firm, corporation or association violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than two hundred dollars nor more than five hundred dollars, or imprisoned, in the discretion of the court; fifty dollars of said fine to be paid to the person or persons furnishing evidence sufficient to convict.

P. L. 1913, c. 707.

2067. Pamlico county: Use of nets regulated. If any person shall set or fish any dutch or pound nets in the waters of Pamlico county, or shall use any seine or drag net in the waters of said county, including the north side of Neuse river from the mouth of the river to the mouth of upper Broad creek, from the first day of May to the first day of January next ensuing, or shall at any time catch fish with a seine or drag net along the shores of said county on any day of the week except Monday, Wednesday and Friday, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 2452; 1885, c. 198; 1889, c. 544; 1893, c. 334.

2068. Pamlico county: Nets in Dawson's creek. It is unlawful for any person to fish with drag or haul net of any description in the waters of Dawson's creek, in Pamlico county. Any person violating this section shall be deemed guilty of a misdemeanor, and fined or imprisoned, at the discretion of the court.

P. L. 1911, c. 470.

2069. Pamlico county: Drag nets prohibited in certain streams. It is unlawful for any person to haul or use any drag net in the waters of Vandemere creek

and its tributaries, Smith's creek, Chappel's creek and its tributaries, Trent creek and its tributaries, and Bay river and its tributaries, from the mouth of Trent creek to the head of both its northwest and southwest prongs, for the purpose of catching or taking fish from said waters. Any person violating this section shall be guilty of a misdemeanor and shall be fined not less than five dollars nor more than ten dollars or imprisoned not less than five days nor more than ten days for each and every offense.

1909, c. 692.

2070. Pasquotank county: Pound or fyke nets in Pasquotank river. It is unlawful for any person, firm or corporation to fish in Pasquotank river above Stinking Gut on either side of said river with pound or fyke nets, or any other kind of net with mudge or leads: Provided, this section shall not be construed to prohibit fishing in said territory with gill nets. Any person, firm or corporation violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed fifty dollars or imprisoned not to exceed thirty days, in the discretion of the court.

P. L. 1913, c. 752, s. 6.

2071. Pasquotank county: Nets in Hatley creek. If any person shall haul or fish with a drag net, or set a pound net in Big Hatley creek, or Little Hatley creek, within two hundred yards of the mouth of either of said creeks, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., s. 2442; 1895, c. 389; 1903, c. 497; 1911, c. 127.

2072. Pasquotank and Perquimans: Gill nets allowed. It is lawful for fishermen fishing in the Albemarle sound lying opposite to Perquimans and Pasquotank counties, and its tributaries lying and being in said counties, to set gill nets as near as one hundred and fifty yards of any pound or dutch nets fished in said waters: Provided, that any net shall not be set beyond the line now prohibited in said waters.

1911, c. 138.

2073. Robeson: Fishing in Lumber river. It is unlawful for any person to fish with seine, nets, traps, gigging, or by muddying, striking or dynamiting, in Lumber river or the other rivers, creeks, lakes or ponds in Robeson county: Provided, that this does not apply to persons fishing on their own premises. Any person violating this section shall be guilty of a misdemeanor and on conviction shall be fined not more than fifty dollars nor less than ten dollars, one-half to go to the informant, or imprisoned not more than thirty days nor less than ten days in jail, with privilege to county commissioners of Robeson county, or adjacent county, to hire out.

P. L. 1911, c. 529; P. L. Ex. Sess. 1913, c. 272.

2074. Robeson: Nets and traps; close season; limit catch. It is unlawful for any person to set any trap or net for the purpose of catching fish in Lumber river or any of its tributaries in Robeson county between the first day of April and the first day of September in any year. It is unlawful at all times for any person to catch or take more than twelve of the fish known as "red breasts" and trout from Lumber river or any of its tributaries in Robeson county, in

any one day, whether said fish be caught with hook and line, net, trap or in any other manner. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court.

P. L. 1911, c. 703.

2075. Sampson: Fishing regulated. It is unlawful for any person to fish in any of the rivers, creeks, or other streams of Sampson county by means of lime, dynamite, pod nets, bag nets, traps, or by any means or contrivance whereby the free passage of fish is obstructed. Any person violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

P. L. 1915, c. 464, ss. 2, 3.

2076. Tyrrell: Alligator river and Frying Pan creek; nets in. If any person shall fish any pound net, gill net, seine or nets of any kind in Alligator river within one mile of the mouth of Frying Pan creek in Tyrrell county, or shall set any weir or fish net of any kind or any other obstruction that prevents the passage of fish in said creek from its mouth to Jarmin's point, at the two pines and low cypress, he shall be guilty of a misdemeanor. If any person shall set any pound net or dutch net in Alligator river within one-half mile of the mouth of Frying Pan creek in Tyrrell county, or in Frying Pan creek within three miles of where it enters into Alligator river, he shall be guilty of a misdemeanor and shall be fined fifty dollars or imprisoned thirty days, or both, at the discretion of the court.

Rev., ss. 2447, 2449; 1889, c. 105; 1899, c. 465; 1905, c. 282.

As to throwing fish offal in Frying Pan creek, etc., see this chapter, s. 1969.

2077. Wayne: Nets and traps in Neuse and Little rivers. The citizens of Wayne county are hereby permitted to put in fish traps and gill stick nets in Neuse and Little rivers, within the limits of Wayne county.

P. L. 1911, c. 465.

SUBCHAPTER IV. NONCOMMERCIAL FISHING

ART. 11. GENERAL REGULATIONS

2078. Trout protected; close season. If any person shall catch mountain trout by seining at any time, or shall take them by shooting or otherwise between the fifteenth day of October and the thirtieth day of December, he shall be guilty of a misdemeanor.

Rev., s. 3418; Code, s. 1122; 1869-70, c. 142.

NOTE 1. For local regulations protecting trout, see list following, by counties.

NOTE 2. For general statutes regulating noncommercial as well as commercial fishing, see *supra*, this chapter, Art. 9.

For fishing without permission on another's land, see Game Laws, s. 2127.

NOTE 3. Local regulations as to fishing in streams enumerated, see *supra* this chapter, Art. 10, Part 2, and the following:

Streams on Grandfather mountain; fishing without consent forbidden. Rev., s. 2842; 1909, c. 84.

Hiwassee river; obstructions in. Rev., s. 2461.

Nantahala river; fishing regulated. Rev., s. 2477.

South Fork river; obstructions in. Rev., s. 2473.

NOTE 4. Local regulations as to counties, see *supra*, this chapter, Art. 10, Part 3, and the following:

- Ashe*. Waters stocked by U. S. Government; fishing prohibited. P. L. 1911, c. 195.
Avery. Elk and Toe rivers; close season. P. L. 1915, c. 526.
Avery, Caldwell, and Mitchell. Rainbow trout; fishing regulated. P. L. 1911, c. 675; P. L. 1913, c. 752, s. 2.
Buncombe. Fish protected; close season for and size of trout; game warden's duty. 1909, c. 570.
Burke. Dynamiting fish prohibited. 1909, c. 895.
 Permission to fish required; dynamiting and seining prohibited. P. L. 1911, c. 137; P. L. 1913, c. 752, s. 1.
Burke, Caldwell, and McDowell. Fishways in Catawba river; seining and trapping prohibited. P. L. 1911, c. 170.
Cabarrus. Seining in Coddle and Big Cold Water creeks. P. L. 1911, c. 361.
Cherokee. Shooting fish. P. L. 1915, c. 608, ss. 4, 5; P. L. 1917, c. 162.
 Seines and traps in Valley, Notla, and Hiwassee rivers. Rev., s. 2458.
Clay. Fishing for California trout regulated. 1909, c. 374.
 Dynamiting fish prohibited. P. L. 1913, c. 623, s. 3.
 Free passage of fish in Mission dam in Hiwassee river. 1909, c. 112.
Columbus. Fishing regulated. P. L. 1917, cc. 394, 713.
Craven. Fishing from bridges at New Bern. Rev., s. 2456.
Duplin and Pender. Fishing regulated. P. L. 1917, c. 665.
Durham and Orange. Use of seines and nets in Eno river. P. L. 1913, c. 547.
Gates. Fish in Speight's mill-pond protected. 1907, c. 646.
 Fishing in Bennett's creek mill-pond regulated. 1907, c. 734.
Graham. Close season for trout in Yellow creek. P. L. 1911, c. 127.
 Close season for rainbow trout. P. L. 1911, c. 59.
Halifax. Fishing regulated. P. L. 1917, c. 174.
Harnett and Lee. Seines prohibited in Upper Little river. P. L. 1911, c. 379.
 Dynamite prohibited in Upper Little river. P. L. 1915, c. 519.
Haywood. Catching trout in Cataloochee creek. Rev., s. 2480.
 Fishing in Cataloochee township. 1907, c. 704.
 Fishing in Cecil township. 1907, c. 696.
Henderson. Fishing in certain streams prohibited. 1895, c. 345; P. L. 1913, c. 623, s. 2.
 Obstructions in streams prohibited. Rev., s. 2479.
Hertford. Fishing in Liverman's mill-pond. P. L. 1915, c. 354.
Johnston. Close season for Hannah's and Stone's creeks. P. L. 1915, c. 645.
 Fishing in Black creek prohibited. 1907, cc. 713, 870; P. L. 1911, c. 493; P. L. 1913, c. 373.
 Fishing in Holt's lake on Black creek. 1919, c. 40.
Madison. Close season; use of dynamite. P. L. 1911, c. 380.
Martin. Permission required to fish in Cross Roads township. 1907, c. 338.
McDowell. Fishing regulated. 1891, c. 5; 1907, cc. 544, 886.
Mitchell. Dynamiting fish prohibited. 1909, c. 895.
Mitchell and Yancey. Use of explosives and dynamite prohibited. P. L. 1913, c. 576.
Perquimans. Shooting fish in Goodwin's mill-pond forbidden. 1909, c. 118.
Polk. Seines, nets, and dynamite prohibited; exception. 1909, c. 590; P. L. 1911, c. 549.
 Fishing in North Pacolet and Vaughan's creeks regulated. 1907, c. 149.
Rockingham. Dynamiting fish in Haw river forbidden. 1909, c. 311.
Sampson. Fishing in certain streams permitted. 1907, c. 359.
Swain. Close season for trout in Tabor's mill creek. P. L. 1911, c. 121.
 Close season in Sawmill and Tabor's mill creeks. P. L. 1915, c. 355.
 Fishing on Sunday prohibited. P. L. 1915, c. 573.
 Hazel and Forney's creeks; close season; limit. 1909, c. 247.
 Hazel creek. 1905, c. 281; 1907, c. 426.
 Rainbow trout in Ocoa township. P. L. 1911, c. 208.
Transylvania. Seining and trapping prohibited. 1909, c. 128.
Warren. Permission required to fish on another's land. P. L. 1919, c. 169.
Watauga. Trout protected. 1899, c. 285; P. L. 1915, c. 622.
 Fishing regulated. 1909, c. 108; P. L. 1911, c. 124; P. L. 1913, c. 762.
 Dynamiting fish prohibited. 1909, c. 895.
Yancey. Fishing regulated. P. L. 1911, c. 290; P. L. 1913, c. 752, s. 7; P. L. 1919, c. 412.

CHAPTER 38

GAME LAWS

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ART. 1. ADMINISTRATION OF GAME LAWS

Part 1. County Administrative System and County Licenses

2079. Application of county game law system. In the following counties the game laws are administered through the county game protection commission as provided in the following eight sections of this chapter, and in these counties licenses of the Audubon society shall not be good: Beaufort, Bertie, Cabarrus, Camden, Carteret, Caswell, Catawba, Cherokee, Chowan, Cleveland, Craven, Dare, Davie, Duplin, Forsyth, Franklin, Gaston, Gates, Halifax, Harnett, Hertford, Hyde, Jackson, Johnston, Jones, Lincoln, Macon, Madison, Martin, Mitchell, Montgomery, Nash, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Polk, Randolph, Richmond, Robeson, Sampson, Stanly, Stokes, Swain, Transylvania, Tyrrell, Union, Vance, Washington, Wayne, Wilkes, Wilson, Yadkin.

1909, c. 840, s. 12; 1909, c. 824; P. L. 1911, cc. 413, 468, 589, 608, 664, 683; P. L. 1913, c. 384.

Public-local laws for the protection of game are a valid exercise of police power by the state: *State v. Blake*, 157-608.

For local laws regulating game protection and licensing in the following counties, see the laws cited:

- Alexander, P. L. 1917, c. 250.
- Anson, P. L. 1917, c. 474; P. L. 1919, c. 165.
- Clay, P. L. 1913, c. 206; 1919, c. 260.
- Craven, P. L. 1911, c. 589; P. L. 1913, c. 384.
- Currituck, P. L. 1917, c. 24; 1909, c. 708.
- Dare, P. L. 1919, c. 33.
- Davidson, Ex. Sess., P. L. 1913, cc. 53, 257.
- Graham, P. L. 1917, c. 125.
- Granville, P. L. 1911, c. 408.
- Guilford, P. L. 1917, c. 649.
- Haywood, P. L. 1915, c. 566.
- Henderson, P. L. 1911, c. 184.
- Hoke, P. L. 1915, c. 459.
- Iredell, P. L. 1917, c. 459.
- Jackson (Sylva township), 1909, c. 534.
- Lincoln, 1909, c. 840.
- Mitchell, P. L. 1913, c. 70.
- Northampton, P. L. 1911, c. 760.
- Onslow, P. L. 1913, c. 591.
- Pender, P. L. 1915, c. 150.
- Robeson, P. L. 1917, c. 376.
- Scotland, P. L. 1917, c. 57.
- Surry, P. L. 1919, c. 168.
- Warren, P. L. 1915, c. 137.
- Yancey, P. L. 1915, c. 136.

2080. Game protection commission; creation and objects. The boards of county commissioners for the several counties named in the preceding section are hereby constituted game protection commissioners for their respective counties, for the better protection and preservation of game in the said counties and to secure the better enforcement of the game laws of said counties.

1909, c. 840, s. 1.

2081. Chief county game warden; appointment, term, duty. The board of county commissioners of each of such counties, on the first Monday in May, one thousand nine hundred and nine, and biennially thereafter, shall appoint a chief game warden for their respective counties, who shall hold his office for a term of two years, and whose duty it shall be diligently to enforce the game laws of their counties, as hereinafter set forth.

1909, c. 840, s. 5.

2082. Deputy township game wardens. For more thorough enforcement of the game laws of said counties it shall be the duty of the chief game warden, upon the petition of three freeholders of any township in said county, to appoint deputy game wardens in said township.

1909, c. 840, s. 6.

2083. Qualification of wardens; clerk's fee for record. Every warden so appointed shall, before entering upon the duties of his office, take and subscribe before the clerk of the superior court of the county wherein he is appointed an oath to perform the duties of his office, together with the other oaths prescribed for police officers, and execute a bond in the sum of fifty dollars for the faithful discharge of his duty, and the oath and bond shall be recorded by the clerk in his office. The clerk shall not charge more than fifty cents for taking and recording said oath.

1909, c. 840, s. 7.

2084. Deputy warden's fees. The deputy game warden shall receive the sum of two and one-half dollars for each nonresident license procured for nonresident hunters, and for each conviction for the said game laws he shall receive the sum of two and one-half dollars, in addition to fees allowed by law for serving process and other acts as constable. The moneys paid out to the chief game warden or his deputies for convictions as herein provided shall be paid out of the fund for the enforcement of the game law by the treasurer of the county, in the same manner as the county funds are disbursed; and the amount due said wardens and deputies for collecting license taxes shall be retained by them when remitting license taxes to the clerk of the court.

1909, c. 840, ss. 8, 9.

For special provisions as to compensation in Craven, see P. L. 1911, c. 589; 1913, c. 384; Pamlico, P. L. 1919, c. 354.

2085. County license for hunters. Any nonresident of the state of North Carolina who desires to hunt, shoot or trap birds or other animals in any part of the said counties shall make application to the clerk of the superior court of the county where the applicant desires to hunt, shoot or trap, who shall issue such a license upon payment of a tax of ten dollars and the clerk's fees, amounting to

fifty cents. The license shall expire on the termination of the hunting season, as fixed for the said counties. The license shall be of such form as the game protection commission of the county shall prescribe, and shall entitle the owner to hunt in any county enumerated in the first section of this chapter, in the manner provided by law for hunting in such county. Any license granted hereunder shall entitle the holder to hunt only in the county issuing the same.

Licenses under this section shall issue only in the counties enumerated in the first section of this chapter.

1909, c. 840, s. 3.

2086. Disposition of license fees from county licenses. The funds received by the clerk of the superior court or other person from the sale of hunters' licenses shall be turned over to the county treasurer, and one-half thereof shall be turned into the school fund of said county and the other half be set apart as a fund for the enforcement of the game law in said county.

1909, c. 840, s. 4.

For special provision in Craven, see P. L. 1911, c. 589; P. L. 1913, c. 384.

Part 2. Administration Through Audubon Society

2087. Audubon society; incorporation and corporate powers. J. Y. Joyner, T. Gilbert Pearson, R. H. Lewis, A. H. Boyden, H. H. Brimley, P. D. Gold, Jr., J. F. Jordan and R. N. Wilson are hereby created a body politic and corporate under the name and style of the Audubon Society of North Carolina, and by that name and style they and their associates and successors shall have perpetual succession, with power to take and hold, either by gift, grant, purchase, devise, bequest or otherwise, any real or personal estate, not exceeding fifty thousand dollars in value, for the general use and advancement of the purposes of the said corporation, or for any special purpose, consistent with the charter; and such property shall be exempt from taxation; to make rules and by-laws; to have and to use a common seal, and to change the same at pleasure; and to do and perform all such acts and things as are or may become necessary for the advancement and furtherance of the corporation.

Rev., s. 1862; 1903 (Pr.), c. 337.

2088. Objects of society. The objects for which the corporation is formed are to promote among the citizens of North Carolina a better appreciation of the value of song and insectivorous birds to man and the state; to encourage parents and teachers to give instruction to children on the subject; to stimulate public sentiment against the destruction of wild birds and their eggs; to secure the enactment and enforcement of proper and necessary laws for the protection and preservation of birds and game of the state; to provide for the naming of special officers and investing them with necessary power, who shall work under the direction and control of the Audubon society of North Carolina, looking to the rigid enforcement of the game and bird protective laws of the state; to distribute literature bearing on these topics among the members of the society and other persons, and to raise and provide funds for defraying the necessary expenses of the society in the accomplishment of the purposes herein named.

Rev., s. 1864; 1903 (Pr.), c. 337, s. 3.

2089. Officers of society. The officers of said corporation shall be a president, vice president, secretary and treasurer, and such other officers as may be fixed by the by-laws. The treasurer shall be appointed as provided in the next following section.

Rev., s. 1863; 1903 (Pr.), c. 337, s. 2.

2090. Appointment of bird and game wardens and treasurer of society. The governor, upon recommendation of the Audubon society of North Carolina, shall from time to time appoint bird and game wardens, and the treasurer of the society, whose terms of office, unless otherwise provided for, shall be during good behavior or until their successors are appointed. The governor shall issue to the treasurer of the Audubon society, and to each person appointed as warden, a commission, and shall transmit such commission to the clerk's office of the superior court for the county from which the prospective treasurer or bird and game warden is appointed; and no tax or fee shall be charged or collected for said commission. Any of the said wardens may be removed by the governor upon proof satisfactory to him that they are not fit persons for said position. The compensation of said wardens shall be fixed and paid by the said society.

Rev., s. 1867; 1903 (Pr.), c. 337, s. 12.

2091. Qualification and badge of bird and game wardens; clerk's fee for record. Every bird and game warden appointed as provided in the last section shall before entering on the duties of his office take and subscribe before the clerk of the superior court of the county in which he resides an oath to perform the duties of his office, together with the other oaths prescribed for police officers, and execute a bond in the sum of one hundred dollars for the faithful performance of his duties, and the said oath and bond shall be recorded by the clerk in his office. The clerk shall not charge more than fifty cents for taking and recording said oath. The game and bird warden when acting in his official capacity shall wear in plain view a metallic shield with the words "Game and Bird Warden" inserted thereon.

Rev., s. 1868; 1903 (Pr.), c. 337, s. 15.

2092. Nonresident hunter's license from Audubon society. Any nonresident who desires to hunt birds or animals in any part of the state other than in the counties enumerated in the first section of this chapter shall make application to the clerk of the superior court of any county, who shall issue such license upon the payment of a tax of ten dollars and the clerk's fee. The license shall expire on the termination of the hunting season as fixed for the several counties, and shall entitle the owner to hunt anywhere in the state other than in the counties enumerated in the first section of this chapter, except upon private property, which he shall not do without the written consent of the owner. The license may be revoked by the Audubon society upon proof that the holder has hunted in violation of the law. No license shall be granted to any person whose license has been revoked, for a period of one year thereafter. Such license shall not authorize the holder to hunt in any county at any time or in any manner other than is provided by law for hunting in such county: Provided, however, that the

nonresident child or parent of a resident owner of land in this state shall be allowed to hunt on the land of his parent or child as though he were a resident of the state.

Rev., s. 1872; 1903 (Pr.), c. 337, ss. 10, 17; 1909, c. 185, s. 1.

The ownership of game is in the people of the state, and the right to hunt and kill game may be granted, withheld, or restricted by the legislature: *State v. Gallop*, 126-979—and nonresident hunters may be excluded altogether, *Ibid.* No one has property in game until it is reduced to possession: *Ibid.*; *State v. House*, 65-315.

2093. Clerks to report on licenses and transmit funds to state treasurer. The clerk of the superior court shall make a report on the first day of December of each year and at the close of the hunting season for their respective counties to the Audubon society, on forms provided by said society, of licenses issued, and shall at the same time transmit all funds received for such license to the treasurer of the state.

Rev., s. 1874; 1903 (Pr.), c. 337, s. 10.

For form of license, see this chapter, s. 2097.

2094. Bird and game fund. The funds received by the treasurer of the state from the license tax on nonresident hunters shall constitute a fund known as the Bird and Game Fund, which fund shall be paid out by the treasurer of the state on the order of the treasurer of the Audubon society of North Carolina, who shall make an annual report to the governor of the receipts and expenditures of the society for the year.

Rev., s. 1871; 1903 (Pr.), c. 337, s. 10.

2095. Exportation of game by licensees from society. Any person holding a hunter's license from the Audubon society to hunt in North Carolina shall be permitted to take out of the state fifty partridges or quail, fifty beach birds or snipe, twelve grouse, or two wild turkeys in a season.

Rev., s. 1873; 1903 (Pr.), c. 337, s. 11.

Shipment of live quail forbidden, see this chapter, s. 2106.

The legislature can forbid any one having game, dead or alive, in possession: *State v. Gallop*, 126-983.

Part 3. Common Provisions as to Wardens and Licenses

2096. Powers of wardens; right of search, seizure and sale. Upon qualifying as prescribed in section 2083 or section 2091 above, the wardens shall possess and exercise the powers and authority of constables under the laws of this state, so far and so far only as such powers apply to the execution of any papers and to proceedings relative to game and game laws. It shall be their duty to see that the bird and game laws are enforced, to obtain information as to the violations thereof, and to prosecute all persons or corporations having in their possession any bird or game contrary to such laws. Upon making affidavit before a justice of the peace or any court of the state that there exist reasonable grounds to believe that any game or game birds are in the possession of any common carrier in violation of the law, such warden shall be entitled to search, open, enter and examine all cars, warehouses and receptacles of common carriers in this state, where they have reason to believe are to be found any game or birds taken or held in violation of the law, and to seize such game or birds.

Any bird or game caught, taken, killed, shipped, or received for shipment had in possession or under control by any person or corporation contrary to the provisions of this law, which may come into the possession of said warden, shall be sold at auction, and the warden disposing of the same shall issue a certificate to the purchaser certifying that the said bird or animal was legally obtained and possessed, and any one so acquiring said bird or animal can have the right to use it as if the same had been sold, killed or possessed in accordance with the law. The funds received from the sale of such confiscated birds or game shall, in the counties enumerated in the first section of this chapter, be paid to the county treasurer and placed to the account of the fund for the enforcement of the game law; in other counties, where the game law is administered through the Audubon society, such funds shall be forwarded by the game warden to the treasurer of the state and placed to the account of the bird and game fund.

Rev., ss. 1868, 1869, 1870; 1903 (Pr.), c. 337, ss. 13, 14, 15; 1909, c. 840, s. 10.

2097. Form and record of hunter's license. The form of license for nonresident hunters shall be prescribed by the game protection commission of the county in the counties enumerated in the first section of this chapter; in other counties by the Audubon society. The game protection commission or the Audubon society in the counties where they respectively exercise authority under this chapter shall furnish to the clerks of the superior court a bound book for the purpose of keeping a record of all hunters' licenses issued.

Rev., s. 1865; 1903 (Pr.), 337, s. 10; 1909, c. 840, s. 2.

As to power of legislature to restrict privilege of hunting, see *State v. Gallop*, 126-979.

2098. Nonresidents hunting without license. If any nonresident shall hunt in the state without license, as required by law, or shall hunt upon the lands of another without his written consent, or shall fail to carry his license with him in hunting, or shall fail upon demand to exhibit it to any game warden or police officer, he shall be guilty of a misdemeanor. Each day's hunting without license shall be a separate offense.

Rev., s. 3469; 1903 (Pr.), c. 337, s. 10.

Punishment for hunting without license in Randolph county, see 1907, c. 727.

See *Daniels v. Homer*, 139-222, and cases cited.

ART. 2. PROTECTION OF GAME AND BIRDS; GENERAL PROVISIONS

2099. Legislative consent to federal regulations on certain federal lands. The consent of the general assembly of North Carolina is hereby given to the making by the congress of the United States, or under its authority, of all such rules and regulations as the federal government shall determine to be needful in respect to game animals, game and nongame birds, and fish on such lands in the western part of North Carolina as shall have been, or may hereafter be, purchased by the United States under the terms of the act of congress of March first, one thousand nine hundred and eleven, entitled "An act to enable any state to coöperate with any other state or states, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purposes of conserving the navigability of

navigable rivers'' (36 U. S. Stat. at Large, p. 961), and acts of congress supplementary thereto and amendatory thereof, and in or on the waters thereon.

1915, c. 205.

2100. Protection of buffalo and elk. It shall be unlawful for any person or persons to shoot, kill, capture, destroy, or run with dogs, or in any other manner interfere with any buffalo or elk in North Carolina. Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and shall be fined or imprisoned, in the discretion of the court.

1917, c. 240.

2101. Game birds defined. Under the laws of this state, the following only shall be considered game birds: loons, and grebes, swans, geese, brant, river, fish and sea ducks, rails, coots, marsh-hens and gallinules, plovers, shore and surf birds, snipe, woodcock, sandpipers, yellow legs, chewink or tohee and curlews, and the wild turkey, grouse, partridge, pheasant, quail, dove, robin and meadow lark.

Rev., s. 1875; 1903 (Pr.), c. 337, s. 4.

Game is not the subject of private ownership except when some express statute confers it: State v. Gallop, 126-983.

2102. Illegal killing of game and birds prohibited. If any person shall at any time hunt, capture or kill any nongame bird, or shall during the close season, or time in each year in which the hunting or killing is prohibited, chase with dogs, hunt, kill, or wound, or in any manner take or capture any game bird, or any deer, opossum, rabbit or squirrel, he shall be guilty of a misdemeanor and be fined not more than fifty dollars or imprisoned not exceeding thirty days. This section shall not apply to birds caught or killed by authority of the Audubon society for scientific purposes only. This section shall not apply to the English or European housesparrow, owls, hawks, crows, blackbirds, jackdaws, turkey buzzards, vultures and rice birds.

Rev., s. 3466; 1903 (Pr.), c. 337, s. 14; 1915, c. 182, s. 1.

For local statutes, varying punishments provided in this section, see the laws referred to in Article 4 of this chapter, Close Seasons for Game, and the following:

Pamlico, 1905, c. 47; Halifax and Warren, 1905, c. 137; Montgomery, 1905, c. 284; Granville, 1905, c. 369; New Hanover, 1905, c. 409.

For local statute in Perquimans county as to rewards for the heads of gray hawks and crows, see P. L. 1911, c. 235.

2103. Birds kept as pets or for breeding. It shall be lawful to keep any wild bird in a cage as a domestic pet, or for the purposes of breeding, raising and domesticating.

Rev., s. 1876; 1903 (Pr.), c. 337, ss. 6, 7.

2104. Certificates to take birds, nests, or eggs. The Audubon society of North Carolina may issue a certificate to any properly accredited persons of the age of twelve years and upward, permitting the holder thereof to collect birds, their nests or eggs for strictly scientific purposes; said certificate shall be in force only during the calendar year in which issued, and shall not be transferable. In order to obtain such certificates the applicant for same must present to the persons having authority to grant such certificates written testimonials from

two well-known scientific men, certifying to the good character and fitness of said applicant to be intrusted with such privilege, and must pay the said society one dollar to defray the necessary expenses attending the granting of such certificate. On satisfactory proof that the holder of such certificate has killed any bird or taken the nests or eggs of any birds other than for scientific purposes, his certificate shall become void, and he shall be further subject for each offense to the penalty provided for such violation of the law.

Rev., s. 1866; 1903 (Pr.), c. 337, s. 5.

2105. Destroying nests or eggs of birds. If any person shall take or needlessly destroy the nest or eggs of any wild birds, except those of the English or European housesparrow, owls, hawks, crows, blackbirds, jackdaws and rice birds, he shall be guilty of a misdemeanor and be fined one dollar for each nest or egg destroyed or taken, or be imprisoned not less than five nor more than ten days for each offense. This section shall not apply to any person taking eggs or nests for scientific purposes only, by authority of the Audubon society of North Carolina.

Rev., s. 3464; Code, s. 2836; 1903 (Pr.), c. 337, s. 4.

As to wild turkeys' and quails' nests in Bertie county. 1909, c. 717.

As to destruction of birds' nests and eggs in Mitchell county. P. L. 1913, c. 70.

For local statute protecting wild animals in parks in Transylvania county, see P. L. 1911, c. 491.

For protection of wild animals and birds in Fairview park, Albemarle, Stanly county. Ex. Sess. 1913, c. 26.

ART. 3. SHIPMENT OR POSSESSION OF GAME

2106. Shipment of live quail or partridges out of state prohibited. No person shall catch, net, or trap any quail or partridges for the purpose of shipping or transporting the same out of the state. No person, firm or corporation shall transport, or cause to be transported or have possession of with intent to transport or to secure the transportation of, any live quail or partridges beyond the limits of the state. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction fined or imprisoned in the discretion of the court.

All authority given to the Audubon society of North Carolina to grant permits to stop a transport of live quail or partridges beyond the limits of the state is revoked.

1911, c. 2.

2107. Exportation from state prohibited. If any person shall knowingly receive for transportation, or shall transport or cause to be transported, or have in his possession with the intent to transport, or to secure the transportation of, or shall in any manner carry or convey, beyond the limits of this state, except for purposes of propagation under permits issued by the Audubon society of North Carolina, any partridge, pheasant, grouse, shore or beach birds, quail, wild turkey, snipe, woodcock, or nongame bird which have been killed or captured within this state, he shall be guilty of a misdemeanor; and each bird so killed or taken or had in possession, received for transportation or transported contrary to the provisions of this section shall constitute a separate offense. The reception by any person or corporation within this state of any such birds or game for

shipment to a point beyond the limits of this state, shall be prima facie evidence that said birds or game were killed within the state for the purpose of conveying same beyond its limits; but the provisions of this section shall not apply to the common carriers into whose possession any of the birds mentioned in this section shall come in the regular course of their business for transportation while they are in transit through the state from any place without the state.

Rev., s. 3471; 1903 (Pr.), c. 337, s. 7; Code, s. 2835.

For special proviso as to Tyrrell county, see 1909, c. 836.

2108. Packages of game to be marked. If any person shall deliver or knowingly receive for transportation any receptacle or package containing birds or game, unless the same shall be labeled on the address side in plain letters with the name and address of the owner and consignor, and with the kind or kinds of birds which the said package or receptacle contains, or shall falsely label the same, he shall be guilty of a misdemeanor.

Rev., s. 3470; 1903 (Pr.), c. 337, s. 8.

ART. 4. CLOSE SEASON FOR GAME

2109. Deer. The close season of each year during which deer shall not be hunted with gun, chased with dogs, killed, trapped, or destroyed, shall, as to the several counties or parts of counties specified, be as follows:

Alamance -----Feb. 1 to Oct. 1 Rev., s. 1881.	Carteret -----Feb. 1 to Sept. 1 P. L. 1915, c. 682.
Alexander -----Feb. 1 to Oct. 1 Rev., s. 1881.	Caswell ---except Nov. 15 to Dec. 15 P. L. 1915, c. 129.
Alleghany -----Feb. 1 to Oct. 1 Rev., s. 1881.	Catawba -----Feb. 1 to Oct. 1 Rev., s. 1881.
Anson -----no open season before 1922 Afterward ----Jan. 20 to Nov. 20 P. L. 1917, c. 474; P. L. 1919, c. 165.	Chatham ---except Nov. 1 to Nov. 15 1907, c. 358.
Ashe -----except Nov. 1 to Nov. 15 1907, c. 358.	Cherokee -----Jan. 1 to Oct. 1 1907, c. 452.
Avery -----no open season before 1922 P. L. 1917, c. 469.	Clay-----no open season before 1929 Thereafter-----Nov. 1 to Jan. 1 P. L. 1919, c. 260.
Beaufort -----Feb. 1 to Nov. 1 P. L. 1917, c. 573.	Cleveland -----Feb. 1 to Oct. 1 Rev., s. 1881,
Bertie -----Jan. 1 to Oct. 1 P. L. 1919, c. 375.	Columbus -----Jan. 1 to Oct. 1 P. L. 1917, c. 394.
Bladen -----Dec. 31 to Sept. 30 P. L. 1911, c. 123.	Craven -----Jan. 1 to Sept. 1 P. L. 1917, c. 443.
Brunswick -----Jan. 1 to Oct. 1 P. L. 1915, c. 568.	Cumberland---except Nov. 15 to Dec. 1 See P. L. 1919, c. 142.
Buncombe -----Jan. 15 to Oct. 15 P. L. 1917, c. 658.	Currituck ----- On North Poplar branch township, March 1 to September 20. Rev., s. 1881. At- lantic township, no open season. 1909, c. 350.
Bertie -----Jan. 1 to Oct. 1 Rev., s. 1881.	Dare -----Feb. 1 to Oct. 1 P. L. 1911, c. 187.
Cabarrus -----Feb. 1 to Oct. 1 Rev., s. 1881.	Davidson---except Nov. 1 to Nov. 15 1907, c. 358.
Caldwell ---no open season before 1922 P. L. 1917, c. 469.	

Davie -----Feb. 1 to Oct. 1 Rev., s. 1881.	Macon-----no open season until 1924 P. L. 1919, c. 45.
Duplin -----Jan. 1 to Oct. 1 P. L. 1917, c. 668.	Madison -----Feb. 1 to Oct. 1 Rev., s. 1881.
Durham -----Feb. 1 to Oct. 1 Rev., s. 1881.	Mecklenburg -----Jan. 20 to Dec. 1 P. L. 1915, c. 562.
Forsyth-----except Nov. 1 to Nov. 15 1907, c. 358.	Mitchell ----except Oct. 15 to Nov. 1 1907, c. 242.
Franklin -----Feb. 1 to Oct. 1 Rev., s. 1881.	Montgomery except Nov. 1 to Nov. 15 1907, c. 358.
Gaston -----Feb. 1 to Oct. 1 Rev., s. 1881.	Moore -----except Nov. 1 to Nov. 15 1907, c. 358.
Gates -----Feb. 1 to Oct. 1 P. L. Ex. Sess. 1913, c. 170.	Nash -----except Sept. 1 to Nov. 1 1907, c. 109.
Graham -----Does, no open season Bucks -----except Oct. 1 to Dec. 1 P. L. 1917, c. 125.	New Hanover-----Jan. 1 to Sept. 1 Rev., s. 1881.
Granville -----Feb. 1 to Nov. 1 P. L. 1917, c. 598.	Northampton -----Feb. 1 to Sept. 15 P. L. 1915, c. 272.
Guilford ---except Nov. 1 to Nov. 15 1907, c. 358.	Onslow -----Mar. 15 to Oct. 15 P. L. 1913, c. 591.
Halifax -----Mar. 1 to Nov. 15 P. L. 1913, c. 591.	Orange -----Feb. 1 to Oct. 1 Rev., s. 1881.
Harnett ---except Nov. 1 to Nov. 15 P. L. 1915, c. 127; P. L. 1917, c. 205.	Pamlico -----Feb. 1 to July 15 1909, c. 710; P. L. 1913, c. 560.
Haywood -----Jan. 1 to Nov. 1 P. L. 1915, c. 566.	Pasquotank -----Feb. 1 to Oct. 1 P. L., Ex. Sess. 1913, c. 170.
Henderson---except Nov. 1 to Dec. 15 1909, c. 471; P. L. 1919, c. 404.	Pender -----Feb. 1 to Oct. 1 P. L. 1919, cc. 163, 285.
Hertford -----Jan. 1 to Sept. 1 P. L. 1913, c. 591.	Perquimans -----Feb. 1 to Oct. 1 P. L., Ex. Sess. 1913, c. 170.
Hoke -----except Nov. 1 to Dec. 1 P. L. 1915, c. 459; P. L. 1917, c. 100.	Person -----Jan. 15 to Sept. 1 Rev., s. 1881.
Hyde-----see statute Currituck township. P. L. 1911, c. 131; P. L. 1913, c. 560.	Polk -----Feb. 1 to Oct. 1 Rev., s. 1881.
Iredell -----Feb. 1 to Oct. 1 Rev., s. 1881.	Randolph --except Nov. 1 to Nov. 15 1907, c. 358.
Jackson -----see statute 1909, c. 471.	Richmond _except Nov. 1 to Nov. 15 P. L. 1915, c. 569.
Johnston -----Feb. 1 to Oct. 1 Rev., s. 1881.	Robeson -----Jan. 1 to Nov. 1 Rev., s. 1881.
Jones? -----Jan. 1 to Sept. 1 P. L. 1917, c. 443.	Rockingham, except Nov. 1 to Nov. 15 1907, c. 358.
Lee -----Feb. 1 to Oct. 1 Rev., s. 1881.	Rowan -----Feb. 1 to Oct. 1 Rev., s. 1881.
Lincoln -----Feb. 1 to Dec. 1 P. L. 1913, c. 659; P. L., Ex. Sess., 1913, c. 75; P. L. 1915, c. 92.	Rutherford -----Feb. 1 to Oct. 1 Rev., s. 1881.
McDowell -----Feb. 1 to Oct. 1 Rev., s. 1881.	Sampson -----Feb. 1 to Oct. 1 Rev., s. 1881.
	Scotland ----except Nov. 1 to Dec. 1 P. L. 1915, c. 57.

Stanly -----except Nov. 1 to Nov. 15 1907, c. 358.	Wake -----Mar. 1 to Nov. 1 1909, c. 723.
Stokes -----except Nov. 1 to Nov. 15 1907, c. 358.	Warren -----Feb. 1 to Oct. 1 Rev., s. 1881.
Surry -----Jan. 1 to Nov. 1 1907, c. 358; P. L. 1919, c. 168.	Washington -----Jan. 15 to Oct. 1 P. L. 1911, c. 216.
Swain -----Jan. 15 to Oct. 15 P. L. 1915, c. 772.	Watauga --except Nov. 1 to Nov. 15 1907, c. 358.
Transylvania -----see statute P. L. 1911, c. 348.	Wilkes -----except Nov. 1 to Nov. 15 1907, c. 358.
Tyrrell -----Feb. 1 to Oct. 15 Rev., s. 1881.	Yadkin -----except Nov. 1 to Nov. 15 1907, c. 358.
Union -----Feb. 1 to Oct. 1 Rev., s. 1881.	Yancey -----except Oct. 1 to Nov. 30 Rev., 1881.
Vance -----Mar. 1 to Nov. 15 P. L. 1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.	

NOTE. For the punishment for violating the various acts cited, see the Acts.

Power of legislature to regulate hunting, see *State v. Gallop*, 126-979. License to hunt is not an immunity or privilege of the people of this state: *Brooks v. Tripp*, 135-161; *Daniels v. Homer*, 139-219.

2110. Foxes. The close season of each year during which foxes shall not be hunted with gun, chased with dogs, killed, trapped or destroyed, shall, as to the several counties or parts of counties specified, be as follows:

Alamance -----Feb. 1 to Oct. 1 P. L. 1911, c. 654.	Lenoir -----Feb. 15 to Sept. 15 P. L. 1917, c. 673.
Alleghany -----Mar. 1 to Oct. 1 P. L. 1915, c. 274.	Lincoln -----Feb. 1 to Nov. 15 P. L. 1913, c. 659.
Buncombe -----Mar. 1 to Sept. 1 P. L. 1917, c. 658.	Montgomery -----Jan. 15 to Oct. 15 P. L. 1911, c. 400.
Burke -----Mar. 1 to Dec. 1 South of Catawba river 1907, c. 388.	Moore -----Mar. 1 to Oct. 1 P. L. 1911, c. 291.
Chatham -----Feb. 1 to Sept. 1 1909, c. 174; P. L. 1911, c. 135.	New Hanover ---Feb. 15 to Sept. 15 P. L. 1917, c. 673.
Clay -----Mar. 1 to Nov. 15 P. L. 1919, c. 260.	Onslow -----Feb. 15 to Sept. 15 P. L. 1917, c. 673.
Cleveland -----Mar. 1 to Dec. 1 1907, c. 388.	Pender -----Feb. 15 to Sept. 15 P. L. 1911, c. 407.
Duplin -----Feb. 15 to Sept. 15 P. L. 1911, c. 407.	Randolph -----Jan. 15 to Nov. 1 P. L. 1919, c. 76.
Franklin -----Mar. 1 to Oct. 15 P. L., Ex. Sess. 1913, c. 169.	Richmond -----Mar. 15 to Sept. 1 P. L. 1911, c. 382.
Granville -----Mar. 1 to Sept. 1 P. L. 1919, c. 282.	Sampson -----Feb. 15 to Sept. 15 P. L. 1917, c. 673.
Halifax -----Mar. 1 to Sept. 15 P. L. 1913, c. 591.	Scotland -----Mar. 2 to Aug. 15 P. L. 1917, c. 57.
Harnett -----April 1 to Sept. 1 1909, c. 667.	Surry -----Jan. 1 to Nov. 1 P. L. 1919, c. 168.
Hoke -----Mar. 2 to Sept. 15 P. L. 1915, c. 459.	Wayne -----Feb. 15 to Sept. 15 P. L. 1917, c. 673.
Lee -----Apr. 1 to Aug. 15 P. L., Ex. Sess. 1913, c. 111.	Wilkes -----Feb. 15 to Oct. 1 P. L. 1913, c. 77.

NOTE. For punishments for violating the acts cited, see the Acts.

2111. Opossum. The close season of each year during which no opossum shall be shot, killed, hunted or in any way captured shall be, as to the several counties specified, as follows:

Alamance -----	Feb. 1 to Oct. 1	Lee -----	Feb. 1 to Oct. 1
Rev., s. 1883.		Rev., s. 1883.	
Alexander -----	Mar. 1 to Nov. 1	Lincoln -----	Jan. 1 to Oct. 1
P. L. 1917, c. 250.		Rev., s. 1883.	
Anson -----	Jan. 20 to Nov. 20	Mecklenburg -----	Feb. 1 to Oct. 1
P. L. 1917, c. 474.		Rev., s. 1883.	
Ashe -----	Feb. 1 to Nov. 1	Montgomery -----	Jan. 1 to Oct. 1
P. L. 1913, c. 560.		P. L. 1911, c. 102.	
Bertie -----	Feb. 1 to Nov. 1	McDowell -----	Mar. 1 to Oct. 1
French's creek township, Cypress		1907, c. 886.	
creek township, Turnbull town-		Moore -----	Feb. 1 to Oct. 1
ship, Colly township.		Rev., s. 1883.	
1911, c. 123.		Orange -----	Feb. 1 to Oct. 1
Bladen -----	Feb. 1 to Dec. 1	Rev., s. 1883.	
1909, c. 418.		Pamlico -----	Feb. 1 to Nov. 1
Cabarrus -----	Feb. 1 to Oct. 1	P. L. 1919, c. 354.	
P. L. 1919, c. 396.		Pasquotank -----	Apr. 1 to Nov. 1
Caswell -----	Feb. 1 to Oct. 1	P. L. 1913, c. 369.	
Rev., s. 1883.		Polk -----	Feb. 1 to Oct. 1
Chatham -----	Feb. 1 to Oct. 1	P. L. 1915, c. 454.	
Rev., s. 1883.		Randolph -----	Jan. 1 to Oct. 1
Clay -----	Mar. 1 to Nov. 15	P. L. 1911, c. 24.	
P. L. 1917, c. 395; 1919, c. 260.		Robeson -----	Mar. 1 to Oct. 1
Currituek -----	Apr. 1 to Nov. 1	P. L. 1917, c. 537.	
P. L. 1911, c. 378; P. L. 1913, c. 560.		Rockingham -----	Feb. 1 to Oct. 1
Durham -----	Feb. 1 to Oct. 1	P. L. 1911, c. 756.	
Rev., s. 1883.		Sampson -----	Mar. 1 to Oct. 1
Edgecombe -----	Jan. 1 to Oct. 1	P. L. 1911, c. 19.	
P. L. 1911, c. 189.		Surry -----	Jan. 1 to Nov. 1
Forsyth -----	Feb. 1 to Oct. 1	P. L. 1919, c. 168.	
P. L. 1913, c. 560.		Swain -----	Feb. 15 to Nov. 15
Franklin -----	Feb. 1 to Oct. 1	P. L. 1915, c. 772.	
Rev., s. 1883.		Union -----	Jan. 1 to Nov. 1
Gaston -----	Jan. 1 to Oct. 15	P. L. 1919, c. 51.	
P. L. 1919, c. 286.		Vance -----	Mar. 1 to Nov. 15
Graham -----	Feb. 1 to Oct. 1	1909, c. 516; P. L. 1911, c. 364; P. L. 1913,	
Rev., s. 1883.		c. 718.	
Greene -----	Feb. 1 to Sept. 1	Wake -----	Feb. 1 to Oct. 1
Rev., s. 1883.		P. L. 1913, c. 225.	
Guilford -----	Feb. 1 to Oct. 1	Warren -----	Jan. 1 to Oct. 1
Rev., s. 1883.		P. L. 1913, c. 560.	
Halifax -----	Feb. 1 to Oct. 1	Watauga -----	Mar. 15 to Nov. 1
Rev., s. 1883.		P. L. 1913, c. 533.	
Harnett -----	Jan. 1 to Oct. 1	Wilkes -----	Mar. 1 to Oct. 15
Rev., s. 1883.		P. L. 1913, c. 77.	
Iredell -----	Mar. 1 to Oct. 1	Yadkin -----	Mar. 1 to Oct. 1
P. L. 1917, c. 459; 1919, c. 480.		1909, c. 612.	
Johnston -----	Mar. 1 to Nov. 1	Yancey -----	Jan. 1 to Nov. 1
P. L. 1913, c. 648.		P. L. 1913, c. 136.	

NOTE. For punishment for violating the acts cited, see the Acts.

2112. Rabbit. The close season of each year during which no rabbits shall be hunted with a gun shall be, as to the several counties specified, as follows:

Anson -----Jan. 20 to Nov. 20 P. L. 1917, c. 474.	Orange -----Feb. 1 to Nov. 15 P. L. 1919, c. 216.
Cabarrus Mar. 1 to Thanksgiving Day P. L. 1913, c. 560.	Rockingham -----Feb. 1 to Oct. 1 P. L. 1911, c. 756.
Durham -----Feb. 1 to Nov. 15 P. L. 1917, c. 400.	Rowan -----May 1 to Sept. 1 P. L. 1911, c. 445.
Forsyth -----Feb. 1 to Oct. 1 P. L. 1913, c. 560.	Surry -----Jan. 1 to Nov. 1 P. L. 1919, c. 168.
Gaston -----Feb. 1 to Nov. 25 P. L. 1919, c. 286.	Warren -----Mar. 1 to Dec. 1 P. L. 1917, c. 348. See P. L. 1919, c. 169.
Granville -----Feb. 1 to Nov. 1 P. L. 1917, c. 598.	NOTE. For punishment for violating the acts cited, see the Acts.

2113. Raccoon. The close season of each year during which no raccoons shall be shot, killed, hunted or in any other way captured, shall be, as to the several counties specified, as follows:

Anson -----Jan. 20 to Nov. 20 P. L. 1917, c. 474.	Pasquotank -----Apr. 1 to Nov. 1 P. L. 1913, c. 369.
Ashe -----Feb. 1 to Nov. 1 P. L. 1913, c. 560.	Robeson -----Mar. 1 to Oct. 1 P. L. 1917, c. 537.
Bladen -----Feb. 1 to Dec. 1 Colly, Cypress creek, French's creek and Turnbull townships. 1909, c. 418.	Swain -----Feb. 15 to Nov. 15 P. L. 1915, c. 772.
Clay -----Mar. 1 to Nov. 15 P. L. 1919, c. 260.	Surry -----Jan. 1 to Nov. 1 P. L. 1919, c. 168.
Craven -----Apr. 1 to Dec. 1 P. L. 1915, c. 37.	Wake -----Feb. 1 to Oct. 1 P. L. 1913, c. 225.
Currituck -----Apr. 1 to Nov. 1 P. L. 1913, c. 560.	Watauga -----Mar. 15 to Nov. 1 P. L. 1913, c. 533.
McDowell -----Nov. 1 to Oct. 15 1907, c. 886.	Yadkin -----Feb. 1 to Nov. 1 1909, c. 612.
	Yancey -----Jan. 1 to Nov. 1 P. L. 1915, c. 136.
	NOTE. For punishment for violating the acts cited, see the Acts.

2114. Squirrel. The close season of each year during which no squirrel shall be hunted, killed, or in any way captured, shall be, as to the several counties specified, as follows:

Alleghany -----Mar. 1 to Aug. 1 P. L. 1913, c. 560.	Bladen -----Mar. 1 to Oct. 1 White Oak township. 1909, c. 163.
Anson -----Jan. 20 to Nov. 20 P. L. 1917, c. 474.	French's creek, Colly, Cypress creek and Turnbull townships; Feb. 1 to Nov. 1.
Avery -----except Sept. 15 to Oct. 31 P. L. 1917, c. 555.	1909, c. 418.
Beaufort -----April 1 to Oct. 1 P. L. 1913, c. 430.	Mar. 1 to Nov. 1, Central and Elizabethtown townships. 1909, c. 181.
Pungo Precinct, no close season. P. L. 1911, c. 766.	
Bertie -----Jan. 1 to Oct. 1 P. L. 1915, c. 555; P. L. 1917, c. 53; P. L. 1919, c. 375.	Brunswick -----Jan. 15 to Sept. 15 P. L. 1915, c. 568.

Buncombe__except Sept. 14 to Jan. 15 P. L. 1919, c. 184.	Hyde _____Feb. 1 to Nov. 1 Currituck township. P. L. 1911, c. 131.
Camden _____Feb. 1 to Oct. 15 P. L. 1919, c. 526.	Iredell _____except May and Sept. P. L. 1919, c. 480.
Carteret _____Mar. 1 to Nov. 1 1907, c. 895; 1909, c. 475.	Johnston _____Mar. 1 to Nov. 1 P. L. 1913, c. 648; P. L. 1917, c. 520.
Catawba _____Feb. 1 to Nov. 25 P. L. 1911, c. 563; P. L. 1913, c. 560; P. L. 1917, c. 412.	Jones _____Mar. 1 to Oct. 1 Rev., s. 1882.
Chowan _____Mar. 1 to Dec. 1 1909, c. 13; P. L. 1913, c. 591.	Lenoir _____Mar. 1 to Sept. 15 1909, c. 614.
Clay _____Feb. 15 to Nov. 25 P. L. 1913, c. 206; P. L. 1915, c. 271; P. L. 1917, c. 417.	Lincoln _____Feb. 1 to Sept. 1 P. L. 1913, c. 659; P. L. 1917, c. 607.
Cleveland _____Mar. 1 to Nov. 1 Rev., s. 1882.	Macon _____except Sept. 1 to Feb. 15 P. L. 1919, c. 45.
Craven _____Mar. 1 to Oct. 1 P. L. 1905, c. 77.	Madison _____Mar. 1 to Oct. 1 Rev., s. 1882.
Cumberland, Mar. 1, 1919-Nov. 1 1921 P. L. 1919, c. 416.	Martin _____Mar. 1 to Oct. 1 1909, c. 602.
Currituck _____Apr. 1 to Oct. 1 1909, c. 351.	Mecklenburg _____Mar. 1 to Nov. 1 Rev., s. 1882.
Dare _____Mar. 1 to Nov. 1 Rev., s. 1882.	Mitchell ___except Sept. 15 to Nov. 1 P. L. 1917, c. 555.
Duplin _____Mar. 1 to Oct. 15 P. L. 1913, c. 560.	Montgomery _____Apr. 1 to Sept. 1 Rev., s. 1882.
Edgecombe _____Mar. 1 to Oct. 1 1909, c. 512.	Nash _____Mar. 1 to Oct. 1 1909, c. 512.
Forsyth _____Feb. 1 to Sept. 1 P. L. 1913, c. 560.	New Hanover ____Feb. 15 to Nov. 15 P. L. 1913, c. 558.
Franklin _____Mar 1 to Nov. 15 P. L. 1913, c. 560.	Onslow _____Mar. 15 to Oct. 15 P. L. 1913, c. 591.
Gaston _____Jan. 25 to Nov. 25 P. L. 1919, c. 286.	Orange _____Feb. 1 to July 1 P. L. 1919, c. 216.
Gates _____Mar. 1 to Nov. 1 Rev., s. 1882.	Pamlico _____Feb. 1 to Nov. 1 P. L. 1919, c. 354.
Granville _____Feb. 1 to Nov. 1 P. L. 1917, c. 598.	Pasquotank till Dec. 1, 1920; thereafter except Dec.-Jan.
Greene _____Feb. 1 to Oct. 1 1907, c. 598.	Pender _____Apr. 1 to Oct. 1 1907, c. 50.
Guilford _____Feb. 1 to Aug. 1 1909, c. 338; P. L. 1911, c. 125.	Rocky Point township, Jan. 1 to Dec. 1. P. L. 1915, c. 150.
Halifax _____Mar. 1 to Nov. 15 P. L. 1913, c. 591.	Perquimans _____Feb. 1 to Oct. 15 P. L. 1919, c. 526.
Harnett _____Feb. 1 to Oct. 15 P. L. 1917, c. 398.	Pitt _____Feb. 1 to Sept. 1 P. L. 1913, c. 606.
Haywood _____Jan. 1 to Sept. 1 P. L. 1915, c. 566.	Polk _____Feb. 1 to Aug. 15 P. L. 1915, c. 454.
Hertford _____Jan. 15 to Sept. 15 P. L. 1917, c. 544.	Robeson _____Mar. 1 to Oct. 1 P. L. 1917, c. 537.
Hoke _____except Nov. 1 to Dec. 1 P. L. 1915, c. 459; P. L. 1917, c. 100.	

Rockingham -----Feb. 1 to Aug. 1 P. L. 1911, c. 756.	Vance -----Mar. 1 to Nov. 15 1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.
Sampson -----Feb. 1 to Nov. 1 P. L. 1917, c. 521.	Wake -----Mar. 1 to Nov. 1 P. L. 1913, c. 225.
Scotland -----except Nov. 1 to Dec. 1 P. L. 1917, c. 57.	Warren -----Mar. 1 to Dec. 1 P. L. 1917, c. 348. See P. L. 1919, c. 169.
Surry -----Jan. 1 to Nov. 1 P. L. 1919, c. 168.	Washington -----Mar. 1 to Dec. 1 P. L. 1911, c. 26; P. L. 1913, c. 560.
Swain -----Jan. 15 to Oct. 15 P. L. 1915, c. 772.	Wayne -----Mar. 1 to Nov. 1 1909, c. 196; P. L., Ex. Sess. 1913, c. 203.
Transylvania -----Apr. 1 to Sept. 1 1907, c. 842.	NOTE. For punishment for violating the acts cited, see the Acts.
Tyrrell -----Mar. 1 to Oct. 1 Rev., s. 1882.	
See State v. Gallop, 126-979; Brooks v. Tripp, 135-161; Daniels v. Homer, 139-219.	

2115. **Furbearing animals.** The close season of each year during which no furbearing animals shall be hunted, killed, or in any way captured, shall be, as to the several counties specified, as follows:

Ashe -----Feb. 1 to Nov. 1 P. L. 1913, c. 560.	Macon -----Feb. 15 to Nov. 15 P. L. 1917, c. 395.
Clay -----Mar. 1 to Nov. 15 P. L. 1917, c. 395; 1919, c. 260.	Pasquotank -----Apr. 1 to Nov. 1 P. L. 1913, c. 369.
Craven -----Apr. 1 to Nov. 30 P. L. 1915, c. 37.	Robeson -----Mar. 1 to Oct. 1 P. L. 1917, c. 537.
Currituck -----Apr. 1 to Nov. 1 P. L. 1913, c. 560.	Stokes -----Jan. 15 to Sept. 1 P. L. 1917, c. 588.
Gates -----Apr. 1 to Nov. 15 P. L. 1911, c. 745.	Surry -----Jan. 1 to Nov. 1 P. L. 1919, c. 168.
Henderson -----Jan. 1 to Oct. 15 Except wildcats, opossum and moles.	Swain -----Feb. 15 to Nov. 15 P. L. 1915, c. 772.
P. L. 1911, c. 522; P. L. 1913, c. 560; 1919, c. 404.	Watauga -----Mar. 15 to Nov. 1 P. L. 1915, c. 533.

NOTE. For punishment for violating the above statutes, see the Acts.

2116. **Quail or partridge.** The close season of each year during which no quail or partridges shall be shot, killed, wounded, or in any matter hunted, taken or captured, shall be, as to the several counties specified, as follows:

Alamance -----Mar. 1 to Nov. 15 1909, c. 715; P. L. 1911, c. 85.	Beaufort -----Mar. 1 to Nov. 1 P. L. 1917, c. 573.
Alexander -----Jan. 1 to Nov. 20 P. L. 1911, c. 754; P. L. 1917, c. 250.	Bertie -----Feb. 15 to Nov. 15 P. L. 1915, c. 555; P. L. 1917, c. 53; P. L. 1919, c. 375.
Alleghany -----Mar. 1 to Oct. 15 P. L. 1913, c. 560.	Bladen -----Mar. 1 to Nov. 1 P. L. 1913, c. 457; P. L. 1915, c. 273.
Anson -----Jan. 20 to Nov. 20 P. L. 1917, c. 474; P. L. 1919, c. 165.	Brunswick -----Mar. 1 to Nov. 1 Rev., s. 1884.
Ashe -----Mar. 1 to Nov. 1 Rev., s. 1884.	Buncombe -----Jan. 15 to Nov. 14 P. L. 1917, c. 658.
Avery -----No open season P. L. 1917, c. 555.	

Burke -----Feb. 1 to Nov. 15 1909, c. 675.	Gaston ---Jan. 15 to Thanksgiving Day 1907, c. 417.
Cabarrus -----Jan. 15 to Dec. 1 P. L. 1911, c. 664.	Gates -----Mar. 1 to Nov. 15 P. L. 1917, c. 544.
Caldwell -----Jan. 20 to Nov. 20 P. L. 1911, c. 8.	Graham -----Mar. 1 to Nov. 1 P. L. 1917, c. 125.
Camden -----Mar. 1 to Nov. 15 P. L. 1917, c. 544.	Granville -----Feb. 1 to Nov. 15 P. L. 1919, c. 458.
Carteret -----Mar. 1 to Nov. 1 P. L. 1915, c. 682.	Greene -----Feb. 1 to Nov. 20 Ex. Sess. 1908, c. 108; 1909, c. 829.
Caswell -----Feb. 1 to Nov. 15 P. L. 1919, c. 149.	Guilford -----Mar. 1 to Nov. 15 1907, c. 345.
Catawba -----Feb. 1 to Nov. 25 P. L. 1911, c. 563; P. L. 1917, c. 412.	Halifax -----Mar. 1 to Nov. 15 P. L. 1913, c. 591.
Chatham -----Mar. 1 to Nov. 15 P. L. 1911, c. 129.	Harnett -----Mar. 1 to Dec. 1 P. L. 1917, cc. 209, 379.
Cherokee -----Feb. 15 to Nov. 15 P. L. 1915, c. 608; P. L. 1917, cc. 156, 352.	Haywood -----Jan. 1 to Nov. 1 P. L. 1915, c. 566.
Chowan -----Mar. 1 to Nov. 15 P. L. 1917, c. 544.	Henderson -----Jan. 15 to Nov. 15 P. L. 1919, c. 404.
Clay -----Feb. 15 to Nov. 15 P. L. 1917, c. 395.	Hertford -----Mar. 1 to Nov. 15 P. L. 1917, c. 544.
Cleveland -----Jan. 10 to Dec. 1 P. L. 1917, c. 426; P. L. 1919, c. 500.	Hoke -----Feb. 16 to Nov. 15 P. L. 1915, c. 459; P. L. 1917, c. 100.
Columbus -----Apr. 1 to Nov. 1 P. L. 1917, c. 394.	Hyde -----Mar. 20 to Oct. 15 Rev., s. 1884.
Craven -----Feb. 15 to Nov. 15 P. L. 1917, c. 443.	Iredell -----Jan. 10 to Dec. 1 P. L. 1917, c. 459.
Cumberland -----Mar. 1 to Nov. 15 P. L. 1919, c. 142.	Jackson -----Mar. 1 to Nov. 1 Rev., s. 1884.
Currituck -----Mar. 1 to Nov. 15 P. L. 1913, c. 560; P. L. 1917, c. 544.	Johnston-----Mar. 1 to Nov. 1 Rev., s. 1884.
Dare -----Mar. 1 to Oct. 15 Rev., s. 1884.	Jones -----Feb. 15 to Nov. 15 P. L. 1917, c. 443.
Davidson -----Mar. 1 to Nov. 15 1907, c. 422.	Lee -----Mar. 1 to Nov. 15 P. L. 1913, c. 612.
Davie -----Feb. 20 to Nov. 20 P. L. 1917, c. 422.	Lenoir -----Feb. 20 to Nov. 20 P. L. 1913, c. 588.
Duplin -----Mar. 1 to Nov. 15 Rev., s. 1884.	Lincoln -----Feb. 1 to Dec. 1 P. L. 1913, c. 659; P. L., Ex. Sess. 1913, c. 75; P. L. 1915, c. 92.
Durham -----Feb. 1 to Nov. 15 P. L. 1917, c. 400.	McDowell -----Feb. 1 to Nov. 15 1909, c. 518; P. L. 1911, c. 128.
Edgecombe -----Feb. 15 to Nov. 15 1907, c. 823.	Macon -----except Dec. 1 to Feb. 1 P. L. 1919, c. 45.
Forsyth -----Jan. 1 to Nov. 20 1909, c. 551.	Madison -----Feb. 1 to Nov. 15 1907, c. 104.
Kernersville and Abbott's creek townships, Feb. 15 to Nov. 15. P. L. 1911, c. 134.	Martin -----Mar. 1 to Nov. 1 Rev., s. 1884.
Franklin -----Mar. 1 to Nov. 15 1907, c. 986.	Mecklenburg -----Jan. 20 to Dec. 1 P. L. 1915, c. 562.

Mitchell -----	No open season	Rutherford -----	Feb. 15 to Dec. 1
P. L. 1917, c. 555.		1909, c. 204; P. L. 1911, c. 182.	
Montgomery ----	Feb. 15 to Nov. 25	Sampson -----	Feb. 1 to Nov. 1
P. L. 1919, c. 413.		P. L. 1917, c. 521.	
Moore -----	Mar. 1 to Nov. 30	Scotland -----	Feb. 15 to Nov. 15
P. L. 1919, c. 533.		P. L. 1917, c. 57.	
Nash -----	Feb. 15 to Nov. 15	Stanly -----	Feb. 1 to Dec. 1
1907, c. 823.		1909, c. 630.	
New Hanover ----	Feb. 15 to Nov. 15	Stokes -----	Jan. 15 to Dec. 15
P. L. 1913, c. 558.		P. L. 1917, c. 588.	
Northampton ----	Mar. 1 to Nov. 15	Surry -----	Jan. 1 to Nov. 1
P. L. 1915, c. 272.		P. L. 1919, c. 168.	
Onslow -----	Mar. 15 to Oct. 15	Swain -----	Mar. 1 to Nov. 15
P. L. 1913, c. 591.		1907, c. 54.	
Orange -----	Feb. 1 to Nov. 15	Transylvania -----	Feb. 1 to Nov. 15
P. L. 1919, c. 216.		P. L. 1911, c. 677.	
Pamlico -----	Feb. 14 to Dec. 1	Tyrrell -----	Mar. 1 to Oct. 15
P. L. 1919, c. 354.		Rev., s. 1884.	
Pasquotank -----	Mar. 1 to Nov. 15	Union -----	Jan. 1 to Dec. 15
P. L. 1917, c. 544.		P. L. 1919, c. 555.	
Pender -----	Mar. 1 to Nov. 1	Vance -----	Mar. 1 to Nov. 15
Rev., s. 1884.		1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.	
Rocky Point township, Jan. 1 to Dec. 1.		Wake -----	Mar. 1 to Nov. 15
P. L. 1915, c. 150.		P. L. 1913, c. 225; P. L. 1917, c. 552.	
Perquimans -----	Mar. 1 to Nov. 15	Warren -----	Mar. 1 to Dec. 1
P. L. 1917, c. 544.		P. L. 1915, c. 137; P. L. 1917, cc. 298, 348.	
Person -----	Feb. 1 to Nov. 15	Washington -----	Mar. 1 to Oct. 1
P. L. 1915, c. 586.		P. L. 1911, c. 26; P. L. 1912, c. 560.	
Pitt -----	Mar. 1 to Nov. 20	Watauga -----	Mar. 1 to Sept. 1
P. L. 1917, c. 155.		1907, c. 851.	
Polk -----	Feb. 15 to Dec. 1	Wayne -----	Mar. 1 to Nov. 1
P. L. 1915, c. 454.		Rev., s. 1884.	
Randolph -----	Mar. 1 to Nov. 15	Wilkes -----	Feb. 10 to Dec. 1
P. L. 1911, c. 198.		Except on Thanksgiving Day.	
Richmond -----	Jan. 25 to Nov. 25	P. L. 1913, c. 77; P. L. 1917, c. 157.	
P. L. 1915, c. 564.		Wilson -----	Mar. 1 to Nov. 15
Robeson -----	Mar. 1 to Nov. 15	Rev., s. 1884.	
P. L. 1917, c. 376.		Yadkin -----	Feb. 1 to Dec. 1
Rockingham -----	Feb. 1 to Nov. 15	1907, c. 607.	
P. L. 1911, c. 756; P. L. 1913, c. 560.		Yancey -----	Jan. 1 to Nov. 1
Rowan -----	Feb. 1 to Dec. 1	P. L. 1915, c. 136.	
P. L. 1913, c. 591.		NOTE. For punishment for violating above acts, see the Acts.	

As to power of legislature to regulate hunting, see *State v. Gallop*, 126-979; *Daniels v. Homer*, 139-219; *Brooks v. Tripp*, 135-161.

2117. **Wild turkey.** The close season for each year during which no wild turkey shall be shot, killed, wounded, or in any manner hunted, taken or captured, shall be, as to the several counties specified, as follows:

Alamance -----	Mar. 1 to Nov. 15	Alleghany -----	Mar. 1 to Nov. 1
1909, c. 715; P. L. 1911, c. 85.		Rev., s. 1885.	
Alexander -----	Mar. 1 to Nov. 1	Anson -----	no open season before 1922
Rev., s. 1885.		afterward Jan. 20 to Nov. 20	
		P. L. 1917, c. 474.	

Ashe -----	Mar. 1 to Nov. 1	Davie -----	No open season
Rev., s. 1885.		P. L. 1917, c. 422.	
Avery -----	No open season	Duplin -----	Mar. 1 to Nov. 1
P. L. 1917, c. 555.		Rev., s. 1885.	
Beaufort -----	Mar. 1 to Nov. 1	Durham -----	Feb. 1 to Nov. 15
P. L. 1917, c. 573.		P. L. 1917, c. 400.	
Bertie -----	Feb. 10 to Nov. 15	Edgecombe -----	Feb. 15 to Nov. 15
P. L. 1915, c. 555; P. L. 1917, c. 53; P. L. 1919, c. 375.		1907, c. 823.	
Bladen -----	Jan. 1 to Nov. 1	Forsyth -----	Mar. 1 to Nov. 1
P. L. 1913, c. 457; P. L. 1915, c. 273.		Rev., s. 1885.	
Brunswick -----	Mar. 1 to Nov. 1	Franklin -----	Mar. 1 to Nov. 1
Rev., s. 1885.		Rev., s. 1885.	
Buncombe -----	Jan. 15 to Nov. 15	Gaston -----	Mar. 1 to Nov. 1
P. L. 1917, c. 658.		Rev., s. 1885.	
Burke -----	Feb. 15 to Dec. 1	Gates -----	Mar. 1 to Nov. 1
1909, c. 675.		Rev., s. 1885.	
Cabarrus -----	Mar. 1 to Dec. 1	Graham -----	Mar. 1 to Nov. 1
Rev., s. 1885.		P. L. 1917, c. 125.	
Caldwell -----	Jan. 20 to Nov. 20	Granville -----	Feb. 1 to Nov. 1
P. L. 1911, c. 8.		P. L. 1917, c. 598.	
Camden -----	Mar. 1 to Nov. 1	Greene -----	Mar. 1 to Nov. 1
Rev., s. 1885.		Rev., s. 1885.	
Carteret -----	Mar. 1 to Nov. 1	Guilford -----	Mar. 1 to Nov. 15
P. L. 1915, c. 682.		1907, c. 345.	
Caswell -----	Feb. 1 to Nov. 15	Halifax -----	Mar. 1 to Nov. 15
P. L. 1915, c. 129; P. L. 1919, c. 149.		P. L. 1913, c. 591.	
Catawba -----	Mar. 1 to Nov. 1	Harnett -----	Mar. 1 to Nov. 1
Rev., s. 1885.		Rev., s. 1885.	
Chatham -----	Mar. 1 to Nov. 15	Haywood -----	Jan. 1 to Nov. 1
P. L. 1911, c. 129.		P. L. 1915, c. 566.	
Cherokee -----	Feb. 15 to Nov. 15	Henderson -----	Jan. 15 to Nov. 15
P. L. 1915, c. 608; P. L. 1917, cc. 156, 352.		Rev., s. 1885; P. L. 1919, c. 404.	
Chowan -----	Mar. 1 to Dec. 1	Hertford -----	Mar. 1 to Nov. 1
P. L. 1913, c. 591.		Rev., s. 1885.	
Clay -----	Feb. 1 to Nov. 15	Hoke -----	except Nov. 1 to Dec. 1
P. L. 1917, c. 395.		P. L. 1915, c. 459; P. L. 1917, c. 100.	
Cleveland -----	Mar. 1 to Nov. 1	Hyde -----	Mar. 1 to Nov. 1
Rev., s. 1885.		Rev., s. 1885.	
Columbus -----	Apr. 1 to Nov. 1	Iredell -----	Mar. 1 to Nov. 1
P. L. 1917, c. 394.		Rev., s. 1885.	
Craven -----	Mar. 1 to Nov. 1	Jackson -----	Mar. 1 to Nov. 1
Rev., s. 1885.		Rev., s. 1885.	
Cumberland -----	Mar. 1 to Nov. 1	Johnston -----	Mar. 1 to Nov. 1
Rev., s. 1885.		Rev., s. 1885.	
No open season in 71st township.		Jones -----	Mar. 1 to Nov. 1
P. L. 1915, c. 671.		1905, c. 77.	
Currituck -----	Mar. 1 to Nov. 1	Lee -----	Mar. 1 to Nov. 1
Rev., s. 1885.		Rev., s. 1885.	
Davidson -----	Mar. 1 to Nov. 15	Lenoir -----	Mar. 1 to Nov. 1
Rev., s. 1885.		Rev., s. 1885.	

Lincoln -----Feb. 1 to Dec. 1 P. L. 1913, c. 659; P. L., Ex. Sess. 1913, c. 75; P. L. 1915, c. 92.	Rockingham -----Feb. 1 to Nov. 15 P. L. 1911, c. 756; P. L. 1915, c. 560.
Macon -----except Dec. 1 to Feb. 1 P. L. 1919, c. 45.	Rowan -----Feb. 1 to Dec. 1 P. L. 1913, c. 591.
Madison -----Feb. 1 to Nov. 15 1907, c. 104.	Rutherford -----Mar. 1 to Nov. 1 Rev., s. 1885.
Martin -----Mar. 1 to Nov. 1 Rev., s. 1885.	Sampson -----Feb. 1 to Nov. 1 P. L. 1917, c. 521.
Mecklenburg -----Jan. 20 to Dec. 1 P. L. 1915, c. 562.	Scotland -----except Nov. 1 to Dec. 1 P. L. 1917, c. 57.
Mitchell -----Feb. 1 to Oct. 15 P. L. 1913, c. 70.	Stanly -----Feb. 1 to Dec. 1 1909, c. 630.
Montgomery -----Jan. 25 to Nov. 25 P. L. 1915, c. 564.	Stokes -----Feb. 15 to Dec. 15 P. L. 1917, c. 588.
Moore -----Jan. 1 to Dec. 1 P. L. 1911, c. 130.	Surry -----closed until Jan. 15, 1922 P. L. 1917, c. 47.
Nash -----Feb. 15 to Nov. 15 1907, c. 823.	Swain -----Jan. 15 to Oct. 15 P. L. 1915, c. 772.
New Hanover -----Mar. 1 to Nov. 1 Rev., s. 1885.	Transylvania -----Feb. 1 to Nov. 15 P. L. 1911, c. 677.
Northampton -----Mar. 1 to Nov. 1 Rev., s. 1885.	Union -----Jan. 15 to Dec. 15 1907, c. 703.
Onslow -----Mar. 15 to Oct. 15 P. L. 1913, c. 591.	Vance -----Mar. 1 to Nov. 15 1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.
Orange -----Feb. 1 to Nov. 15 P. L. 1919, c. 216.	Wake -----Mar. 1 to Nov. 15 P. L. 1913, c. 225; P. L. 1917, c. 552.
Pamlico -----Jan. 20 to Nov. 20 P. L. 1919, c. 354.	Warren -----Mar. 1 to Dec. 1 P. L. 1915, c. 137; P. L. 1917, cc. 298, 348.
Pasquotank -----Mar. 1 to Nov. 1 Rev., s. 1885.	Washington -----Mar. 1 to Nov. 1 Rev., s. 1885.
Pender -----Mar. 1 to Dec. 1 P. L. 1919, c. 163.	Watauga -----Mar. 1 to Nov. 1 Rev., s. 1885.
Perquimans -----Mar. 1 to Nov. 1 Rev., s. 1885.	Wayne -----Mar. 1 to Nov. 1 Rev., s. 1885.
Person -----Feb. 1 to Nov. 15 P. L. 1915, c. 586; P. L. 1917, c. 355.	Wilkes -----Mar. 1 to Nov. 1 Rev., s. 1885.
Pitt -----Mar. 1 to Nov. 1 Rev., s. 1885.	Wilson -----Mar. 1 to Nov. 15 Rev., s. 1885.
Polk -----Feb. 15 to Dec. 1 1909, c. 590; P. L. 1915, c. 454.	Yadkin -----Mar. 1 to Nov. 1 Rev., s. 1885.
Randolph -----Mar. 1 to Nov. 15 P. L. 1911, c. 198.	Yancey -----Jan. 1 to Nov. 1 P. L. 1915, c. 136.
Richmond -----except Nov. 1 to Nov. 15 P. L. 1915, c. 569.	
Robeson -----Mar. 1 to Nov. 15 P. L. 1917, c. 376.	

NOTE. For punishment for violating above acts, see the Acts.

2118. **Dove, robin, and lark.** The close season for each year during which no dove, robin, or lark shall be shot, killed, wounded, or in any manner hunted, taken or captured, shall be, as to the several counties specified, as follows:

Alamance	Dove	Mar. 1 to Nov. 15
	1909, c. 715; P. L. 1911, c. 85.	
	Robin	Apr. 1 to Nov. 15
	P. L. 1913, c. 560.	
	Lark	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Alexander		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Alleghany	Dove and lark	Mar. 1 to Nov. 1
	Rev., s. 1886.	
	Robin	Mar. 1 to Oct. 15
	P. L. 1913, c. 560.	
Anson		Jan. 20 to Nov. 20
	P. L. 1917, c. 474; P. L. 1919, c. 165.	
Ashe		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Avery		No open season
	P. L. 1917, c. 555.	
Beaufort		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Bertie		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Bladen		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Brunswick		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Buncombe		Jan. 15 to Nov. 1
	P. L. 1917, c. 658.	
	No open season for robin.	
	P. L. 1913, c. 816.	
Burke		Feb. 15 to Dec. 1
	1909, c. 675.	
Cabarrus		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Caldwell		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Camden		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Carteret		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Caswell		Mar. 1 to Nov. 15
	P. L. 1915, c. 129.	
Catawba		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Chatham		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Cherokee	Dove and robin	Feb. 15 to Nov. 15
	P. L. 1915, c. 608; P. L. 1917, cc. 156, 352.	
	Lark	Mar. 1 to Nov. 15
	Rev., s. 1886.	

Chowan		Mar. 1 to Dec. 1
	P. L. 1913, c. 591.	
Clay		Feb. 15 to Nov. 25
	P. L. 1913, c. 206; P. L. 1917, c. 417.	
Cleveland		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Columbus	Dove	Apr. 1 to Nov. 1
	P. L. 1917, c. 394.	
	Robin and lark	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Craven		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Cumberland		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Currituck		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Dare		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Davidson		Apr. 1 to Oct. 15
	Rev., s. 1886.	
Davie		Feb. 20 to Nov. 20
	P. L. 1917, c. 422.	
Durham		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Edgecombe	Dove	Jan. 1 to July 15
	1909, c. 511.	
	Robin and lark	Mar. 1 to Nov. 15
	Rev., s. 1886.	
Forsyth		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Franklin	Dove and lark	Mar. 1 to Nov. 1
	Rev., s. 1886.	
	Robin	No open season
	P. L. 1913, c. 816.	
Gaston		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Gates		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Granville		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Greene		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Guilford		Mar. 1 to Nov. 15
	1907, c. 345.	
Halifax		Mar. 1 to Nov. 15
	P. L. 1913, c. 591.	
	Robin	No open season
	P. L. 1913, 816.	
Harnett		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Haywood		Mar. 1 to Nov. 1
	Rev., s. 1886.	
Henderson		Apr. 1 to Nov. 15
	Rev., s. 1886.	

Hertford	Dove and lark Rev., s. 1886.	Mar. 1 to Nov. 1
	Robin P. L. 1913, c. 816.	No open season
Hoke	Rev., s. 1886.	Mar. 1 to Nov. 1
Hyde	Rev., s. 1886.	Mar. 1 to Nov. 1
Iredell	Rev., s. 1886.	Mar. 1 to Nov. 1
Jackson	Rev., s. 1886.	Mar. 1 to Nov. 1
Johnston	Rev., s. 1886.	Mar. 1 to Nov. 1
Jones	Rev., s. 1886.	Mar. 1 to Nov. 1
Lee	Rev., s. 1886.	Mar. 1 to Nov. 1
Lenoir	Rev., s. 1886.	Mar. 1 to Nov. 1
Lincoln		Feb. 1 to Dec. 1
	P. L. 1913, c. 659; P. L., Ex. Sess. 1913, c. 75; P. L. 1915, c. 92.	
McDowell	Rev., s. 1886.	Mar. 1 to Nov. 1
Macon	Rev., s. 1886.	Mar. 1 to Nov. 1
Madison	1907, c. 104.	Feb. 1 to Nov. 15
Martin	Rev., s. 1886.	Mar. 1 to Nov. 1
Mecklenburg		Jan. 20 to Dec. 1
	P. L. 1915, c. 562.	
	Robin P. L. 1913, c. 816.	No open season
Mitchell		No open season
	P. L. 1917, c. 555.	
Montgomery		Jan. 26 to Nov. 25
	P. L. 1915, c. 564.	
Nash	Dove and lark Rev., s. 1886.	Mar. 1 to Nov. 1
	Robin P. L. 1913, c. 816.	No open season
New Hanover		Feb. 15 to Nov. 15
	P. L. 1913, c. 558.	
Northampton	Dove and lark Rev., s. 1886.	Feb. 15 to Nov. 1
	Robin P. L. 1915, c. 272.	Apr. 1 to Nov. 1
Onslow	Dove and robin P. L. 1913, c. 591.	Mar. 15 to Oct. 15
	Lark Rev., s. 1886.	No close season
Orange	Robin and lark P. L. 1919, c. 216.	Feb. 1 to Nov. 15

Pamlico	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Pasquotank	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Pender	Lark -----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
	Dove and robin -----	Jan. 1 to Dec. 1
	P. L. 1915, c. 150.	
Perquimans	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Person	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Pitt	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Polk	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Randolph	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Richmond	-----	Jan. 26 to Nov. 25
	P. L. 1915, c. 564.	
Robeson	-----	Mar. 2 to Nov. 15
	P. L. 1917, c. 376.	
Rockingham	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Rowan	-----	Feb. 1 to Dec. 1
	P. L. 1913, c. 591.	
Rutherford	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Sampson	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Scotland	Dove -----	Feb. 15 to Nov. 20
	P. L. 1913, c. 610; P. L., Ex. Sess. 1913, c. 175.	
	Robin and lark -----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Stanly	-----	Feb. 1 to Dec. 1
	1909, c. 630.	
Stokes	-----	Jan. 15 to Dec. 15
	P. L. 1917, c. 588.	
Surry	-----	Jan. 1 to Nov. 1
	P. L. 1919, c. 168.	
Transylvania	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Tyrrell	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Union	Dove and lark -----	Jan. 15 to Dec. 15
	1907, c. 703.	
	Robin -----	No open season
	P. L. 1913, c. 816.	
Vance	-----	Mar. 1 to Nov. 15
	1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.	
Wake	Dove and lark -----	Mar. 1 to Nov. 15
	P. L. 1913, c. 225; P. L. 1917, c. 552.	
	Robin -----	Mar. 1 to Nov. 15
	1909, c. 688.	

Warren	-----	Feb. 1 to Aug. 1
	Rev., s. 1886.	
Washington	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Watauga	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Wayne	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Wilkes	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Yadkin	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	
Yancey	-----	Mar. 1 to Nov. 1
	Rev., s. 1886.	

NOTE. For punishment for violating above acts, see Acts.

2119. **Pheasant.** The close season for each year during which no pheasant shall be shot, killed, wounded, or in any manner captured or taken, shall be, as to the several counties specified, as follows:

Alleghany	-----	Mar. 1 to Oct. 15
	P. L. 1913, c. 560.	
Ashe	-----	except Nov. 1 to Nov. 15
	1907, c. 358.	
Avery	-----	No open season
	P. L. 1917, c. 555.	
Buncombe	-----	Jan. 15 to Nov. 14
	P. L. 1917, c. 658.	
Burke	-----	Feb. 15 to Dec. 1
	1909, c. 675.	
Caldwell	-----	Jan. 20 to Nov. 20
	P. L. 1911, c. 8.	
Caswell	-----	Mar. 1 to Nov. 15
	P. L. 1915, c. 129.	
Chatham	-----	except Nov. 1 to Nov. 15
	1907, c. 358.	
Cherokee	-----	Feb. 15 to Nov. 15
	P. L. 1915, c. 608; P. L. 1917, cc. 156, 352.	
Chowan	-----	Mar. 1 to Dec. 1
	P. L. 1913, c. 591.	
Clay	-----	Feb. 15 to Nov. 25
	P. L. 1913, c. 206; P. L. 1917, c. 417.	
Davidson	-----	except Nov. 1 to Nov. 15
	1907, c. 358.	
Davie	-----	Feb. 20 to Nov. 20
	P. L. 1917, c. 422.	
Forsyth	-----	except Nov. 1 to Nov. 15
	1907, c. 358.	
Franklin	-----	No open season
	P. L. 1917, c. 399.	
Guilford	-----	except Nov. 1 to Nov. 15
	1907, c. 358.	
Halifax	-----	Mar. 1 to Nov. 15
	P. L. 1913, c. 591.	
Haywood	-----	Jan. 1 to Nov. 1
	P. L. 1915, c. 566.	

Henderson	-----	Jan. 1 to Nov. 1
	Rev., s. 1887; P. L. 1919, c. 404.	
Iredell	-----	No open season
	1917, c. 82.	
Lincoln	-----	Feb. 1 to Dec. 1
	P. L. 1913, c. 659; P. L., Ex. Sess. 1913, c. 75; P. L. 1915, c. 22.	
Macon	-----	except Dec. 1 to Feb. 1
	P. L. 1919, c. 45.	
Madison	-----	Feb. 1 to Nov. 15
	1907, c. 104.	
Mecklenburg	-----	Jan. 20 to Dec. 1
	P. L. 1915, cc. 562, 758; P. L. 1917, c. 495.	
Mitchell	-----	No open season
	P. L. 1917, c. 555.	
Montgomery	-----	except Nov. 1 to Nov. 15
	1907, c. 358.	
Moore	-----	except Nov. 1 to Nov. 15
	1907, c. 358.	
Orange	-----	No open season
	1917, c. 82.	
Polk	-----	Feb. 15 to Dec. 1
	1909, c. 590.	
Randolph	-----	except Nov. 1 to Nov. 15
	1907, c. 358.	
Richmond	-----	Mar. 1 to Nov. 20
	1913, c. 610.	
Robeson	-----	Mar. 1 to Nov. 15
	P. L. 1917, c. 376.	
Rockingham	-----	except Nov. 1 to Nov. 15
	1907, c. 358.	
Rowan	-----	Feb. 1 to Dec. 1
	P. L. 1913, c. 591.	
Scotland	-----	Feb. 15 to Nov. 20
	P. L. 1913, c. 610; P. L., Ex. Sess. 1913, c. 175.	
Stanly	-----	Feb. 1 to Dec. 1
	1909, c. 630.	
Stokes	-----	Jan. 15 to Dec. 15
	P. L. 1917, c. 588.	
Surry	-----	closed until Jan. 15, 1922
	P. L. 1917, c. 47.	
Swain	-----	Jan. 15 to Oct. 15
	P. L. 1915, c. 772.	
Transylvania	-----	Mar. 1 to Nov. 1
	1907, c. 679.	
Vance	-----	Mar. 1 to Nov. 15
	1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.	
Wake	-----	Mar. 1 to Nov. 1
	1909, c. 723.	
Warren	-----	Mar. 1 to Nov. 1
	P. L. 1911, c. 61; P. L. 1913, c. 560; P. L., Ex. Sess. 1913, c. 256.	
Watauga	-----	closed until 1922
	P. L. 1917, c. 469.	
Wilkes	----- (Except Thanksgiving Day) -----	Feb. 10 to Dec. 1
	P. L. 1913, c. 77; P. L. 1917, c. 157.	

Yadkin	-----	except Nov. 1 to Nov. 15
	1907, c. 358.	
Yancey	-----	Jan. 1 to Nov. 1
	P. L. 1915, c. 136.	

NOTE. For punishment for violating above acts, see the Acts.

2120. **Woodcock.** The close season for each year during which no woodcock shall be shot, killed, wounded, or in any manner captured or taken, shall be, as to the several counties specified, as follows:

Alamance	-----	Mar. 1 to Nov. 15
	1909, c. 715; P. L. 1911, c. 85.	
Anson	-----	Jan. 20 to Nov. 20
	P. L. 1917, c. 474; P. L. 1919, c. 165.	
Avery	-----	No open season
	P. L. 1917, c. 555.	
Bladen	-----	Feb. 1 to Nov. 1
	P. L. 1911, c. 123.	
Brunswick	-----	Jan. 1 to Sept. 1
	Rev., s. 1888.	
Carteret	-----	Mar. 1 to Nov. 1
	P. L. 1915, c. 682.	
	White Oak township	Feb. 1 to Aug. 1
	P. L. 1915, c. 682.	
Caswell	-----	Mar. 1 to Nov. 15
	P. L. 1915, c. 129.	
Chatham	-----	Mar. 1 to Nov. 15
	P. L. 1911, c. 129.	
Cherokee	-----	Mar. 1 to Nov. 1
	Rev., s. 1888.	
Chowan	-----	Mar. 1 to Dec. 1
	P. L. 1913, c. 591.	
Clay	-----	Feb. 15 to Nov. 25
	P. L. 1913, c. 206; P. L. 1917, c. 417.	
Craven	-----	Feb. 1 to Nov. 1
	1905, c. 183.	
Davie	-----	Feb. 1 to Nov. 20
	P. L. 1917, c. 422.	
Edgecombe	-----	Mar. 1 to Nov. 1
	Rev., s. 1888.	
Halifax	-----	Mar. 1 to Nov. 15
	P. L. 1913, c. 591.	
Henderson	-----	No open season
	Rev., s. 1888.	
Jones	-----	Feb. 1 to Nov. 1
	1905, c. 183.	
Lincoln	-----	Feb. 1 to Dec. 1
	P. L. 1913, c. 659; P. L., Ex. Sess. 1913, c. 75; P. L. 1915, c. 92.	
Mecklenburg	-----	Jan. 20 to Dec. 1
	P. L. 1915, c. 562.	
Mitchell	-----	No open season
	P. L. 1917, c. 555.	
Montgomery	-----	Jan. 25 to Nov. 25
	P. L. 1917, c. 564.	

Orange	-----	Feb. 1 to Nov. 15
	1909, c. 543; P. L. 1919, c. 216.	
Pender	-----	Jan. 1 to Dec. 1
	P. L. 1915, c. 150.	
Randolph	-----	Mar. 1 to Nov. 15
	P. L. 1911, c. 198.	
Richmond	-----	Jan. 25 to Nov. 25
	P. L. 1915, c. 564.	
Robeson	-----	Mar. 1 to Nov. 15
	P. L. 1917, c. 376.	
Rowan	-----	Feb. 1 to Dec. 1
	P. L. 1913, c. 591.	
Stanly	-----	Feb. 1 to Dec. 1
	1909, c. 630.	
Stokes	-----	Jan. 15 to Dec. 15
	P. L. 1917, c. 588.	
Surry	-----	Jan. 1 to Nov. 1
	P. L. 1919, c. 168.	
Vance	-----	Mar. 1 to Nov. 15
	1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.	
Wake	-----	Mar. 1 to Nov. 1
	P. L. 1913, c. 225; P. L. 1917, c. 552.	
Warren	-----	Mar. 1 to Dec. 1
	P. L. 1915, c. 137; P. L. 1917, cc. 298, 348.	

NOTE. For punishment for violating above acts, see the Acts.

2121. **Snipe, shore birds, other game birds.** The close season for each year during which no snipe, shore birds, or other game birds as indicated shall be shot, killed, wounded, or in any manner captured or taken, shall be, as to the several counties specified, as follows:

Alamance	Ducks	-----	Apr. 1 to Nov. 15
	P. L. 1913, c. 560.		
	Other game birds	-----	Mar. 1 to Nov. 15
	1909, c. 715; P. L. 1911, c. 85.		
Anson	Any game bird, i.e., quail, snipe, woodcock, dove, robin and meadow lark	-----	Jan. 20 to Nov. 20
	P. L. 1919, c. 165.		
Avery		-----	No open season
	P. L. 1917, c. 555.		
Beaufort	Summer duck	-----	Feb. 1 to Sept. 15
	1907, c. 384.		
Bladen	Wild duck—Colly, Cypress creek, French creek and Turnbull townships	-----	Feb. 1 to Dec. 1
	1909, c. 418.		
Brunswick	Snipe and shore birds	-----	Feb. 1 to Aug. 1
	1909, c. 757.		
Carteret	Snipe	-----	March 1 to Dec. 1
	P. L. 1915, c. 688.		
	Other game birds	-----	Apr. 1 to Oct. 1
	1907, c. 895; 1909, c. 475.		
Caswell	Any game birds	-----	Feb. 1 to Nov. 15
	P. L. 1915, c. 129; 1919, c. 149.		

Cherokee	-----	Rev., s. 1889.	-----	Mar. 1 to Nov. 15
Chowan	-----	Any game birds	-----	Mar. 1 to Dec. 1
		P. L. 1913, c. 591.		
Clay	-----	Any game birds	-----	Feb. 15 to Nov. 25
		P. L. 1913, c. 206; P. L. 1917, c. 417.		
Craven	-----	Wild duck and other water fowl	-----	Mar. 1 to Nov. 1
		Rev., s. 1889.		
		Summer duck	-----	Mar. 1 to Sept. 1
		1909, c. 519.		
Davie	-----	Any game birds	-----	Feb. 1 to Nov. 20
		P. L. 1917, c. 422.		
Edgecombe	-----	Any game birds, not otherwise regulated	-----	Mar. 1 to Nov. 15
		Rev., s. 1889.		
Gaston	-----	Any game birds	-----	Jan. 25 to Nov. 25
		P. L. 1919, c. 286.		
		No open season for mockingbird and bluebird.		
		1907, c. 823.		
Granville	-----	Snipe and other game birds, not other-	-----	Mar. 1 to Nov. 1
		wise regulated	-----	
		Rev., s. 1889.		
Guilford	-----	Snipe duck	-----	No open season
		1909, c. 338.		
		Any species of duck	-----	Mar. 1 to Aug. 1
		P. L. 1911, c. 125.		
Halifax	-----	Snipe	-----	May 1 to Feb. 1
		Rev., s. 1889.		
		Any game birds	-----	Mar. 1 to Nov. 15
		P. L. 1913, c. 591.		
Henderson	-----	Any game birds	-----	Mar. 1 to Nov. 15
		Rev., s. 1889; P. L. 1919, c. 404.		
Iredell	-----	Snipes, ducks and doves	-----	Mar. 1 to Nov. 1
		P. L. 1919, c. 480.		
Jones	-----	Wild duck and other waterfowls	-----	Mar. 1 to Nov. 1
		Rev., s. 1889.		
Lincoln	-----	Any game birds	-----	Feb. 1 to Dec. 1
		P. L. 1913, c. 659; P. L., Ex. Sess. 1913, c. 75; P. L. 1915, c. 92.		
Mecklenburg	-----	Any game birds	-----	Jan. 20 to Dec. 1
		P. L. 1915, c. 562.		
Mitchell	-----		-----	No open season
		P. L. 1917, c. 555.		
Montgomery	-----	Any game birds	-----	Feb. 15 to Nov. 25
		P. L. 1919, c. 413.		
Nash	-----	Mockingbird and bluebird	-----	No open season
		1907, c. 823.		
New Hanover	-----		-----	Feb. 1 to Aug. 1
		1909, c. 757.		
Orange	-----	Any game bird	-----	Feb. 1 to Nov. 30
		1909, c. 543; P. L. 1919, c. 216.		
Pender	-----		-----	Feb. 1 to Aug. 1
		1909, c. 757.		

Richmond	-----	Jan. 25 to Nov. 25
	P. L. 1915, c. 564.	
Robeson	-----	Mar. 1 to Nov. 15
	P. L. 1917, c. 376.	
Rowan	-----	Feb. 1 to Dec. 1
	P. L. 1913, c. 591.	
Stanly	-----	Feb. 1 to Dec. 1
	1909, c. 630.	
Stokes	-----	Jan. 15 to Dec. 15
	P. L. 1917, c. 588.	
Surry	-----	Jan. 1 to Nov. 1
	P. L. 1919, c. 168.	
Vance	-----	Mar. 1 to Nov. 15
	1909, c. 516; P. L. 1911, c. 364; P. L. 1913, c. 718.	
Wake	-----	Mar. 1 to Nov. 1
	P. L. 1913, c. 225; P. L. 1917, c. 552.	
Warren	-----	May 1 to Feb. 1
	Snipe Rev., s. 1889.	

NOTE. For punishment for violating above acts, see the Acts.

ART. 5. GENERAL HUNTING LAWS

2122. Hunting on Sunday or at night. If any person shall hunt or shoot any wild fowl, or game bird, on any day after the hour of sunset, or before the hour of daylight, or shall use any gun other than can be fired from the shoulder, or shall hunt or shoot wild fowl, birds or game of any kind on Sunday, he shall be guilty of a misdemeanor: Provided, that wild fowl may be hunted after sunset and before daylight and by firelight in that part of Bogue sound in Carteret county west of Sally Bell's shoal.

Rev., s. 3459; Code, s. 2837; 1903, c. 346.

See *State v. Drake*, 64-589.

2123. Hunting wild fowls with aeroplane. It shall be unlawful to make use of any aeroplane, seaplane, or other kind of air machine in shooting, chasing, pursuing, or harassing wild ducks, geese, swan, or other wild waterfowl in and upon the sounds, rivers, creeks, or bays of the state of North Carolina. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned for not less than sixty days nor more than six months.

1917, c. 85, ss. 12.

2124. Hunting game birds with fire. If any person shall hunt wild fowl, or game birds of any kind, with fire, he shall be guilty of a misdemeanor, and upon conviction be fined not less than twenty and not more than fifty dollars, or imprisoned not less than ten days and not more than thirty days.

Rev., s. 3479; Code, s. 2839.

2125. Hunting deer by firelight. If any person shall hunt for deer with a gun in the woods in the night-time, by firelight, or shall kill or catch any wild deer while swimming streams or other bodies of water, the person so offending shall be guilty of a misdemeanor and shall pay a fine not exceeding fifty dollars, or

be imprisoned not exceeding thirty days. When more persons than one are engaged in committing the offense of fire-hunting, any one may be compelled to give evidence against all others concerned; and the witness, upon giving such information, shall be acquitted and held discharged from all penalties and pains to which he was subject by his participation in the offense.

This section shall not apply to Currituck county.

Rev., s. 3462; Code, ss. 1058, 1059; R. C., c. 34, ss. 95, 96; 1774, c. 103; 1784, c. 212, ss. 1, 3; 1801, c. 595; 1856-7, c. 24; 1879, c. 92; 1905, c. 388.

2126. Nonresidents hunting otter, muskrats, or mink. If any person who has not resided within the state two years shall hunt or trap otters, muskrats or minks, or shall sell the hides or skins from these animals in or out of the state, he shall be guilty of a misdemeanor and shall for each offense be fined not less than thirty dollars nor more than fifty dollars.

Rev., s. 3467; 1905, c. 394.

2127. Hunting without landowner's permission. If any person shall, without having first obtained permission of the owner, hunt with gun or dogs on the land of another, or if he shall fish or attempt to catch fish from said lands after being forbidden, either personally or by notices written or printed, posted at the courthouse door and at three places on said land, he shall be guilty of a misdemeanor and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., s. 3480; Code, s. 2831; 1895, c. 147; 1915, c. 271, s. 1.

NOTE. For local laws requiring landowner's permission in the counties named, see:

Alleghany, P. L. 1913, c. 560.

Avery, P. L. 1913, c. 560, s. 24.

Bertie, 1907, c. 142.

Iredell, P. L. 1915, c. 459.

Jackson, 1907, c. 763.

Warren, P. L. 1919, c. 169.

In Wake county prosecution can be maintained only upon complaint of the landowner, 1909, c. 620.

ART. 6. LOCAL HUNTING LAWS

2128. Local by counties: Written permission of landowners required. In the counties and localities enumerated below, if any person shall hunt with dog or gun upon the land of another without the written consent of the owner of the land he shall be guilty of a misdemeanor and punishable as indicated:

Alexander, fine not more than fifty dollars, or imprisoned not to exceed thirty days,

P. L. 1911, c. 754.

Anson, fine not less than ten dollars or not more than fifty dollars, or imprisonment not less than ten days or more than four months.

P. L. 1917, c. 474; P. L. 1919, c. 165.

Carteret, Beaufort, Merrimon, Morehead City, Newport townships. In Beaufort and Merrimon, fine not more than ten dollars, or worked on the roads of these townships not more than ten days. In Newport township, fine not more than twenty-five dollars or imprisoned not more than fifteen days.

1907, c. 747; P. L. 1911, c. 386; P. L. 1913, c. 738.

Catawba, fine not less than five dollars nor more than fifty dollars, or imprisoned not more than thirty days.

Cherokee, forfeit twenty-five dollars and fine or imprisonment in the discretion of the court. Does not apply to hunting foxes or wolves.

P. L. 1907, c. 452.

Chowan, in Edenton township, fine not less than one dollar nor more than ten dollars or imprisoned not less than one or more than ten days.

P. L. 1913, c. 591.

Clay, fine not less than twenty-five dollars nor more than fifty dollars, or both, at the discretion of the court.

P. L. 1907, c. 51; P. L. 1919, c. 260.

Cleveland, fine not more than twenty dollars, or imprisoned not more than thirty days.

P. L. 1917, c. 426.

Craven, fine not less than five dollars or more than twenty-five dollars, or imprisoned not more than thirty days.

Rev., s. 3481.

Cumberland, punishment as in Craven.

Rev., s. 3481.

Currituck, fine not more than ten dollars, or imprisoned not more than ten days.

Rev., s. 3481.

Davidson, fine five dollars for each offense.

P. L. 1907, c. 348.

Guilford, fine not less than five dollars nor more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1915, c. 578.

Harnett, fine or imprisonment at discretion of court.

1907, c. 699; 1909, c. 746.

Haywood, fine not less than five dollars, or imprisoned, in the discretion of the court.

P. L. 1915, c. 566.

Henderson, fine not less than two dollars nor more than twenty-five dollars, or imprisoned not less than five or more than ten days.

1907, c. 453.

Hertford, punishment as in Craven.

Rev., s. 3481.

Hoke, penalty of twenty-five dollars or imprisoned not to exceed twenty days.

P. L. 1915, c. 459.

Jackson, in Sylva township, fine ten dollars or imprisoned not more than thirty days.

1909, c. 534.

Iredell, violation a misdemeanor.

P. L. 1919, c. 480.

Jones, punishment as in Craven.

Rev., s. 3481.

Lee, Cape Fear township, for nonresident. Fine not less than five dollars nor more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1919, c. 546.

Lincoln, fine not more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1913, c. 659.

Macon, fine not more than ten dollars, or imprisoned in discretion of court, or both.

P. L. 1915, c. 565.

Madison, fine not more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1915, c. 559.

Martin, Goose Nest, Poplar Point, and Hamilton townships, fine not over five dollars, or imprisonment not over ten days. Cross Roads township, fine or imprisonment in discretion of the court.

Rev., s. 3481; 1907, c. 338.

Mecklenburg, fine not more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1911, c. 543.

Montgomery, fine not less than ten dollars nor more than fifty dollars, or imprisoned not more than thirty days.

Rev., s. 3481.

Nash, fine not less than five dollars nor more than twenty-five.

Rev., s. 3481.

Pamlico, fine not less than twenty-five dollars, or imprisoned not more than thirty days, or both, in the discretion of the court.

P. L. 1919, c. 354.

Pender, fine not less than five dollars nor more than ten dollars, or imprisoned not more than ten days.

1909, c. 170.

Polk, fine not more than fifty dollars, or imprisoned not more than thirty days.

1909, c. 590.

Randolph, quail, whole county, fine not more than fifty dollars or imprisoned not over thirty days. Any game, Asheboro and Cedar Grove townships, fine not less than five dollars nor more than ten dollars, imprisoned not more than ten days. Back Bay township, any game, fine not over five dollars, or imprisonment not over ten days.

Rev., s. 3481; P. L. 1913, c. 379; P. L. 1911, c. 693.

Richmond, in Mineral Springs, Steele and Wolf Pit townships, fine not less than five dollars nor more than fifty, or imprisoned not more than twenty days.
Rev., s. 3481; 1909, c. 766.

Robeson, fine not less than five dollars nor more than ten dollars.
Rev., s. 3481.

Rowan, punishment as in Craven.
Rev., s. 3481.

Rutherford, quail, whole county, fine not more than fifty dollars or imprisoned not more than thirty days. Rutherford township, any game, fine five dollars.
Rev., s. 3481; P. L. 1917, c. 413.

Scotland, penalty of twenty-five dollars, or imprisoned not more than twenty days. Does not apply to hunting rabbits.
P. L. 1917, c. 57.

Stokes, fine not less than five dollars nor more than twenty-five dollars for each offense.
P. L. 1917, c. 588.

Swain, for quail, fine not less than five dollars nor more than ten dollars, or imprisoned not exceeding ten days for each offense.
P. L. 1915, c. 772.

Transylvania, fine not less than five dollars nor more than one hundred dollars, or imprisoned in the discretion of the court.
1907, c. 842.

Union, fine not more than fifty dollars, or imprisoned not more than thirty days for each offense.
1907, c. 703.

Wayne, fine not less than five dollars nor more than ten dollars for each offense.
Rev. s. 3481.

Wilkes, in certain sections south of Wilkesboro, fine not less than one dollar nor more than twenty-five dollars, or imprisoned for not more than thirty days, or both, in the discretion of the court.
P. L. 1913, c. 591.

Yadkin, fine not more than five dollars or less than two dollars, or imprisoned not more than ten days or less than five days.
1909, c. 612.

Yancey, fine not less than twenty-five dollars nor more than fifty dollars for each offense, or imprisoned at the discretion of the court.
P. L. 1915, c. 136; 1919, c. 412.

NOTE. For statute regulating setting traps on another's land without written permission in Bertie county. P. L. 1917, c. 53.

2129. Local by counties: Bag limit: In the counties enumerated below the various kinds of game and birds specified allowed to a hunter are as follows:

Beaufort, quail, partridges, ruffed grouse, pheasant, fifteen a day combined. Fine not more than twenty-five dollars, or imprisoned not more than twenty-five days.

1913, c. 430.

Bertie, quail, ten a day; wild turkeys, three a day. Fine or imprisoned in the discretion of the court.

P. L. 1919, c. 375.

Brunswick, marsh hens, fifteen a day. Fine five dollars for each offense or imprisoned ten days.

1909, c. 757.

Buncombe, deer, two a season. Partridges, pheasants or wild doves, twenty-five a day. Fine not exceeding fifty dollars, or imprisoned not more than thirty days.

1907, c. 877; 1909, c. 570.

Cabarrus, quail, fifteen a day. Fine not less than ten dollars nor more than fifty dollars for each offense.

1907, c. 586.

Clay, quail, ten per day; three wild gobblers and two turkey hens a season. Fine not more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1915, c. 271; P. L. 1917, c. 417.

Cleveland, quail, fifteen a day. Fine not exceeding twenty dollars, or imprisoned not more than thirty days.

P. L. 1917, c. 426.

Dare, deer, five a season. Fine not more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1911, c. 187.

Haywood, deer, two a season; pheasants, one; wild turkeys, one; other birds, fifteen a day. Fine not less than five dollars, or imprisonment, in the discretion of the court.

P. L. 1915, c. 566.

Henderson, bucks, two a season. First offense, fined twenty-five dollars, or imprisoned in the discretion of the court; second offense, fine of fifty dollars or imprisoned in the discretion of the court, or both.

1909, c. 471; P. L. 1919, c. 404.

Jackson, bucks, two a season. Fine same as Henderson.

1909, c. 471.

Jones, quail, twelve a day; deer, one a day. Fine not less than five dollars nor more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1917, c. 443.

Lenoir, quail, twenty-five a day for individual or party. Fine not more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1913, c. 588.

Lincoln, quail, ten a day. Fine not over fifty dollars, or imprisoned not over thirty days.

P. L. 1913, c. 659.

Madison, quail, pheasant, grouse, wild turkeys or doves, twenty-five a day. Fine not more than fifty dollars or imprisoned not more than thirty days.

1907, c. 104.

Mecklenburg, quail, partridge, fifteen a day. Fine not more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1911, c. 543.

New Hanover, marsh hens, fifteen a day. Fine five dollars for each offense, or imprisoned for ten days.

1909, c. 757.

Pamlico, quail, ten a day. Fine not less than twenty-five dollars, or imprisoned not more than thirty days, or both, at the discretion of the court.

P. L. 1919, c. 354.

Pender, marsh hens, fifteen a day. Fine five dollars, or imprisoned ten days.

1909, c. 757.

Robeson, fifteen game birds a day; squirrels, ten a day. Fine not more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1917, cc. 376, 537.

Surry, quail, ten a day; squirrel, rabbit, woodcock, dove, robin, four a day of each; opossum, two a day. Fine not more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1919, c. 168.

Transylvania, deer, three a season; squirrels, five; quail, partridge, twenty a day. Deer, fine not less than twenty-five dollars, or imprisoned, in the discretion of the court. Squirrels and partridges, fine not less than five dollars or more than one hundred dollars, or imprisoned, in the discretion of the court.

P. L. 1911, c. 348; 1907, c. 842.

Vance, game birds, fifteen a day. Fine not less than five dollars or not more than ten dollars, or imprisoned not less than ten nor more than thirty days.

P. L. 1915, c. 670.

2130. Local by counties: Exportation of game. Any person who shall export game and birds of the kinds indicated from the counties specified below shall be guilty of a misdemeanor, punishable by fine not to exceed fifty dollars, or imprisonment not to exceed thirty days, except as otherwise indicated:

Alamance, quail, for sale, until March 8, 1919.

P. L. 1915, c. 563; P. L. 1917, c. 388.

Alexander, quail, for sale.

P. L. 1911, c. 754.

Anson, quail, for sale.

P. L. 1915, c. 162.

Avery, pine or gray squirrel, or any game bird. Fine not more than sixty dollars, or imprisoned not more than thirty days, or both, in the discretion of the court.

P. L. 1913, c. 560.

Bladen, quail, or wild turkey, for sale.

P. L. 1913, c. 457.

Catawba, quail, misdemeanor; punished in the discretion of the court.

Rev., s. 3472.

Chatham, quail, for sale.

P. L. 1915, c. 162.

Cherokee, quail, pheasant, partridge, dove, robin, snipe, woodcock, or deer. Penalty of twenty dollars; also fined or imprisoned in the discretion of the court.

1907, c. 452.

Clay, quail, not over twenty-five a season; game birds. not over twenty, to be open to view.

P. L. 1915, c. 271; P. L. 1919, c. 260.

Craven, deer, woodcock, snipe, dove, wild turkey, or squirrels, until March 6, 1923. Fine not less than twenty-five dollars nor more than fifty, or imprisoned not more than thirty days.

P. L. 1911, c. 589; P. L. 1913, c. 384.

Cumberland, quail, snipe, or woodcock. Fine not more than fifty dollars, or imprisoned not more than twenty days.

P. L. 1915, c. 171.

Davidson, quail.

P. L. 1915, c. 162.

Davie, quail. Fine or imprisoned in the discretion of the court.

P. L. 1915, c. 140.

Duplin, quail, for sale. Fine not less than five dollars nor more than ten dollars for each offense.

P. L. 1917, c. 668.

Guilford, quail, for sale.

P. L. 1915, c. 162.

Harnett, quail. Fined, or imprisoned, in the discretion of the court.

1907, c. 699.

Henderson, quail. Fined, or imprisoned, in the discretion of the court.

P. L. 1911, c. 184.

Hoke, quail, except nonresident landowner, may carry away quail killed on own land. Penalty twenty-five dollars or imprisonment not to exceed twenty days.

P. L. 1915, c. 459.

Hyde, Currituck township, deer. Fine not less than ten dollars or more than fifty.

P. L. 1911, c. 131.

Iredell, quail. Fined or imprisoned in the discretion of the court.

P. L. 1917, c. 459; 1919, c. 480.

Jackson, quail. Fine ten dollars, or imprisoned not more than thirty days.

1909, c. 534.

Macon, quail.

P. L. 1915, c. 162.

Madison, quail, partridge, squirrel, or pheasant.

P. L. 1915, c. 559.

Mecklenburg, quail.

P. L. 1917, c. 414.

Montgomery, quail, partridge, pheasant, wild turkey, grouse, or dove, outside of county. Fine not more than twenty-five dollars, or imprisoned not more than thirty days for each offense.

1907, c. 689.

Pamlico, fine not less than fifty dollars or imprisoned not more than thirty days, or both, in the discretion of the court.

P. L. 1919, c. 354.

Pitt, quail.

P. L. 1917, c. 155.

Randolph, quail.

P. L. 1915, c. 162.

Robeson, any game bird.

P. L. 1917, c. 376.

Rockingham, quail. Fine not more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1919, c. 276.

Sampson, quail, except nonresident taking away quail killed on his own land. Fine not exceeding ten dollars.

P. L. 1913, c. 245.

Scotland, quail, except landowners. Penalty of not more than twenty-five dollars, or imprisoned not more than twenty days.

P. L. 1917, c. 57.

Stanly, any game birds. Fine not less than ten dollars or more than fifty dollars for each offense, or imprisoned not more than thirty days.

P. L. 1911, c. 359.

Stokes, any game bird, for sale. Fine not less than five dollars nor more than twenty-five dollars.

P. L. 1917, c. 588.

Surry, any game. Fine not more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1919, c. 168.

Union, lark, dove, quail, or partridge.

1907, c. 703; P. L. 1917, c. 416.

Warren, quail, partridge, wild turkey, woodcock, rabbits, squirrels; except nonresident hunters, allowed to take out twenty-five quail and one wild turkey during one season. Fine not less than ten dollars nor more than fifty dollars, or not more than thirty days imprisonment.

P. L. 1915, c. 137.

Wayne, bob-white, quail, partridge, snipe, or woodcock. Fine not more than fifty dollars, or imprisoned not exceeding twenty days.

P. L. 1915, c. 171.

Wilson, quail, except nonresident, may carry out of county game killed on own land. Fine not less than five dollars nor more than fifty dollars for each offense.

P. L. 1915, c. 738.

Yadkin, quail, for sale. Fine not less than five dollars nor more than ten dollars, or imprisoned not less than ten or more than twenty days for each offense.

1909, c. 698.

2131. Local by counties: Sale of game. Any person who shall sell, offer for sale, or have in his possession for sale, any game or birds as indicated in the counties enumerated, shall be guilty of a misdemeanor and punishable by a fine not to exceed fifty dollars, or imprisonment not to exceed thirty days, unless another punishment is specified.

P. L. 1915, c. 563.

Alamance, quail.

P. L. 1917, c. 388; 1919, c. 423.

Alexander, quail, except to resident of county for own use.

P. L. 1911, c. 754.

Anson, quail.

P. L. 1915, c. 162.

Avery, pine, or gray squirrels, or any game birds. Fine not more than sixty dollars, or imprisoned not over thirty days.

P. L. 1913, c. 560, s. 24.

Beaufort, quail, or pheasant. Fine not to exceed twenty-five dollars, or imprisoned not more than twenty-five days.

P. L. 1913, c. 430.

Bladen, quail, or wild turkey.

P. L. 1913, c. 457.

Brunswick, snipe, woodcock, or summer duck; any wild fowl.

Rev., s. 3479; 1909, c. 577.

Buncombe, quail, pheasant, wild turkey, or dove.

Rev., s. 3472.

Catawba, quail, or squirrel, during close season. Fined, or imprisoned, in the discretion of the court.

P. L. 1913, c. 412.

Chatham, quail.

P. L. 1915, c. 162.

Cherokee, quail, pheasant, partridge, dove, robin, snipe, woodcock, or deer. Penalty of twenty dollars; also fined or imprisoned, in the discretion of the court.

1907, c. 452.

Clay, quail.

P. L. 1915, c. 271.

Craven, deer, woodcock, snipe, dove, wild turkey, or squirrels. Fine not less than twenty-five dollars nor more than fifty dollars, or imprisoned more than thirty days.

P. L. 1911, c. 589; P. L. 1913, c. 384.

Cumberland, quail, snipe, or woodcock. Fine not more than fifty dollars, or imprisoned not more than twenty days.

P. L. 1915, c. 171.

Dare, wild fowl.

Rev., s. 3477.

Davidson, quail.

P. L. 1915, c. 162.

Davie, quail. Fined or imprisoned, in the discretion of the court.

P. L. 1915, c. 140.

Durham, quail, except landowner.

P. L. 1913, c. 292.

Forsyth, quail, partridge, bob-white, snipe, woodcock, or other game birds.

P. L. 1917, c. 677.

Granville, quail, or partridge. Fine not less than five dollars nor more than twenty dollars.

P. L. 1917, c. 598.

Guilford, quail.

P. L. 1915, c. 162.

Harnett, quail. Fine or imprisonment, in the discretion of the court.

1907, c. 699.

Haywood, deer, or hide of deer. Fine not less than five dollars, or imprisoned, in the discretion of the court.

P. L. 1915, c. 566.

Henderson, any game, misdemeanor.

P. L. 1919, c. 404.

Iredell, quail. Fine or imprisonment, in the discretion of the court.
P. L. 1917, c. 459; P. L. 1919, c. 480.

Macon, quail.
P. L. 1915, c. 162.

Madison, quail, partridge, squirrel, rabbit, or pheasant.
P. L. 1915, c. 559.

Mecklenburg, quail.
P. L. 1917, c. 414.

Montgomery, quail, partridge, pheasant, wild turkey, goose, or dove, outside of county. Fine of not more than twenty-five dollars or imprisoned not more than thirty days for each offense.
1907, c. 689.

Moore, quail, or wild turkey. Fine of not more than thirty dollars and also a penalty of twenty dollars.
P. L. 1911, c. 130.

New Hanover, any game bird and squirrel.
Rev., s. 3477; P. L. 1913, c. 558; P. L. 1917, c. 677.

Orange, quail, except landowner, killed on his own land.
P. L. 1913, c. 292.

Pamlico, out of county, fine not less than twenty-five dollars, or imprisoned not more than thirty days, or both, in the discretion of the court.
P. L. 1919, c. 354.

Pasquotank, quail. Fine not less than five dollars nor more than ten for each offense.
P. L. 1913, c. 560.

Pender, Rockypoint township, partridge, quail, woodcock, robins, doves, wild turkeys, or squirrels. Fine not more than ten dollars, or imprisoned not more than twenty days.
P. L. 1915, c. 150.

Pitt, quail.
P. L. 1917, c. 155.

Randolph, quail.
P. L. 1915, c. 162.

Robeson, any game birds.
P. L. 1917, c. 376.

Rockingham, quail. Fine not more than fifty dollars, or imprisoned not more than thirty days.
P. L. 1919, c. 276.

Rowan, quail.
P. L. 1913, c. 591.

Rutherford, quail.
P. L. 1913, c. 556.

Sampson, quail. Fine not exceeding ten dollars.

P. L. 1913, c. 245.

Stanly, quail. Fine not less than ten dollars nor more than fifty for each offense.

P. L. 1917, c. 516.

Surry, any game. Fine not more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1919, c. 168.

Swain, quail, squirrels. Fine not less than five nor more than ten dollars.

Rev., s. 3472; P. L. 1919, c. 381.

Transylvania, squirrels, not more than two a day. Fine not less than five nor more than one hundred dollars, or imprisoned, in the discretion of the court.

1907, c. 842; P. L. 1911, c. 193.

Union, lark, dove, quail, or partridge.

1907, c. 703; P. L. 1917, c. 416.

Vance, quail, woodcock, wild turkey, any game bird of market value. Fine of not less than five dollars nor more than ten, or imprisoned not more than thirty days.

P. L. 1915, c. 670.

Wake, quail, partridge, or wild turkeys.

P. L. 1913, c. 225.

Warren, quail, partridge, or woodcock, wild turkeys, rabbits, or squirrels, except nonresident hunters, may take away twenty-five quail and one turkey each season.

P. L. 1915, c. 137.

Wayne, bob-white, quail, partridge, snipe, or woodcock. Fine not more than fifty dollars, or imprisoned not to exceed twenty days.

P. L. 1915, c. 171.

Wilkes, quail, partridge, pheasant, or goose. Penalty of ten dollars.

P. L. 1913, c. 77.

Wilson, quail, except nonresident may carry out of county game killed on own land. Fine not less than five dollars nor more than fifty.

P. L. 1915, c. 738.

Yadkin, quail.

P. L. 1917, c. 132.

2132. Local by counties: Bird dogs running at large. It shall be unlawful for the owner or any person having the care of any pointer or setter dog to permit the same to run at large unmuzzled during the breeding season of quail, namely, from April the first to September first of any year. When any pointer or setter dog shall be found ranging unmuzzled in the field or woods it shall be prima facie evidence that the owner of such pointer or setter dog has violated the pro-

visions of this section, and upon conviction such owner or his agent shall be deemed guilty of a misdemeanor and shall be fined not more than fifty dollars or imprisoned not longer than thirty days.

This section shall apply only to the counties of Davidson, Durham, Greene, Guilford, Forsyth, Iredell, Johnston, Moore, Transylvania and Yancey.

1909, c. 775.

NOTE. Clay, bird-dogs running at large prohibited, February 15 to November 15. Fine not less than ten dollars nor more than twenty-five dollars. P. L. 1917, c. 417.

Catawba, bird-dogs running at large, April 1 to October 1. Misdemeanor, fine or imprisonment, in the discretion of the court. P. L. 1913, c. 412.

Mecklenburg, unlawful for person owning dogs to allow them to run at large from April 1 to October 1. May use dogs during this season for chasing or catching carnivorous animals, or for other legitimate purposes. Fine not less than two dollars nor more than ten dollars for each offense. P. L. 1915, c. 562.

Orange, bird-dogs not allowed to run at large during the months of May, June, July and August, of each year. Fined or imprisoned, in the discretion of the court. 1909, c. 543.

Rowan, any dog, May 1 to September 1. Fine not more than ten dollars, or imprisoned not more than five days. P. L. 1911, c. 445.

Stanly, all dogs to be kept up during the bird-raising season in each year, such season to be set by the majority of the qualified voters of the county. P. L. 1913, c. 683.

Wilkes, dogs not allowed to run at large from May 1 to October 1. Penalty of one dollar for each offense, or imprisoned not less than ten nor more than twenty days, or both, in the discretion of the court. P. L. 1915, c. 737.

Rutherford, bird-dogs, May 15 to August 15. Fine not exceeding fifty dollars, or imprisoned not exceeding thirty days. P. L. 1913, c. 513.

2133. Local by counties: Netting quail. Any person who shall net or trap any quail or partridge in the counties specified below, shall be guilty of a misdemeanor, and punishable as indicated:

Brunswick, except on own land. Punished in the discretion of the court.

Rev., s. 3468.

Burke, except on own land. Punished in the discretion of the court.

Rev., s. 3468.

Davie, fined or imprisoned, in the discretion of the court.

P. L. 1917, c. 422.

Granville, fined not less than five dollars nor more than twenty dollars.

P. L. 1917, c. 598.

Guilford, fined not more than five dollars for each bird captured in violation of law.

1907, c. 345.

Lincoln, fine not more than fifty dollars, or imprisoned not more than thirty days.

P. L. 1913, c. 659.

Madison, except on own land. Punishable in the discretion of the court.

Rev., s. 3468.

McDowell, fined or imprisoned, in the discretion of the court.

1907, c. 886.

New Hanover, punishable in the discretion of the court.

P. L. 1913, c. 400.

Randolph, except on own land. Punishable in the discretion of the court.
Rev., s. 3468.

Richmond, except on own land. Punishable in the discretion of the court.
Rev., s. 3468.

Stokes, except on own land. Punishable in the discretion of the court.
Rev., s. 3468.

Surry, fined not less than ten nor more than fifty dollars for each offense, or imprisoned not less than ten nor more than thirty days.
P. L. 1917, c. 47.

2134. Local by counties: Chasing deer. If any person shall chase deer with dogs in Clay, Graham, Macon, or Swain counties, or in French's Creek, Cypress Creek, Colly, and Turnbull townships, in Bladen county, he shall be guilty of a misdemeanor.

Rev., s. 3460; 1903, c. 591; 1909, c. 418, s. 1.

2135. Local by counties: Killing wild fowl for sale. If any person shall kill, for sale, any wild fowls in the waters of Dare, New Hanover or Brunswick counties between the tenth days of March and November of any year, or ship out of the state between said dates any wild fowl killed in the waters aforesaid, or if any nonresident shall in said counties, or in Currituck county, shoot any wild fowl from any blind, box or battery or float, not on land at the time, he shall be guilty of a misdemeanor and be fined not more than fifty dollars, or imprisoned not more than thirty days.

Rev., s. 3477; Code, s. 2840; 1889, c. 59.

2136. Brunswick: Killing deer in water. If any person shall kill by shooting or drowning or knocking in the head any deer while swimming in any waters of Brunswick county, he shall be guilty of a misdemeanor, and be fined not less than five nor more than twenty dollars.

Rev., s. 3463; 1905, c. 413.

2137. Carteret: Hunting wild fowl at night. If any person shall hunt or shoot wild fowl by firelight after the hour of sunset and before the hour of sunrise in Carteret county, except in that part of Bogue sound west of Sally Bell shoal, or use for such shooting any other gun than one that can be fired from the shoulder; or if any person shall hunt or shoot wild fowl in Carteret county with or from batteries or sneak boats from the first day of April to the first day of December of any year; or if any person shall hunt wild fowl with batteries or sneak boats, or shoot them therefrom in that part of Bogue sound, Carteret county, west of Sally Bell shoal, at any season, he shall be guilty of a misdemeanor and be fined not less than one hundred nor more than two hundred dollars for each offense. Lanterns and other equipment used in fire lighting and found in the possession of persons in the act of going hunting or returning from hunting shall be prima facie evidence that the persons have violated this section.

Rev., s. 3473; 1903, c. 346; 1907, c. 895.

2138. Currituck: Wild fowl hunting regulated. If any person shall put bushes or blinds of any kind on their boats or floats of any kind with the intent to decoy

or pursue ducks, or shall sail or row or propel a boat in any way after wild fowl in the waters of Currituck sound, for the purpose of forcing them on the wing, or shoot them with rifle or shotgun from any boat while sailing, or shall place any sail, flag or other device upon any land bordering on the water to frighten any wild fowl, or shall leave more than one stationary bush or blind standing in the water between the hours of sunset and sunrise, or shall fail to anchor any decked boat or float-house or house built over the water and used to live in for the purpose of fishing or hunting wild fowl, in shoal water not more than three hundred yards from the mainland on the west side of Currituck sound, or at some public landing on the east side between the north end of Church's island and the south end of Powell's point, at dark, or shall at sunset fail to take up his decoy and proceed to go to some landing as aforesaid, or shall leave any landing or anchorage before sunrise in the morning for the purpose of hunting or fishing, or shall before sunrise put out any decoys of any kind, or nets, or shall continue to hunt or fish after sunset, or shall between the thirty-first day of March and the first day of November of any year shoot or capture any wild fowl over decoys, or shall between the first day of November of any year and the thirty-first day of March of the next year, on any Wednesday, Saturday or Sunday, hunt, take, kill or capture any wild fowl, or on any of said days shall disturb or rout any raft of wild fowl unless the same be unavoidable in the usual course of navigation, or shall between the first day of November and the fifteenth day of February skiff or ring-shoot any boobies or ruddy duck, or shall between the thirty-first day of March and the first day of November ship out of the county any wild fowl, or shall sail or propel a boat on Sunday for the purpose of locating wild fowl, or if any hired or employed person shall sail or lay around anywhere near any person who may be gunning or fishing to damage his shooting or keep him from shooting, he shall be guilty of a misdemeanor: Provided, that nothing in this section shall prevent any person tending a battery or any person shooting from a bush blind from shooting winged or crippled fowls from his boat while sailing or in motion.

This section shall only apply to Currituck county.

1907, c. 376.

2139. Dare: Hunting wild fowl; license and regulation. In the waters of Dare county north of a line running east and west through the northern end of Roanoke island, shooting wild fowl by a nonresident of the state from blind, battery, box or float is subject to a license tax of twenty-five dollars a year. In waters of county lying south of said line, a license fee of twenty-five dollars a year is required to be paid by each club house, shooting resort or other place of resort for sportsmen, the members and guests of which, without further taxation, shall be entitled to shoot wild fowl afloat within four miles of the club, lodge or resort. In waters south of said line, nonresidents not more than two at a time may shoot wild fowl from a blind, battery, box or float, which is the property of a resident of Dare county and upon which a tax of five dollars a year has been paid.

The license above provided for shall be issued by the clerk of the court of Dare county, and the license taxes imposed shall be paid to him, and he shall pay them to the county treasurer for the benefit of the school fund. Any non-

resident shooting wild fowl contrary to the provisions of this section and any person hunting wild fowl in any manner not authorized by law shall be guilty of a misdemeanor.

Rev., ss. 1877, 1878, 1879, 1880, 3475, 3476; 1897, c. 415; 1899, c. 133, ss. 2, 3; 1901, c. 157.

See *State v. Gallop*, 126-983.

2140. Hyde, Pamlico sound: Wild fowl hunting regulated. If any person shall shoot any wild fowl in the waters of Pamlico sound, in Hyde county, from any box, battery or float, not on land at the time, he shall be guilty of a misdemeanor: Provided, residents of the state may shoot from batteries not on land on Monday, Tuesday, Thursday and Friday of each week, and on no other days.

Rev., s. 3478; 1897, c. 484.

2141. New Hanover: Selling game evidence of illegal hunting. If any person shall offer for sale on the market, in New Hanover county, any quail, wild turkeys or ducks between the first day of March and the first day of September it shall be prima facie evidence of his having killed such game out of season.

Rev., s. 3465; 1905, c. 409.

CHAPTER 39

GAMING CONTRACTS AND FUTURES

ART. 1. GAMING CONTRACTS.

- 2142. Gaming and betting contracts void.
- 2143. Players and betters competent witnesses.

ART. 2. CONTRACTS FOR "FUTURES."

- 2144. Certain contracts as to "futures" void.
- 2145. Prima facie evidence of illegal contract in "futures."
- 2146. Burden shifted by plea of illegality; pleadings not evidence in criminal action.
- 2147. Entering into or aiding contracts for "futures" misdemeanor.
- 2148. Opening office for sales of "futures" misdemeanor.
- 2149. Evidence in prosecutions under this article.

ART. 1. GAMING CONTRACTS

2142. Gaming and betting contracts void. All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event whatever, shall be unlawful; and all contracts, judgments, conveyances and assurances for and on account of any money or property, or thing in action, so wagered, bet or staked, or to repay, or to secure any money, or property, or thing in action, lent or advanced for the purpose of such wagering, betting, or staking as aforesaid, shall be void.

Rev., s. 1687; Code, ss. 2841, 2842; R. C., c. 51, ss. 1, 2; 1810, c. 796.

This section construed liberally: *Turner v. Peacock*, 13-303. Gambling contracts are void: *Banking Co. v. Tate*, 122-313; *Turner v. Peacock*, 13-303; *Bettis v. Reynolds*, 34-344.

Note given in consideration of a bet on horse race in another state not enforceable here: *Gooch v. Faucett*, 122-270. Renewal note to purchaser for value, without notice that original was for gaming debt, is valid: *Calvert v. Williams*, 64-168. It is settled that money, or a horse, or a judgment won at cards and actually paid and delivered cannot be recovered if the game was fairly played: *Teague v. Perry*, 64-41, and cases cited; *Dunn v. Holloway*, 16-322; *Hodges v. Pittman*, 4-276—but can be recovered when game unfairly played, or fraud perpetrated, *Webb v. Fulchire*, 25-485. Note given subsequently, in purchase of a magistrate's judgment which had been won at cards by payee from maker, is not void under statute against gaming: *Teague v. Perry*, 64-39.

Where stakeholder pays over money after being notified by loser not to do so, he is liable to loser: *Wood v. Wood's Executor*, 7-172—for as long as money is in hand of stakeholder it belongs to the one having the legal right, *Forrest v. Hart*, 7-458.

Where A won a justice's judgment from B at a game of cards unfairly played, and took from defendants in the judgment a bond payable to himself for the amount, upon which he brought suit, and to which the statute against gaming was pleaded: Held, that he could not recover: *Warden v. Plummer*, 49-524.

Ten-pins is not a game of chance: *State v. King*, 113-631; *State v. Gupton*, 30-271. "Shooting for beef" where party pays for his privilege of shooting is not a game of chance: *State v. DeBoy*, 117-702.

2143. Players and betters competent witnesses. No person shall be excused or incapacitated from confessing or testifying touching any money or property, or thing in action, so wagered, bet or staked, or lent for such purpose, by reason of his having won, played, bet or staked upon any game, lot or chance, casualty, or unknown or contingent event aforesaid; but the confession or testimony of such person shall not be used against him, in any criminal prosecution, on account of such betting, wagering or staking.

Rev., s. 1688; Code, s. 2843; R. C., c. 51, s. 3.

See section 4435 and annotations.

ART. 2. CONTRACTS FOR "FUTURES"

2144. **Certain contracts as to "futures" void.** Every contract, whether in writing or not, whereby any person shall agree to sell and deliver any cotton, indian corn, wheat, rye, oats, tobacco, meal, lard, bacon, salt pork, salt fish, beef, cattle, sugar, coffee, stocks, bonds, and choses in action, at a place and at a time specified and agreed upon therein, to any other person, whether the person to whom such article is so agreed to be sold and delivered shall be a party to such contract or not, when, in fact, and notwithstanding the terms expressed of such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them that money or other thing of value shall be paid to the one party by the other, or to a third party, the party to whom such payment of money or other thing of value shall be made to depend, and the amount of such money or other thing of value so to be paid to depend upon whether the market price or value of the article so agreed to be sold and delivered is greater or less at the time and place so specified than the price stipulated to be paid and received for the articles so to be sold and delivered, and every contract commonly called "futures" as to the several articles and things hereinbefore specified, or any of them, by whatever other name called, and every contract as to the said several articles and things, or any of them, whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered, but only the payment of a sum of money or other thing of value, such payment and the amount thereof and the person to whom the same is to be paid to depend on whether or not the market price or value is greater or less than the price so agreed to be paid for the said article or thing at the time and place specified in such contract, shall be utterly null and void; and no action shall be maintained in any court to enforce any such contract, whether the same was made in or out of the state, or partly in and partly out of this state, and whether made by the parties thereto by themselves or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent of any such party, directly or remotely connected with any such contract in any way whatever, have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency; nor shall the courts of this state have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract. This section shall not be construed so as to apply to any person, firm, corporation or his or their agent engaged in the business of manufacturing or wholesale merchandising in the purchase or sale of the necessary commodities required in the ordinary course of their business.

Rev., s. 1689; 1889, c. 221, s. 1; 1905, c. 538, s. 7; 1909, c. 853, s. 1.

"Bucket shop" defined in *State v. McGinnis*, 138-724. One buying "futures" for another cannot recover for loss: *Garseed v. Sternberger*, 135-501; *Williams v. Carr*, 80-294; *Burns v. Tomlinson*, 147-645. As to sufficiency of evidence of gambling contract, see *Cantwell v. Boykin*, 127-64. Lender of money to pay losses in futures may recover, if not connected with the speculation: *Ballard v. Green*, 118-390; *Williams v. Carr*, 80-294. Statutes forbidding the running of a bucket shop are clearly within police power of state: *State v. McGinnis*, 138-724.

The intention of both parties that there is not to be a delivery of the property makes the contract invalid: *Orvis v. Holt*, 173-231; *Holt v. Wellons*, 163-124; *Harvey v. Pettaway*, 156-

375; *Rodgers v. Bell*, 156-378; *Rankin v. Mitehem*, 141-277; *State v. Clayton*, 138-732; *State v. McGinnis*, 138-724; *Williams v. Carr*, 80-294.

If there is in the contract the right to require actual delivery and an intention to demand it if the exigencies of party's business shall require it, this is a legal contract, notwithstanding mere expectation that delivery will not be demanded: *State v. Clayton*, 138-732. The test is the intention and effect and not the form: *Holt v. Wellons*, 163-124; *Edgerton v. Edgerton*, 153-167. Where contract not a gambling one on its face, proper to leave that question to jury: *Rankin v. Mitehem*, 141-277; *Burns v. Tomlinson*, 147-634. Where plaintiff's agent made contract for futures, but plaintiff intended delivery, plaintiff is bound by act of agent: *Sprunt v. May*, 156-388.

Contracts for futures made in another state will not be enforced here: *Burrus v. Witcover*, 158-384. Such contracts are not protected by interstate commerce clause of federal constitution: *State v. Clayton*, 138-732.

A judgment upon a contract for futures will be set aside: *Randolph v. Heath*, 171-383. A judgment of another state on such contract will not be sustained: *Mottu v. Davis*, 151-237.

The last sentence in this section is construed to refer to the burden of proof as provided in section 2146, and not as an exemption from liability: *Sprunt v. May*, 156-388; *Rodgers v. Bell*, 156-378. See, also, *State v. McGinnis*, 138-724; *State v. Clayton*, 138-732.

2145. Prima facie evidence of illegal contract in "futures." Proof that any thing of value agreed to be sold and delivered was not actually delivered at the time of making the agreement to sell and deliver, and that one of the parties to such agreement deposited or secured, or agreed to deposit or secure, what are commonly called "margins," shall constitute prima facie evidence of a contract declared void by the preceding section.

Rev., s. 1690; 1889, c. 221, s. 2; 1905, c. 538, ss. 5, 7.

Where parties to a purchase or sale for future delivery upon "margin" will not need the commodity in ordinary course of business, this section makes the purchase in such case prima facie evidence that such contract is a wagering contract: *State v. Clayton*, 138-732; *State v. McGinnis*, 138-724; *Burns v. Tomlinson*, 147-634, 147-645.

2146. Burden shifted by plea of illegality; pleadings not evidence in criminal action. When the defendant in any action pending in any court shall allege specifically in his answer that the cause of action alleged in the complaint is in fact founded upon a contract such as is by this chapter made void, and such answer shall be verified, then the burden shall be upon the plaintiff in such action to prove by the proper evidence, other than any written evidence thereof, that the contract sued upon is a lawful one in its nature and purposes; and the defendant may likewise produce evidence to prove the contrary: Provided, nevertheless, that any allegation or statement of fact made in any pleading in any such action, or the evidence produced on the trial in any such action, shall not be evidence against the party making or producing the same in any criminal action against such party.

Rev., s. 1691; 1889, c. 221, s. 2.

The last sentence of section 2144 is construed as a part of this section: *Sprunt v. May*, 156-388; *Rodgers v. Bell*, 156-378.

The burden is upon the claimant to show a legal obligation: *Heath v. Heath*, 175-457; *Holt v. Wellons*, 163-124; *Cobb v. Guthrie*, 160-313; *Burns v. Tomlinson*, 147-634, 147-645. Where an administrator has paid a debt and the legatees or distributees contest it as illegal, the burden is upon the legatees: *Overman v. Lanier*, 157-544.

2147. Entering into or aiding contract for "futures" misdemeanor. If any person shall become a party to any contract declared void in this article; or if any person shall be the agent, directly or indirectly, of any party in making or fur-

thering or effectuating the same; or if any agent or officer of a corporation shall in any manner knowingly aid in making or furthering any such contract to which the corporation is a party, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than one hundred dollars nor more than five hundred dollars, and may be imprisoned in the discretion of the court.

If any person shall, while in this state, consent to become a party to any such contract made in another state, and if any person shall, as agent of any person or corporation, become a party to any such contract made in another state, or in this state do any act or in any way aid in the making or furthering of any such contract so made in another state, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than fifty nor more than two hundred dollars, and may be imprisoned in the discretion of the court.

Rev., ss. 3823, 3824; 1889, c. 221, ss. 3, 4.

See annotations under section 2144. This section is constitutional: *State v. McGinnis*, 138-724; *State v. Clayton*, 138-732.

Section referred to in *Garseed v. Sternberger*, 135-501; *Cantwell v. Boykin*, 127-64.

2148. Opening office for sales of "futures" misdemeanor. If any person, corporation or other association of persons, either as principals or agents, shall establish or open an office or place of business in this state for the purpose of carrying on or engaging in making such contracts as are forbidden in this article, he shall be guilty of a misdemeanor, and shall on conviction be fined and imprisoned in the discretion of the court.

Rev., s. 3825; 1905, c. 538, ss. 1, 2.

See *State v. McGinnis*, 138-724; *State v. Clayton*, 138-732, and other cases cited under section 2144.

2149. Evidence in prosecutions under this article. No person shall be excused on any prosecution under the provisions of this article from testifying touching anything done by himself or others contrary to the provisions thereof, but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him. In all such prosecutions proof that the defendant was a party to a contract, as agent or principal, to sell and deliver any article, thing or property specified or named in this article, or that he was the agent, directly or indirectly, of any party in making, furthering or effectuating the same, or that he was the agent or officer of any corporation or association or person in making, furthering or effectuating the same, and that the article, thing or property agreed to be sold and delivered was not actually delivered, and that settlement was made or agreed to be made upon the difference in value of said article, thing or property, shall constitute against such defendant prima facie evidence of guilt. Proof that any person, corporation or other association of persons, either as principals or agents, has established an office or place where are posted or published from information received the fluctuating prices of grain, cotton, provisions, stocks, bonds and other commodities, or of any one or more of the same, shall constitute prima facie evidence of being guilty of violating the provisions of this article.

Rev., s. 3826; 1905, ss. 3, 4, 5.

See *State v. McGinnis*, 138-724; *State v. Clayton*, 138-732, and other cases cited under section 2144.

CHAPTER 40

GUARDIAN AND WARD

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ART. 1. JURISDICTION IN MATTER OF GUARDIANSHIP

2150. Jurisdiction in clerk of superior court. The clerks of the superior court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics, inebriates, and inmates of the Caswell training school.

Rev., s. 1766; Code, s. 1566; R. C., c. 54, s. 2; 1762, c. 69, ss. 5, 7; 1868-9, c. 201, s. 4; 1917, c. 41, s. 1.

See section 2285. Powers which court of equity formerly exercised in regard to orphans and their estates now conferred upon clerk: *Duffy v. Williams*, 133-197.

Jurisdiction of clerk in appointment of guardians of infants does not extend to a case where petitioner asks for custody of child who had been placed by mother under control of another: *In re Lewis*, 88-31. Appointment of guardian is matter of discretion: *Battle v. Vick*, 15-294; *Long v. Rhymes*, 6-122; *Grant v. Whitaker*, 5-231; *Mills v. McAllister*, 2-303—exercise of which cannot be reviewed by supreme court, *Battle v. Vick*, 15-294.

Court not bound to confirm choice of guardian made by infant of fourteen years of age and upwards: *Grant v. Whitaker*, 5-231; *Wynne v. Always*, 5-38.

For old case dealing with jurisdiction of courts under section, see *Harriss v. Richardson*, 15-279.

ART. 2. CREATION AND TERMINATION OF GUARDIANSHIP

2151. Appointment by parents; effect; powers and duties of guardian. Any father, though he be a minor, may, by deed executed in his lifetime and with the written consent and privy examination of the mother, if she be living, or by his last will and testament in writing, if the mother be dead, dispose of the custody and tuition of any of his infant children, being unmarried, and whether born at his death or in ventre sa mere, for such time as the children may remain under twenty-one years of age, or for any less time. Or in case the father is dead and has not exercised his said right of appointment, then the mother, whether of full age or minor, may do so. Every such appointment shall be good and effectual against any person claiming the custody and tuition of such child or children. Every guardian by deed or will shall have the same powers and rights and be subject to the same liabilities and regulations as other guardians.

Rev., ss. 1762, 1763, 1764; Code, ss. 1562, 1563, 1564; R. C., c. 54; 1762, c. 69; 1868-9, c. 201; 1881, c. 64; 1911, c. 120.

Where testator by will directs that children should be placed with certain person until their majority, of whose circumstances testator was aware, such person entitled to their custody in absence of finding of unfitness: *In re Young*, 120-151.

Father entitled to custody of children against claims of every one: *In re Fain*, 172-790; *In re Jones*, 153-312; *Newsome v. Bunch*, 144-16; *Latham v. Ellis*, 116-30—except those to whom he may have committed their custody and tuition by deed, *Latham v. Ellis*, 116-30—**or unless found to be unfitted for their care and custody, Ibid.**

Testator cannot appoint testamentary guardian except to his own children: *Camp v. Pittman*, 90-615.

Court intimates that mother cannot make disposition of her child so as to confer upon another the right to its custody and control: *In re Lewis*, 88-31.

Provisions of section allowing father to appoint testamentary guardian for children does not embrace grandchildren: *Williamson v. Jordan*, 45-46.

Father cannot appoint guardian for children, nor impose upon any one the duties and obligations of that office, except by deed executed in his lifetime, or by last will and testament executed in writing: *Peyton v. Smith*, 22-325—but where it can be clearly collected from will of father that certain persons are thereby appointed to have custody of person and estate of children until they arrive at age, such appointment will constitute them guardian, *Ibid*.

No one has right to guardianship of an infant, except as testamentary guardian, or as appointed by father by deed, or by the court: *Long v. Rhymes*, 6-122.

Testamentary guardian entitled to custody of child: *In re Young*, 120-151.

2152. Natural guardianship on death of father. In case of the death of the father of an infant, the mother of such child surviving such father shall immediately become the natural guardian of such child to the same extent and in the same manner, plight and condition as the father would be if living; and the mother in such case shall have all the powers, rights and privileges, and be subject to all the duties and obligations of a natural guardian. But this shall not be construed as abridging the powers of the courts over minors and their estates and to the appointment of guardians.

Rev., s. 1765; Code, s. 1565; 1883, c. 364.

Mother, if suitable person, entitled to care and custody of infant child, even if there be others more suitable: *Ashby v. Page*, 106-328. Court intimates that mother cannot make a disposition of child so as to confer upon another right to its custody and control: *In re Lewis*, 88-31. As to mother's duty to support her child, see *Ibid*.

2153. Appointment on divorce of parents. When parents are divorced and a child is entitled to any estate, the court granting the divorce must certify that fact to the clerk of the superior court, to the end that he may appoint a fit and proper person to take the care and management of such estate, whose powers and duties shall be the same in all respects as other guardians, except that a guardian so appointed shall not have any authority over the person of such child, unless the guardian be the father or mother.

Rev., s. 1770; Code, s. 1571; R. C., c. 54, s. 4; 1888, c. 16; 1868-9, c. 201, s. 9.

2154. Appointment when father living. The clerk of the superior court may appoint a guardian of the estate of any minor, although the father of such minor be living. And the guardian so appointed shall be governed in all respects by the laws relative to guardians of the estate in other cases, but shall have no authority over the person of such minor.

Rev., s. 1771; Code, s. 1572; R. C., c. 54, ss. 4, 7; 1806, c. 707; 1868-9, c. 201, s. 10.

2155. Separate appointment for person and estate; yearly support specified; payments allowed in accounting. Instead of granting general guardianship to one person, the clerk of the superior court may commit the tuition and custody of the person to one and the charge of his estate to another, whenever and at any time during minority, inebriety, idiocy or lunacy, it appears most conducive to the proper care of the orphan's, inebriate's, idiot's, or lunatic's estate, and to his suitable maintenance, nurture and education. In such cases the clerk must order what yearly sums of money or other provisions shall be

allowed for the support and education of the orphan, or for the maintenance of the idiot, lunatic or inebriate, and must prescribe the time and manner of paying the same; but such allowance may, upon application and satisfactory proof made, be reduced or enlarged, or otherwise modified, as the ward's condition in life and the kind and value of his estate may require. All payments made by the guardian of the estate to the tutor of the person, according to any such order, shall be deemed just disbursements and be allowed in the settlement of his accounts; but for the payment thereof by the one and the receipt thereof by the other merely, no commissions shall be allowed to either, though commissions may be allowed to the tutor of the person on his disbursements only.

Rev., ss. 1767, 1768, 1769; Code, ss. 1567, 1568, 1569; R. C., c. 54, s. 3; 1840, c. 31; 1868-9, c. 201, ss. 6, 7,

As to maintenance and education of ward generally, see *Duffy v. Williams*, 133-195; *Tharrington v. Tharrington*, 99-118. As to disbursements and commissions generally, see sections 2189, 2190.

2156. Proceedings on application for guardianship. On application to any clerk of the superior court for the custody and guardianship of any infant, idiot, inebriate, lunatic, or inmate of the Caswell training school, it is the duty of such clerk to inform himself of the circumstances of the case on the oath of the applicant, or of any other person, and if none of the relatives of the infant, idiot, inebriate, lunatic, or inmate of the Caswell training school are present at such application, the clerk must assign, or for any other good cause he may assign, a day for the hearing; and he shall thereupon direct notice thereof to be given to such of the relatives and to such other persons, if any, as he may deem it proper to notify. On the hearing he shall ascertain, on oath, the amount of the property, real and personal, of the infant, idiot, inebriate, lunatic, or inmate of the Caswell training school, and the value of the rents and profits of the real estate, and he may grant or refuse the application, or commit the guardianship to some other person, as he may think best for the interest of the infant, idiot, inebriate, lunatic, or inmate of the Caswell training school.

Rev., s. 1772; Code, s. 1620; C. C. P., s. 474; 1917, c. 41, s. 2.

Failure to notify relative who has custody of child of proceedings to appoint guardian is irregularity under section, which does not render appointment of guardian void, though not conclusive upon such relative: *In re Parker*, 144-170. Except as between parents, under section 2241, right of custody of child cannot be determined under writ of habeas corpus: *Ibid.* As to who may take proper steps to set aside appointment of guardian, see *Ibid.*

2157. Letters of guardianship. The clerk of the superior court must issue to every guardian appointed by him a letter of appointment, which shall be signed by him and sealed with the seal of his office.

Rev., s. 1773; Code, s. 1621; C. C. P., c. 475.

2158. Removal by clerk. The clerks of the superior court have power, on information or complaint made, at all times to remove guardians and appoint successors, to make and establish rules for the better ordering, managing and securing infants' estates, and for the better education and maintenance of wards; and it is their duty to do so in the following cases:

1. Where the guardian wastes or converts the money or estate of the ward to his own use.
2. Where the guardian in any manner mismanages the estate.

3. Where the guardian is about or intends to marry any ward in disparagement.

4. Where the guardian neglects to educate or maintain the ward in a manner suitable to his or her degree.

5. Where the guardian is legally disqualified to act as a person would be to be appointed administrator.

6. Where the guardian or his sureties are likely to become insolvent or non-residents of the state.

Rev., s. 1774; Code, s. 1583; R. C., c. 54, ss. 2, 13; 1762, c. 69; 1868-9, c. 201, s. 20; C. C. P., ss. 470, 476.

Court (now clerk superior court) can at any time remove guardian upon proper cause shown, and has entire discretion in appointment of successor: *In re Dixon*, 156-26; *Bray v. Brumsey*, 5-227.

Use by guardian of funds of his ward for his own business is sufficient to warrant his removal: *Ury v. Brown*, 129-270.

Word "disparagement," with reference to marrying off ward, defined: *Shutt v. Carloss*, 36-232. Guardian not answerable in pecuniary damages for marrying female ward in disparagement: *Ibid*.

Where guardian of infant moves to another state, taking with him part of infant's property, court has right to remove him and appoint another in his place: *Cooke v. Beale*, 33-36.

An order by superior court clerk in a cause pending before him for removal of testamentary guardian, where it is not alleged nor found as a fact by clerk that estate of ward had been wasted, nor that guardian insolvent so that ward should be unable to recover balance due on final settlement, is improperly made: *Sanderson v. Sanderson*, 79-369.

For annotations on removal of administrators, see under section 31, which may be useful in construing this section.

2159. Interlocutory orders on revocation. In all cases where the letters of a guardian are revoked, the clerk of the superior court may, from time to time, pending any controversy in respect to such removal, make such interlocutory orders and decrees as will tend to the better securing the estate of the ward, or other party seeking relief by such revocation.

Rev., s. 1775; Code, s. 1607; 1868-9, c. 201, s. 44.

2160. Resignation; effect; accounting on resignation. Any guardian wishing to resign his trust may apply in writing to the superior court, setting forth the circumstances of his case. If, at the time of making the application, he also exhibits his final account for settlement, and if the clerk of the superior court is satisfied that the guardian has been faithful and has truly accounted, and if a competent person can be procured to succeed in the guardianship, the clerk of the superior court may accept the resignation of the guardian and discharge him from the trust. But the guardian so discharged and his sureties are still liable in relation to all matters connected with the trust before the resignation.

Rev., s. 1776; Code, s. 1608; 1868-9, c. 201, s. 45.

Where permission given to guardian by clerk of court to file *ex parte* final account and turn over guardianship to another, he is not thereby discharged from liabilities connected with his trust arising before resignation: *Luton v. Wilcox*, 83-20. Section merely referred to in *Ellis v. Scott*, 75-111.

ART. 3. GUARDIAN'S BOND

2161. Bond to be given before receiving property. No guardian appointed for an infant, idiot, lunatic, insane person or inebriate, shall be permitted to

receive property of the infant, idiot, lunatic, insane person or inebriate until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court.

Rev., s. 1777; Code, s. 1573; C. C. P., s. 355.

See sections 339, 346, 2162. **Guardian and his bond liable for all moneys due his wards which he has collected or ought to have collected:** Loftin v. Cobb, 126-58—and where administrator of former guardian himself becomes guardian, he and his guardian bond become liable for any balance due from solvent estate of former guardian, *Ibid*.

Giving of bond required of guardians not essential to validity of appointment itself: Howerton v. Sexton, 104-75—though failure to take bond subjects the officer whose duty it is to see that it is made to consequences of omission, *Ibid*.

2162. Terms and conditions of bond; increased on sale of realty. Every guardian of the estate, before letters of appointment are issued to him, must give a bond payable to the state, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. The penalty in such bond must be double, at least, the value of all personal property and the rents and profits issuing from the real estate of the infant, which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or of any other person. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge touching the guardianship of the estate committed to him. If, on application by the guardian, the court or judge shall decree a sale for any of the causes prescribed by law of the property of such infant, idiot, lunatic or insane person, before such sale be confirmed, the guardian shall be required to file a bond as now required in double the amount of the real property so sold.

Rev., ss. 323, 1778; Code, s. 1574; R. C., c. 54, s. 5; 1762, c. 69, s. 7; 1825, c. 1285, s. 2; 1833, c. 17; 1868-9, c. 201, s. 11; 1874-5, c. 214.

Bond guarantees good faith and reasonable diligence: Smith v. Patton, 131-397; Moore v. Eure, 101-11; Atkinson v. Whitehead, 66-296. **Penalty in bond omitted:** Rollins v. Ebbs, 138-140, 137-355—or other sureties to sign, Barnes v. Lewis, 73-138.

Breach of bond for failing to educate ward and protect estate: Boyett v. Hurst, 54-166—for failure to account for money collected, or which should have been collected, Rollins v. Ebbs, 138-140; Loftin v. Cobb, 126-58; Topping v. Windley, 99-4; Humble v. Mebane, 89-410; Harris v. Harrison, 78-202. **When condition deemed to be broken:** Barrett v. Munroe, 20-334.

Action on bond in name of state for benefit of plaintiff: Norman v. Walker, 101-24; Williams v. McNair, 98-332; Carmichael v. Moore, 88-29; Jones v. McKinnon, 87-294; McKinnon v. McKinnon, 81-201.

Defense in action on bond: Felton v. Long, 43-224; Ledford v. Vandyke, 44-480; State v. Cordon, 30-179. **Construction of bond:** Iredell v. Barbee, 31-250. **Account as evidence:** Loftin v. Cobb, 126-58; Turner v. Turner, 104-566; Luton v. Wileox, 83-20. **Judgment on bond:** Anthony v. Estes, 101-541.

For statute of limitations on bond, see section 439.

2163. To be recorded in clerk's office; action on bond. The bond so taken shall be recorded in the office of the clerk of the superior court appointing the guardian; and any person injured by a breach of the condition thereof may prosecute a suit thereon, as in other actions.

Rev., s. 1779; Code, s. 1575; R. C., c. 54, s. 5; 1868-9, c. 201, s. 12.

For action on guardian bonds, see section 2162. **Person to whom court of equity has decreed that guardian should pay fund according to tenor of bond is person injured within meaning of section:** State v. Brown, 67-481. **As to breach of bond, see *Ibid*.**

2164. Where several wards with estate in common, one bond sufficient. When the same person is appointed guardian to two or more minors, idiots, lunatics or insane persons possessed of one estate in common, the clerk of the superior court may take one bond only in such case, upon which each of the minors or persons for whose benefit the bond is given, or their heirs or personal representatives, may have a separate action.

Rev., s. 1780; Code, s. 1576; R. C., c. 54, s. 8; 1822, c. 1161; 1868-9, c. 201, s. 13.

2165. Renewal of bond every three years; enforcing renewal. Every guardian shall renew his bond before the clerk of the superior court every three years, during the continuance of the guardianship. The clerk of the superior court shall issue a citation against every guardian failing to renew his bond, requiring such guardian to renew his bond within twenty days after service of the citation; and on return of the citation duly served and failure of the guardian to comply therewith, the clerk shall remove him and appoint a successor.

Rev., ss. 324, 1781, 1782; Code, ss. 1581, 1582; R. C., c. 54, s. 10; 1762, c. 69, s. 15; 1868-9, c. 201, ss. 18, 19.

See section 2167. As to liabilities of sureties upon first bond where same renewed, see *Jones v. Blanton*, 41-115; *Butler v. Durham*, 38-589; *Jones v. Hays*, 38-502. Section merely referred to in *Topping v. Windley*, 99-4. Clerk not liable upon official bond for failure to issue ex officio a notice to guardian to renew bond: *Sullivan v. Lowe*, 64-500; see, also, *Jones v. Biggs*, 46-364; but see *State v. Watson*, 29-289.

2166. Relief of endangered sureties. Any surety of a guardian, who is in danger of sustaining loss by his suretyship, may file his complaint before the clerk of the superior court where the guardianship was granted, setting forth the circumstances of his case and demanding relief; and thereupon the guardian shall be required to answer the complaint within twenty days after service of the summons. If, upon the hearing, the clerk of the superior court deem the surety entitled to relief, the same may be granted by compelling the guardian to give a new bond, or to indemnify the surety against apprehended loss, or by the removal of the guardian from his trust; and in case the guardian fail to give a new bond or security to indemnify when required to do so within reasonable time, the clerk of the superior court must enter a peremptory order for his removal, and his authority as guardian shall thereupon cease.

Rev., s. 1783; Code, s. 1606; R. C., c. 54, s. 35; 1762, c. 69, ss. 21, 22; 1868-9, c. 201, s. 43.

Where sureties of guardian obtain order for counter security under section, and at that time guardian owes ward, and never afterwards returns account or makes payment, no presumption of satisfaction arises from his then being able to pay sum he owed, and sureties to first bond liable for it, although order for counter security expressly releases them: *Foye v. Bell*, 18-475. Where new sureties ordered to be given, obligation of bond given by new sureties extends to entire guardianship, retrospective as well as prospective: *Bell v. Jasper*, 37-597—and such second bond is at least additional and cumulative security for ward, *Ibid.*

2167. Liability of clerk for taking insufficient bond. If any clerk of the superior court shall commit the estate of an infant, idiot, lunatic, insane person or inebriate to the charge or guardianship of any person without taking good and sufficient security for the same as directed by law, such clerk shall be liable, on his official bond, at the suit of the party aggrieved, for all loss and damages sustained for want of security being taken; but if the sureties were good at the time of their being accepted, the clerk of the superior court shall not be liable.

Rev., s. 1784; Code, s. 1614; R. C., c. 54, s. 2; 1762, c. 69, ss. 5, 6; 1868-9, c. 201, s. 51.

Giving bond required of guardian is not essential to validity of appointment, but failure to take bond subjects officer to consequences of such omission: *Howerton v. Sexton*, 104-75—and neither clerk nor his sureties will be heard to deny that guardian, appointed by former, improperly received funds which he is shown to have taken possession of for ward, *Topping v. Windley*, 99-4. Clerks of superior court liable upon official bonds for all losses sustained by reason of their failure to require proper security upon guardian bonds: *Ibid.* As to when action may be maintained against clerk on official bond, see *Jones v. Biggs*, 46-364; also section 927.

For old case under section now practically valueless, see *Davis v. Somerville*, 15-382.

2168. Liability of clerk for other defaults. If any clerk of the superior court shall willfully or negligently do, or omit to do, any other act prohibited, or other duty imposed on him by law, by which act or omission the estate of any ward suffers damage, he shall be liable therefor as directed in the preceding section.

Rev., s. 1785; Code, s. 1615; 1868-9, c. 201, s. 52.

ART. 4. POWERS AND DUTIES OF GUARDIAN

2169. To take charge of estate. Every guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor.

Rev., s. 1786; Code, s. 1588; R. C., c. 54, s. 21; 1762, c. 69, s. 3; 1868-9, c. 201, s. 25.

It seems that a guardian may compromise a claim for damages for injury to ward, but this will not be binding upon the ward if attended with fraud: *Bunch v. Lumber Co.*, 174-8. Guardian having no title to land of ward, it is not his duty to sue for recovery of realty: *Cross v. Craven*, 120-331. Guardian may exchange personal for real security for debt due ward: *Christmas v. Wright*, 38-549.

2170. To sell perishable goods on order of clerk. Every guardian shall sell, by order of the clerk of the superior court, all such goods and chattels of his ward as may be liable to perish or be the worse for keeping. Every such order shall be entered in the order record of the superior court and must contain a descriptive list of the property to be sold, with the terms of sale.

Rev., s. 1787; Code, s. 1589; R. C., c. 54, s. 22; 1762, c. 69, s. 10; 1868-9, c. 201, s. 26.

2171. How sales and rentals made. All sales and rentings by guardians shall be publicly made, between the hours of ten o'clock a.m. and four o'clock p.m., after twenty days notice posted at the courthouse and four other public places in the county. But, upon petition by the guardian, the clerk of the superior court of the county in which the land of the ward is situated, or of the county wherein the guardian has qualified, may make an order, on satisfactory evidence, upon the oath of at least two disinterested freeholders acquainted with the said land, that the best interests of the said ward will be subserved by a private renting of said land, allowing the guardian to rent the land privately. The terms of all such rentings shall be reported to said clerk of the superior court and be approved by him. In cases where guardians have heretofore rented their ward's land at private rentings in good faith and for the benefit of the ward's estate, they shall not be liable to the penalty heretofore prescribed by law. The proceeds of all sales of personal estate and rentings of real property, except the rentings of lands leased for agricultural purposes, when not for cash, shall be secured by bond and good security.

Rev., s. 1788; Code, s. 1590; 1891, c. 83; 1901, c. 97; R. C., c. 54, s. 26; 1793, c. 391.

Section impliedly declares it to be to the interest of wards to rent lands publicly: *Duffy v. Williams*, 133-198.

Provisions of section requiring sales by guardians to be public does not apply to sales made under direction of superior court in exercise of its general jurisdiction in equity: *Barcello v. Hapgood*, 118-712. Provisions of section requiring all sales and rentings of real and personal property by guardians to be made publicly, and upon terms therein prescribed, are peremptory: *Pate v. Kennedy*, 104-234—and leave no discretion to guardian, *Ibid.* Private renting is valid as to third parties: *Perry v. Perry*, 127-23.

Section merely referred to in *Norman v. Dunbar*, 53-317.

2172. When lands may be leased. The guardian may lease the lands of an infant for a term not exceeding the end of the current year in which the infant shall come of age, or die in nonage. But no guardian, without leave of the clerk of the superior court, shall lease any land of his ward without impeachment of waste, or for a term of more than three years, unless at a rent not less than three per centum on the assessed taxable value of the land.

Rev., s. 1789; Code, s. 1591; R. C., c. 54, s. 25; 1762, c. 69, s. 13; 1794, c. 413, s. 2.

Section merely referred to in *Melton v. McKesson*, 35-475.

2173. When guardians to cultivate lands of wards. Where any parent of a minor child qualifies as guardian of such child, and the ward owns or is entitled to the possession of any real estate used or which may be used for agricultural purposes, such guardian may make application to the clerk of the superior court of the county wherein the land is situate for permission to cultivate it, and the petition shall set forth the nature, extent and location of the same. It shall then be the duty of the clerk to appoint three disinterested resident freeholders, who shall go upon the land and, after being sworn to act impartially, assess the annual rental value thereof. The commissioners shall report their proceedings and findings to the clerk within ten days after the notification of their appointment, and if the clerk shall deem the same to be the interest of the ward he shall make an order allowing the guardian to cultivate the land for a term not exceeding three years at the annual rental value assessed by the commissioners to be paid to the ward by the guardian. The term, however, shall not extend beyond the minority of the minor. The commissioners shall receive as compensation for said services the same fees as are allowed commissioners in partition of real estate.

1909, c. 57.

2174. When timber may be sold. In case the land cannot be rented for enough to pay the taxes and other dues thereof, and there is not money sufficient for that purpose, the guardian, with the consent of the clerk of the superior court, may annually dispose of or use so much of the lightwood, and box or rent so many pine trees, or sell so much of the timber on the same, as may raise enough to pay the taxes and other duties thereon, and no more.

Rev., s. 1790; Code, s. 1596; R. C., c. 54, s. 27; 1762, c. 69, s. 14; 1868-9, c. 201, s. 33.

Where guardian sold timber on land of ward without order of court as required by section, and took note for purchase money, maker of note cannot, when sued upon same by guardian and ward, set up failure of guardian to observe statutory mandate: *Evans v. Williamson*, 79-86.

2175. Plate and jewelry to be kept. All plate and jewelry shall be preserved and delivered to the ward at age, in kind, according to weight and quantity.

Rev., s. 1791; Code, s. 1597; 1895, c. 74; 1868-9, c. 201, s. 34.

2176. Personal representative of guardian to pay over to clerk. In all cases where a guardian of any minor child or of an idiot, lunatic, inebriate or insane person dies, it is competent for the executor or administrator of such deceased guardian, at any time after the grant of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such deceased guardian was appointed, any moneys belonging to any such minor child, idiot, lunatic, insane person or inebriate, and any such payment shall have the effect to discharge the estate of said deceased guardian and his sureties upon his guardian bond to the extent of the amount so paid.

Rev., s. 1794; Code, s. 1622; 1881, c. 301, s. 2.

Administrator of deceased ward not entitled to recover from administrator of deceased guardian moneys which came into guardian's hands as proceeds of ward's real estate sold under decree of court in partition: *Allison v. Robinson*, 78-222. As bearing on section, see *Jennings v. Copeland*, 90-572.

2177. Collection of claims; duty and liability. Every guardian shall diligently endeavor to collect, by all lawful means, all bonds, notes, obligations or moneys due his ward when any debtor or his sureties are likely to become insolvent, on pain of being liable for the same.

Rev., s. 1795; Code, s. 1593; R. C., c. 54, s. 23; 1762, c. 69, s. 10; 1868-9, c. 201, s. 30.

Guardian responsible not only for what he receives, but for all he might have received by exercise of ordinary diligence and highest degree of good faith: *Armfield v. Brown*, 73-81. Guardian accountable to ward for sum of money in hands of administrator if such administrator or his sureties were solvent at time when such funds ought to have been paid to guardian: *Covington v. Leak*, 65-594—or within time when judgment could have been obtained upon administration bond, *Ibid*.

Where guardian waited six months after principal in note, held by him as guardian, died insolvent, before he sued surety, who also became insolvent before suit brought, guardian having opportunity of knowing condition of affairs, he is liable for debt: *Williamson v. Williams*, 59-62.

Guardian having no title to land of ward, it is not his duty to sue for recovery of realty: *Cross v. Craven*, 120-331.

Guardian liable to ward for negligence in failing to sue on note due ward until parties thereto become insolvent: *Coggins v. Blythe*, 113-102. Where guardian carelessly and without consideration, upon hasty opinion of counsel, employed by debtor, and not by way of compromise of doubtful claim, accepted from solvent debtor half sum he should have collected, he is responsible for what he failed to collect: *Culp v. Stanford*, 112-664.

Guardian acting in good faith not responsible for omitting to collect note during late war, when it appears that obligors solvent during war, and rendered insolvent by its results: *Love v. Logan*, 69-70.

For additional annotations hereunder, see section 2308.

2178. Liability for lands sold for taxes. If any guardian suffer his ward's lands to lapse or become forfeited or be sold for nonpayment of taxes or other dues, he shall be liable to answer for the full value thereof to his ward.

Rev., s. 1796; Code, s. 1595; R. C., c. 54, s. 27; 1762, c. 69, s. 14; 1868-9, c. 201, s. 32.

2179. Liability for costs. All fees and costs of the superior court for issuing orders, citations, summonses or other process against guardians for their supposed defaults shall be paid by the party found in default.

Rev., s. 1797; Code, s. 1611; 1868-9, c. 201, s. 48.

For duty of guardian to pay owelty, see *Partition*, s. 3224.

For compound interest on obligations to guardians, see *Interest*, s. 2308.

ART. 5. SALES OF WARD'S ESTATE

2180. **Special proceedings to sell; judge's approval required.** On application of the guardian by petition, verified upon oath, to the superior court, showing that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale or mortgage be had by such person, in such way and on such terms as may be most advantageous to the interest of the ward; but no sale or mortgage shall be made until approved by the judge of the court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale or mortgage shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify. The guardian may not mortgage the property of his ward for a term of years exceeding the minority of the ward. The word "mortgage" wherever used herein shall be construed to include deeds in trust.

Rev., s. 1798; Code, s. 1602; R. C., c. 54, ss. 32, 33; 1827, c. 33; 1868-9, c. 201, s. 39; 1917, c. 25S, s. 1.

Powers of court hereunder settled in *Ex parte Dodd*, 62-99; *Troy v. Troy*, 45-87; *Williams v. Harrington*, 33-616; *Harrison v. Richardson*, 15-279.

Clerk should require satisfactory proof of necessity to sell in addition to verified petition: In *re Propst*, 144-562—and decree should not be made upon *ex parte* affidavit, *Harrison v. Bradley*, 40-136.

Court may sell land of minors for better investment when they are properly represented before court: *Hutchinson v. Hutchinson*, 126-671—and court will act, when all interests are found in classes, if one of each class is before court, *Ibid*.

By this section clerk and court in term have concurrent jurisdiction in matter of ordering sale of infants' lands upon petition of their guardians: *Barcello v. Hapgood*, 118-712. Not erroneous or irregular to order sale of infant's land to be made privately by guardian: *Ibid*.; *Thompson v. Rospigliosi*, 162-146. Where judge renders judgment, upon finding by referee that sale should be made, that sale be made privately, purchaser acquires good title: *Ibid*.

While formal direction to make title is not always necessary, confirmation of sale cannot be dispensed with: In *re Dickerson*, 11-108. Where court directed sale to be made without taking any means to ascertain necessity therefor, and report of sale was never confirmed, not error in court, upon motion of infant, to set aside sale and order another: *Ibid*.

Ward has right to subject land sold by his guardian to payment of purchase money: *Murrill v. Humphrey*, 88-138.

Where ward's land sold under decree of court upon petition of guardian the title acquired is not rendered invalid by reversal of decree on account of irregularity in proceeding of which purchaser had no notice: *Sutton v. Schonwald*, 86-198.

One who conducts suit as guardian of infants is not party of record, but infants themselves are real plaintiffs: *George v. High*, 85-113—nor will any one who has an interest in action hostile to that of infants be permitted to conduct same, *Ibid*.

Court of equity not only has power, but should, in exercise of its discretion in proper cases, authorize and confirm private sale of land of infants; therefore, where guardian, in accordance with order of court, exposes at public sale land of wards, but no sale for want of bidders at fair price, and land subsequently sold privately, upon terms approved by court, purchaser acquires good title: *Rowland v. Thompson*, 73-504.

For cases under section prior to enactment of section 1744, allowing sale of estates limited to persons not in esse, see *Ex parte Dodd*, 62-97; *Houston v. Houston*, 62-95; *Watson v. Watson*, 56-400.

Where all persons who have an interest in land, whether vested, contingent or executory, are in esse, and are before court, court may make order of sale: *Houston v. Houston*, 62-95 (note that court can sell land in certain cases where some of parties not in esse under section 1744).

After sale, it ought to appear to be for the benefit of infant to confirm same: *Harrison v. Bradley*, 40-136.

Where guardian obtains decree of court for sale of ward's land to make him liable for any loss in consequence of such sale, it must appear that he willfully practiced deception on court by false allegations and false evidence, or by industriously concealing material facts: *Harrison v. Bradley*, 40-136.

Where purchaser fails to pay note for purchase money of land under section, land may still be held liable for purchase money, although irregular and invalid deed made by commissioners contrary to directions of court: *Singletery v. Whitaker*, 62-77. Bidder at judicial sale acquires no rights until proposition accepted by court: *Dula v. Seagle*, 98-458. Decree directing commissioner to sell lands, receive purchase money and make title, without requiring report and confirmation of sale by court, is irregular: *Ibid.*

Superior courts have authority to direct sales of property of infants, both real and personal, in proper cases: *Tate v. Mott*, 96-19. Guardian appointed in another state has no authority to represent his wards in suits and proceedings in this state, but when he brings suit for them as guardian he will be treated as if he were next friend: *Ibid.*

Section merely referred to in *Ex parte Miller*, 90-627; *Morris v. Gentry*, 89-252; *Smith v. Witter*, 174-616.

2181. Fund from sale has character of estate sold and subject to same trusts.

Whenever, in consequence of any sale under the preceding section, the real or personal property of the ward is saved from demands to which in the first instance it may be liable, the final decree shall declare and set apart a portion of the personal or real estate thus saved, of value equal to the real and personal estate sold, as property exchanged for that sold; and in all such cases of sale, whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired shall be enjoyed, alienated, devised or bequeathed, and shall descend and be distributed, as by law the property sold might and would have been had it not been sold, until it be reconverted from the character thus impressed upon it by some act of the owner and restored to its character proper.

Rev., s. 1799; Code, s. 1603; R. C., c. 54, s. 33; 1827, c. 33, s. 2; 1868-9, c. 201, s. 40.

Although duty of court of equity, where real estate of infant is sold under its decree, to direct proceeds to be held as real estate: *Harrison v. Bradley*, 40-136—yet husband of such infant, who has received proceeds from wife's guardian, has no right to complain that such course has not been adopted, *Ibid.* Where female ward's land sold for her benefit, and she marries and dies before coming of age: Held, that money retained character of realty: *Wood v. Reeves*, 58-271.

Section merely referred to in *Tate v. Mott*, 96-22; *Ex parte Miller*, 90-627; *Douglas v. Caldwell*, 59-21.

2182. Sale of ward's estate to make assets.

When a guardian has notice of a debt or demand against the estate of his ward, he may apply by petition, setting forth the facts, to the clerk of the superior court wherein the guardianship was granted, for an order to sell so much of the personal or real estate as may be sufficient to discharge such debt or demand; and the order of the court shall particularly specify what property is to be sold and the terms of sale; but no real estate shall be sold under this section, in any case, without the revision and confirmation of the order therefor by the judge of the superior court. The proceeds of sale under this section shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative; and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases.

Rev., ss. 1800, 1801; Code, ss. 1604, 1605; R. C., c. 54, s. 34; 1789, c. 311, s. 5; 1868-9, c. 201, ss. 41, 42.

Before lands of infant can be sold for payment of debts, there must be a judgment of court that there is a debt against estate of ward which renders sale necessary: *Pendleton v. Trueblood*, 48-96; *Coffield v. McLean*, 49-15; *Leary v. Fletcher*, 23-259—and must be alleged in petition that debt to be satisfied was one against ancestor, and not simply debt contracted by ward or his guardian, *Coffield v. McLean*, 49-15—but amount of such debts, to whom due, or other particular description not essential to validity of order authorizing sale, *Pendleton v. Trueblood*, 48-96. Court must select part or parts of property which can be disposed of with least injury to ward: *Leary v. Fletcher*, 23-259.

Where court, on petition of guardian of infant, made order that he, said guardian, sell land of said deceased, or so much thereof as will be sufficient to discharge debt, such order unauthorized and void, and purchaser thereunder acquired no title: *Ducket v. Skinner*, 33-431; *Leary v. Fletcher*, 23-259.

Guardian of lunatic may, by order of county court (now clerk superior court), rightfully sell personal property of ward for payment of debts, provided no fraud in proceeding: *Howard v. Thompson*, 30-367.

Order “to sell land of ward named in petition, adjoining lands of A. B. and others, containing about 110 acres,” is sufficient specification of land under section, where it appears that ward had no other land: *Pendleton v. Trueblood*, 48-96.

Sale of land by guardian under order of clerk superior court, made without ascertaining that there were debts against ward which made sale necessary, and which did not designate with certainty land to be sold, is void: *Spruill v. Davenport*, 48-42.

Money from sale of lands belonging to wards is subject to attachment in hands of clerk after confirmation of sale: *LeRoy v. Jacobsy*, 136-443. When guardian of infant under order of court sells ward’s land for payment of debts of ancestor, he is bound to observe same priority in payment of debts as administrator or executor in applying personal assets: *Marchant v. Sanderlin*, 25-501.

ART. 6. RETURNS AND ACCOUNTING

2183. Return within three months. Every guardian, within three months after his appointment, shall exhibit an account, upon oath, of the estate of his ward, to the clerk of the superior court; but such time may be extended by the clerk of the superior court, on good cause shown, not exceeding six months.

Rev., s. 1802; Code, s. 1577; R. C., c. 54, s. 11; 1762, c. 69, s. 9; 1868-9, c. 201, s. 14.

Duty of guardian within three months after his appointment to exhibit account, upon oath, of estate of ward, to clerk superior court, and to make annual return: *Norman v. Walker*, 101-26. Section merely referred to in *Self v. Shugart*, 135-186; *Sanderson v. Sanderson*, 79-371.

2184. Procedure to compel return. In cases of default to exhibit the return required by the preceding section, the clerk of the superior court must issue an order requiring the guardian to file such return forthwith, or to show cause why an attachment should not issue against him. If, after due service of the order, the guardian does not, on the return day of the order, file such return, or obtain further time to file the same, the clerk of the superior court shall issue an attachment against him, and commit him to the common jail of the county till he files such return.

Rev., s. 1803; Code, s. 1578; R. C., c. 54, s. 12; 1762, c. 69, s. 15; 1868-9, c. 201, s. 15.

2185. Additional assets to be returned. Whenever further property of any kind, not included in any previous return, comes to the hands or knowledge of any guardian, he must cause the same to be returned within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as prescribed in the preceding section.

Rev., s. 1804; Code, s. 1579; 1868-9, c. 201, s. 16.

2186. Annual accounts. Every guardian shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file in the office of the clerk of the superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk of the superior court may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must indorse his approval thereon, which shall be deemed prima facie evidence of correctness.

Rev., s. 1805; Code, s. 1617; R. C., c. 54, ss. 11, 12; 1762, c. 69, ss. 9, 15; 1871-2, c. 46.

Word "account" defined: *State v. Dunn*, 134-668. Vouchers should show character of, and necessity for, expenditures: *McLean v. Breese*, 109-564. Ex parte accounts filed are taken to be correct until shown erroneous: *Turner v. Turner*, 104-572. Guardian should set out how he invested ward's estate and nature of securities which he holds as guardian: *Collins v. Gooch*, 97-186. Ward entitled to demand of guardian annual statement of manner and nature of his investments of ward's estate: *Moore v. Askew*, 85-199. Annual accounts are presumptive evidence against sureties: *Loftin v. Cobb*, 126-58. Section merely referred to in *Sanderson v. Sanderson*, 79-317.

2187. Procedure to compel accounting. If any guardian omit to account, as directed in the preceding section, or renders an insufficient and unsatisfactory account, the clerk of the superior court shall forthwith order such guardian to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such guardian fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against him for contempt and commit him till he exhibits such account, and may likewise remove him from office.

Rev., s. 1806; Code, s. 1618; C. C. P., s. 479.

Word "account" defined: *State v. Dunn*, 134-668. Clerk must require guardians to make quarterly and annual returns, and on failure to do so to attach and remove guardians from office: *Sanderson v. Sanderson*, 79-371; *In re Dixon*, 156-26.

2188. Final account. A guardian may be required to file such account at any time after six months from the ward's coming of full age or the cessation of the guardianship; but such account may be filed voluntarily at any time, and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk of the superior court.

Rev., s. 1807; Code, s. 1619; C. C. P., s. 481.

Upon the death of the ward the trust ends and the distributees may have administration and call for an account: *Lowden v. Hathcock*, 150-438.

Section not intended to bestow upon guardian ward's money and property for six months after he becomes of age: *Self v. Shugart*, 135-189—nor to deprive him of right to bring action during that period, but simply means that guardian presumed to have settled with ward within six months, and after its lapse clerk can call on guardian to file final account, with receipts of ward, in full settlement, to complete record in his office, for section states that such return shall be audited and recorded, *Ibid.*—but such final account is intended to be subsequent to settlement with ward, not preparatory thereto, *Ibid.*

Ten years after ward coming of age bars action by him against his guardian for settlement: *Dunn v. Beaman*, 126-766; *Lowden v. Hathcock*, 150-438.

Clerk of superior court has jurisdiction of proceeding against guardian for account and settlement: *McNeill v. Hodges*, 105-52; *Donnelly v. Wilcox*, 113-408; *McLean v. Breece*, 113-390; *Clodfelter v. Post*, 70-733; *Rowland v. Thompson*, 65-110—and of course between guardian and ward's personal representative, *McLean v. Breece*, 113-390—therefore judgment rendered therein is estoppel to action in superior court between same parties and upon same question, *Donnelly v. Wilcox*, 113-408.

Where guardian surrendered office to one whom he supposed to be legal successor and made settlement with him, although he was not regularly appointed guardian until nine months thereafter, management of fund during that period is treated as exercise of agency of former guardian: *Jennings v. Copeland*, 90-572.

Superior court has no original jurisdiction of action for an account by existing guardian of infant children against their former guardian: *Sudderth v. McCombs*, 65-186; *Rowland v. Thompson*, 65-110—such action must be brought before clerk, *Ibid.*

As to jurisdiction of deputy clerk in proceeding for account and settlement, see *Rowland v. Thompson*, 65-110.

For practice before clerk in taking accounts of guardians, see *Rowland v. Thompson*, 64-714.

Settlement between guardian and ward and receipt by latter of former's personal bond for balance, is sufficient defense to action on guardian bond: *State v. Cordon*, 30-179; *Ledford v. Vandyke*, 44-480.

For charging guardian with compound interest in making final settlement, see section 2308.

2189. Expenses and disbursements credited to guardian. Every guardian may charge in his annual account all reasonable disbursements and expenses; and if it appear that he has really and bona fide disbursed more in one year than the profits of the ward's estate, for his education and maintenance, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year; but such disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward.

Rev., s. 1808; Code, s. 1612; R. C., c. 54, s. 28; 1762; c. 69, ss. 18, 19; 1799, c. 536, s. 2; 1868-9, c. 201, s. 49.

See section 2155. For annotations as to allowances made administrators, etc., see under section 157 (reasoning very similar).

In passing the accounts of a guardian he cannot, except under rare circumstances, be allowed disbursements beyond income of ward: *Caffey v. McMichael*, 64-507; *Johnston v. Coleman*, 56-290; *Long v. Norecom*, 37-354.

Court may allow money in excess of income expended in education without permission of clerk: *Duffy v. Williams*, 133-195.

Clerk may allow costs of suit brought by guardian for ward where guardian went on prosecution bond and had to pay costs individually: *Green v. Burgess*, 117-495—may allow disbursements made to pay debts of lunatic (his ward) contracted before his lunacy, he being dead and his child being of age, *McLean v. Breece*, 113-390—may allow reasonable attorney's fees paid in good faith, *Burke v. Turner*, 85-500; *Whitford v. Foy*, 65-265; *Moore v. Shields*, 69-50—may allow expenditures demanded by such circumstances amounting to physical necessity as would compel court to authorize them without hesitation, *Long v. Norecom*, 37-354.

No allowance to father, though he be guardian, for maintenance of child, if he is able to maintain it: *Burke v. Turner*, 85-500—nor to father as guardian for education of child, he being able to educate it, *Walker v. Crowder*, 37-478. No allowance for counsel fees when counsel employed for personal advantage of guardian: *Johnston v. Haynes*, 65-509—or to keep ward out of just rights, *Moore v. Shields*, 69-50—or in defending action brought by ward for settlement, *Ibid.*

Guardian who advances money for ward over and above income of estate in order to set him up in business or for other purposes, without applying to court for leave, not entitled to charge ward with it: *Shaw v. Coble*, 63-377.

Where guardian grossly abusing his trust, claims credit for certain amount for ward's expenditures, and files no exhibit of items of expenditures, and does not make it appear that same proper, such credit will not be allowed him: *Boyett v. Hurst*, 54-166.

Guardians are chargeable with highest rate of interest where funds are used in his own business: *Fisher v. Brown*, 135-198.

2190. Commissions. The superior court shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors.

Rev., s. 1809; Code, s. 1613; R. C., c. 54, s. 28; 1762, c. 69, ss. 18, 19; 1868-9, c. 201, s. 50.

For annotations as to commissions allowed administrators, etc., see under section 157 (may be of service in construing this section). Where guardian uses funds of ward, but makes regular annual settlement, charging himself with interest thereon, he is entitled to his commissions: *Fisher v. Brown*, 135-198; *Carr v. Askew*, 94-194.

Where sum received was \$10,000 and there was no trouble or litigation connected with estate, commission of 2½ per cent on receipts and 5 per cent on disbursements was allowed: *Carr v. Askew*, 94-194.

Commissions allowed by referee will not be reduced unless they are manifestly excessive: *Wilson v. Lineberger*, 88-416.

Ex parte order of court allowing commissions to guardian not conclusive in litigation between ward and guardian: *Walton v. Erwin*, 36-136. Possibly there may be cases in which, office being troublesome, and guardian faithful, and dying or giving up office upon some necessity, court may give to such guardian full commission and also reasonable compensation to successor: *Ibid.* Two and one-half per cent is reasonable commission where guardian had received nearly whole of ward's estate in notes, had collected very little on notes, and paid same over to succeeding guardian: *Ibid.*

Guardian not entitled to commissions on money collected and used by him in own business: *Burke v. Turner*, 85-500; but see *Fisher v. Brown*, 135-198; *Carr v. Askew*, 94-194—nor on debts of his ward paid to firm of which guardian is a member, *Burke v. Turner*, 85-500.

Compensation of guardians should depend upon time employed, labor performed, services rendered and responsibility encountered in performance of duties: *Whitford v. Foy*, 65-265; *Hodge v. Hawkins*, 21-564; *Shutt v. Carloss*, 36-232.

Guardian entitled to commissions although he omitted to keep and render regular accounts, where no imputation cast upon his integrity by reason of neglect: *McNeill v. Hodges*, 83-504. Guardian not entitled to commissions upon any disbursements made after ward arrives at full age: *Ibid.* Reasonable commissions will always be allowed to guardian unless in case of fraud or very culpable negligence: *Whitford v. Foy*, 65-265—but rate will depend upon amount of estate, trouble of managing same, and whether fees paid to counsel for assisting in management, last of which will lessen rate, *Ibid.* Commissions should be allowed guardian on amount of notes and other securities for debt delivered to ward upon cessation of guardianship: *Whitford v. Foy*, 65-265. Not unreasonable to allow 5 per cent commissions to guardian on receipts and disbursements, which embrace large number of receipts and vouchers extending through period of fourteen years: *Covington v. Leak*, 65-594. Guardian entitled to commissions upon payments made for goods bought of firm of which he is a member: *Williamson v. Williams*, 59-62—but not on charges for board while ward lived in his family, *Ibid.*

Where guardian keeps no account and makes no report of trust, as general rule he will not be allowed commissions: *Topping v. Windley*, 99-4.

Compensation cannot be allowed independent of commissions to guardian for time and trouble: *Shutt v. Carloss*, 36-232.

ART. 7. PUBLIC GUARDIANS

2191. Appointment; term; oath. There may be in every county a public guardian, to be appointed by the clerk of the superior court for a term of eight years. The public guardian shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties imposed upon him; the oath so taken and subscribed shall be filed in the office of the clerk of the superior court.

Rev., ss. 1758, 1759; Code, ss. 1556, 1560; 1874-5, c. 221, ss. 1, 5.

2192. Bond of public guardian; increasing bond. The public guardian shall enter into bond with three or more sureties, approved by the clerk in the penal sum of six thousand dollars, payable to the state of North Carolina, conditioned

faithfully to perform the duties of his office and obey all lawful orders of the superior or other courts touching said guardianship of all wards, money or estate that may come into his hands. Whenever the aggregate value of the real and personal estate belonging to his several wards exceeds one-half the bond herein required the clerk of the superior court shall require him to enlarge his bond in amount so as to cover at least double the aggregate amount under his control as guardian.

Rev., ss. 321, 322; Code, ss. 1557, 1558; 1874-5, c. 221, ss. 2, 3.

2193. Powers, duties, liabilities, compensation. The powers and duties of said public guardian shall be the same as other guardians, and he shall be subject to the same liabilities as other guardians under the existing laws, and shall receive the same compensation as other guardians.

Rev., s. 1761; Code, s. 1561; 1874-5, c. 221, ss. 6, 7.

2194. When letters issue to public guardian. The public guardian shall apply for and obtain letters of guardianship in the following cases:

1. When a period of six months has elapsed from the discovery of any property belonging to any minor, idiot, lunatic, insane person or inebriate, without guardian.

2. When any person entitled to letters of guardianship shall request in writing the clerk of the superior court to issue letters to the public guardian; but it is lawful and the duty of the clerk of the superior court to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person entitled to qualify as guardian, setting forth a sufficient cause for such revocation.

Rev., s. 1760; Code, s. 1561; 1874-5, c. 221, ss. 6, 7.

ART. 8. FOREIGN GUARDIANS

2195. Right to removal of ward's personalty from state. Where any ward, idiot, lunatic or insane person, residing in another state or territory, or in the District of Columbia, or Canada, or other foreign country, is entitled to any personal estate in this state, or personal property substituted for realty by decree of court, or to any money arising from the sale of real estate, whether the same be in the hands of any guardian residing in this state, or of any executor, administrator or other person holding for the ward, idiot, lunatic or insane person, or if the same (not being adversely held and claimed) be not in the lawful possession or control of any person, the guardian of the ward, idiot, lunatic or insane person, duly appointed at the place where such ward, idiot, lunatic or insane person resides, may apply to have such estate removed to the residence of the ward, idiot, lunatic or insane person by petition filed before the clerk of the superior court of the county in which the property or some portion thereof is situated; which shall be proceeded with as in other cases of special proceedings.

Rev., s. 1816; Code, ss. 1598, 1601; R. C., c. 54, s. 29; 1820, c. 1044; 1842, c. 38; 1868-9, c. 201, ss. 35, 38; 1874-5, c. 168; 1913, c. 86, s. 1.

Where it appears that property of ward residing in another state is in this state, consisting of good bonds at interest in hands of guardian here, and ward nearly of age, no special necessity appearing for such transfer, court will refuse order to transfer property: *Douglas v. Caldwell*, 59-20.

For cases prior to enactment of section and rendered nugatory by same, see *McNeely v. Jamison*, 55-186; *Pugh v. Mordecai*, 41-61. Section referred to in *Tate v. Mott*, 96-28.

2196. Contents of petition; parties defendant. The petitioner must show to the court a copy of his appointment as guardian and bond duly authenticated, and must prove to the court that the bond is sufficient, as well in the ability of the sureties as in the sum mentioned therein, to secure all the estate of the ward wherever situated. Any person may be made a party defendant to the proceeding who may be made a party defendant in civil actions under the provisions of the chapter entitled Civil Procedure.

Rev., ss. 1817, 1818; Code, ss. 1599, 1600; R. C., c. 54, s. 30; 1820, c. 1044, s. 2; 1842, c. 38; 1868-9, c. 201, ss. 36, 37.

For removal of trust funds from the state, see Trustees, Art. 2.

Section merely referred to in *Tate v. Mott*, 96-28.

For rate of interest guardian notes to bear, see section 2308.

For guardians of idiots, inebriates and lunatics, see sections 2284-2290. For cross-index of appointments of guardian, see section 952. For payment of owelty of partition due from ward, see section 3224.

ART. 9. ESTATES WITHOUT GUARDIAN

2197. Duty of grand jury as to orphans and guardians. The grand jury of every county is charged with and shall present to the superior court the names of all orphan children that have no guardian or are not bound out to some trade or employment. They shall further inquire of all abuses, mismanagement and neglect of all such guardians as are appointed by the clerk of the superior court. The clerk of the superior court shall, at each term of the superior court, lay before the grand jury a list of all the guardians acting in his county or appointed by him.

Rev., s. 1810; Code, s. 1609; R. C., c. 54, s. 18; 1762, c. 69, s. 17; 1868-9, c. 201, s. 46.

2198. Solicitor to apply for receiver for orphans' estates. Whenever an orphan, having any estate, is presented by a grand jury, for whom no suitable person will become guardian, the clerk of the superior court must give notice thereof forthwith to the solicitor of the state for the judicial district, who shall apply in behalf of the orphan to the judge of the superior court of the county where such presentment was made, to the end that a receiver be appointed.

Rev., s. 1811; Code, s. 1610; R. C., c. 54, s. 19; 1846, c. 43; 1868-9, c. 201, s. 47.

Section merely referred to in *Rogers v. Odom*, 86-432.

2199. Solicitor to prosecute bond of guardian removed without a successor. Whenever any guardian is removed, and no person is appointed to succeed in the guardianship, the clerk of the superior court shall certify the name of such guardian and his sureties to the solicitor of the judicial district, who shall forthwith institute an action on the bond of the guardian in the superior court, for securing the estate of the ward.

Rev., s. 1812; Code, s. 1584; R. C., c. 54, s. 14; 1844, c. 41; 1868-9, c. 201, s. 21.

Action under section is properly action brought by solicitor for benefit of ward when guardian has been removed, and infant is not necessary party, perhaps not proper party, to it: *Temple v. Williams*, 91-89; *Becton v. Becton*, 56-419—therefore infant not bound as party to action by record, and it is not conclusive upon him when afterwards, suing by next friend, or suing after he comes of age, to call former guardian to account: *Temple v. Williams*, 91-89; *Becton v. Becton*, 56-423.

2200. Judge to appoint receiver; his rights and duties. The judge of the superior court, either residing in or presiding over the courts of the district, before whom such action is brought, shall have power to appoint the clerk of the superior court or some discreet person as a receiver to take possession of the ward's estate, to collect all moneys due to him, to secure, lend, invest or apply the same for the benefit and advantage of the ward, under the direction and subject to such rules and orders in every respect as the said judge may from time to time make in regard thereto; and the accounts of such receiver shall be returned, audited and settled as the judge may direct. The receiver shall be allowed such amounts for his time, trouble and responsibility as seem to the judge reasonable and proper; and such receivership may be continued until a suitable person can be procured to take the guardianship.

Rev., s. 1813; Code, s. 1585; R. C., c. 54, s. 15; 1844, c. 41, s. 2; 1868-9, c. 201, s. 22.

When clerk superior court is appointed receiver he is liable officially for funds coming into his hands: *Hannah v. Hyatt*, 170-634. But he is not so liable when he makes payments under order of court: *Ibid.*

Appointment of receiver for insane person's estate should be made only on motion of solicitor after wife and one or more adult children, if there are such, or some near relative or friend, have been brought before judge at chambers or in term: *In re Hybart*, 119-359.

Where in order of court appointing A. B., clerk superior court, receiver of infant's estate, word "as" was omitted before words "clerk superior court," the intention of court to appoint clerk receiver in his official capacity was sufficiently indicated: *Waters v. Melson*, 112-89. Under section, court has authority to appoint clerk of superior court receiver of infant's estate: *Ibid.*—and sureties on official bond liable for any breach of his duties as such receiver, *Ibid.*; *Boothe v. Upchurch*, 110-62; *Syme v. Bunting*, 91-48; *Rogers v. Odom*, 86-432.

Burden upon receiver and his sureties to show that he used due diligence in investing money in his hands: *Waters v. Melson*, 112-89. As a general rule receiver is responsible for his own neglect only, and is protected when he acts in entire good faith: *Collins v. Gooch*, 97-186—but when receiver appointed to take charge of infant's estate who has no guardian and is directed to lend out money and pay income over to ward, he will be held to same accountability as guardian, *Ibid.* Receiver may keep money in bank as safe place of deposit, or may use bank as means of transmitting money to distant places, and if he uses reasonable diligence, will not be held liable if bank fails: *Ibid.*—but this does not authorize loan to bank by such trustee without taking security, *Ibid.* Where receiver was appointed to take charge of infant's estate and invest same, and report to court annually, and deposited portion of money in bank in another state, which afterwards failed, he is liable for loss if he failed to report to court manner of the investment of estate, though he acted in the best faith: *Ibid.* Receiver appointed to take charge of ward's estate when guardian removed is not invested with powers of guardian, but acts under control of court until another guardian appointed: *Temple v. Williams*, 91-82—and a settlement with such receiver, even though under direction of court, is not conclusive against ward, but only raises presumption that account and settlement correct: *Ibid.*

For procedure where receiver alleged to have committed breach of trust, see *Atkinson v. Smith*, 89-72.

Section merely referred to in *Timberlake v. Green*, 84-660; *Harris v. Harrison*, 75-433.

2201. Receiver to pay over estate to infant or guardian. When another guardian is appointed, he may apply by motion, on notice, to the judge of the superior court for an order upon the receiver to pay over all the money, estate and effects of the ward; and if no such guardian is appointed, then the ward, on coming of age, or in case of his death, his executor, administrator or collector, and the heir or personal representative of the idiot, lunatic or insane person, shall have the like remedy against the receiver.

Rev., s. 1814; Code, s. 1587; R. C., c. 54, s. 17; 1844, c. 41, s. 4; 1868-9, c. 201, s. 24.

Settlement with receiver, even if had under direction of court, not conclusive against ward: *Temple v. Williams*, 91-82—but only raises presumption that account and settlement correct, *Ibid*.

Section merely referred to in *Timberlake v. Green*, 84-660.

2202. Duties and compensation of solicitor. The solicitor shall prosecute the action and take all necessary orders therein, and for his services shall be allowed such reasonable compensation as may be just, not to exceed ten dollars; in passing on the returns of receivers, where the estate of the infant does not exceed five hundred dollars, not to exceed five dollars; and where the estate exceeds five hundred dollars, not to exceed ten dollars. The amount in each case to be fixed by the judge.

Rev., s. 1815; Code, s. 1586; 1895, c. 14; R. C., c. 54, s. 16; 1844, c. 41, s. 3; 1868-9, c. 201, s. 23.

Section merely referred to in *Timberlake v. Green*, 84-660.

CHAPTER 41

HABEAS CORPUS

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ART. 1. CONSTITUTIONAL PROVISIONS

2203. **Remedy without delay for restraint of liberty.** Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed.

Rev., s. 1819; Const., Art. I, s. 18.

2204. **Habeas corpus not to be suspended.** The privileges of the writ of habeas corpus shall not be suspended.

Rev., s. 1820; Const., Art. I, s. 21.

ART. 2. APPLICATION

2205. **Who may prosecute writ.** Every person imprisoned or restrained of his liberty within this state, for any criminal or supposed criminal matter, or on any pretense whatsoever, except in cases specified in the succeeding section, may prosecute a writ of habeas corpus, according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and, if illegal, to be delivered therefrom.

Rev., s. 1821; Code, s. 1623; 1868-9, c. 116, s. 1.

Habeas corpus is not a substitute for an appeal: *State v. Burnette*, 173-734; *State v. Webb*, 155-426; *In re Holley*, 154-163; *Ex parte McCown*, 139-95. The only inquiry is as to the power of the court to make the order under which the petitioner is held: *Ibid*.

Where defendant, charged with burglary with intent to commit murder, pleaded guilty of larceny and was sentenced to imprisonment in penitentiary, he is entitled to writ of habeas corpus that he may be taken from penitentiary and held to answer charge in court below: *State v. Queen*, 91-659.

Person illegally detained in hospital for the dangerous insane cannot be released on habeas corpus if he is insane at time of return of writ: *In re Boyett*, 136-415.

The filing of a true bill for murder does not deprive court of power to issue habeas corpus and to admit defendant to bail: *State v. Herndon*, 107-934.

2206. **When application denied.** Application to prosecute the writ shall be denied in the following cases:

1. Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts.

2. Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.

3. Where any person has willfully neglected, for the space of two whole terms after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.

4. Where no probable ground for relief is shown in the application.

Rev., s. 1822; Code, s. 1624; 1868-9, c. 116, s. 2.

Writ of habeas corpus will not be issued when it appears on face of petition that petitioner is detained by virtue of final judgment of court of competent jurisdiction: *In re Croom*, 175-455; *State v. Dunn*, 159-470; *Howie v. Spittle*, 156-180; *In re Holley*, 154-163; *In re Brittain*, 93-587—as power is denied to courts in such cases, *Ledford v. Emerson*, 143-527; *In re Schenck*,

74-607—and application must be refused even where it appears that applicant imprisoned in state's prison and sentence of court erroneous, *In re Schenck*, 74-607; but see *State v. Queen*, 91-659.

2207. By whom application is made. Application for the writ may be made either by the party for whose relief it is intended or by any person in his behalf.

Rev., s. 1823; Code, s. 1625; 1868-9, c. 116, s. 3.

2208. To judge of supreme or superior court; in writing. Application for the writ shall be made in writing, signed by the applicant—

1. To any one of the justices of the supreme court.

2. To any one of the superior court judges, either at term time or in vacation.

Rev., s. 1824; Code, s. 1626; 1868-9, c. 116, s. 4.

Presenting petition to judge for writ of habeas corpus gives him jurisdiction of subject: *State v. Edney*, 60-463. Section merely referred to in *State v. Herndon*, 107-938; *In re Schenck*, 74-608.

2209. Contents of application. The application must state, in substance, as follows:

1. That the party, in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known.

2. The cause or pretense of such imprisonment or restraint, according to the knowledge or belief of the applicant.

3. If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made.

4. If the imprisonment or restraint is alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant.

5. The facts set forth in the application must be verified by the oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits.

Rev., s. 1825; Code, s. 1627; 1868-9, c. 116, s. 5.

Parties may waive all errors in proceedings on petition for habeas corpus: *State v. Edney*, 60-463. What may constitute waiver of errors: *Ibid*.

Petition must allege that the imprisonment has not been already adjudged upon prior writ of habeas corpus: *In re Brittain*, 93-587.

Where defendant was not originally liable for arrest and had been discharged upon habeas corpus, he cannot be held upon a surrender by his sureties: *Ledford v. Emerson*, 143-527.

2210. Issuance of writ without application. When the supreme or superior court, or any judge of either, has evidence from any judicial proceeding before such court or judge that any person within this state is illegally imprisoned or restrained of his liberty, it is the duty of said court or judge to issue a writ of habeas corpus for his relief, although no application be made for such writ.

Rev., s. 1826; Code, s. 1632; 1868-9, c. 116, s. 10.

Section merely referred to in *State v. Jones*, 113-672; *State v. Applewhite*, 75-232; *In re Schenck*, 74-610.

ART. 3. WRIT

2211. **Writ granted without delay.** Any court or judge empowered to grant the writ, to whom such applications may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is, by this chapter, prohibited from prosecuting the writ.

Rev., s. 1827; Code, s. 1628; 1868-9, c. 116, s. 6.

Duty of judge to whom application for writ of habeas corpus made, to issue same if petition made in conformity to statute: In re Patterson, 99-407—and if it has been obtained upon false statements, or by suppression of facts which would prevent its issue, will be dismissed upon hearing, Ibid. Presumption of innocence applies only on a trial, and does not avail to furnish presumption that detention of party on regular process, when committing officer has jurisdiction, is alleged: State v. Jones, 113-669.

For review of decision, see annotations under section 2234.

2212. **Penalty for refusal to grant.** If any judge authorized by this chapter to grant writs of habeas corpus refuses to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand five hundred dollars.

Rev., s. 1828; Code, s. 1631; 1868-9, c. 116, s. 9.

2213. **Sufficiency of writ; defects of form immaterial.** No writ of habeas corpus shall be disobeyed on account of any defect of form. It shall be sufficient—

1. If the person having the custody of the party imprisoned or restrained be designated either by his name of office, if he have any, or by his own name, or, if both such names be unknown or uncertain, he may be described by an assumed appellation, and any one who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name, or description, or to another person.

2. If the person who is directed to be produced be designated by name, or if his name be uncertain or unknown, he may be described by an assumed appellation or in any other way, so as to designate the person intended.

Rev., s. 1829; Code, ss. 1629, 1630; 1868-9, c. 116, ss. 7, 8.

2214. **Service of writ.** The writ of habeas corpus may be served by any qualified elector of this state thereto authorized by the court or judge allowing the same. It may be served by delivering the writ, or a copy thereof, to the person to whom it is directed; or, if such person cannot be found, by leaving it, or a copy, at the jail, or other place in which the party for whose relief it is intended is confined, with some under officer or other person of proper age; or, if none such can be found, or if the person attempting to serve the writ be refused admittance, by affixing a copy thereof in some conspicuous place on the outside, either of the dwelling-house of the party to whom the writ is directed or of the place where the party is confined for whose relief it is sued out.

Rev., s. 1833; Code, s. 1657; 1868-9, c. 116, s. 32.

See Ex parte Kerr, 64-816.

ART. 4. RETURN

2215. **When writ returnable.** Writs of habeas corpus may be made returnable at a certain time, or forthwith, as the case may require. If the writ be returnable at a certain time, such return shall be made and the party shall be produced at the time and place specified therein.

Rev., s. 1830; Code, s. 1656; 1868-9, c. 116, s. 31.

2216. **Contents of return; verification.** The person or officer on whom the writ is served must make a return thereto in writing, and, except where such person is a sworn public officer and makes his return in his official capacity, it must be verified by his oath. The return must state plainly and unequivocally—

1. Whether he has or has not the party in his custody or under his power or restraint.

2. If he has the party in his custody or power, or under his restraint, the authority and the cause of such imprisonment or restraint, setting forth the same at large.

3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ to the court or judge before whom the same is returnable.

4. If the person or officer upon whom such writ is served has had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place.

Rev., s. 1831; Code, s. 1633; 1868-9, c. 116, s. 11.

2217. **Production of body if required.** If the writ requires it, the officer or person on whom the same has been served shall also produce the body of the party in his custody or power, according to the command of the writ, except in the case of the sickness of such party, as hereinafter provided.

Rev., s. 1832; Code, s. 1636; 1868-9, c. 116, s. 14.

ART. 5. ENFORCEMENT OF WRIT

2218. **Attachment for failure to obey.** If the person or officer on whom any writ of habeas corpus has been duly served refuses or neglects to obey the same, by producing the body of the party named or described therein, and by making a full and explicit return thereto, within the time required, and no sufficient excuse is shown for such refusal or neglect, it is the duty of the court or judge before whom the writ has been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person or officer, directed to the sheriff of any county within this state, and commanding him forthwith to apprehend such person or officer and bring him immediately before such court or judge. On being so brought such person or officer shall be committed to close custody in the jail of the county where such court or judge may be, without being allowed the liberties thereof, until such person or officer make return to

such writ and comply with any order that may be made by such court or judge in relation to the party for whose relief the writ has been issued.

Rev., s. 1834; Code, s. 1637; 1868-9, c. 116, s. 15.

Where officer of troops, acting under authority of governor, the commander in chief, refuses to obey the writ of habeas corpus there is "sufficient excuse" under section: Ex parte Moore, 64-809. As bearing upon section, see Ex parte Moore, 65-349.

2219. Liability of judge refusing attachment. If any judge willfully refuses to grant the writ of attachment, as provided for in the preceding section, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Rev., s. 1835; Code, s. 1638; 1870-1, c. 221, s. 2.

2220. Attachment against sheriff to be directed to coroner; procedure. If a sheriff has neglected to return the writ agreeably to the command thereof, the attachment against him may be directed to the coroner or to any other person to be designated therein, who shall have power to execute the same, and such sheriff, upon being brought up, may be committed to the jail of any county other than his own.

Rev., s. 1836; Code, s. 1639; 1868-9, c. 116, s. 16.

2221. Precept to bring up party detained. The court or judge by whom any such attachment may be issued may also at the same time, or afterwards, direct a precept to any sheriff, coroner, or other person to be designated therein, commanding him to bring forthwith before such court or judge the party, wherever to be found, for whose benefit the writ of habeas corpus has been granted.

Rev., s. 1837; Code, s. 1640; 1868-9, c. 116, s. 17.

See Ex parte Moore, 64-810.

2222. Liability of judge refusing precept. If any judge refuses to grant the precept provided for in the preceding section, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Rev., s. 1838; Code, s. 1641; 1870-1, c. 221, s. 3.

2223. Liability of judge conniving at insufficient return. If any judge grants the attachment, or the precept, and gives the officer or other person charged with the execution of the same verbal or written instructions not to execute the same, or to make any evasive or insufficient return, or any return other than that provided by law; or shall connive at the failing to make any return or any evasive or insufficient return, or any return other than that provided by law, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Rev., s. 1839; Code, s. 1642; 1870-1, c. 221, s. 4.

2224. Power of county to aid service. In the execution of any such attachment, precept or writ, the sheriff, coroner, or other person to whom it may be directed, may call to his aid the power of the county, as in other cases.

Rev., s. 1840; Code, s. 1643; 1868-9, c. 116, s. 18.

"Power of county" means men of county in which writ is to be executed: Ex parte Moore, 64-811. As to posse comitatus generally, see Worth v. Comrs., 118-122.

2225. Obedience to order of discharge compelled. Obedience to a judgment or order for the discharge of a prisoner or person restrained of his liberty, pursuant to the provisions of this chapter, may be enforced by the court or judge by attachment in the same manner and with the same effect as for a neglect to make return to a writ of habeas corpus; and the person found guilty of such disobedience shall forfeit to the party aggrieved two thousand five hundred dollars, besides any special damages which such party may have sustained.

Rev., s. 1841; Code, s. 1649; 1868-9, c. 116, s. 24.

2226. No civil liability for obedience. No officer or other person shall be liable to any civil action for obeying a judgment or order of discharge upon writ of habeas corpus.

Rev., s. 1842; Code, s. 1650; 1868-9, c. 116, s. 25.

2227. Recommittal after discharge; penalty. If any person shall knowingly again imprison or detain one who has been set at large upon any writ of habeas corpus, for the same cause, other than by the legal process or order of the court wherein he is bound by recognizance to appear, or of any other court having jurisdiction in the case, he shall be guilty of a misdemeanor.

Rev., s. 3581; Code, s. 1651; 1868-9, c. 116, s. 26.

A party released on writ of habeas corpus, on the ground that the court committing him has no jurisdiction, may be again arrested for the same cause upon legal process from a court having jurisdiction: *Barbee v. Weatherspoon*, 88-19.

2228. Disobedience to writ or refusing copy of process; penalty. If any person to whom a writ of habeas corpus is directed shall neglect or refuse to make due return thereto, or to bring the body of the party detained according to the command of the writ without delay, or shall not, within six hours after demand made therefor, deliver a copy of the commitment or cause of detainer, such person shall, upon conviction on indictment, be fined one thousand dollars, or imprisoned not exceeding twelve months, and if such person be an officer, shall moreover be removed from office.

Rev., s. 3597; Code, s. 1652; 1868-9, c. 116, s. 27.

2229. Penalty for false return. If any person shall make a false return to a writ of habeas corpus, he shall be guilty of a misdemeanor.

Rev., s. 3582; Code, s. 1653; 1868-9, c. 116, s. 28.

2230. Penalty for concealing party entitled to writ. If any one having in his custody, or under his power, any party who, by law, would be entitled to a writ of habeas corpus, or for whose relief such writ shall have been issued, shall, with intent to elude the service of such writ, or to avoid the effect thereof, transfer the party to the custody, or put him under the power or control, of another, or shall conceal or change the place of his confinement, or shall knowingly aid or abet another in so doing, he shall be guilty of a misdemeanor.

Rev., s. 3583; Code, ss. 1654, 1655; 1868-9, c. 116, ss. 29, 30.

ART. 6. PROCEEDINGS AND JUDGMENT

2231. Notice to interested parties. When it appears from the return to the writ that the party named therein is in custody on any process, or by reason of

any claim of right, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it appears that the person so interested, or his attorney, if he have one, has had reasonable notice of the time and place at which such writ is returnable.

Rev., s. 1843; Code, s. 1634; 1868-9, c. 116, s. 12; 1870-1, c. 221, s. 1.

2232. Notice to solicitor. When it appears from the return that such party is detained upon any criminal accusation, the court or judge may, if he thinks proper, make no order for the discharge of such party until sufficient notice of the time and place at which the writ has been returned, or is made returnable, is given to the solicitor of the county in which the person prosecuting the writ is detained.

Rev., s. 1844; Code, s. 1635; 1868-9, c. 116, s. 13.

Where it appears from return on writ of habeas corpus that petitioner detained on criminal charge, court may continue hearing for reasonable time to give solicitor opportunity to examine into case: *State v. Jones*, 113-669.

2233. Subpœnas to witnesses. Any party to a proceeding on a writ of habeas corpus may procure the attendance of witnesses at the hearing, by subpœna, to be issued by the clerk of any superior court, under the same rules, regulations and penalties prescribed by law in other cases.

Rev., s. 1845; Code, s. 1659; 1868-9, c. 116, s. 34.

2234. Proceedings on return; facts examined; summary hearing of issues. The court or judge before whom the party is brought on a writ of habeas corpus shall, immediately after the return thereof, examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same has been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing or remanding such party.

Rev., s. 1846; Code, s. 1644; 1868-9, c. 116, s. 19.

Petition will be dismissed where writ was obtained upon false statements, or by suppression of facts which would prevent its issue: *In re Patterson*, 99-407.

No appeal lies from decision of the judge, but the case may be reviewed by certiorari: *In re Croom*, 175-455; *In re Wiggins*, 165-457; *In re Holley*, 154-163; *Ledford v. Emerson*, 143-527; *State v. Herndon*, 107-934; *Walton v. Gatlin*, 60-318.

If, upon certiorari, supreme court reverses and sets aside judgment of court below and proceedings are remanded, no procedendo issues to any particular judge, but petitioner can exercise his statutory right to apply, de novo, to any judge authorized to grant the writ: *State v. Herndon*, 107-934.

Presumption of innocence applies only on a trial, and does not avail to furnish presumption that detention of party on regular process, when committing officer has jurisdiction, is illegal: *State v. Jones*, 113-669—therefore burden rests on petitioner to show commitment illegal, *Ibid*.

2235. When party discharged. If no legal cause is shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held. But if it appears on the return to the writ that the party is in custody by virtue of

civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:

1. Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person.
2. Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged.
3. Where the process is defective in some matter of substance required by law, rendering such process void.
4. Where the process, though in proper form, has been issued in a case not allowed by law.
5. Where the person, having the custody of the party under such process, is not the person empowered by law to detain him.
6. Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law.

Rev., s. 1847; Code, s. 1645; 1868-9, c. 116, s. 20.

Where it appears from sheriff's return to habeas corpus that petitioner is in custody on mittimus regularly issued for failure to give bond to answer criminal charge of which court had jurisdiction, detention clearly legal: *State v. Jones*, 113-669—and burden on petitioners to show wherein it was illegal, not upon state to show that they were lawfully in custody, *Ibid*.

Where defendant was sentenced to imprisonment in two cases, the sentences are concurrent unless otherwise specified, and upon the expiration of the time he may be discharged upon habeas corpus: *In re Black*, 162-457; *State v. Cathey*, 170-794.

The state cannot appeal from an order discharging a prisoner in habeas corpus: *In re Williams*, 149-436.

Section referred to in *Ashby v. Page*, 108-6.

2236. When party remanded. It is the duty of the court or judge forthwith to remand the party, if it appears that he is detained in custody, either—

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction.
2. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree.
3. For any contempt specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged.
4. That the time during which such party may be legally detained has not expired.

Rev., s. 1848; Code, s. 1646; 1868-9, c. 116, s. 21.

Party is remanded when it appears that he is held under the process or judgment of a competent court: *In re Hinson*, 156-250; *In re Holley*, 154-163. Provision of subsection 3 as peremptory as that of subsection 2: *State v. Queen*, 91-662. Section merely referred to in *Ashby v. Page*, 108-8. See section 2206.

2237. When party bailed or remanded. If it appears that the party has been legally committed for any criminal offense, or if it appears by the testimony offered with the return of the writ, or upon the hearing thereof, that the party is guilty of such an offense, although the commitment is irregular, the court or judge shall proceed to let such party to bail, if the case is bailable and good

bail is offered; if not, the court or judge shall forthwith remand such party to the custody or place him under the restraint from which he was taken, if the person or officer, under whose custody or restraint he was, is legally entitled thereto; if not so entitled, the court or judge shall commit such party to the custody of the officer or person legally entitled thereto.

Rev., s. 1849; Code, s. 1647; 1868-9, c. 116, s. 22.

The prisoner may be held to bail to appear before proper court for hearing: *State v. Burnette*, 173-734; *State v. Herndon*, 107-934. See annotations under sections 2234, 2235.

2238. Party held in execution not to be discharged. When a writ of habeas corpus cum causa issues and the sheriff or other officer to whom it is directed returns upon the same that the prisoner is condemned, by judgment given against him, and held in custody by virtue of an execution issued against him, the prisoner shall not be let to bail, but shall be presently remanded, where he shall remain until discharged in due course of law.

Rev., s. 1850; Code, s. 937; R. C., c. 31, s. 111; 2 Hen. V., c. 2.

See *Ledford v. Emerson*, 143-527; *State v. Herndon*, 107-934.

2239. When party ill, cause determined in his absence. When, from the illness or infirmity of the person directed to be produced by a writ of habeas corpus, such person cannot, without danger, be brought before the court or judge where the writ is made returnable, the party in whose custody he is may state the fact in his return to the writ; and if the court or judge is satisfied of the truth of the allegation, and the return is otherwise sufficient, the court or judge shall proceed to decide on such return and to dispose of the matter in the same manner as if the body had been produced.

Rev., s. 1851; Code, s. 1648; 1868-9, c. 116, s. 23.

2240. No second committal after discharged; penalty. No person who has been set at large upon any writ of habeas corpus shall be again imprisoned or detained for the same cause by any person whatsoever other than by the legal order or process of the court wherein he shall be bound by recognizance to appear or of any other court having jurisdiction in the case, under the penalty of two thousand five hundred dollars to the party aggrieved thereby.

Rev., s. 1852; Code, s. 1651; 1868-9, c. 116, s. 26.

Where defendant was not originally liable to arrest, and had been discharged upon habeas corpus, he cannot be held upon surrender by his sureties: *Ledford v. Emerson*, 143-527. Party set at large by writ of habeas corpus upon ground that judgment of imprisonment void for want of jurisdiction in court, may be again arrested for same cause upon legal process of court having jurisdiction: *Barbee v. Weatherspoon*, 88-19.

ART. 7. HABEAS CORPUS FOR CUSTODY OF CHILDREN IN CERTAIN CASES

2241. Custody as between parents in certain cases; modification of order. When a contest shall arise on a writ of habeas corpus between any husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children, the court or judge, on the return of such writ, may award the charge or custody of the child or children so brought before it either to the husband or to the wife, for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of

such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same.

Rev., s. 1853; Code, s. 1661; 1858-9, c. 53; 1868-9, c. 116, s. 36.

For consequence of divorce on right to custody of children, see Divorce and Alimony, s. 1664.

For effect of abandonment, see Adoption of Minors, s. 189.

Except as between parents, under this section right of custody of child cannot be determined by writ of habeas corpus: *In re Parker*, 144-170.

Where the custody of the child is decreed in a divorce proceeding, the remedy is by motion in the cause and not by habeas corpus: *Page v. Page*, 166-90; s. c., 161-170. But a decree of divorce in another state awarding the custody of a child may be disregarded, and custody awarded under this section: *In re Alderman*, 157-507; *Harris v. Harris*, 115-587.

Parents of child, while living together, have prima facie right to custody: *In re Jones*, 153-312. Mother of illegitimate child has first right to custody: *Ibid.*

As between father and mother, the father's right to custody of child is recognized: *In re Fain*, 172-790; *In re Jones*, 153-312; *Newsome v. Bunch*, 144-15. But the welfare of the child is first consideration: *In re Alderman*, 157-507, and cases cited—and the judge may, in the exercise of discretion, award the custody to the mother, even when nonresident, *In re Means*, 176-307; *Harris v. Harris*, 115-587—or to a third person, *In re Turner*, 151-474.

Where it appears that both father and mother are of good character and able to support and educate child, but that mother had married again and that new husband was a man of dissipated habits, proper to award custody of child to father: *In re D'Anna*, 117-462.

Section confers upon court very large powers to "promote interest and welfare of children": *Jones v. Cotten*, 108-458. Section is express that custody shall be given either to father or mother: *Thompson v. Thompson*, 72-33. Where no abandonment of child proven, court must still find facts entitling plaintiff to child's restoration: *Newsome v. Bunch*, 142-19. Section referred to in *Latham v. Ellis*, 116-33; *Musgrove v. Kornegay*, 52-72.

2242. Appeal to supreme court. In all cases of habeas corpus, where a contest arises in respect to the custody of minor children, either party may appeal to the supreme court from the final judgment.

Rev., s. 1854; Code, s. 1662; 1858-9, c. 53, s. 2.

In habeas corpus cases involving custody of children, either party may appeal: *Musgrove v. Kornegay*, 52-71; *State v. Miller*, 97-451. The supreme court will review errors of law, but not findings of fact by the lower court upon competent evidence: *Stokes v. Cogdell*, 153-181; *Harris v. Harris*, 115-587.

Section referred to in *Jones v. Cotten*, 108-457; *Brown v. Rainor*, 108-204.

ART. 8. HABEAS CORPUS AD TESTIFICANDUM

2243. Authority to issue the writ. Every court of record has power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of habeas corpus, for the purpose of bringing before the said court any prisoner who may be detained in any jail or prison within the state, for any cause, except a prisoner under sentence for a capital felony, to be examined as a witness in such suit or proceeding in behalf of the party making the application.

Such writ of habeas corpus may be issued by any justice of the peace or clerk of the superior court, upon application as provided in this section, to bring any person confined in the jail or prison of the same county where such justice or clerk may reside, to be examined as a witness before such justice or clerk.

In cases where the testimony of any prisoner is needed in a proceeding before a justice of the peace, or a clerk, and such person is confined in a county in

which such justice or clerk does not reside, application for habeas corpus to testify may be made to any judge of the supreme or superior court.

Rev., ss. 1855, 1856; Code, ss. 1663, 1664; 1868-9, c. 116, ss. 37, 38.

Section applies only to parties strictly so called, and not to state: *State v. Jones*, 176-702; *Ex parte Harris*, 73-65; *State v. Adair*, 68-68—therefore it is error in court below to refuse petition of solicitor for habeas corpus ad testificandum to bring prisoner under death sentence, that he might testify in trial then pending, *Ex parte Harris*, 73-65; *State v. Adair*, 68-68. Parties litigant have no right to writ of habeas corpus ad testificandum under section for witness under sentence for (capital) felony: *State v. Adair*, 68-70.

2244. Contents of application. The application for the writ shall be made by the party to the suit or proceeding in which the writ is required, or by his agent or attorney. It must be verified by the applicant, and shall state—

1. The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired.

2. That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes.

Rev., s. 1857; Code, s. 1665; 1868-9, c. 116, s. 39.

2245. Service of writ. The writ of habeas corpus to testify shall be served by the same person, and in like manner in all respects, and enforced by the court or officer issuing the same as prescribed in this chapter for the service and enforcement of the writ of habeas corpus cum causa.

Rev., s. 1858; Code, s. 1666; 1868-9, c. 116, s. 40.

2246. Applicant to pay expenses and give bond to return. The service of the writ shall not be complete, however, unless the applicant for the same tenders to the person in whose custody the prisoner may be, if such person is a sheriff, coroner, constable or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he also gives bond, with sufficient security, to such sheriff, coroner, constable or marshal, as the case may be, conditioned that such applicant will pay the charges of carrying back such prisoner.

Rev., s. 1859; Code, s. 1667; 1868-9, c. 116, s. 41.

2247. Duty of officer to whom writ delivered or on whom served. It is the duty of the officer to whom the writ is delivered or upon whom it is served, whether such writ is directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof upon pain, on refusal or neglect, to forfeit to the party on whose application the same has been issued the sum of five hundred dollars.

Rev., s. 1860; Code, s. 1668; 1868-9, c. 116, s. 42.

2248. Prisoner to be remanded. After having testified, the prisoner shall be remanded to the prison from which he was taken.

Rev., s. 1861; Code, s. 1669; 1868-9, c. 116, s. 43.

For costs of habeas corpus, see Costs, s. 1244.

CHAPTER 42

INNS, HOTELS, AND RESTAURANTS

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ART. 1. INNKEEPERS

2249. **Must furnish accommodations.** Every innkeeper shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers whom he may accept as guests in his inn or hotel.

Rev., s. 1909; 1903, c. 563.

An inn or hotel is a public house of entertainment for all who choose to visit it: *Holstein v. Phillips*, 146-366.

A guest's right of occupancy of an inn is dependent upon proper behavior, decent conduct and obedience to reasonable rules and regulations: *Hutchins v. Durham*, 118-457—and if wrongly evicted, can only sue for damages, *Ibid*.

As to right of innkeeper to expel from inn persons who are not guests, see *State v. Steele*, 106-766. As to right to put out persons, or refuse lodging to persons, who apply to become guests who are considered objectionable on account of character or color, see *Ibid*. As to rights of hotel to arrange for a livery business connected therewith or to grant a monopoly of soliciting the livery business to a party, see *Ibid*.

One who occasionally entertains strangers, receiving compensation therefor, is not an innkeeper: *State v. Mathews*, 19-424.

Boarding-house distinguished from an inn: *State v. McRae*, 170-712.

2250. Liability for loss of baggage. Innkeepers shall not be liable for loss, damage or destruction of the baggage or property of their guests except in case such loss, damage, or destruction results from the failure of the innkeeper to exercise ordinary, proper and reasonable care in the custody of such baggage and property; and in case of such loss, damage or destruction resulting from the negligence and want of care of the said innkeeper he shall be liable to the owner of the said baggage and property to an amount not exceeding one hundred dollars. Any guest may, however, at any time before a loss, damage or destruction of his property, notify the innkeeper in writing that his property exceeds in value the said sum of one hundred dollars, and shall upon demand of the innkeeper furnish him a list or schedule of the same, with the value thereof, in which case the innkeeper shall be liable for the loss, damage or destruction of said property because of any negligence on his part for the full value of the same. Proof of the loss of any such baggage, except in case of damage or destruction by fire, shall be prima facie evidence of the negligence of said hotel or innkeeper.

Rev., s. 1910; 1903, c. 563, s. 2.

A boarder, as distinguished from a guest, is one who abides at a place: *Holstein v. Phillips*, 146-366. Facts in this case held to show that there was a relation of innkeeper and guest between parties, and hotel was liable as insurer for loss of money of guest as at common law, hotel having failed to comply with provisions of section 2254: *Ibid.* Common-law liability of innkeeper for loss of goods of a guest, also liability of boarding-house keeper for loss of goods of a boarder, stated: *Ibid.* A guest in hotel who holds position of regular boarder or lodger can only hold proprietor to the exercise of ordinary care on the part of himself and employees as to goods and money of guests: *Ibid.*

Innkeeper is bound to use reasonable care for the personal safety of his guests: *Patrick v. Springs*, 154-270.

2251. Safekeeping of valuables. It is the duty of innkeepers, upon the request of any guest, to receive from said guest and safely keep money, jewelry and valuables to an amount not exceeding five hundred dollars; and no innkeeper shall be required to receive and take care of any money, jewelry or other valuables to a greater amount than five hundred dollars: Provided, the receipt given by said innkeeper to said guest shall have plainly printed upon it a copy of this section. No innkeeper shall be liable for the loss, damage or destruction of any money or jewels not so deposited.

Rev., s. 1911; 1903, c. 563, s. 3.

See annotations under section 2250.

2252. Loss by fire. No innkeeper shall be liable for loss, damage or destruction of any baggage or property caused by fire not resulting from the negligence of the innkeeper or by any other force over which the innkeeper had no control. Nothing herein contained shall enlarge the limit of the amount to which the innkeeper shall be liable as provided in preceding sections.

Rev., s. 1912; 1903, c. 563, s. 4.

Liability for personal injury of guest: *Patrick v. Springs*, 154-270.

2253. Negligence of guest. Any innkeeper against whom claim is made for loss sustained by a guest may show that such loss resulted from the negligence of such guest or of his failure to comply with the reasonable and proper regulations of the inn.

Rev., s. 1914; 1903, c. 563, s. 7.

The guest must exercise reasonable care to protect himself against personal injury: *Patrick v. Springs*, 154-270.

For lien of innkeepers on baggage and other property, see section 2461.

2254. Copies of this chapter to be posted. Every innkeeper shall keep posted in every room of his house occupied by guests, and in the office, a printed copy of this article and of all regulations relating to the conduct of guests. This chapter shall not apply to innkeepers, or their guests, where the innkeeper fails to keep such notices posted.

Rev., s. 1913; 1903, c. 563, ss. 5, 6.

For lien of innkeepers on baggage and other property, see Liens, Art. 5.

Facts held to show that there was relation of innkeeper and guest between the parties, and the hotel was liable as insurer for loss of money of guest as at common law, hotel having failed to comply with this section: *Holstein v. Phillips*, 146-366.

ART. 2. SANITARY INSPECTION AND CONDUCT

2255. Definitions: Hotel, restaurant; transient guest. A hotel within the meaning of this article is an inn or public lodging-house of more than fifteen bedrooms where transient guests are fed or lodged for pay in this state.

The term "restaurant" as used in this article shall include lunch counters and cafés.

The term "transient guest," within the meaning of this article, shall mean one who puts up for less than one week at such hotel.

1917, c. 66, s. 1.

2256. Rates for rooms to be posted. Every transient hotel shall keep posted in a conspicuous place in the office a list of its charges for rooms, with or without meals, in accordance with the plan or plans on which the hotel is operated, giving the exact transient rate, and shall also keep posted in each room the rate for that room, with or without meals, in accordance with its plan as stated above, giving the transient rate per day and week, and the rate for each person in the room.

1917, c. 66, s. 2.

2257. Fire extinguishers. Every hotel shall provide each floor with one or more fire extinguishers of a type approved by the National Board of Fire Underwriters, which shall be kept in good working order at all times, with plain instructions thereon.

1917, c. 66, s. 3.

2258. Stairways and fire-escapes. All hotels hereafter constructed in this state, over two stories in height and over one hundred feet in length, shall be constructed so that there shall be at least two stairs for the use of guests leading from the ground floor to the uppermost story, and for larger buildings such number as the state insurance commissioner shall designate. Every hotel in

this state over two stories in height shall be provided, without delay, with permanent iron balconies with iron stairs leading from one balcony to the other, above the ground floor, and with stairway or ladder extending to the ground, in case such hotel is over one hundred and fifty feet in length, and in other cases such number as may be directed by the state insurance commissioner or agent: Provided, that where said hotels already built and only three stories in height are, in the opinion of the state insurance commissioner or agent, provided with sufficient inner stairways, so located as to furnish sufficient egress in case of fire, the aforesaid official may waive the requirement for outside iron balconies and stairs. Such balconies and iron stairs shall be constructed at the expense of the owner of said hotel: Provided, that where hotels are already built where fire-escapes are located so as to go through any room, this section shall not apply: Provided, that this article shall not apply to private residences at which lodgers are not received for hire.

1917, c. 66, s. 4.

2259. Directions to fire-escapes. In every hotel having fire-escapes directions for reaching the fire-escapes shall be kept posted at the entrance of stairway, elevator shaft and in each bedroom above the ground floor. From eight o'clock in the evening until six o'clock in the morning the location and direction of the fire-escapes shall be indicated with red lights.

1917, c. 66, s. 5.

2260. Inside courts to be provided with escapes. The owner or proprietor, or person in charge of every hotel now existing or hereafter constructed with an inside court or lightwell inclosed on all sides and with sleeping rooms or lodging apartments, the only windows of which open upon or into such court or lightwell, shall provide a proper escape from such inside court or lightwell through a room or rooms, or otherwise, on a level with the lowest floor to which the lightwell extends.

1917, c. 66, s. 6.

2261. Life-lines at bathing beaches. Every keeper or proprietor of a hotel or boarding-house, and every person having for use a bathing-house upon any beach or shore of the ocean for the accommodation of his guests or of other persons for pay, shall provide and maintain for the safety of such bathers two lines of sound, serviceable, and strong manila or hemp rope, not less than one inch in diameter, securely anchored at some point above high water, at the same distance apart as the line of bathing-houses or space fronting on such beach occupied by them is in width; and from the two points at which such life-lines are so anchored such lines shall be made to extend as far into the surf as bathing is ordinarily safe and free from danger of drowning to persons not expert in swimming; and at such points of safety such lines shall be anchored and buoyed. From the two points of lines so extended, and anchored and buoyed, a third line shall be extended, connecting the two extremities, and buoyed at such points as to be principally above the surface of the water, thereby inclosing a space within such lines and the beach within which bathing is believed to be safe. Every such keeper or proprietor or other person shall cause to be painted and put up, in some prominent place upon the beach near such bathing-houses, the following words: "Bathing beyond the lines is danger-

ous." Such lines so placed, anchored and buoyed, and such notices so put up shall continue and be so maintained by every such keeper, proprietor, or other person during the entire season of bathing. The owner of the bathing-house shall not be subject to the provisions of this section where it is used, occupied, or maintained by a lessee for hire; but such lessee shall be deemed the keeper or proprietor thereof.

1917, c. 66, s. 7.

2262. Water-closets and bath-rooms; sewer connections. In all cities, towns, or villages where a system of waterworks and sewerage is maintained for public use, every hotel therein accessible to water main and sewer main shall be equipped, within six months after February 26, 1917, with suitable water-closets for the accommodation of its guests, which water-closets shall be connected and trapped by proper plumbing with such water and sewerage systems, and there shall be some adequate means of flushing said water-closets with the water in such manner as to prevent sewer gas from arising therefrom. The water-closets and bath-rooms must be sufficiently lighted to permit the reading of ten point roman type eighteen inches from the normal eye. The wash-bowls in the main wash-room of such hotel must be connected and trapped and equipped in similar manner, both as to method and time; all such equipment to be paid for by the owner.

1917, c. 66, s. 8.

2263. Privies. In all towns and villages not having a system of waterworks and sewerage, every hotel not provided with waterworks and wash-rooms as in the preceding section provided shall have properly constructed privies as approved by the state board of health, the same to be kept in sanitary condition at all times.

1917, c. 66, s. 9.

2264. Cisterns and tanks to be screened. The proprietor of every hotel shall keep all cisterns, tanks and other receptacles containing standing water screened or otherwise so covered as to prevent the entrance of flies, mosquitoes, and other disease-carrying insects. The term "standing water" as used in this article shall mean water that remains for ten days or more in a cistern, tank, or other receptacle.

1917, c. 66, s. 10.

2265. Water not from public water supply to be analyzed. A sample of water used in every hotel and restaurant, except in cases where the water is derived from some public water supply, shall be sent by the proprietor to the state laboratory of hygiene for analysis twice each year, with a certificate that it is the water used in such hotel or restaurant, and if the sample is found by said laboratory to be unfit for the use that is made of the water in the hotel or restaurant, the further use of such water shall be discontinued until permission is granted by the state board of health to resume the use of such water.

1917, c. 66, s. 11.

2266. Prevention of flies; screens, etc. The proprietor or keeper of every hotel or restaurant shall keep screened the doors, windows and all openings of the

kitchen and dining-room with suitable mesh-wire gauze from the first of April to the first of December. Every hotel must have all bed-room windows screened or else provide each bed with a mosquito bar for the use of its patrons for protection against flies, mosquitoes, and other insects, and it shall be the duty of the proprietor or keeper of every hotel and restaurant to use such other means, as fly paper, fly traps, etc., as may be necessary to keep their restaurant, kitchen, and dining-rooms reasonably free from flies.

1917, c. 66, s. 12.

2267. Bed-rooms; size and arrangement of beds. In every sleeping-room the minimum floor area shall be sixty square feet per bed, and under no circumstances shall there be provided less than five hundred cubic feet of air space per bed. There shall always be space in each room and the arrangement of each room shall be such that there may be a space of two feet between any beds in the room. All beds shall be so arranged that the air shall circulate freely under each. In no hotel shall beds or bunks in the same room or apartment be placed one above another: Provided, this section shall not apply in cases of emergency.

1917, c. 66, s. 13.

2268. Windows and blinds for rooms. Each room in every hotel hereafter constructed shall be well lighted, with outside window space not less than one-eighth the floor space. Each window in each hotel now existing or hereafter constructed shall be provided with either blinds having hinges and shutters or slats freely movable and in good working order, or with a movable shade which effectively excludes the light when drawn.

1917, c. 66, s. 14.

2269. Sheets and bed linen. All hotels shall hereafter provide each bed, bunk, cot, or other sleeping place for the use of guests with pillow-slips and under and top sheets of sufficient width to cover the mattress thereof, and to be at least ninety inches long. All pillow-slips and sheets after being used by one guest must be washed and ironed before being used by another guest, a clean set being furnished each succeeding guest.

1917, c. 66, s. 15.

2270. Vermin. All beds, bedclothing, mattresses, and pillows shall always be kept clean and free from vermin.

1917, c. 66, s. 16.

2271. Diseased guests; disinfection. Every room after being occupied by any one known or suspected to be suffering from tuberculosis, diphtheria, or any contagious disease must be thoroughly disinfected as prescribed by the state board of health before further occupancy; and every room after being occupied by any one known or suspected to be suffering from measles or whooping cough must be thoroughly aired for twenty-four hours before subsequent occupancy.

1917, c. 66, s. 17.

2272. Towels; roller towels forbidden. All hotels shall furnish each guest with a clean towel; and the use of the roller or other towels used in common is hereby prohibited in all hotels and restaurants.

1917, c. 66, s. 18.

2273. Refrigerators, cold storage rooms, kitchen. The refrigerator, ice boxes, and cold storage rooms of all hotels or restaurants must be kept free from foul and unpleasant odors, mold, and slime. The kitchen must be well lighted and ventilated, the floor clean, and the side walls and ceilings free from cobwebs and accumulated dirt.

1917, c. 66, s. 19.

2274. Tableware and kitchen utensils. All dishes, tableware, and kitchen utensils must be thoroughly washed and rinsed with clean water after using; food served to customers when part of same has been used must not again be served to other customers.

1917, c. 66, s. 20.

2275. Garbage. All garbage must be kept covered and protected from flies, in barrels or galvanized iron cans, and removed at least twice a week.

1917, c. 66, s. 21.

2276. Premises, walls, and fixtures. Every lodging-house and every part thereof shall at all times be kept free from filth and rubbish in or on the premises belonging to or connected with the same. All water-closets, wash-basins, baths, windows, fixtures, fittings, and painted surface shall at all times be kept clean and in good repair. The floors, walls, and ceilings of all rooms, passages, and stairways must at all times be clean and in good repair.

1917, c. 66, s. 22.

2277. Annual inspection and certificate by state board of health. For the purpose of carrying out the provisions of this article the state board of health is authorized and required to inspect, through its officers or agents, without cost to the hotels, all hotels and restaurants in the state once a year. If upon inspection of any hotel or restaurant it shall be found that this article has been fully complied with, the secretary of the state board of health shall issue a certificate to that effect to the person operating the same, and such certificate shall be kept posted in plain view in some conspicuous place in said hotel or restaurant.

1917, c. 66, s. 23.

2278. Special inspections by state board authorized. No hotel or restaurant shall be inspected oftener than once a year, unless there is a change of proprietors, or unless it shall appear to the state board of health from the inspection made that additional inspections are necessary, or upon a verified complaint signed by three or more patrons, setting forth facts showing that such hotel is in an unsanitary condition or that fire-escapes and appliances are not kept and maintained in accordance with the provisions of law. Upon receipt of such complaint, the state board of health shall make, or cause to be made, an inspection or examination of the matters complained of, and if upon inspection such complaint is found to be justifiable, the actual cost of inspection shall be charged and collected from the proprietor of the hotel. In case the complaint is found to be without reasonable grounds, the actual cost for such inspection shall be chargeable against and collected from the person or persons making the complaint.

1917, c. 66, s. 24.

2279. Inspection reports to be filed. The official representative or agent of the state board of health shall after inspection make a report of the condition of the hotel inspected upon blanks to be provided by the state board of health, showing in detail the condition of the hotel with reference to compliance with this article, which report shall be filed in the office of the board.

1917, c. 66, s. 25.

2280. Entry for inspection authorized. The inspectors, officers, or agents of the state board of health are hereby empowered and authorized to enter any hotel at all reasonable hours to make such inspection; and it is hereby made the duty of every person in the management or control of such hotel to afford free access to every part of the hotel, and render all aid and assistance necessary to enable the inspector to make a full, thorough, and complete examination thereof; but no inspector shall violate the privacy of any guest without his or her consent.

1917, c. 66, s. 26.

2281. Inspector to notify proprietor of violation of article. It shall be the duty of the inspector, upon ascertaining, by inspection or otherwise, that any hotel is being carried on contrary to any of the provisions of this article, to notify the manager, or proprietor, in what respect it fails to comply with the law, requiring such persons within a reasonable time to do or to cause to be done the things necessary to make it comply with the law, whereupon such proprietor or manager shall forthwith comply with such requirements.

1917, c. 66, s. 27.

2282. Violation of article or obstructing enforcement a misdemeanor. Any owner or manager, agent or person in charge of a hotel, café, or restaurant, or any other person who shall willfully obstruct, hinder, or interfere with any inspector in the proper discharge of his duty, or who shall willfully fail or neglect to comply with any of the provisions of this article after notice from the inspector or any other person in authority, shall be guilty of a misdemeanor, and, upon conviction thereof, be fined not less than ten dollars nor more than fifty dollars for each offense, and each day that he shall fail to comply shall be a separate and distinct offense.

1907, c. 66, s. 28.

2283. Inspector to swear out warrants. It shall be the duty of the inspector, in case he shall have knowledge of any violation of this article, to swear out a warrant against the person offending.

1917, c. 66, s. 29.

CHAPTER 43

INSANE PERSONS AND INCOMPETENTS

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ART. 1. INEBRIATES

2284. Inebriates defined. Any person who habitually, whether continuously or periodically, indulges in the use of intoxicating liquors, narcotics or drugs to such an extent as to stupefy his mind and to render him incompetent to transact ordinary business with safety to his estate, or who renders himself, by reason of the use of intoxicating liquors, narcotics or drugs, dangerous to person or property, or who, by the frequent use of liquor, narcotics or drugs, renders himself cruel and intolerable to his family, or fails from such cause to provide his family with reasonable necessities of life, shall be deemed an inebriate: Provided, the habit of so indulging in such use is at the time of inquisition of at least one year's standing.

Rev., s. 1892; Code, s. 1671; 1891, c. 15, s. 7; 1903, c. 543; 1879, c. 329.

For rules for admission into hospitals, see Hospitals for Insane.

See *In re Anderson*, 132-246.

ART. 2. GUARDIANSHIP AND MANAGEMENT OF ESTATES OF INCOMPETENTS

2285. Inquisition of lunacy; appointment of guardian. Any person, in behalf of one who is deemed an idiot, inebriate, or lunatic, or incompetent from want

of understanding to manage his own affairs by reason of the excessive use of intoxicating drinks, or other cause, may file a petition before the clerk of the superior court of the county where such supposed idiot, inebriate or lunatic resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the supposed idiot, inebriate or lunatic, to the sheriff of the county, commanding him to summon a jury of twelve men to inquire into the state of such supposed idiot, inebriate or lunatic. Upon the return of the sheriff summoning said jury, the clerk of the superior court shall swear and organize said jury and shall preside over said hearing, and the jury shall make returns of their proceedings under their hand to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, lunatic, or incompetent person by inquisition of a jury, as in cases of orphans.

Either the applicant or the supposed idiot, inebriate, lunatic, or incompetent person may appeal from the finding of said jury to the next term of the superior court, when the matters at issue shall be regularly tried *de novo* before a jury, and pending such appeal, the clerk of the superior court shall not appoint a guardian for the said supposed idiot, inebriate, lunatic, or incompetent person, but the resident judge of the district, or the judge presiding in the district, may in his discretion appoint a temporary receiver for the alleged incompetent pending the appeal. The trial of said appeal in the superior court shall have precedence over all other causes.

The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, lunatic or incompetent person by inquisition of a jury, as in cases of orphans.

Rev., s. 1890; Code, s. 1670; C. C. P., s. 473; 1919, c. 54.

See section 2155. While not required by section that idiot should be brought before clerk or jury in person, it is prudent to have such idiot personally before court, or at least to give such notice as will give information of proposed action in ample time for him to be present: *In re Propst*, 144-562; *Dowell v. Jacks*, 53-389.

Where jury finds defendant to be of unsound mind and incompetent to manage his own affairs, but not an idiot or lunatic, court should appoint guardian: *In re Anderson*, 132-243.

Section embraces four classes of persons for whom guardians may be appointed, namely, idiots, lunatics, inebriates and those who are incompetent from want of understanding to manage their own affairs by reason of excessive use of intoxicating liquors or other cause: *In re Anderson*, 132-243.

Words "idiot," "lunatic," "inebriate," "incompetent to manage affairs" interpreted: *Ibid.*; *In re Denny*, 150-423.

Appointment of guardian for lunatic valid until proceedings and orders under inquisition reversed: *Sims v. Sims*, 121-297. Report of jury in inquisition of lunacy need not be formally confirmed by clerk of court, section only requiring it to be filed and recorded: *Sims v. Sims*, 121-297.

Inquisition of lunacy not conclusive against person dealing with supposed lunatic: *Parker v. Davis*, 53-460—but he may show that at time of contract supposed lunatic had sufficient capacity to make same, *Ibid.*

Inquisition which merely states that person is "of unsound mind" does not show, even *prima facie*, that he is an idiot: *Christmas v. Mitchell*, 38-535. Ancient presumption of law that one born deaf and dumb is an idiot does not now exist: *Ibid.* While it is proper that inquisition should distinctly find party to be lunatic or idiot, sufficient if equivalent description be used, as that "he is of insane mind": *Armstrong v. Short*, 8-11. Moral debasement not necessarily and of itself insanity: *Mayo v. Jones*, 78-402. Insanity cannot be proven by general reputation: *State v. Coley*, 114-879. Feebleness of health, with occasional fits, is no

evidence of insanity: *Chamblee v. Broughton*, 120-170. General power of court over person and property of lunatic explained: *Smith v. Witter*, 174-616, citing *Blake v. Respass*, 77-195.

Case under former enactment somewhat similar to above: *Bethea v. McLennon*, 23-523. Section referred to in *Price v. Price*, 133-510; *Smith v. Smith*, 106-502.

2286. Guardian appointed on certificate from hospital for insane. If any person is confined in any hospital for insane persons, in any state, territorial or governmental asylum or hospital, in this state or any other state or territory, or in the District of Columbia, the certificate of the superintendent of such hospital declaring such person to be of insane mind and memory, which certificate shall be sworn to and subscribed before the clerk of the superior court or any notary public, or the clerk of any court of record of the county in which such hospital is situated, and certified under the seal of court, shall be sufficient evidence to authorize the clerk to appoint a guardian for such idiot, lunatic or insane person.

Rev., ss. 1891, 4609; Code, s. 1673; 1860-1, c. 22; 1907, c. 232.

Section referred to in *Somers v. Comrs.*, 123-584; *In re Hybart*, 119-365.

2287. Restoration to sanity or sobriety; effect; how determined. When any insane person or inebriate becomes of sound mind and memory, or becomes competent to manage his property, he is authorized to manage, sell and control all his property in as full and ample a manner as he could do before he became insane or inebriate, and a petition in behalf of such person may be filed before the clerk of the superior court of the county of his residence, setting forth the facts, duly verified by the oath of the petitioner, whereupon the clerk shall issue an order, upon notice to the person alleged to be no longer insane or inebriate, to the sheriff of the county, commanding him to summon a jury of six freeholders to inquire into the sanity of the alleged sane person, formerly a lunatic, or the sobriety of such alleged restored person, formerly an inebriate. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same, and if the jury find that the person whose mental or physical condition inquired of is sane and of sound mind and memory, or is no longer an inebriate, as the case may be, the said person is authorized to manage his affairs, make contracts and sell his property, both real and personal, as if he had never been insane or inebriate.

Rev., s. 1893; Code, s. 1672; 1901, c. 191; 1903, c. 80; 1879, c. 324, s. 4.

When insanity once shown to exist, there is presumption that it continues; open to be rebutted by testimony showing restoration of mental soundness: *Beard v. R. R.*, 143-136. Appointment of guardian for lunatic continues until declared sane: *Sims v. Sims*, 121-297.

2288. Legal rights restored upon certificate of sanity by superintendent of hospital. Any person who has been declared of unsound mind and memory under the section 2286, and for whom a guardian has been appointed, may be fully restored to his rights to manage his or her property by a certificate from the superintendent of the hospital where such person of unsound mind and memory has been confined stating that such insane person has been restored to sound mind and memory. This certificate shall be sworn to and subscribed before the clerk of the superior court or notary public for the county in which the hospital wherein such person has been confined is located, and certified under the seal of said court to the clerk of the superior court of the county wherein said person has his legal residence immediately before being declared of unsound mind and

memory. The clerk of such resident county shall record the certificate and immediately issue a notice to the guardian of such person, requiring him to file his final account within sixty days from the date of service of the notice. From the date of docketing the record of such certificate the person formerly of unsound mind and memory shall be restored to all his legal rights.

1909, c. 176.

2289. Estates without guardian managed by clerk. When any person is declared to be of nonsane mind or inebriate, and no suitable person will act as his guardian, the clerk shall secure the estate of such person according to the law relating to orphans whose guardians have been removed.

Rev., s. 1894; Code, s. 1676; R. C., c. 57, s. 6; 1846, c. 43, s. 1.

See section 2199. Under section, appointment of receiver for insane person's estate should be made only on motion of solicitor, after wife and one or more adult children, if there are such, or some near relative or friend have been brought before judge at chambers or in term: In re Hybart, 119-359.

2290. Allowance to abandoned insane wife. When any insane wife is abandoned by her husband, she may, by her guardian, or next friend, in case there be no guardian, apply to the clerk of the superior court for support and maintenance, which the clerk may decree as in cases of alimony, out of any property or estate of her husband.

Rev., s. 1895; Code, s. 1686; 1858-9, c. 52, s. 1.

Solvent insane not entitled to free admission to asylum: *Hospital v. Fountain*, 128-23.

ART. 3. SALES OF ESTATES

2291. Clerk may order sale or renting. When it appears to any clerk of the superior court by report of the guardian of any idiot, inebriate or lunatic, that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the county, the clerk may make an order for the sale or renting of his personal or real estate, or any part thereof, in such manner and upon such terms as he may deem advisable. Such order shall specify particularly the property thus to be disposed of, with the terms of renting or sale, and shall be entered at length on the records of the court; and all sales and rentings made under this section shall be valid to convey the interest and estate directed to be sold, and the title thereof shall be conveyed by such person as the clerk may appoint on confirming the sale; or the clerk may direct the guardian to file his petition for such purpose.

Rev., s. 1896; Code, s. 1674; R. C., c. 57, s. 4; 1801, c. 589.

This section applies only to the sale of vested interests: *Smith v. Witter*, 174-616. For sale of contingent interest the jurisdiction is in superior court at term under section 1744: *Ibid.* See, as to sales of ward's lands by general guardian, sections 2180, 2182.

Section merely referred to in *Adams v. Thomas*, 81-297; *Howard v. Thompson*, 30-369.

2292. Purposes for which estate sold; parties; disposition of proceeds. When it appears to the clerk, upon the petition of the guardian of any idiot, inebriate or lunatic, that a sale of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance, or when the clerk is satisfied that the interest of the idiot, inebriate or lunatic would be materially and essentially promoted by the sale of any part of such estate; or when any part of his real estate is required for public

purposes, the clerk may order a sale thereof to be made by such person, in such way and on such terms as he shall adjudge. The clerk, if it be deemed proper, may direct to be made parties to such petition the next of kin or presumptive heirs of such nonsane person or inebriate. And if on the hearing the clerk orders such sale, the same shall be made and the proceeds applied and secured, and shall descend and be distributed in like manner as is provided for the sale of infants' estates decreed in like cases to be sold on application of their guardians, as directed in the chapter entitled Guardians.

Rev., s. 1897; Code, s. 1675; R. C., c. 57, s. 5.

This does not apply to sale of contingent interest; for such interests the jurisdiction is in superior court at term under section 1744: *Smith v. Witter*, 174-616.

See, as to sales of wards' estates generally, sections 2180, 2182.

Subject to reasonable maintenance of lunatic and his minor children, residue of his property is liable to pay his debts anterior to lunacy: *Adams v. Thomas*, 83-521. Property of lunatic cannot be applied to debts unless sufficient part thereof has been retained for support of wife and infant children: *McLean v. Breese*, 109-564; *Adams v. Thomas*, 81-296; *Ex parte Latham*, 41-408; *In re Latham*, 39-231.

Court of probate (now clerk superior court) has no power to provide for payment of debts of lunatic contracted prior to lunacy: *Smith v. Pipkin*, 79-569; *Blake v. Respass*, 77-193—but such jurisdiction vested in superior court, *Blake v. Respass*.

Superior courts have concurrent jurisdiction with clerk over lunatics and their estates: *Smith v. Pipkin*, 79-569.

Where land of lunatic sold on petition of guardian, proceeds are under direction of court, and no creditor can claim priority: *Ex parte Latham*, 41-406—no creditor can seize same under execution, teste of which subsequent to date of decree: *Latham v. Wiswall*, 37-294—for such decree is one substantially in rem, and subjects property to control of court, *Ibid*.

Jurisdiction in lunacy strictly territorial, and court in this state can neither charge land of lunatic in another state nor its proceeds in hands of heir here for his support: *Allison v. Campbell*, 21-152.

2293. Sale of land of wife of lunatic upon petition. Where the wife of a lunatic owns real estate in her own right the sale of which will promote her interest, a sale of the same may be made upon the order of the clerk of the superior court of the county where the land lies, upon the petition of the wife of said lunatic and the guardian of the lunatic husband, and the proceeds of said sale shall be paid to the wife of said lunatic.

Rev., s. 1898; Code, s. 1687; 1881, c. 361.

The wife has her election to proceed under this section or make the conveyance without the joinder of husband under section 2529: *Lancaster v. Lancaster*, 178-22.

2294. Wife of insane person entitled to special proceeding for sale of his property. Every woman whose husband is a lunatic or insane and is confined in an asylum in this state, and who was living with her husband at the time he was committed to such asylum, if she be in needy circumstances, shall have the right to bring a special proceeding before the clerk of the superior court to sell the property of her insane husband, or so much thereof as is deemed expedient, and have the proceeds applied to her support: Provided, that said proceeding shall be approved by the judge of the superior court holding the courts of the judicial district where the said property is situated. When the deed of the commissioner appointed by the court, conveying the lands belonging to the insane husband is executed, probated, and registered, it conveys a good and indefeasible title to the purchaser.

1911, c. 142, ss. 1, 2.

ART. 4. SURPLUS INCOME AND ADVANCEMENTS

2295. Income of insane widowed mother used for children's support. When a father dies leaving him surviving minor children and a widow who is the mother of such children, but leaving no sufficient estate for the support and maintenance and education of such minor children, and the mother is or becomes insane and is so declared according to law, and such insanity continues for twelve months thereafter, and she has an estate which is placed in the hands of a guardian or other person, as provided by law, the estate of such insane mother shall in such cases as are provided for in the succeeding section be made liable for the support, maintenance and education of the class of persons mentioned in said section to the same extent, in the same manner and under the same rules and regulations as applies to estates of fathers thereunder.

Rev., s. 1899; 1905, c. 546.

2296. Advancement of surplus income to next of kin. When any nonsane person, of full age, and not having made a valid will, has children or grandchildren (such grandchildren being the issue of a deceased child), and is possessed of an estate, real or personal, whose annual income is more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessaries and suitable comforts of life, it is lawful for the clerk of the superior court for the county in which such person has his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person.

Rev., s. 1900; Code, s. 1677; R. C., c. 57, s. 9.

2297. For what purpose and to whom advanced. Such advancements shall be ordered only for the better promotion in life of such as are of age, or married, and for the maintenance, support and education of such as are under the age of twenty-one years and unmarried; and in all cases the sums ordered shall be paid to such persons as, in the opinion of the clerk, will most effectually execute the purpose of the advancement.

Rev., s. 1901; Code, s. 1678; R. C., c. 57, s. 10.

2298. Distributees to be parties to proceeding for advancement. In every application for such advancements, the guardian of the nonsane person and all such other persons shall be parties as would at that time be entitled to a distributive share of his estate if he were then dead.

Rev., s. 1902; Code, s. 1679; R. C., c. 57, s. 11.

2299. Advancements to be equal; accounted for on death. The clerk, in ordering such advancements, shall, as far as practicable, so order the same as that, on the death of the nonsane person, his estate shall be distributed among his distributees in the same equal manner as if the advancements had been made by the person himself; and on his death every sum advanced to a child or grandchild shall be an advancement, and shall bear interest from the time it may be received.

Rev., s. 1903; Code, s. 1680; R. C., c. 57, s. 12.

2300. **Clerk may select those to advance.** When the surplus aforesaid is not sufficient to make distribution among all the parties, the clerk may select and decree advancements to such of them as may most need the same, and may apportion the sum decreed in such amounts as are expedient and proper.

Rev., s. 1904; Code, s. 1681; R. C., c. 57, s. 13.

2301. **Advancements to be secured against waste.** It is the duty of the clerk to withhold advancements from such persons as will probably waste them, or so to secure the same, when they may have families, that it may be applied to their support and comfort; but any sum so advanced shall be regarded as an advancement to such persons.

Rev., s. 1905; Code, s. 1682; R. C., c. 57, s. 14.

2302. **Appeal; removal to superior court.** Any person made a party may appeal from any order of the clerk; or may, when the pleadings are finished, require that all further proceedings shall be had in the superior court.

Rev., s. 1906; Code, s. 1683; R. C., c. 57, s. 15.

2303. **Advancements only when insanity permanent.** No such application shall be allowed under this chapter but in cases of such permanent and continued insanity as that the nonsane person shall be judged by the clerk to be incapable, notwithstanding any lucid intervals, to make advancements with prudence and discretion.

Rev., s. 1907; Code, s. 1684; R. C., c. 57, s. 16.

2304. **Decrees suspended upon restoration of sanity.** Upon such insane person being restored to sanity, every order made for advancements shall cease to be further executed, and his estate shall be discharged of the same.

Rev., s. 1908; Code, s. 1685; R. C., c. 57, s. 17.

CHAPTER 44

INTEREST

2305. Legal rate is six per cent.

2306. Penalty for usury; corporate bonds may be sold below par.

2307. Time from which interest runs.

2308. Obligations due guardians to bear compound interest.

2309. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal.

2310. Judgment by default final, clerk ascertainment.

2311. Interest from verdict to judgment added as costs.

2305. Legal rate is six per cent. The legal rate of interest shall be six per cent per annum for such time as interest may accrue, and no more.

Rev., s. 1950; Code, s. 3385; 1895, c. 69; 1876-7, c. 91.

“Interest” defined: *Burwell v. Burgwyn*, 100-392; *Bledsoe v. Nixon*, 69-91. Legal rate of interest is six per cent: *Topping v. Windley*, 99-10—and no more can be allowed, *Ibid*.

State not bound to pay interest unless it specially contracts to do so: *Attorney-General v. Navigation Co.*, 37-444.

How interest counted in case of partial payments stated in *Reade v. Street*, 122-301; *Bunn v. Moore*, 2-279.

Where contract made in one country to be performed in another, rate of interest will be according to law of latter: *Roberts v. McNeely*, 52-506—but where money loaned in Virginia on real estate in this state contract is governed by rate of interest in this state, *Faison v. Grandy*, 128-438—however, it is held that parties may stipulate otherwise, *Arrington v. Gee*, 27-590. Where contract for loan of money made in another state, it will bear rate of interest of such state, though note for amount loaned be executed in this state: *Davis v. Coleman*, 29-424.

Where interest payable at specific time, action lies for failure to pay, before maturity of obligation: *Scott v. Fisher*, 110-311; *Parker v. Horton*, 176-143.

On suit to enforce option, six per cent is legal rate of interest properly allowed from time obligation matured, in absence of express stipulation in instrument for lower rate: *Alston v. Connell*, 145-1. Under act authorizing collection of delinquent taxes, interest and penalties, no rate of interest being fixed therein, only six per cent can be recovered: *Wilmington v. Stolter*, 122-395; *Wilmington v. Cronly*, 122-388.

For cases under section prior to amendment of same, see *Trimble v. Hunter*, 104-138; *Hughes v. Boone*, 102-137; *Burwell v. Burgwyn*, 100-392; *Wilson v. Lineberger*, 88-427.

Section merely referred to in *Fisher v. Brown*, 135-198; *Faison v. Grandy*, 126-829.

2306. Penalty for usury; corporate bonds may be sold below par. The taking, receiving, reserving or charging a greater rate of interest than six per centum per annum, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid may recover back twice the amount of interest paid, in an action in the nature of action for debt. In any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it is lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest. Nothing contained in the foregoing section, however, shall be

held or construed to prohibit private corporations from paying a commission on or for the sale of their coupon bonds, nor from selling such bonds for less than the par value thereof. This section shall not apply to contracts executed prior to February twenty-first, one thousand eight hundred and ninety-five.

Rev., s. 1951; Code, s. 3836; 1895, c. 69; 1903, c. 154; 1876-7, c. 91.

For special usury statute for New Hanover and Guilford counties, see 1905, c. 819.

For statute of limitations, see section 442. For damages against officers for money unlawfully detained, see section 357.

History of usury laws discussed in *Tayloe v. Parker*, 137-418; *Bank v. Loven*, 172-666.

GENERAL EFFECT OF STATUTE. Interest is a creature of statute, and usury has been unlawful from the days of Moses: *Hughes v. Boone*, 102-137. Section prohibits any one, without exception, from exacting more than six per cent for the loan of money: *Meroney v. Loan Assn.*, 116-882. Purpose and effect of section is to make void, ipso facto, all agreements for usurious interest: *Ward v. Sugg*, 113-489; *Bank v. Lineberger*, 83-458; *Erwin v. Morris*, 137-48; *Banking Co. v. Tate*, 122-317; *Glisson v. Newton*, 2-336. Custom of merchants will not be permitted to modify usury laws: *Gore v. Lewis*, 109-539.

A note tainted with usury retains the taint in the hands of a subsequent holder. The forfeiture of interest is the decree of the law: *Faison v. Grandy*, 126-827, and cases cited—therefore a note embracing usurious stipulation is void as against maker, in hands of purchaser before maturity for value and without notice, to extent to which contract usurious, *Ward v. Sugg*, 113-489, overruling *Coor v. Spicer*, 65-401; *Collier v. Nevill*, 14-30.

Where mortgage executed to secure usurious note, usury only affects interest and does not impair validity of mortgage: *Spivey v. Grant*, 96-214.

Provision in charter allowing corporation to lend money at usurious rate of interest does not confer power upon it to do so: *Bank v. Manufacturing Co.*, 96-298—but provision to borrow money at such rate not liable to any objection, *Ibid*.

Contract not affected by usurious element if it is incorporated by mistake: *Webb v. Bishop*, 101-99.

Where usurious interest is reduced to and included in judgment, judgment cannot be impeached as to that part, but is valid as to whole: *Burwell v. Burgwyn*, 105-498.

The statute applies to banks, and in case of loans made to an officer or stockholder: *MacRackan v. Bank*, 164-24. Pawnbrokers are not exempt, see section 7006.

Section does not apply to contracts antedating its ratification: *Grant v. Morris*, 81-150; *Roberts v. Life Ins. Co.*, 118-429—and right of plaintiff to recover on contract made prior to that time governed by section 3836 of the Code of 1883, *Ibid*.

For cases prior to amendment of section, see *Elliott v. Sugg*, 115-236; *Moore v. Beaman*, 111-328; *Rogers v. Bank*, 108-574; *Cook v. Patterson*, 103-127; *Hughes v. Boone*, 102-137; *Webb v. Bishop*, 101-99; *Moore v. Cameron*, 93-51; *Dail v. Harper*, 83-4; *Bank v. Lutterloh*, 81-143; *Kidder v. McIlhenny*, 81-123; *Comrs. v. R. R.*, 77-289; *Latham v. Bldg. and Loan Assn.*, 77-145; *Coble v. Shoffner*, 75-42; *Simonton v. Lanier*, 71-498; *Pond v. Horne*, 65-84.

WHEN CONTRACT USURIOUS. What constitutes usury is a question of law to be determined by court when facts not in dispute: *Grant v. Morris*, 81-150. Nature and terms of contract determine its character and purpose, and if it be usurious in itself, it must be taken to have been so intended, and parties cannot be heard to contrary: *Burwell v. Burgwyn*, 100-389.

To constitute a usurious transaction, four requisites must appear: (1) There must be a loan; (2) an understanding that the money is to be returned; (3) a greater rate of interest than the law allows is to be paid or agreed to be paid; (4) this must be done intentionally: *Bank v. Wysong & Miles Co.*, 177-380; *Loan Co. v. Yokley*, 174-573; *Monk v. Goldstein*, 172-516; *Doster v. English*, 152-341; *Bennett v. Best*, 142-168; *Yarborough v. Hughes*, 139-199; *Miller v. Ins. Co.*, 118-612.

Usury distinguished from a profit-sharing investment: *Riley v. Sears*, 154-509.

Agreement that person was to have one and one-half per cent per month (or 18 per cent per annum) upon overdrawn sums is usurious as to excess for charge for overdrafts above legal rate of interest: *Burwell v. Burgwyn*, 100-389. Where a bank makes a loan at legal rate, and requires the borrower to keep a certain per cent of the loan on deposit, it is usury: *Bank v. Wysong & Miles Co.*, 177-380, 177-284. Where person takes negotiable security and advances

thereon, after deducting interest in advance up to date of maturity, a less sum than value, yet holding person advanced for full amount, the loan is usurious: *Ballinger v. Edwards*, 39-449; but see *Bennett v. Best*, 142-168.

Stipulation in note or mortgage for payment by mortgagor, or out of proceeds of sale, of attorney's fee in addition to principal and interest of note, is evidence of usurious nature of transaction: *Williams v. Rich*, 117-235; *Briseo v. Norris*, 112-671; *Tinsley v. Hoskins*, 111-340. Stipulation in mortgage that mortgagee should retain from proceeds of sale costs and charges, including commissions of five per cent for making sale in addition to principal and interest due on debt, is not usurious in absence of proof of usurious intent, as provision is not part of consideration of loan: *Howell v. Pool*, 92-450. See *Turner v. Boger*, 126-300.

Usury in contract by insurance company to lend money secured by real estate mortgage and by reassignment of endowment policy equal to amount of loan: *Miller v. Ins. Co.*, 118-612; *Carter v. Ins. Co.*, 122-338. Agreement entered into with full knowledge and with intent to pay and receive greater rate of interest than allowed by law, whereby it is stipulated that lender shall receive commission as consideration therefor, in addition to legal interest, is usurious: *Arrington v. Goodrich*, 95-462.

Mistake in construction of law, if it results in taking more than legal rate of interest, will render contract usurious: *Collier v. Nevill*, 14-30—but error in fact by which more than legal rate is reserved will not vitiate, *Ibid.* Wherever debtor by terms of contract can avoid payment of larger by payment of smaller sum at earlier day, contract not usurious: *Moore v. Hylton*, 16-429—for, to constitute usury, obligation to pay more than legal interest must be absolute, *Ibid.* Where payee of a note receives payment in full before maturity, only on condition that interest is paid to maturity, it is not usury: *Smithwick v. Whitley*, 152-366.

Usury consists in unlawful gain, beyond rate of six per cent taken or reserved by lender, and not in actual or contingent loss sustained by borrower: *Ehringhaus v. Ford*, 25-522—and the proper subject of inquiry is what borrower is to pay for forbearance, *Ibid.* Presumed that person taking bond embracing usurious interest did it knowingly and therefore corruptly: *Dawson v. Taylor*, 28-225. Acceptance of any consideration, as here notes on other parties in payment of usurious interest, is in violation of section and will subject payee to penalty: *Pritchard v. Meekins*, 98-244; *Cavaness v. Troy*, 32-315.

If security, founded upon antecedent lawful consideration, is tainted with usury, original demand will be revived and may be enforced: *Rountree v. Brinson*, 98-107. See, also, *Cobb v. Morgan*, 83-211.

Mere entry on account and subsequent presentation of usurious claim is not "charging" within the meaning of section: *Grant v. Morris*, 81-150. Transfer of money by debtor to creditor under contract for usurious interest cannot be treated by courts as payment on principal debt, when it was not so intended by parties at time: *Cobb v. Morgan*, 83-211.

Every attempt by bank to put upon borrower bank bills not its own and below par at that time and place is usurious, unless bank by contract of loan engage to make notes as good as cash: *Bank of State v. Ford*, 27-692.

Pure contract of indemnity against doubtful claim is not within section: *Dowell v. Vannoy*, 14-43.

"Time" price charge of ten per cent on cash price for supplies furnished under agricultural lien, being usual rate of advance, is not usurious: *Churchill v. Turnage*, 122-426.

To render person liable to penalty for usury it is not necessary to show that principal money has been paid: *Seawell v. Shomberger*, 6-200—for offense complete when anything received for forbearance over and above rate of six per cent per year, *Ibid.*

Agreement to pay interest on note "at rate of six per cent per annum, to be compounded annually" renders contract usurious: *Cox v. Brookshire*, 76-314. But interest upon interest due at a specified time and unpaid is not usury: *Crowell v. Jones*, 167-386; *Scott v. Fisher*, 110-311, and cases cited. Not usury for indorsee of note to take new note from maker at end of six months, payable immediately, including accrued interest: *Holland v. Mosteller*, 51-582. Taking interest by a bank upon discounting negotiable security, though payable directly to the bank, is not usurious: *State Bank v. Hunter*, 12-100.

The owner of a note may sell it for any price agreed upon, but if the purchaser requires the owner's indorsement as a guaranty of payment, it is in effect a loan and the usury law would apply: *Sedbury v. Duffy*, 158-431; *Bynum v. Rogers*, 49-399.

Where charter of corporation allowed it to borrow money upon such terms as directors might determine, and to issue bonds or other evidences of indebtedness, it may sell bonds below face value, and the loan is not usurious: *Bank v. Mfg. Co.*, 96-298.

Provision in contract for payment of penalty for failure of borrower to ship certain cotton as agreed will not be adjudged usurious upon the face of the contract, but only upon proof aliunde of intent to make penalty a device for securing more than legal rate of interest: *Elliott v. Sugg*, 115-236.

Contract payable in another state to avoid usury law is usurious: *Meroney v. Loan Assn.*, 112-842.

BUILDING AND LOAN ASSOCIATIONS NOT EXEMPT. State usury laws apply to loans by foreign building and loan associations at home office: *Rowland v. Building Assn.*, 115-825; *Meroney v. Loan Assn.*, 116-882; *Dickerson v. Bldg. Assn.*, 89-37. In absence of special legislation, corporations are affected by usury law to same extent as natural persons: *Comrs. v. R. R.*, 77-289. Inasmuch as general law fixes rate of interest at six per cent per annum, no special act of legislature can be allowed to alter or change general law in this respect: *Rowland v. Loan Assn.*, 116-877. Building and loan associations calling borrower "a partner" or substituting "redeeming" for "lending," or "premium" for "bonus" for an amount they profess to have advanced and yet withhold, or "dues" for "interest," or any like subterfuge, will not avail to avoid usury laws: *Mills v. B. and L. Assn.*, 75-292; *Hallowell v. B. and L. Assn.*, 120-286. Transaction between quasi-building and loan association and its borrowing stockholder is simply a loan, and is usurious where he is liable under certain circumstances to pay more than amount loaned and legal interest: *Meroney v. Loan Assn.*, 116-882.

In accounting in action to foreclose mortgage given to secure loan by building and loan association, borrower should be charged with principal of loan, with legal interest, and credited with payments made on account of principal, interest, fines and penalties: *Rowland v. Loan Assn.*, 118-173—and be charged his pro rata part of expense account of association, *Williams v. Maxwell*, 123-586.

Where usury exacted and taken, all interest is thereby forfeited, and debtor becomes only liable for the principal: *Cheek v. B. and L. Assn.*, 126-242; *Smith v. B. and L. Assn.*, 119-249. Borrowing member of building and loan association who has paid usurious interest can recover twice the amount of usurious interest so paid: *Cheek v. B. and L. Assn.*, 126-242; *Hallowell v. B. and L. Assn.*, 120-286—for in such case legal consequences follow irrespective of question of intent, *Cheek v. B. and L. Assn.*, 126-242—and this though borrower is in *pari delicto* in transaction, *Hallowell v. B. and L. Assn.*, 120-286.

Effect of contract where usury charged is simply a loan without interest; all payments made must be credited on principal, and, in addition, borrower entitled to recover, or have credited on debt, double the amount of payments made as interest within two years prior to action brought: *Smith v. B. and L. Assn.*, 119-249. See, also, *Rowland v. Loan Assn.*, 118-173.

LEX LOCI CONTRACTUS AS AFFECTING USURY. Where contract made in one state to be performed in another, rate of interest will be governed by law of latter state: *Roberts v. McNeely*, 52-506—unless parties stipulate otherwise, *Arrington v. Gee*, 27-590. Where money loaned in Virginia upon land in this state, contract is governed by rate of interest in this state: *Faison v. Grandy*, 128-438. Where contract for loan of money made in another state, it will bear rate of interest of such state, though note for amount loaned be executed in this state: *Davis v. Coleman*, 29-424.

Contract made in another state stipulating for rate of interest legal in that state is not unlawful here: *Houston v. Potts*, 64-33; but see *Morris v. Hockaday*, 94-286—for whether contract usurious is question to be determined by laws of state where contract made, *Copeland v. Collins*, 122-619—though some cases hold that it is determined by laws of state where it is to be performed, *Hilliard v. Outlaw*, 92-266.

Where bond dated in this state, but had not specified place of payment, it is governed by the usury laws of this state: *Morris v. Hockaday*, 94-286—though if it appear that bond given for goods purchased in another state, rule would be different, *Ibid.*

In enforcement of mortgage on land, usury law of state in which land is will govern, security having been given for money to be used in state, though payment of loan in another state provided: *Meroney v. Loan Assn.*, 116-882.

PENALTY FOR USURY. Forfeiture of all interest is by operation of law, while the penalty of double the amount of interest paid is a cause of action: *Ervin v. Bank*, 161-42; *Faison v. Grandy*, 126-830; *Cheek v. B. and L. Assn.*, 126-242; *Bank v. Ireland*, 122-576.

The penalty is to be recovered only for usury actually paid: *Corey v. Hooker*, 171-229. In action to recover for overpayment of interest made by mistake, recovery cannot be had for forfeiture of double the interest as penalty for usury: *Gilliam v. Ins. Co.*, 121-369—since upon allegation of such overpayment by mistake no legal implication arises that plaintiff is suing for forfeiture, *Ibid.*

In action to recover twice amount of interest paid, plaintiff entitled to recover back double entire interest paid at time of usurious transaction, and not merely double usurious excess, provided it occurred within two years before action brought: *Tayloe v. Parker*, 137-418.

Court of equity will not permit enforcement of usurious contract: *Beard v. Bingham*, 76-285.

Usury in debt secured by mortgage on household and kitchen furniture a misdemeanor, see section 4509; *State v. Davis*, 157-648.

PLEADING AND PRACTICE HEREUNDER. Payer of usurious interest may recover same in action for money had and received to his use: *Cobb v. Morgan*, 83-211—or by way of counterclaim when action brought for balance due on usurious contract, *Ibid.*

Plea of usury can be taken advantage of only by borrower or debtor, or other person directly connected with transaction upon whom burden of usury falls: *Faison v. Grandy*, 128-438—mortgagor may show that consideration of bond secured by mortgage is tainted with usury, *Arrington v. Goodrich*, 95-462; *Moore v. Beaman*, 111-328; *Gore v. Lewis*, 109-539. Surety may set up defense of usury: *Bank v. Loven*, 172-666. Grantee of mortgagor may also set up defense, to determine amount of the debt: *Elliott v. Brady*, 172-828; *Ervin v. Morris*, 137-48. Whether a creditor may plead usury against another creditor, to protect debtor's estate, see *Riley v. Sears*, 154-509.

Wife who is surety for husband, for money borrowed, cannot sue lender or recover by way of counterclaim for usurious interest not paid by her: *Meares v. Butler*, 123-206. Receiver appointed to take charge of estate may recover for usury paid: *Riley v. Sears*, 154-509. A decedent's estate is not liable for usury received by administrator: *Whisnant v. Price*, 175-611.

Where A. executed a mortgage to secure debts of a firm after a certain time, and there was prior indebtedness subject to usury, A. can claim benefit of usury law only as it affects his liability; and when a judgment is rendered including the usury, the land may be sold to pay it: *Burwell v. Burgwyn*, 105-498.

Defendant may set up usury as a defense in an action to recover property for purpose of sale under chattel mortgage: *Noland v. Osborne*, 177-14; *Moore v. Woodward*, 83-531.

Usury must be paid in money or money's worth before an action can be maintained therefor: *Corey v. Hooker*, 171-229; *Rushing v. Bivens*, 132-273; *Stedman v. Bland*, 26-296—and renewal of note given for usury does not amount to payment, *Rushing v. Bivens*, 132-273.

A purchaser of property who agrees to pay, as part of the price, a note affected with usury, cannot take advantage of the usury: *Riley v. Sears*, 154-509, and cases cited. When the parties come to an agreement and settlement of their rights growing out of usury, it cannot be used again in an action on the original debt: *Beck v. Bank*, 161-201.

For complaints held to be sufficient under section, see *Smith v. B. and L. Assn.*, 119-249; *Churchill v. Turnage*, 122-426; *Morgan v. Bank*, 93-352. If usury pleaded, the facts which it is alleged constitute it must be specifically set forth so that court may see that, if true, transaction illegal: *Rountree v. Brinson*, 98-107. In action to recover usurious interest, it is immaterial whether debtor solicited extension of time upon his own suggestion of bonus, or whether creditor suggested usury: *Tayloe v. Parker*, 137-418.

To avoid bond on ground of usury, it must be shown to have been illegal *ab initio*: *Wharton v. Eborn*, 88-344—for if good in its creation, cannot be avoided by any subsequent usurious agreement, *Ibid.*

An agreement with principal, upon usurious consideration, to extend time of payment of a note will discharge the surety: *Scott v. Harris*, 76-205; *Carter v. Duncan*, 84-676, overruling on this point *Bank v. Lineberger*, 83-454.

If usurious character of transaction not manifest upon face, but depends on facts and circumstances connected with transaction, as part of *res gestæ*, it is question of fact as well as law, and should be submitted to jury: *Miller v. Ins. Co.*, 118-612.

In an accounting before referee in action by borrower against a bank, lender, where it appeared that bank charged usury for its various loans to plaintiff, and such usury was paid

by separate check at different times: Held, that it was not part of the account so as to be credited to plaintiff, but a separate matter which plaintiff could have recovered penalty for if suit brought in two years: *Rogers v. Bank*, 108-574.

In proving usury, it is competent to prove facts and circumstances connected with the matter, amount actually paid, amounts actually due, and calculations made: *Cuthbertson v. Austin*, 152-336; *Bennett v. Best*, 142-168—but mere fact that amount received by debtor is less than apparent principal of debt, and treating amount thus received as true principal would render transaction usurious, will not alone constitute proof of usury, *Ibid.*

Where note and mortgage were admitted to be in consideration of debt due on prior mortgage, and it appeared that new mortgage debt exceeded old debt by several hundred dollars, for which no consideration was proved, difference between true amount of old debt and amount of new mortgage usurious: *Churchill v. Turnage*, 122-426.

For time in which action against foreign corporation to recover usury must be brought, see *Williams v. B. and L. Assn.*, 131-267, and cases cited; *Roberts v. Ins. Co.*, 118-429.

Debtor seeking aid of court of equity will have usurious element eliminated from debt only upon his paying principal and legal rate of interest: *Corey v. Hooker*, 171-229; *Owens v. Wright*, 161-127; *Churchill v. Turnage*, 122-426; *Gore v. Lewis*, 109-539; *Carver v. Brady*, 104-219; *Cook v. Patterson*, 103-127; *Manning v. Elliott*, 92-48; *Purnell v. Vaughan*, 82-134; *Kidder v. McIlhenny*, 81-123; *Beard v. Bingham*, 76-285; *Ballinger v. Edwards*, 39-449; *McBrayer v. Roberts*, 17-75—the only forfeiture enforced against creditor being excess of legal rate, *Churchill v. Turnage*, 122-426—but this rule not applicable when creditor comes into court, asking enforcement of usurious claim, *Manning v. Elliott Bros.*, 92-48—nor in an action to recover usurious interest paid, *Cuthbertson v. Bank*, 170-531; *Cheek v. B. and L. Assn.*, 127-121.

Decree of foreclosure based on usurious mortgage will not be disturbed on appeal where defendant did not demand judgment he might have been entitled to under this section: *Elks v. Hamby*, 160-20.

As to costs in action under section to recover double amount of interest paid, see *Smith v. B. and L. Assn.*, 119-249.

As to jurisdiction of state courts over actions to recover penalty for taking usurious interest under statutes of United States, see *Morgan v. Bank*, 93-352; *Bank v. Ireland*, 122-576. The remedy against a national bank for usury is by independent action and not by counterclaim: *Bank v. Wysong & Miles Co.*, 177-380.

2307. Time from which interest runs. Interest is due and payable on instruments, as follows:

1. All bonds, bills, notes, bills of exchange, liquidated and settled accounts shall bear interest from the time they become due, provided such liquidated and settled accounts be signed by the debtor, unless it is specially expressed that interest is not to accrue until a time mentioned in the said writings or securities.

2. All bills, bonds, or notes payable on demand shall be held and deemed to be due when demandable by the creditor, and shall bear interest from the time they are demandable, unless otherwise expressed.

3. All securities for the payment or delivery of specific articles shall bear interest as moneyed contracts; and the articles shall be rated by the jury at the time they become due.

4. Bills of exchange drawn or indorsed in the state, and which have been protested, shall carry interest, not from the date thereof, but from the time of payment therein mentioned.

Rev., s. 1952; Code, ss. 44, 45, 46, 47; R. C., c. 13; 1786, c. 248; 1828, c. 2.

See section 2998. Coupons, when detached from bond to which they were annexed, bear interest from time they were due and payable: *Burroughs v. Comrs.*, 65-234. An order upon a county treasurer, signed by chairman of board of commissioners, bears interest from time of demand of payment: *Yellowly v. Comrs.*, 73-164. A bond on contract due at a certain time, "without interest," bears interest from maturity: *Dowd v. R. R.*, 70-468.

Method of computing interest in case of partial payments stated in *Reade v. Street*, 122-301; *Aiken v. Cantrell*, 127-416; *Bunn v. Moore*, 2-279.

2308. **Obligations due guardians to bear compound interest.** Guardians shall have power to lend any portion of the estate of their wards upon bond with sufficient security, to be repaid with interest annually, and all the bonds, notes or other obligations which he shall take as guardian shall bear compound interest, for which he must account, and he may assign the same to the ward on settlement with him.

Rev., s. 1953; Code, s. 1592; R. C., c. 54, s. 23; 1762, c. 69; 1816, c. 925; 1868-9, c. 201, s. 29.

For additional annotations as to investment of ward's money and liability of guardian for compound interest, see under sections 4018 and 2189.

GUARDIAN'S INVESTMENT OF WARD'S MONEY. Policy of section is to require investment by guardian to be secured by bond or note of some person in addition to borrower: *Watson v. Holton*, 115-36. Where guardian loaned ward's money to one member of firm for private purposes of latter, taking his bond, with borrower's partner as surety, both of whom solvent at that time, but afterwards became insolvent, guardian not liable for loss, for in addition to borrower there was a person responsible for loan who might have remained solvent despite the insolvency of his partner, the borrower, *Ibid.* Guardian not bound to have money ready to pay ward when he comes of age, but ward bound to take bond in discharge of guardian, which latter properly took and has not made his own by fraud or laches: *Goodson v. Goodson*, 41-238—for such a bond in truth belongs to ward, just as much as specific chattel, *Ibid.* As to assignment by guardian to third persons of bonds of ward, see *Newsom v. Newsom*, 40-122; *Exum v. Bowden*, 39-281; *Fox v. Alexander*, 36-340; *Lockhart v. Phillips*, 36-342; *Powell v. Jones*, 36-337.

Guardian having personal security for debt due ward may exchange such personal for real security, and if he does so bona fide he is not responsible to ward: *Christmas v. Wright*, 38-549.

Investments of ward's money are in guardian's discretion, as they are upon his responsibility: *Gary v. Cannon*, 38-64—and courts will never undertake to dictate to guardian of ward to whom he shall loan money, or how long he shall lend money to any particular person, *Ibid.*

For case under section dealing with losses caused by result of civil war, see *Whitford v. Foy*, 65-265.

If bond with two obligors, of whom principal solvent and surety doubtful, be accepted by guardian, he is liable if money lost: *Hurdle v. Leath*, 63-597. Words "bond with sufficient security" defined: *Hurdle v. Leath*, 63-600.

GUARDIAN CHARGEABLE WITH COMPOUND INTEREST. In settlement of guardian's accounts he should be charged with compound interest on all moneys collected, or which he might have collected, for his ward: *Latham v. Wilcox*, 99-367. Interest not compounded against guardian for time when funds of ward remain in his hands after relation has ceased: *Mitchell v. Robards*, 17-478. Simple interest is to be computed against guardian in favor of ward from death of former, unless compound interest received: *Ryan v. Blount*, 16-382. Ordinarily guardian is to be charged with compound interest, but he may be exempted from it by proving that after suitable exertions he was unable to realize it: *Ibid.* Guardian can only be charged with compound interest to death of his ward: *Carr v. Askew*, 94-194; *Whitford v. Foy*, 65-273—or marriage, *Whitford v. Foy*, 65-273—and from that time only bears simple interest, though if guardian received more he would be liable to pay it, *Ibid.*

Where same person executor of will and guardian of minor children, he is chargeable with compound interest from time administration of estate was, or might have been, concluded: *Hodge v. Hawkins*, 21-564—unless he can show special equitable circumstances to discharge him of such accountability, *Ibid.*

Guardians of lunatics are responsible for compound interest in same manner and to the same extent as guardians of infants: *Spack v. Long*, 36-426—and bonds, etc., payable to them as guardians bear compound interest in same manner as bonds payable to guardians of infants, *Ibid.*

Upon marriage of feme ward, compound interest ceases, and she has no right to demand same in settlement with guardian: *Winstead v. Stanfield*, 68-40; *Whitford v. Foy*, 65-273.

Guardian's primary duty is to invest trust fund, and he will be chargeable with interest in absence of proof that it remained in his hands unemployed without his fault: *Wilson v. Lineberger*, 88-416.

Rule for compounding interest upon notes due guardians is to make "annual rests," making aggregate of principal and interest due at end of particular year a capital sum bearing six per cent interest, thence forward for another year, and so on: *Little v. Anderson*, 71-190; *Ford v. Vandyke*, 33-227.

Section merely referred to in *Rowland v. Thompson*, 73-517; *Smith v. Gilmer*, 64-548; *Williamson v. Williams*, 59-65. For old case under section, see *Wood v. Brownrigg*, 14-430.

2309. Contracts, except penal bonds, and judgments to bear interest; jury to distinguish principal. All sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it is paid and satisfied. In like manner, the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section.

Rev., s. 1954; Code, s. 530; R. C., c. 31, s. 90; 1786, c. 253; 1789, c. 314, s. 4; 1807, c. 721.

CONTRACTS. Upon money contract in this state plaintiff entitled to have six per cent by way of interest, to be ascertained either by jury or clerk, as mere matter of calculation: *Houston v. Potts*, 65-41. When verdict gives interest from maturity, judgment can fix date from admitted contract sued on: *Penniman v. Alexander*, 112-778. Interest is chargeable from time of subscription to stock of corporation until paid: *Cotton Mills v. Burns*, 114-353. Where person orders another, who is indebted to him, to pay balance to third person, interest should be computed on such balance from day order presented: *Brem v. Covington*, 104-589.

As law implies contract on part of tenant in common in possession and in sole enjoyment of common property to account with cotenants for rents and profits, he is chargeable with interest from date of demand or suit brought: *Jolly v. Bryan*, 86-462.

Where, in action to recover value of tract of land, amount of damages bears interest from time it fell due by contract of sale: *Farmer v. Willard*, 75-401.

Judge has no right to leave it to jury to give plaintiff interest or not, as they should think proper: *Barlow v. Norfleet*, 72-535—but should instruct them that if they found that defendant owed the principal money demanded, plaintiff was entitled to interest from time it was due, *Ibid*.

In actions for money loaned, or money paid or had and received or due on account stated, jury should be instructed to allow interest, promise to pay being implied from nature of transaction: *Devereux v. Burgwin*, 33-490—and in trover and trespass de bonis asportatis jury may, in their discretion, allow interest upon value from time of conversion or seizure, *Ibid*.

In action for breach of warranty, plaintiff not entitled to interest upon amount recovered: *Lewis v. Rountree*, 79-122; but see *Kester v. Miller Bros.*, 119-475.

Interest is allowed upon items of independent account when used as set-off or counterclaim to extinguish or reduce debt: *Overby v. B. and L. Assn.*, 81-56—but not upon payments as such, whose effect is to reduce pro tanto sum due, interest being first discharged, *Ibid*.

General rule for interest on accounts in ordinary dealings is that it is chargeable only after account has been rendered: *Holden v. Peace*, 39-223—unless otherwise agreed, or course of business shows it to be otherwise understood, *Ibid*.

Verdict allowing "interest to date" in a case where proof is that principal sum was due in April, 1876, is sufficiently definite as to time for which computation is to be made: *Greenleaf v. R. R.*, 91-33.

In a recovery for breach of contract, if amount is ascertained from the terms or by relevant evidence, interest should be added: *Chatham v. Realty Co.*, 174-671; *Bond v. Cotton Mills*, 166-20. In cases not within this section, interest is not allowed unless there has been some default in withholding funds: *Ibid*.

In action by shipper to recover from carrier money wrongfully received by reason of illegal freight charge, amount of overcharge draws interest: *Lumber Co. v. R. R.*, 141-171.

Interest is not allowed when not in contemplation of parties: *Vick v. Vick*, 126-127. Interest may be allowed as equitable set-off against use, under parol purchase of land: *Pass v. Brooks*, 125-129. Interest must not be calculated on interest: *Aiken v. Cantrell*, 127-416. Administrator who did not use funds is not chargeable with interest: *Coggins v. Flythe*, 113-102. Assignee should collect interest on debts over one year old: *Weisel v. Cobb*, 118-11. Interest is offset by rents in action for quiet enjoyment: *Wyche v. Ross*, 119-174. On false warranty as to quality, interest is chargeable from date of delivery: *Kester v. Miller Bros.*, 119-475. How interest computed in case of partial payments stated in *Reade v. Street*, 122-301; *Aiken v. Cantrell*, 127-416; *Bunn v. Moore*, 2-279.

Where bond or other instrument for payment of money does not specify on face that interest is to be paid, interest is in nature of damages, and payment of principal money will bar action for interest: *King v. Phillips*, 95-245—but where interest stipulated for in contract itself, it becomes part of debt, and may be recovered, though principal sum has been paid, *Ibid.*

PENAL BONDS. Recovery upon penal bond cannot exceed penalty named therein, though excess is for interest on amount of defalcation after breach of bond: *Sewing Machine Co. v. Seago*, 128-158. Interest cannot be charged against sureties on penalty in administrator's bond: *Moseley v. Johnson*, 144-274.

As to proper judgment upon penal bond, see *Wall v. Covington*, 83-144; *Trice v. Turrentine*, 35-212.

Penalty imposed upon sheriffs and tax collectors for failure to settle with county treasurer does not bear interest: *Davenport v. McKee*, 98-500.

CLAIMS NOT ARISING OUT OF CONTRACT. Interest is not allowed as damages in action for personal injury: *Penny v. R. R.*, 161-523. Interest not allowed on recovery in tort, as a matter of law, except from the judgment: *Hoke v. Whisnant*, 174-658. But jury may allow interest in an action for destruction of property: *Harper v. R. R.*, 161-451; *Ripley v. Miller*, 46-479.

Although allowance of interest in action for damages for conversion of property is discretionary with jury: *Stephens v. Koonce*, 103-266—yet, after verdict judgment for damages assessed bears interest by virtue of section, *Ibid.*—and this is so though verdict for certain sum “without interest,” *Ibid.*

Interest is not allowed as a matter of law in action of claim and delivery, as section does not embrace such cases: *Fountain Co. v. Schell*, 160-529; *Patapsco v. Magee*, 86-350—but jury may, in discretion and as damages, allow interest upon value of property from time it was taken, *Ibid.*

Interest is not allowed on the value of land taken under eminent domain, except from the judgment: *Durham v. Davis*, 171-305; *R. R. v. Mfg. Co.*, 166-168. But interest may be considered in estimating the compensation of the landowner: *Ibid.*; *Abernathy v. R. R.*, 159-340.

JUDGMENTS. Judgment bears interest from time of rendition till paid: *In re Chisholm's Will*, 176-211; *McNeil v. R. R.*, 138-1; *Stephens v. Koonce*, 103-266; *Deloach v. Worke*, 10-36.

Design of section to allow plaintiff interest on principal sum recovered from time judgment rendered: *Deloach v. Worke*, 10-36—and jury must distinguish between principal and interest where whole sum assessed in damages, but where principal and interest are discriminated on record, or by inspection of record it can be collected what principal is, interest shall be calculated on that, *Ibid.*

Amount of judgment should be calculated up to first day of term at which rendered and principal thereof should bear interest from such time until paid: *Reade v. Street*, 122-301.

When the jury has found the principal sum due by contract, the judgment should include interest from date of contract: *Chatham v. Realty Co.*, 174-671; *Bond v. Cotton Mills*, 166-20; *Lumber Co. v. R. R.*, 141-171.

When jury has fixed amount due in tort, it is error for the court to add interest, but the judgment bears interest from the first day of the term: *Hoke v. Whisnant*, 174-658; *Harper v. R. R.*, 161-451; *Fountain Co. v. Schell*, 160-529; *Penny v. Ludwick*, 152-375; *Lance v. Butler*, 135-419.

Where judgment by default and inquiry, and on inquiry jury responded to issue that certain amount due, it was error to add interest to amount so found for time elapsed prior to inquiry: *Williams v. Lumber Co.*, 118-928—as such interest presumed to have been included in verdict as rendered, *Ibid.*

Where definite amount ascertained to be due distributee upon settlement of estate, and ordered to be paid, no demand necessary before suit brought to entitle him to interest on amount from date of decree: *McRae v. Malloy*, 87-196. Judgment for taxes should include interest on amount due: *Wilmington v. McDonald*, 133-548; see, also, *Wilmington v. Cronly*, 122-388; *Wilmington v. Stolter*, 122-395. Widow entitled to interest upon judgment against personal representative of deceased husband for amount covering deficiency of personal estate so as to make up total sum allowed her as year's support: *Long v. Long*, 85-415. Where compromise judgment was entered whereby legatees named in will were to receive certain amounts in settlement of their legacies which were ordered to be paid by administrator c. t. a. thereafter to be appointed, judgment was not such as would, under section, draw interest from date: *Moore v. Pullen*, 116-284.

2310. Judgment by default final, clerk ascertains. When a suit is instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, and the defendant does not plead to issue thereon, upon judgment, the clerk of the court shall ascertain the interest due by law, without a writ of inquiry, and the amount shall be included in the final judgment of the court as damages, which judgment shall be rendered therein in the manner prescribed by the preceding section.

Rev., s. 1956; Code, s. 531; R. C., c. 31, s. 91; 1797, c. 475.

As to power of court to correct mistake of clerk in calculation of interest under section, see *Griffin v. Hinson*, 51-154.

Section merely referred to in *Rogers v. Moore*, 86-86; *Parker v. Smith*, 64-291; *Hartsfield v. Jones*, 49-312.

2311. Interest from verdict to judgment added as costs. When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment is finally entered shall be computed by the clerk and added to the costs of the party entitled thereto.

Rev., s. 1955; Code, s. 529.

CHAPTER 45

JURORS

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ART. 1. JURY LIST AND DRAWING OF ORIGINAL PANEL

2312. **Jury list from taxpayers of good character.** The board of county commissioners for the several counties at their regular meeting on the first Monday in June, in the year nineteen hundred and five, and every two years thereafter, shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of all such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence. A list of the names thus selected shall be made out by the clerk of the board of commissioners and shall constitute the jury list, and shall be preserved as such.

Rev., s. 1957; Code, ss. 1722, 1723; 1806, c. 694; 1889, c. 559; 1899, c. 729; 1897, cc. 117, 539; 1899, c. 729.

Statutory provisions are directory with reference to revision of jury list, making up jury list, time, place and manner of drawing jury; and a failure to observe these does not invalidate the venire in the absence of bad faith or corruption: *State v. Banner*, 149-519; *State v.*

Teachey, 138-587; State v. Daniels, 134-648; State v. Dixon, 131-810; Moore v. Guano Co., 130-235; State v. Perry, 122-1018; State v. Smarr, 121-669; State v. Stanton, 118-1182; State v. Fertilizer Co., 111-660; State v. Hensley, 94-1027; State v. Martin, 82-672; State v. Griffice, 74-319; State v. Haywood, 73-437; State v. Seaborn, 15-310.

Irregularity of commissioners failing to make prepayment of taxes a qualification for persons on jury list is not ground for quashing indictment found by grand jury drawn therefrom: State v. Daniels, 134-641; State v. Fertilizer Co., 111-659—and merely purging jury list of names of those who have not paid taxes, without adding any new names thereto, does not vitiate venire in absence of fraud or corruption on part of commissioners, State v. Dixon, 131-808—moreover, where commissioners laid aside names of several persons otherwise qualified because they did not know whether they were residents of county, and list completed by names of other qualified persons: Held, that if there was irregularity it did not affect action of jurors drawn and summoned, State v. Wilcox, 104-847.

Objection for defects in jury list or in drawing the jury, or to the qualification of a grand juror, must be made before entering the plea of not guilty: State v. Banner, 149-519.

Only qualifications for jury service are payment of taxes for preceding year, good moral character and sufficient intelligence: State v. Peoples, 131-788; State v. Sherman, 115-774; State v. Edens, 85-524—and, if on original panel, juror not required to be freeholder, Hall v. Whitehead, 115-29; State v. Freeman, 100-432; State v. Mills, 91-593; State v. Wincroft, 76-38.

Juror must be twenty-one years of age, State v. Griffice, 74-316—and must have paid taxes for fiscal year next preceding time when name placed on jury lists: State v. Sherman, 115-773; State v. Davis, 109-780; State v. Gardner, 104-739; State v. Hargrave, 100-484; Sellers v. Sellers, 98-13; State v. Haywood, 94-847; State v. Carland, 90-673—though where sheriff enjoined from collection of tax, failure to pay same no disqualification, State v. Heaton, 77-505. Juror of original panel is not disqualified though he has served on jury in same court within two years: State v. Brittain, 89-481. No objection to tales juror that name does not appear on jury list: Lee v. Lee, 71-139. Ground for objection to indictment that grand jurors who found bill had not paid taxes for preceding year: State v. Watson, 86-624; State v. Griffice, 74-316—though indictment will not be quashed because jury list from which grand jury drawn failed to contain names of all persons in county qualified to act as jurors, State v. Haywood, 73-437.

Competency of grand juror depends upon competency at time of service, not at time when name put on list: State v. Perry, 122-1018; State v. Wilcox, 104-847.

Findings of court as to whether challenged juror had paid taxes is final and not reviewable: State v. Carland, 90-668; State v. Wincroft, 76-38.

Only exemptions from jury service are those prescribed by section 2329: State v. Cantwell, 142-604.

Section merely referred to in State v. Vick, 132-996; State v. Sharp, 110-607; Boyer v. Teague, 106-619.

2313. Names on list put in box. The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

Rev., s. 1958; Code, s. 1726; 1868-9, c. 9, s. 5.

For manner of drawing jury in Guilford, see 1905, c. 613; in Cleveland, see 1909, c. 356; Johnston, P. L. 1917, c. 31.

Partitions of jury box marked "jurors drawn" and "jurors not drawn" instead of "No. 1" and "No. 2," and only one key which unlocked both partitions, and same in custody of register: Held, special venire drawn therefrom was legal: State v. Potts, 100-457—and failure of sheriff, chairman and clerk of commissioners to keep box locked is not ground for challenge to array, State v. Hensley, 94-1021.

Section merely referred to in State v. Peoples, 131-784.

2314. Manner of drawing panel for term from box. At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

Rev. s. 1959; Code, ss. 1727, 1731; 1889, c. 559; 1897, c. 117; 1868-9, c. 175; 1868-9, c. 9, s. 6; 1806, c. 694; 1901, c. 636; 1901, c. 28, s. 3; 1903, c. 11; 1905, cc. 38, 76, s. 4; 1905, c. 285.

For special act for Buncombe county, see 1907, c. 239; for Columbus county, see 1909, c. 608. Provision of section requiring persons named on scrolls drawn from jury box to constitute jury is mandatory: *Moore v. Guano Co.*, 130-229—but provision fixing number of jurors to be drawn is directory, *State v. Watson*, 104-735—and indictment will not be quashed for failure to observe them where it does not appear that there was corrupt motive, *Ibid.* The time of drawing is considered directory, if the drawing is otherwise properly done: *Lanier v. Greenville*, 174-311.

Where one whose name was not drawn from the box was summoned and served by mistake, the grand jury is illegally constituted: *State v. Paramore*, 146-604. Where sheriff, who was defendant in action to be tried, received scrolls as drawn, called names and passed same into locked box, without submitting scrolls to the inspection of commissioners: *Held*, drawing irregular, and array set aside: *Boyer v. Teague*, 106-576—though where commissioners, while drawing jurors, laid aside several names, otherwise qualified, because they did know whether they were residents of county, and jury list completed by names of other qualified persons: *Held*, same did not affect action of jurors so drawn and summoned, *State v. Wilcox*, 104-847.

No constitutional limitation upon powers of legislature to prescribe method by which jurors are to be selected and summoned: *State v. Brittain*, 143-668. Grand juries are essential constitutional constituents appertaining to system of superior courts, and may not be discontinued by county commissioners under legislative enactment of 1899, chapter 371: *Mott v. Comrs.*, 126-866. Mandamus is proper remedy to force county commissioners to draw jury for the term, and solicitor is proper party to apply for same: *Ibid.* Drawn by commissioners instead of by boy under ten, challenge to array sustained: *Moore v. Guano Co.*, 130-229.

Where the court is not held until the second week it is not error to take the jurors summoned for that week as grand jurors: *State v. Wood*, 175-809.

Section merely referred to in *State v. Peoples*, 131-785; *Leach v. Linde*, 108-550; *State v. Gardner*, 104-742; *Sellers v. Sellers*, 98-17—and, as incidentally bearing upon section, see *State v. Teachey*, 138-587.

2315. Local modifications as to drawing panel. In Buncombe county forty-eight jurors shall be drawn to serve the first week and twenty-four to serve the second week.

In Cumberland county the commissioners may, in their discretion, cause an additional twelve scrolls to be drawn, to serve as the jury for the first week.

In Forsyth county the board of county commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors to those now provided by law. At all civil terms, regular and special, for the first week thirty jurors shall be drawn and summoned, and likewise for the second week. At all criminal terms, regular and special, for the first week forty-two jurors shall be drawn and summoned. For the second week thirty jurors shall be drawn and summoned.

In Hertford county fifteen extra jurors shall be drawn and summoned for the second week.

In Iredell county twenty-four jurors shall be drawn and summoned for the second week.

In Randolph county forty-two scrolls shall be drawn for the first week and twenty-four for the second week. The commissioners may at the same time and in the same manner draw the names of twenty-four other persons who shall serve as petit jurors for the week for which they are drawn and summoned.

In Rockingham county the board of county commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors to those now provided by law. At all civil terms, regular and special, for the first week thirty jurors shall be drawn and summoned; for the second week twenty-four jurors shall be drawn and summoned. At all criminal terms, regular and special, for the first week forty-two jurors shall be drawn and summoned; for the second week twenty-four jurors shall be drawn and summoned.

In Rowan county twenty-four jurors shall be drawn and summoned for the second week.

Rev., s. 1959; 1907, c. 239; Ex. Sess. 1913, c. 4; P. L. 1915, cc. 233, 744, 764.

For special law applicable to Cleveland county, see 1909, c. 356.

2316. Jurors having suits pending. If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box.

Rev., s. 1960; Code, s. 1728; 1868-9, c. 9, s. 7; 1806, c. 694.

Where juror has suit pending and at issue in court it is fundamental objection to him when-ever made to appear: *Hodges v. Lassiter*, 96-351—and is cause of challenge, though commissioners allowed name to go on venire, *Ibid.*—but fact that juror has suit pending, but not at issue at term at which drawn to serve, is not disqualification, *State v. Smarr*, 121-669; *State v. Hopkins*, 154-622.

Where indictment against juror pending to which he had never pleaded, held not disqualified by section even if same applicable: *Hodges v. Lassiter*, 96-351. Where judgment rendered in action to which juror was party at same term, from which appeal taken, though same not perfected, held same was suit pending and at issue: *Wilson v. Hughes*, 94-182. Juror not disqualified by fact that he has suit pending and at issue in court unless it is to be tried at same term at which he is drawn to serve: *State v. Spivey*, 132-989. Juror is not party to action pending and at issue in court, though interested as creditor in fund for which receiver has brought suit: *Vickers v. Leigh*, 104-260—though on prosecution bond of another plaintiff in another action, though against same defendant on similar cause of action, *Jenkins v. R. R.*, 110-438—though prosecutor in criminal action, *State v. Brady*, 107-827.

Grand juror not disqualified because he has civil action pending in another court of county: *State v. Edens*, 85-525—though fact that grand juror had suit pending and at issue in same court is ground for motion to quash indictment, *State v. Gardner*, 104-739; *State v. Smith*, 80-410; *State v. Liles*, 77-496.

Regulations of section as to revision of jury list directory only: *State v. Banner*, 149-519; *State v. Dixon*, 131-810; *State v. Perry*, 122-1018—and failure to observe same does not vitiate venire in absence of bad faith or corruption on part of commissioners, *Ibid.*

Section merely referred to in *State v. Sharp*, 110-607; *State v. Parish*, 104-687.

2317. Disqualified persons drawn. If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

Rev., s. 1961; Code, s. 1729; 1889, c. 559; 1897, c. 117, s. 5; 1806, c. 694.

2318. How drawing to continue. The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed.

Rev., s. 1962; Code, s. 1730; 1868-9, c. 9, s. 9; 1806, c. 6, s. 94.

Where, in drawing grand jury, names of some drawn and put back in box and others drawn instead to equalize number among townships, held not grounds for challenge to array, as section merely directory: *State v. Martin*, 82-672; but see *Moore v. Guano Co.*, 130-229. There is no restriction upon powers of legislature to regulate manner in which jurors shall be selected and summoned: *State v. Brittain*, 143-668.

Section merely referred to in *State v. Peoples*, 131-785; *Boyer v. Teague*, 106-619.

2319. Drawing when commissioners fail to draw. If the commissioners for any cause fail to draw a jury for any term of the superior court, regular or special, the sheriff of the county and the clerk of the commissioners, in the presence of and assisted by two justices of the peace of the county, shall draw such jury in the manner above prescribed; and if a special term continues for more than two weeks, then for the weeks exceeding two a jury or juries may be drawn as in this section provided.

Rev., s. 1963; Code, s. 1732; 1868-9, c. 9, s. 11.

The twenty days specified in section 2314 not applicable to this section: *Lanier v. Greenville*, 174-311—the deputy sheriff may act for the sheriff, *Ibid.*

Where commissioners fail to draw jury for third week of court, and court orders same drawn as prescribed by section, such jury is legal: *Leach v. Linde*, 108-547—though sheriff not required to act unless commissioners neglect to draw jury, *Boyer v. Teague*, 108-619—and then duty devolves upon him, clerk of commissioners and two justices of the peace, *Ibid.*

ART. 2. PETIT JURORS; ATTENDANCE, REGULATION AND PRIVILEGES

2320. Summons to jurors drawn; to attend until discharged. The clerk of the board of county commissioners shall, within five days from the drawing, deliver the list of the jurors drawn for the superior court to the sheriff of the county, who shall summon the persons therein named to attend as jurors at such court. The summons shall be served, personally, or by leaving a copy thereof at the house of the juror, at least five days before the sitting of the court to which he may be summoned. Jurors shall appear and give their attendance until duly discharged.

Rev., s. 1976; Code, s. 1733; 1868-9, c. 9, s. 12; R. C., c. 31, s. 29; 1779, c. 157, ss. 4, 6.

For provision for additional jurors from other counties, as a substitute for removal when a fair trial cannot be had, see *Civil Procedure*, s. 473.

For service by telephone, see section 819. Section referred to in *Boyer v. Teague*, 106-621. When the list is given to the sheriff he has no authority to change a name: *State v. Paramore*, 146-604.

2321. Summons to talesmen; their disqualifications. That there may not be a defect of jurors, the sheriff shall by order of the court summon, from day to day, of the bystanders, other jurors, being freeholders, within the county where the court is held, or the judge may, in his discretion, at the beginning of the term direct the tales jurors to be drawn from the jury box used in drawing the petit jury for the term, in the presence of the court; such tales jurors so drawn to be summoned by the sheriff and to serve on the petit jury, and on any day the court may discharge those who have served the preceding day. The judge may, upon his own motion, or upon the request of counsel for either plaintiff or defendant, instruct the sheriff to summon such jurors outside of the courthouse. It is a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such term of court.

Rev., s. 1967; Code, s. 1733; R. C., c. 31, s. 29; 1779, c. 156, s. 69; 1911, c. 15; 1915, c. 210.

Tales jurors must have same qualifications as regular jurors with additional one of being freeholders: *Hale v. Whitehead*, 115-29; *State v. Sherman*, 115-773; *State v. Hargrave*, 100-485; *State v. Carland*, 90-668; *State v. Whitley*, 88-691—and must own real estate in county where court sits, *State v. Cooper*, 83-671—but tenant by curtesy initiate is freeholder, *Hodgin v. R. R.*, 143-93; *Thompson v. Wiggins*, 109-508; *State v. Mills*, 91-581—as is mortgagor in possession of freehold, *State v. Ragland*, 75-12—though juror who holds license to lay off oyster and clam bed in waters of state is not freeholder, *State v. Young*, 138-571. Freeholder defined in *State v. Ragland*, 75-12; see, also, *State v. Hensley*, 94-1021. While deputy sheriffs are not exempt from jury duty, the court may excuse them from serving as tales jurors: *McLawnhorn v. Harris*, 156-107.

The court may order a new jury to be summoned from the bystanders after the regular jury has been discharged: *State v. Manship*, 174-798.

Only tales jurors come within provisions of section disqualifying jurors who have acted in same court within two years: *Hale v. Whitehead*, 115-29; *State v. Whitfield*, 92-831; *State v. Brittain*, 89-481. To disqualify them it must appear that they were not only summoned, but acted as jurors in same court within two years: *Burnett v. Roanoke Mills Co.*, 152-35; *State v. Whitfield*, 92-831; *State v. Outerbridge*, 82-617; *State v. Howard*, 82-623; *State v. Thorne*, 81-555—but juror of original panel cannot be challenged upon such grounds, *State v. Brittain*, 89-481.

Talesmen may be summoned from bystanders in court, or the officer may be directed to go outside and summon them: *Lupton v. Spencer*, 173-126—when they come in they are bystanders: *State v. McDowell*, 123-764; *State v. Lamon*, 10-175. No objection to tales juror that name does not appear on list made out by county commissioners: *Lee v. Lee*, 71-139.

Exemption of members of fire company from jury service in general does not discharge them from service as talesmen: *State v. Willard*, 79-660, and, as bearing upon question of exemption releasing from service as tales jurors, see *State v. Williams*, 18-372; *State v. Hogg*, 6-319.

Court may order any number of talesmen necessary: *State v. Lamon*, 10-175.

Section merely referred to in *State v. Sharp*, 110-607; *Boyer v. Teague*, 106-621; *State v. Wineroft*, 76-39; *State v. Benton*, 19-201.

2322. How talesmen summoned when sheriff interested. When, in the trial of any action before a jury, the sheriff of the county in which the case is to be tried is a party to or has any interest in the action, or when the presiding judge finds upon investigation that the sheriff of the county is not a suitable person, on account of indirect interest in or relative to the cause of action, to be entrusted

with the summoning of the tales jurors in any particular case pending, such judge shall appoint some suitable person to summon the jurors in place of the sheriff.

Rev., s. 1968; 1889, c. 441.

Court has power to appoint suitable person to summon jury from bystanders, where array set aside for irregularity of sheriff in drawing jury, sheriff being party to action: *Boyer v. Teague*, 106-576. And where the person so appointed has been guilty of improper conduct in regard to selection of jurors, a new trial will be granted: *Lupton v. Spenceer*, 173-126.

2323. Penalty for disobeying summons. Every person on the original venire summoned to appear as a juror who fails to give his attendance until duly discharged shall forfeit and pay for the use of the county the sum of twenty dollars, to be imposed by the court; but each delinquent juryman shall have until the next succeeding term to make his excuse for his nonattendance, and, if he renders an excuse deemed sufficient by the court, he shall be discharged without costs. Every person summoned of the bystanders who shall not appear and serve during the day as a juror shall be fined in the sum of two dollars, unless he can show sufficient cause to the court; and the clerk shall forthwith issue an execution against the estate of the delinquent tales juror for such amercement and costs.

Rev., s. 1977; Code, ss. 1734. 405; R. C., c. 31, s. 30; 1779, c. 157, s. 4; 1783, c. 189; 1806, c. 694.

Section referred to in *State v. Jones*, 67-285.

2324. Jury sworn; judge decides competency. The clerk shall, at the beginning of the court, swear such of the petit jury as are of the original panel, to try all civil cases; and if there should not be enough of the original panel, the talesmen shall be sworn. The petit jurors of the original panel, as well as talesmen, shall be sworn as prescribed in the chapter entitled Oaths. Nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any of them; and if by reason of such challenge, any juror is withdrawn, his place on the jury shall be supplied by any of the original venire, or from the bystanders qualified to serve as jurors. The judge or other presiding officer of the court shall decide all questions as to the competency of jurors in both civil and criminal actions.

Rev., s. 1966; Code, s. 405; R. C., c. 31, s. 34; 1790, c. 321; 1822, c. 1133, s. 1.

CHALLENGE TO THE ARRAY. Objection to manner of summoning jury should be taken by challenge to array: *State v. Douglass*, 63-500. A challenge to the array can be taken only when there is partiality or misconduct in the sheriff, or some irregularity in making out the list: *State v. Speaks*, 94-865; *Moore v. Guano Co.*, 130-231. Objection must be made before entering on the formation of the jury and before challenge to the polls, or before the jury has been completed or sworn, or before entering on the trial: *State v. Parker*, 132-1014. A challenge to the array must affect the whole panel: *State v. Hensley*, 94-1021. It is duty of court to see that jurors are competent, fair and impartial: *State v. Boon*, 80-461.

In criminal case, solicitor for state said: "If any member of jury has formed and expressed an opinion that prisoner is not guilty, let it be known." No juror answering thereto, prisoner thereupon admits the cause as a challenge to the array: Held, not a challenge to the array: *State v. Walker*, 145-567.

CHALLENGES FOR CAUSE. Judge determines facts as well as legal sufficiency of challenge based upon them: *State v. Kilgore*, 93-533. Rulings of law by court on challenge for cause are subject to review: *State v. Vick*, 132-995—though findings are conclusive, *State v. Vick*, 132-997—as are also findings of fact and law on challenges to the favor, *Ibid.*; *State v.*

Green, 95-611. Finding of judge that juror is indifferent is not reviewable: *State v. Banner*, 149-519; *State v. Register*, 133-746; *State v. Kinsauls*, 126-1095; *State v. Potts*, 100-457.

Challenge for cause must be made in apt time: *State v. Lambert*, 93-618; *State v. Boon*, 80-461. Too late for challenge where juror accepted by prisoner and served on trial: *State v. Lambert*, 93-618. A good challenge for cause before juror is sworn, if denied, is ground for new trial; if made afterward, it is within the discretion of the court: *Carter v. King*, 174-549. Discretionary with court to permit juror to be challenged for cause after being tendered to defendant and before jury impaneled: *State v. Green*, 95-611; see *Dunn v. R. R.*, 131-449. Court may excuse juror, before impaneled, though solicitor has passed him to prisoner, and has not challenged him for cause: *State v. Vick*, 132-995. Discretionary power of judge as to challenge is limited to "challenges for cause," and he cannot extend time for peremptory challenges: *State v. Fuller*, 114-885; *Dunn v. R. R.*, 131-446. See section 2331.

Where general question was asked if any juror had formed and expressed an opinion that plaintiff ought not to recover, and one juror responded that he had, but added, on being questioned, that "notwithstanding such expression of opinion, I can try case impartially according to evidence and charge of court": Held, his honor properly found him to be a competent juror: *Dunn v. R. R.*, 131-446; *State v. Bohanon*, 142-695; *State v. Potts*, 100-457; *State v. Efler*, 85-585; *State v. Collins*, 70-241.

A tales juror called on a trial in April, 1894, is not disqualified because he had not paid his taxes for 1893, he having paid them for 1892: *State v. Sherman*, 115-773—but where he has not paid his taxes for fiscal year preceding first Monday in September next before time he is called on to serve, he may be excluded on being challenged: *State v. Hargrave*, 100-484. See, also, *State v. Gardner*, 104-739.

A tales juror must have same qualifications as regular juror, with the additional one of being a freeholder: *Hale v. Whitehead*, 115-29; *State v. Hargrave*, 100-485; *State v. Sherman*, 115-773—and the finding by trial judge that juror is not a freeholder is conclusive on appeal, *State v. Register*, 133-746. Tenant by curtesy initiate is a freeholder: *Hodgin v. R. R.*, 143-93; *Thompson v. Wiggins*, 109-508; *State v. Mills*, 91-581—as is mortgagor in possession of freehold, *State v. Ragland*, 75-12—but one who holds license to lay off oyster and clam bed in waters of state is not a freeholder, *State v. Young*, 138-571.

That a juror is the employee of a party is a good cause of challenge: *Oliphant v. R. R.*, 171-303; *Norris v. Mills*, 154-474; *Blemis v. Cotton Mills*, 150-493. Cause for challenge that a juror is interested in a corporation as a party: *Walters v. Lumber Co.*, 165-388; *Bank v. Oil Mills*, 150-683.

Where it does not appear that a party is insured in an indemnity company, it is error to allow the question whether any juror is interested in such company: *Starr v. Oil Co.*, 165-587—otherwise where a party carries a policy in an indemnity company, *Featherstone v. Cotton Mills*, 159-429.

Where the county is a party, the relationship of a juror to one of the county commissioners is too remote: *Gates County v. Hill*, 158-584.

The causes of challenge given in the statutes are in addition to the cause of pecuniary interest: *Bank v. Oil Mills*, 150-683. When a party objecting to a juror on the ground of pecuniary interest has exhausted his peremptory challenges, it is error for the court to refuse the challenge: *Ibid.*

2325. Questioning jurors without challenge. The court, or any party to an action, civil or criminal, shall be allowed, in selecting the jury, to make inquiry as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged.

1913, c. 31, s. 6.

Effect of change made by this section explained: *State v. Christy*, 170-772.

2326. Causes of challenge to jurors drawn from box. It shall not be a valid cause of challenge that a juror called from those whose names are drawn from the box is not a freeholder or has served upon the jury within two years prior

to the court at which the case is tried. In other respects the cause of challenge shall be the same as now provided by law, and nothing herein shall modify any law authorizing jurors to be summoned from counties other than the county of trial.

1913, c. 31, ss. 5, 7.

Section probably refers to special venire under section 2339. See, also, section 2321.

2327. Jurors impaneled to try case furnished with accommodations. When a jury, impaneled to try any cause, is put in charge of an officer of the court, the said officer shall furnish said jury with such accommodation as the court may order, and the same shall be paid for by the party cast or by the county, under the order and in the discretion of the judge of the court.

Rev., s. 1978; Code, s. 1736; 1876-7, c. 173; 1889, c. 44.

Verdict of jury cannot be impeached because sheriff declined to give them refreshments except water until they agreed on verdict or until judge directed him to take them to dinner: *Gaither v. Generator Co.*, 121-384. County not liable for board of jury in capital case during pendency of trial: *Young v. Comrs.*, 76-316.

2328. Exemption from civil arrest. No sheriff or other officer shall arrest under civil process any juror during his attendance on or going to and returning from any court of record. All such service shall be void, and the defendant on motion shall be discharged.

Rev., s. 1979; Code, s. 1735; R. C., c. 31, s. 31; 1779, c. 157, s. 10.

Exemption of jurors from civil arrest does not apply to parties arrested in criminal proceedings: *White v. Underwood*, 125-25—and section does not repeal by implication the common-law exemption of nonresidents from service of civil process while attending litigation in courts of state: *Cooper v. Wyman*, 122-784.

Section merely referred to in *Greenleaf v. Bank*, 133-296.

2329. Exemptions from jury duty. 1. All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers and railroad conductors in active service, and all members of the national guard of North Carolina who comply with and perform all duties required of them as members of said national guard, shall be exempt from service as jurors.

Rev., s. 1980; Code, ss. 1723, 2269; 1885, c. 289; 1889, c. 255; 1897, c. 32; 1901, c. 118; 1909, cc. 333, 868; 1913, c. 38, s. 1; 1915, c. 260.

For dentists exempt from jury duty, see section 6640. Exemption from jury service is a mere privilege, not a contract, and may be revoked by legislature at any time: *State v. Cantwell*, 142-604. Exemption from jury service in general does not release from service as talesman: *State v. Willard*, 79-660; *State v. Williams*, 18-372; *State v. Hogg*, 6-319—but he is not bound to serve on special venire, *State v. Whitford*, 34-99.

Section referred to in *State v. Peoples*, 131-785; *State v. Haywood*, 94-850.

2. On the first day of January and July of each year the commanding officer of each company, troop, battery or division of the national guard of North Carolina shall file with the clerk of the superior court of the county in which said

company, troop, battery or division is located a statement giving the names and rank of each member of his organization who has performed all military duties required of such member during the preceding six months, and any member of such military organization whose name shall not appear upon the statement shall not receive the benefit of the exemption provided above during the six months immediately following the filing of said statement.

1913, c. 38, s. 2.

3. The board of county commissioners of any county in North Carolina may, in their discretion, exempt any ex-confederate soldier in their county from jury duty who shall apply to them for exemption.

1915, c. 228.

2330. Clerk to keep record of jurors. The clerk of the superior court shall record alphabetically in a book kept for the purpose the names of all grand and petit jurors and talesmen who serve in his court, with the term at which they serve.

Rev., s. 1981; 1893, c. 52, s. 3.

ART. 3. PEREMPTORY CHALLENGES IN CIVIL CASES

2331. Four peremptory challenges on each side. The clerk, before a jury is impaneled to try the issues in any civil suit, shall read over the names of the jury upon the panel in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily four jurors upon the said panel, without showing any cause therefor, which shall be allowed by the court.

Rev., s. 1964; Code, s. 406; R. C., c. 31, s. 35; 1796, c. 452, s. 2; 1812, c. 833.

For peremptory challenges in criminal actions, see sections 4633, 4634.

Party has right to reject jurors, but not to select them: *State v. Banner*, 149-519; *State v. Sultan*, 142-574; *State v. Register*, 133-750; *Dunn v. Railroad*, 131-447; *State v. McDowell*, 123-764; *State v. Jacobs*, 106-695; *State v. Jones*, 97-469; *State v. Hensley*, 94-1021; *State v. Gooch*, 94-987; *State v. Smith*, 24-402; *State v. Arthur*, 13-217—and to secure fair and impartial jury to try cause, *State v. Jones*, 97-469; *State v. Hensley*, 94-1021; *State v. Gooch*, 94-987. Exception of party to eligibility of juror cannot be sustained where he has not exhausted his peremptory challenges: *Carter v. King*, 174-549; *Oliphant v. R. R.*, 171-303; *Hodgin v. R. R.*, 143-93; *State v. Sultan*, 142-569; *State v. Bohanon*, 142-695; *Ives v. R. R.*, 142-131; *State v. Teachey*, 138-587; *State v. Register*, 133-750; *State v. Kinsauls*, 126-1095; *State v. Brogden*, 111-657; *State v. Pritchett*, 106-667; *State v. Potts*, 100-457; *State v. Freeman*, 100-429; *State v. Jones*, 97-469; *State v. Hensley*, 94-1021; *State v. Gooch*, 94-987; *State v. Brittain*, 89-504; *Caperhart v. Stewart*, 20-101; *Whitaker v. Carter*, 26-461; *State v. Arthur*, 13-217.

Party's reason for peremptorily challenging juror cannot be inquired into: *Dupree v. Ins. Co.*, 92-417—as law gives litigant right to object to limited number of jurors without assigning cause, *Ibid.* Where jury has been accepted by parties, it is error to allow peremptory challenges to be made: *Dunn v. R. R.*, 131-446.

Challenge must be made before impaneled: *Baxter v. Wilson*, 95-137; *State v. Williams*, 66-126.

Whether there are one or more plaintiffs or defendants, only four peremptory challenges on each side allowed: *Bryan v. Harrison*, 76-360; but see section 2332.

No peremptory challenge allowed after juror has been passed and accepted: *Dunn v. R. R.*, 131-447; *State v. Fuller*, 114-885.

2332. Where several defendants; challenges apportioned; discretion of judge. When there are two or more defendants in a civil action the judge presiding at the trial, if it appears to the court that there are divers and antagonistic interests between the defendants, may in his discretion apportion among the defendants the challenges now allowed by law to defendants, or he may increase the number of challenges to not exceeding four to each defendant or class of defendants representing the same interest. In either event, the same number of challenges shall be allowed each defendant or class of defendants representing the same interest. The decision of the judge as to the nature of the interests and number of challenges shall be final.

Rev., s. 1965; 1905, c. 357.

See section 4634.

ART. 4. GRAND JURORS

2333. How grand jury drawn. The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

Rev., s. 1969; Code, s. 404; R. C., c. 31, s. 33; 1779, c. 157, s. 11.

No grand jury for special terms, unless required by order, see section 1454. The grand jury may be composed of less than eighteen, but not less than twelve. If only sixteen appear on the regular panel, the judge may use these as the grand jury without further drawing: *State v. Wood*, 175-809.

2334. Grand juries in certain counties. At the first fall and spring terms of the criminal courts held for the counties of Gaston, Guilford, Mecklenburg, and Wake, grand juries shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve during the remaining fall and spring terms, respectively.

1913, c. 196; 1917, cc. 116, 118; 1919, cc. 113, 187.

2335. Exceptions for disqualifications. All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived. But no indictment shall be quashed, nor shall judgment thereon be arrested, by reason of the fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue.

Rev., s. 1970; Code, s. 1741; 1907, c. 36, s. 1.

Regular way of making objection where facts appear on face of record is by motion to quash: *State v. Haywood*, 94-847—but where same do not appear on record, objection should be taken by plea in abatement, *Ibid.*—though distinction not held to be important now, and motion to quash permitted in either case, *Ibid.* See, also, *State v. Banner*, 149-519.

Motion to quash must be made in apt time: *State v. Gardner*, 104-739; *State v. Haywood*, 94-847; *State v. Griffice*, 74-316; *State v. Seaborn*, 15-305—which is before plea, *State v. Watson*, 86-624; *State v. Baldwin*, 80-390; *State v. Griffice*, 74-316—and if motion made before plea, defendant has right to have same granted, *State v. Gardner*, 104-739; *State v. DeGraff*, 113-688—if made after plea but before jury impaneled, it may be granted in sound

discretion of court, *Ibid.*— but if motion not made till after jury sworn, objection deemed to be waived: *State v. Gardner*, 104-739; *State v. Banner*, 149-519.

When motion to quash for disqualification of grand juror is made after plea, and declined without assignment of reason, it is presumed it was declined in the discretion of the court, hence no appeal will lie: *State v. DeGraff*, 113-688.

Plea in abatement filed before pleading generally to indictment is proper way to raise question of qualification of an individual grand juror: *State v. Sharp*, 110-604; but see *State v. Haywood*, 94-847—though such plea will not be sustained, unless shows want of some positive qualification prescribed by law, *State v. Sharp*, 110-604—and all other objections to competency of grand jurors must be taken by challenge in apt time, *Ibid.* Plea in abatement, on grounds of incompetency of one of grand jurors, put in after pleading to indictment, is not in apt time: *State v. Potts*, 100-457.

Motion to quash allowed where persons of negro race excluded from grand jury solely on account of color, and defendant is a colored man: *State v. Peoples*, 131-785—where grand juror failed to pay taxes for preceding year, *State v. Fertilizer Co.*, 111-659; *State v. Griffice*, 74-316—where one of grand jurors who found bill at time a suit pending and at issue in same court, *State v. Gardner*, 104-739; *State v. Smith*, 80-140—where one of grand jurors under age of twenty-one years at time of finding bill, *State v. Griffice*, 74-321.

Motion to quash not allowed on ground that prepayment of taxes was not made qualification for persons on jury list from which grand jury found: *State v. Daniels*, 134-641; *State v. Fertilizer Co.*, 111-658—that son of prosecutor was member of grand jury and actively participated in finding bill, *State v. Sharp*, 110-604—that it appeared that jury list from which grand jury drawn did not contain names of all persons in county qualified to act as jurors, *State v. Haywood*, 73-437.

An act of legislature making concurrence of nine members of grand jury sufficient is unconstitutional: *State v. Barker*, 107-913.

Defendant is not required to show affirmatively that grand juror, who was disqualified by having suit on docket, was actually present and participated in deliberations of grand jury when bill found: *State v. Smith*, 80-410. No evidence of disqualification is necessary when court refuses motion to quash solely on ground that it is too late: *State v. Haywood*, 94-847. Juror not disqualified for nonpayment of tax for preceding year where he was not liable to tax: *State v. Perry*, 122-1018. No disqualification for grand juror that he is not a freeholder: *Ibid.* Burden of showing disqualification of juror is upon the defendant: *Ibid.* Fact that grand juror was a minor when his name put upon jury list is immaterial if he was of age at time he served: *Ibid.*

That the foreman of grand jury was prosecutor and swore out the warrant before the justice is not sufficient ground to quash the bill: *State v. Pitt*, 166-268.

Omission of foreman to mark on indictment names of witnesses sworn and examined is no ground for quashing bill: *State v. Hines*, 84-810.

If a minor serves on grand jury, a plea in abatement would lie as to all bills in whose finding he took part: *State v. Perry*, 122-1021.

Certificate on back of bill of indictment not appearing to have been signed by foreman is not ground for motion to quash: *State v. Long*, 143-670.

2336. Foreman may administer oaths to witnesses. The foreman of every grand jury duly sworn and impaneled in any of the courts has power to administer oaths and affirmations to persons to be examined before it as witnesses: Provided, that the said foreman shall not administer such oath or affirmation to any person except those whose names are endorsed on the bill of indictment by the officer prosecuting in behalf of the state, or by direction of the court. The foreman of the grand jury shall mark on the bill the names of the witnesses sworn and examined before the jury.

Rev., s. 1971; Code, s. 1742; 1879, c. 12.

Authority of foreman to swear witness to be examined before grand jury does not oust such power of clerk of court: *State v. White*, 88-698; *State v. Allen*, 83-680. Judge has no power to require grand jury to have state's witnesses examined publicly: *State v. Branch*, 68-186.

Record stated that persons impaneled as grand jurors, among whom was the one appointed foreman, were "duly drawn, sworn, and court, having appointed J. P. foreman, are charged": Held, that it sufficiently appeared that foreman had been properly drawn and sworn: *State v. Weaver*, 104-758.

Recital that "jurors upon their oath present," etc., raises presumption, when accompanied by endorsement "a true bill," signed by foreman, that it was duly returned and presented in open court: *State v. Weaver*, 104-758.

The indorsement "a true bill" raises presumption that every member of grand jury concurred in finding it: *State v. McNeill*, 93-552.

One defendant cannot be examined against his codefendant for purpose of obtaining true bill against both: *State v. Krider*, 78-481.

A presentment need not be signed by any one; it is the returning of indictment in open court and its being there recorded that makes it effectual: *State v. Cox*, 28-440.

Not ground to quash indictment that blank space after "thus" in certificate "witnesses whose names are marked thus, were sworn and examined" was not filled in with cross-mark or check: *State v. Sultan*, 142-569; *State v. Sheppard*, 97-401—as requirement that foreman shall mark on bill names of witnesses sworn and examined is merely directory, *State v. Hollingsworth*, 100-535; *State v. Hines*, 84-810—and endorsement upon back of indictment forms no part of record, *State v. Sheppard*, 97-401.

Where it does not appear by endorsement on bill that witnesses were sworn and examined, it is no ground for motion to quash indictment where proof is that witnesses were sworn: *State v. Hollingsworth*, 100-535; *State v. Sheppard*, 97-401; *State v. Hines*, 84-810—or for motion in arrest of judgment after verdict, *State v. Sheppard*, 97-401—and motion in arrest of judgment will not be sustained where it does not appear from endorsement on indictment that witnesses were sworn before sent to grand jury, *State v. Roberts*, 19-540.

Not necessary that it should appear that state's witnesses sent before jury by solicitor: *State v. Frizell*, 111-722.

No endorsement on bill of indictment by grand jury necessary: *State v. Long*, 143-676; *State v. Sultan*, 142-569, overruling *State v. McBroom*, 127-528—and record that it was presented by grand jury is sufficient in absence of evidence to impeach it, *State v. Sultan*, 142-569; *State v. Guilford*, 49-83; *State v. Cox*, 28-440; *State v. Calhoun*, 18-376; and as bearing upon same, see *State v. Harwood*, 60-226; *State v. Roberts*, 19-540. Indictment need not be signed by any one: *State v. Mace*, 86-668; *State v. Cox*, 28-440; *State v. Calhoun*, 18-374.

The foreman can excuse a grand juror for the term: *State v. Perry*, 122-1022.

Section merely referred to in *State v. Ivey*, 100-540.

2337. Grand jury to visit jail and county home. Every grand jury, while the court is in session, shall visit the county home for the aged and infirm, the workhouse, if there is one, and the jail, examine the same, and especially the apartments in which inmates and prisoners shall be confined; and they shall report to the court the condition thereof and of the inmates and prisoners confined therein, and also the manner in which the jailer or superintendent has discharged his duties.

Rev., s. 1972; Code, s. 785; R. C., c. 30, s. 3; 1816, c. 911, s. 3.

For duty of grand jury in reporting infants without guardian, see *Guardian and Ward*, s. 2197.

ART. 5. SPECIAL VENIRE

2338. Special venire to sheriff in capital cases. When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some speci-

fied day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned.

Rev., s. 1973; Code, s. 1738; R. C., c. 35, s. 30; 1830, c. 27; 1913, c. 31, s. 1.

For special law applicable to New Hanover county, see 1909, c. 342.

For application of special act, see *State v. Sandlin*, 156-624. Discretionary with judge to order special venire in capital cases: *State v. Brogden*, 111-656. Special venire ordered hereunder only where person charged with capital offense: *State v. Bullock*, 63-570. Where on trial for murder solicitor states he will only ask for verdict of manslaughter, no special venire necessary: *State v. Hunt*, 128-584. Discretionary with judge whether he will order venire under this section or section 2339: *State v. Smarr*, 121-669—though practice of drawing jury under section 2339 commended, *State v. Brogden*, 111-656. Judge may determine number of special venire: *Ibid.*—which he may likewise change by another order, *Ibid.* Order for special venire sufficient if made at term at which trial had: *State v. Murph*, 60-129—but not necessary that record should show that writ of venire facias issued by clerk where shown that order obtained and jurors attended, *State v. Perry*, 44-330.

Objection to manner of summoning special venire should be taken by challenge to array: *State v. Douglass*, 63-500—but it is no cause of challenge to array by negro accused of crime that special venire is composed entirely of white men, there being no charge of corruption or unfairness against sheriff, *State v. Sloan*, 97-499.

Juror summoned on special venire is qualified to serve, if freeholder of county where trial had: *State v. Powell*, 94-965; *State v. Kilgore*, 93-533; *State v. Carland*, 90-668. See section 2326.

It is no cause of challenge that a special venireman had served on the jury within the past two years: *State v. Starnes*, 94-973; *State v. Kilgore*, 93-533; *State v. Whitfield*, 92-831; but see *State v. Cody*, 119-909, and section 2326—or had not paid taxes for preceding year, *State v. Kilgore*, 93-533; but see *State v. Cody*, 119-909—or that has suit pending and at issue in court, *State v. Starnes*, 94-973; but see *State v. Cody*, 119-909—but that juror is nonresident of county where trial had is cause of challenge, *State v. Bullock*, 63-570.

Special venire is in aid of original panel, and only such jurors are taken from it as required to form jury after original exhausted: *State v. Washington*, 90-664—and jurors of regular panel should be drawn from box before special venire summoned and drawn, *State v. Benton*, 19-196.

Person exempted by law from jury service not bound to serve on special venire: *State v. Whitford*, 34-99.

Prisoner has right to have jurors stood aside by state in capital case tendered to him or challenged by state before another venire resorted to: *State v. Hensley*, 94-1021; *State v. Washington*, 90-664; *State v. Shaw*, 25-532.

An alien is not entitled to a jury de mediatate lingue in this state: *State v. Antonio*, 11-200.

Not error for judge, in ordering special venire, to direct sheriff to summon only freeholders who have paid taxes for preceding year, who have not served on jury within last two years, who have no suits pending and at issue in court, and not under indictment: *State v. Cody*, 119-908; but see *State v. Starnes*, 94-973; *State v. Kilgore*, 93-533.

For who are freeholders, see under section 2321.

2339. Drawn from jury box in court by judge's order. When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order

another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen, the drawing shall be completed from box number two after the same has been well shaken.

Rev. s. 1974; Code, s. 1739; 1897, c. 364; 1913, c. 31, s. 2.

See section 2326.

Statute must be strictly observed: *State v. Parker*, 132-1015. Immaterial that error in middle letter of name of juror entered on scroll: *State v. Mills*, 91-581—or that Christian name only indicated by initial letters, *State v. Simmons*, 51-309.

It is no cause for challenge to array that sheriff failed to summon several of special venire drawn from jury box: *State v. Stanton*, 118-1182—or that jury box not revised by county commissioners, in absence of allegation that sheriff acted corruptly or with partiality in summoning venire, or that something was done which affected the integrity and fairness of entire panel, *Ibid.*

Action of judge in determining qualifications of juror when his name drawn from the box is ground for challenge to array by motion to quash and set aside entire panel: *State v. Moore*, 120-570—and in absence of such challenge defendant cannot take advantage of alleged error after trial and judgment, *Ibid.*

Integrity and fairness of special venire not affected by fact that one man named in writ had removed from county, and another was dead when jury list revised by commissioners: *State v. Whitt*, 113-716; *State v. Hensley*, 94-1021—nor by fact that one named in writ is not summoned, *State v. Whitt*, 113-716—nor by fact that sheriff, in copying list of venire, omitted by mistake the name of one person, and such person in consequence was not summoned, *Ibid.*

Not grounds for challenge to array that sheriff returned on writ that he had not summoned one juror because dead, and had not summoned three others because they could not be found: *State v. Speaks*, 94-865.

Where special venire drawn by boy over ten years of age, and several of venire served as jurors, such facts should be taken advantage of by challenge to array: *State v. Parker*, 132-1014—or by motion to quash panel before jury sworn, and not by motion in arrest of judgment, *Ibid.*

Practice of drawing jurors from box under this section commended: *State v. Brogden*, 111-656; *State v. Whitson*, 111-695—though section not mandatory, *State v. Whitson*, 111-695—but discretionary with court whether it will summon venire under this section, *State v. Smarr*, 121-669.

Where special venire exhausted without completing jury, court may order further venire to be summoned from bystanders: *State v. Stanton*, 118-1182. Only freeholders can be summoned: *State v. Moore*, 120-566—and findings of judge that persons drawn on special venire were not freeholders is conclusive on appeal, *State v. Register*, 133-746. As to who are freeholders, see under section 2321.

Where partitions of jury box marked ‘jurors drawn’ and ‘jurors not drawn’ instead of ‘No. 1’ and ‘No. 2,’ and only one key, which unlocked both partitions, same being in possession of register, special venire drawn therefrom under directions of presiding judge was legal: *State v. Potts*, 100-457.

Quere, whether juror who holds bond to make title to tract of land, on which portion of purchase money still due, is freeholder capable of serving upon special venire: *State v. Hensley*, 94-1021.

Court at term to which writ of special venire returnable may permit amendment of return to writ by sheriff showing list of names of veniremen, those summoned and those not summoned, together with reason why not summoned: *State v. Whitt*, 113-716.

It is not error, after special venire is exhausted, to have names of special veniremen who were stood aside put in the hat and drawn again instead of having them called in order in which they were stood aside: *State v. Utley*, 132-1022.

Section referred to in *State v. Jones*, 97-470; *State v. Gooch*, 94-1006.

2340. **Penalty on sheriff not executing writ or jurors not attending.** If any sheriff fails duly to execute and return such writ of venire facias, he shall be fined by the court not exceeding one hundred dollars. All jurors so summoned shall attend until discharged by the court, under the same rules and penalties as are prescribed for other jurors.

Rev., ss. 1975, 3602; Code, s. 1740; R. C., c. 35, s. 31; 1830, c. 27, s. 2.

Where a sheriff, in making his return on a writ and list of special venire, endorsed thereon: "Received October 25, 1893; executed October 30, 1893, by summoning one hundred and fifty men," it was within discretion of court to which writ returnable to permit amendment of return so as to show those actually summoned and those not, with reasons why they were not: *State v. Whitt*, 113-716.

For jurors in justices' courts, see section 1504.

For jury trial in divorce proceeding, see section 1662.

For right of jury trial, see sections 556, 562, 2370.

For waiver of jury trial, see section 568.

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CHAPTER 46

LANDLORD AND TENANT

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ART. 1. GENERAL PROVISIONS

2341. Lessor and lessee not partners. No lessor of property, merely by reason that he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lessee.

Rev., s. 1982; Code, s. 1744; 1868-9, c. 156, s. 3.

Lessor and lessee are not partners: *State v. Keith*, 126-1115. Where one person was to furnish land, farming implements, feed and team, and another person was to do the work, and crops to be equally divided, there was no agricultural partnership: *Lawrence v. Weeks*, 107-119; *Day v. Stevens*, 88-83, correcting *Curtin v. Cash*, 84-41.

Section merely referred to in *Belcher v. Grimsley*, 88-90.

2342. **Attornment unnecessary on conveyance of reversions, etc.** Every conveyance of any rent, reversion, or remainder in lands, tenements or hereditaments, otherwise sufficient, shall be deemed complete without attornment by the holders of particular estates in said lands: Provided, no holder of a particular estate shall be prejudiced by any act done by him as holding under his grantor, without notice of such conveyance.

Rev., s. 947; Code, s. 1764; 4 Anne, c. 16, s. 9; 1868-9, c. 156, s. 17.

2343. **Term forfeited for nonpayment of rent.** In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within ten days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reëntry in the lease.

1919, c. 34.

2344. **Recovery for use and occupation.** When any person occupies land of another by the permission of such other, without any express agreement for rent, or upon a parol lease which is void, the landlord may recover a reasonable compensation for such occupation, and if by such parol lease a certain rent was reserved, such reservation may be received as evidence of the value of the occupation.

Rev., s. 1986; Code, s. 1746; 1868-9, c. 156, s. 5.

Where lease void under statute of frauds, lessor could only recover for time premises were occupied: *Harty v. Harris*, 120-411.

2345. **Rent apportioned, where lease terminated by death.** If a lease of land, in which rent is reserved, payable at the end of the year or other certain period of time, is determined by the death of any person during one of the periods in which the rent was growing due, the lessor or his personal representative may recover a part of the rent which becomes due after the death, proportionate to the part of the period elapsed before the death, subject to all just allowances; and if any security was given for such rent it shall be apportioned in like manner.

Rev., s. 1987; Code, s. 1747; 1868-9, c. 156, s. 6.

2346. **Rents apportioned, where right to payment terminated by death.** In all cases where rents, rent charges, annuities, pensions, dividends, or any other payments of any description, are made payable at fixed periods to successive owners under any instrument, or by any will, and where the right of any owner to receive payment is terminable by a death or other uncertain event, and where such right so terminates during a period in which a payment is growing due, the payment becoming due next after such terminating event, shall be apportioned among the successive owners according to the parts of such periods elapsing before and after the terminating event.

Rev., s. 1988; Code, s. 1748; 1868-9, c. 156, s. 7.

Section referred to in *Spruill v. Arrington*, 109-195.

2347. In lieu of emblements, farm lessee holds out year, with rents apportioned. When any lease for years of any land let for farming on which a rent is reserved determines during a current year of the tenancy, by the happening of any uncertain event determining the estate of the lessor, the tenant in lieu of emblements shall continue his occupation to the end of such current year, and shall then give up such possession to the succeeding owner of the land, and shall pay to such succeeding owner a part of the rent accrued since the last payment became due, proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor to the giving up such possession; and the tenant in such case shall be entitled to a reasonable compensation for the tillage and seed of any crop not gathered at the expiration of such current year from the person succeeding to the possession.

Rev., s. 1990; Code, s. 1749; 1868-9, c. 156, s. 8.

Whenever relation of landlord and tenant exists, without any limitation as to time, such tenancy shall be from year to year: *Stedman v. McIntosh*, 26-291; *Murrill v. Palmer*, 164-50.

Lease of land made by tenant for life terminates at his death, but by this section lease continued to end of current lease year, that tenant may gather crops: *King v. Foscue*, 91-116—but in such case remainderman entitled to part of rent proportionate to part of year elapsing after termination of life estate to surrendering of possession to remainderman, *Ibid.*; *Hayes v. Wrenn*, 167-229.

Section embraces lease for single year, although it provides in terms “for any lease for years”: *King v. Foscue*, 91-116.

Section merely referred to in *Spruill v. Arrington*, 109-195; *Railroad v. Railroad*, 104-671; *Dail & Bro. v. Freeman*, 92-358.

2348. Grantees of reversion and assigns of lease have reciprocal rights under covenants. The grantee in every conveyance of reversion in lands, tenements or hereditaments has the like advantages and remedies by action or entry against the holders of particular estates in such real property, and their assigns, for nonpayment of rent, and for the nonperformance of other conditions and agreements contained in the instruments by the tenants of such particular estates, as the grantor or lessor or his heirs might have; and the holders of such particular estates, and their assigns, have the like advantages and remedies against the grantee of the reversion, or any part thereof, for any conditions and agreements contained in such instruments, as they might have had against the grantor or his lessors or his heirs.

Rev., s. 1989; Code, s. 1765; 32 Hen. VIII, c. 34; 1868-9, c. 156, s. 18.

2349. Agreement to rebuild, how construed in case of fire. An agreement in a lease to repair a demised house shall not be construed to bind the contracting party to rebuild or repair in case the house shall be destroyed or damaged to more than one-half of its value, by accidental fire not occurring from the want of ordinary diligence on his part.

Rev., s. 1985; Code, s. 1752; 1868-9, c. 156, s. 11.

2350. Tenant not liable for accidental damage. A tenant for life, or years, or for a less term, shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part, unless he so contract.

Rev., s. 1991; Code, s. 1751; 1868-9, c. 156, s. 10.

For liability of landlord and tenant for injury resulting from defective premises, see *Fields v. Ogburn*, 178-407; *Bailey v. Long*, 175-687; *Rucker v. Willey*, 174-42; *Knight v. Foster*, 163-329.

2351. Willful destruction by tenant misdemeanor. If any tenant shall, during his term or after its expiration, willfully and unlawfully demolish, destroy, deface, injure or damage any tenement house, uninhabited house or other out-house, belonging to his landlord or upon his premises by removing parts thereof or by burning, or in any other manner, or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure or any part thereof, built or standing upon the premises of such landlord, or shall willfully and unlawfully cut down or destroy any timber, fruit, shade or ornamental tree belonging to said landlord, he shall be guilty of a misdemeanor.

Rev., s. 3686; Code, s. 1761; 1883, c. 224.

Meaning of word "wilful" as here used: *State v. Whitener*, 93-590.

A charge of burning a dwelling-house by defendant as "lessee" comes hereunder: *State v. Graham*, 121-623. Evidence that defendant at a prior time was guilty of a similar offense, inadmissible: *Ibid.*

Burden of proof is upon state to establish that the relation of landlord and tenant existed; that during the term, or after its expiration, tenant willfully and unlawfully injured the house, etc.: *State v. Godwin*, 138-582. And if defendant destroyed the house under reasonable and bona fide belief that he had right to do so, he is not guilty: *State v. Lumber Co.*, 153-610. A corporation is indictable hereunder for acts of its agents: *Ibid.*

Section cited in *State v. Chaffin*, 125-660; *State v. Morgan*, 136-630, approving *State v. Whitener*, 93-590.

2352. Lessee may surrender, where building destroyed or damaged. If a demised house, or other building, is destroyed during the term, or so much damaged that it cannot be made reasonably fit for the purpose for which it was hired, except at an expense exceeding one year's rent of the premises, and the damage occur without negligence on the part of the lessee or his agents or servants, and there is no agreement in the lease respecting repairs, or providing for such a case, and the use of the house damaged was the main inducement to the hiring, the lessee may surrender his estate in the demised premises by a writing to that effect delivered or tendered to the landlord within ten days from the damage, and by paying or tendering at the same time all rent in arrear, and a part of the rent growing due at the time of the damage, proportionate to the time between the last period of payment and the occurrence of the damage, and the lessee shall be thenceforth discharged from all rent accruing afterwards; but not from any other agreement in the lease. This section shall not apply if a contrary intention appear from the lease.

Rev., s. 1992; Code, s. 1753; 1868-9, c. 156, s. 12.

2353. Wrongful surrender to other than landlord misdemeanor. Any tenant or lessee of lands who shall willfully, wrongfully and with intent to defraud the landlord or lessor, give up the possession of the rented or leased premises to any person other than his landlord or lessor, shall be guilty of a misdemeanor.

Rev., s. 3682; Code, s. 1760; 1883, c. 138.

2354. Notice to quit in certain tenancies. A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days.

Rev., s. 1984; Code, s. 1750; 1891, c. 227; 1868-9, c. 156, s. 9.

Where tenant, under lease for year 1896 at specified price per month, payable in advance, held until June, 1897, and the landlord received rent up to June, 1897, the tenancy was from month to month in 1897: *Simmons v. Jarman*, 122-195.

Where tenant from month to month, who has paid his rent to June 1, 1897, received notice from landlord on May 18, 1897, "to get out within thirty days," such notice was invalid as to May, as rent had been paid: *Simmons v. Jarman*, 122-195—and invalid as to June because prescribed time for quitting did not end with end of month, *Ibid*.

What constitutes a tenancy from year to year: *Murrill v. Palmer*, 164-50; *Holton v. Andrews*, 151-340. Whenever relation of landlord and tenant exists without any limitation as to time, such tenancy shall be from year to year: *Stedman v. McIntosh*, 26-291—and neither party can put an end to it, except by regular notice, *Ibid*.

Persons occupying stalls in town market house do not acquire rights of tenants from year to year by being permitted to hold over after period covered by their license has expired: *Hutchins v. Durham*, 118-457.

Where person put in possession of land by owner without any agreement for rent and with express provision that he shall leave whenever owner requires him to do so, he is not tenant from year to year: *Humphries v. Humphries*, 25-362—and not entitled to statutory notice, *Ibid*.

Where tenant leased premises at stipulated rent per month and held over for several months, paying same rent without any new agreement, he was a tenant from month to month, and entitled to fourteen (now seven) days notice to quit: *Branton v. O'Bryant*, 93-99.

Where person leased to another, who assigned same to third person, notice to quit given by landlord instead of by immediate lessor is sufficient: *Waters v. Roberts*, 89-145.

Tenant entitled to written or verbal notice to quit: *Vincent v. Corbin*, 85-108—and mere demand for possession is insufficient, *Ibid*.

For cases prior to amendment changing law, see *Vincent v. Corbin*, 85-108; *Jones v. Willis*, 53-430; *Stedman v. McIntosh*, 26-291.

ART. 2. AGRICULTURAL TENANCIES

2355. Landlord's lien on crops for rents, advances, etc., enforcement. When lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands are paid and until all the stipulations contained in the lease or agreement are performed, or damages in lieu thereof paid to the lessor or his assigns, and until said party or his assigns is paid for all advancements made and expenses incurred in making and saving said crops. A landlord to entitle himself to the benefit of the lien herein provided for, must conform as to the prices charged for the advance to the provisions of the article Agricultural Liens, in the chapter Liens.

This lien shall be preferred to all other liens, and the lessor or his assigns is entitled, against the lessee or cropper, or the assigns of either, who removes the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property.

Rev., s. 1993; Code, s. 1754; 1876-7, c. 283; 1917, c. 134.

Common-law remedy of lessor by distress does not obtain in this state: *Howland v. Forlaw*, 108-567.

Where tenants in common agreed to make partition of lands and fix boundaries, and that one should occupy whole and pay to other his portion of crop raised thereon, such agreement did not create relation of landlord and tenant between parties: *Medlin v. Steele*, 75-154.

As to whether parties are tenants or croppers, see *Neal v. Bellamy*, 73-384; *Hudgins v. Wood*, 72-256; *Haywood v. Rogers*, 73-320; *State v. Burwell*, 63-661; *Denton v. Strickland*, 48-62; *Harrison v. Ricks*, 71-7. Cropper has no estate in land, and his possession is that of landlord: *State v. Austin*, 123-749. Tenant or cropper and servant distinguished in *State v. Etheridge*, 169-263. Where contract is one of tenancy, relation terminates upon division of crops, there being no unsatisfied lien for advances or to secure performance of other stipulations: *Curtis v. Cash*, 84-41.

Where it appeared that there had been an adjustment between parties of conflicting claims to land, and agreement that defendant should remain in possession of and cultivate land upon payment of part of crop as rent, relation of lessor and lessee existed under contract, which is supported by sufficient consideration: *Durant v. Taylor*, 89-351.

Hay is ordinarily embraced in word "crops" as used in section, but not, it seems, when it is merely a spontaneous growth, as crab-grass sprung up after another crop housed: *State v. Crook*, 132-1053.

For cases under prior enactment, see *Durham v. Speeke*, 82-87; *Foster v. Penny*, 76-131; *Varney v. Spencer*, 72-382; *Deaver v. Rice*, 20-576.

Tenant can recover damages for failure of landlord to furnish him with fertilizers which he agreed to do: *Herring v. Armwood*, 130-177.

"ADVANCEMENTS." Where landlord either pays for or becomes responsible for supplies to enable tenant to make a crop, such supplies are advances: *Powell v. Perry*, 127-22. Supplies necessary to make and save crop are such articles as are in good faith furnished to and received by tenant for that purpose: *Ledbetter v. Quick*, 90-276—and proper for court to leave it to jury to find whether mule, wagon, etc., were treated as advancements, *Ibid*. When landlord and tenant undertake by collusion and fraud to create indebtedness to former, under color of advancements, to prejudice of creditors of tenant, such transaction will not be sustained: *Ledbetter v. Quick*, 90-276. Advancements for which lien is created in favor of landlord by section embraces anything of value supplied by landlord to tenant, or cropper, in good faith, directly or indirectly, for purpose of making and saving crop: *Brown v. Brown*, 109-124—and where advancements are of such things as in their nature are appropriate and necessary to cultivation of crop, as farming implements and work animals, they will be presumed to create lien, *Ibid*.—but when they are of articles not in themselves so appropriate and necessary, as dry goods and groceries, whether they create a lien depends upon purpose for which they are furnished, and it must affirmatively appear that they were made in aid of crop, *Ibid*. Where landlord furnished board to tenant and family while crop was being cultivated, if landlord supplied board so that tenant might make and save crop, nothing to contrary appearing, reasonable value of such board would constitute advancements within meaning of section: *Ibid*.

Where landlord advanced certain cotton seed, etc., to his tenant in 1884, and in 1885 and 1886 allowed tenant to retain parts of undivided cotton seed and crops as advancements, he had a landlord's lien on such seed and crops: *Thigpen v. Maget*, 107-39—which took priority over lien of tenant's vendee of crops, who had advanced supplies to tenant, *Ibid*.—division of crop and delivery back to tenant not being necessary to constitute a valid advancement, *Ibid*.

LANDLORD'S LIEN. Law implies lien by virtue of section when relation of landlord and tenant established: *State v. Smith*, 106-653. Landlord's lien superior to all other liens: *Reynolds v. Taylor*, 144-167; *Brewer v. Chappell*, 101-251; *Wooten v. Hill*, 98-48; *Ledbetter v. Quick*, 90-276. When defendant rents store upon plaintiff's lands for mercantile purposes and land for agricultural purposes, under an entire and indivisible contract to pay stipulated sum and certain portion of crops raised on land as entire rent of store and lands, without apportionment of any distinct part to be paid for store, plaintiff has a landlord's lien on all products grown on land until entire rent paid: *Reynolds v. Taylor*, 144-165. Lessee who sublets land and furnishes supplies to sub-tenants, holds prior lien to mortgagor of crops: *Perry v. Perry*, 127-23. Landlord's lien under section is released only upon absolute and unqualified division to tenant of his share: *Jarrell v. Daniel*, 114-212—and where landlord and tenant through common agent set apart share of crop which tenant was to have whenever advancements paid on it, and tenant was not to remove such share until lien paid off, there was no such division as to divest lien of landlord, *Ibid*.

After default by vendee of land to pay purchase money, vendor may by contract become landlord of vendee so as to avail himself of landlord's lien given by section, rent, however,

to go as credit upon purchase price agreed to be paid for land: *Jones v. Jones*, 117-254— and courts will not declare such contract void, *Ibid*.

Section makes judgment for rent a lien on crop: *Hargrove v. Harris*, 116-419.

Subrenting does not release landlord's lien upon crops: *State v. Crook*, 132-1054; *Montague v. Mial*, 89-137—though sub-tenant's crop may thereby be subjected to double lien, that of landlord and his immediate lessor, but lien of landlord paramount, *Montague v. Mial*, 89-137; *Moore v. Faison*, 97-322.

Where a note is executed for rent of land which the tenant has the option to purchase, the owner has a landlord's lien on the crop: *Burwell v. Warehouse Co.*, 172-79. When landlord and tenant join in a mortgage to a third person and landlord pays the debt, his lien is prior to that of the mortgage as against the tenant's right to have the property applied: *Tripp v. Harris*, 154-296.

That lease between lessor and lessee is void does not affect relations existing between lessee and sub-tenant as to lien for advancements: *Perry v. Perry*, 127-23.

Tenant being estopped from denying that party from whom he leased is his landlord and entitled to rents cannot escape landlord's lien by claiming personal property exemptions out of crop: *Hamer v. McCall*, 121-196; *Durham v. Speeke*, 82-87.

Agreement after default between mortgagor and mortgagee that mortgagor was to remain in possession as tenant would confer landlord's lien upon mortgagee: *Cooper v. Kimball*, 123-120.

Landlord's lien extends to and includes costs of such legal proceedings as are necessary to recover his rents: *Slaughter v. Winfrey*, 85-159—and as all crops are his until such lien discharged, tenant has no property therein which he can claim as his constitutional exemption as against such costs, *Ibid*.

Where lessee sublets part of farm, he becomes lessor to his sub-lessee, and he is entitled to same lien on crop which section gives to lessor: *Moore v. Faison*, 97-322—but original lessor, after his lessee has paid him in full, has no lien under section on crop of sub-lessee for advances made by him to sub-lessee, *Ibid*.

Landlord's lien may be given up, but contract to give it up, in order to be enforced, must be based upon consideration: *Sugg v. Farrar*, 107-123. Although lien of landlord for advances is superior to that of third party making advances to tenant, nevertheless, such priority exists only for advances made, or rents accrued, during year in which crops were made, and not for balance due for antecedent year: *Fleming v. Davenport*, 116-153; *Ballard v. Johnson*, 114-141.

Except in case of landlord and tenant, provided for specially by section, lessor has no lien upon products of leased property as rent: *Howland v. Forlaw*, 108-567—it is for all purposes, until division, deemed vested in tenant, and his sale to third parties before rent ascertained and set apart conveys good title, *Ibid*.

POSSESSION AND TITLE TO CROP. All crops raised on land, whether by tenant or cropper, are deemed to be vested in landlord, in absence of agreement to contrary, until rent and advancements paid: *State v. Austin*, 123-749; *Boone v. Darden*, 109-74; *Smith v. Tindall*, 107-88; *State v. Smith*, 106-654; *Durham v. Speeke*, 82-90—and an attempt to appropriate and carry off crop may be repelled by landlord by force, provided no more force is used than necessary to protect his possession, *State v. Austin*, 123-759. Although constructive possession of crop is vested by section in landlord, yet during cultivation, and for all purposes of making and gathering crop, actual possession is in tenant until rent and advances become due, or division can be had: *Jordan v. Bryan*, 103-59; *State v. Townsend*, 170-696.

For lessor's protection, as between him and tenant, possession of crop deemed vested in lessor: *State v. Higgins*, 126-1112; *State v. Keith*, 126-1114; *Bridgers v. Dill*, 97-222; *Kesler v. Cornelison*, 98-383—but as between tenant and third parties, tenant entitled to possession and crop, *Ibid*. Until division of crop and possession by tenant of his share, tenant can not convey legal title to purchaser: *McNeely v. Hart*, 32-63. Section gives landlord title to crop until rent actually paid (whether claim be reduced to judgment or not) and such title not impaired by fact that tenant conveys crop to third person, who takes without notice of landlord's claim: *Belcher v. Grimsley*, 88-88. Tenant may in good faith, for purpose of preserving crop, sever it from land and remove it to place of security upon land upon which produced, without notice to landlord: *State v. Williams*, 106-646.

Where occupant of land is vendee or mortgagor in default, though he may for some purposes be considered a tenant at will, he is not a lessee whose crop, under section, is vested in landlord: *Taylor v. Taylor*, 112-27.

Landlord who has agreed to take portion of crop, or specified sum of money as rental, and has received part of rental in money, is entitled to possession of whole crop until rent satisfied: *McGehee v. Breedlove*, 122-277.

When cropper abandons before maturity, he forfeits all interest in crop, which becomes fully the property of landlord: *Beacom v. Boing*, 126-136.

DIVISION OF CROP. Cropper cannot convey legal title to his share of crop to third person before actual division and appropriation: *McNeely v. Hart*, 32-63. Where in contract between landlord and tenant no time was fixed for division of crop, landlord was not obliged to wait until whole crop had been gathered, but had right to bring action for possession of crop before it was fully harvested: *Rich v. Hobson*, 112-79. Proper course, ordinarily, between landlord and tenant, is to have crops divided as they are gathered, subject to convenience and interest of parties, and as soon as reasonably can be. *Smith v. Tindall*, 107-88. Landlord was entitled to have his crop, that is, enough for rent and advancements, gathered at time he demands it, and he was not obliged to wait for division until whole crop was gathered, *Ibid.*

Where, by agreement between landlord and tenant, advances made by former to latter should be due and demandable "when all crops gathered and divided," but no agreement as to time when they should be divided, landlord's right to demand rent and pay for advances did not accrue until crop gathered and ready for division: *Jordan v. Bryan*, 103-59—and where he divided corn with tenant, who removed his share thereof, landlord waived and lost his lien on defendant's share, *Ibid.*

Where landlord and tenant set apart share of crop for tenant to have upon paying advances due upon it, and tenant told not to move such share until lien paid off, there was no such division as to divest lien of landlord: *Jarrell v. Daniel*, 114-212.

PRIORITY AS BETWEEN LANDLORD AND THIRD PARTY. Landlord's lien for rent and advances is superior to that of third party making advances to tenant: *Fleming v. Davenport*, 116-153; *Ballard v. Johnson*, 114-141; *Spruill v. Arrington*, 109-192; *Branch v. Galloway*, 105-193—notwithstanding priority of latter in point of time, *Spruill v. Arrington*, 109-192.

Where it does not appear that mule sold to tenant was part of supplies advanced by landlord, mortgage creditor has prior lien on crop as to it, and landlord could not retain crops for its purchase money: *Branch v. Galloway*, 105-193—use of mule in cultivation of crops not necessarily making it an advancement, *Ibid.*

Where landlord, who had lien on certain property, directed purchaser of such property from tenant to pay purchase money to tenant, but revoked order before same paid, there being no consideration for the order, and no change of status of parties, and purchaser afterwards paid money to tenant, landlord entitled to recover value of property from purchaser: *Sugg v. Farrar*, 107-123.

Landlord liable to account to person advancing supplies to tenant for value of crops in excess of his lien: *Crinkley v. Egerton*, 113-142.

Landlord's lien for rent takes priority of mortgage for advancements, especially when parties contract that landlord's lien for rent shall be retained: *Crinkley v. Egerton*, 113-444.

After forfeiture, mortgagee can by contract become landlord of mortgagor so as to avail himself of landlord's lien which, though such contract be oral and unregistered, has priority over supplies furnished by third persons who by registration of mortgage are fixed with notice of mortgagor's default and mortgagee's right of entry: *Ford v. Green*, 121-70.

REMEDY TO RECOVER POSSESSION. Action will lie, not only where crop removed from land leased, but also in a case where tenant or cropper or any other person takes crops into his absolute possession and denies right of landlord thereto: *Livingston v. Farish*, 89-140. If tenant at any time before satisfying landlord's liens for rent and advances, removes crop or any part of it, he becomes liable civilly and criminally: *Jordan v. Bryan*, 103-59. Landlord cannot bring claim and delivery for crop before time fixed for division, unless tenant about to remove or dispose of crop, or to abandon growing crop: *Ibid.*; see *Smith v. Tindall*, 107-88.

Landlord may bring claim and delivery to recover possession of crops raised by tenant or cropper, where his right of possession denied: *Livingston v. Farish*, 89-140—or may resort to

any other appropriate remedy to enforce his lien for rent due and advances made, *Ibid.*—and may bring action in nature of trover, *Alsbrook v. Shields*, 67-333.

Crops produced by tenant being vested in lessor until rents shall be paid, he can maintain an action for recovery of an undivided portion, and it is not necessary that he shall specially designate in his complaint or affidavit in claim and delivery such undivided part: *Boone v. Darden*, 109-74.

As to jurisdiction of actions under section, see *Durant v. Taylor*, 89-351; *Montague v. Mial*, 89-137; *Deloach v. Coman*, 90-186; *Foster v. Penny*, 76-131; *State v. Surles*, 74-33.

Section merely referred to in *Parker v. Brown*, 136-280; *Perkins v. Brinkley*, 133-158; *Cooper v. Kimball*, 123-124; *State v. Ewing*, 108-756; *Brown v. Miller*, 108-395; *State v. Turner*, 106-694; *Rouse v. Wooten*, 104-229; *State v. Copeland*, 86-692.

2356. Rights of tenant. When the lessor or his assigns gets the actual possession of the crop or any part thereof otherwise than by the mode prescribed in the preceding section, and refuses or neglects, upon a notice, written or oral, of five days, given by the lessee or cropper or the assigns of either, to make a fair division of said crop, or to pay over to such lessee or cropper or the assigns of either, such part thereof as he may be entitled to under the lease or agreement, then and in that case the lessee or cropper or the assigns of either is entitled to the remedies against the lessor or his assigns given in an action upon a claim for the delivery of personal property to recover such part of the crop as he, in law and according to the lease or agreement, may be entitled to. The amount or quantity of such crop claimed by said lessee or cropper or the assigns of either, together with a statement of the grounds upon which it is claimed, shall be fully set forth in an affidavit at the beginning of the action.

Rev., s. 1994; Code, s. 1755; 1876-7, c. 283, s. 2.

Where cropper dies before harvesting his crop his personal representatives are entitled to recover his share of the crop: *Parker v. Brown*, 136-280.

When lessee wrongfully deprived of actual possession of crop by lessor, he is left to his civil remedy for the breach of trust, should lessor refuse to account: *State v. Keith*, 126-1114—and can resort to claim and delivery after five days notice, *State v. Austin*, 123-751; *Boone v. Darden*, 109-78; *Wilson v. Respass*, 86-112.

Right of cropper to receive his portion of crops is protected by section, which for certain purposes creates lien in his favor, and which will be enforced against employer, or landlord, or his assigns: *Rouse v. Wooten*, 104-229—and which has precedence over agricultural liens made subsequent to contract, but before crop harvested, *Ibid.*

Where landlord took crop into his sole possession, refusing to divide same when demanded, on ground that crop was not in condition for division, but not denying tenant's right to division, and crop destroyed by fire while in his possession, tenant cannot maintain action in nature of trover against him: *Shearin v. Rigsbee*, 97-216.

Lessor has no right, where there is no agreement to that effect, to take actual possession from lessee or cropper, and can never do so, except when he obtains same by action of claim and delivery, upon removal of crop by lessee or cropper: *State v. Copeland*, 86-694.

2357. Action to settle disputes between parties. When any controversy arises between the parties, and neither party avails himself of the provisions of this chapter, it is competent for either party to proceed at once to have the matter determined in the court of a justice of the peace, if the amount claimed is two hundred dollars or less, and in the superior court of the county where the property is situate if the amount so claimed is more than two hundred dollars.

Rev., s. 1995; Code, s. 1756; 1876-7, c. 283, s. 3.

Widow of tenant cultivating land on shares, after crop allotted to her in her year's support, may maintain action for conversion against landlord: *Parker v. Brown*, 136-280—and not compelled to resort to remedy prescribed by section, *Parker v. Brown*, 136-287—but may bring

civil action to recover value of crops, subject to such deductions as lessor is entitled to by reason of advancements, and such damage as he may have sustained by inability of lessee to perform contract, *Ibid.*

Damages resulting from failure of landlord to furnish fertilizers to his tenant are not too remote for consideration: *Herring v. Armwood*, 130-177.

Although action under section is wrongfully brought before clerk of court, yet when it gets into superior court at term, by appeal or otherwise, latter has jurisdiction of whole cause: *Elliott v. Tyson*, 117-114.

Special jurisdiction of justices of the peace under section does not extend to torts, but is confined to actions for enforcing contracts: *Montague v. Mial*, 89-137.

Action by landlord against tenant for recovery of rent, sum demanded not exceeding \$200, is action upon contract of lease and cognizable in court of justice of the peace: *Deloach v. Coman*, 90-186.

As bearing upon section, see *Durant v. Taylor*, 89-351. Section discussed in *Wilson v. Respass*, 86-114. Section referred to in *Elliott v. Tyson*, 116-184; *State v. Copeland*, 86-694.

2358. Tenant's undertaking on continuance or appeal. In case there is a continuance or an appeal from the justice's decision to the superior court, the lessee or cropper, or the assigns of either, shall be allowed to retain possession of said property upon his giving an undertaking to the lessor or his assigns, or the adverse party, in a sum double the amount of the claim, if such claim does not amount to more than the value of such property, otherwise to double the value of such property, with good and sufficient surety, to be approved by the justice of the peace or the clerk of the superior court, conditioned for the faithful payment to the adverse party of such damages as he shall recover in said action.

Rev., s. 1995; Code, s. 1756; 1876-7, c. 283, s. 3.

See annotations under section 2357.

2359. Crops delivered to landlord on his undertaking. In case the lessee or cropper, or the assigns of either, at the time of the appeal or continuance mentioned in the preceding section, fails to give the undertaking therein required, then the constable or other lawful officer shall deliver the property into the actual possession of the lessor or his assigns, upon the lessor or his assigns giving to the adverse party an undertaking in double the amount of said property, to be justified as required in the preceding section, conditioned for the forthcoming of such property, or the value thereof, in case judgment is pronounced against him.

Rev., s. 1996; Code, s. 1757; 1876-7, c. 283, s. 4.

Where lessor solvent and required to give bond of indemnity, court will not restrain him from selling crop: *Wilson v. Respass*, 86-112.

Section merely referred to in *Rouse v. Wooten*, 104-229.

2360. Crops sold, if neither party gives undertaking. If neither party gives the undertaking described in the two preceding sections, it is the duty of the justice of the peace or the clerk of the superior court to issue an order to the constable or sheriff, or other lawful officer, directing him to take into his possession all of said property, or so much thereof as may be necessary to satisfy the claimant's demand and costs. and to sell the same under the rules and regulations prescribed by law for the sale of personal property under execution, and to hold the proceeds thereof subject to the decision of the court upon the issue or issues pending between the parties.

Rev., s. 1997; Code, s. 1758; 1876-7, c. 283, s. 5.

Landlord's lien extends to and includes cost of such legal proceedings as are necessary to recover rents: *Slaughter v. Winfrey*, 85-159—and tenant has no property therein which he can claim as his constitutional exemption as against such costs, *Ibid*.

2361. Tenant's crop not subject to execution against landlord. Whenever servants and laborers in agriculture shall by their contracts orally or in writing be entitled, for wages, to a part of the crops cultivated by them, such part shall not be subject to sale under executions against their employers, or the owners of the land cultivated.

Rev., s. 1998; Code, s. 1796.

Section referred to in *Tedder v. R. R.*, 124-344.

2362. Unlawful seizure by landlord or removal by tenant misdemeanor. If any landlord shall unlawfully, willfully, knowingly and without process of law, and unjustly seize the crop of his tenant when there is nothing due him, he shall be guilty of a misdemeanor. If any lessee or cropper, or the assigns of either, or any other person, shall remove a crop, or any part thereof, from land without the consent of the lessor or his assigns, and without giving him or his agent five days notice of such intended removal, and before satisfying all the liens held by the lessor or his assigns, on said crop, he shall be guilty of a misdemeanor.

Rev., ss. 3664, 3665; Code, s. 1759; 1876-7, c. 283, s. 6; 1883, c. 83.

LANDLORD'S LIABILITY. The word "crop" includes that which is ungathered as well as gathered, and a charge against the landlord for seizing "corn growing and unmaturing in the field" is sufficient: *State v. Townsend*, 170-696.

It is not essential that the landlord should take forcible or even manual possession of tenant's crop. The offense is complete if he secures such control over crop as to prevent tenant's removing his part in a peaceable manner: *State v. Ewing*, 108-755. Section cited in *State v. Williams*, 106-649.

TENANT'S LIABILITY. This section extends to and protects receivers charged with the management of lands: *State v. Turner*, 106-691. Lessor who has sold his interest in crop to another, indictable for removing hereunder: *State v. Rose*, 90-712.

Tenant cannot set up as a defense the landlord's breach of contract, whereby he owes the landlord nothing: *State v. Bell*, 136-674, overruling *State v. Neal*, 129-692. If tenant aids and abets subtenant in removing a crop before paying the lien of the landlord, he is guilty: *State v. Crook*, 132-1053. As to punishment, see *State v. Powell*, 94-920.

Landlord's right to lien is not impaired by sub-letting: *Montague v. Mial*, 89-137.

See generally: *State v. Long*, 78-571. As to whether hay is part of crop, see *State v. Crook*, 132-1053.

Section cited in *Jordan v. Bryan*, 103-65; *State v. Ewing*, 108-756; *Ellis v. Hampton*, 123-194.

INDICTMENT. Sufficiency of, generally: *State v. Turner*, 106-971; *State v. Walker*, 87-541; *State v. Rose*, 90-712. Sufficient to aver that the act was done "wilfully and unlawfully": *State v. Pender*, 83-651. Should aver removal "before satisfying all liens held by the lessor or his assigns on said crop": *State v. Merritt*, 89-506; *State v. Rose*, 90-712—"without having given any notice of such intended removal" is sufficient, *State v. Powell*, 94-920. Not necessary to aver that landlord had a lien on said crop: *State v. Smith*, 106-653—not necessary to negative any agreement between the parties that crop should not be subject to statutory liens, *State v. Turner*, 106-691.

EVIDENCE. Offense not complete unless failure to give notice is proved; and it may be proved by any competent evidence; it is not necessary that it be proved by the landlord, his agent or assignee: *State v. Crowder*, 97-432.

INTENT. The tenant may sever and remove crop, for purpose of preserving it, to a place of security upon land upon which it was produced; but if he removes it from land, he is guilty, and the intent is not an essential element: *State v. Williams*, 106-646; see, also, *Varner v. Spencer*, 72-381; compare *State v. Pender*, 83-651.

VARIANCE. *State v. Ray*, 92-810. No variance where the allegation was that A. was owner of the land and the landlord, and the proof was that A. was landlord, but that he rented the land of another: *State v. Foushee*, 117-766.

COMPARE. Cropper cannot be guilty of larceny for secretly appropriating crop, while it is in his possession: *State v. Copeland*, 86-691; *State v. McCoy*, 89-466—but he is guilty of larceny for such an appropriation after his possession has terminated by delivery to landlord: *State v. Webb*, 87-558; *State v. King*, 98-649.

2363. Turpentine and lightwood leases. This chapter shall apply to all leases or contracts to lease turpentine trees, or use lightwood for purposes of making tar, and the parties thereto shall be fully subject to the provisions and penalties of this chapter.

Rev., s. 1999; Code, s. 1762; 1893, c. 517; 1876-7, c. 283, s. 7.

Where A. agrees to allow B. to cultivate pine trees where A. lives for a year to enable him to make and save turpentine, and for compensation B. is to have one-half of turpentine, this is not a lease of land or of trees: *Denton v. Strickland*, 48-61.

2364. Mining and timber land leases. If in a lease of land for mining, or of timbered land for the purpose of manufacturing the timber into goods, rent is reserved, and if it is agreed in the lease that the minerals, timber or goods, or any portion thereof, shall not be removed until the payment of the rent, in such case the lessor shall have the rights and be entitled to the remedy given by this chapter.

Rev., s. 2000; Code, s. 1763; 1868-9, c. 156, s. 16.

A timber option or purchase is not a leasehold interest: *Timber Co. v. Wells*, 171-262.

ART. 3. SUMMARY EJECTMENT

2365. Tenant holding over may be dispossessed in certain cases. Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in either of the following cases:

Remedy by summary proceedings in ejectment before justice of peace is restricted to cases where relation between parties is that of landlord and tenant: *McIver v. R. R.*, 163-544; *McDonald v. Ingram*, 124-272; *Hauser v. Morrison*, 146-248; *McCombs v. Wallace*, 66-481; *Hughes v. Mason*, 84-472. Where relation existing between parties is that of vendor and vendee, vendor not entitled to evict vendee by summary proceedings under section: *Johnson v. Hauser*, 82-375; *Hauser v. Morrison*, 146-248; *Riley v. Jordan*, 75-180; *McCombs v. Wallace*, 66-481.

Where defendant held under an agreement to pay rent and an option to purchase which he had failed to comply with, the section applies: *Jerome v. Setzer*, 175-391. When vendee unconditionally surrenders his rights under contract of purchase, and enters into contract of lease, he may be evicted hereunder, and it is not necessary that he should actually surrender possession of land and receive it again at hands of lessor: *Riley v. Jordan*, 75-180. That vendee remained silent when contract of sale of land was mutilated under direction of vendor, is not sufficient evidence of abandonment of rights under contract, nor of change of relations from vendor and vendee to landlord and tenant to give justice of peace jurisdiction of action to summarily eject vendee: *Boone v. Drake*, 109-79. See, also, *Hauser v. Morrison*, 146-248.

Where in action under section it appeared that defendant, a slave, entered into possession of land as tenant of plaintiff, and in 1865 refused to pay further rent and disclaimed being plaintiff's tenant, he was estopped to deny plaintiff's title, and plaintiff was entitled to recover: *Wilson v. James*, 79-349.

Section does not apply to mortgagor who is allowed to remain in possession, and on demand, after default, refuses to surrender possession: *Culbreth v. Hall*, 159-588; *Greer v. Wilbar*, 72-592; *McMillan v. Love*, 72-18. Bargainer in deed of trust, containing stipulations for retention of possession of land conveyed until sold under terms of trust, and who holds possession after sale of premises by trustee, is not such tenant as comes within section: *McCombs v. Wallace*, 66-481—hence proceedings cannot be taken under section to evict him, *Ibid*.

This remedy does not apply when title to land is involved or the equitable rights of the parties are to be adjusted: *McLaurin v. McIntyre*, 167-350.

Lessee cannot resist action by lessor for recovery of land, brought after termination of lease, by showing superior title in third person or in himself acquired before or after contract: *Davis v. Davis*, 83-71.

Right of tenant to homestead is no defense to action to recover premises brought by landlord: *Abbott v. Cromartie*, 72-292.

When tenant, sued for possession, denies his tenancy, landlord not required to prove demand for possession, or that term has expired: *Springs v. Schenck*, 99-551.

Section merely referred to in *Featherstone v. Carr*, 132-800; *Crinkley v. Egerton*, 113-450; *Cottingham v. McKay*, 86-241.

1. When a tenant in possession of real estate holds over after his term has expired.

Summary proceedings in ejectment before justice under subsection can only be had where simple relation of lessor and lessee exists, and there is a holding over after term: *McIver v. R. R.*, 163-544; *McDonald v. Ingram*, 124-272; *Hughes v. Mason*, 84-472—and jurisdiction of justice excluded where relation is that of mortgagor and mortgagee, or vendor and vendee, *Ibid*.; *Culbreth v. Hall*, 159-588; *Hauser v. Morrison*, 146-248; *Riley v. Jordan*, 75-180; *McCombs v. Wallace*, 66-481; *Greer v. Wilbar*, 72-592; *McMillan v. Love*, 72-18.

The issue hereunder is: Was defendant tenant of plaintiff, and does he hold over after expiration of tenancy? *McDonald v. Ingram*, 124-272.

Effect of acceptance of rental for period beyond term, see *Vanderford v. Foreman*, 129-217.

Subsection constitutional: *Credle v. Gibbes*, 65-192. Subsection referred to in *Parker v. Allen*, 84-466; *Medlin v. Steele*, 75-154.

2. When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.

Summary proceeding under section begun during lessee's term cannot be maintained where contract of lease contained no condition breach of which would authorize reëtry by lessor: *Meroney v. Wright*, 81-390—and mere failure to pay rent upon "lease at _____dollars a year, payable monthly," does not warrant such reëtry: *Ibid*.

Subsection referred to in *Parker v. Allen*, 84-467. See section 2343.

3. When any tenant or lessee of lands or tenements, who is in arrear for rent, or has agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated.

Rev., s. 2001; Code, ss. 1766, 1777; 4 Geo. II, c. 28; 1868-9, c. 156, s. 19; 1905, cc. 297, 299, 820.

2366. **Local: Refusal to perform contract ground for dispossession.** When any tenant or cropper who enters into a contract for the rental of land for the current or ensuing year willfully neglects or refuses to perform the terms of his contract without just cause, he shall forfeit his right of possession to the premises. This section applies only to the following counties: Alleghany, Anson, Beaufort, Bertie, Bladen, Burke, Cabarrus, Camden, Carteret, Caswell, Chat-

ham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Duplin, Edgecombe, Franklin, Gaston, Gates, Greene, Halifax, Harnett, Hertford, Hyde, Jackson, Johnston, Jones, Lenoir, Martin, Mecklenburg, Montgomery, Nash, Northampton, Onslow, Pender, Perquimans, Pitt, Randolph, Robeson, Rockingham, Rowan, Sampson, Swain, Tyrrell, Union, Wake, Wayne, Washington, Wilson, Yadkin.

Rev., s. 2001, subsec. 4; Code, ss. 1766, 1777; 4 Geo. II, c. 28; 1868-9, c. 156, s. 19; 1905, cc. 297, 299, 820; 1907, cc. 43, 153; 1909, cc. 40, 550.

2367. Summons issued by justice on verified complaint. When the lessor or his assigns, or his or their agent or attorney, makes oath in writing, before any justice of the peace of the county in which the demised premises are situated, stating such facts as constitute one of the cases above described, and describing the premises and asking to be put in possession thereof, the justice shall issue a summons reciting the substance of the oath, and requiring the defendant to appear before him or some other justice of the county, at a certain place and time (not to exceed five days from the issuing of the summons, without the consent of the plaintiff or his agent or attorney), to answer the complaint. The plaintiff or his agent or attorney may in his oath claim rent in arrear, and damage for the occupation of the premises since the cessation of the estate of the lessee: Provided, the sum claimed shall not exceed two hundred dollars; but if he omits to make such claim, he shall not be thereby prejudiced in any other action for their recovery.

Rev., s. 2002; Code, s. 1767; 1868-9, c. 156, s. 20; 1869-70, c. 212.

Where defendant denies alleged tenancy, it is the duty of justice to proceed and try issue of tenancy: *Foster v. Penry*, 77-160. Provision for renewal in lease gives an equity which may be set up as a defense in summary proceedings in ejectment: *McAdoo v. Callum*, 86-419. Tenant may set up in answer any equitable defense which he may have to landlord's claim: *Forsythe v. Bullock*, 74-135. If he fails to set up the defense that he is not a tenant, but holds under an agreement to purchase, whether he can afterwards maintain an action to enforce such agreement, see *Isler v. Hart*, 161-499.

Question of jurisdiction is not to be determined by matter set up in answer, but court should hear evidence upon issue of tenancy: *Hahn v. Guilford*, 87-172. Section referred to in *Medlin v. Steele*, 75-154.

2368. Service of summons. The officer receiving such summons shall immediately serve it by the delivery of a copy to the defendant or by leaving a copy at his usual or last place of residence, with some adult person, if any such be found there; or, if the defendant has no usual place of residence in the county and cannot be found therein, by fixing a copy on some conspicuous part of the premises claimed.

Rev., s. 2003; Code, s. 1768; 1868-9, c. 156, s. 21.

2369. Judgment by default or confession. The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the defendant fails to appear, or admits the allegations of the complaint, the justice shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the

lessee, not exceeding two hundred dollars, be claimed in the oath of the plaintiff as due and unpaid, the justice shall inquire thereof, and give judgment as he may find the fact to be.

Rev., s. 2004; Code, s. 1769; 1868-9, c. 156, s. 22.

2370. Trial by justice; jury trial; judgment; execution. If the defendant by his answer denies any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be. If either party demands a trial by jury, it shall be granted under the rules prescribed by law for other trials by jury before a justice; and if the jury finds that the allegation in the plaintiff's oath, which entitles him to be put in possession, is true, the justice shall give judgment that the defendant be removed from and the plaintiff put in possession of the demised premises, and also for such rent and damages as shall have been assessed by the jury, and for costs; and shall issue his execution to carry the judgment into effect.

Rev., s. 2005; Code, s. 1770; 1868-9, c. 156, s. 23.

Judgment for tenant is not an estoppel on landlord to extent of precluding him from showing in subsequent action advancements made prior to eviction to which he was entitled: *Burwell v. Brodie*, 134-540. **Judgment for plaintiff is an estoppel as to the question of tenancy, and defendant cannot restrain the execution of the judgment:** *Isler v. Hart*, 161-499.

2371. Damages assessed to trial. On appeal to the superior court, the jury trying the issue joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court, and judgment for the rent in arrear and for the damages assessed may, on motion, be rendered against the sureties to the appeal.

Rev., s. 2006; Code, s. 1775; 1868-9, c. 156, s. 28.

Where an appeal is taken to superior court, rents and damages may be recovered against defendant and his sureties to the time of trial: *Dunn v. Patrick*, 156-248.

Section referred to in *Nesbitt v. Turrentine*, 83-538.

2372. Rent and costs tendered by tenant. If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease. If the plaintiff further prosecutes his action, and the defendant pays into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed.

Rev., s. 2007; Code, s. 1773; 4 Geo. II, c. 28, s. 4; 1868-9, c. 156, s. 26.

Tender by tenant of rent accrued after termination of lease does not preclude landlord from recovering possession: *Vanderford v. Foreman*, 129-217. **Acceptance by landlord of rent accruing after termination of lease, after suit for possession, does not preclude landlord from recovering:** *Ibid*.

2373. Undertaking on appeal; when to be increased. Either party may appeal from the judgment of the justice, as is prescribed in other cases of appeal from the judgment of a justice; but no execution commanding the removal of a defendant from the possession of the demised premises shall be suspended until

the defendant gives an undertaking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant pays any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land. At any term of the superior court of the county in which such appeal is docketed after the lapse of one year from the date of the filing of the undertaking above mentioned, the tenant, after legal notice to that end has been duly executed on him, may be required to show cause why said undertaking should not be increased to an amount sufficient to cover rents and damages for such period as to the court may seem proper, and if such tenant fails to show proper cause and does not file such bond for rents and damages as the court may direct, or make affidavit that he is unable so to do and show merits, his appeal shall be dismissed and the judgment of the justice of the peace shall be affirmed.

Rev., s. 2008; Code, s. 1772; 1868-9, c. 156, s. 25; 1883, c. 316.

Where enjoined from bringing actions upon each installment of rent as vexatious, such person not precluded thereby from issuing execution on judgment for recovery of property after expiration of lease: *Featherstone v. Carr*, 134-66. As to action against sureties on undertaking, see *Blackmore v. Winders*, 144-212. Should bonds become impaired, or if litigation should become protracted to such an extent as to require additional security to protect plaintiffs in their rents, superior court can require additional security under section: *Featherstone v. Carr*, 132-802. Justice has discretion as to sufficiency of surety upon undertaking, which judge will not review in absence of any suggestion that justice acted dishonestly or capriciously: *Steadman v. Jones*, 65-388. As bearing upon section, see *Rollins v. Henry*, 76-269; *Dunn v. Patrick*, 156-248.

2374. Restitution of tenant, if case quashed, etc., on appeal. If the proceedings before the justice are brought before a superior court and quashed, or judgment is given against the plaintiff, the superior or other court in which final judgment is given shall, if necessary, restore the defendant to the possession, and issue such writs as are proper for that purpose.

Rev., s. 2009; Code, s. 1774; 1868-9, c. 156, s. 27.

As to writ of restitution generally, see *Railroad v. Railroad*, 108-304. Where party put out of possession of land under judgment which is afterwards reversed or set aside, court will restore party to possession of land: *Lytle v. Lytle*, 94-522. Where in action before justice judgment rendered for plaintiff, who was put into possession, but on appeal to superior court, judgment for defendant, defendant entitled to writ of restitution as part of judgment: *Meroney v. Wright*, 84-336. Whenever party put out of possession by process of law, and proceedings adjudged void, order for writ of restitution is part of judgment, and should be made: *Perry v. Tupper*, 70-538.

2375. Damages to tenant for dispossession, if proceedings quashed, etc. If, by order of the justice, the plaintiff is put in possession, and the proceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal.

Rev., s. 2010; Code, s. 1776; 1868-9, c. 156, s. 30.

Under section, tenant who secures reversal of summary proceedings against him may have damages for eviction assessed in original or in a separate action: *Burwell v. Brodie*, 134-540. As to complaint in action hereunder, see *Ibid.*

ART. 4. FORMS

2376. Forms sufficient. The following forms, or substantially similar, shall be sufficient in all proceedings under this chapter :

OATH OF PLAINTIFF

North Carolina,-----County.

A. B., plaintiff,
against
C. D., defendant. } Summary proceedings in ejectment.

The plaintiff (his agent or attorney) maketh oath that the defendant entered into the possession of a piece of land in said county (describe the land) as a lessee of the plaintiff (or as lessee of E. F., who, after the making of the lease, assigned his estate to the plaintiff, or otherwise, as the fact may be) ; that the term of the defendant expired on the ___ day of _____ 19___ (or that his estate has ceased by nonpayment of rent, or otherwise, as the fact may be) ; that the plaintiff has demanded the possession of the premises of the defendant, who refused to surrender it. but holds over ; that the estate of the plaintiff is still subsisting, and the plaintiff asks to be put in possession of the premises.

The plaintiff claims _____ dollars for rent of the premises from the ___ day of _____ 19___ to the ___ day of _____ 19___, and also _____ dollars for the occupation of the premises since the ___ day of _____ 19___ to the date hereof.

A. B., plaintiff.

Subscribed and sworn to before me, this ___ day of _____ 19___

J. K., J. P.

SUMMONS

North Carolina,-----County.

A. B., plaintiff,
against
C. D., defendant. } Summary proceedings in ejectment.

A. B. (his agent or attorney) having made and subscribed before me the oath, a copy of which is annexed, you are required to appear before me on the ___ day of _____, 19___, at _____, then and there to answer the complaint; otherwise judgment will be given that you be removed from the possession of the premises.

Witness my hand and seal this ___ day of _____, 19___

J. K., J. P. (Seal).

To C. D., defendant.

The justice attaches the oath of the plaintiff to the summons and delivers them, and a copy of both of them, to the officer, and makes the following entry on his docket, or varies it according to the facts :

DOCKET ENTRIES

A. B., plaintiff,
against
C. D., defendant. } Summary proceedings in ejectment for (describe the premises).

Oath of plaintiff (his agent or attorney) filed on the ___ day of _____ 19___
Plaintiff claims _____ dollars for rent from _____ to _____, and _____ dollars for occupation from _____ to _____

Summons issued the ___ day of _____, 19___, to _____, constable (or sheriff, as the case may be).

The officer serves the summons and returns it to the justice with the oath of the plaintiff, and with his return indorsed:

RETURN OF OFFICER

On this day I served the within summons on the defendant, C. D., by delivering him a copy thereof, and of the oath of A. B., annexed (or by leaving a copy thereof and the oath of A. B. at the usual place of residence of the defendant C. D., with an adult found there) (or the said C. D. not being found in my county, and having no usual or last place of residence therein) (or no adult person being found at his usual or last place of residence, by posting a copy of the summons and of the oath of A. B., annexed, on a conspicuous part of the premises claimed).

N. M., Constable.

The ---- day of -----, 19----.

RECORD TO BE ENTERED ON DOCKET

A. B., plaintiff, against C. D., defendant.	}	Summary proceedings in ejection.
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It appearing that the summons, with a copy of the oath of the plaintiff (his agent or attorney), was duly served on defendant,* and whereas the defendant fails to appear (or admits the allegations of the plaintiff), I adjudge that the defendant be removed from and the plaintiff put in possession of the premises described in the oath of the plaintiff. I also adjudge that the plaintiff recover of defendant ----- dollars for rent from the ---- day of -----, 19---- to the ---- day of -----, 19----, and ----- dollars for damages for occupation of the premises from the ---- day of -----, 19----, to this day, and ----- dollars for his costs; the ---- day of -----, 19----.

If the defendant admits part of the allegations of plaintiff, but not all, the judgment must be varied accordingly; for example: follow the foregoing to the asterisk (*), and then proceed:

And whereas the defendant appears and admits the first and second allegations of the plaintiff, and denies the residue; and whereas both parties waived a trial by jury, I heard evidence upon the matters in issue, and find (here state the findings on the matters in issue separately).

Supposing the findings are for the plaintiff, the record would proceed:

I therefore adjudge that the defendant (and so on from the asterisk (*)).

If either party demands a jury, the record will proceed from the asterisk (*) as follows:

And whereas the plaintiff (or defendant, as the case may be) demanded a trial of the issues joined by a jury, I caused a jury to be summoned, to wit: (here give the names of the jurors summoned) from whom the following jury was duly impaneled, to wit: (here state the names of the six jurors impaneled), who find (here state the verdict of jury; if they find all the issues for the plaintiff, say so; if any particular issues, say so; also state the sums assessed by them for rent and for occupation to trial). Therefore, I adjudge, etc. (as in form No. 5, from asterisk (*)).

If either party appeals, the justice will enter on his docket as follows, altering the entry according to the facts:

RECORD OF APPEAL

From the foregoing judgment the plaintiff (or defendant, as the case may be) prayed an appeal to the next superior court of said county, which is allowed.

EXECUTION ON JUDGMENT FOR PLAINTIFF

A. B., plaintiff,
against
C. D., defendant. } -----County.

The State of North Carolina, to any lawful officer of said county—Greeting:

You are hereby commanded to remove C. D. from, and put A. B. in, the possession of a certain piece of land (here describe it as in the oath of plaintiff). You shall also make out the goods and chattels, lands and tenements, of said defendant ----- dollars, with interest from the ----- day of -----, 19____, to the day of payment, which the plaintiff lately recovered of the defendant as rent and damages, and the further sum of ----- dollars as costs, in said action. Return this writ, with a statement of your proceedings thereon, before me (state when and where according to general law respecting justices' executions).

Witness my hand and seal, this ----- day of -----, 19____ (Seal.)

BOND TO STAY EXECUTION

We, the undersigned, ----- and -----, acknowledge ourselves indebted to ----- in the sum of ----- dollars:

Witness our hands and seals, this the ----- day of -----, A. D. 19____.

Whereas on the ----- day of -----, A. D. 19____, before ----- a justice of the peace for ----- county, A. B. recovered a judgment against C. D. for ----- and for ----- dollars damages for the detention of said real estate from the ----- day of -----, A. D. 19____, to the ----- day of -----, A. D. 19____; and whereas the said ----- has prayed an appeal to the superior court from said judgment, and also asks that execution on said judgment shall be suspended: Now, therefore, if the said ----- shall pay any judgment which, in this or in any other action, the said ----- may recover for the rent of said premises, and for damages for detention thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

----- (Seal.)
----- (Seal.)
----- (Seal.)

STAY OF EXECUTION

The State of North Carolina, to any officer having an execution in favor of A. B., plaintiff, v. C. D., defendant, in a summary proceeding in ejectment, signed by-----

The defendant having given bond to me, as required by law, on his appeal to the superior court of ----- county, in the above case, you will stay further proceedings upon said execution and immediately return the same to me, with a statement of your action under it.

Witness my hand and seal this ----- day of -----, 19____ C. D., defendant. -----, J. P. (Seal.)

CERTIFICATE ON RETURN OF APPEAL

The annexed are the original oath, summons and other papers, and a copy of the record of the proceedings in the case of a summary proceeding in ejectment, A. B., plaintiff, v. C. D., defendant. -----, J. P. (Seal.)

(Here state all the costs, to whom paid or due, and by whom.) (All the papers must be attached.)

Rev., s. 2011; Code, s. 1780.

NOTE.—For requirement of leases in writing, see Contracts Requiring Writing, s. 988.

CHAPTER 47

LAND REGISTRATION

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ART. 1. NATURE OF PROCEEDING

2377. Jurisdiction in superior court. For the purpose of enabling all persons owning real estate within this state to have the title thereto settled and registered, as prescribed by the provisions of this chapter, the superior court of the county in which the land lies in the state shall have exclusive original jurisdiction of all petitions and proceedings had thereupon, under the rules of practice and procedure prescribed for special proceedings except as herein otherwise provided.

1913, c. 90, s. 1.

General purpose and history of the statute explained. *Dillon v. Broeker*, 178-65; *Cape Lookout Co. v. Gold*, 167-63.

This statute is remedial in its nature and should be liberally construed to carry out its intent: *Dillon v. Broeker*, 178-65. The power of the court as to making parties and allowing amendments the same as in other proceedings: *Mfg. Co. v. Spruill*, 169-618.

2378. Proceedings in rem; vests title. The proceedings under any petition for the registration of land, and all proceedings in the court in relation to registered land, shall be proceedings in rem against the land, and the decrees of the court shall operate directly on the land, and vest and establish title thereto in accordance with the provisions of this chapter.

1913, c. 90, s. 2.

2379. Rules of practice prescribed by attorney-general. The attorney-general, with the approval of the supreme court, shall from time to time make, change, revise and revoke rules of practice in the superior court for the administration of this chapter. He shall in like manner prescribe forms for use in such court, and in the notation of the registry of titles of memorials, claims, liens, lis pendens, and all other involuntary charges upon and to such registered lands. Whenever a question shall arise in the administration of this chapter as to the proper method of protecting or asserting any right or interest under the law, and the method of procedure is in doubt, it shall be the duty of the clerk or register of deeds to notify the attorney-general, who, with the approval of the supreme court, shall prescribe a rule covering such case.

1913, c. 90, s. 31.

ART. 2. OFFICERS AND FEES

2380. Examiners appointed by clerk. The clerk of the superior court of each county shall appoint three or more examiners of titles, who shall be licensed attorneys at law, residing in the state of North Carolina. They shall qualify by taking oath before the clerk to faithfully discharge the duties of such office, which oath shall be filed in the office of the clerk. The term of office shall be two years. Examiners of titles shall have and exercise the jurisdiction and perform the

duties hereinafter prescribed, and receive the fees herein provided. They shall not appear in or have any connection with any proceeding instituted under the provisions of this chapter, and they shall be subject to removal at will by such clerk or judge of the superior court.

1913, c. 90, s. 3; 1917, c. 63.

2381. Fees of officers. The fees to be allowed the clerks and sheriffs in this proceeding shall be the same as now allowed by law to clerks and sheriffs in other special proceedings. The examiner hereinbefore provided for shall receive, as may be allowed by the clerk, a minimum fee of five dollars for such examination of each title of property assessed upon the tax books at the amount of five thousand dollars or less; for each additional thousand dollars of assessed value of property so examined he shall receive fifty cents; for examination outside of the county he shall receive a reasonable allowance. There shall be allowed to the register of deeds for copying the plot upon registration of titles book one dollar; for issuing the certificate and new certificates under this chapter, fifty cents for each; for noting the entries or memorandum required and for the entries noting the cancellation of mortgages and all other entries, if any, herein provided for, a total of twenty-five cents for the entry or entries connected with one transaction. The county or other surveyor employed under the provisions of this chapter shall not be allowed to charge more than forty cents per hour for his time actually employed in making the survey and the map, except by agreement with the petitioner: Provided, however, that a minimum fee of two dollars in any case may be allowed.

There shall be no other fees allowed of any nature except as herein provided, and the bond of the register, clerk and sheriff shall be liable in case of any mistake, malfeasance, or misfeasance as to the duties imposed upon them by this chapter in as full a manner as such bond is now liable by law.

1913, c. 90, s. 30.

ART. 3. PROCEDURE FOR REGISTRATION

2382. Who may institute proceedings. Any person, being in the peaceable possession of land within the state and claiming an estate of inheritance therein, may prosecute a special proceeding in rem against all the world in the superior court for the county in which such land is situate, to establish his title thereto, to determine all adverse claims and have the title registered. Any number of the separate parcels of land claimed by the petitioner may be included in the same proceeding, and any one parcel may be established in several parts, each of which shall be clearly and accurately described and registered separately, and the decree therein shall operate directly upon the land and establish and vest an indefeasible title thereto. Any person in like possession of lands within the state, claiming an interest or estate less than the fee therein, may have his title thereto established under the provisions of this chapter, without the registration and transfer features herein provided.

1913, c. 90, s. 4.

2383. Land lying in two or more counties. In every proceeding to register title, in which it is alleged in the petition or made to appear that the land therein described, whether in one or more parcels, is situated partly in one county and

partly in another, or is situated in two or more counties, that is to say, when an entire tract, or two or more entire tracts, are situated in two or more counties (but not separate or several tracts situated in different counties) it shall be competent to institute the proceedings before the clerk of the superior court of any county in which any part of such tract lying in two or more counties is situated, and said clerk shall have jurisdiction both of the parties and of the subject-matter as fully as if said land was situated wholly in his county; but upon the entry of a final decree of registration of title, the clerk by or before whom the same was rendered shall certify a copy thereof to the register of deeds of every county in which said land or any part thereof is situated, and the same shall be there filed and recorded; and every such register of deeds, upon demand of the person entitled and payment of requisite fees therefor, shall issue and deliver a certificate of title for that part of said land situated in his county. This section shall apply and become effective in all cases or proceedings heretofore conducted before any clerk of the superior court of this state for registration of title, as in this chapter authorized, when the land described in the petition as an entire tract was situated in two or more counties, as aforesaid; and upon the filing and recording of a certified copy of the final decree or decree of registration therein, the register of deeds shall issue and deliver a certificate of title to the present owner or person entitled to the same, for that part of the land situated in his county, as aforesaid, upon payment or tender of proper fees therefor.

1919, c. 82, s. 1.

2384. Petition filed; contents. Suit for registration of title shall be begun by a petition to the court by the persons claiming, singly or collectively, to own or have the power of appointing or disposing of an estate in fee simple in any land, whether subject to liens or not. Infants and other persons under disability may sue by guardian or trustee, as the case may be, and corporations as in other cases now provided by law; but the person in whose behalf the petition is made shall always be named as petitioner. The petition shall be signed and sworn to by each petitioner, and shall contain a full description of the land to be registered as hereinafter provided, together with a plot of same by metes and bounds, corners to be marked by permanent markers of iron, stone or cement; it shall show when, how and from whom it was acquired, and whether or not it is now occupied, and if so, by whom; and it shall give an account of all known liens, interest, equities and claims, adverse or otherwise, vested or contingent, upon such land. Full names and addresses, if known, of all persons who may be interested by marriage or otherwise, including adjoining owners and occupants, shall be given. If any person shall be unable to state the metes and bounds, the clerk may order a preliminary survey.

1913, c. 90, s. 5.

2385. Summons issued and served; disclaimer. The clerk of the court shall issue a summons directed to the sheriff of every county in which persons named as interested may reside, such persons being made defendants, and the summons shall be returnable as in other cases of special proceedings, except that the return shall be at least sixty days from the date of the summons. The summons shall be served at least ten days before the return thereof and the return recorded in the same manner as in other special proceedings; and all parties under

disabilities shall be represented by guardian, either general or ad litem. If the persons named as interested are not residents of the state of North Carolina, and their residence is known, which must appear by affidavit, the summons must be served on such nonresidents as is now prescribed by law for service of summons on nonresidents.

Any party defendant to such proceeding may file a disclaimer of any claim or interest in the land described in the petition, which shall be deemed an admission of the allegations of the petition, and the decree shall bar such party and all persons thereafter claiming under him, and such party shall not be liable for any costs or expenses of the proceeding except such as may have been incurred by reason of his delay in pleading.

1913, c. 90, s. 6.

2386. Notice of petition published. In addition to the summons issued, prescribed in the foregoing section, the clerk of the court shall, at the time of issuing such summons, publish a notice of the filing thereof containing the names of the petitioners, the names of all persons named in the petition, together with a short but accurate description of the land and the relief demanded, in some secular newspaper published in the county wherein the land is situate, and having general circulation in the county; and if there be no such paper, then in a newspaper in the county nearest thereto and having general circulation in the county wherein the land lies, once a week for eight issues of such paper. The notice shall set forth the title of the cause and in legible or conspicuous type the words "To whom it may concern," and shall give notice to all persons of the relief demanded and the return day of the summons: Provided, that no final order or judgment shall be entered in the cause until there is proof and adjudication of publication as in other cases of publication of notice of summons. The provisions of this section, in respect to the issuing and service of summons and the publication of the notice, shall be mandatory and essential to the jurisdiction of the court to proceed in the cause: Provided, that the recital of the service of summons and publication in the decree or in the final judgment in the cause, and in the certificate issued to the petitioner as hereinafter provided, shall be conclusive evidence thereof.

1913, c. 90, s. 7; 1915, c. 128, s. 1; 1919, c. 82, s. 2.

What is sufficient publication of notice: *Cape Lookout Co. v. Gold*, 167-63.

2387. Hearing and decree:

1. *Referred to examiner.* Upon the return day of the summons the petition shall be set down for hearing upon the pleadings and exhibits filed. If any person claiming an interest in the land described in the petition, or any lien thereon, shall file an answer, the petition and answer, together with all exhibits filed, shall be referred to the examiner of titles, who shall proceed, after notice to the petitioner and the persons who have filed answer or answered, to hear the cause upon such parol or documentary evidence as may be offered or called for and taken by him, and in addition thereto make such independent examination of the title as may be necessary. Upon his request the clerk shall issue a commission under the seal of the court for taking such testimony as shall be beyond the jurisdiction of such examiner.

2. *Examiner's report.* The examiner shall, within thirty days after such hearing, unless for good cause the time shall be extended, file with the clerk

a report of his conclusions of law and fact, setting forth the state of such title, any liens or encumbrances thereon, by whom held, amount due thereon, together with an abstract of title to the lands and any other information in regard thereto affecting its validity.

3. *Exceptions to report.* Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions, either to the conclusions of law or fact. Whereupon the clerk shall transmit the record to the judge of the superior court for his determination thereof; such judge may on his own motion certify any issue of fact arising upon any such exceptions to the superior court of the county in which the proceeding is pending, for a trial of such issue by jury, and he shall so certify such issue of fact for trial by jury upon the demand of any party to the proceeding. If, upon consideration of such record, or the record and verdict of issues to be certified and tried by jury, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations, liens, etc., declaring the land entitled to registration accordingly, and the same, together with the record, shall be docketed by the clerk of the court as in other cases, and a copy of the decree certified to the register of deeds of the county for registration as hereinafter provided. Any of the parties may appeal from such judgment to the supreme court, as in other special proceedings.

4. *No judgment by default.* No judgment in any proceeding under this chapter shall be given by default, but the court must require an examination of the title in every instance except as respects the rights of parties who, by proper pleadings, admit the petitioner's claim. If, upon the return day of the summons and the day upon which the petition is set down for hearing, no answer be filed, the clerk shall refer the same to the examiner of titles, who shall, after notice to the petitioner, proceed to examine the title, together with all liens or encumbrances set forth or referred to in the petition and exhibits, and shall examine the registry of deeds, mortgages, wills, judgments, mechanic liens and other records of the county, and upon such examination he shall, as hereinbefore provided, report to the clerk the condition of the title, with a notice of liens or encumbrances thereon. The examiner shall have power to take and call for evidence in such case as fully as if the application were being contested. If the title shall be found to be in the petitioner, the clerk shall enter a decree to that effect and declaring the land entitled to registration, with entry of any limitations, liens, etc., and shall certify the same for registration, as hereinbefore provided, after approval by the judge of the superior court.

1913, c. 90, s. 8.

2388. *Effect of decree; approval of judge.* Every decree rendered as hereinbefore provided shall bind the land and bar all persons and corporations claiming title thereto or interest therein; quiet the title thereto, and shall be forever binding and conclusive upon and against all persons and corporations, including the state of North Carolina and the state board of education, whether mentioned by name in the order of publication, or included under the general description, "to whom it may concern"; and every such decree so rendered, or a duly certified copy thereof, as also the certificate of title issued thereon to the person or corporation therein named as owner, or to any subsequent transferee or purchaser,

shall be conclusive evidence that such person or corporation is the owner of the land therein described, and no other evidence shall be required in any court of this state of his or its right or title thereto. It shall not be an exception to such conclusiveness that the person is an infant, lunatic or is under any disability, but such person may have recourse upon the indemnity fund hereinafter provided for, for any loss he may suffer by reason of being so concluded. Such decree shall, in addition to being signed by the clerk of the court, be approved by the judge of the superior court, who shall review the whole proceeding and have power to require any reformation of the process, pleading, decrees or entries.

1913, c. 90, s. 9; 1919, c. 82, s. 3.

In a suit brought to sell property under this statute, if the requirements are fully met the deed by the commissioners cuts off the rights of all persons, when an attorney is appointed to represent possible contingent interests under section 1744: *Dillon v. Broeker*, 178-65.

Power of the judge as to review of proceedings, allowing amendments, etc.: *Mfg. Co. v. Spruill*, 169-618.

ART. 4. REGISTRATION AND EFFECT

2389. Manner of registration. The county commissioners of each county shall provide for the register of deeds in the county a book, to be called Registration of Titles, in which the register shall enroll, register and index, as hereinafter provided, the decree of title before mentioned and the copy of the plot contained in the petition, and all subsequent transfers of title, and note all voluntary and involuntary transactions in any wise affecting the title to the land, authorized to be entered thereon. If the title be subject to a trust condition, encumbrance or the like, the words "in trust," "upon condition," "subject to encumbrance," or like appropriate insertion shall indicate the fact and fix any person dealing with such certificate with notice of the particulars of such limitations upon the title as appears upon the registry. No erasure, alteration, or amendment shall be made upon the registry after entry and issuance of a certificate of title except by order of a court of competent jurisdiction.

1913, c. 90, s. 10; 1919, c. 236, s. 1.

Cited in *Dillon v. Broeker*, 178-65.

2390. Certificate issued. Upon the registration of such decree the register of deeds shall issue an owner's certificate of title, under the seal of his office, which shall be delivered to the owner or his agent duly authorized, and shall be substantially as follows:

STATE OF NORTH CAROLINA—COUNTY OF _____

The certificate of _____

I hereby certify that the title is registered in the name of _____ to and situate in said county and State, described as follows: (Here describe land as in decree.)

Estate _____ (here name the estate and any limitation or encumbrance thereon, as fee simple, upon condition, in trust, subject to encumbrance, and the like). Under decree of the land court of _____ county, entitled _____

Registered No. _____, Book No. _____, page _____

Witness my hand and seal, at office at _____, this _____ day of _____, A. D. 19____

(SEAL) _____, Register of Deeds.

1913, c. 90, s. 10.

Cited in *Dillon v. Broeker*, 178-65.

2391. Certificates numbered; entries thereon. All certificates of title to land in the county shall be numbered consecutively, which number shall be retained as long as the boundaries of the land remain unchanged, and a separate page or more, with appropriate space for subsequent entries, shall be devoted to each title in the registration of titles book for the county. Every entry made upon any certificate of title in such book or upon the owner's certificate, under any of the provisions of this chapter, shall be signed by the register of deeds and minutely dated in conformity with the dates shown by the entry book.

1913, c. 90, s. 11.

Section cited in *Dillon v. Broeker*, 178-65.

2392. New certificate issued, if original lost. Whenever an owner's certificate of title is lost or destroyed, the owner or his personal representative may petition the court for the issuance of a new certificate. Notice of such petition shall be published once a week for four successive weeks, under the direction of the court, in some convenient newspaper, and noted upon the registry of titles, and upon satisfactory proof having been exhibited before it that the certificate has been lost or destroyed the court may direct the issuance of a new certificate, which shall be approximately designated and take the place of the original, but at least thirty full days shall elapse between the filing of the petition and making the decree for such new certificate.

1913, c. 90, s. 24.

2393. Registered owner's estate free from adverse claims; exceptions. Every registered owner of any estate or interest in land bought under this chapter shall, except in cases of fraud to which he is a party or in which he is a privy, without valuable consideration paid in good faith, and except when any registration has been procured through forgery, hold the land free from any and all adverse claims, rights or encumbrances not noted on the certificate of title, except (1) liens, claims or rights arising or existing under the laws or constitution of the United States which the statutes of this state cannot require to appear of record under registry laws; (2) taxes and assessments thereon due the state or any county, city or town therein, but not delinquent; (3) any lease for a term not exceeding three years, under which the land is actually occupied.

1913, c. 90, s. 25.

Cited in *Dillon v. Broeker*, 178-65.

2394. Adverse claims existing at initial registry; affidavit; limitation of action. Any person making any claim to or asserting any lien or charge upon registered land, existing at the initial registry of the same and not shown upon the register or adverse to the title of the registered owner, and for which no other provision is herein made for asserting the same in the registry of titles, may make an affidavit thereof setting forth his interest, right, title, lien or demand, and how and under whom derived, and the character and nature thereof. The affidavit shall state his place of residence and designate a place at which all notices relating thereto may be served. Upon the filing of such affidavit in the office of the clerk of the superior court, the clerk shall order a note thereof as in the case of charges or encumbrances, and the same shall be entered by the register of deeds. Action shall be brought upon such claim within six months after the

entry of such note, unless for cause shown the clerk shall extend the time. Upon failure to commence such action within the time prescribed therefor, the clerk shall order a cancellation of such note. If any person shall wantonly or maliciously or without reasonable cause procure such notation to be entered upon the registry of titles, having the effect of a cloud upon the registered owner's title, he shall be liable for all damages the owner may suffer thereby.

1913, c. 90, s. 25.

2395. Decree and registration run with the land. The obtaining of a decree of registration and the entry of a certificate of title shall be construed as an agreement running with the land, and the same shall ever remain registered land, subject to the provisions of this chapter and all amendments thereof.

1913, c. 90, s. 26.

2396. No right by adverse possession. No title to nor right or interest in registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession.

1913, c. 90, s. 27.

2397. Jurisdiction of courts; registered land affected only by registration. Except as otherwise specially provided by this chapter, registered land and ownership therein shall be subject to the jurisdiction of the courts in the same manner as if it had not been registered; but the registration shall be the only operative act to transfer or affect the title to registered land, and shall date from the time the writing, instrument or record to be registered is duly filed in the office of the register of deeds, subject to the provisions of this chapter; no voluntary or involuntary transaction shall affect the title to registered lands until registered in accordance with the provisions of this chapter: Provided, that all mortgages, deeds, surrendered and canceled certificates, when new certificates are issued for the land so deeded, the other paper-writings, if any, pertaining to and affecting the registered estate or estates herein referred to, shall be filed by the register of deeds for reference and information, but the registration of titles book shall be and constitute sole and conclusive legal evidence of title, except in cases of mistake and fraud, which shall be corrected in the methods now provided for the correction of papers authorized to be registered.

1913, c. 90, s. 28.

No distinction is made between creditors and purchasers under the act: *Dillon v. Broeker*, 178-65. Registration of titles is necessary, constitutes the only operative act and is conclusive legal evidence of title: *Dillon v. Broeker*, 178-65.

2398. Priority of right. In case of conflicting claims between the registered owners the right, title or estate derived from or held under the older certificate of title shall prevail.

1913, c. 90, s. 29.

2399. Compliance with this chapter due registration. When the provisions of this chapter have been complied with, all conveyances, deeds, contracts to convey or leases shall be considered duly registered, as against creditors and purchasers, in the same manner and as fully as if the same had been registered in the manner heretofore provided by law for the registration of conveyances.

1913, c. 90, s. 32.

ART. 5. ADVERSE CLAIMS AND CORRECTIONS AFTER REGISTRATION

2400. Limitations. No decree of registration heretofore entered, and no certificate of title heretofore issued pursuant thereto, shall be adjudged invalid, revoked, or set aside, unless the action or proceeding in which the validity of such decree of registration or certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within twelve months from March 10, 1919.

No decree of registration hereafter entered and no certificate of title hereafter issued pursuant thereto shall be adjudged invalid or revoked or set aside, unless the action or proceeding in which the validity of such decree or of the certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within twelve months from the date of such decree.

No action or proceeding for the recovery of any right, title, interest, or estate in registered land adverse to the title established and adjudicated by any decree of registration heretofore entered shall be maintained unless such action or proceeding be commenced within twelve months from the date last mentioned; and no action or proceeding for the recovery of any right, title, interest, estate in registered land, adverse to the right established by any decree of registration hereafter shall be maintained unless such action or proceeding be commenced within twelve months from the date of such decree.

No action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land which existed at the date when any decree of registration was heretofore entered, and which was not recognized or established by such decree, shall be maintained, unless such action or proceeding be commenced within twelve months from the date above mentioned; and no action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land in existence at the date of any decree of registration hereafter entered, and which is not recognized and established by such decree, shall be maintained, unless such action or proceeding be commenced within twelve months from the date of such decree.

1919, c. 236, s. 1.

2401. Adverse claim subsequent to registry; affidavit of claim prerequisite to enforcement; limitation. Any person claiming any right, title, or interest in registered land adverse to the registered owner thereof, arising subsequent to the date of the original decree of registration, may, if no other provision is made for registering the same, file with the register of deeds of the county in which such decree was rendered or certificate of title thereon was issued, a verified statement in writing, setting forth fully the right, title, or interest so claimed, how or from whom it was acquired, and a reference to the number, book, and page of the certificate of title of the registered owner, together with a description of the land by metes and bounds, the adverse claimant's place of residence and his postoffice address, and, if a nonresident, he shall designate or appoint the said register of deeds to receive all notices directed to or to be served upon such adverse claimant in connection with the claim by him made, and such statement shall be noted and filed by said register of deeds as an adverse claim; but no action or proceeding to

enforce such adverse claim shall be maintained unless the same be commenced within six months of the filing of the statement thereof.

1919, c. 236, s. 1.

2402. Suit to enforce adverse claim; summons and notice necessary. Upon the institution of any action or proceeding to enforce such adverse claim, notice thereof shall be served upon the register of deeds, who shall enter upon the registry a memorandum that suit has been brought or proceeding instituted to determine the validity of such adverse claim; and summons or notice shall be served upon the holder or claimant of the registered title or certificate or other person against whom such adverse claim is alleged, as provided by law for the institution of suits or proceedings in the courts of this state.

If no notice of the institution of an action or proceeding to enforce an adverse claim be served upon the register of deeds and upon the holder of the registered title or certificate, or other person, as aforesaid, within seven months from the date of filing the statement of adverse claim, the register of deeds shall cancel upon the registry the adverse claim so filed and make a memorandum setting out that no notice of suit or proceeding to enforce the same had been served upon him within seven months as herein required, and that such adverse claim was therefore canceled; and thereafter no action or proceeding shall be begun or maintained to enforce such adverse claim in any of the courts of this state.

1919, c. 236, s. 1.

2403. Judgment in suit to enforce adverse claim; register to file. The court shall certify its judgment to the register of deeds; if such adverse claim be held valid, the register of deeds shall make such entry upon the registry and upon the owner's certificate of title as may be directed by the court, or he may file and record a certified copy of the judgment or order of the court thereon; if such adverse claim be held invalid the register of deeds shall cancel such adverse claim upon the registry, noting thereon that the same was done by order or judgment of the court, or he may file and record a certified copy of the judgment or order of the court thereon.

1919, c. 236, s. 1.

2404. Correction of registered title; limitation of adverse claims. Any registered owner or other claimant under the registered title may at any time apply to the court in which the original decree was entered, by petition, setting out that registered interests of any description, whether vested, contingent, expectant or inchoate, have terminated and ceased, or that new interests have arisen or been created which do not appear upon the certificate, or that any error or omission was made in entering or issuing the certificate or any duplicate thereof, or that the name of any person on the certificate has been changed, or that the registered owner had married or, if registered as married, that the marriage has been terminated, or that a corporation which owned registered lands has been dissolved, without conveying the same or transferring its certificate within three years after the dissolution, or any other reasonable and proper ground of correction or relief; and such court may hear and determine the petition after notice to all parties in interest, and may make such order or decree as may be appropriate and lawful in the premises; but nothing in this section shall be construed to authorize any such court to open any original decree of registration which

was entered more than twelve months prior to the filing of such petition, and nothing shall be done or ordered by the court to divest or impair the title or other interest of a purchaser who holds a transfer or certificate of title for value and in good faith. No action or proceeding shall be commenced or maintained to set up or establish any right, claim, interest or estate adverse to the order or decree or certificate of title issued thereon made or entered upon any petition or other proceeding authorized by this section, unless the same shall be brought and instituted within six months from the date of such order or decree authorized by this section.

1919, c. 236, s. 1.

ART. 6. METHOD OF TRANSFER

2405. When whole of land conveyed. Whenever the whole of any registered estate is transferred or conveyed the same shall be done by a transfer or conveyance upon or attached to the certificate substantially as follows:

A B and wife (giving the names of the parties owning land described in the certificate and their wives) hereby, in consideration of ----- dollars, sell and convey to C D (giving name of purchaser) the lot or tract of land, as the case may be, described in the certificate of title hereto attached.

The same shall be signed and properly acknowledged by the parties and their wives and shall have the full force and effect of a deed in fee simple: Provided, that if the sale shall be in trust, upon condition, with power to sell or other unusual form of conveyance, the same shall be set out in the deed, and shall be entered upon the registration of titles book as hereinafter provided; that upon presentation of the transfer, together with the certificate of title, to the register of deeds, the transaction shall be duly noted and registered in accordance with the provisions of this chapter, and certificate of title so presented shall be canceled and a new certificate with the same number issued to the purchaser thereof, which new certificate shall fully refer by number and also by name of holder to former certificate just canceled.

1913, c. 90, s. 12.

2406. Conveyance of part of registered land. The transfer of any part of a registered estate, either of an undivided interest therein or of a separate lot or parcel thereof, shall be made by an instrument of the transfer or conveyance similar in form to that herein provided for the transfer of the whole of any registered estate, to which shall be attached the certificate of title of such registered estate. In case of the transfer of an undivided interest in a registered estate, such instrument or transfer or conveyance shall accurately specify and describe the extent and amount of the interest transferred and of the interest retained, respectively. In case of a transfer of a separate lot or parcel of a registered estate, such instrument of transfer or conveyance shall describe the lot or parcel transferred either by metes and bounds or by reference to the map or plat attached thereto, and shall in every case be accompanied by a map or plat having clearly indicated thereon the boundaries of the whole of the registered estate and of the lot or parcel to be transferred.

1919, c. 82, s. 4.

2407. Duty of register of deeds upon part conveyance. Upon presentation to the register of deeds of an instrument of transfer or conveyance of an undivided

interest in a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of title attached thereto and to issue to each owner a new certificate of title, each bearing the same number as the original certificate of title and accurately specifying and describing the extent and the amount of the interest retained or of the interest transferred, as the case may be. Upon presentation to the register of deeds of an instrument of transfer or conveyance of a separate lot or parcel of a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of title attached thereto and to issue to each owner a new certificate of title bearing a new number and describing the separate lot or parcel retained or transferred, as the case may be, either by metes and bounds or by reference to a map or plat thereto attached.

1919, c. 82, s. 4.

2408. Subdivision of registered estate. Any owner of a registered estate who may desire to subdivide the same may make application in writing to the register of deeds for the issuance of a new certificate of title for each subdivision, to which application shall be attached a map or plat having clearly indicated thereon the boundaries of the whole of the registered estate in question and of each lot or parcel for which he desires a new certificate of title. Thereupon it shall be the duty of the register of deeds, upon payment by such applicant of necessary surveyor's fees, if any are required, and of the amount herein provided for issuing the certificates of title and recording the map, to cancel the certificate of title attached to said application and to issue to such owner new certificates of title, each bearing a new number, for each lot or parcel shown upon the said map, describing such lot or parcel in such certificates either by metes and bounds or by reference to a map or plat attached thereto.

1919, c. 82, s. 4.

2409. References and cross-references entered on register. In all cases the register of deeds shall place upon the registry of title books and upon the certificate of title of such registered estate therein, references and cross-references to the new certificates issued as above provided, in accordance with the provisions of this article, and the new certificates issued shall fully refer by number and by name of the holder to the canceled certificate in place of which they are issued.

1919, c. 82, s. 4.

2410. When land conveyed as security.

1. Whole land conveyed. Whenever the owner of any registered estate shall desire to convey same as security for debt, it may be done in the following manner, by a short form of transfer, substantially as follows, to wit:

A B and wife (giving names of all owners or holders of certificates and their wives) hereby transfer to C. D. the tract or lot of land described as No. _____ in registration of titles book for _____ county, a certificate for the title for same being hereto attached, to secure a debt of _____ dollars, due to _____, of _____ county and state, on the _____ day of _____, 19____, evidenced by bond (or otherwise as the case may be) dated the ____ day of _____, 19____. In case of default in payment of said debt with accrued interest, _____ days notice of sale required.

The same shall be signed and properly acknowledged by the parties making same, and shall be presented, together with the owner's certificate, to the regis-

ter of deeds, whose duty it shall be to note upon the owner's certificate and upon the certificate of title in the registration of titles book the name of the trustee, the amount of debt, and the date of maturity of same.

2. *Part of land conveyed.* When a part of the registered estate shall be so conveyed, the register of deeds shall note upon the book and owner's certificate the part so conveyed, and if the same be required and the proper fee paid by the trustee, shall issue what shall be known as a partial certificate, over his hand and seal, setting out the portion so conveyed.

3. *Effect of transfer.* All transfers by such short form shall convey the power of sale upon due advertisement at the county courthouse and in some newspaper published in the county, or adjoining county, in the same manner and as fully as is now provided by law in the case of mortgages and deeds of trust and default therein.

4. *Other encumbrances noted.* All registered encumbrances, rights or adverse claims affecting the estate represented thereby shall continue to be noted, not only upon the certificate of title in the registration book, but also upon the owner's certificate, until same shall have been released or discharged. And in the event of second or other subsequent voluntary encumbrances the holder of the certificate may be required to produce such certificate for the entry thereon or attachment thereto of the note of such subsequent charge or encumbrance as provided in this article.

5. *Other forms of conveyance may be used.* Nothing in this section nor this chapter shall be construed to prevent the owner from conveying such land, or any part of the same, as security for a debt by deed of trust or mortgage in any form which may be agreed upon between the parties thereto, and having such deed of trust or mortgage recorded in the office of the register of deeds as other deeds of trust and mortgages are recorded: Provided, that the book and page of the record at which such deed of trust or mortgage is recorded shall be entered by the register of deeds upon the owner's certificate and also on the registration of titles book.

1913, c. 90, s. 14; 1915, c. 245.

6. *Sale under lien; new certification.* Upon foreclosure of such deed of trust or mortgage, or sale under execution for taxes or other lien on the land, the fact of such foreclosure or sale shall be reported by the trustee, mortgagee or other person authorized to make the same, to the register of deeds of the county in which the land lies, and, upon satisfactory evidence thereof, it shall be his duty to call in and cancel the outstanding certificate of title for the land so sold, and to issue a new certificate in its place to the purchaser or other person entitled thereto; and the production of such outstanding certificate and its surrender by the holder thereof may be compelled, upon notice to him, by motion before and order of the clerk of the superior court in the original proceeding or the clerk of the superior court of the county in which the land lies; but the right of appeal from such order may be exercised and shall be allowed as in other special proceedings, and pending any such appeal the rights of all parties shall be preserved.

1919, c. 82, s. 5.

2411. *Owner's certificate presented with transfer.* In voluntary transactions the owner's certificate of title must be presented along with the writing or instru-

ment conveying or effecting the sale, and thereupon and not otherwise the register shall be authorized to register the conveyance or other transaction upon proof of payment of all delinquent taxes or liens, if any, or if such payment be not shown the entry and new certificate shall note such taxes or liens as having priority thereto.

1913, c. 90, s. 15.

2412. Transfers probated; partitions; contracts. All transfers of registered land shall be duly executed and probated as required by law upon like conveyances of other lands, and in all cases of change in boundary by partition, subtraction or addition of land there shall be an accurate survey and permanent marking of boundaries and accurate plots, showing the courses, distances and markings of every portion thereof, which shall be duly proved and registered as upon the initial registration. Such transfers shall be presented to the register of deeds for entry upon the registration of titles book and upon the owner's certificate within thirty days from the date thereof, or become subject to any rights which may accrue to any other person by a prior registration. All leases or contracts affecting land for a period exceeding three years shall be in writing, duly proved before the clerk of the superior court, recorded in the register's office, and noted upon the registry and upon the owner's certificate.

1913, c. 90, ss. 15, 32.

2413. Certified copy of order of court noted. In voluntary transactions a certificate from the proper state, county or court officer, or certified copy of the order, decree or judgment of any court of competent jurisdiction shall be authority for him to order a proper notation thereof upon the registration of titles book, and for the register of deeds to note the transaction under the direction of the court.

1913, c. 90, s. 16.

2414. Production of owner's certificate required. Whenever owner's certificate is not presented to the register along with any writing, instrument or record filed for registration under this chapter, he shall forthwith send notice by registered mail to the owner of such certificate, requesting him to produce the same in order that a memorial of the transaction may be made thereon; and such production may be required by subpoena duces tecum or by other process of the court, if necessary.

1913, c. 90, s. 17.

2415. Registration notice to all persons. Every voluntary or involuntary transaction, which if recorded, filed or entered in any clerk's office would affect unregistered land, shall, if duly registered in the office of the proper register as the case may be, and not otherwise, be notice to all persons from the time of such registration, and operate, in accordance with law and the provisions of this chapter, upon any registered land in the county of such registration.

1913, c. 90, s. 18.

2416. Conveyance of registered land in trust. Whenever a writing, instrument or record is filed for the purpose of transferring registered land in trust, or upon any equitable condition or limitation expressed therein, or for the purpose

of creating or declaring a trust or other equitable interest in such land, the particulars of the trust, condition, limitation or other equitable interest shall not be entered on the certificate, but it shall be sufficient to enter in the book and upon the certificates a memorial thereof by the terms "in trust" or "upon condition" or in other apt words, and to refer by number to the writing, instrument or record authorizing or creating the same. And if express power is given to sell, encumber or deal with the land in any manner, such power shall be noted upon the certificates by the term "with power to sell" or "with power to encumber," or by other apt words.

1913, c. 90, s. 19.

2417. Authorized transfer of equitable interests registered. No writing or instrument for the purpose of transferring, encumbering or otherwise dealing with equitable interests in registered land shall be registered unless the power thereto enabling has been expressly conferred by or has been reserved in the writing or instrument creating such equitable instrument, or has been declared to exist by the decree of some court of competent jurisdiction, which decree must also be registered.

1913, c. 90, s. 20.

ART. 7. LIENS UPON REGISTERED LANDS

2418. Docketed judgments. Whenever any judgment of the superior court of the county in which the registered estate is situated shall be duly docketed in the office of the clerk of the superior court, it shall be the duty of the clerk to certify the same to the register of deeds. The register of deeds shall thereupon enter the certificate of title, the date, and the amount of the judgment, and the same shall be a lien upon such land as fully as such docketed judgment would be a lien upon unregistered lands of the judgment debtor.

1913, c. 90, s. 22.

2419. Notice of delinquent taxes filed. It shall be the duty of the sheriff or other collector of taxes or assessments of each county and town, not later than the first day of March in each year, to file an exact memorandum of the delinquency, if any, of any registered land for the nonpayment of the taxes or assessments thereon, including the penalty therefor, in the office of the register of deeds for registration; and if such officer fails to perform such duty, and there shall be subsequent to such day a transfer of the land as hereinbefore provided, the grantee shall acquire a good title free from any lien for such taxes and assessments, and such sheriff or other collector of taxes and his sureties shall be liable for the payment of the taxes and assessments with the penalty and interest thereon.

1913, c. 90, s. 21.

2420. Sale of land for taxes; redemption. Whenever any sale of registered land is made for delinquent taxes or levies, it shall be the duty of the sheriff or other officer to make such sale forthwith, to file a memorandum thereof for registration in the office of the register of deeds; and thereupon the registered owner shall be required to produce his certificate for cancellation, and a new owner's

certificate shall be issued in favor of the purchaser, and the land shall be transferred on the land books to the name of such purchaser, unless such delinquent charges and all penalties and interest thereon be paid in full within ninety days after date of such sale; but a note shall be entered upon the certificate of title and also upon any such new owner's certificate, reserving the privilege of redemption in accordance with the law. In case of any redemption under this section of land sold for taxes, a note of the fact shall be duly registered, and if an owner's certificate has been issued to any purchaser, the same shall be canceled and a new one shall be issued to the person who has redeemed.

1913, c. 90, ss. 22, 23.

2421. Sale of unredeemed land; application of proceeds. If there be no redemption of land under the preceding section, in accordance with the law, it shall be the duty of the sheriff or other collector of taxes in the county or town in which the land lies to sell the same at public auction for cash, first giving such notice of the time and place of sale as is prescribed for execution sales, and the proceeds of sale shall be applied, first, to the payment of all taxes and assessments then due to the state, county and town, with interest, penalty and costs; second, to the payment of all sums paid by any person who purchased at the former tax sale, with interest and the additional sum of five dollars; third, to the payment of a commission to the officer making the sale of five per centum on the first three hundred dollars and two per centum on the residue of the proceeds; fourth, to the satisfaction of any liens other than the taxes and assessments registered against the land in the order of their priorities; fifth, and the surplus, if any, to the person in whose name the land was previous to sale for taxes, subject to redemption as provided herein, his heirs, personal representatives or assigns. A note of the sale under this section shall be duly registered, and a certificate shall be entered and an owner's certificate issued in favor of the purchaser in whom title shall be thereby vested as registered owner, in accordance with the provisions of this chapter. Nothing in this section shall be so construed as to affect or divert the title of a tenant in reversion or remainder to any real estate which has been returned delinquent and sold on account of the default of the tenant for life in paying the taxes or assessments thereon.

1913, c. 90, s. 23.

ART. 8. ASSURANCE FUND

2422. Assurance fund provided; investment. Upon the original registration of land and also upon the entry of certificate showing the title as registered owners in heirs or devisees, there shall be paid to the clerk of the court one-tenth of one per cent of the assessed value of the land for taxes, as an assurance fund, which shall be paid over to the state treasurer, who shall be liable therefor upon his official bond as for other moneys received by him in his official capacity. He shall keep all the principal and interest of such fund invested, except as required for the payment of indemnities, in bonds and securities of the United States, of this state, or of counties and other municipalities within the state. Such investment shall be made upon the advice and concurrence of the governor and council of state, and he shall make report of such funds and the investment thereof to the general assembly biennially.

1913, c. 90, s. 33.

2423. Action for indemnity. Any person who, without negligence on his part, sustains loss or damage or is deprived of land, or of any estate or interest therein, through fraud or negligence or in consequence of any error, omission, mistake, misfeasance, or misdescription in any certificate of title or in any entry or memorandum in the registration book, and who, by the provisions of this chapter, is barred or in any way precluded from bringing an action for the recovery of such land or interest or estate therein or claim upon same, may bring an action in the superior court of the county in which the land is situate for the recovery of compensation for such loss or damage from the assurance fund. Such action shall be against the state treasurer and all other persons who may be liable for the fraud, negligence, omission, mistake or misfeasance; but if such claimant has the right of action or other remedy for the recovery of the land, or of the estate or interest therein, or of the claim upon same, he shall exhaust such remedy before resorting to the assurance fund.

1913, c. 90, s. 34.

2424. Satisfaction by third person or by treasurer. If there are defendants other than the state treasurer, and judgment is rendered in favor of the plaintiff and against the treasurer and some or all of the other defendants, execution shall first be issued against the other defendants, and if such execution is returned unsatisfied in whole or in part, and the officer returning the same shall certify that it cannot be collected from the property and effects of the other defendants, or if the judgment be against the treasurer only, the clerk of the court shall certify the amount due on the execution to the state auditor, who shall issue his warrant therefor upon the state treasurer, and the same shall be paid. In all such cases the treasurer may employ counsel who shall receive reasonable compensation for his services from the assurance fund.

1913, c. 90, s. 35.

2425. Payment by treasurer, if assurance fund insufficient. If the assurance fund shall be insufficient at any time to meet the amount called for by any such certificate, the treasurer shall pay the same from any funds in the treasury not otherwise appropriated; and in such case any amount thereafter received by the treasurer on account of the assurance fund shall be transferred to the general funds of the treasury until the amount advanced shall have been paid.

1913, c. 90, s. 36.

2426. Treasurer subrogated to right of claimant. In every case of payment by the treasurer from the assurance funds under the provisions of this chapter the treasurer shall be subrogated to all the rights of the plaintiff against all and every other person or property or securities to a trustee, or by the improper exercise of any power of sale in benefit of the assurance fund.

1913, c. 90, s. 37.

2427. Assurance fund not liable for breach of trust; limit of recovery. The assurance fund shall not be liable to pay any loss, damage or deprivation occasioned by a breach of trust, whether expressed, constructive or implied, by any registered owner who is a trustee, or by the improper exercise of any power of sale in a mortgage or deed of trust. Nor shall any plaintiff recover as com-

pensation under the provisions of this chapter more than the fair market value of the land at the time when he suffered the loss, damage or deprivation thereof.

1913, c. 90, s. 38.

2428. Statute of limitation as to assurance fund. Action for compensation from the assurance fund shall be begun within three years from the time the cause of action accrued. In cases of infancy or other disability now recognized by law, persons under such disability shall have one year after the removal of such disability within which to begin the action.

1913, c. 90, s. 39.

CHAPTER 48

LIBEL AND SLANDER

- 2429. Libel against newspaper; notice before action.
- 2430. Effect of publication in good faith and retraction.
- 2431. Anonymous communications.
- 2432. Charging innocent woman with incontinency.

2429. Libel against newspaper; notice before action. Before any action, either civil or criminal, is brought for the publication, in a newspaper or periodical, of a libel, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant, specifying the article and the statements therein which he alleges to be false and defamatory.

Rev., s. 2012; 1901, c. 557.

For pleadings in libel and slander, see section 542.

Complaint must allege five days notice to defendant in writing, specifying article and false statements therein: *Williams v. Smith*, 134-249; *Osborn v. Leach*, 135-628. Effect of failure to give notice: *Ibid.* Where newspaper publishes retraction, no notice as required hereunder need be given: *Osborn v. Leach*, 135-628. Failure of complaint to allege the five days notice is demurrable: *Ibid.*—and where demurrer sustained, plaintiff entitled to amend, *Ibid.*; *Williams v. Smith*, 134-249.

2430. Effect of publication in good faith and retraction. If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of “guilty” is rendered on such a state of facts, the defendant shall be fined a penny and the costs, and no more.

Rev., s. 2013; 1901, c. 557.

Where statute for libel applies equally to all newspapers and periodicals, it does not amount to unconstitutional discrimination: *Osborn v. Leach*, 135-628.

Provision of section taking away from person right to recover punitive damage is constitutional: *Osborn v. Leach*, 135-628. Where paper pleaded retraction of publication, it is necessary for it also to show that publication was made in good faith, and with reasonable ground to believe same to be true, in order to remove it from punitive damages: *Osborn v. Leach*, 135-628. “Actual damages” includes pecuniary loss, physical pain, mental suffering and injury to reputation: *Ibid.*—and is property, while punitive damages is not property, *Ibid.*

2431. Anonymous communications. The two preceding sections shall not apply to anonymous communications and publications.

Rev., s. 2014; 1901, c. 557, s. 3.

Article signed “Smith” is not anonymous publication: *Williams v. Smith*, 134-249.

2432. Charging innocent woman with incontinency. Whereas doubts have arisen whether actions of slander can be maintained against persons who may attempt, in a wanton and malicious manner, to destroy the reputation of innocent

and unprotected women, whose very existence in society depends upon the unsullied purity of their character, therefore any words written or spoken of a woman, which may amount to a charge of incontinency, shall be actionable.

Rev., s. 2015; Code, s. 3763; R. C., c. 106; 1808, c. 478.

For criminal libel and slander, see Crimes and Punishments, Art. 13.

As to damages in action hereunder, see *Bowden v. Bailes*, 101-612; *Sowers v. Sowers*, 87-303. Not necessary to allege that words "wantonly and wilfully" uttered: *Bowden v. Bailes*, 101-612. Words which amount to charge of incontinency must import not merely lascivious disposition, but fact of adultery or fornication: *McBrayer v. Hill*, 26-136; *Lucas v. Nichols*, 52-35; *State v. Moody*, 98-671.

"Innocent" woman means one who has never had actual illicit intercourse with a man: *State v. Misenheimer*, 123-758; *State v. Malloy*, 115-737; *State v. Hinson*, 103-374; *State v. Brown*, 100-519; *State v. Davis*, 92-764; *State v. Grigg*, 104-882; *State v. Ferguson*, 107-849.

Husband is liable for wife's slander: *Presnell v. Moore*, 120-390. As to action by husband for slander of wife, see *Harper v. Pinkston*, 112-293.

Words which impute to female wanton and lascivious disposition only are not actionable: *Lucas v. Nichols*, 52-32.

WHAT AMOUNTS TO CHARGE OF INCONTINENCY. Saying of woman that she had sexual intercourse with a male dog: *State v. Hewlin*, 128-571—that she is a "d—whore," *State v. Shoemaker*, 101-690—that if plaintiff (an unmarried woman) "did not give birth to child she missed a good opportunity of having it," *Sowers v. Sowers*, 87-303—that she "was kept by a man," *McBrayer v. Hill*, 26-136. It is not charging incontinency to say that a single woman looked like she had miscarried: *State v. Benton*, 117-788—or that she is a "damned bitch," *State v. Harwell*, 129-550. The words spoken must amount to a charge of actual illicit sexual intercourse: *State v. Moody*, 98-671; *State v. Aldridge*, 86-680. When the words spoken are ambiguous, it is for the jury to determine whether they amount to a slanderous charge: *State v. Howard*, 169-312.

CHAPTER 49

LIENS

ART. 1. MECHANICS', LABORERS' AND MATERIALMEN'S LIENS.

- 2433. On buildings and property, real and personal.
- 2434. Buildings on married woman's land.
- 2435. On personal property repaired.
- 2436. Laborer's lien on lumber and its products.

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- 2454. Owner may pay orders for wages.
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- 2489. Lienor's claim disputed; proceeds of sale held; issue made for trial.
- 2490. Local: Short form of liens.
- 2491. Local: Rights on lienee's failure to cultivate.
- 2492. Local: Commissioners to furnish blank records.

ART. 1. MECHANICS', LABORERS' AND MATERIALMEN'S LIENS

2433. On buildings and property, real and personal. Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished.

Rev., s. 2016; Code, s. 1781; 1901, c. 617; 1869-70, c. 206, s. 1.

History of statutes: *Mfg. Co. v. Andrews*, 165-285, and see Const. N. C., art. 14, s. 4, which is foundation of successive statutes.

"Mechanic's lien," "laborer's lien" and "material lien" discussed and distinguished: *Broyhill v. Gaither*, 119-443.

LIEN: CHARACTER AND ESSENTIALS. The lien is statutory, given to enforce a debt, and without a debt there can be no lien: *Foundry Co. v. Aluminum Co.*, 172-704; *Weathers v. Borders*, 124-610; *Boone v. Chatfield*, 118-916; *Grissom v. Pickett*, 98-54; *Wilkie v. Bray*, 71-205. Relation of debtor and creditor must exist, and the lien depends on and is incident to debt: *Mfg. Co. v. Andrews*, 165-285; *Baker v. Robbins*, 119-289. Thus no lien against owner for improvements put up on credit of, and under contract with, lessee: *Boone v. Chatfield*, 118-916; *Weathers v. Cox*, 159-575. No lien to person who officiously without authority on contract builds upon another's land: *Thompson v. Taylor*, 110-70—nor against mortgagee, where, without his knowledge or subsequent ratification, improvements made by contract with mortgagor, though mortgagor's equity is subject to lien: *Baker v. Robbins*, 119-289.

There must be a contract, express or implied, under which materials were furnished or work done in order for the lien to exist: *Nicholson v. Nichols*, 115-200. See *Bruce v. Mining Co.*, 147-642.

Statute designed to protect those who work or supply materials and who, in absence of the statute, would have no security but the personal obligations of employer: *Grissom v. Pickett*, 98-54.

PROPERTY SUBJECT TO LIEN. Nothing that does not become part of realty is the subject of mechanic's lien; therefore trade fixtures put up by lessee not subject to lien: *Woodworking Co. v. Southwick*, 119-611—mortgagor's removing house after lien attached does not affect the lien, *Turner v. Mebane*, 110-413.

Subject to mechanic's lien—estate by entireties, for materials furnished under contract with both husband and wife: *Finch v. Cecil*, 170-72—leasehold for five years, *Woodworking Co. v. Southwick*, 119-611—property of corporation chartered to supply water to city, *Pipe, etc., Co. v. Howland*, 111-615.

Not subject to mechanic's lien—courthouse: *Snow v. Comrs.*, 112-335—public school building, *Hardware Co. v. Graded School*, 150-680—property of municipal corporation, but laborers and material men, as beneficiaries of contract between municipality and contractor, can sue on contractor's bond, and municipality may be liable for any balance due contractor, *Schefflow v. Pierce*, 176-91. See *Gastonia v. Engineering Co.*, 131-363. See, also, section 2445.

Where contractor undertakes to put up and complete building on undivided tract of 80 acres, the mechanic's lien extends to whole of tract, and it is no segregation that house and improvements enclosed by fence: *Broyhill v. Gaither*, 119-443.

As to agricultural liens on crops and sufficiency of description of land thereunder, see section 2480.

“WORK DONE.” Work done must be actual, manual labor, done under contract for such labor: *Bruce v. Mining Co.*, 147-642; *Cook v. Ross*, 117-193.

Statute includes the contractor, under whom his employees and agents work: *Schefflow v. Pierce*, 176-91; *Lester v. Houston*, 101-605—contractor has lien against railroad for work on construction, etc., *Dunavant v. R. R.*, 122-999.

Semble, includes only services or labor for betterment of property on which it is bestowed; in other cases laborer must secure himself as at common law: *Tedder v. R. R.*, 124-342.

Superintendent of laborers who does no manual labor himself is not entitled to lien: *Cook v. Ross*, 117-193. Caretaker has no lien: *Bruce v. Mining Co.*, 147-642; *Morrison v. Mining Co.*, 143-250. So overseer: *Whitaker v. Smith*, 81-340. So bookkeeper, though he occasionally did manual labor: *Nash v. Southwick*, 120-459.

MATERIAL FURNISHED. “Material furnished” means such material as enters into and becomes part of property and adds to its value: *Coal Co. v. Electric Co.*, 118-232. These words mean something furnished to be appropriated on the land to some lawful purpose connected with the land: *Pipe, etc., Co. v. Howland*, 111-615. Semble, materials are not furnished hereunder unless actually appropriated to improvements on land; but where not so used nor understanding for such use, no lien arises: *Lanier v. Bell*, 81-337.

Where subject-matter for which debt incurred keeps its identity it is not “material” within this section: *Fulp v. Power Co.*, 157-154. Poles, wires, and appliances for carrying electricity held not material furnished: *Ibid.* So, steam engine, though built into wall: *James v. Lumber Co.*, 122-157. So electric dynamo: *Electric Co. v. Power Co.*, 122-599. Plans and specifications furnished by architect are not material hereunder: *Stephens v. Hicks*, 156-239.

Whether coal furnished to factory a lien on product, quere: *Norfleet v. Cotton Factory*, 172-833.

AMOUNT SECURED. Where contractor labors and furnishes material under entire and indivisible contract, his lien embraces entire outlay, whether in labor or materials: *Isler v. Dixon*, 140-529; *Broyhill v. Gaither*, 119-443.

PRIORITIES. Lien attaches at the beginning of the work or of the furnishing of materials: *McAdams v. Trust Co.*, 167-494; *Cheesborough v. Sanatorium*, 134-245; *Burr v. Maultsby*, 99-263.

Lien does not affect mortgages and encumbrances existing prior to lien's attaching, but is superior to those subsequently attaching: *McAdams v. Trust Co.*, 167-494; *Dunavant v. R. R.*, 122-999. Such lien entitled to no preference over prior mortgage as against mortgagee; would only be lien against mortgagor on his equity of redemption: *Cox v. Lighting Co.*, 152-164.

Mechanic's lien hereunder is, under const., art. 10, s. 4, superior to homestead exemption of owner; but mere material lien is not entitled to the constitutional priority: *Broyhill v. Gaither*, 119-443; *Cumming v. Bloodworth*, 87-83.

As to priority between liens hereunder and corporate mortgages under section 1140: *McAdams v. Trust Co.*, 167-494; *Cox v. Lighting Co.*, 152-164; *Moore v. Industrial Co.*, 138-304; *Electric Co. v. Power Co.*, 122-599; *James v. Lumber Co.*, 122-157; *Coal Co. v. Electric Co.*, 118-232.

DECREEING LIEN. In action to recover for work and labor upon construction of house, court may, in judgment for amount due, decree lien on premises: *Oakley v. Van Noppen*, 95-60.

SECTION REFERRED TO: *Harvey v. Johnson*, 133-358; *James v. Lumber Co.*, 122-160; *Cameron v. Lumber Co.*, 118-267; *Paper Co. v. Chronicle*, 115-145; *Cook v. Cobb*, 101-69; *Bank v. Mfg. Co.*, 96-309; *McDougall v. Crapon*, 95-294.

2434. **Buildings on married woman's land.** The preceding section applies to the property of a married woman when it appears that such building was built or repaired on her land with her consent or procurement. In such case she shall be deemed to have contracted for such improvements.

Rev., s. 2016; Code, s. 1781; 1869-70, c. 206; 1901, c. 617.

Section is constitutional: *Finger v. Hunter*, 130-529. Lien under section is for all debts contracted for work and labor done on married women's property: *Ball v. Paquin*, 140-83. Written consent of husband not necessary to charge wife hereunder: *Ball v. Paquin*, 140-98; *Finger v. Hunter*, 130-529.

No lien on wife's land for improvements made by husband: *Kearney v. Vann*, 154-311; *Anderson v. Anderson*, 177-401. See *Stephens v. Hicks*, 156-239.

Where married woman contracted with her husband to repair her house, and he bought material, material man has no lien unless notice given before she paid husband in full: *Payne v. Flack*, 152-600. Before Martin act (section 2507), in absence of lien on married woman's separate property, contract void unless made as required by law: *Stephens v. Hicks*, 156-239—and before this section married woman could not subject her real property to lien for improvements, *Weathers v. Borden*, 124-610. See *Green v. Bennett*, 120-394; *Thompson v. Taylor*, 110-70; *Weir v. Page*, 109-220; *Nicholson v. Nichols*, 115-200.

2435. **On personal property repaired.** Any mechanic or artisan who makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property has a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges are paid; and if not paid for within thirty days, if it does not exceed fifty dollars, or within ninety days if over fifty dollars, after the work was done, such mechanic or artisan may proceed to sell the property so made, altered or repaired at public auction, by giving two weeks public notice of such sale by advertising in some newspaper in the county in which the work may have been done, or if there is no such newspaper, then by posting up notice of such sale in three of the most public places in the county, town or city in which the work was done, and the proceeds of the said sale shall be applied first to the discharge of the said lien and the expenses and costs of keeping and selling such property, and the remainder, if any, shall be paid over to the owner thereof.

Rev., s. 2017; Code, s. 1783; 1869-70, c. 206, s. 3.

Where A. contracted with lumber company to cut, haul and raft logs standing on plaintiff's land, severance of the logs from the land converts them into personalty, and A. is entitled to lien under this section on logs for labor in performing contract: *Thomas v. Merrill*, 169-623. See *Huntsman v. Lumber Co.*, 122-583. Mere mortgagee of personal property in possession entitled to no lien: *Block v. Dowd*, 120-402.

Lien hereunder depends upon laborer's or artisan's possession of the chattel, and is lost when he surrenders possession: *Tedder v. R. R.*, 124-342; *Block v. Dowd*, 120-402; *McDougall v. Crapon*, 95-292. See *Thomas v. Merrill*, 169-623—but lien is not lost unless the surrender is voluntary, *Auto Co. v. Rudd*, 176-497.

Statute gives right to enforce lien by sale: *McDougall v. Crapon*, 95-292. Sale restrained until existence of lien and amount of indebtedness are determined: *Huntsman v. Lumber Co.*, 122-583.

Relation of lien hereunder to common-law lien for services: *Thomas v. Merrill*, 169-623; *McDougall v. Crapon*, 95-292.

Section cited: *Glazener v. Lumber Co.*, 167-676.

2436. **Laborer's lien on lumber and its products.** Every person doing the work of cutting or sawing logs into lumber, getting out wood pulp, acid wood or tan

bark, has a lien upon the said lumber for the amount of wages due them, and the said lien shall have priority over all other claims or liens upon said lumber, except as against a purchaser for full value and without notice thereof: Provided, any such laborer whose wages for thirty or less number of days performed are due and unpaid shall file notice of such claim before the nearest justice of the peace in the county in which said work has been done, stating the number of days of labor performed, the price per day, and the place where the lumber is situate, and the person for whom said labor was performed, which said statement shall be signed by the said laborer or his attorney, and the said laborer shall also give to the owner thereof, within five days after the lien has been filed with the justice of the peace, as aforesaid, a copy of said notice as filed with the said justice of the peace. If the owner cannot be located, then notice shall be given by attaching said notice on the logs or lumber, wood pulp, acid wood or tan bark upon which the labor sued for was performed, and any person buying said lumber or logs, wood pulp, acid wood or tan bark after such notice has been filed with the nearest justice of the peace, shall be deemed to have bought the same with notice thereof, but no action shall be maintained against the owner of said logs or lumber, wood pulp, acid wood or tan bark or the purchaser thereof under the provisions of this section unless same is commenced within thirty days after notice is filed with the justice of the peace by such laborer, as above provided.

1913, c. 150, s. 6.

Requisites for lien under section examined, and no lien unless claimant shows compliance with all requisites: *Bryson v. Lumber Co.*, 171-700. Various mill hands in mill where lumber sawed held entitled to lien hereunder, but hands engaged in operating log train only not entitled: *Hogsed v. Lumber Co.*, 170-529; s. c., sub nomine, *Glazener v. Lumber Co.*, 167-676. Liens hereunder of laborers employed by contractor exist only when owner of the lumber on which the labor is bestowed is indebted to the contractor: *Bryson v. Lumber Co.*, 171-700, and cases cited.

Notice required for, and priority of, lien: *Bryson v. Lumber Co.*, 171-700; *Glazener v. Lumber Co.*, 167-676.

Quere whether notice before justice of peace required when company operated by receiver under order of court: *Walker v. Lumber Co.*, 170-460.

Observations on construction of section: *Thomas v. Merrill*, 169-623.

ART. 2. SUBCONTRACTORS', ETC., LIENS AND RIGHTS AGAINST OWNERS`

2437. Lien given subcontractors, etc., on real estate. All subcontractors and laborers who are employed to furnish, or who do furnish labor or material for the building, repairing or altering any house or other improvement on real estate, have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanics' lien now provided by law, when notice thereof shall be given as hereinafter provided, which may be enforced as other liens in this chapter, except where it is otherwise provided; but the sum total of all the liens due subcontractors and material men shall not exceed the amount due the original contractor at the time of notice given.

Rev., s. 2019; Code, ss. 1801, 1803; 1880, c. 44, ss. 1, 3.

History of subcontractor's lien statutes: *Ingold v. Hickory*, 178-614; *Mfg. Co. v. Andrews*, 165-285; *Lester v. Houston*, 101-605.

The section enacts that the laborer and the material man may, by giving notice to the owner, have a lien on the property of the owner to the extent of the contract price; that the owner is liable for the amount due the contractor at the time of notice; and that when lien once acquired by notice, owner, as trustee, must distribute fund pro rata: Foundry Co. v. Aluminum Co., 172-704.

Lien obtained by filing notice or itemized statements before owner has paid contractor in full: West v. Laughinghouse, 174-214; Foundry Co. v. Aluminum Co., 172-704; Building Co. v. Hospital Co., 176-87; s. c., 174-57; Supply Co. v. Eastern Star Home, 163-513; Clark v. Edwards, 119-115; Pinkston v. Young, 104-102—whereupon owner becomes liable as trustee to the amount due contractor, Building Supplies Co. v. Hospital Co., 176-87; s. c., 174-57; Foundry Co. v. Aluminum Co., 172-704—for lien is limited to owner's indebtedness to contractor, Wood v. R. R., 131-48; Clark v. Edwards, 119-115—and owner not otherwise responsible to subcontractor or laborer, Wood v. R. R., 131-48.

By giving proper notice, subcontractor substituted for contractor as to amount due or to become due from owner, without regard to account between contractor and subcontractor: Brick Co. v. Pulley, 168-371; Granite Co. v. Bank, 172-354. See Powder Co. v. Denton, 176-426; Powell v. Lumber Co., 168-632.

Laborer's lien, or lien for materials, when filed, relates back and takes priority over all liens attaching subsequent to beginning work or furnishing first materials: Clark v. Edwards, 119-115; Lumber Co. v. Hotel Co., 109-658; Burr v. Maultsby, 99-263; Chadbourne v. Williams, 71-444.

Right to lien does not apply to public property, and right to payment out of funds depends on lien: Hutchinson v. Comrs., 172-844—though no lien may be filed against town, it may be liable to subcontractors for balance due contractor when proper notice given; and laborers and material men may sue on contractor's bond, Scheflow v. Pierce, 176-91.

Mere fact that laborers and subcontractors are working on building is not notice to owner not to pay contractor until he has ascertained how much is due by him to every subcontractor and laborer: Clark v. Edwards, 119-115.

Lien given by section does not supersede that in favor of contractor: Lester v. Houston, 101-605—but only gives it a preference to extent of amounts which may be due subcontractor, provided it does not exceed sum which may be due original contractor, *Ibid*.

Subcontractor may enforce lien for labor or materials against owner of property, though contract with principal contractor has not been completed: Lumber Co. v. Hotel Co., 109-658—or has been abandoned, *Ibid*.

Section merely referred to: Dunavant v. R. R., 122-999; Parsley v. David, 106-225.

Public laws 1911, c. 761, as to liens in certain counties, invalid: Supply Co. v. Eastern Star Co., 163-513.

2438. Notice to owner; liability. Any subcontractor, laborer or material man, who claims a lien as provided in the preceding section, may give notice to the owner or lessee of the real estate who makes the contract for such building or improvement at any time before the settlement with the contractor, and if the said owner or lessee refuses or neglects to retain out of the amount due the said contractor under the contract as much as is due or claimed by the subcontractor, laborer or material man, the subcontractor, laborer or material man may proceed to enforce his lien, and after such notice is given, no payment to the contractor shall be a credit on or discharge of the lien herein provided.

Rev., s. 2020; Code, s. 1802; 1880, c. 44, s. 2.

Lien acquired by notice to owner, and exists only from date of notice: Building Supplies Co. v. Hospital Co., 176-87; s. c., 174-57; Wood v. R. R., 131-48; Clark v. Edwards, 119-115; Pinkston v. Young, 104-102. And see cases *infra* this note. Mere knowledge that laborers at work or that materials furnished is not sufficient notice: Building Supplies Co. v. Hospital Co., 176-87; s. c., 174-57; see Clark v. Edwards, 119-115. Notice held sufficient to establish lien: Building Corp. v. Jones, 174-57.

Notice must be given to owner before he pays contractor: Supply Co. v. Eastern Star Co., 163-513. Material man dealing with husband, who has contracted with his wife to build her house, must notify wife before she pays her husband: Payne v. Flack, 152-600.

Subcontractor can enforce lien against owner only to extent of sums due contractor at date of giving notice to owner of his claim: *Clark v. Edwards*, 119-115. Where one furnishes material to subcontractor and gives notice to owner, his right to recover depends on amount due contractor, not on amount due subcontractor: *Powder Co. v. Denton*, 176-426; *Powell v. Lumber Co.*, 168-632; *Brick Co. v. Pulley*, 168-371. Relation of debtor and creditor exists between owner and subcontractor, or material man, only to extent of lien acquired by giving notice: *Hardware Co. v. Graded School*, 151-507; *Hall v. Jones*, 151-419.

Materials furnished must be to one engaged on the building and actually used in the building: *Brick Co. v. Pulley*, 168-371.

After notice to owner suit must be brought in six months; lien need not be filed with clerk: *Granite Co. v. Bank*, 172-354; *Mfg. Co. v. Andrews*, 165-285; *Hildebrand v. Vanderbilt*, 147-639. If after notice given lien lost by failure to sue in time, claimant may yet recover from owner his pro rata share of amount due contractor: *Hildebrand v. Vanderbilt*, 147-639.

Subcontractor may enforce lien for labor or materials against owner, though contract with principal contractor has not been completed or has been abandoned: *Lumber Co. v. Hotel Co.*, 109-658. Contractor cannot sue owner for benefit of subcontractor without showing express trust: *Perry v. Swanner*, 150-141. Enforcement of subcontractor's lien for materials furnished: *Bain v. Lamb*, 167-304. Sufficiency of complaint in action to enforce material man's lien hereunder: *Parsley v. David*, 106-225. Action by owner against surety of defaulting contractor; items properly allowable as damages, etc.: *Donlan v. Trust Co.*, 139-212.

Judgment against owner should declare only amount due for which execution may issue, and should not direct payment into court: *Hildebrand v. Vanderbilt*, 147-639.

Contractor necessary party to action to enforce lien of subcontractor: *Lumber Co. v. Hotel Co.*, 109-658—but trustee in conveyance subject to lien is not, *Ibid.*

Section referred to: *Pipe, etc., Co. v. Howland*, 111-618; *Lester v. Houston*, 101-605.

See *infra* this chapter, art. 8.

2439. Statement of contractor's indebtedness to be furnished to owner; effect.

When any contractor, architect or other person makes a contract for building, altering or repairing any building or vessel, or for the construction or repair of a railroad, with the owner thereof, it is his duty to furnish to the owner or his agent, before receiving any part of the contract price, as it may become due, an itemized statement of the amount owing to any laborer, mechanic or artisan employed by such contractor, architect or other person, or to any person for materials furnished, and upon delivery to the owner or his agent of the itemized statement aforesaid, it is the duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for, which will be sufficient to pay such laborer, artisan or mechanic for labor done, or such person for material furnished, which said amount the owner shall pay directly to the laborer, mechanic, artisan or person furnishing materials. The owner may retain in his hands until the contract is completed such sum as may have been agreed on between him and the contractor, architect or other person employing laborers, as a guaranty for the faithful performance of the contract by such contractor. When such contract has been performed by the contractor such fund reserved as a guaranty shall be liable to the payment of the sum due the laborer, mechanic or artisan for labor done, or the person furnishing the materials as hereinbefore provided.

Rev., s. 2021; 1887, c. 67; 1891, c. 203; 1899, c. 335; 1903, c. 478.

This and the following four sections (statute of 1887) provide an additional method of creating and enforcing a lien in favor of mechanics and laborers; the contractor is required to give owner notice of claims of subcontractors and others; but there is no lien until prescribed notice is given: *Pinkston v. Young*, 104-102. By giving notice claimant has double security, a lien upon property enforceable by suit, and to his share of money due from owner to contractor: *Foundry Co. v. Aluminum Co.*, 172-704; *West v. Laughinghouse*, 174-214; *Mfg. Co. v. Andrews*, 165-285.

When statement is furnished by contractor, obligation arises on part of the owner which material man may enforce in his own name: *Perry v. Swanner*, 150-141—but obligation not debtor and creditor except to amount of lien acquired, *Hardware Co. v. Graded School*, 151-507. Lien only in favor of material man furnishing material to one having some contract relation to the work: *Brick Co. v. Pulley*, 168-371.

When lien fixed by notice, claimant may enforce it without regard to condition of account between contractor and subcontractor: *Powell v. Lumber Co.*, 168-632; *Brick Co. v. Pulley*, 168-371.

It is duty of owner to retain out of amount due contractor sum to pay laborers and material men: *Hildebrand v. Vanderbilt*, 147-639.

Notice given by contractor to architect of owner of claims is not without further proof of agency sufficient to raise lien hereunder: *Building Supplies Co. v. Hospital Co.*, 176-87.

Section not repealed by amendments to section 2444, contained in 1913, c. 150: *Powder Co. v. Denton*, 176-426.

2440. Laborer, etc., may furnish statement of claim to owner; effect. Any laborer, mechanic, artisan or person furnishing materials may furnish to such owner or his agents before he shall have paid the contractor an itemized statement of the amount owing to such laborer, mechanic or artisan employed by said contractor, architect or other person for work or labor on such building, vessel or railroad, and any person may furnish to such owner or his agents an itemized statement of the amount due him for materials furnished for such purposes. Upon the delivery of such notice to such owner or his agent the person giving such notice is entitled to all the liens and benefits conferred by law in as full and ample a manner as though the statement was furnished by the contractor, architect or such other person. And after the notice herein provided is given, no payment to the contractor shall be a credit or a discharge of the lien herein provided.

Rev., s. 2021; 1887, c. 67; 1891, c. 203; 1899, c. 335; 1903, c. 478; 1913, c. 150, s. 4.

See annotations under preceding section.

2441. Sums due by statement to constitute lien. The sums due to the laborer, mechanic or artisan for labor done, or due the person furnishing materials, as shown in the itemized statement rendered to the owner, shall be a lien on the building, vessel or railroad built, altered or repaired, without any lien being filed before a justice of the peace or the superior court.

Rev., s. 2022; 1887, c. 67, s. 2.

Section dispenses with necessity of filing itemized statement before justice of the peace or clerk: *Pinkston v. Yjung*, 104-102; *Granite Co. v. Bank*, 172-354; *Hildebrand v. Vanderbilt*, 147-639. Claim filed with owner constitutes lien on property to extent of amount due contractor: *Foundry Co. v. Aluminum Co.*, 172-704.

2442. Where sums due contractor from owner insufficient; payment pro rata. If the amount due the contractor by the owner is insufficient to pay in full the laborer, mechanic or artisan, for his labor, and the person furnishing materials, for materials furnished, it is the duty of the owner to distribute the amount pro rata among the several claimants, as shown by the itemized statement furnished the owner, or of which notice has been given the owner by the claimant.

Rev., s. 2023; 1887, c. 67, s. 3; 1913, c. 150, s. 5.

Where there are several claims filed, distribution is pro rata: *Foundry Co. v. Aluminum Co.*, 172-704; *West v. Laughinghouse*, 174-214; *Mfg. Co. v. Andrews*, 165-285. Lien properly perfected has priority over attachment lien: *Granite Co. v. Bank*, 172-354.

Section does not repeal the three preceding sections: *Powder Co. v. Denton*, 176-426—not in conflict with section 2471, *Mfg. Co. v. Andrews*, 165-285.

2443. Contractor failing to furnish statement, or not applying owner's payments to laborer's claims, misdemeanor. If any contractor or architect shall fail to furnish to the owner an itemized statement of the sums due to every one of the laborers, mechanics or artisans employed by him, or the amount due for materials, before receiving any part of the contract price, he shall be guilty of a misdemeanor. If any contractor shall fail to apply the contract price paid him by the owner or his agent to the payment of bills for labor and material, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court.

Rev., s. 3663; 1887, c. 67, s. 4; 1913, c. 150, s. 8.

Referred to: *Pinkston v. Young*, 104-102.

2444. Laborer for railroad contractor may sue company; conditions of action. As often as any contractor for the construction of any part of a railroad which is in progress of construction is indebted to any laborer for thirty or less number of days labor performed in constructing said road, or is indebted for more than thirty days to any person furnishing material for the construction of said road, such laborer or material man may give notice of such indebtedness to said company in a manner herein provided, and said company shall thereupon become liable to pay such laborer or material man the amount so due for labor or material, and action may be maintained against said company therefor. Such notice shall be given by said laborer to said company within twenty days after the performance of the number of days labor for which the claim is made, and such notice shall be given by the material man to said company within thirty days after the materials have been furnished. Such notice to be given by the laborer shall be in writing and shall state the amount and number of days labor and the time when the labor was performed for which the claim is made, and the name of the contractor from whom due, and shall be signed by such laborer or his attorney; and such notice of the material man shall be in writing and shall state the amount of material furnished and when furnished, and the name of the contractor to whom furnished and by whom due, and shall be signed by such material man or his attorney. The notice shall be served on an engineer, agent or superintendent employed by said company having charge of the section of road on which such labor was performed or material furnished, personally or by leaving the same at the office or usual place of business of said engineer, agent, or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section unless the same is commenced within ninety days after notice is given to the company by such laborer or material man as above provided.

Rev., s. 2018; Code, s. 1942; 1871-2, c. 138, s. 12; 1913, c. 150, s. 1.

Section considered with reference to sections 2439, 2440, 2470, 2474: *Powder Co. v. Denton*, 176-426.

A logging railroad is a railroad within this section: *Carter v. Lumber Co.*, 160-8. Laborer seeking to subject railroad company hereunder must show substantial compliance with section: *Moore v. R. R.*, 112-236. Privilege conferred by section restricted to laborers, and for work done for thirty days or less in constructing road, and company can in no event be held liable for payment of accounts due by contractors for materials: *Ibid.* Contractor or subcontractor entitled to file lien within one year of doing work or furnishing material: *Dunavant v. R. R.*, 122-999. After complying with requirements of section, laborer can assign claim as debt either against employer or railroad company: *Moore v. R. R.*, 112-236—and assignee can enforce claim, *Ibid.*

2445. Contractor on municipal building to give bond; action on bond. Every county, city, town or other municipal corporation which lets a contract for the building, repairing or altering any building, public road, or street, shall require the contractor for such work (when the contract price exceeds five hundred dollars) to execute bond with one or more solvent sureties before beginning any work under said contract, payable to said county, city, town or other municipal corporation, and conditioned for the payment of all labor done on and material and supplies furnished for the said work. The amount of the said bond to be given by said contractor shall be equal to the contract price up to two thousand dollars, and when the contract price is between two and ten thousand dollars the amount of said bond shall be two thousand dollars plus thirty-five per cent of the excess of the contract price over two thousand dollars and under ten thousand; when the contract is over ten thousand dollars, the amount of the said bond shall be two thousand dollars plus twenty-five per cent of the excess of the contract price over the sum of two thousand dollars. If the official of the said county, city, town or other municipal corporation, whose duty it is to take said bond, fails to require the said bond herein provided to be given, he is guilty of a misdemeanor. Any laborer doing work on said building and material man furnishing material therefor and used therein, has the right to sue on said bond, the principal and sureties thereof, in the courts of this state having jurisdiction of the amount of said bond, and any number of laborers or material men whose claims are unpaid for work done and material furnished in said building have the right to join in one suit upon said bond for the recovery of the amounts due them respectively.

1913, c. 150, s. 2; 1915, c. 191, s. 1.

Section requires municipal corporation to take a bond and authorizes laborers and material men to sue on the bond, and a provision in the bond interfering with this right of action is invalid: *Ingold v. Hickory*, 178-614. Where bond taken from contractor by municipality was for protection of obligee alone, sureties are not liable to material men: *McCausland v. Construction Co.*, 172-708. *Semble*, that section for protection of county, etc., and that subcontractors and material men acquire no rights thereunder: *Fore v. Feimster*, 171-551.

ART. 3. LIENS ON VESSELS

2446. For towage and for supplies at home port. Every vessel, boat, scow, lighter, flat, raft or other water craft is subject to a lien for the payment of towage done by any steamboat or tugboat; and every vessel and boat is subject to a lien for debts due for materials and supplies furnished to such vessel or boat in her home port. These liens shall be filed and enforced as is provided for other liens.

Rev., s. 2040; 1893, c. 357; 1909, c. 147.

2447. For labor in loading and unloading. Every vessel, her tackle, apparel and furniture, is subject to a lien for all labor done by contractors or others in loading or discharging the cargo of such vessel, and also for all labor done by any subcontractor or laborer employed in discharging or loading any such vessel, when such labor is done under contract with a contractor or stevedore who may be employed by the master, agent or owner of such vessel.

Rev., s. 2041; Code, s. 1804; 1881, c. 356, s. 1.

2448. Filing lien; laborer's notice to master. The liens provided for in the preceding sections shall be filed as is provided for other liens. The subcontractor or laborer may give notice to the master, agent or owner of such vessel, that the contractor or stevedore is or will become indebted to him. It shall then be the duty of such master, agent or owner of such vessel to retain out of the amount due to such contractor or stevedore under his contract as much as is due or claimed by the person giving the notice, and after such notice is given no payment to the contractor or stevedore shall be a credit on or a discharge of the lien herein provided.

Rev., s. 2042; Code, s. 1805; 1881, c. 356, s. 2.

Section referred to: Pipe, etc., Co. v. Howland, 111-628.

2449. Enforcement of lien. The enforcement of such lien shall be by summons against the contractor or stevedore, and also against the master, agent or owner of such vessel, who made the contract with such contractor or stevedore, if over two hundred dollars, to be issued by the clerk of the superior court, and if under two hundred dollars, by a justice of the peace.

Rev., s. 2043; Code, s. 1806; 1881, c. 356, s. 3.

2450. Judgment against contractor binds master and vessel. The judgment against the contractor or stevedore shall also be a judgment against the master, agent or owner of such vessel, and also against such vessel itself, her tackle, apparel and furniture, which shall be seized, held and sold under execution for the satisfaction of such judgment.

Rev., s. 2044; Code, s. 1807; 1881, c. 356, s. 4.

2451. Liens not to exceed amount due contractor. The sum total of all the liens due to different subcontractors and laborers, performed for any contractor or stevedore under any contract with any master, agent or owner of any vessel, shall not exceed the amount due to the contractor or stevedore at the time of notice given to the owner, agent or master, or the amount due to the contractor or stevedore at the time of the service of summons upon the master, agent or owner, when no notice has been given.

Rev., s. 2045; Code, s. 1808; 1881, c. 356, s. 5.

Section referred to: Pipe, etc., Co. v. Howland, 111-628.

2452. Owner to see laborers paid. In all cases where steamships or vessels of any kind are loaded or unloaded or where any work is done in or about the same by the contractors to do the same known as stevedores or "boss stevedores," who in doing the same employ laborers to assist or do the work by the hour, day, week or month, it is the duty of the owner or agent of the vessel to see that the laborers employed in or about the same by the stevedore, contractor or "boss stevedore" are fully paid the wages that may be due such laborer before he makes final settlement with the contractor, stevedore or "boss stevedore."

Rev., s. 2046; 1887, c. 145, s. 1.

2453. Owner may refuse to settle with contractor till laborers paid. Any owner or agent referred to in the preceding section may refuse final settlement with the "boss stevedore" or contractor until he or they satisfy the said owner or agent, by written oath if necessary, that the same has been done.

Rev., s. 2047; 1887, c. 145, s. 2.

2454. Owner may pay orders for wages. It is lawful for the owner or agent of such vessel to pay off from time to time such orders for wages as may be due and given therefor in favor of the laborers by the contractor or stevedore, which on final settlement may be deducted from the contract price.

Rev., s. 2048; 1887, c. 145, s. 3.

2455. Laborer's right of action against owner. Any owner or agent of such vessel who neglects or refuses to comply with the preceding provisions is liable to such laborer in a civil action for the amount of the wages so due him by the contractor, stevedore or "boss stevedore."

Rev., s. 2049; 1887, c. 145, s. 4.

2456. Stevedore's false oath punishable as perjury. If any contractor, stevedore or boss stevedore shall make any false oath or false representation with intent to wrong, cheat or defraud any laborer in violation of the four preceding sections, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished as is now prescribed by law for perjury.

Rev., s. 3613; 1887, c. 145, s. 5.

2457. Stevedores to be licensed; omission misdemeanor. No person shall engage in the business of loading or unloading vessels upon contract, nor shall any person solicit or make any contract for himself or for any other person to load or unload any vessel either by day's work or by the job, without having previously obtained a license therefor, in the manner provided by law for other licenses for trades and occupations. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court.

Rev., ss. 2050, 3791; 1891, c. 450; 1899, c. 595.

2458. Tax and bond on procuring license. Before the sheriff shall issue the said license the applicant shall pay to the sheriff an annual tax of fifty dollars, and shall execute a bond with two or more approved sureties in the sum of two thousand dollars, payable to the state of North Carolina, and conditioned for the faithful performance of his duties and the due and lawful payment of all sums due to laborers assisting in the work of loading or unloading any vessels upon which the applicant may be engaged. And every bond so taken shall be renewed annually, and shall be filed with and preserved by the register of deeds in trust for every person that shall be injured by the breach of his contracts, who may severally bring suit thereon for the damages by each one sustained.

Rev., s. 2051; 1891, c. 450.

ART. 4. WAREHOUSE STORAGE LIENS

2459. Liens on goods stored for charges. Every person, firm or corporation who furnishes storage room for furniture, tobacco, goods, wares or merchandise and makes a charge for storing the same, has the right to retain possession of and a lien upon all furniture, tobacco, goods, wares or merchandise until such storage charges are paid.

1913, c. 192, s. 1; 1915, c. 190, s. 1.

2460. Enforcement by public sale. If such charges are not paid within ten days after they become due, then such person, firm or corporation is authorized to sell said furniture, tobacco, goods, wares or merchandise at the county courthouse door, after first advertising such sale for ten days at said courthouse door and three other public places in said county, or in some newspaper published in said county where the goods or tobacco are stored, and out of the proceeds of such sale to pay the costs and expenses of sale and all costs and charges due for storage, and the surplus, if any, pay to the owner of such furniture, tobacco, goods, wares or merchandise.

1913, c. 192, s. 2; 1915, c. 190, s. 2.

ART. 5. LIENS OF HOTEL, BOARDING AND LODGING-HOUSE KEEPER

2461. Lien on baggage. Every hotel, boarding-house keeper and lodging-house keeper who furnishes board, bed or room to any person has the right to retain possession of and a lien upon all baggage or other property of such person that may have been brought to such hotel, boarding-house or lodging house, until all reasonable charges for such room, bed and board are paid.

Rev., s. 2037; 1899, c. 645, s. 1; 1917, c. 26, s. 1.

Lien recognized: *State v. Hill*, 166-298. Innkeeper has a lien even upon goods of third person held by guest, and brought within inn, unless he knew that they were not the property of guest: *Covington v. Newberger*, 99-523—but one who entertains strangers only occasionally, although he receives compensation therefor, is not an innkeeper, *State v. Mathews*, 19-424.

2462. Baggage may be sold. If such charges are not paid within ten days after they become due, then the hotel, boarding-house or lodging-house keeper is authorized to sell said baggage or other property at the courthouse door, after first advertising such sale for ten days at said courthouse door and three other public places in the county, and out of the proceeds of sale to pay the costs and expenses of sale and all costs and charges due for said board, bed or room, and the surplus, if any, pay to the owner of said baggage or other property.

Rev., s. 2038; 1899, c. 645, s. 2; 1917, c. 26, s. 2.

2463. Notice of sale. Written notice of such sale shall be served on the owner of such baggage or other property ten days before such sale, if he is a resident of the state; but if he is a nonresident of the state, or if his residence is unknown, the publication of such notice for ten days at the courthouse door and three other public places in the county shall be sufficient service of the same.

Rev., s. 2039; 1887, c. 645, s. 3.

ART. 6. LIENS OF LIVERY-STABLE KEEPERS

2464. Lien for ninety days keep on animals in possession. Every keeper of livery, sale, or boarding stables has a lien upon and the right to retain the possession of every horse, mule, or other animal belonging to the owner or person contracting for the board and keep of any horse, mule, or other animal, for any and all unpaid amounts due for board of any horse, mule, or other animal. This lien shall not attach for amounts accruing for a longer period than ninety

days from the reception of such property or from the last full settlement; nor does this lien apply if the property is removed from the possession of said keeper of said livery, sale, or boarding stable.

1911, c. 141, s. 1.

2465. Enforcement by public sale. If such charges are not paid within fifteen days after they become due and demand is made for the same, then the keeper of such livery, sale or boarding stable is authorized to sell the property at the county courthouse door, after first advertising said sale for ten days at the county courthouse door and three other public places in said county, and out of the proceeds of such sale to pay the costs and charges due for the board and keep of said horse, mule, or other animal, including the charges for keeping said animal until said sale, and the surplus, if any, pay to the owner of said animal.

1911, c. 141, s. 2.

2466. Notice of sale to owner. Written notice of such sale shall be served on the owner of such horse, mule, or other animal ten days before such sale, if he is a resident of the state; but if he be a nonresident of the state, or if his residence is unknown, the publication of such notice for ten days at the county courthouse door and three other public places in the county shall be sufficient service of the same.

1911, c. 141, s. 3.

ART. 7. LIENS ON COLTS, CALVES AND PIGS

2467. Season of sire a lien. In all cases where the owner, or any agent for or employee of the owner, of any mare, jennet, cow or sow, turns the same to a studhorse, jack, bull, or boar, for the purpose of raising colts, calves, or pigs, the price charged for the season of the studhorse, jack, bull, or boar constitutes a lien on the colt, calf, or pigs until the price so charged for the season is paid.

Rev., s. 2024; Code, s. 1797; 1885, c. 72; 1887, c. 14; 1872-3, c. 94, s. 1; 1915, c. 18, s. 1.

2468. Colts, etc., not exempt from execution for season price. The colt, calf, or pigs shall not be exempt from execution for the payment of said season price by reason of the operation of the personal property exemption: Provided, the person claiming such lien institutes action to enforce the same within twelve months from the foaling of the colt, dropping the calf, or farrowing of the pigs.

Rev., s. 2025; Code, s. 1798; 1885, c. 72; 1872-3, c. 94, s. 2; 1879, c. 47; 1915, c. 18; 1917, c. 229.

ART. 8. PERFECTING, ENFORCING AND DISCHARGING LIENS

2469. Claim of lien to be filed; place of filing. All claims against personal property, of two hundred dollars and under, may be filed in the office of the nearest justice of the peace; if over two hundred dollars or against any real estate or interest therein, in the office of the superior court clerk in any county where the labor has been performed or the materials furnished; but all claims

shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished.

Rev., s. 2026; Code, s. 1784; 1869-70, c. 206, s. 4; 1876-7, c. 53, s. 1.

For local variation as to justice's jurisdiction in Johnston county, see 1907, c. 148.

For clerk's duty to record, see section 952, subsection 23.

Claim filed under this section must be in substantial compliance with statute and must set forth in detail the character of labor performed or materials furnished, the time when performed or furnished, the amount due therefor, and the property upon which labor performed or materials furnished: *Jefferson v. Bryant*, 161-404; *Fulp v. Power Co.*, 157-157; *Cook v. Cobb*, 101-68; *Wray v. Harris*, 77-77—without such particulars, is irregular and void, *Wray v. Harris*, 77-77—cannot be amended by court in action to enforce the lien, *Jefferson v. Bryant*, 161-404. Creditors with claims for materials, who have not filed liens at time of issuing an insurance policy, cannot claim benefits under the policy: *Roper v. Ins. Co.*, 161-151.

Upon filing of notice within proper time and in prescribed manner, lien given laborers and mechanics attaches to property upon which labor or materials bestowed: *Burr v. Maultsby*, 99-263—and relates back to time of beginning of work or furnishing of materials, *Ibid.*; *Clark v. Edwards*, 119-115; *Lumber Co. v. Hotel Co.*, 109-658; *Chadbourn v. Williams*, 71-444—and is effectual not only against all other liens or encumbrances which attached subsequently, but against purchasers for value and without notice, *Burr v. Maultsby*, 99-263. Notice of lien on land must be filed in office of superior court clerk: *Lanier v. Bell*, 81-337. Lien of person who furnished materials for building is not avoided because in notice thereof filed with clerk it is made to attach on two distinct lots separated by street: *Chadbourn v. Williams*, 71-444. Notice of lien required to be filed since enactment of section should be filed with clerk of superior court, though materials began to be furnished before section went into effect: *Ibid.* Only original contractor can file notice of mechanic's lien: *Zachary v. Perry*, 130-289.

Laborer's lien filed after employer's death is valid though employer named in caption instead of administrator: *Pugh v. Baker*, 127-2. For claim of laborer held to be made out in substantial compliance with section, see *Cameron v. Lumber Co.*, 118-266.

Taking note for debt is not waiver of lien, nor is an extension of time of payment unless beyond time allowed for filing: *Lumber Co. v. Trading Co.*, 163-314.

Section merely referred to: *Kornegay v. Styron*, 105-19; *Jarrett v. Self*, 90-479.

As to justice's jurisdiction in Johnston county, see 1907, c. 148.

2470. Time of filing notice. Notice of lien shall be filed as hereinbefore provided, except in those cases where a shorter time is prescribed, at any time within six months after the completion of the labor or the final furnishing of the materials, or the gathering of the crops.

Rev., s. 2028; Code, s. 1789; 1868-9, c. 117, s. 4; 1876-7, c. 53, s. 2; 1881, c. 65; 1883, c. 101; 1909, c. 32; 1913, c. 150, s. 7.

Section valid: *Pipe, etc., Co. v. Howland*, 111-623. Where lien filed in proper time it relates back to time of furnishing material, etc.: *Granite Co. v. Bank*, 172-354. Filing within six months necessary to affect purchasers for value and without notice: *Lumber Co. v. Trading Co.*, 163-314. The shorter time referred to herein means the time referred to in section 2444: *Powder Co. v. Denton*, 176-426. Section formerly required one year instead of six months: *Dunavant v. R. R.*, 122-999.

2471. Date of filing fixes priority. The liens created and established by this chapter shall be paid and settled according to the priority of the notice of the lien filed with the justice or the clerk.

Rev., s. 2035; Code, s. 1792; 1868-9, c. 117, s. 11.

Liens which are to be filed with the justice or clerk are paid according to priority; subcontractors' claims which require only notice to owner are paid pro rata: *Mfg. Co. v. Andrews*, 165-285; *Foundry Co. v. Aluminum Co.*, 172-704.

Laborer's lien, or lien for materials, when filed relates back and takes priority over all liens attaching subsequent to beginning work or furnishing first material: *Clark v. Edwards*, 119-115; *Lumber Co. v. Hotel Co.*, 109-658; *Burr v. Maultsby*, 99-263; *Chadborn v. Williams*, 71-444.

2472. Laborer's crop lien dates from work begun. The lien for work on crops given by this chapter shall be preferred to every other lien or encumbrance which attached to the crops subsequent to the time at which the work was commenced.

Rev., s. 2034; Code, s. 1782; 1869-70, c. 206, s. 2.

Lien of laborer has precedence over agricultural liens made subsequent to his contract, but before crop harvested: *Rouse v. Wooten*, 104-229.

Lien provided by section arises out of simple relation of debtor and creditor for labor done or materials furnished and where there is no other security than personal obligation of debtor: *Grissom v. Pickett*, 98-54. Where plaintiff, having abandoned contract with defendant to cultivate crop on shares and attempted to assert lien upon crop for labor performed on same, he does not come within section: *Ibid.*

Section merely referred to: *Tedder v. R. R.*, 124-344; *Pipe, etc., Co. v. Howland*, 111-617; *Brewer v. Chappell*, 101-254; *Farrar v. Staton*, 101-79. Cases of interest, not entirely applicable under present law: *Lumber Co. v. Hotel Co.*, 109-658; *Burr v. Maultsby*, 99-263; *Warren v. Woodard*, 70-382.

2473. Duly filed claims of prior creditors not affected. Nothing in this chapter shall be construed to affect the rights of any person to whom any debt may be due for any work done for which priority of claim is filed with the proper officer.

Rev., s. 2036; Code, s. 1786; 1869-70, c. 206, s. 6.

See section 1140 as to priority between corporate mortgage and claims for labor, etc.

2474. Action to enforce lien. Action to enforce the lien created must be commenced in the court of a justice of the peace, and in the superior court, according to the jurisdiction thereof, within six months from the date of filing the notice of the lien. But if the debt is not due within six months, but becomes due within twelve months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due.

Rev., s. 2027; Code, ss. 1785, 1790; 1868-9, c. 117, s. 7; 1869-70, c. 206, s. 5; 1876-7, c. 250; 1876-7, c. 251.

Failure to commence action within time specified discharges the lien: *Norfleet v. Cotton Factory*, 172-833.

Defects in claim under section 2469 not cured by alleging necessary facts in pleading in action brought to enforce lien: *Cook v. Cobb*, 101-68; *Jefferson v. Bryant*, 161-404.

Section cannot have been intended for case in which resort to any court unnecessary, and complete relief may be obtained by parties' own act: *McDougall v. Crapon*, 95-295.

Action against a married woman for less than \$200 for material used in building a house must be brought before a justice of the peace: *Finger v. Hunter*, 130-529; *Smaw v. Cohen*, 95-85—but where proceeding not under section, but an action to coerce payment out of separate estate of feme covert for her contracts, superior court alone has jurisdiction, although amount be less than \$200, *Smaw v. Cohen*, 95-85. But see section 2507.

As to parties to action hereunder, see *Pugh v. Baker*, 127-2; *Lumber Co. v. Hotel Co.*, 109-658; *Clark v. Edwards*, 119-115; *Moore v. R. R.*, 112-236.

Section merely referred to: *McMillan v. Williams*, 109-252; *Hodges v. Hill*, 105-131; *Boyle v. Robbins*, 71-133.

2475. When attachment available to plaintiff. In all cases where the owner or employer attempts to remove the crop, houses or appurtenances from the premises, without the permission, or with the intent to defraud the lience of his lien, the claimant may have a remedy by attachment.

Rev., s. 2031; Code, s. 1795; 1868-9, c. 117, s. 14.

As to sufficiency of affidavits to obtain attachment, see *Brogden v. Privett*, 67-45.

2476. Defendant entitled to counterclaim. The defendant in any suit to enforce the lien is entitled to any setoff arising between the contractors during the performance of the contract, or counterclaim allowed by law.

Rev., s. 2032; Code, s. 1788; 1869-70, c. 206, s. 8.

2477. Execution. Upon judgment rendered in favor of the claimant, an execution for the collection and enforcement thereof shall issue in the same manner as upon other judgments in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title and interest which the owner had in the premises or the crops thereon, at the time of filing notice of the lien, before such execution shall extend to the general property of the defendant.

Rev., s. 2029; Code, s. 1791; 1868-9, c. 117, s. 9.

Judgment to enforce mechanic's lien upon specific property for its satisfaction must contain general description of such property, and execution thereon must direct that such property shall first be sold to satisfy judgment: *McMillan v. Williams*, 109-252. Justice cannot declare, but can render direct judgment appropriating funds belonging to plaintiff: *Markham v. McCown*, 124-163. Property subject to lien must be first sold: *McMillan v. Williams*, 109-252; *Pipe, etc., Co. v. Howland*, 111-615.

Section merely referred to: *Burr v. Maultsby*, 99-266; *Boyle v. Robbins*, 71-133.

2478. No justice's execution against land. No execution issued by a justice of the peace, under this chapter, shall be enforced against real estate or any interest therein, but justices' judgments may be docketed on the judgment docket of superior court for the purpose of selling such estate or any interest therein.

Rev., s. 2030; Code, s. 1794; 1868-9, c. 117, s. 13.

When land to be sold in enforcing lien, judgment rendered before justice shall be docketed in superior court, whence execution may issue: *Smaw v. Cohen*, 95-85.

2479. Discharge of liens. All liens created by this chapter may be discharged as follows:

1. By filing with the justice or clerk a receipt or acknowledgment, signed by the claimant, that the lien has been paid or discharged.
2. By depositing with the justice or clerk money equal to the amount of the claim, which money shall be held by said officer for the benefit of the claimant.
3. By an entry in the lien docket that the action on the part of the claimant to enforce the lien has been dismissed, or a judgment rendered against the claimant in such action.
4. By a failure of the claimant to commence an action for the enforcement of the lien within six months from the notice of lien filed.

Rev., s. 2033; Code, s. 1793; 1868-9, c. 117, s. 12.

Lien lost by failure to sue in six months: *Hildebrand v. Vanderbilt*, 147-639; *Norfleet v. Cotton Factory*, 172-833.

ART. 9. AGRICULTURAL LIENS FOR ADVANCES

2480. Lien on crops for advances. If any person makes any advance either in money or supplies to any person who is engaged in or about to engage in the cultivation of the soil, the person making the advance is entitled to a lien on the crops made during the year upon the land in the cultivation of which the advance has been expended, in preference to all other liens, except the laborer's and landlord's liens, to the extent of such advance. Before any advance is made an agreement in writing for the advance shall be entered into, specifying the amount to be advanced, or fixing a limit beyond which the advance, if made from time to time during the year, shall not go; and this agreement shall be registered in the office of the register of the county where the person advanced resides within thirty days after its date.

Rev., s. 2052; Code, s. 1799; 1893, c. 9; 1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1.

As to husband's creating lien on crop raised on wife's land, see *Loftin v. Crossland*, 94-76; *Bray v. Carter*, 115-16; *Rawlings v. Neal*, 126-271; *Wells v. Batts*, 112-283; *Branch v. Ward*, 114-148; *Guano Co. v. Colwell*, 177-218.

Section has no application in the absence of a claim for its special priorities: *Odom v. Clark*, 146-544.

Merchant gets nothing when tenant abandons crop before maturity: *Beacom v. Boing*, 126-136; *Thigpen v. Leigh*, 93-48.

Registration of mortgage not essential to validity of lien as between parties thereto: *Reese v. Cole*, 93-87. Quere, whether compliance with other requirements contained in section necessary between parties: *Ibid*.

As to parol evidence to show that supplies furnished after execution of lien, see *Meekins v. Walker*, 119-46.

Restrictive provisions of section are for security of creditors and others dealing with debtor: *Nichols v. Speller*, 120-79; *Reese v. Cole*, 93-87.

THE AGREEMENT; FORM AND SUFFICIENCY OF. No particular form necessary: *Townsend v. McKinnon*, 98-103. Agreement must be in writing: *Patapsco v. Magee*, 86-350—and strictly conform to statute, *Ibid*.; *Rawlings v. Hunt*, 90-270; *Townsend v. McKinnon*, 98-103—and must be executed before advances are made or supplies furnished, *Patapsco v. Magee*, 86-350; *Knight v. Rountree*, 99-389; *Meekins v. Walker*, 119-46; *Clark v. Farrar*, 74-686; *Harris v. Jones*, 83-317; but see *Reese v. Cole*, 93-87. It must be for advances of money or supplies, made to the person engaged or about to engage in cultivation of soil for the cultivation of the crop of that year: *Clark v. Farrar*, 74-686; *Loftin v. Hines*, 107-360; *Wooten v. Hill*, 98-48; *Woodlief v. Harris*, 95-211. Where agreement, in form of chattel mortgage, held sufficient as an agricultural lien for advancements: *Townsend v. McKinnon*, 98-103. Agricultural lien will not be allowed to operate as a mortgage in certain cases: *Clark v. Farrar*, 74-686; *Patapsco v. Magee*, 86-350—but where instrument intended by parties to operate as agricultural lien, but it fails to set out some essential matter, it will be given effect as a common-law mortgage, if in form sufficient, *Spivey v. Grant*, 96-214. Instrument may be so framed as to operate in one part as a mortgage and in another part as an agricultural lien: *Rawlings v. Hunt*, 90-270. Agricultural lien and mortgage may be created by same instrument: *Wooten v. Hill*, 98-48. For cases on question as to sufficiency of description of land on which crop to be grown, see *Perry v. Bragg*, 109-303; *Weil v. Flowers*, 109-212; *Brown v. Miller*, 108-395; *Gwathney v. Etheridge*, 99-571; *Hurley v. Ray*, 160-376.

Where land fully described, and in same instrument it says "and upon any other land I may cultivate in county," the lien is good as to land described, but not as to any other: *Gwathney v. Etheridge*, 99-571; *Perry v. Bragg*, 109-303; *Weil v. Flowers*, 109-212; *Crinkley v. Egerton*, 113-142. Land on which crop to be grown must be identified at time lien created: *Gwathney v. Etheridge*, 99-571; *Hurley v. Ray*, 160-376. Power of sale upon default in paying advances inserted in instrument giving lien upon crops, does not invalidate instrument: *Crinkley v. Egerton*, 113-142.

Instrument which gives lien on crop for supplies to be furnished in making a crop and also conveys personal property as additional security, with ordinary powers of sale, is valid both as a chattel mortgage and as an agricultural lien: *Nichols v. Speller*, 120-75.

Where words of grant in an instrument are that grantor "conveys a lien upon each and every of said crop," to be made upon certain land, such words will constitute valid mortgage upon crops, although not planted at time when such instrument is executed and registered: *Harris v. Jones*, 83-317.

WHAT ARE ADVANCES HEREUNDER. See under section 2355. As to whether a mule is an advancement, see *Branch v. Galloway*, 105-193. Person who gives mortgage on crops to obtain supplies under section estopped from asserting that articles which he received as compliance with contract are not "supplies" within meaning of section: *Womble v. Leach*, 83-84—and a second mortgagee who acquires an interest in crop after such advances made is also bound by such admission, *Ibid.* Supplies necessary to make and save crop are such articles as are in good faith furnished to and received by tenant for that purpose: *Ledbetter v. Quick*, 90-276.

NATURE, VALIDITY AND EXTENT OF LIEN. The lien only extends to the crop of the year for which advances made: *Clark v. Farrar*, 74-686. Between parties, in absence of fraud and compulsion, lien attaches for dry goods, shoes, tobacco, powders, snuff and candy, without showing that such articles were actually used in making crop: *Nichols v. Speller*, 120-75.

Validity of lien not affected by fact that land upon which crop planted was, while crop growing, recovered from person giving lien: *Brown v. Miller*, 108-375.

Section intended to give lien a "preference to all other liens existing or otherwise" to extent of such advance: *Nichols v. Speller*, 120-78—and section should be strictly construed when rights of other creditors intervene, *Ibid.* Mortgage on crop not expressed to be for advances to be made, and not recorded in thirty days after its execution, has no rights as agricultural lien under section: *Cooper v. Kimball*, 123-120. Where agricultural lien made by vendee who has paid only portion of purchase money, of which vendor has notice, but makes no objection, his assent to lien presumed: *Dail v. Freeman*, 92-351.

Agreement purporting on its face to be agricultural lien, only for future advances, cannot be supported as a mortgage as against purchaser for a different purpose and founded on consideration not expressed, but concealed or disguised in instrument: *Clark v. Farrar*, 74-686. Crop lien to secure agricultural advances under section valid inter partes, though not registered within thirty days as required by section: *Gay v. Nash*, 78-100. One who advances money or supplies on agricultural lien for making a crop not bound to see that same are used on farm: *Nichols v. Speller*, 120-75.

PRIORITY BETWEEN LIENS. As to landlord's lien for rent and advances being prior to agricultural lien hereunder, see section 2356. As to crop liens given by mortgagors or trustees in possession taking priority over mortgage and deed in trust, see section 2481.

When landlord releases his lien on a part of the crop, the next lien for advancements applies as against the rights of third persons: *White v. Winslow*, 163-40.

Where mortgage given on crop and agricultural lien thereafter executed which recites that lienor is to pay certain amount out of crops, lienee holds crop subject to mortgage debt: *Brasfield v. Powell*, 117-140. Subsequent mortgage on same property given to secure advancements of supplies, there being nothing to show for what purpose supplies furnished, does not create prior lien: *Brown v. Miller*, 108-395. Where two mortgages on crop of cotton, and first mortgagee advanced money in order to save crop and prepare it for market, in excess of amount secured by mortgage, not entitled to same to exclusion of second mortgagee: *Weathersbee v. Farrar*, 97-106.

Agricultural lien duly executed and registered takes precedence of mortgage of prior date and registration upon "crop" therein subjected to extent of advances made: *Wooten v. Hill*, 98-48. Where tenant makes agricultural lien and afterwards land is sold under execution as property of landlord, owner of lien has right to crop superior to purchaser at execution sale: *Dail v. Freeman*, 92-351. Lien of laborer has precedence over agricultural liens made subsequent to his contract, but before crop harvested: *Rouse v. Wooten*, 104-229. Mortgage given by tenant to third person on his crop produced on certain farm does not give lien on rents paid by sub-tenant of portion of farm, where such rents assigned before execution of mortgage: *Norfleet v. Baker*, 131-99.

As to priority of landlord's lien over lien given by section, see *Ford v. Green*, 121-70; *Spruill v. Arrington*, 109-192; *Fleming v. Davenport*, 116-153; *Ballard v. Johnson*, 114-141; *Thigpen v. Maget*, 107-39; *Branch v. Galloway*, 105-193; *Brewer v. Chappell*, 101-251; *Wooten v. Hill*, 98-48; *Thigpen v. Leigh*, 93-47; *Ledbetter v. Quick*, 90-276; *Harrison v. Ricks*, 71-9.

2481. Contract for advances by mortgagor in possession. The preceding section shall apply to all contracts made for the advancement of money and supplies, or either, for the purposes herein specified by mortgagors or trustors who may be in possession of the lands mortgaged or conveyed in trust at the time of the making of the contract for such advancement of money or supplies, either in case the debts secured in said mortgage or deed of trust be due or not.

Rev., s. 2053; 1889, c. 476.

Where mortgagor in possession has given lien on crops for advances to aid in cultivating same, such lien superior to that of mortgagee of land: *Hinton v. Walston*, 115-7; *Carr v. Dail*, 114-284; *McNair v. Pope*, 104-350; *Killebrew v. Hines*, 104-182—even though lien improperly registered, *Carr v. Dail*, 114-284; *Killebrew v. Hines*, 104-182; but see *Brewer v. Chappell*, 101-251.

2482. Price to be charged for articles advanced limited. In order to be entitled to the benefits of the lien on crops in favor of landlords and other persons advancing supplies under the article, Agricultural Tenancies, of the chapter, Landlord and Tenant, and under the present article, or on a chattel mortgage on crops, such landlord or person shall charge for such supplies a price or prices of not more than ten per cent over the retail cash price or prices of the article or articles advanced, and the said ten per cent shall be in lieu of interest on the debt for such advances. If more than ten per cent over the retail cash price is charged on any advances made under the lien or mortgage given on the crop, then the lien or mortgage shall be null and void as to the article or articles upon which such overcharge is made. At the time of each sale there shall be delivered to the purchaser a memorandum showing the cash prices of the articles advanced.

1917, c. 134, s. 1.

2483. "Cash prices" defined and determined. In the case of retail merchants, the retail cash price or prices shall be the regular cash price or prices charged by the same merchant to cash customers for the same article or articles in like quantities at the same time. In the case of advances of supplies by landlords or other persons not engaged in business as retail merchants, or by retail merchants who have no regular cash prices, if the prices charged are called into question by the purchaser the retail cash price or prices of the supplies advanced may be determined by taking the average between the cash price or prices for the same class or classes of goods of two neighboring merchants, one selected by the landlord or other person making the advance and the other by the one to whom the advance is made.

1917, c. 134, s. 2.

2484. Person advanced not estopped by agreement. No agreement or understanding between the parties as to the price or prices to be charged shall work an estoppel against the person to whom supplies have been advanced from showing that the price or prices charged were in fact more than ten per cent over the average retail cash price or prices in that locality at the time the advance or

advances were made. If the price or prices charged by the merchants or landlord were in fact more than ten per cent, then the lien shall be null and void as to the article or articles upon which such overcharge is made.

1917, c. 134, s. 2.

2485. Commission in lieu of interest, where advance in money. Any person, firm, or corporation, including any bank or credit union, making any advancement in money to any person for the purpose of enabling such person to cultivate a crop, and taking as sole security for the advance so made a lien or mortgage on the crops to be cultivated and the personal property of the person to whom the advances are made, may charge, in lieu of interest, a commission of not more than ten per cent of the amount of money actually advanced: Provided, that money advanced under the provisions of this section shall be advanced in installments agreed upon at the time of the contract, and the ten per cent commission herein allowed shall not be deducted, but shall be added to the amount of money agreed to be advanced.

1917, c. 134, s. 3.

2486. Disposition of commission, where advanced by credit union. In case the money is advanced by a credit union, the funds derived from the ten per cent commission allowed in the preceding section shall be used to pay such interest as the union may pay for the money borrowed by it for the benefit of its members, and to cover losses sustained by the union on account of loans made to members, and to further cover any reasonable expenses incurred by the union in connection with the loans made to members, and the balance of said fund shall be returned to the borrowers at the end of each year.

1917, c. 134, s. 4.

2487. Purchasers for value protected. All liens or mortgages made under the provisions of this article shall be valid for their face value in the hands of purchasers for value and before maturity, even though the charges made are in excess of those allowed herein; but in such cases the party to whom the advances are made has the right to recover from the party making the advances any sum he may be compelled to pay a third party in excess of the charges allowed by this article.

1917, c. 134, ss. 5, 6.

2488. Crop seized and sold to preserve lien. If the person making such advances makes an affidavit before the clerk of the superior court of the county in which such crops are, that the amount secured by said lien for such advances, or any part thereof, is due and unpaid, that the person to whom such advances have been made, or any other person having the said crop in his possession, is about to sell or dispose of his crop, or in any other way is about to defeat the lien hereinbefore provided for, accompanied with a statement of the amount then due, it is lawful for him to issue his warrant, directed to any of the sheriffs of this state, requiring them to seize the said crop, and, after due notice, sell the same for cash and pay over the net proceeds thereof, or so much thereof as may be necessary in the extinguishment of the amount then due. This proceeding shall not affect the rights of landlords or laborers.

Rev., s. 2054; Code, s. 1800; 1893, c. 9; 1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88.

Clerk superior court has power to revoke and supersede warrant issued under section, where same improvidently granted: *Cottingham v. McKay*, 86-241. Where, in proceeding under section, money arising from the sale of crop paid into court and proceeding dismissed, court has the power to order a return of the money to the defendant, although the plaintiff has instituted another action and files an affidavit that defendant is insolvent: *Ibid.* Where defendant denies that there is anything due for advances and there is a general verdict for plaintiff, it is error in court to refuse judgment because jury failed to assess damages: *Gay v. Nash*, 84-333. Not necessary to regularity of proceeding under section to enforce lien that summons should be issued to defendant: *Thomas v. Campbell*, 74-787.

Section merely referred to in *Crinkley v. Egerton*, 113-146; *Foundry Co. v. Howland*, 111-627; *Harrison v. Rieks*, 71-9.

2489. Lienor's claim disputed; proceeds of sale held; issue made for trial. If the person to whom the advances have been made, or who claims an interest in the crops, within thirty days after such sale has been made, gives notice in writing to the sheriff, accompanied with an affidavit, to the effect that the amount claimed is not justly due, it is the duty of the sheriff to hold the proceeds of such sale subject to the decision of the court upon an issue which shall be made up and set for trial at the next succeeding term of the superior court for the county in which the person to whom such advances have been made resides.

Rev., s. 2054; Code, s. 1800; 1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; 1893, c. 9.

2490. Local: Short form of liens. For the purpose of creating a valid agricultural lien under the preceding sections for supplies to be advanced, and also to constitute a valid chattel mortgage as additional security thereto, and to secure a preëxisting debt, the following or a substantially similar form shall be deemed sufficient, and for those purposes legally effective, in the counties of Alamance, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Carteret, Caswell, Catawba, Chowan, Columbus, Craven, Cumberland, Davie, Davidson, Duplin, Durham, Edgecombe, Forsyth, Gaston, Gates, Granville, Halifax, Harnett, Hertford, Hyde, Iredell, Johnston, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Northampton, Onslow, Pender, Pamlico, Person, Pitt, Polk, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Transylvania, Tyrrell, Union, Vance, Wake, Watauga, Washington, Wayne and Wilson:

North Carolina, _____ County.

Whereas, _____ ha_____ agreed to make advances to _____ for the purpose of enabling said _____ to cultivate the lands herein-after described during the year 19____, the amount of said advances not to exceed _____ dollars; and,

Whereas, said _____ is indebted to said _____ in the further sum of _____ dollars now due; now, therefore, in order to secure the payment of the same the said _____ do_____ hereby convey to said _____ all the crops of every description which may be raised during the year 19____ on the following lands in _____ County, North Carolina, _____ Township, adjoining the lands of _____ and also the following other property, viz.: _____

And if by the _____ day of _____, 19____, said _____ fail_____ to pay said indebtedness, then said _____ may foreclose this lien as provided in section two thousand four hundred and eighty-eight of the Consolidated Statutes or otherwise, and may sell said crops and other property after ten days notice posted at the courthouse door and three other public places in said county, and apply the proceeds to the payment of said indebtedness and all costs and expenses of executing this

conveyance, and pay the surplus to said-----, and the said----- hereby represents that said crops and other property are the absolute property of----- and free from encumbrance-----.

Witness ----- hand-- and seal, ----- this the ----- day of -----, 19-----
Witness:-----

-----, owner of the lands described in the foregoing instrument, in consideration of the advances to be made, as therein provided, do--- hereby agree to waive and release my lien as landlord upon said crops to the extent of said advances made to said -----.

This the ----- day of -----, 19-----

Witness:----- (Seal.)

North Carolina,-----County.

The due execution of the foregoing instrument was this day proven before me by the oath and examination of -----, the subscribing witness thereto.

This the ----- day of -----, 19-----

----- (Seal.)

North Carolina,-----County.

The foregoing certificate of -----, a ----- of ----- County, is adjudged to be correct. Let the instrument with the certificate be registered.

This the ----- day of -----, 19-----

-----, Clerk Superior Court.

Rev., s. 2055; 1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; 1907, c. 843; 1909, c. 532; P. L. 1913, c. 49.

No particular form is required; the instrument is construed to effectuate the intention: Jones v. McCormick, 174-82.

2491. Local: Rights on lienee's failure to cultivate. If any person in the counties mentioned in the preceding section, after executing a lien as aforesaid for advances, fails to cultivate the lands described therein, or does any other act calculated to impair the security therein given, then the person to whom the lien was executed is relieved from any further obligation to furnish supplies, and the debts and advances theretofore made become due and collectible at once, and the person to whom the instrument was executed may proceed to take possession of, cultivate and harvest said crops, and to sell the other property described therein. It is not necessary to incorporate such power in the instrument, but this section is sufficient authority for the same. The sale of any property described in any instrument executed under the provisions of this chapter may be made at any place in the county where such property is situated after ten days notice published at the courthouse door and three other public places in said county.

Rev., s. 2056; 1899, c. 17, s. 3; 1901, c. 329, s. 3.

2492. Local: Commissioners to furnish blank records. The board of commissioners of the said counties shall have record books made with the aforesaid forms printed therein, and the cost of said books and of the printing of said forms, and of such other said books as may be hereafter required, shall be paid by the respective counties, and furnished to the register of deeds.

Rev., s. 2057; 1899, c. 17, s. 4; 1901, c. 329, s. 4.

For fees for probating and registering lien bonds, see sections 3903, 3904, 3906, 3907. For laborer's lien on corporate assets, see section 1197. For power to take crops, see sections 830, 2488. For landlord's lien, see section 2355. For lien of docketed judgment, see section 614. For lien of docketed judgments of justices of the peace, see section 1517. For lien upon land for improvements made, see section 703. Debts which are liens on decedent's property paid by administrator, see section 93.

CHAPTER 50

MARRIAGE

ART. 1. GENERAL PROVISIONS.

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ART. 1. GENERAL PROVISIONS

2493. Requisites of marriage; solemnization. The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a justice of the peace, and the consequent declaration by such minister or officer that such persons are man and wife, shall be a valid and sufficient marriage: Provided, that the rite of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be interfered with by the provisions of this chapter: Provided further, marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation.

Rev., s. 2081; Code, s. 1812; 1871-2, c. 193, s. 3; 1908, c. 47; 1909, c. 704, s. 2; 1909, c. 897.

No such thing as marriage simply by consent (so-called common-law marriage) in this state; history of marriage laws stated: *State v. Wilson*, 121-650.

Section only prescribes what constitutes valid marriage: *State v. Brown*, 119-827.

As to sham marriages, see *State v. Wilson*, 121-650; *State v. Brown*, 119-825. As to evidence of marriage, see *Jones v. Reddick*, 79-290; *State v. Robbins*, 28-23; *Weaver v. Cryer*, 12-337. As to marriage celebrated by ordained minister, who depends for his support upon some other occupation than minister, see *In re Cunninggim*, 60-397.

Marriage by law is complete when parties, able and willing to contract, have actually contracted to be man and wife in form and with the solemnities required by law: *State v. Patterson*, 24-346—and consummation by carnal knowledge not necessary to its validity, *Ibid*. Cohabitation between an indian man and woman, according to ancient customs of their tribe, which leave parties free to dissolve the connection at pleasure, is not marriage: *State v. Tacha-na-tah*, 64-614—for there is but one law of marriage for all residents of this state, *Ibid*. While consent is essential to marriage in this state, it must also be acknowledged in manner and before person prescribed by section: *State v. Wilson*, 121-650.

Marriage brought about by threats of wife's father and by false representations of pregnancy is valid: *Bryant v. Bryant*, 171-746.

Elder in colored Methodist church is an ordained minister of the gospel within meaning of section, and as such can celebrate rites of matrimony: *State v. Parker*, 106-711.

Validity of statutes curing marriages void for nonobservance of statutory formality: *Cooke v. Cooke*, 61-583.

For case under former enactment, see *State v. Bray*, 35-289.

2494. Capacity to marry. All unmarried male persons of sixteen years, or upwards, of age, and all unmarried females of fourteen years, or upwards, of age, may lawfully marry, except as hereinafter forbidden.

Rev., s. 2082; Code, s. 1809; R. C., c. 68, s. 14; 1871-2, c. 193.

Female at fourteen may lawfully marry: *Whitaker v. Hamilton*, 126-466. Male, being of marriageable age at eighteen, may be indicted for seduction under promise of marriage: *State v. Creed*, 171-837.

2495. Want of capacity; void and voidable marriages. All marriages between a white person and a negro or indian, or between a white person and person of negro or indian descent to the third generation, inclusive, or between a Cherokee indian of Robeson county and a negro, or between a Cherokee indian of Robeson county and a person of negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under fourteen years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void: Provided, double first cousins may not marry; and Provided further, that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or indian, or of negro or indian descent to the third generation, inclusive, and for bigamy.

Rev., s. 2083; Code, s. 1810; R. C., c. 68, ss. 7, 8, 9; 1871-2, c. 193, s. 2; 1887, c. 245; 1911, c. 215, s. 2; 1913, c. 123; 1917, c. 135.

The persons now known as Cherokee Indians of Robeson County were formerly known as Croatan indians. See chapter Indians, s. 6257.

For suits to nullify marriages contracted contrary to the provisions of this section, see section 1658 and annotations thereunder.

Action to nullify marriage is not technically action for divorce, though placed under chapter "Divorce," and although alimony pendente lite may be allowed: *Taylor v. White*, 160-38 (discussing *Lea v. Lea*, 104-603).

Marriage between white person and negro is void: *Hare v. Board of Education*, 113-9; *Woodward v. Blue*, 103-114; *State v. Kennedy*, 76-251—approved in *State v. Cutshall*, 110-552; *State v. Hairston*, 63-451; *State v. Ross*, 76-242; *State v. Rheinhardt*, 63-547; *State v. Melton*, 44-49; *State v. Hooper*, 27-201; *State v. Fore*, 23-378; *State v. Watters*, 25-455—meaning of "to third generation inclusive": *Ferrall v. Ferrall*, 153-174. Bigamous marriages void: *Irby v. Wilson*, 21-512. But only marriages prohibited between races and bigamous marriages are absolutely void; all other marriages prohibited hereunder must be declared void by the court, that is, are voidable: *Watters v. Watters*, 168-411.

Marriage of an insane person is voidable, on behalf of the insane person: *Watters v. Watters*, 168-411 (discussing *Sims v. Sims*, 121-297; *Crump v. Morgan*, 38-91; *Johnson v. Kincaid*, 37-470).

Marriage between persons nearer of kin than first cousins, followed by cohabitation and birth of issue, cannot be declared void after death of either party, for court's power to declare void in such case confined to time when parties living: *Baity v. Cranfill*, 91-293.

Marriage where one person under legal age is not void, but voidable: *State v. Parker*, 106-711—and ratified where parties continue as husband and wife after legal age reached, *Koonce v. Wallace*, 52-194. Court will not decree nullity where marriage followed by twenty years cohabitation as husband and wife: *State v. Parker*, 106-711.

To bring case of unlawful marriage within proviso to section it must be shown not only that one of parties dead, but that cohabitation and birth of issue followed unlawful marriage: *Ward v. Bailey*, 118-55.

Marriage between white person and negro in another state is valid in this state: *State v. Ross*, 76-242; *State v. Schlachter*, 61-520—but where they leave this state for purpose of celebrating such marriage and then of returning, such marriage void, *State v. Cutshall*, 110-552; *State v. Kennedy*, 76-251. Provisions of section prohibiting marriage between races are not in conflict with state constitution or amendments to federal constitution: *State v. Hairston*, 63-451.

It is competent for legislature to impose, and therefore to remove, conditions in respect to marriage relation: *Baity v. Cranfill*, 91-293—but legislature cannot validate marriage which is nullity, as for want of consent, *Cooke v. Cooke*, 61-583.

Section to be considered with sections 2500 and 2503 in determining the inquiry to be made before issuing license: *Joyner v. Harris*, 157-296.

For case prior to enactment of section as to impotency of one of parties, see *Smith v. Morehead*, 59-360. Section referred to in *Hopkins v. Bowers*, 111-177.

As to Cherokee Indians of Robeson County, see section 6257.

2496. Prohibited degrees of kinship. When the degree of kinship is estimated with a view to ascertain the right of kinspeople to marry, the half-blood shall be counted as the whole-blood: Provided, that nothing herein contained shall be so construed as to invalidate any marriage heretofore contracted in case where by counting the half-blood as the whole-blood the persons contracting such marriage would be nearer of kin than first cousins; but in every such case the kinship shall be ascertained by counting relations of the half-blood as being only half so near kin as those of the same degree of the whole-blood.

Rev., s. 2084; Code, s. 1811; 1879, c. 78.

Section referred to: *Baity v. Cranfill*, 91-296.

2497. Marriages between slaves validated. Persons, both or one of whom were formerly slaves, who have complied with the provisions of section five, chapter forty, of the acts of the general assembly, ratified March tenth, one thousand eight hundred and sixty-six, shall be deemed to have been lawfully married.

Rev., s. 2085; Code, s. 1842; 1866, c. 40, s. 5.

Section valid: *Bettis v. Avery*, 140-186; *Baity v. Cranfill*, 91-298. Necessary consent to marriage is supplied by continuing cohabitation: *Bettis v. Avery*, 140-186—and such continued cohabitation, after passage of section, is conclusive evidence of party's consent to contract, *Long v. Barnes*, 87-329; *State v. Whitford*, 86-636—nor can such marriage be avoided by failure to have acknowledgment of same entered of record, *Erwin v. Bailey*, 123-628; *State v. Whitford*, 86-636; *State v. Adams*, 65-538. Relation of man and wife existing between former slaves, if continued until passage of act, culminated into valid marriage and is legalized by section: *Nelson v. Hunter*, 140-598; *Erwin v. Bailey*, 123-628; *Bettis v. Avery*, 140-186; *State v. Melton*, 120-591; *State v. Harris*, 63-1.

This section has retroactive effect so as to legalize relation from beginning of it, thereby legitimatizing all offsprings of cohabitation born during entire period, and conduct of parents after passage of act could not render offspring of union illegitimate: *Nelson v. Hunter*, 140-598. Section intended for benefit of those who occupied such relations to each other exclusively, and not to others at same time: *Branch v. Walker*, 102-34.

As bearing upon section, see *State v. Adams*, 65-537. For case prior to enactment of section, see *State v. Samuel*, 19-177. Section merely referred to: *Jones v. Hoggard*, 108-178.

ART. 2. MARRIAGE LICENSE

2498. Solemnization without license unlawful. No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, until there is delivered to him a license for the marriage of the

said persons, signed by the register of deeds of the county in which the marriage is intended to take place, or by his lawful deputy.

Rev., s. 2086; Code, s. 1813; 1871-2, c. 193, s. 4.

Marriage not invalid because solemnized without a license: *Maggett v. Roberts*, 112-71; *State v. Parker*, 106-711; *State v. Robbins*, 28-23—or **under an illegal license**, *Maggett v. Roberts*, 112-71.

2499. Penalty for solemnizing without license. Every minister or officer who marries any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within two months after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars to any person who sues therefor, and he shall also be guilty of a misdemeanor.

Rev., ss. 2087, 3372; Code, s. 1817; R. C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8.

Marriage not invalid because solemnized without license: *Maggett v. Roberts*, 112-71; *State v. Parker*, 106-711; *State v. Robbins*, 28-23—or **under illegal license**, *Maggett v. Roberts*, 112-71—and the only effect of marrying a couple without legal license is to subject officer or minister to penalty of \$200, *Maggett v. Roberts*, 112-74; *State v. Parker*, 106-713; *State v. Robbins*, 28-23.

Personating minister and solemnizing marriage with consent of parties not a criminal offense: *State v. Brown*, 119-825.

Section cited: *Norman v. Dunbar*, 53-319; *State v. Parker*, 106-713; *Maggett v. Roberts*, 112-74.

2500. License issued by register of deeds. Every register of deeds shall, upon application, issue a license for the marriage of any two persons, if it appears to him probable that there is no legal impediment to such marriage. Where either party to the proposed marriage is under eighteen years of age, and resides with the father, or mother, or uncle, or aunt, or brother, or elder sister, or resides at a school, or is an orphan and resides with a guardian, the register shall not issue a license for such marriage until the consent in writing of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom said infant was placed at school, and under whose custody and control he or she is, is delivered to him, and such written consent shall be filed and preserved by the register. When it appears to the register of deeds that it is probable there is a legal impediment to the marriage of any person for whom a license is applied, he has power to administer to the person so applying an oath touching the legal capacity of said parties to contract a marriage.

Rev., s. 2088; Code, s. 1814; 1887, c. 331; 1871-2, c. 193, s. 5.

The written consent of parents is the condition precedent to issue of license to one under eighteen years: *Coley v. Lewis*, 91-21. Written consent of mother sufficient, though stepfather dissents: *Owens v. Munden*, 168-266—but mother's consent insufficient where child living with father, *Littleton v. Haar*, 158-566.

Duty of register of deeds to be cautious and scrutinize application under peril of incurring penalty imposed by section 2503: *Agent v. Willis*, 124-29; *Laney v. Mackey*, 144-633—to make reasonable inquiry, *Julian v. Daniels*, 175-549; *Gray v. Lentz*, 173-346; *Savage v. Moore*, 167-383; *Joyner v. Harris*, 157-296; *Williams v. Hodges*, 101-302; *Laney v. Mackey*, 144-633; *Bowles v. Cochran*, 93-398—but he need not examine witnesses under oath, though section empowers him to do so, *Furr v. Johnson*, 140-157. See annotations under section 2503.

This section and section 2503, being in *pari materia*, should be construed together: *Williams v. Hodges*, 101-302; *Bowles v. Cochran*, 93-398. As to inquiry to be made, section 2495 also to be considered: *Joyner v. Harris*, 157-296.

Section merely referred to: *Hareum v. Marsh*, 130-158; *Wilkinson v. Dellinger*, 126-462; *Joyner v. Roberts*, 112-111; *Maggett v. Roberts*, 112-73; *Walker v. Adams*, 109-483; *State v. Snuggs*, 85-541.

2501. Obtaining license by false representation misdemeanor. If any person shall obtain a marriage license for the marriage of persons under the age of eighteen years by misrepresentation or false pretenses, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days, or both, at the discretion of the court.

Rev., s. 3371; 1885, c. 346.

As to false pretenses generally, see section 4277.

2502. Form of license. License shall be in the following or some equivalent form :

To any ordained minister of any religious denomination, minister authorized by his church, or to any justice of the peace for _____ county: A. B. having applied to me for a license for the marriage of C. D. (the name of the man to be written in full) of (here state his residence), aged ____ years (race, as the case may be), the son of (here state the father and mother, if known; state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state), and E. F. (write the name of the woman in full) of (here state her residence), aged ____ years (race, as the case may be), the daughter of (here state names and residences of the parents, if known, as is required above with respect to the man). (If either of the parties is under eighteen years of age, the license shall here contain the following:) And the written consent of G. H., father (or mother, etc., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to such marriage known to me, you are hereby authorized, at any time within sixty days from the date hereof, to celebrate the proposed marriage at any place within the said county. You are required, within sixty days after you shall have celebrated such marriage, to return this license to me at my office with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under penalty of forfeiting two hundred dollars to the use of any person who shall sue for the same.

Issued this ____ day of _____, 19____ L. M.,
Register of Deeds of _____ County.

Every register of deeds shall designate in every marriage license issued the race of the persons proposing to marry by inserting in the blank after the word "race" the words "white," "colored" or "indian," as the case may be. The certificate shall be filled up and signed by the minister or officer celebrating the marriage, and also be signed by one or more witnesses present at the marriage, who shall add to their names their place of residence, as follows:

I, N. O., an ordained or authorized minister of (here state to what religious denomination, or justice of the peace, as the case may be), united in matrimony (here name the parties), the parties licensed above, on the ____ day of _____, 19____, at the house of P. R., in (here name the town, if any, the township and county), according to law.

Witness present at the marriage: _____ N. O.
S. T., of (here give residence).

Rev., s. 2089; Code, s. 1815; 1899, c. 541, ss. 1, 2; 1871-2, c. 193, s. 6; 1909, c. 704, s. 3; 1917, c. 38.

A blank marriage license, though signed by the register of deeds, is not issued until filled up and handed to person who is to be married, or to some one for him; and if, at the time of such issuance, register has become *functus officio*, failure to record it does not render him liable to penalty imposed by sections 2504 and 2505 for failure to record substance of each marriage license issued: *Maggett v. Roberts*, 112-71.

2503. Penalty for issuing license unlawfully. Every register of deeds who knowingly or without reasonable inquiry, personally or by deputy, issues a

license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of eighteen years, without the consent required by law, shall forfeit and pay two hundred dollars to any parent, guardian, or other person standing in loco parentis, who sues for the same.

Rev., s. 2090; Code, s. 1816; 1895, c. 387; 1901, c. 722; R. C., c. 68, s. 13; 1871-2, c. 193, s. 7.

Legal definition of "penalty": *Bd. of Ed. v. Henderson*, 126-689. Register liable when he issues license to those under eighteen years without consent: *Laney v. Mackey*, 144-630.

When application made for license, register must be cautious and scrutinize application: *Agent v. Willis*, 124-29—to make reasonable inquiry whether there is any legal impediment to marriage, *Bowles v. Cochran*, 93-398—and where he is without knowledge of parties, it must appear probable to him upon reasonable inquiry that license may and ought to issue, *Agent v. Willis*, 124-29. The inquiry necessary to be made to relieve him from liability cannot be delegated to a deputy, but conducted by register himself: *Maggett v. Roberts*, 112-71; *Cole v. Laws*, 108-185—for the trust is personal to the register, *Maggett v. Roberts*, 112-71.

This section and section 2495 are in pari materia and are to be construed together: *Bowles v. Cochran*, 93-398; *Joyner v. Harris*, 157-296.

Where register delivers license complete in form to person with instructions not to give same to parties until written consent of mother obtained, and same delivered without such consent, register liable for penalty: *Coley v. Lewis*, 91-21.

Issuing of license by register in violation of section not indictable offense: *State v. Snuggs*, 85-541—but penalty of \$200 is prescribed to person aggrieved who shall sue therefor, *Ibid.*—and this mode of proceeding excludes that by indictment, unless illegal act be done mala fide, *Ibid.*

What is "reasonable inquiry": *Julian v. Daniels*, 175-549; *Gray v. Lentz*, 173-346; *Savage v. Moore*, 167-383; *Joyner v. Harris*, 157-296; *Furr v. Johnson*, 140-157; *Bowles v. Cochran*, 93-398. As to when "reasonable inquiry" hereunder is question for court or jury, see *Furr v. Johnson*, 140-157; *Trolinger v. Boroughs*, 133-312; *Harcum v. Marsh*, 130-154; *Joyner v. Roberts*, 114-389. As to burden of proof in actions hereunder, see *Furr v. Johnson*, 140-157. As to abatement of action by death of register, see *Wallace v. McPherson*, 139-297. As to power of legislature to relieve officer from penalty given by section by an act passed after bringing of action therefor, see *Bray v. Williams*, 137-387. For cases in which inquiry held to be reasonable, see *Furr v. Johnson*, 140-157; *Harcum v. Marsh*, 130-154; *Joyner v. Roberts*, 114-380; *Walker v. Adams*, 109-481; *Bowles v. Cochran*, 93-398. For cases in which inquiry held not to be reasonable, see *Laney v. Mackey*, 144-631; *Morrison v. Teague*, 143-186; *Trolinger v. Boroughs*, 133-312; *Cole v. Laws*, 104-651; *Williams v. Hodges*, 101-300.

Sufficiency of written consent, see under section 2500.

Venue of action hereunder is in county in which cause of action arises: *Dixon v. Haar*, 158-341.

As to complaint in action hereunder, see *Maggett v. Roberts*, 108-174.

As to proper name under which to prosecute action, see *Ibid.*; see *Norman v. Dunbar*, 53-320.

Section merely referred to: *Wilkinson v. Dellinger*, 126-462.

2504. Record of licenses and returns; originals filed. Every register of deeds shall keep a book (which shall be furnished on demand by the board of county commissioners of his county) on the first page of which shall be written or printed:

Record of marriage licenses and of returns thereto, for the county of _____, from the _____ day of _____, 19____, to the _____ day of _____, 19____, both inclusive.

In said book shall be entered alphabetically, according to the names of the proposed husbands, the substance of each marriage license and the return thereupon, as follows: The book shall be divided by lines with columns which shall be properly headed, and in the first of these, beginning on the left, shall be put the

date of issue of the license; in the second, the name in full of the intended husband, with his residence; in the third, his age; in the fourth, his race and color; in the fifth, the name in full of the intended wife, with her residence; in the sixth, her age; in the seventh, her race and color; in the eighth, the name and title of the minister or officer who celebrated the marriage; in the ninth, the day of the celebration; in the tenth, the place of the celebration; in the eleventh, the names of all or at least three of the witnesses who signed the return as present at the celebration. The original license and return thereto shall be filed and preserved.

Rev., s. 2091; Code, s. 1818; 1899, c. 541, s. 3; 1871-2, c. 193, s. 9.

As bearing upon section, see *Bray v. Williams*, 137-387.

Section merely referred to: *Maggett v. Roberts*, 112-71.

2505. **Penalty for failure to record.** Any register of deeds who fails to record, in the manner above prescribed, the substance of any marriage license issued by him, or who fails to record, in the manner above prescribed, the substance of any return made thereon, within ten days after such return made, shall forfeit and pay two hundred dollars to any person who sues for the same.

Rev., s. 2092; Code, s. 1819; 1871-2, c. 193, s. 10.

Penalty given by section is as applicable to failure to record license or its substance, when issued, as to failure to record return thereof: *Maggett v. Roberts*, 108-174. Where at time of issuance of license register becomes *functus officio*, failure to record it does not render him liable to penalty: *Maggett v. Roberts*, 112-71.

As to name in which action for penalty should be prosecuted, see *Maggett v. Roberts*, 108-174. As to jurisdiction of action for penalty hereunder, see *Ibid.* As to constitutionality of act of legislature relieving register from penalty hereunder, passed after action brought for recovery thereof, see *Bray v. Williams*, 137-387.

CHAPTER 51

MARRIED WOMEN

ART. 1. POWERS AND LIABILITIES OF MARRIED WOMEN.

- 2506. Property of married woman secured to her.
- 2507. Capacity to contract.
- 2508. Capacity to draw checks.
- 2509. Conveyance or lease of wife's land requires husband's joinder.
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ART. 2. ACTS BARRING RECIPROCAL PROPERTY RIGHTS OF HUSBAND AND WIFE.

- 2522. Divorce a vinculo and felonious slaying a bar.
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ART. 3. FREE TRADERS.

- 2525. Requisites of writing to make her free trader.
- 2526. Writing effective from registration.
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- 2529. Separation by divorce or deed; husband non compos.
- 2530. Abandonment by husband.

ART. 1. POWERS AND LIABILITIES OF MARRIED WOMEN

2506. Property of married woman secured to her. The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried.

Rev., s. 2093; Const., Art. X, s. 6.

For purchase-money mortgage executed by husband alone, see Widows, s. 4101.

This section is identical with const., art. 10, s. 6, and reference is made to annotations thereunder. For other statutes affecting married women, see especially:

Chapter Conveyances, art. 2, conveyances by husband and wife (s. 997 et seq).

Chapter Widows, passim.

Index, under heading, Married Women.

Sections of this chapter and cross-references thereunder.

MARRIED WOMEN'S RIGHTS UNDER CONSTITUTION AND STATUTES: GENERAL PROGRESS. Estate conferred on married women by const., art. 10, s. 6, was early held not to include as incidents either absolute power of disposal or general power to control; her "sole and separate estate" thereunder was assimilated to her separate equitable property; in the absence of additional legislation she was subject to the disabilities established with

reference to her separate equitable estate by courts of equity; but unless prohibited by this provision, the legislature might remove all a married woman's incapacities and give her full power to contract: *Pippen v. Wesson*, 74-437.

The views thus laid down long controlled legislature and courts, but later decisions express the view that the constitutional provision by its own words gives the married woman complete control over her own property, except that husband's assent is required to her conveyance: See *Freeman v. Lide*, 176-434, and cases cited; also this chapter *passim*, especially sections 2510, 2515.

Whether present statutes are regarded as needed supplements to the constitutional provision, or as stating consequences implicitly contained therein, as result of enactments in this chapter, married women are fully emancipated as to property rights, except that they must have husband's consent to conveyance: *Freeman v. Lide*, 176-434.

And they are absolutely emancipated as to all contracts, except those with their husbands, as to which requirements of section 2515 control: *Everett v. Ballard*, 174-16; and see section 2507.

The history of legislation affecting married women up to 1905 is given, with references to the cases, in *Ball v. Paquin*, 140-83. For history and present state of law as to married women's contracts, see under section 2507.

WHEN PROVISION TOOK EFFECT. Const., art. 10, s. 6, took effect for purposes of domestic policy upon its adoption by the state in April, 1868, and not when congress approved it: *Freeman v. Lide*, 176-434.

When marriage occurred before 1868, husband's vested rights in wife's property previously acquired (e. g., to reduce her choses in action to possession) were not affected; but wife's property acquired after 1868 became her separate property, though marriage was before that date: *Morris v. Morris*, 94-613. When land acquired and marriage occurred before 1868, husband can make good title without wife's joinder; otherwise if land acquired or marriage took place after such date: *Castlebury v. Maynard*, 95-281. Deed between husband and wife made before 1868 governed by law then existing: *Walton v. Parish*, 95-259. In action by wife to recover land, marriage since 1868 presumed: *Lloyd v. Lloyd*, 113-186.

Where marriage since 1868, husband taking title to land bought with wife's money holds as trustee for her: *Kirkpatrick v. Holmes*, 108-206; *Ray v. Long*, 128-90; *Cunningham v. Cunningham*, 121-413; *Gidney v. Moore*, 86-485; *Cunningham v. Bell*, 63-328; *Lyon v. Akin*, 78-258; see *Vance v. Vance*, 118-864.

Fact that husband, by mistake and ignorance, without wife's knowledge, takes notes and mortgage for wife's land to himself does not affect her title thereto or render securities subject to his debts: *Rodman v. Harvey*, 102-1.

DISPOSITION, NOT ACQUISITION, REGULATED. Constitutional and statutory provisions regulate married women's powers of disposition, not of acquisition, of property: *Osborne v. Wilkes*, 108-651, 667, and cases cited.

STATUTE LIMITATIONS AGAINST MARRIED WOMEN. Since by const., art. 10, s. 6, wife's property is her own and beyond control of husband, and wife may sue husband in regard thereto (s. 454), and coverture not a disability to prevent running of statute of limitations, a claim which wife has against husband will be barred as in other cases: *Graves v. Howard*, 159-594.

TRANSFERS INTER VIVOS AND BY WILL. Word "conveyed" in constitutional provision has reference only to transfers and alienations of real estate: *Vann v. Edwards*, 135-661—and married woman may dispose of her personality as fully and freely as though unmarried, *Vann v. Edwards*, 135-661; *Ball v. Paquin*, 140-83; *Rea v. Rea*, 156-529.

Married woman may devise and bequeath her property as if unmarried, and her devise or bequest defeats her husband's claim as tenant by curtesy consummate: See section 2511.

Under const., art. 10, s. 6, and C. S., s. 2434, under chapter Liens, taken together, lien is given on property of married women for debts contracted for work and labor thereon: *Ball v. Paquin*, 140-83—for ruling that lien did not exist in the absence of valid contract, see *Weathers v. Borders*, 121-387; s. e., 124-610.

SEPARATE PROPERTY TRUSTS FOR MARRIED WOMEN SINCE CONSTITUTION. Deeds executed before 1868, creating separate property trusts for married women, were construed as creating active trusts, and were unexecuted by statute of uses, though no active duties imposed on trustee; but since 1868, to be saved from the operation of statute, active duties

must be thrown on trustee, or there must be contingent estates to be preserved: *Freeman v. Lide*, 176-434, following *Perkins v. Brinkley*, 133-154.

In deed in trust for sole and separate use of married woman, with restraint on anticipation, the restraint is void after husband's death (deed since 1868): *Lee v. Oates*, 171-717.

As to the power of married woman over her equitable separate estate under such a trust, see *Hardy v. Holly*, 84-661; *Kirby v. Boyette*, 118-244; *Cameron v. Hicks*, 141-21.

2507. Capacity to contract. Subject to the provisions of section 2515 of this chapter, regulating contracts of wife with husband affecting corpus or income of estate, every married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but no conveyance of her real estate shall be valid unless made with the written assent of her husband as provided by section six of article ten of the constitution, and her privy examination as to the execution of the same taken and certified as now required by law.

Rev., s. 2094; Code, s. 1826; 1871-2, c. 193, s. 17; 1911, c. 109.

INTRODUCTORY STATEMENT. This section, the Martin act, passed March 6, 1911, has revolutionized the law as to married women's contracts. It repealed the statute which for forty years had controlled the subject, and rendered obsolete the mass of decisions construing the old law. This note contains the constructions of the section, and does not attempt to reproduce the obsolete cases interpreting the repealed statute. After the decisions on the statute, however, are given some references as to the former law.

General discussion of scope of statute and its bearing on married women's rights in *Rea v. Rea*, 156-529.

CONSTRUCTIONS OF SECTION. Section came before the court in a case involving the validity of a transfer or gift of corporate stock by a wife to her husband, made by filling out the blank endorsement on the stock certificate, without the formalities and private examination required by section 2515, and such transfer was upheld: *Rea v. Rea*, 156-529.

Section is prospective and not applicable to contracts made before its passage: *Stephens v. Hicks*, 156-239.

Section practically constitutes married women free traders as to all their ordinary dealings: *Price v. Electric Co.*, 160-450, per Hoke, J.; *McCurry v. Purgason*, 170-463.

Married woman is liable upon her contract for the price of goods sold and delivered; for under section she may contract without husband's consent as freely as if unmarried, and husband need not be joined in suit on the contract: *Lipinsky v. Revell*, 167-508.

Section does not, in absence of wife's contract to pay for necessaries or funeral expenses, impose a liability upon her estate therefor, both being proper charges against husband's estate: *Bowen v. Daugherty*, 168-242.

Contract by wife as surety for husband is valid without formalities required by section 2515, and wife is suable thereon alone: *Royal v. Southerland*, 168-405.

Married woman's contract to convey land, without privy examination, renders her liable in damages for its breach; but to render such contract enforceable specifically there must be joinder of husband and her privy examination: *Warren v. Dail*, 170-406. Wife liable in damages for breach of contract to convey lands, though contract made without husband's consent: *Everett v. Ballard*, 174-16.

Married woman, under section, liable upon her contracts as though unmarried; personal judgment may be recovered against her thereon, and upon execution issued, her property, real and personal, may be sold as though she were single, although the debt was not charged upon her property: *Thrash v. Ould*, 172-728. Married woman liable on her contracts, whether as individual or as partner: *Grocery Co. v. Bails*, 177-298.

Section cited: *Kilpatrick v. Kilpatrick*, 176-182.

LAW BEFORE ENACTMENT OF SECTION. Before the Martin act (this section), married woman's power to contract was greatly restricted. Indeed, she could make no personal contract, but following, as suggested in *Pippen v. Wesson*, 74-437, equitable doctrines as to her equitable separate estate, she could bind her separate statutory estate by "an engagement in the nature of an executory contract," which could be enforced against her property in a court

having equity powers. The suit on such engagement resulted in a decree against the property charged, not in a judgment against her. See *Thompson v. Coats*, 174-193; *Flaum v. Wallace*, 103-296.

The validity and extent of such charge depended upon the consent of her husband, the nature of the debt or liability for which the charge was created, and the manner in which the charge was created or evidenced: *Flaum v. Wallace*, 103-296; *Loan Assn. v. Black*, 119-323, summary of *Avery, J.*, pp. 326, 327; *Ball v. Paquin*, 140-83; *Bank v. Benbow*, 150-781.

The former law has been carefully worked out in an elaborate table with numerous citations by *Dean S. F. Mordecai*, which is inserted in full in *Vann v. Edwards*, 128-425, and again, with the author's permission, in *Pell's Revisal* as a part of the note to *Rev.*, s. 2094. It has been referred to by the court or judges in opinions, see *Everett v. Ballard*, 174-16.

A reference to some leading cases, of special importance in the development of the law on this subject, follows:

Harris v. Johnson, 72-183 (1875). Married woman's bond without husband's consent void. *Pippen v. Wesson*, 74-437 (1876). Pioneer case laying down principles which have had the widest effect. See under section 2506.

Dougherty v. Sprinkle, 88-300 (1883). No personal judgment against married woman on promise; no jurisdiction in justice of the peace, since suit is equitable.

Flaum v. Wallace, 103-296 (1889). Discussion of married woman's contracts by *Shepherd, J.*; necessity of husband's consent; method of charging real and personal property; note held express charge, although consideration not for wife's benefit.

Farthing v. Shields, 106-289 (1890). Married woman's power to charge her separate real property measured by her power to dispose of it, and therefore to require deed and privy examination.

Loan Assn. v. Black, 119-323 (1896). Useful summary by *Avery, J.*, on pp. 326, 327.

Harvey v. Johnson, 133-352 (1903). Note of husband and wife, charging her separate estate, binds her personal property, but not her realty in absence of privy examination; obligation enforceable only in superior court, not before justice of peace. Discussion in opinion of court and in dissenting opinion.

Vann v. Edwards, 135-661 (1904). Married woman may sell and transfer her personal property as feme sole, without husband's consent. See section 2506 and notes.

Ball v. Paquin, 140-83 (1905). Contracts for labor and material on wife's land, which is described, bind her real property without express charge, if executed by husband and wife with privy examination. Full discussion of married women's contracts, with history and legislation to date, by *Connor, J.*, and *Clark, C. J.*

Bank v. Benbow, 150-781 (1909). Summary by *Brown, J.*, with references.

Thompson v. Coats, 174-193 (1917). Summary of old law by *Brown, J.*

Where a married woman domiciled in this state made a contract in another state, valid where it was made, it will not be enforced in this state unless it complies with the law here: *Armstrong v. Best*, 112-59 (1893); *Bank v. Howell*, 118-271—otherwise as to contract of non-resident, *Bank v. Granite Co.*, 155-43.

RECENT CASES INVOLVING LAW BEFORE MARTIN ACT: *Bank v. Benbow*, 150-781; *Bushnell v. Bertolett*, 153-564; *Bank v. Granite Co.*, 155-43 (nonresident married woman's contract, enforceable here according to its validity by *lex loci contractus*); *Smathers v. Bank*, 155-283 (liability of married women as stockholders in banks); *Robinson v. Jarrett*, 159-165 (justice of peace had jurisdiction of married woman's contract for necessary expenses, before Martin act); *Gann v. Spencer*, 167-429; *Thompson v. Coats*, 174-193.

2508. Capacity to draw checks. Bank deposits made by or in the name of a married woman shall be paid only to her or on her order, and her check, receipt or acquittance shall be valid in law to fully discharge the bank from any and all liability on account thereof.

Rev., s. 2095; 1891, c. 221, s. 30; 1893, c. 344.

Section cited by *Clark, C. J.*, concurring, in *Warren v. Dail*, 170-406.

2509. Conveyance or lease of wife's land requires husband's joinder. No lease or agreement for a lease or sublease or assignment by any married woman, not a free trader, of her lands or tenements, or chattels real, to run for more than

three years, or to begin in possession more than six months after its execution, or any conveyance of any freehold estate in her real property, shall be valid, unless the same be executed by her and her husband, and proved or acknowledged by them, and her free consent thereto appear on her examination separate from her husband, as is now or may hereafter be required by law in the probate of deeds of *femes covert*.

Rev., s. 2096; Code, s. 1834; 1871-2, c. 193, s. 26.

As to requirements and formalities for married women's conveyances, see section 997.

Husband's written assent to wife's conveyance is necessary: *Stallings v. Walker*, 176-321; *Kilpatrick v. Kilpatrick*, 176-182; *Walton v. Bristol*, 125-419; *Loan Assn. v. Black*, 119-323; *Farthing v. Shields*, 106-289; *Wood v. Wheeler*, 106-512; *Harris v. Jenkins*, 72-183—and his assent is expressed by signing and acknowledging with the wife, *Jackson v. Beard*, 162-105; *Council v. Pridgen*, 153-443; *Jennings v. Hinton*, 126-51; *Brinkley v. Ballance*, 126-397; *Bank v. Ireland*, 122-571; *Green v. Bennett*, 120-394; *Jones v. Craigmiles*, 114-613; *Farthing v. Shields*, 106-289; *Flaum v. Wallace*, 103-296; *Harris v. Jenkins*, 72-186. Husband's written assent endorsed on the deed does not validate it: *Council v. Pridgen*, 153-443. Wife's privy examination necessary: *Jackson v. Beard*, 162-105; *Council v. Pridgen*, 153-443. And see section 997. Not necessary that married woman be privately examined as to execution of instrument made while she was unmarried, but not acknowledged until after her marriage: *Darden v. Steamboat Co.*, 107-437.

Property having once become separate property of married woman, as by descent from ancestor as one of his heirs, her estate can only be conveyed by deed with formal legal requirements: *Spears v. Woodhouse*, 162-66; *Sprinkle v. Spainhour*, 149-223. See, also, as to estates by entireties, section 1735.

Conveyance of land in this state by a nonresident *feme covert* must comply with the law of this state: *Wood v. Wheeler*, 111-231; *Smith v. Ingram*, 130-100.

2510. Husband cannot convey, etc., wife's land without her consent; not liable for his debts. No real estate belonging at the time of marriage to females, married since the third Monday of November, one thousand eight hundred and forty-eight, nor any real estate by them subsequently acquired, nor any real estate acquired on and since the first day of March, one thousand eight hundred and forty-nine, by *femes covert*, who were such on the said third Monday of November, one thousand eight hundred and forty-eight, shall be subject to be sold or leased by the husband for the term of his own life or any less term of years, except by and with the consent of his wife first had and obtained, to be ascertained and effectuated by deed and privy examination, according to the rules required by law for the sale of lands belonging to *femes covert*. And no interest of the husband whatever in such real estate shall be subject to sale to satisfy any execution obtained against him; and every such sale is hereby declared null and void.

Rev., s. 2097; Code, s. 1840; R. C., c. 56; 1848, c. 41.

Sole purpose of section (act of 1848) in then state of law "was to provide for her (wife) a home of which she could not be deprived either by the husband or by his creditors"; but neither this section nor constitution of 1868 destroyed tenancy by curtesy initiate: *Houston v. Brown*, 52-161; *Taylor v. Taylor*, 112-134; *Cobb v. Raspberry*, 116-137; *Richardson v. Richardson*, 150-549. Section prevented husband as tenant by curtesy initiate from selling or leasing wife's lands without her consent, evidenced by privy examination: *McCaskill v. McCormac*, 99-548—and prevented sale under execution against him, *Cobb v. Raspberry*, 116-137; *Bruce v. Nicholson*, 109-202.

Where marriage took place and issue born before constitution of 1868, section did not impair husband's right, as tenant by curtesy initiate, to rents and profits of wife's land: *Cobb v. Raspberry*, 116-137; *Thompson v. Wiggins*, 109-508, and cases cited. Where marriage was in 1867, but first child not born until ratification of constitution of 1868, husband has no vested rights to be impaired by const., art. 10, s. 6: *Richardson v. Richardson*, 150-549.

Since enactment of section husband may surrender his estate by curtesy initiate and let it merge in wife's reversion, and wife may, with husband's assent, sell same and receive all the purchase money: *Teague v. Downs*, 69-280.

Written lease of wife's land for five years, made by husband and wife subsequent to section, without her privy examination as required by section, is void as to wife and passes no interest of husband in rents and profits: *Richardson v. Richardson*, 150-549.

Tenancy by curtesy consummate remains as at common law: *Thompson v. Wiggins*, 109-508.

CURTESY INITIATE SINCE CONSTITUTION OF 1868. By this section and const., art. 10, s. 6, tenancy by curtesy initiate is stripped of its common-law attributes until there remains only husband's right of occupancy with wife, with right of ingress and egress; by curtesy initiate husband still has freehold interest, but shorn of right to take rents and of power to lease: *Walker v. Long*, 109-510. See, also, discussion, with cases cited, in *Sipe v. Herman*, 161-107, and in opinion of court and of dissenting justices in *Jackson v. Beard*, 162-105. Wife now entitled to management and control of her separate estate and to receive rents and profits: *Nelson v. Neison*, 176-191.

Tenant by curtesy initiate, being freeholder, is eligible as juror in cases where being freeholder is requisite: *Hodgin v. R. R.*, 143-93; *Thompson v. Wiggins*, 109-508; *State v. Mills*, 91-581.

Tenant by curtesy initiate has not such interest or estate in wife's land as will put in operation statute of limitations against either husband or wife in favor of one claiming title by adverse possession: *Jones v. Coffey*, 109-515.

As to curtesy generally, see section 2519.

2511. Capacity to make will. Every married woman has power to devise and bequeath her real and personal estate as if she were a feme sole; and her will shall be proved as is required of other wills.

Rev., s. 2098; Code, s. 1839; 1871-2, c. 193, s. 31.

The wife can dispose of her property acquired since 1868 by will, and thereby bar her husband's right of tenancy by the curtesy: *Freeman v. Lide*, 176-434; *Watts v. Griffin*, 137-572; *Hallyburton v. Slagle*, 132-947; *Ex parte Watts*, 130-237; *Tiddy v. Graves*, 126-620, 127-502. Married woman may devise legal and equitable separate estate, whether the trust is active or passive: *Freeman v. Lide*, 176-434.

2512. May insure husband's life. Any feme covert in her own name, or in the name of a trustee with his assent, may cause to be insured for any definite time the life of her husband, for her sole and separate use, and she may dispose of the interest in the same by will, notwithstanding her coverture.

Rev., s. 2099.

2513. Earning and damages from personal injury are wife's property. The earnings of a married woman by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried.

1913, c. 13, s. 1.

Married woman may sue for damages for personal injuries without joinder of husband, and her diminished earning capacity may be considered as an element of damages: *Kirkpatrick v. Crutchfield*, 178-348.

Former rule was that earnings of wife belonged to husband, but he might confer on her the rights thereto, and they were then regarded as her separate property, which she could recover by action in her own name: *Syme v. R. R.*, 88-463; *Hairston v. Glenn*, 120-341; *Cunningham v. Cunningham*, 121-413; *Price v. R. R.*, 160-450; *Patterson v. Franklin*, 168-75; *McCurry v. Purgason*, 170-463.

Section said to be result of *Price v. R. R.*, 160-450; *Patterson v. Franklin*, 168-75, in concurring opinion; *McCurry v. Purgason*, 170-463, in concurring opinion.

Section cited and distinguished: *Floyd v. R. R.*, 167-55.

2514. Savings from separate property; liability of husband for income. The savings from the income of the separate estate of the wife are her separate property. But no husband who, during the coverture (the wife not being a free trader under this chapter), has received, without objection from his wife, the income of her separate estate, shall be liable to account for such receipt for any greater time than the year next preceding the date of a summons issued against him in an action for such income, or next preceding her death.

Rev., s. 2100; Code, s. 1837; 1871-2, c. 193, s. 29.

Wife entitled to recover and hold to her own use her separate property and income therefrom, and agents managing same for her, including her husband, must account with her for sums received therefrom: *Manning v. Manning*, 79-300; *Nelson v. Nelson*, 176-191; *State v. Lanier*, 89-517. Income of separate estate belongs to wife, and husband liable to account for it, but not for more than a year: *Faireloth v. Borden*, 130-263; *Wells v. Batts*, 112-283—unless by special contract, *Battle v. Mayo*, 102-413.

When husband works wife's land, in the absence of any contract, he has no interest in the crop, but supplies furnished with wife's consent may be chargeable to her: *Guano Co. v. Colwell*, 177-218.

Only positive and unequivocal assent of wife to disposition by husband of crops grown on her land, and not mere silence, estops her to assert title to same: *Branch v. Ward*, 114-148.

2515. Contracts of wife with husband affecting corpus or income of estate. No contract between a husband and wife made during coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such contract is in writing, and is duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of *femes covert*, it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be.

Rev., s. 2107; Code, s. 1835; 1871-2, c. 193, s. 27.

For married woman's power to contract as limited by this section, see section 2507. As to fraudulent conveyances and contracts between husband and wife, see sections 1005-1007. As to conveyances of married woman, see section 997.

Common-law rule that transactions between husband and wife regarding wife's separate property are void is modified by this section, and wife may contract with husband by complying herewith: *Sims v. Ray*, 96-87.

The purpose of the statute is to protect the wife from the influence and control the husband is presumed to have over her by reason of the marital relation, by an adjudication of the probate officer on her interests: *Kearney v. Vann*, 154-311; *Sims v. Ray*, 96-87; *Howard v. Early*, 126-170.

Section does not apply to gift by married woman to her husband of her personal property: *Rea v. Rea*, 156-529, discussed and explained in *Singleton v. Cherry*, 168-402; *Butler v. Butler*, 169-584; *Kilpatrick v. Kilpatrick*, 176-182.

The statutes do not limit married woman's acquisition of property, but merely restrict her disposition thereof: *Osborne v. Wilkes*, 108-651, and cases cited.

Deed from wife to husband not executed and probated as required by section is void: *Wallin v. Rice*, 170-417; *Singleton v. Cherry*, 168-402; *Long v. Rankin*, 108-333. Covenant of war-

ranty in deed not so executed will not make it an estoppel: *Wallin v. Rice*, 170-417. Required certificate cannot be added after probate: *Butler v. Butler*, 169-584. Deed not complying with section is color of title: *Norwood v. Totten*, 166-648. Possession of husband under deed of wife not in compliance with section is adverse only after wife's death: *Kornegay v. Price*, 178-441.

Where land is bought with the wife's money and title is taken in the name of the husband, or of the husband and wife, this is in effect a conveyance of realty by her, and invalid unless executed in conformity with this section: *Deese v. Deese*, 176-527; *Kilpatrick v. Kilpatrick*, 176-182. So of investments by the husband of wife's property in personalty which would impair the body of the capital of her personal estate: *Kilpatrick v. Kilpatrick*, 176-182; *Gooch v. Bank*, 176-213. Wife's assignment to husband of her policy on his life so as to make it payable to him at her death must conform to section, as it would affect corpus of estate at her death: *Sydnor v. Boyd*, 119-481.

Contracts between husband and wife affecting wife's land must have the certificate required hereunder: *Anderson v. Anderson*, 177-401. Separation agreement fixing the property rights of husband and wife must be executed in conformity with section: *Archbell v. Archbell*, 158-409. Wife may appoint husband as her agent in ordinary way except where land is the subject of agency, and then this section must be complied with: *Stout v. Perry*, 152-312.

Conveyance of land from husband to wife will pass legal estate of vendor and enable vendee to sustain action to declare title and recover possession: *Walker v. Long*, 109-510. See *McLamb v. McPhail*, 126-218; *Fort v. Allen*, 110-183; *Sydnor v. Boyd*, 119-481.

Where husband improves land with his own money, putting title in the wife, a gift to the wife is presumed, and there is no resulting trust to him: *Arrington v. Arrington*, 114-116. Improvements placed by husband on wife's land are presumed to be a gift to her: *Nelson v. Nelson*, 176-191; *Kearney v. Vann*, 154-311; *Arrington v. Arrington*, 114-116.

Section merely referred to: *Bailey v. Bailey*, 127-474; *Walton v. Bristol*, 125-419.

2516. Contracts between husband and wife generally; releases. Contracts between husband and wife not forbidden by the preceding section and not inconsistent with public policy are valid, and any persons of full age about to be married, and, subject to the preceding section, any married person, may release and quitclaim dower, tenancy by the curtesy, and all other rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estates so released.

Rev., s. 2108; Code, s. 1836; 1871-2, c. 193, s. 28.

Effect of section as modifying common law as to contracts between husband and wife: *Sims v. Ray*, 96-87, and see under section 2515.

Section declares all contracts between husband and wife, subject to restrictions of section 2515, valid unless contrary to public policy: *Sydnor v. Boyd*, 119-481.

Separation agreements, made in accordance with section 2515, are valid: *Archbell v. Archbell*, 158-409, and see section 2529.

Mutual releases by husband and wife of their interests in each other's property do not bar wife, in subsequent suit for divorce, from applying for temporary alimony and attorney's fees: *Bailey v. Bailey*, 127-474.

Where husband occupies wife's land for nine years under special agreement to account for rents, his notes to her for the rents are valid indebtedness from husband to wife: *Battle v. Mayo*, 102-413.

Policy of courts as to enforcement of contracts, founded on valuable consideration, between husband and wife, discussed: *George v. High*, 85-99.

Section merely referred to: *Harvey v. Johnson*, 133-352.

See cross-references to other sections at beginning of annotations under section 2515.

2517. Wife's antenuptial contracts and torts. The liability of a feme sole for any debts owing, or contracts made or damages incurred by her before her marriage shall not be impaired or altered by such marriage. No man by marriage

shall incur any liability for any debts owing, or contracts made, or for wrongs done by his wife before the marriage.

Rev., ss. 2101, 2106; Code, ss. 1822, 1823; 1871-2, c. 193, ss. 13, 14.

A justice of the peace has jurisdiction of an action against a married woman to recover a debt contracted prior to her marriage: *McAfee v. Gregg*, 140-449; *Beville v. Cox*, 109-269; *Hodges v. Hill*, 105-130; *Neville v. Pope*, 95-346.

Wife may appoint husband agent to settle antenuptial debts without formality required in section 2515: *Stout v. Perry*, 152-312.

2518. For wife's torts, husband jointly liable. Every husband living with his wife is jointly liable with her for all damages accruing from any tort committed by her and for all costs and fines incurred in any criminal proceeding against her.

Rev., s. 2105; Code, s. 1833; 1871-2, c. 193, s. 25.

Where husband and wife are jointly sued for the wrong of the wife and the wife die, the action abates: *Roberts v. Lisenbee*, 86-136. Common-law and statutory liability of husband for contracts and torts of wife discussed by *Ashe, J.*, in *Ibid.* Husband jointly liable for torts of wife or her agent: *Brittingham v. Stadiem*, 151-299.

2519. Estate by the curtesy. Every man who has married or shall marry a woman, and by her has issue born alive, shall, after her death intestate as to the lands, tenements and hereditaments hereinafter mentioned, be entitled to an estate as tenant by the curtesy during his life, in all the lands, tenements and hereditaments whereof his said wife was beneficially seized in deed during the coverture, wherein the said issue was capable of inheriting, whether the said seizin was of a legal or of an equitable estate; except that when the wife has obtained a divorce a mensa et thoro, and is not living with her husband at her death, or when the husband has abandoned his wife, or has maliciously turned her out of doors, and they are not living together at her death; or if the husband has separated himself from his wife, and is living in adultery at her death, he shall not be tenant by the curtesy of her lands, tenements and hereditaments.

Rev., s. 2102; Code, s. 1838; 1871-2, c. 193, s. 30.

Requisites and attributes of tenancy by curtesy at common law: *Richardson v. Richardson*, 150-549; *Cobb v. Rasberry*, 116-137; *Taylor v. Taylor*, 112-134; *Morris v. Morris*, 94-613; *Long v. Graeber*, 64-431; *Houston v. Brown*, 52-161. Consideration of birth alive as requisite: *Fleming v. Sexton*, 172-250.

Tenancy by curtesy initiate is now, by constitution and statutes, stripped of common-law features and reduced to bare right of occupancy; but tenant by curtesy initiate still technically a freeholder: See section 2510—and regarded as having an interest in wife's land, *Jackson v. Beard*, 162-105; *McGlennery v. Miller*, 90-215. But compare *Sipe v. Herman*, 161-107, and dissenting opinions in *Jackson v. Beard*, 162-105.

Estate of husband as tenant by curtesy consummate remains as at common law, and is liable to sale under execution: *Thompson v. Wiggins*, 109-508; *McCaskill v. McCormac*, 99-548.

Husband must join in wife's deed to pass his interest in her land as tenant by curtesy initiate: *McGlennery v. Miller*, 90-215—and his act in joining is so far contractual that if he is infant at the time he may subsequently disaffirm the deed in apt time, *Jackson v. Beard*, 162-105. Husband as tenant by curtesy initiate is necessary party to suit respecting wife's land: *McGlennery v. Miller*, 90-215.

Wife's obtaining divorce a mensa suspends husband's rights in her lands until a reconciliation: *Taylor v. Taylor*, 112-134.

Where deed to wife, who bought and paid for land, was lost without registration, and after her death her husband procured a deed to be executed to himself, he held the land, by implication of law, as trustee for their children, subject to his life estate by the curtesy: *Norcum v. Savage*, 140-472.

LANDS SUBJECT TO CURTESY. For husband to have curtesy, wife must have had seizin in deed at common law: *Nixon v. Williams*, 95-103; In re *Dixon*, 156-26—exception as to wild

lands, *Pierce v. Wannett*, 32-446. Where descent from ancestor in actual seizin is cast on married woman, actual entry is not necessary to entitle husband to curtesy: *Childers v. Bumgarner*, 53-297.

Seizin in wife subject to outstanding life estate does not give husband curtesy: *Jones v. Whichard*, 163-241; *In re Dixon*, 156-26; *Carter v. Williams*, 43-177. But outstanding term of years does not prevent curtesy: *Carter v. Williams*, 43-177. Husband entitled to curtesy in wife's equitable "estates": *Sentill v. Robeson*, 55-510; *Hunt v. Satterwhite*, 85-73. But not of lands held by the wife as trustee: *Norton v. McDevit*, 122-755. Seizin of wife as tenant in common is sufficient: *Childers v. Bumgarner*, 53-297; *Hunt v. Satterwhite*, 85-73—or as joint tenant since survivorship abolished, *Ibid*.

Where wife has life estate with power of appointment in fee at her death, husband not entitled to curtesy if she fails to appoint: *Graves v. Trueblood*, 96-495.

Where wife's lands are mortgaged for husband's debt, and mortgage is foreclosed after her death, surplus goes to heirs, charged with husband's curtesy: *Harrington v. Rawls*, 136-65.

Wife's devise of lands acquired since 1868 defeats husband's curtesy: *Freeman v. Lide*, 176-434, and see section 2511.

2520. In actions against wife, husband served and may defend. In all actions brought against a married woman, who is not a free trader (as hereinafter provided for), the summons shall be served upon the husband also, and on motion to the court in which the action is pending, he may be allowed, with her consent, to defend the same in her name and behalf, but no judgment shall be given against him upon any liability claimed against her arising before the marriage or upon any contract made by her alone after her marriage.

Rev., s. 2103; Code, s. 1824; 1871-2, c. 193, s. 15.

See generally, for cases where married woman may sue or be sued alone and when with her husband, section 454.

Since enactment of Martin act, section 2507, it is not necessary to join husband as defendant with the wife in an action on her contracts: *Lipinsky v. Revell*, 167-508. Compare rule before act: *Harvey v. Johnson*, 133-352. The effect of section 2507, as interpreted in *Lipinsky v. Revell*, 167-508, is far-reaching and should be kept in mind in considering the cases cited hereunder.

A feme covert and her husband must be joined in action to recover property fraudulently conveyed to wife: *Pender v. Mallett*, 123-57. She may be sued alone in tort when husband abandons her: *Heath v. Morgan*, 117-504—in ejectment, when her husband is an alien, resides abroad, or has abandoned her, *Finley v. Saunders*, 98-462. A married woman, being a free trader, may consent to judgment fixing no personal liability upon her, without husband being joined: *Roseman v. Roseman*, 127-494.

A husband, tenant by the curtesy initiate, has an interest in wife's land and is a necessary party to a suit respecting it, and if he refuses to become a coplaintiff in an action by wife to assert her right to property, he should be made party defendant; but where action concerns her separate property or is between herself and her husband, she may sue alone: *McGlennery v. Miller*, 90-215, and see section 454.

Where husband and wife are jointly sued for wrong of the wife and the wife die, the action abates: *Roberts v. Lisenbee*, 86-136.

Where husband is a nonresident or fugitive from justice this section does not apply: *Heath v. Morgan*, 117-504. Where husband is an alien and never lived in or visited the United States, this section does not apply: *Levi v. Marsha*, 122-565.

Acceptance of service of summons by a married woman gives jurisdiction: *Nicholson v. Cox*, 83-44.

Where husband and wife are sued together on joint obligation, it is duty of husband to defend for both and to set up wife's inability in a proper case, and if he fail to do so, wife cannot have judgment against her set aside on ground of her incompetency to contract: *Vick v. Pope*, 81-22.

Judgment against married woman appearing in suit by counsel of husband's selection is as binding as one against any other person unless it be obtained by the fraudulent combination of husband with adverse litigant: *Ibid*.

No judgment can be rendered against a husband who is joined with his wife in an action under section 454: *Harvey v. Johnson*, 133-352; *Nicholson v. Cox*, 83-48; *Vick v. Pope*, 81-22.

In all actions whose object is to bind real estate belonging to a feme covert, service of summons must be made personally upon her as well as upon her husband: *Rowland v. Perry*, 64-578—and where it is not so done a judgment by default against wife must be vacated, *Ibid*.

A power of attorney, given by a married woman, to dismiss an action concerning her land need not be registered to give it validity: *Hollingsworth v. Harman*, 83-153.

Where feme covert, sued with husband as surety, accepts service of summons at husband's instance, relying upon him to employ counsel and defend suit, and he does not, and judgment goes by default, judgment will be set aside at her instance on ground of excusable neglect: *Nicholson v. Cox*, 83-48.

Where a feme covert was sued with her husband, whom she instructed to make a proper defense to the action, which he failed to do, it is no ground for injunction to restrain collection of judgment in absence of fraud: *Neville v. Pope*, 95-346.

2521. Discharge of husband from defense; liability for costs. When a husband is allowed to defend for his wife, he may be ordered to pay costs for any misconduct, and may be discharged from the conduct of her defense, if it shall appear to the court that his defense is not bona fide in her interest.

Rev., s. 2104; Code, s. 1825; 1871-2, c. 193, s. 16.

ART. 2. ACTS BARRING RECIPROCAL PROPERTY RIGHTS OF HUSBAND AND WIFE

2522. Divorce a vinculo and felonious slaying a bar. When a marriage is dissolved a vinculo, the parties respectively, or when either party is convicted of the felonious slaying of the other or of being accessory before the fact of such felonious slaying, the party so convicted, shall thereby lose all his or her right to an estate by the curtesy, or dower, and all right to any year's provision or distributive share in the personal property of the other, and all right to administer on the estate of the other, and every right and estate in the real or personal estate of the other party, which by settlement before or after marriage was settled upon such party in consideration of the marriage only.

Rev., s. 2109; Code, s. 1843; 1871-2, c. 193, s. 42.

Where a wife who had resided here, bona fide removed to Illinois, and instituted an action for divorce in one of the courts of that state, and the husband in this state appeared by attorney and defended the action there: Held, that he was bound by a decree for divorce on a verdict rendered in that action, and that his property rights in her estate here were terminate from its date: *Arrington v. Arrington*, 102-491.

Personal choses in action which belong to the wife reduced into possession by the husband, in the words of a recent author, remain his, but as to rights dependent on marriage, and not actually vested, a full divorce or the legal annihilation ends them: *Arrington v. Arrington*, 102-514.

For annotations upon the subject of divorce and alimony generally, see chapter Divorce and Alimony, sections 1655-1668.

For effect of divorce upon right to administer upon the estate of husband or wife, as the case may be, see section 10. For effect of divorce upon right of dower, see section 4099.

2523. Wife's elopement or divorce a mensa at husband's suit a bar. If a married woman elopes with an adulterer, or willfully and without just cause abandons her husband and refuses to live with him, and is not living with her husband at his death, or if a divorce from bed and board is granted on the application of the husband, she shall thereby lose all right to dower in the lands and tenements of her husband, and also all right to a year's provision, and to a distributive

share from the personal property of her husband, and all right to administration on his estate, and also all right and estate in the property of her husband, settled upon her upon the sole consideration of the marriage, before or after marriage; and such elopement may be pleaded in bar of any action, or proceeding, for the recovery of such rights and estates; and in case of such elopement, abandonment, or divorce, the husband may sell and convey his real estate as if he were unmarried, and the wife shall thereafter be barred of all claim and right of dower therein.

Rev., s. 2110; Code, s. 1844; 1893, c. 153, ss. 1, 2, 3; 1871-2, c. 193, s. 44.

Wife who commits adultery and is not living with husband at his death is thereby deprived of her dower: *Phillips v. Wiseman*, 131-402.

2524. **Husband's living in adultery, etc., or divorce a mensa at wife's suit a bar.** If a husband separates from his wife and lives in adultery, or willfully and without just cause abandons his wife and refuses to live with her, and such conduct on his part is not condoned by her, or if a divorce from bed and board is granted on the application of the wife, he shall thereby lose all right to curtesy in the real property of the wife, and also all right and estate of whatever character in and to her personal property, as administrator, or otherwise; and also any right and estate in the property of the wife which may have been settled upon him solely in consideration of the marriage by any settlement before or after marriage, and in case of such adultery and abandonment or divorce, the wife may sell and convey her real property as if she were unmarried, and the husband, if there has been no condonation at the time of the conveyance, shall thereafter be barred of all claim and right to curtesy in such real property.

Rev., s. 2111; Code, s. 1845; 1893, c. 153, s. 4; 1871-2, c. 193, s. 45.

See section 12 and chapter Divorce and Alimony. Section referred to: *Joyner v. Joyner*, 151-181.

ART. 3. FREE TRADERS

2525. **Requisites of writing to make her free trader.** Every married woman of the age of twenty-one years or upwards, with the consent of her husband, may become a free trader in the manner following:

1. By antenuptial contract, proved and registered, as hereinafter required; or,
2. By her and her husband signing a writing in the following or some equivalent form:

A. B., of the age of twenty-one years or upwards, wife of C. D., of _____ county, with his consent, testified by his signature hereto, enters herself as a free trader from the date of the registration hereof.

(Signed)

A. B.
C. D.

Witness: E. F.

Registered this _____ day of _____, 19____

The said writing may be proved by the subscribing witness or acknowledged by the parties before any officer authorized to take the probate of deeds, and shall be filed and registered in the office of the register of deeds for the county in which the woman proposes to have her principal or only place of business.

Rev., s. 2112; Code, s. 1827; 1871-2, c. 193, ss. 18, 19.

“The Martin act, s. 2507, practically constituted married women free traders as to all their ordinary dealings”: *Patterson v. Franklin*, 168-75, per Hoke, J., for court.

There is no constitutional inhibition on the power of the legislature to declare where and how the wife may become a free trader, const., art. 10, s. 6, being intended to protect instead of disable her: *Hall v. Walker*, 118-377.

By proper construction of section 2514, where wife is not a free trader, the husband's liability is limited, but where she is a free trader his liability to account for her income received by him is unlimited except by the general law applicable to agents and other persons: *Manning v. Manning*, 79-302.

Being entered as a free trader does not enable a married woman to convey her land as if she were single: *Council v. Pridgen*, 153-443.

Section merely referred to: *Finger v. Hunter*, 130-531; *Bazemore v. Mountain*, 126-318; *Williams v. Walker*, 111-604; *Weir v. Page*, 109-223; *Clark v. Hay*, 98-425.

2526. Writing effective from registration. From the time of the registration of the writing mentioned in the preceding section, the married woman therein mentioned shall be a free trader, and authorized to contract and deal as if she were a feme sole.

Rev., s. 2113; Code, s. 1828; 1871-2, c. 193, s. 20.

The words “free trader,” “contract,” and “deal” herein refer to contracts in some business enterprise, and do not refer to conveyances of her realty by married woman: *Council v. Pridgen*, 153-443.

The following decisions were before enactment of section 2507: Where a married woman is a free trader and consents to a judgment which fixes no personal liability upon her, the husband need not be a party to the proceeding: *Roseman v. Roseman*, 127-494. A feme covert may be sued in a court of a justice of the peace for a debt due by her, or on a contract made by her, before marriage, or for a debt contracted by her as a free trader: *Neville v. Pope*, 95-346; *Hodges v. Hill*, 105-130. Section merely referred to: *Harvey v. Johnson*, 133-357; *Moore v. Wolfe*, 122-715; *Sanderlin v. Sanderlin*, 122-1; *Wilcox v. Arnold*, 116-711; *Green v. Ballard*, 116-144; *Weir v. Page*, 109-223; *Farthing v. Shields*, 106-295; *Flaum v. Wallace*, 103-304.

2527. Certified copy as evidence. A copy of such writing, duly proved and registered and certified by the register of the county in which the same is registered, is admissible in evidence as certified copies of registered deeds are or may be allowed to be.

Rev., s. 2114; Code, s. 1829; 1871-2, c. 193, s. 21.

See section 2507.

Where it was averred and not denied that a married feme defendant was a free trader, and the judgment fastened no personal liability on her, held she was bound by judgment: *Roseman v. Roseman*, 127-494—but per *Montgomery, J.*, dissenting, the fact of free-tradership only provable by registered writing or certified copy. See *Williams v. Walker*, 111-604.

2528. Revocation by entry on record and publication. The right of a married woman to act as a free trader may be ended at any time by an entry by her, or by her attorney, in the margin of the registration of the writing above mentioned, to the effect that from the date of such marginal entry she ceases so to act, and by publication to that effect weekly for three weeks in some newspaper published in the county in which she had her principal or only place of business, or if there is none so published, then in any other convenient newspaper. But such entry and publication shall not impair any liabilities incurred previously thereto, nor prevent such married woman from becoming liable afterwards to any person whom she may fraudulently induce to deal with her as a free trader.

Rev., s. 2115; Code, s. 1830; 1871-2, c. 193, s. 22.

Section referred to: *Ball v. Paquin*, 140-83.

2529. Separation by divorce or deed; husband non compos. Every woman who is living separate from her husband, either under a judgment of divorce by a competent court or under a deed of separation executed by said husband and wife and registered in the county in which she resides, or whose husband has been declared an idiot or a lunatic, shall be deemed and held, from the docketing of such judgment, or from the registration of such deed, or from the date of such idiocy or lunacy and during its continuance, a free trader, and may convey her personal estate and her real estate without the assent of her husband.

Rev., s. 2116; Code, s. 1831; 1871-2, c. 193, s. 23; 1880, c. 35.

See section 2507.

Section recognizes validity of separation deed: *Archbell v. Archbell*, 158-409.

For married woman to be free trader on ground of husband's idiocy or lunacy, he should have been declared idiot or lunatic: *Abbott v. Hancock*, 123-99. Where husband idiot or lunatic, wife may convey under this section or proceed under section 2293: *Lancaster v. Lancaster*, 178-22.

Married woman whose husband is alien, who was never in United States, is personally liable on her contracts: *Levi v. Marsha*, 122-565.

Section merely referred to: *Ellett v. Ellett*, 157-162; *Harvey v. Johnson*, 133-352; *Sanderlin v. Sanderlin*, 122-1; *Moore v. Wolfe*, 122-715; *Farthing v. Shields*, 106-295; *Hodges v. Hill*, 105-130; *Flaum v. Wallace*, 103-304; *Sparks v. Sparks*, 94-527.

2530. Abandonment by husband. Every woman whose husband abandons her, or maliciously turns her out of doors, shall be deemed a free trader, so far as to be competent to contract and be contracted with, and to bind her separate property, but the liability of her husband for her reasonable support shall not thereby be impaired. She may also convey her personal estate and her real estate without the assent of her husband.

Rev., s. 2117; Code, s. 1832; 1871-2, c. 193, s. 24.

See section 2507, as modifying some decisions hereunder.

Section is constitutional: *Hall v. Walker*, 118-377; *Finger v. Hunter*, 130-529; *Brown v. Brown*, 121-8. What constitutes abandonment hereunder: *Vandiford v. Humphrey*, 139-65. Married woman abandoned by husband may make valid deed, without joinder of husband: *Bachelor v. Norris*, 166-506; *Pardon v. Paschal*, 142-538.

Where husband is a nonresident and a fugitive from justice he is not a necessary party in an action against a married woman: *Heath v. Morgan*, 117-504. An action to recover possession of land may be sustained against a married woman alone whose husband is an alien, resides abroad, or has abandoned his wife: *Finley v. Saunders*, 98-462. A wife abandoned by her husband may maintain an action for tort in her own name against a third person: *Brown v. Brown*, 121-8.

Right of abandoned married woman to contract in regard to her separate property as free trader discussed: *Vandiford v. Humphrey*, 139-65.

Wife of nonresident alien liable on contracts: *Levi v. Marsha*, 122-565.

Section merely referred to: *Smith v. Bruton*, 137-81; *Ball v. Paquin*, 140-98; *Harvey v. Johnson*, 133-357; *Moore v. Wolfe*, 122-715; *Wilcox v. Arnold*, 116-710; *Farthing v. Shields*, 106-295; *Hodges v. Hill*, 105-130.

NOTE.—For married women trading without disclosing name, see Partnership, s. 3292.

For judgment entered against married women, see Civil Procedure, ss. 602, 603.

For marriage settlements, see Conveyances, ss. 1008, 1009, and this chapter, s. 2516.

CHAPTER 52

MILLS

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ART. 1. PUBLIC MILLS

2531. **Public mills defined.** Every water grist-mill, steam mill, or wind-mill, that grinds for toll, is a public mill.

Rev., s. 2119; Code, s. 1846; R. C., c. 71, s. 1; 1777, c. 122, s. 1.

“Mill-seat” defined in *State v. Sutton*, 139-574. “Grist-mill” held sufficient description of public mill in petition for damages: *Little v. Stanback*, 63-285; *State v. Jaynes*, 78-508; *Hyatt v. Myers*, 73-240. This section merely referred to in *Mizell v. McGowan*, 120-136.

2532. **Miller to grind according to turn; tolls regulated.** All millers of public mills shall grind according to turn, and shall well and sufficiently grind the grain brought to their mills, if the water will permit, and shall take no more toll for grinding than one-eighth part of the indian corn and wheat, and one-fourteenth part for chopping grain of any kind; and every miller and keeper of a mill making default therein shall, for each offense, forfeit and pay five dollars to the party injured: Provided, that the owner may grind his own grain at any time.

Rev., s. 2120; Code, s. 1847; R. C., c. 71, s. 6; 1777, c. 122, s. 10; 1793, c. 402; 1905, c. 694; 1907, c. 367.

2533. Measures to be kept; tolls by weight or measure. All millers shall keep in their mills the following measures, namely, a half-bushel and peck of full measure, and also proper toll-dishes for each measure; but the toll allowed by law may be taken by weight or measure at the option of the miller and customer.

Rev., s. 2121; Code, s. 1848; 1885, c. 202; R. C., c. 71, s. 7; 1777, c. 122, s. 11.

2534. Keeping false toll-dishes misdemeanor. If any owner, by himself or servant, keeping any mill, shall keep any false toll-dishes, he shall be guilty of a misdemeanor.

Rev., s. 3679; Code, s. 1848; R. C., c. 71, s. 7; 1777, c. 122, s. 11.

See generally: *State v. Perry*, 50-252. **Not necessary in indictment to aver the capacity of the false toll-dish:** *Ibid.* **Sufficiency of evidence hereunder:** *Ibid.*—**insufficiency,** *State v. Nixon*, 50-257. Section cited in *Hyatt v. Myers*, 73-240.

ART. 2. CONDEMNATION FOR MILL BY OWNER OF ONE BANK OF STREAM

2535. Special proceedings; parties; summons. Any person wishing to build a water mill, who has land on only one side of a stream, shall issue a summons returnable to the superior court of the county in which the land sought to be condemned, or some part of it, lies, against the persons in possession and the owners of the land on the opposite side of the stream, and against such others as have an interest in the controversy, and the procedure shall be as is provided in other special proceedings, except so far as the same may be modified by this chapter.

Rev., s. 2122; Code, s. 1849; 1868-9, c. 158, s. 1.

Twenty years possession of an easement raises the presumption of a grant: *Benbow v. Robbins*, 71-338; *Geer v. Water Co.*, 127-354; *Gerenger v. Summers*, 24-229; *Rogers v. Mabe*, 15-180.

The ground on which is presumed a grant of the privilege of ponding water on another's land for the purpose of a mill is that it has been enjoyed by the person claiming and those with whom he connects himself twenty years or more in the state or to the extent to which he claims: *Gerenger v. Summers*, 24-229—and it is no answer to this presumption that the height of the water had been sometimes lowered by a drought, or that the water had been occasionally let off for the purpose of repairing the mill and only for the period required for such purpose, *Ibid.*

A parol license granted to one to build a dam upon grantor's land, either voluntary or supported by a valuable consideration, may be revoked by the owner without incurring liability in damages, where notice is given and reasonable opportunity afforded to remove improvements put up thereunder: *Kivett v. McKeithan*, 90-106. The builder of the dam should have taken a conveyance of the easement, or pursued the remedy pointed out for the condemnation of land for mill purposes: *Ibid.*

An injunction will not be granted to restrain the erection of a dam whereby the mill wheel of the plaintiff is flooded, so as to become useless: *Burnett v. Nicholson*, 72-334.

A parol license ceases at death of licensor: *Bridges v. Purcell*, 18-492.

Section referred to in *Gwaltney v. Timber and Land Co.*, 111-564; *Bass v. Navigation Co.*, 111-454.

2536. Commissioners to be appointed. If no just cause is shown against the building of such mill, the court shall appoint three freeholders, one of whom shall be chosen by the plaintiff, another by the defendants, and the third by the court, or if the plaintiff or defendants refuse or fail, or unreasonably delay to

name a commissioner, the court shall name one in lieu of such delinquent party. These commissioners may be changed from time to time by permission of the court for just cause shown.

Rev., s. 2123; Code, s. 1850; 1868-9, c. 158, s. 2.

2537. Meeting to be appointed and commissioners notified; witnesses examined.

The third commissioner shall cause the others to be notified of the time and place of meeting, and shall preside at their meetings. They may, if necessary, summon and examine witnesses, who shall be sworn by the presiding commissioner. Any commissioner named by or for either of the parties who, without just cause, fails to attend any meeting notified by the president, shall forfeit and pay to the opposite party fifty dollars; and if the president, in like manner, unreasonably delays to notify the other commissioners of a meeting, or fails to attend one that is appointed, he shall forfeit and pay to the plaintiff fifty dollars, and to the defendant a like sum.

Rev., s. 2124; Code, s. 1851; 1868-9, c. 158, s. 3.

2538. Oath and duty of commissioners. The commissioners shall be sworn by some officer qualified to administer an oath to act impartially between the parties, and to perform the duties herein imposed on them honestly and to the best of their ability. They shall view the premises where the mill is proposed to be built, and shall lay off and value a portion of the land of the plaintiff, not to exceed one acre in area, and an equal area of the land of the defendants opposite thereto, and report their proceedings to the court within a reasonable time, not exceeding sixty days.

Rev., s. 2125; Code, s. 1852; 1868-9, c. 158, s. 4.

Majority signing report is sufficient: *Austin v. Helms*, 65-560.

2539. Contents of commissioners' report. The report of the commissioners shall set forth:

1. The location, quantities and value of the several areas laid off by them.
2. Whether either of them includes houses, gardens, orchards or other immediate conveniences.
3. Whether the proposed mill will overflow another mill or create a nuisance in the neighborhood.
4. Any other matter upon which they have been directed by the court to report, or which they may think necessary to the doing of full justice between the parties.

Rev., s. 2126; Code, s. 1853; 1868-9, c. 158, s. 5.

Proper for commissioners to report whether proposed mill will overflow another or create a nuisance: *Burnett v. Nicholson*, 72-334. Commissioners forbidden to include houses, etc., in survey; the valuation must be confined to the naked land: *Burgess v. Clark*, 35-109. Not necessary that all commissioners should sign report, a majority being sufficient: *Austin v. Helms*, 65-560.

2540. When building not to be allowed. If the area laid off on the land of either party take away houses, gardens, orchards, or other immediate conveniences; or if the mill proposed will overflow another mill, or will create a nuisance in the neighborhood, the court shall not allow the proposed mill to be built.

Rev., s. 2127; Code, s. 1854; 1868-9, c. 158, s. 6.

Commissioners are not authorized to include in the valuation any houses found on the condemned area, even though erected there by petitioner before proceedings were commenced; valuation must be confined to naked land: *Burgess v. Clark*, 35-109. Commissioner must report whether proposed mill will overflow another mill, or will create a nuisance in the neighborhood: *Burnett v. Nicholson*, 72-334.

Where mill would be a public benefit, on principle that private advantage must yield to public benefit, no injunction will lie: *Daughtry v. Warren*, 85-136. No injunction lies where damages not irreparable: *Burnett v. Nicholson*, 72-334.

2541. Power of court on return of report. If the report is in favor of building the proposed mill, and is confirmed, then the court may, in its discretion, allow either the plaintiff or defendant to erect such mill at the place proposed, and shall order the costs, and the value of the opposite area, to be paid by the party to whom such leave is granted; and upon such payment, the party to whom such leave is granted shall be vested with title in fee to the opposite area. Such payment may be made into court for the use of the parties entitled thereto.

Rev., s. 2128; Code, s. 1855; 1868-9. c. 158, s. 7.

For costs, see section 1245.

2542. Time for beginning and building mill; to be kept up. The person to whom leave is granted shall, within one year, begin to build such water mill, and shall finish the same within three years; and thereafter keep it up for the use and ease of its customers, or such as shall be customers to it; otherwise, the said land shall return to the person from whom it was taken, or to such other person as shall have his right, unless the time for finishing the mill, for reasons approved by the court, be enlarged.

Rev., s. 2129; Code, s. 1856; 1868-9, c. 158, s. 8.

2543. Rebuilding mill after destruction. If a water mill belonging to a married woman, or a minor, a person of unsound mind, or imprisoned, falls, burns, or is otherwise destroyed, such person and his heirs shall have three years to rebuild and repair the same, and any person under any disability aforesaid shall have three years from the removal of the disability.

Rev., s. 2130; Code, s. 1857; 1903, c. 74, ss. 1, 2; 1868-9, c. 158, s. 9.

ART. 3. CONDEMNATION FOR RACES, WATERWAYS, ETC., BY OWNER OF MILL OR MILLSITE

2544. Special proceedings; summons. Any person who has land on one or both sides of a stream and wishes to build a water mill, or has a water mill already built and may find it necessary for the better operation of said mill or the building of the said mill to convey water either to or from his mill by ditch, waterway, drain, mill-race or tail-race, or in any other manner, over the lands of any other person, or erect a dam to pond said water over the lands of any other person, or raise any dam already built, may make application by petition in writing to the clerk of the superior court of the county in which the said lands to be affected, or a greater part thereof, are situated, for the right to so convey the said water or pond the same by the erection of a dam or the raising of any dam already built; and the procedure shall be as in other special proceedings.

Rev., s. 2131; 1905, c. 534, s. 1a, k.

2545. Contents of petition. The petition shall specify the lands to be affected, the name of the owner of said lands, and the character of the ditch, race, water-

way or drain or pond intended to be made, and said owner or owners shall be made parties defendant. The petition shall state the distance desired to be condemned on each side of the ditch, waterway or drain to be constructed or erected, and not more than thirty feet from each bank can be condemned.

Rev., s. 2132; 1905, c. 534, s. 1b.

2546. Commissioners to be appointed. Upon the hearing of the petition, if the prayer thereof be granted, the clerk shall appoint three disinterested persons qualified to act as jurors, and not connected either by blood or marriage with the parties, appraisers to assess the damage, if any, that will accrue to the said lands by the contemplated work, and shall issue a notice to them to meet upon the premises on a day specified, not to exceed ten days from the date of said notice.

Rev., s. 2133; 1905, c. 534, s. 1c.

2547. Oath and duty of commissioners. The appraisers having met, shall take an oath before some officer qualified to administer oaths to faithfully perform their duty and to do impartial justice in the case, and shall then examine all the lands in any way to be affected by the said work and assess the damage thereto and make report thereof under their hands and seals to the clerk from whom the notice issued, who shall have power to confirm the same.

Rev., s. 2134; 1905, c. 534, s. 1d.

2548. Assessment of damages. In determining the amount of such compensation to be paid to the owners of the said lands and assessing the damages thereto by reason of the erection or construction of such waterway, ditch, drain or dam, they shall make an allowance or deduction on account of any benefits which the parties in interest may derive from the construction or erection of such waterway, ditch, drain or dam, and shall ascertain the damages, as near as may be, to the extent it may damage each acre of land so appropriated or occupied by the said mill-owner. The damage assessed by the appraisers under this article shall include all damages that the owners shall thereafter suffer or be entitled to by reason of the construction of the said waterways, races, ditches or dams.

Rev., s. 2135; 1905, c. 534, s. 1e, m.

2549. When commissioners' report not to be affirmed. If the area laid off on the lands of either party take away houses, gardens, orchards or immediate conveniences, or if the mill proposed or erected will overflow another mill or pond water within two hundred feet of another mill, or will overflow or pond water within two hundred feet of the millsite or premises of a person who has the right under this chapter, or by the authority of law, to rebuild a mill after its destruction, or if the mill create a nuisance in the neighborhood, the court shall not allow the report of the appraisers to be affirmed.

Rev., s. 2136; 1905, c. 534, s. 1g.

See section 2540.

2550. When petitioner may enter on lands. After the return of the appraisers and the confirmation thereof the petitioner shall have full right and power to enter upon said lands and make such ditches, waterways, drains, races or other necessary works and construct such dams: Provided, he has first paid or tendered the damage assessed as above to the owner of such lands or his known or

recognized agent in this state. If the owner is a nonresident and has no known agent in this state, the amount so assessed shall be paid by the petitioner into the office of the clerk of the superior court of the county for the use of such owner: Provided further, that the mill-owner shall not be compelled to pay said damages so assessed unless he shall enter upon such lands and make ditches, drains or other works or erect such dam.

Rev., s. 2137; 1905, c. 534, s. 11.

2551. Owner of mills and millsites protected. No other person shall have the right to erect or maintain any dam, ditch, waterway, drain or race that will overflow or pond water within two hundred feet of the millsite or premises of any person or body corporate who shall have erected a mill, dam, ditch, drain or race under the provisions of this chapter, or of any millsite owned by any person who has the right under this chapter, or by the authority of law, to rebuild a mill after its destruction. When any person violates the provisions of this section the owner of said mill or millsite shall have a right of action against said person to tear down said dam or other works so built or erected to the extent herein forbidden and to abate the same as prescribed by law for the abatement of nuisances.

Rev., s. 2138; 1905, c. 534, s. 1h.

2552. Report to be registered. The petitioner, or any other person interested, may have the said assessment registered upon the certificate of the clerk, and shall pay the register the usual legal fees for registering such instruments in his office.

Rev., s. 2139; 1905, c. 534, s. 1i.

3553. Fees of appraisers. Each appraiser shall be entitled to a fee of one dollar for each day actually employed in making said assessment, to be paid by the petitioner.

Rev., s. 2140; 1905, c. 534, s. 1j.

2554. Obstructing mill races or dams a misdemeanor. Any person who shall obstruct any drain, ditch or dam constructed under this article shall be guilty of a misdemeanor.

Rev., 3381; 1905, c. 534, s. 1l.

ART. 4. RECOVERY OF DAMAGES FOR ERECTION OF MILL

2555. Action in superior court; procedure. Any person conceiving himself injured by the erection of any grist-mill, or mill for other useful purposes, may issue his summons returnable before the judge of the superior court of the county where the damaged land or any part thereof lies, against the persons authorized to be made parties defendant. In his complaint he shall set forth in what respect and to what extent he is injured, together with such other matters as may be necessary to entitle him to the relief demanded. The court shall then proceed to hear and determine all the questions of law and issues of fact arising on the pleadings as in other civil actions.

Rev., s. 2141; Code, s. 1858; 1876-7, c. 197, s. 1.

Possession alone is sufficient to support a petition for damage for ponding water hereunder: *Pace v. Freeman*, 32-103; *Yeargain v. Johnston*, 1-180; but see *Waddy v. Johnson*, 27-333—and plaintiff need not prove his title, *Yeargain v. Johnston*, 1-180.

General history of the law with respect to actions for ponding water reviewed in *Hester v. Broach*, 84-253.

An executor or administrator has a right to pursue the remedy provided for damages for the overflowing by a millpond of his testator's or intestate's land in the lifetime of such testator or intestate: *Howcott v. Warren*, 29-20—and one whose land is overflowed by a millpond may have an action against the executor or administrator of the person who erected the mill and dam, *Howcott v. Coffield*, 29-24. Heir cannot be sued for ancestor's erecting mill or dam which causes overflow of land: *Fellow v. Fulgham*, 7-254.

One is not obliged to wait until the expiration of a year before he files his petition hereunder: *Cochran v. Wood*, 28-194. Plaintiff must state in his petition in what respect he was injured, and his proofs cannot go beyond his allegations: *Bridgers v. Purcell*, 23-232. When suit is brought within the year damages are necessarily limited to the time injury has existed: *Ibid.*

Injury arising to adjacent land by the overflowing of the waters of a millpond is a tort; although the statute has given a new remedy for it, it has not altered its nature: *Wilson v. Myers*, 11-73.

Where erection of a mill on a stream causes water to overflow land or mill of another only when stream is swollen, that circumstance will not excuse party from damage altogether, but will only diminish the quantum: *Pugh v. Wheeler*, 19-50.

It is not competent as defense to show that the effect of the backing of water on the lands of adjoining owners was beneficial: *Chaffin v. Mfg. Co.*, 135-95. It is competent to show the condition of the banks of the stream above and below the dam in order to show that this condition was not caused by erection of dam: *Chaffin v. Mfg. Co.*, 135-95. The mere raising of a stream within its banks, although it is not thrown out of them, is an injury to land through which it runs: *Little v. Stanback*, 63-285. It is competent to show, in an action for ponding water by increase in the height of defendant's dam, that, by direction of defendant, dam was built so as not to pond water above old water-marks. To sustain the action plaintiff must show affirmatively that alleged increased volume of water was occasioned by increased size of dam: *Godfrey v. Maberry*, 84-255.

As to whether the injury for which damage can be claimed refers only to the physical injury of the land, or includes injury to health, etc., see *Gillett v. Jones*, 18-339; *Waddy v. Johnson*, 27-333; *Bridgers v. Purcell*, 23-232; *Purcell v. McCallum*, 18-221.

Damages may be recovered for injury to land resulting proximately from the maintenance by defendant of a dam, though such injury was aggravated by other causes not within defendant's control: *Cline v. Baker*, 118-780. Where sole issue was whether defendant's dam injured plaintiff's land, through which a creek passed before emptying into the pond above the dam, it was not error to instruct the jury that if the injury resulted from filling up creek with sand between plaintiff's land and the pond, by washing of hillsides, falling of leaves and branches, and failure to clean out channel, plaintiff could not recover, provided those obstructions did not result from the maintenance of dam: *Ibid.*

If plaintiff's land be overflowed by water on account of defendant's dam, he is entitled to nominal damages: *Chaffin v. Mfg. Co.*, 135-103; *McGee v. Fox*, 107-769; *Wright v. Stowe*, 49-516. Plaintiff has right to have question submitted to jury whether overflow was injurious; and any former benefits the land may have received from such overflow has nothing to do with the question: *Kimel v. Kimel*, 49-121; *McGee v. Fox*, 107-766.

As to relative rights of owners of land through which nonnavigable streams flow with reference to use of the water thereof, see *Durham v. Cotton Mills*; 141-615; *Pugh v. Wheeler*, 19-50. Conveyance made to defeat, hinder, or delay a party injured by the erection of a mill in his recovery of damages is fraudulent and void as to such party, and the owner of such mill remains liable for damages: *Purcell v. McCallum*, 18-221. The remedy under this article does not apply to an action for damages for trespass committed on plaintiff's land: *Henley v. Wilson*, 77-216.

Sale of mill property held to pass as appurtenant an easement to pond water above mill to extent that it was done at time of the conveyance: *Latta v. Electric Co.*, 146-285—but not to pass as appurtenant thereto an easement in another tract in which vendor had an interest under a resulting trust, when no easement actually existed, *Ibid.*

Where one pays for certain property which he has another purchase in his own name, the mere fact that the one paying for the property intended at some future time to raise a dam on his own property so as to back water upon the other does not ipso facto create an easement

in the other property: *Latta v. Power Co.*, 146-285. A covenant in a deed held expressly confined to dams which might be placed in a river on lands within the boundaries mentioned: *Ibid.*

Dam erected below a steam mill for purpose of floating timber to mill and not for purpose of driving machinery of mill, by which water is ponded back upon land of another, does not come within meaning of section: *Bryan v. Burnett*, 47-305.

Where milldam so obstructs water as to prevent land from being drained, the owner is entitled to damages: *Johnson v. Roane*, 48-523; *Wilhelm v. Burleyson*, 106-381; *Burnett v. Nicholson*, 72-334.

Under this chapter it is no objection that some who did the injury were mere temporary owners; if their interest was limited, it should have been offered when the five years judgment was about to be entered up: *Wilson v. Myers*, 11-73.

Evidence admissible to show that defendant had been warned against shutting down his flood-gates and had been told of the custom of a former owner of the dam in raising the flood-gates: *Hardin v. Ledbetter*, 103-90.

Other decisions upon subject of ponding water and the diverting of water upon land of another not caused by building mill, see *Clark v. Guano Co.*, 144-64; *Greenwood v. R. R.*, 144-446; *Craft v. R. R.*, 136-49; *Chaffin v. Mfg. Co.*, 135-95; *Candler v. Electric Co.*, 135-12; *Rice v. R. R.*, 130-375; *Mullen v. Canal Co.*, 130-496; *Lassiter v. R. R.*, 126-509; *Mizzell v. McGowan*, 125-439; *Hocutt v. R. R.*, 124-214; *Parker v. R. R.*, 123-71; *Harrell v. R. R.*, 122-822; *Nichols v. R. R.*, 120-495; *Parker v. R. R.*, 119-677; *Fleming v. R. R.*, 115-676; *Ward v. R. R.*, 112-168; *Adams v. R. R.*, 110-325; *Staton v. R. R.*, 109-337, 111-278; *Knight v. R. R.*, 111-80.

HOW JURY MUST ASSESS DAMAGES. An issue involving amount of annual damage done by ponding water is the proper one to be submitted to the jury: *Hester v. Broach*, 84-251. Jury has no right to go back farther than one year in assessing damages, but if they do, the error may be corrected in the judgment: *Goodson v. Mullen*, 92-207; *Pugh v. Wheeler*, 19-50. In assessing damages jury are not bound to give damages at an average for five years, but may assess sums for different periods during that time: *Pugh v. Wheeler*, 19-50. It is error to charge the jury that to entitle plaintiff to nominal damages he must show damages capable of being estimated, perceptible, as an appreciable quantity: *Chaffin v. Mfg. Co.*, 135-95; *McGee v. Fox*, 107-769; *Wright v. Stowe*, 49-516. Verdict of jury in cases hereunder and judgment of court thereon are conclusive as to assessment of damages up to time judgment rendered: *Beatty v. Conner*, 34-341; *Burnett v. Nicholson*, 86-99. Where jury finds damages are different for different years, they should assess them separately for each year: *Goodson v. Mullen*, 92-207. By this section damages are to be assessed for five years as they were prior to 1877: *Goodson v. Mullen*, 92-207.

Where defendant erected another mill and dam lower down the stream which ponded water on plaintiff's mill, the measure of damage is the injury actually sustained up to time of trial, and in estimating same, decrease of custom (in the matter of tolls) cannot be considered: *Burnett v. Nicholson*, 86-99—and evidence to show how much it will cost plaintiff to raise his dam and water wheel to escape injury complained of was properly excluded: *Ibid.*

Where a second action is brought hereunder damages should be assessed for the time between the commencement of the first action and the commencement of the second: *Bradley v. Amis*, 3-399; *Moore v. Love*, 48-215.

Damages to plaintiff's land can be estimated by comparing its productiveness before and after flooding or sobbing: *Spilman v. Navigation Co.*, 74-675.

For assessment of damages where mill overflowed by backing water thereon, see *Hardin v. Ledbetter*, 103-90.

2556. When dams abated as nuisances. When damages are recovered in final judgment in such civil actions, and execution issues and is returned unsatisfied, and the plaintiff is not able to collect the same either because of the insolvency of the defendant or by reason of the exemptions allowed to defendant, the judge shall, on the facts being made to appear before him by affidavit or other evidence, order that the dam, or portion of the dam, or other cause creating the injury, shall be abated as a nuisance, and he shall have power to make all necessary orders to effect this purpose.

Rev., s. 2142; Code, s. 1859; 1876-7, c. 197, s. 3.

An injunction will not be granted to restrain erection of dam whereby mill wheel of plaintiff is flooded so as to become useless: *Burnett v. Nicholson*, 72-334—because for such injury damage will adequately compensate, and should annual damage exceed twenty dollars, plaintiff is remitted to his common-law action and can compel abatement of nuisance, *Ibid*.

No injunction issues to restrain the rebuilding of a mill when it is for the public benefit that it be rebuilt: *Daughtry v. Warren*, 85-136.

Case where party indicted for keeping up nuisance created by ponding water not strictly within scope of this section: *State v. Holman*, 104-861.

As to injunctions against erection of dams, etc., on ground that they are nuisances, see *Eason v. Perkins*, 17-38; *Daughtry v. Warren*, 85-136; *Dorsey v. Allen*, 85-358; *Brown v. R. R.*, 83-128; *Hyatt v. Myers*, 73-232; *Privett v. Whitaker*, 73-554; *Clark v. Lawrence*, 59-83; *Atty.-Gen. v. Lea*, 38-301; *Atty.-Gen. v. Hunter*, 16-12; *Bell v. Blount*, 11-384.

2557. Judgment for annual sum as damages. A judgment giving to the plaintiff an annual sum by way of damages shall be binding between the parties for five years from the issuing of the summons, if the mill is kept up during that time, unless the damages are increased by raising the water or otherwise.

In all cases where the final judgment of the court assesses the yearly damage of the plaintiff as high as twenty dollars, nothing contained in this chapter shall be construed to prevent the plaintiff, his heirs or assigns, from suing as heretofore, and in such case the final judgment aforesaid shall be binding only for the year's damage preceding the issuing of the summons.

Rev., ss. 2143, 2144; Code, ss. 1860, 1861; 1868-9, c. 158, ss. 12, 14.

If, at the trial, five years have elapsed since the filing of the petition, a peremptory judgment for annual damages for five years is proper, whether such annual damage be above or below twenty dollars: *Gillett v. Jones*, 18-339.

Owners of land granted license to other persons "to build a mill and back water on us, so they don't back on our bottoms": Held, that the license is exceeded when the dam is raised to such height that water is ponded back so as to subvert the "bottoms" and render drainage impossible, and make them unfit for cultivation, although they are not actually overflowed: *Cagle v. Parker*, 97-271.

Easement obtained by twenty years possession does not protect owner of dam from liability on account of new injury: *Powell v. Lash*, 64-456.

Where annual damages are assessed at less than twenty dollars per annum, judgment is for five years including year preceding the filing of petition, for each year's damages so assessed, with a cessat executio for each year after the first year: *Goodson v. Mullen*, 92-207.

Owner of land injured by erection of mill, who has proceeded by petition, under which annual damage assessed is as high as twenty dollars, and who has taken judgment for and received damage for the whole five years, cannot maintain an action on the case, brought after expiration of five years, without having again ascertained the annual damage by proceeding under a second petition: *Gilliam v. Canady*, 33-106.

Judgment for permanent damages for a certain time for ponding water does not estop subsequent action to recover permanent damages since that time: *Candler v. Electric Co.*, 135-12.

Where damages assessed at as much as twenty dollars a year, judgment was the same as when assessed at less than twenty dollars, except that plaintiff had his election to take judgment for five years, or only for one year preceding filing of petition, in which case he is at liberty to bring his action at common law; but if action was continued for more than five years, judgment was for entire amount, and plaintiff was barred of his election: *Goodson v. Mullen*, 92-207.

Where jury found that land was damaged \$80 per year, and his honor gave judgment for a sum in gross, and not for each year's damage, held no error: *Goodson v. Mullen*, 92-211; *Gillett v. Jones*, 18-339.

2558. Final judgment; costs and execution. If the final judgment of the court is that the plaintiff has sustained no damage, he shall pay the costs of his proceeding; but if the final judgment is in favor of the plaintiff, he shall have

execution against the defendant for one year's damage, preceding the issuing of the summons, and for all costs: Provided, that if the damage adjudged does not amount to five dollars, the plaintiff shall recover no more costs than damages. And if the defendant does not annually pay the plaintiff, his heirs or assigns, before it falls due, the sum adjudged as the damages for that year, the plaintiff may sue out execution for the amount of the last year's damage, or any part thereof which may remain unpaid.

Rev., s. 2145; Code, s. 1862; 1868-9, c. 158, s. 15.

Jury having assessed in this case but one dollar damages, the court did right in giving plaintiff no more costs than damages under the act of 1833: *Bridges v. Purell*, 23-232.

CHAPTER 53

MONOPOLIES AND TRUSTS

- 2559. Combinations in restraint of trade illegal.
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- 2571. Criminal prosecutions; solicitors to assist; expenses.
- 2572. Remedy by civil action.
- 2573. In what name civil action prosecuted.
- 2574. Civil action by person injured; treble damages.

2559. Combinations in restraint of trade illegal. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the state of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent representing a corporation, and such corporation shall be fined in the discretion of the court not less than one thousand dollars.

1913, c. 41, s. 1.

The general purpose of the act of 1907, c. 218, which has been supplanted by this chapter, was to prevent the formation of trusts and combinations which might buy out or crush out competition: *Wooten v. Harris*, 153-43.

An agreement by milk dealers to raise the price of milk is an indictable offense at common law and also under this chapter: *State v. Craft*, 168-208. See section 2563.

2560. Any restraint in violation of common law included. Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of the preceding section of this chapter.

1913, c. 41, s. 2.

The sale of an established business, including good will, with an agreement not to engage in competition, is not a violation of this chapter: *Sea Food Co. v. Way*, 169-679; *Wooten v. Harris*, 153-43. See cases under section 2563.

2561. Burden of proof as to reasonableness on defendant. All contracts, combinations in the form of trust, and conspiracies in restraint of trade or commerce prohibited in the two preceding sections of this chapter are hereby declared to be unreasonable and illegal, unless the persons entering into such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce can show affirmatively upon an indictment or civil action for violation of the preceding sections of this chapter that such contract, combination in the form of trust, conspiracy in restraint of trade or commerce does not injure

the business of any competitor, or prevent any one from becoming a competitor because his or its business will be unfairly injured by reason of such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce.

1913, c. 41, s. 3.

Section referred to in *Shute v. Shute*, 176-462.

2562. Contracts to be in writing. No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the state of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: Provided, nothing herein shall be construed to legalize any contract or agreement not to enter into business in the state of North Carolina, or at any point in the state of North Carolina, which contract is now illegal, or which contract is made illegal by any other section of this chapter.

1913, c. 41, s. 4.

See contracts requiring writing, ch. 19.

2563. Particular acts defined. In addition to the matters and things hereinbefore declared to be illegal, the following acts are declared to be unlawful, that is, for any person, firm, corporation, or association directly or indirectly to do or to have any contract, express or knowingly implied, to do any of the acts or things specified in any of the subsections of this section.

1. To agree or conspire with any other person, firm, corporation or association to put down or keep down the price of any article produced in this state by the labor of others, which article the person, firm, corporation or association intends, plans or desires to buy.

2. To make a sale of any goods, wares, merchandise, articles or things of value whatsoever in North Carolina, whether directly or indirectly, or through any agent or employee, upon the condition that the purchaser thereof shall not deal in the goods, wares, merchandise, articles or things of value of a competitor or rival in the business of the person, firm, corporation or association making such sales.

A contract to sell patterns of a certain kind for a dealer and not to sell other patterns in competition is in violation of this subsection: *Fashion Co. v. Grant*, 165-453.

3. To willfully destroy or injure, or undertake to destroy or injure, the business of any opponent or business rival in the state of North Carolina with the purpose or intention of attempting to fix the price of anything of value when the competition is removed.

Attempting to injure or destroy the business of a competitor in the sale of ice: *Smith v. Ice Co.*, 159-151.

4. Who directly or indirectly buys or sells within the state, through himself or itself, or through any agent of any kind or as agent or principal, or together with or through any allied, subsidiary or dependent person, firm, corporation or association, any article or thing of value which is sold or bought in the state to injure or destroy or undertake to injure or destroy the business of any rival or opponent, by lowering the price of any article or thing of value sold, so low, or by raising the price of any article or thing of value bought, so high as to leave an unreasonable or inadequate profit for a time, with the purpose of increasing the profit on the business when such rival or opponent is driven out of business, or his or its business is injured.

5. Who deals in any thing of value within the state of North Carolina, to give away or sell, at a place where there is competition, such thing of value at a price lower than is charged by such person, firm, corporation or association for the same thing at another place, where there is not good and sufficient reason, on account of transportation or the expense of doing business, for charging less at the one place than at the other, with the view of injuring the business of another.

6. Who is engaged in buying or selling any thing of value in North Carolina, to make or have any agreement or understanding, express or implied, with any other person, firm, corporation or association, not to buy or sell such things of value within certain territorial limits within the state, with intention of preventing competition in selling or to fix the price or prevent competition in buying of such things of value within these limits: Provided, nothing herein shall be construed to prevent an agent from representing more than one principal. But nothing in this proviso shall be construed to authorize two or more principals to employ a common agent for the purpose of suppressing competition or lowering prices: Provided further, that nothing herein shall be construed to prevent a person, firm or corporation from selling his or its business and good will to a competitor, and agreeing in writing not to enter the business in competition with the purchaser in a limited territory, as is now allowed under the common law: Provided, such agreement shall not violate the principles of the common law against trusts and shall not violate the provisions of this chapter.

1913, c. 41, s. 5.

An agreement to prevent competition in ginning cotton within a certain territory is invalid: *Shute v. Shute*, 176-462. An agreement to prevent competition in the sale of flour is invalid: *Culp v. Love*, 127-457. An agreement to fix or raise the price of milk is illegal: *State v. Craft*, 168-208. Agreements interfering with competition are subject to the construction of the court as to reasonableness: *Mar-Hof Co. v. Rosenbacker*, 176-330.

The sale of an established business and good will, with an agreement not to enter into competition, is valid if it is in reasonable restraint of trade, that is, where the restraint is such as to afford a fair protection to the rights of the purchaser and not unreasonably interfere with the rights of the other party and the public: *Sea Food Co. v. Way*, 169-679. An agreement not to enter into competition in the sale of fish: *Ibid.*—not to engage in the business of a barber, *Bradshaw v. Millikin*, 173-432; *Faust v. Rohr*, 166-187—not to engage in grocery business, *Finch v. Michael*, 167-322—not to engage in sale of liquor, *Disosway v. Edwards*, 134-254; *Jolly v. Brady*, 127-142—not to engage in practice of medicine, *Teague v. Schaub*, 133-458; *Hauser v. Harding*, 126-295—not to engage in manufacture of lumber and ginning cotton, *Shute v. Heath*, 131-281—not to engage in mercantile business, *Wooten v. Harris*, 153-43—not to engage in livery business, *Anders v. Gardner*, 151-604; *King v. Fountain*, 126-196—not to engage in milling business, *Kramer v. Old*, 119-1—not to engage in running newspaper, *Cowan v. Fairbrother*, 118-406—not to engage in business of druggist, *Reeves v. Sprague*, 114-647; *Baker v. Cordon*, 86-116—not to engage in business of photographer, *Baumgarten v. Broadway*, 77-8.

2564. Violation a misdemeanor; punishment. Any corporation, either as agent or principal, violating any of the provisions of preceding section shall be guilty of a misdemeanor, and such corporation shall upon conviction be fined not less than one thousand dollars for each and every offense, and any person, whether acting for himself or as officer of any corporation or as agent of any corporation or person violating any of the provisions of this chapter shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

1913, c. 41, s. 5.

See *State v. Craft*, 168-208.

2565. Persons encouraging violation guilty. Any person, being either within or without the state, who encourages or willfully allows or permits any agent or associates in business in this state to violate any of the provisions of this chapter shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in the preceding section.

1913, c. 41, s. 6.

2566. Continuous violations separate offenses. Where the things prohibited in this chapter are continuous, then in such event, after the first violation of any of the provisions hereof, each week that the violation of such provision shall continue shall be a separate offense.

1913, c. 41, s. 7.

2567. Duty of attorney-general to investigate. The attorney-general of the state of North Carolina shall have power, and it shall be his duty, to investigate, from time to time, the affairs of all corporations doing business in this state, which are or may be embraced within the meaning of the statutes of this state defining and denouncing trusts and combinations against trade and commerce, or which he shall be of opinion are so embraced, and all other corporations in North Carolina doing business in violation of law; and all other corporations of every character engaged in this state in the business of transporting property or passengers, or transmitting messages, and all other public-service corporations of any kind or nature whatever which are doing business in the state for hire. Such investigation shall be with a view of ascertaining whether the law or any rule of the North Carolina corporation commission is being or has been violated by any such corporation, officers or agents or employees thereof, and if so, in what respect, with the purpose of acquiring such information as may be necessary to enable him to prosecute any such corporation, its agents, officers and employees for crime, or prosecute civil actions against them if he discovers they are liable and should be prosecuted.

1913, c. 41, s. 8.

2568. Power to compel examination. In performing the duty required in the preceding section, the attorney-general shall have power, at any and all times, to require the officers, agents or employees of any such corporation, and all other persons having knowledge with respect to the matters and affairs of such corporations, to submit themselves to examination by him, and produce for his inspection any of the books and papers of any such corporations, or which are in any way connected with the business thereof; and the attorney-general is hereby given the right to administer oath to any person whom he may desire to examine. He shall also, if it may become necessary, have a right to apply to any judge of the supreme or superior court, after five days notice of such application, for an order on any such person or corporation he may desire to examine to appear and subject himself or itself to such examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such judge.

1913, c. 41, s. 9.

2569. Person examined exempt from prosecution. No person examined, as provided in the preceding section, shall be subject to indictment, prosecution, pun-

ishment or penalty by reason or on account of anything disclosed by him upon such examination, and full immunity from prosecution and punishment by reason or on account of anything so disclosed is hereby extended to all persons so examined.

1913, c. 41, s. 9.

2570. Refusal to furnish information; false swearing. Any corporation unlawfully refusing or willfully neglecting to furnish the information required by this chapter, when it is demanded as herein provided, shall be guilty of a misdemeanor and fined not less than one thousand dollars: Provided, that if any corporation shall in writing notify the attorney-general that it objects to the time or place designated by him for the examination or inspection provided for in this chapter, it shall be his duty to apply to a judge of the supreme or superior court, who shall fix an appropriate time and place for such examination or inspection, and such corporation shall, in such event, be guilty under this section only in the event of its failure, refusal or neglect to appear at the time and place so fixed by the judge and furnish the information required by this chapter. False swearing by any person examined under the provisions of this chapter shall constitute perjury, and the person guilty of it shall be punishable as in other cases of perjury.

1913, c. 41, s. 10.

2571. Criminal prosecution; solicitors to assist; expenses. The attorney-general in carrying out the provisions of this chapter shall have a right to send bills of indictment before any grand jury in any county in which it is alleged this chapter has been violated or in any adjoining county, and may take charge of and prosecute all cases coming within the purview of this chapter, and shall have the power to call to his assistance in the performance of any of these duties of his office which he may assign to them any of the solicitors in the state, who shall, upon being required to do so by the attorney-general, send bills of indictment and assist him in the performance of the duties of his office: Provided, that the state shall pay the actual and necessary expenses of the solicitor incurred while performing such duties and not over one hundred dollars as an extra fee when the expense account is approved by the attorney-general and governor and duly audited, and the amount of the fee is fixed by them.

The necessary expenses incident to carrying out the provisions of this chapter shall, when approved by the governor and audited, be paid out of any money in the state treasury not otherwise appropriated.

1913, c. 41, s. 13.

2572. Remedy by civil action. If it shall become necessary to do so, the attorney-general may prosecute civil actions in the name of the state on relation of the attorney-general to obtain a mandatory order to carry out the provisions of this chapter, and the venue shall be in any county as selected by the attorney-general.

1913, c. 41, s. 11.

2573. In what name civil action prosecuted. It shall be the duty of the attorney-general, upon his ascertaining that the laws have been violated by any trust or public-service corporation, so as to render it liable to prosecution in a civil action,

to prosecute such action in the name of the state, or any officer or department thereof, as provided by law, or in the name of the state on relation of the attorney-general, and to prosecute all officers or agents or employees of such corporations, whenever in his opinion the interests of the public require it.

1913, c. 41, s. 12.

2574. **Civil action by person injured; treble damages.** If the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

1913, c. 41, s. 14.

Under act of 1907, c. 218, plaintiff could recover actual and punitive damages: *Smith v. Ice Co.*, 159-151.

CHAPTER 54

MORTGAGES AND DEEDS OF TRUST

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ART. 1. CHATTEL MORTGAGES: FORM AND SUFFICIENCY

2575. Form of chattel mortgage. Any person indebted to another in a sum to be secured may execute a chattel mortgage in form substantially as follows:

I, _____, of the county of _____ in the state of North Carolina, am indebted to _____, of _____ county, in said state, in the sum of _____ dollars, for which he holds my note to be due the _____ of _____, A. D. 19____, and to secure the payment of the same, I do hereby convey to him these articles of personal property, to wit: _____ but on this special trust, that if I fail to pay said debt and interest on or before the _____ day of _____, A. D. 19____, then he may sell said property, or so much thereof as may be necessary, by public auction for cash, first giving twenty days notice at three public places, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay any surplus to me.

Given under my hand and seal this _____ day of _____, A. D. 19____

(Seal).

Rev., s. 1039; Code, s. 1273; 1870-1, c. 277; 1911, c. 69, s. 1.

No particular form essential to validity of chattel mortgage; it is sufficient if words employed express, in terms or by just implication, purpose to convey property as security for debt: *Noland v. Osborne*, 177-14; *Williamson v. Bitting*, 159-321; *Strouse v. Cohen*, 113-349; *Comron v. Standland*, 103-207. For instrument held to be sufficient as chattel mortgage: *Ibid.*; *Weil v. Flowers*, 109-212; *Nichols v. Speller*, 120-75; *Millhiser v. Pleasants*, 118-237;

Brown v. Dail, 117-41; *Harris v. Jones*, 83-317; *Cotten v. Willoughby*, 83-75; *Robinson v. Ezzell*, 72-231. For instrument held insufficient as chattel mortgage, see *Britt v. Harrell*, 105-10; *Chemical Co. v. Johnson*, 98-123; *Atkinson v. Graves*, 91-99.

Mere informality will not vitiate a chattel mortgage: *Comron v. Standland*, 103-207—and no seal is necessary, *Ibid.*; also, *Foundry Co. v. Waltman*, 114-178—neither is a power of sale necessary, *Comron v. Standland*, 103-207. Valid chattel mortgage may be made by owner of land of crop sown thereon but not yet growing: *Cotten v. Willoughby*, 83-75; *Harris v. Jones*, 83-317; *Robinson v. Ezzell*, 72-231; *Atkinson v. Graves*, 91-101; *Gwathney v. Etheridge*, 99-571.

As bearing upon section, see *Brown v. Miller*, 108-395; *Harris v. Woodard*, 96-232.

2576. Registration. Chattel mortgages substantially in the form provided in the last section are good to all intents and purposes when the same are duly registered according to law.

Rev., s. 1040; Code, ss. 1273, 1274; 1870-1, c. 277, ss. 1, 2.

For registration of chattel mortgages, see further, *Probate and Registration*, s. 3311.

For fees for probate and registration, see sections 3903, 3904, 3906, 3907. For joinder of chattel mortgage and lien bond, see section 2490. See, also, section 3311. Mortgages good inter partes without registration: *Williams v. Jones*, 95-504; *Robinson v. Willoughby*, 70-363; *Leggett v. Bullock*, 44-283; *Pike v. Armistead*, 16-111. Mortgage may be registered after death of mortgagor: *Williams v. Jones*, 95-504. Registration of mortgage after commission in bankruptcy is good against assignee: *Ibid.* Where husband mortgaged horse, but not registered until after his death, and prior to registration horse assigned to widow as part of year's support, widow took property subject to mortgage lien: *Williams v. Jones*, 95-504.

Assignment of chattel mortgage need not be registered under section: *Hodges v. Wilkinson*, 111-56. Mortgages are, as between parties thereto, when registered, effectual from their delivery: *Brem v. Lockhart*, 93-191. Delivering mortgage to register outside of office is not a filing for registration until it is taken to the office and duly noted: *McHan v. Dorsey*, 173-694. If two mortgages are filed and registered at the same time, the older mortgage has priority: *Ibid.*

As to where mortgages to be registered, see under section 3311; *Williamson v. Bitting*, 159-321.

As bearing upon section, see *Thomas v. Cooksey*, 130-151; *Chemical Co. v. Johnson*, 98-123.

2577. Mortgage of household and kitchen furniture. All conveyances of household and kitchen furniture by a married man, made to secure the payment of money or other thing of value, are void, unless the wife joins therein and her privy examination is taken in the manner prescribed by law in conveyances of real estate.

Rev., s. 1041; 1891, c. 91.

This is a valid exercise of police power and is constitutional: *Thomas v. Sanderlin*, 173-329. A piano is included in household and kitchen furniture: *Ibid.*

Section not applicable to note signed by husband and wife binding her separate personal property: *Harvey v. Johnson*, 133-352—and not applicable to absolute sale of such property, *Kelly v. Fleming*, 113-133—but only to conveyance by chattel mortgage or by deed of trust or conditional sale, *Ibid.* As to sufficiency of instrument to convey property under section, see *Kelly v. Fleming*, 113-133.

ART. 2. RIGHT TO FORECLOSE OR SELL UNDER POWER

2578. Representative succeeds on death of mortgagee or trustee in deeds of trust; parties to action. When the mortgagee in a mortgage, or the trustee in a deed in trust, executed for the purpose of securing a debt, containing a power of sale, dies before the payment of the debt secured in such mortgage or deed in trust, all the title, rights, powers and duties of such mortgagee or trustee pass to and devolve upon the executor or administrator of such mortgagee or trustee,

including the right to bring an action of foreclosure in any of the courts of this state as prescribed for trustees or mortgagees, and in such action it is unnecessary to make the heirs at law of such deceased mortgagee or trustee parties thereto.

Rev., s. 1031; 1901, c. 186; 1887, c. 147; 1895, c. 431; 1905, c. 425.

When power of sale in mortgage is given to mortgagee and his executor, etc., and mortgagee dies leaving will under which executor qualifies, the power of sale upon default vests in executor by virtue of this section and also by virtue of the mortgage: *Scott v. Lumber Co.*, 144-44—and if power had not been conferred upon executors by instrument they could still have exercised same under this section, *Ibid.* Section intended to confer power of sale upon executor or administrator of deceased mortgagee where power not given in instrument: *Yount v. Morrison*, 109-520. Where stipulated that vendor or lawful representatives might sell land and apply proceeds to payment of sum due, held that "lawful representatives" meant executors or administrators of vendor, and conferred upon them not only power to sell, but power to convey: *Overman v. Jackson*, 104-4.

Cases under section rendered inapplicable by amendment of same: *Eason v. Dortch*, 136-291; *Hughes v. Gay*, 132-50.

2579. Foreclosures by representatives validated. In all actions which were brought or prosecuted prior to the fourth day of March, one thousand nine hundred and five, for the foreclosure of any mortgage or deed in trust by any executor or administrator of any deceased mortgagee or trustee where the heirs of the mortgagee were duly made parties and regular and orderly decrees of foreclosure entered by the court and sale had by a commissioner appointed by the court for that purpose and deed made after confirmation, the title so conveyed to purchaser at such judicial sale shall be deemed and held to be vested in such purchaser, whether the heir of such deceased mortgagee or trustee was a party to such foreclosure proceeding or not, and such heir of any deceased mortgagee is estopped to bring or prosecute any further action against such purchaser for the recovery of such property or foreclosure of such mortgage or deed in trust.

Rev., s. 1032; 1905, c. 425, s. 2.

2580. Renunciation by representative; clerk appoints trustee. The executor or administrator of any deceased mortgagee or trustee in any mortgage or deed of trust heretofore or hereafter executed may renounce in writing, before the clerk of the superior court before whom he qualifies, the trust under the mortgage or deed of trust at the time he qualifies as executor or administrator, or at any time thereafter before he intermeddles with or exercises any of the duties under said mortgage or deed of trust, except to preserve the property until a trustee can be appointed. In every such case of renunciation the clerk of the superior court of any county wherein the said mortgage or deed of trust is registered has power and authority, upon proper proceedings instituted before him, as in other cases of special proceedings, to appoint some person to act as trustee and execute said mortgage or deed of trust. The clerk, in addition to recording his proceedings in his book of orders and decrees, shall enter the name of the substituted trustee or mortgagee on the margin of the deed in trust or the mortgage in the book of the office of the register of deeds of said county.

Rev., s. 1038; 1905, c. 128.

See annotations under section 2583.

2581. Agent to sell under power may be appointed by parol. All sales of property, real or personal, under a power of sale contained in any mortgage or deed

of trust to secure the payment of money, by any mortgagee or trustee, through an agent or attorney for that purpose, by such mortgagee or trustee, appointed orally or in writing, whether such writing has been or shall be registered or not, shall be valid, whether or not such mortgagee or trustee was or shall be present at such sale.

Rev., s. 1035; 1895, c. 117.

2582. Survivorship among donees of power of sale. In all mortgages and deeds of trust wherein two or more persons, as trustees or otherwise, are given power to sell the property therein conveyed or embraced, and one or more of such persons dies, any one of the persons surviving having such power may make sale of such property in the manner directed in such deed, and execute such assurances of title as are proper and lawful under the power so given; and the act of such person, in pursuance of said power, shall be as valid and binding as if the same had been done by all the persons on whom the power was conferred.

Rev., s. 1033; 1885, c. 327, s. 2.

Where one of trustees in power of sale contained in mortgage dies, survivor may execute trust: *Cawfield v. Owens*, 129-286.

2583. Clerk appoints successor to incompetent trustee. When the sole or last surviving trustee named in a will or deed of trust dies, removes from the county where the will was probated or deed executed and from the state, or in any way becomes incompetent to execute the said trust, or is a nonresident of this state, the clerk of the superior court of the county wherein the will was probated or deed of trust was executed is authorized and empowered, in proceedings to which all persons interested shall be made parties, to appoint some discreet and competent person to act as trustee and execute the trust according to its true intent and meaning, and as fully as if originally appointed: Provided, that in all actions or proceedings had under this section prior to January first, one thousand nine hundred, before the clerks of the superior court in which any trustee was appointed to execute a deed of trust where any trustee of a deed of trust has died, removed from the county where the deed was executed and from the state, or in any way become incompetent to execute the said trust, whether such appointment of such trustee by order or decree, or otherwise, was made upon the application or petition of any person or persons ex parte, or whether made in proceedings where all the proper parties were made, are in all things confirmed and made valid so far as regards the parties to said actions and proceedings to the same extent as if all proper parties had originally been made in such actions or proceedings.

Rev., s. 1037; Code, s. 1276; 1901, c. 576; 1869-70, c. 183; 1873-4, c. 126.

See sections 172, 2579. Trustee dying or becoming incompetent to act, clerk empowered to appoint another: *McAfee v. Green*, 143-411; *Wright v. Fort*, 126-615—who, when decree appointing is signed, succeeds to legal title upon same trusts as original trustee, *Ibid.*—and he can bring action for recovery of trust estate, *Warren v. Howard*, 99-190. All persons interested must be made parties, and application for appointment of trustee cannot be ex parte: *Guion v. Melvin*, 69-243. Where clerk dismisses proceeding for want of jurisdiction, on appeal superior court can appoint: *Roseman v. Roseman*, 127-494. Upon death of last survivor of board of trustees named in deed for property to be used as “Baptist church and for education of youths of colored race” their successors will be appointed by clerk of court under this section: *Thornton v. Harris*, 140-498. Not necessary in substituting trustee to require bond of substituted trustee, it being in court’s discretion: *Strayhorn v. Green*, 92-119. Where executor is

by will also appointed trustee, and renounces or dies, administrator c. t. a. succeeds to trusteeship, and hence appointment hereunder void: *Clark v. Peebles*, 120-31. Where power to be exercised entirely at discretion of donee of powers, courts of equity have no jurisdiction to force him to act, and, if he has died without exercising power, cannot confer it upon trustee appointed by court: *Young v. Young*, 97-132.

Section merely referred to in *Eason v. Dortch*, 136-291; *Etheridge v. Vernoy*, 71-184.

2584. Mortgage to guardian; powers pass to succeeding guardian. When a guardian to whom a mortgage has been extended dies or is removed or resigns before the payment of the debt secured in such mortgage, all the rights, powers and duties of such mortgagee shall devolve upon the succeeding guardian.

Rev., s. 1034; 1905, c. 433.

ART. 3. MORTGAGE SALES

2585. Personal property; notice and place of sale. All personal property sold under the terms of any mortgage or other contract, expressed or implied, whether advertised in some newspaper or otherwise, shall be advertised by posting a notice at some conspicuous place at the courthouse door in the county where the property is situated, such notice to be posted for at least twenty days before the sale, unless a shorter time be expressed in the contract.

Rev., s. 1042; 1889, c. 70; 1909, c. 49, s. 1.

For advertisement of execution sales of personal property, see Civil Procedure, art. 28.

For sale of land under mortgage, see section 687.

Mortgagee cannot buy at his own sale, and the same rule applies to the assignee of the mortgage: *Owens v. Mfg. Co.*, 168-397.

Failure to advertise according to the terms of the power of sale in a mortgage is an irregularity, which might cause the sale to be set aside as to the immediate purchaser, but not as against a remote purchaser without notice: *Hinton v. Hall*, 166-477. The time and place of sale must be designated with certainty: *Hayes v. Pace*, 162-288. Notice of mortgage sales must be in compliance with the statute and the stipulations in the mortgage, but a postponement of the sale only requires reasonable notice to be given: *Ferebee v. Sawyer*, 167-199.

Where the bidder at a mortgage sale fails to comply, a resale may be made at once, if the bidders have not dispersed; otherwise a new advertisement must be made: *Love v. Harris*, 156-88. Power of sale in a mortgage must comply strictly with the terms: *Jenkins v. Griffin*, 175-184; *Eubanks v. Becton*, 158-230.

For notice of sale, see additional annotations under sections 687, 695. Presumption is that sale properly advertised: *Cawfield v. Owens*, 129-288. Parties may affix such terms and conditions to mortgage as they see fit, provided creditors or others interested at time not affected thereby: *McIver v. Smith*, 118-73.

Expense of advertising charged as cost against the property: *Turner v. Boger*, 126-300.

2586. Charges for legal advertising. The publication of all advertising required by law to be made in newspapers in this state shall be paid for at not to exceed the local commercial rate of the newspaper selected. Any public or municipal officer or board created by or existing under the laws of this state that is now or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements is hereby authorized to pay therefor prices not exceeding said rates. Nothing herein shall apply to contracts or agreements for legal advertising in this state existing at the time this section takes effect.

No newspaper in this state shall accept or print any legal advertising until said newspaper shall have first filed with the clerk of the superior court of the county in which it is published a sworn statement of its current commercial rate

for the several classes of advertising regularly carried by said publication, and any owner or manager of a newspaper violating the provisions of this section shall be guilty of a misdemeanor.

1919, c. 45, ss. 1, 2.

The cost of advertising is limited to \$3 except by special agreement, and a charge of \$69 for advertising for thirty days in a daily paper will not be allowed: *Banking Co. v. Leach*, 169-706 (under former law).

2587. Foreclosure of conditional sales. In all sales of personal property wherein the title is retained by the seller to secure the purchase money, or any part thereof, and no power of sale is conferred, and default is made in the payment of said obligation by the purchaser, then in all such cases it is lawful for the owner of such debt thereby secured, without an order of court, to sell such property, or so much thereof as may be necessary to pay off said indebtedness, at public auction for cash, after first giving twenty days notice at three or more public places in the county wherein the sale is to be made, and apply the proceeds of such sale to the discharge of said debt, interest on the same, and costs of foreclosure, and pay any surplus to the person legally entitled thereto. Before making any such sale, in addition to the advertisement above required, the owner of said debt shall, at least ten days before the day of sale, mail a copy of the notice of sale to the last known postoffice address of the original purchaser or his assigns.

1913, c. 60, s. 1.

See section 3312.

2588. Real property; notice of sale must describe premises. In sales of real estate under deeds of trust or mortgages it is the duty of the trustee or mortgagee making such sale to fully describe the premises in the notice required by law substantially as the same is described in the deed of authority under which said trustee or mortgagee makes such sale.

Rev., s. 1043; 1895, c. 294.

The parties may designate in the mortgage the time and place of sale. If the land lies in a county which is afterwards divided, a sale in the original county is valid: *Palmer v. Latham*, 173-60.

2589. Real property; power of sale barred when foreclosure barred. The power of sale of real property contained in any mortgage or deed of trust for the benefit of creditors shall become inoperative, and no person shall execute any such power, when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations.

Rev., s. 1044.

This applies to debts existing at the time it was passed: *Graves v. Howard*, 159-594.

Statute of limitations does not begin to run against principal of mortgage of land until due, and power of sale contained in mortgage may be exercised within ten years after maturity of principal: *Scott v. Lumber Co.*, 144-44—and statute does not begin to run upon default in payment of annual interest upon principal, when power of sale in mortgage is optional with mortgagee upon default of either interest or principal of debt, *Ibid.* Section changes law as laid down in *Menzel v. Hinton*, 132-660; *Cone v. Hyatt*, 132-810. Where debt payable in two installments, payable at different times, creditor may wait until second installment due, and statute of limitations will not begin to run until that time: *Cone v. Hyatt*, 132-810; see, also, *Capehart v. Dettrick*, 91-344. Power of sale in mortgage not affected by mortgagor's death,

and may be exercised without notice to heirs: *Carter v. Slocomb*, 122-475. Power of sale not barred for ten years after last payment: *Jenkins v. Griffin*, 175-184. Sale is void where the power of sale is barred: *Ferrell v. Hinton*, 161-348.

2590. Land lying in two or more counties; place of sale. When a mortgage or deed in trust conveying lands lying partly in two or more counties confers upon the mortgagee or mortgagees, trustee or trustees, therein named, any power for the sale of such lands, without naming the place of sale, or conferring upon such mortgagee or mortgagees, trustee or trustees, the right to select the same, in the exercise of such power, any sale thereunder may be made at the courthouse door of any one of the counties in which such lands are situate, and at no other place except as hereinafter provided; but when such lands consist of two or more detached parcels, lying wholly within the limits of different counties, the sale of each and every one of such parcels shall be made at the courthouse door of the county in which the same is situate.

1911, c. 165, s. 1.

See *Palmer v. Latham*, 173-60.

2591. Reopening judicial sales, etc., on advanced bid. In the foreclosure of mortgages or deeds of trust on real estate, or in the case of the public sale of real estate by an executor, administrator, or administrator with the will annexed, or by any person by virtue of the power contained in a will, the sale shall not be deemed to be closed under ten days. If in ten days from the date of the sale, the sale price is increased ten per cent where the price does not exceed five hundred dollars, and five per cent where the price exceeds five hundred dollars, and the same is paid to the clerk of the superior court, the mortgagee, trustee, executor, or person offering the real estate for sale shall reopen the sale of said property and advertise the same in the same manner as in the first instance. The clerk may, in his discretion, require the person making such advance bid to execute a good and sufficient bond in a sufficient amount to guarantee compliance with the terms of sale should the person offering the advance bid be declared the purchaser at the resale. Where the bid or offer is raised as prescribed herein, and the amount paid to the clerk, he shall issue an order to the mortgagee or other person and require him to advertise and resell said real estate. It shall only be required to give fifteen days notice of a resale. Resales may be had as often as the bid may be raised in compliance with this section. Upon the final sale of the real estate, the clerk shall issue his order to the mortgagee or other person, and require him to make title to the purchaser. The clerk shall make all such orders as may be just and necessary to safeguard the interest of all parties, and he shall keep a record which will show in detail the amount of each bid, the purchase price, and the final settlement between parties. This section shall not apply to the foreclosure of mortgages or deeds of trust executed prior to April first, nineteen hundred and fifteen.

1915, c. 146; 1917, c. 127, ss. 3, 4; 1919, c. 124.

Power of court to order a resale in a judicial sale and under power in a mortgage or deed of trust discussed: *Sutton v. Craddock*, 174-274; *Upchurch v. Upchurch*, 173-88; *Thompson v. Rospigliosi*, 162-145; *Uzzle v. Weil*, 151-132.

2592. Surplus after sale to be paid to clerk, in certain cases. It is competent for any trustee or mortgagee who sells any real, personal or mixed property

under the power of sale contained in any deed of trust or mortgage of any kind and who has in his hands any surplus money, after paying the debt or debts secured by such deed of trust or mortgage and costs and expenses of such sale, to pay into the office of the clerk of the superior court of the county where the sale was had, any surplus moneys in his hands as aforesaid in all cases where the grantor in such deed of trust or mortgage is dead and there is no executor or administrator of his estate, and in all other cases where such trustee or mortgagee is, for any cause, in doubt as to who is the proper party or parties to whom to pay such surplus moneys. Such payment to the clerk shall have the effect to discharge such trustee or mortgagee from all liability to the extent of the amount so paid. The clerk shall receive such money from such trustee or mortgagee and execute a receipt for the same under the seal of his office. The failure of any clerk, however, to place his seal upon such receipt shall not invalidate the receipt if it bears the genuine signature of the clerk. The official bond of such clerk shall be responsible for the safe keeping of such moneys until the same shall be paid to the party or parties entitled thereto, or be paid out under the order of a court of competent jurisdiction.

1913, c. 15, ss. 1, 2.

2593. Special proceedings to determine ownership of surplus. Special proceedings may be instituted before the clerk of the superior court to determine who is the rightful party to whom any fund paid into his office under the preceding section shall be paid. All persons claiming an interest in such funds shall be made parties, and if an answer is filed raising issues as to the ownership of said moneys, the case shall be transferred to the civil issue docket of the superior court for trial. Any party in interest may appeal to the judge of the superior court from any order made by the clerk. The clerk may require bond of parties when action is transferred to civil issue docket, as in other civil actions. The court may, in its discretion, order the costs and a reasonable attorney's fee to be paid out of the funds in controversy.

1913, c. 15, s. 3; 1919, c. 111, ss. 1, 2.

ART. 4. DISCHARGE AND RELEASE

2594. Discharge of record of mortgages and deeds of trust. Any deed of trust or mortgage registered as required by law may be discharged and released in the following manner:

1. The trustee or mortgagee or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortgagee or legal representative, may, in the presence of the register of deeds or his deputy, acknowledge the satisfaction of the provisions of such deed of trust or mortgage, whereupon the register or his deputy shall forthwith make upon the margin of the record of such deed of trust or mortgage an entry of such acknowledgment of satisfaction, which shall be signed by the trustee, mortgagee, legal representative or attorney, and witnessed by the register or his deputy, who shall also affix his name thereto.

2. Upon the exhibition of any mortgage, deed of trust or other instrument intended to secure the payment of money, accompanied with the bond or note, to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee,

trustee, or assignee of the same, or by any chartered active banking institution in the state of North Carolina, when so endorsed in the name of the bank by an officer thereof, the register or his deputy shall cancel the mortgage or other instrument by entry of "satisfaction" on the margin of the record; and the person so claiming to have satisfied the debt may retain possession of the bond or mortgage or other instrument. But if the register or his deputy requires it, he shall file a receipt to him showing by whose authority the mortgage or other instrument was canceled.

3. Upon the exhibition of any mortgage, deed of trust, or other instrument intended to secure the payment of money by the grantor or mortgagor, his agent or attorney, together with the notes or bonds secured thereby, to the register of deeds or his deputy of the county where the same is registered, the deed of trust, mortgage, notes or bonds being at the time of said exhibition more than ten years old, counting from the date of maturity of the last note or bond, the register or his deputy shall make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not.

4. Every such entry thus made by the register of deeds or his deputy, and every such entry thus acknowledged and witnessed, shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded.

Rev., s. 1046; Code, s. 1271; 1870-1, c. 217; 1891, c. 180; 1893, c. 36; 1901, c. 46; 1917, c. 49, s. 1; 1917, c. 50, s. 1.

The entry of satisfaction of a mortgage by the proper person is conclusive of the fact of the discharge: *Smith v. Fuller*, 152-7.

Attorney cannot cancel or discharge mortgage unless authorized by client: *Christian v. Yarborough*, 124-72—but if client, after being informed, retains benefit from the unauthorized action of his attorney, it is a ratification, *Ibid*.

Trustee has no power hereunder to release portion of premises from an unsatisfied trust: *Woodcock v. Merrimon*, 122-731; *Brown v. Davis*, 109-23—but if he is authorized to do so, he should state his authority, the consideration for the release, and the name of the grantee, *Ibid*.

Entry of satisfaction of a mortgage on margin of registry, witnessed by register of deeds, is competent evidence of payment of debt secured thereby: *Robinson v. Sampson*, 121-99. Purchaser at sale made in pursuance of mortgage, without notice of unrecorded release of timber rights in land, obtains good title: *Barber v. Wadsworth*, 115-29; *Lumber Co. v. Dail*, 111-120. Mortgage can only be released so as to affect purchasers at sale by cancellation hereunder, or by reconveyance duly recorded: *Barber v. Wadsworth*, 115-32. Where decree adjudges deed void, no marginal cancellation, as in case of mortgages and deeds of trust, is required, but same is commendable practice: *Smith v. King*, 107-273. When mortgage debt has been satisfied, mortgage is no longer operative, though not marked satisfied of record: *Blake v. Broughton*, 107-220; *Walker v. Mebane*, 90-259. Release of debt secured by mortgage need not be under seal: *Adams v. Battle*, 125-158.

Section merely referred to in *Bank v. Mfg. Co.*, 96-305.

2595. Register to enter satisfaction on index. When satisfaction of the provisions of any deed of trust or mortgage is acknowledged and entry of such acknowledgment of satisfaction is made upon the margin of the record of said deed of trust or mortgage, or when the register of deeds or his deputy shall cancel the mortgage or other instrument by entry of satisfaction, then the register of deeds or his deputy shall enter upon the alphabetical indexes kept by him, as required by law, and opposite the names of the grantor and grantee and on

a line with the names of said grantor and grantee, the words "satisfied mortgage," if the instrument of which satisfaction has been acknowledged or entered is a mortgage, and the words "satisfied deed of trust," if the instrument of which satisfaction has been acknowledged or entered is a deed of trust.

1909, c. 658, s. 1.

2596. Recorded deed of release of mortgagee's representative. The personal representative of any mortgagee or trustee in any mortgage or deed of trust which has heretofore or which may hereafter be registered in the manner required by the laws of this state may discharge and release the same and all property thereby conveyed by deed of quitclaim, release or conveyance executed, acknowledged and recorded as is now prescribed by law for the execution, acknowledgment and registration of deeds and mortgages in this state.

1909, c. 283, s. 1.

2597. Release of corporate mortgages by corporate officers. All mortgages and deeds in trust executed to a corporation may be satisfied and so marked of record, as by law provided for the satisfaction of mortgages and deeds in trust, by the president, cashier, secretary or treasurer of such corporation signing the name of such corporation by him as such officer. Where mortgages or deeds in trust were marked "satisfied" on the records before the twenty-third day of February, nineteen hundred and nine, by any president, secretary, treasurer or cashier of any corporation by such officer writing his own name and affixing thereto the title of his office in such corporation, such satisfaction is validated, and is as effective to all intents and purposes as if a deed of release duly executed by such corporation had been made, acknowledged and recorded: Provided, however, this validating provision shall not apply to any suits pending in the courts of the state on February 23, 1909.

1909, c. 283, ss. 2, 3.

CHAPTER 55

MOTOR VEHICLES

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ART. 1. GENERAL PROVISIONS.

2598. **Terms defined.** The term and words "motor vehicles" used in this chapter shall be construed to mean all vehicles propelled by any power other than muscular power, except traction engines, road rollers, fire wagons, engines, police patrol wagons, ambulances, and such vehicles as run only upon rails or tracks. The term "owner" shall include any person, firm, association, or corporation owning a motor vehicle or renting a motor vehicle, or having the exclusive use thereof under a lease or otherwise. The term "public highway" or "highways" shall be construed to mean any public highway, township, county or state road, or any country road, any public street, alley, park, parkway, drive or public place in any city, village, or town. The term and words "business portion of any city or village" shall be construed to mean the territory of a city or incorporated village contiguous to a public highway which is at that point either wholly or partially built up with structures devoted to business.

1917, c. 140, s. 1.

For definition of automobile, see *Motor Co. v. Flynt*, 178-399. The general use of automobiles for business or for pleasure makes garages or supply stations a necessity, and the establishment of such stations in a residential section is not a nuisance per se: *Hanes v. Carolina Cadillac Co.*, 176-350.

2599. Violation a misdemeanor. Any person violating any provision of this chapter shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1917, c. 140, s. 21.

The act of 1904, c. 445, by imposing a punishment by "fine not exceeding \$50, or imprisonment not exceeding twenty days, or both," placed this beyond the jurisdiction of a justice of the peace: *State v. McAden*, 162-575. This is changed in this section.

A person driving an automobile in violation of law, and thereby causing the injury or death of another person, may be criminally liable: *State v. Gash*, 177-595 (manslaughter); *State v. McIver*, 175-761 (manslaughter).

2600. Duty of officer; manner of enforcement. For the purpose of enforcing the provisions of this chapter it is hereby made the duty of every police officer, every marshal, deputy marshal, or watchman of any incorporated city or village, and every sheriff, deputy sheriff, and all other lawful officers of any county, and every constable of any township, to arrest, within the limits of their jurisdiction, any person known personally to any such officer, or upon the sworn information of a credible witness, to have violated any of the provisions of this chapter, and to immediately bring such offender before any justice of the peace or officer having jurisdiction; and any such person so arrested shall have the right of immediate trial, and all other rights given to any person arrested for having committed a misdemeanor. Every officer herein named who shall neglect or refuse to carry out the duties imposed by this chapter shall be liable on his official bond for such neglect or refusal as provided by law in like cases.

1917, c. 140, s. 22.

2601. No municipal ordinance in conflict. No governing board of any city or town shall pass or have in effect or in force any ordinance contrary to the provisions of this chapter.

1917, c. 140, s. 23.

ART. 2. REGISTRATION OF VEHICLES

2602. Application for registration. Every owner of a motor vehicle which shall be operated or driven upon the public highways of this state either by himself, his chauffeur, or another by his authority, shall, for each motor vehicle owned, except as herein otherwise expressly provided, cause to be filed in the office of the secretary of state an application for registration on a blank to be furnished by the secretary of state for that purpose, containing a brief description of the motor vehicle to be registered, including the name, maker's or manufacturer's serial number, style of machine, and horsepower, the name and address of the owner, and such other information as the secretary of state may deem necessary.

1917, c. 140, s. 2.

2603. Registered by secretary of state. Upon receipt of an application for registration of a motor vehicle as provided in this chapter, the secretary of state shall file such application in his office and register such motor vehicle, with the name and residence of the owner, together with the facts stated in such application, in a book or index to be kept for that purpose, under the distinctive number assigned to such motor vehicle by the secretary of state, which book or index shall be open to inspection during reasonable business hours.

1917, c. 140, s. 3.

2604. Registration lists. The secretary of state shall have printed as soon as practicable after the beginning of each automobile registration year a list of the automobile registrations in this state, and supplementary lists from time to time thereafter, showing license number, name, and address of party to whom issued, and name of machine registered. Five hundred copies or more, within the discretion of the secretary of state, of such directory shall be printed, to be paid for from the revenue derived from the registration of automobiles, by warrant of the auditor on the state treasurer.

1919, c. 127.

2605. Number and certificate given; expiration of certificate. Upon the filing of such application and the payment of fees provided in this chapter, the secretary of state shall assign to such motor vehicle a distinctive number, and, without expense to the applicant, issue and deliver to the owner a certificate of registration in such form as the secretary of state may determine, and shall also furnish to such applicant one display number as hereinafter provided for. All certificates of registration shall expire on June thirtieth, following the date of issue.

1917, c. 140, ss. 4, 5.

2606. Dealers to report sales. The secretary of state shall require from each wholesale and retail dealer in automobiles in the state once each month a list of all retail sales, and it shall be the duty of each of the aforesaid dealers to furnish this information to the secretary of state within the first ten days of each month of such sales made during the preceding month.

1917, c. 140, s. 5.

2607. Cancellation and transfer of certificate. Upon the sale of a motor vehicle registered under the provisions of this chapter, the registered owner shall within ten days from the date of such sale return to the secretary of state his certificate of registration furnished him as hereinbefore provided for, which certificate of registration shall be canceled: Provided, that such registered owner may, at the time of returning such certificate, upon proper application for transfer filed in the office of the secretary of state and the payment of a transfer fee of fifty cents, have a new certificate of registration issued to him, containing the original registration number, for a motor vehicle owned by him of not greater tax horsepower, such certificate to remain in force until June thirtieth following date of issue. In case the machine for which a transfer license is desired is of greater tax horsepower, the difference between the amount paid for the original license and the annual fee for the machine for which transfer license is desired shall be paid at the time such application for transfer is filed, but nothing herein contained shall be construed as authorizing the secretary of state to make a rebate in case the transfer license is issued for a machine of less tax horsepower than the one originally registered. A license cannot be transferred from one person to another.

1917, c. 140, s. 8.

2608. Display numbers required. In addition to the certificate of registration, the secretary of state shall furnish to each registered owner two display numbers, which shall at all times be conspicuously displayed by such owner, one on the front and one on the rear of the registered motor vehicle for which the display

numbers are issued. The display numbers shall be rigidly fastened in a horizontal position, and the lower edges thereof shall be at least fifteen inches from the ground, and during the times when a motor vehicle is required to display lights the rear registered number shall be so illuminated as to be legible at a distance of fifty feet. In case of the loss or destruction of a display number, the secretary of state, upon proper proof thereof filed with him, and the payment of one dollar, shall secure for such owner a duplicate number, and the secretary of state may in his discretion authorize the applicant for duplicate number to have prepared for use a temporary number until the duplicate can be made and furnished. It shall be deemed a violation of this chapter for any person to display a fictitious number or more than two display numbers on any motor vehicle operated on the highways of this state. From and after July 1, 1920, the secretary of state shall furnish but one display number with certificate of registration, and the one display number issued shall be conspicuously displayed on the rear of the registered motor vehicle for which it was issued.

1917, c. 140, s. 9; 1919, c. 258.

2609. Nature of display numbers. The display numbers shall be made of suitable metal, in such size and form as the secretary of state may prescribe, and shall be of a distinctive different color or shade each year.

1917, c. 140, s. 10.

2610. Special numbers to dealers. Every person, firm, association, or corporation manufacturing or dealing in motor vehicles handled for purposes of sale only may, instead of registering such motor vehicles so manufactured or dealt in, make a verified application upon a blank to be furnished by the secretary of state for a general distinctive number for all motor vehicles owned or controlled by such manufacturer or dealer, such application to contain such information as to name, style and class of cars manufactured or dealt in by such person, firm, association, or corporation as the secretary of state may require; and upon the payment of an annual registration fee of twenty-five dollars, such person, firm, association or corporation shall be assigned a distinctive number, to be used by them in the operation of all motor vehicles used for demonstration purposes on the public highways, and the secretary of state shall furnish to such dealer as many duplicate pairs of such display number as they may desire, upon application to him and the payment of five dollars for each pair: Provided, that nothing in this section shall be construed to apply to a motor vehicle operated by any manufacturer or dealer for hire.

1917, c. 140, s. 11; 1919, c. 189, s. 6.

2611. Nonresident owners of vehicles. Nonresident owners or operators of motor vehicles shall be subject to the same requirements and laws as resident owners or operators: Provided, that the nonresident owner of a motor vehicle which is properly registered under the laws of another state, district, or territory shall be exempt from the registration provisions of this chapter for the same period that a properly registered owner of this state is exempt from the registration provisions of the state in which such nonresident resides, not exceeding sixty days: Provided, that nothing herein contained shall be construed to exempt any motor vehicles used for hire by a nonresident.

1917, c. 140, s. 12.

ART. 3. LICENSE FEES

2612. **Amount of license fees.** A license or registration fee shall be charged and collected annually on motor vehicles registered under the provisions of this chapter on each motor vehicle, except motor trucks, motor vehicles for the carriage of passengers for hire, and motorcycles, as follows: On each motor vehicle having a rating of twenty-six horsepower or less, a registration license fee of ten dollars; on each motor vehicle having a rating of more than twenty-six horsepower but not more than thirty horsepower, a registration or license fee of fifteen dollars; on each motor vehicle having a rating of more than thirty horsepower, a registration or license fee of twenty dollars; that each motor vehicle used for the carriage of passengers for hire shall carry a special "service" license to be furnished by the secretary of state, for which the license fee shall be twice the amount fixed for like motor vehicles for private use. The annual license or registration fee for a motorcycle shall be five dollars. The annual registration or license fee for motor trucks shall be as follows: On each motor truck with a carrying capacity of not more than one ton, twelve dollars and fifty cents; on each motor truck with a carrying capacity of more than one ton but not more than two tons, twenty-five dollars; on each motor truck with a carrying capacity of more than two tons but not more than three tons, forty dollars; on each motor truck with a carrying capacity of more than three tons but not more than four tons, sixty-five dollars; on each motor truck with a carrying capacity of more than four tons but not more than five and one-half tons, one hundred dollars; on each trailer, ten dollars for the first ton carrying capacity, and twenty dollars for each additional ton. The method of computing the horsepower of motor vehicles shall be the formula adopted by the society of automobile engineers: Provided, that—

1. Any applicant for the registration of any motor vehicle on or after the first day of March of each year shall be required to pay for said registration a license fee for the balance of the year ending June thirtieth only one-half of the fee levied in this section.

2. No county, city or town shall charge any license or registration fee on motor vehicles in excess of one dollar per annum.

3. No motor truck with a carrying capacity of more than five and one-half tons nor any motor truck with steel tires shall be licensed or allowed to be used upon the state highway system.

4. All necessary expenses of collecting the said license or registration fees, including clerical assistance, the cost of purchasing number plates and mailing same, and for such blanks, books, and other supplies as cannot be furnished by the state printer, shall be paid for monthly from the revenue derived from said fees by warrant of the auditor on the state treasurer; and said expenses shall be approved by the governor and council of state, and shall not in the aggregate exceed ten per cent of the total amount collected by the secretary of state under the provisions of this chapter.

1917, c. 140, s. 6; 1919, c. 189, s. 5.

2613. **Application of funds by state highway commission.** All funds collected by the secretary of state under the provisions of this chapter, or amendments thereto, shall be paid to the state treasurer monthly, to be kept as a separate fund to be known as the "state highway fund," which shall be drawn upon and

expended as directed by the state highway commission for the construction and maintenance of a system of state highways as authorized by article 1, entitled State Highway Commission and State Highway Fund, of the chapter Roads and Highways, or by this chapter. Nothing in this chapter shall prevent the state highway commission and the local road authorities to make agreements as to the method or the amount required for the maintenance of roads and bridges to be maintained under the provisions of this chapter.

1917, c. 140, s. 7; 1917, c. 141; 1913, c. 107, s. 7.

ART. 4. OPERATION OF VEHICLES

2614. By incompetent person; racing. No person shall operate a motor vehicle upon the public highways of this state who is under the age of sixteen years and who is not competent physically and mentally, and no person shall operate a motor vehicle when intoxicated, or in a race, or on a bet or wager, or for the purpose of making a speed record: Provided, nothing herein contained shall prevent racing on private race courses or tracks.

1917, c. 140, s. 13.

Person under age of 16 driving an automobile is negligence per se, but there is no civil liability unless such negligence is the proximate cause of an injury: *Taylor v. Stewart*, 172-203; s. c., 175-199.

The owner of an automobile is not liable for the injury caused by the negligence of one in charge of the machine, merely from the fact of ownership: *Linville v. Nissen*, 162-96—nor would the relation of father and son make the owner liable, *Ibid*.

But the owner is liable when he authorizes such use, or the person so using the machine is his agent and within the scope of his employment: *Linville v. Nissen*, 162-96; *Cates v. Hall*, 171-360; *Taylor v. Stewart*, 172-203; s. c., 175-199; *Williams v. May*, 173-78; *Clark v. Sweaney*, 175-280; s. c., 176-529; *Wilson v. Polk*, 175-490.

The fact that the person injured was at the time violating the law will not prevent a recovery, unless such violation in some way contributed to the injury: *Zageir v. Express Co.*, 171-692.

2615. Brakes, horns, and lights required. Every motor vehicle operated or driven upon the public highways of this state shall be provided with adequate brakes in good working order and sufficient to control such vehicle at all times, when same is in use, and a suitable and adequate bell, horn, or other device for signaling, and shall during the period from one-half hour after sunset to one-half hour before sunrise, display at least two lighted lamps on the front, and shall also display a red light visible from the rear, which may be in combination with the light illuminating the display number on the rear. as heretofore provided in this chapter: Provided, that the lamps on such vehicle need not be lighted when the vehicle is standing under the rays of a light and can be plainly seen, and that one light displayed on the front of a motorcycle shall be deemed a compliance with this section. A motor vehicle of any kind operated on the public highways of the state shall not use any lighting device equipped with a reflector, unless the same shall be so designed, deflected, or arranged that no portion of the beam or reflected light, when measured seventy-five feet or more ahead of the lamps, shall rise above forty-two inches from the level surface on which the vehicle stands under all conditions of load.

1917, c. 140, ss. 14, 16; 1919, c. 292.

Running an automobile at night without sufficient headlight: *Wilson v. Polk*, 175-490.

2616. Driving regulations; frightened animals; crossings. A person operating or driving a motor vehicle shall, on signal by raising the hand, from a person riding, leading, or driving a horse or horses or other draft animals, bring such motor vehicle immediately to a stop, and, if traveling in the opposite direction, remain stationary so long as may be reasonable to allow such horse or other animal to pass, and, if traveling in the same direction, use reasonable caution in thereafter passing such horse or other animal: Provided, that in case such horse or other animal appears badly frightened, and the person operating such motor vehicle is so signaled to do, such person shall cause the motor of the motor vehicle to cease running so long as shall be reasonably necessary to prevent accident and insure the safety of others; and it shall also be the duty of any male chauffeur or driver of any motor vehicle and other male occupants thereof over the age of sixteen years while passing any horse, horses or other draft animals which appear frightened, upon the request of the person in charge thereof and driving such horse or horses or other draft animals, to give such assistance as would be reasonable to insure the safety of all persons concerned and to prevent accident. In approaching or passing a car of a street railway which has been stopped to allow passengers to alight or embark, the operator of every motor vehicle shall slow down, and shall bring said vehicle to a full stop when going in the same direction as the street car. Upon approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, and upon approaching an intersecting highway or a curve, or a corner in a highway where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn, or other device for signaling. Upon approaching an intersecting highway, a bridge, dam, sharp curve, or deep descent, and also in traversing such intersecting highway, bridge, dam, curve, or descent, a person operating a motor vehicle shall have it under control and operate it at such speed, not to exceed ten miles an hour, having regard to the traffic then on such highway and the safety of the public.

1917, c. 140, s. 15.

It is the duty of the operator of an automobile on the highway or public streets to use reasonable precaution to avoid injury, and he is required to take into consideration the tendency of the machine to frighten horses: *Tudor v. Bowen*, 152-441; *Gaskins v. Hancock*, 156-56; *Curry v. Fleer*, 157-16; *Long v. Warlick*, 148-32.

Regulations to be observed in approaching an intersecting highway: *Manly v. Abernathy*, 167-220—an "intersecting" highway means one that touches or joins another without necessarily crossing it, *Ibid.* This includes a railroad: *Hinton v. R. R.*, 172-587; *Shepard v. R. R.*, 169-239. But a violation of such regulation by the person injured will not prevent a recovery if such negligence is not the proximate cause of the injury: *Hinton v. R. R.*, 172-587; *Shepard v. R. R.*, 169-239; *s. c.*, 166-539; *Clark v. Wright*, 167-646.

A violation of the statute in regard to crossings, resulting in the death of a person, may make the offender criminally liable: *State v. Gash*, 177-595; *State v. McIver*, 175-761.

2617. Rule of the road in passing. Whenever a person operating a motor vehicle shall meet on the public highway any other person riding or driving a horse or horses or other draft animals, or any other vehicle, the person so operating such motor vehicle and the person so riding or driving a horse, horses, or other draft animals, shall reasonably turn the same to the right of the center of such highway so as to pass without interference. Any person so operating a motor vehicle shall, on overtaking any such horse, draft animal, or other vehicle, pass on the left side thereof, and the rider or driver of such horse, draft

animal, or other vehicle shall, as soon as practicable, turn to the right so as to allow free passage on the left. Any person so operating a motor vehicle shall, at the intersection of a public highway, keep to the right of the intersection of the center of such highway when turning to the right and pass to the right of such intersection when turning to the left, and shall signal with the outstretched hand the direction in which turn is to be made.

1917, c. 140, s. 16.

Failure to turn to the right, as required by the statute, is negligence and renders the person liable if it is the proximate cause of injury to another: *Goodrich v. Matthews*, 177-198—but not if the violation was caused by the wrongful act of the person injured, *Ledbetter v. English*, 166-125; *Cook v. Jerome*, 172-626.

2618. Speed regulations; mufflers. No person shall operate a motor vehicle upon the public highways of this state recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limb of any person: Provided, that a rate of speed in excess of eighteen miles per hour in the residence portion of any city, town, or village, and a rate of speed in excess of ten miles per hour in the business portion of any city, town, or village, and a rate of speed in excess of twenty-five miles per hour on any public highway outside of the corporate limits of any incorporated city or town, shall be deemed a violation of this section: Provided further, that no person shall operate upon the public highways inside the corporate limits of any incorporated city or town of this state a motor vehicle with muffler cut-out open.

1917, c. 140, s. 17.

Violation of speed regulations is negligence, and in case of injury or death of another person it may render the offender criminally liable: *State v. Gash*, 177-595; *State v. McIver*, 175-761.

Liability for damages caused by exceeding the speed limit: *Clark v. Sweaney*, 175-280; s. e., 176-529; *Linville v. Nissen*, 162-96; *Clark v. Wright*, 167-646.

2619. Obstructions in road. No person shall throw, place or deposit any glass or other sharp or cutting substance or any injurious obstruction in or upon any of the public highways of this state.

1917, c. 140, s. 18.

2620. Stopping motors; standing near fire plug. No person shall permit the motor of a motor vehicle to remain running when such motor vehicle is unoccupied on the public highways of this state for a longer period than five minutes: Provided, that no motor vehicle shall be left standing within fifteen feet of a fire plug upon the public highways of this state unless in charge of a person who can immediately move such vehicle in case of necessity.

1917, c. 140, s. 19.

2621. Use of vehicle without owner's consent. No person shall use or operate any motor vehicle owned by another without the knowledge or consent, expressed or implied, of such owner, on any public highway or elsewhere in this state: Provided, this section shall not be construed to repeal or in any way affect any law making the unlawful taking of such vehicle for temporary use a criminal offense.

1917, c. 140, s. 20.

See Crimes, Larceny.

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CHAPTER 56

MUNICIPAL CORPORATIONS

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SUBCHAPTER I. REGULATIONS INDEPENDENT OF ACT OF 1917

ART. 1. GENERAL POWERS

2622. Body politic. Every incorporated city or town is a body politic and corporate, and shall have the powers prescribed by statute, and those necessarily implied by law, and no other.

Rev., s. 2915; Code, s. 702.

Creation of private corporations and public corporations distinguished: *Mills v. Williams*, 33-558.

The term "municipal corporation," in a broad sense, includes public corporations or public quasi-corporations, such as counties, townships, and other governmental agencies, while in the generally restricted sense it applies only to incorporated cities and towns: *Smith v. Trustees*, 141-143. Distinction between towns and counties in their corporate powers and liabilities: *White v. Comrs.*, 90-437; *McCormac v. Comrs.*, 90-441; *Dare v. Currituck*, 95-189; *Manuel v. Comrs.*, 98-9; *Prichard v. Comrs.*, 126-908.

Drainage districts are not municipal corporations, but quasi-public corporations or governmental agencies: *Comrs. v. Webb*, 160-594; *Sanderlin v. Luken*, 152-743. A corporation with capital stock and organized for business purposes is not a municipal corporation, although it may be authorized to exercise certain governmental powers: *Southern Assembly v. Palmer*, 166-75.

Municipal corporations, in the absence of constitutional restrictions, are the creatures of legislative will, and are subject to its control: *Lutterloh v. Fayetteville*, 149-65; *Manly v. Raleigh*, 57-372. For constitutional restriction as to creation by general laws instead of by special charter, see const., art. 8, sec. 4, and subchapter 2 of this chapter.

Municipal corporations are but instrumentalities of the state for the administration of local government, and their powers may be enlarged, abridged, or entirely withdrawn, at the pleasure of the legislature: *Woodall v. Highway Com.*, 176-377; *Murphy v. Webb*, 156-402; *Burgin v. Smith*, 151-561; *Wharton v. Greensboro*, 146-356; *Jones v. Comrs.*, 137-592; *Lilly v. Taylor*, 88-490; *State v. Thomas*, 118-1221; *Wood v. Oxford*, 97-227; *State v. Beacham*, 125-652.

Legislature may submit question of acceptance of charter to a vote of the people: *Henderson v. Davis*, 106-88—may confer upon governor the power to appoint aldermen, *Harris v. Wright*, 121-172—may change boundaries, *Comrs. v. Thorn*, 117-211; *Lutterloh v. Fayetteville*, 149-65—may abolish and recreate with different limits, *Ward v. Elizabeth City*, 121-1.

Municipal corporation can exercise only such powers as (1) are granted in express words; (2) necessarily or fairly implied from the charter, and (3) essential to the declared objects and purposes of the corporation; not such as are simply convenient, but those which are indispensable: *State v. Webber*, 107-962; *Elizabeth City v. Banks*, 150-407; *Mayo v. Comrs.*, 122-5; *Smith v. New Bern*, 70-18.

The municipal powers are governmental and proprietary or private; the former are under the control of the legislature, and the latter are within the discretion of the officers: *Asbury v. Albemarle*, 162-247; *Sewerage Co. v. Monroe*, 162-275; *Hines v. Rocky Mount*, 162-409; *State v. Prevo*, 178-740.

A municipal corporation is exempt from liability for any injury resulting from a failure to exercise its governmental powers, or for their improper or negligent exercise, but it is amenable to an action for injury caused by its neglect to perform its ministerial functions or by an improper or unskillful performance of them: *Smith v. Comrs.*, 176-466; *Price v. Trustees*, 172-84; *Snider v. High Point*, 168-608; *Hobbs v. Washington*, 168-293; *Nichols v. Fountain*, 165-166; *Donnell v. Greensboro*, 164-330; *Howland v. Asheville*, 174-749; *Hull v. Roxboro*, 142-453; *Williams v. Greenville*, 130-93; *Fisher v. Newbern*, 140-506; *Levin v. Burlington*, 129-184; *McIlhenny v. Wilmington*, 127-146; *Prichard v. Commissioners*, 126-908; *Downs v. High Point*, 115-182; *Coley v. Statesville*, 121-301; *Moffitt v. Asheville*, 103-237; *Threadgill v. Comrs.*, 99-352; *Bunch v. Edenton*, 90-431; *Lewis v. Raleigh*, 77-229; *Hill v. Charlotte*, 72-55; *Moser v. Burlington*, 162-141; *Hines v. Rocky Mount*, 162-409; *Harrington v. Greenville*, 159-632; *Woodie v. North Wilkesboro*, 159-353; *Terrell v. Washington*, 158-282.

Debts due from municipal corporation are not extinguished by repeal of its charter, and still exist notwithstanding that repeal: *Broadfoot v. Fayetteville*, 124-478; *Wilson v. Leary*, 120-

90 (overruling *Fox v. Horah*, 36-358; *Wallace v. Trustees*, 84-164)—and remedies for enforcement of them existing when contract was made must be left unimpaired by legislature unless a substantial equivalent is provided, *Ibid*.

2623. Corporate powers. A city or town is authorized:

1. To sue and be sued in its corporate name.

The corporation of Hickory having been chartered under the name of "The City of Hickory," a summons is properly directed against "the city of Hickory" and served upon the mayor and the secretary of board of aldermen: *Loughran v. Hickory*, 129-281.

A municipality is a proper party to institute an action to prevent a public nuisance by proposed enlargement of a freight depot in the city: *Hickory v. Railroad*, 141-716.

Cities and towns must be sued in county in which they are located, and if suit is brought in another county, they have the right to have it removed: *Jones v. Statesville*, 97-86.

Demand must be made that governing body sue to enforce its contracts before citizen has right to do so: *Merrimon v. Paving Co.*, 142-539. See section 3206.

Where charter of a city requires notice within specified time of a claim before action can be brought, a claimant must allege and prove that notice was given: *Cresler v. Asheville*, 134-311.

Notice to agent is notice to principal; and this rule of law is applicable to municipal corporations, but notice to certain petty officials does not bring a case within the rules: *Shields v. Durham*, 118-450; see *Hawley v. Comrs.*, 82-22.

The law requiring that claims against municipal corporations shall be presented to proper authorities and demand for payment as prerequisites to an action to enforce such claims, applies only to demands arising *ex contractu* and not to those arising *ex delicto*: *Shields v. Durham*, 118-450; see section 1330; *R. R. v. Brunswick*, 178-254. Failure to present claim may be excused by showing that claimant was not in condition to give the notice: *Hartsell v. Asheville*, 164-193; *s. c.*, 166-633; *Terrell v. Washington*, 158-282.

2. Out of any funds on hand, and without creating any debt, to purchase and hold real estate for the use of its inhabitants.

Municipal corporation may acquire title to land by adverse possession: *Raleigh v. Durfey*, 163-154.

3. To purchase and hold land, within or without its limits, not exceeding fifty acres, for the purpose of a cemetery, and to prohibit burial of persons at any other place in the town, and to regulate the manner of burial in such cemetery. All municipal corporations purchasing real property at any trustee's, mortgagee's, or commissioner's sale or execution or tax sale shall be entitled to a conveyance therefor from the trustee, mortgagee or other person or officer conducting such sale, and deeds to such municipal corporations or their assigns shall have the same force and effect as conveyances to private purchasers. The provisions of this subsection shall apply to such sales and conveyances as may have been heretofore made by the persons and officers herein mentioned.

Right acquired by any person, under a deed or contract, to bury dead bodies in any particular spot, or to erect and maintain vaults for that purpose, whether construed as an easement or license, is subject to police power of government, in the exercise of which not only future interments may be prohibited, but the remains of persons theretofore buried may be removed: *Humphrey v. Church*, 109-132; *Wardens v. Washington*, 109-21.

4. To make such contracts, and purchase and hold such personal property as may be necessary to the exercise of its powers.

It is questionable whether a town could engage in a business enterprise for the profit that might be made, or that it would be sustained, although sanctioned by act of legislature and a majority of town voters: *Slocomb v. Fayetteville*, 125-362.

5. To make such orders for the disposition or use of its property as the interest of the town requires.

See section 2688.

6. To grant upon reasonable terms franchises for public utilities, such grants not to exceed the period of sixty years, unless renewed at the end of the period granted; also to sell or lease any waterworks, lighting plants, gas or electric, or any other public utility which may be owned by any city or town: Provided, that in the event of such sale or lease it shall be approved by a majority of the qualified voters of such city or town; and also to make contracts, for a period not exceeding thirty years, for the supply of light, water or other public commodity. But this subsection shall not apply to Cumberland county.

“Public utilities” include railroads, both steam and street, telegraphs, telephones, waterworks, gas works, and electric light plants: *Turner v. Public-Service Co.*, 170-172.

The right given to a gas company to place gas-pipes and mains in public streets to distribute gas for public and private use is a franchise and not a license: *Elizabeth City v. Banks*, 150-407—and before the adoption of this subsection in 1905 a municipal corporation could not grant such franchise, *Ibid.*

City authorities are empowered to issue license for laying down a street railway track upon streets of city, and for operation of railway: *Atkinson v. Railway Co.*, 113-581. License granted to lay a track upon and to that extent use streets, in the absence of an express power in charter to do so, such license cannot be construed into a grant of a permanent easement: *State v. R. R.*, 141-736—and a contract to allow a railroad to exercise such privilege is made subject to the police power vested in the city, *Ibid.*

Where a city granted a street railway company right to construct branch road over certain street, it cannot, by subsequent ordinance, arbitrarily annul its license; and when, under such latter ordinance, it attempts by force to prevent completion of road then in process of construction, injunction will issue restraining city from such interference: *R. R. v. Asheville*, 109-688. Injunctions which encourage enterprise and facilitate public convenience will be dissolved only in clear cases: *Ibid.*

While a town has right to grant a franchise to a water company, and the water company has the power to stipulate that it will not charge in excess of the maximum rates named in ordinance granting the franchise, yet, if such maximum rates are discriminating or unreasonable, they are not binding upon consumers, whom the courts will protect against unreasonable charges: *Griffin v. Water Co.*, 122-206; see *Gorrell v. Water Supply Co.*, 124-334.

Acceptance of franchise by water company carries with it the duty of supplying water to all persons along the lines of its mains without discrimination and at uniform rates: *Griffin v. Water Co.*, 122-206; *Gorrell v. Water Supply Co.*, 124-334; *Solomon v. Sewerage Co.*, 133-150. And also to furnish water to schools free, where the contract so provides: *Water Co. v. Trustees*, 151-171.

Quere, whether legislature can authorize town authorities to grant exclusive franchises: *R. R. v. R. R.*, 114-725; but see *Thrift v. Elizabeth City*, 122-31.

The power of municipal corporation to grant a franchise to a public utility to use the streets is subject to the right of the abutting property-owners to demand compensation for any additional servitude: *Staton v. R. R.*, 147-428; *Brown v. Electric Co.*, 138-533; but see *Hester v. Traction Co.*, 138-288.

Where railroad company entered upon and constructed its road upon a street, thereby reducing width of latter, and it does not appear that it entered under any statutory authority, but only by license of city, abutting property-owner who is endamaged thereby may maintain a common-law action for damages: *White v. Railroad*, 113-610; compare *Hester v. Traction Co.*, 138-288; *Brown v. Electric Co.*, 138-533.

By act of 1911, c. 86, municipal corporations were authorized to establish public utilities: *Murphy v. Webb*, 156-402—and they might exercise the power of eminent domain for that purpose, *Eppley v. Bryson City*, 157-487. This act was repealed except as to Cherokee, see note following this section. For general power to acquire public utilities, see sections 2787 (3), 2807, 2832.

7. To provide for the municipal government of its inhabitants in the manner required by law.

8. To levy and collect such taxes as are authorized by law.

Bill incorporating town is valid even if not read and passed on three several days according to constitutional requirement, but such town's governing body cannot levy a tax under it: *Cotton Mills v. Waxhaw*, 130-293. Power to tax must be strictly construed: *Plymouth v. Cooper*, 135-5—and is determined by charter, *Winston v. Beeson*, 135-271; see sections 2677, 2678, 2813.

9. To do and perform all other duties and powers authorized by law.

For an enumeration of powers under municipal act of 1917, see section 2787.

Power may be granted to condemn land outside of corporate limits for waterworks: *Asheville v. Weaver*, 148-56.

Legislature may authorize municipal corporations to apply their revenue and credit to any legitimate public purpose within the scope of its organization, unless prohibited by the constitution, and such purpose as tends to the general good of the community, although the advantage does not reach every individual taxpayer residing there, is such public purpose: *Wood v. Oxford*, 97-227—but it cannot authorize any subscription or donation to a private purpose, *Ibid.*

Powers are granted to municipal corporations to be used for public purposes exclusively; any act for private benefit, with incidental public benefit, is void: *Fisher v. New Bern*, 140-506; *Stratford v. Greensboro*, 124-127.

City cannot authorize obstruction of street by railroad and manufacturing company for private advantage of the latter: *Butler v. Tobacco Co.*, 152-416.

Municipal corporation has only such police power as is expressly granted or reasonably implied: *State v. Dannenberg*, 150-799.

Resident taxpayer has sufficient interest in subject to invoke courts to prevent an illegal disposition of public funds, or illegal creation of a public debt, or to prevent the misuse of corporate power: *Stratford v. Greensboro*, 124-127; *Merrimon v. Paving Co.*, 142-539—but the citizen cannot call upon courts to interfere with control of corporate property or performance of corporate contracts until he has first applied to corporation or governing body to take action, and they have refused, and he has exhausted all means within his reach to obtain redress within corporation, unless there is fraud or the threatened action is *ultra vires*: *Merrimon v. Paving Co.*, 142-538.

Board could not make contract for legal services binding for an unlimited time and irrevocable by their successors: *Wilmington v. Bryan*, 141-666.

Rev., s. 2916; Code, ss. 704, 3817; 1901, c. 283; 1905, c. 526; 1907, c. 978; P. L. 1917, c. 223.

Approval by majority of qualified voters in case of sale or lease of public utilities, not required in the town of Reidsville. Pr. 1917, c. 28.

Reformatories for women established by county and city. See Reformatories, Art. 3.

In Alamance county towns may condemn land for cemetery. 1907, c. 172.

Act 1911, c. 86, allowing municipalities to establish public utilities, repealed except as to Cherokee. 1913, c. 179.

May become members of memorial associations. See Monuments, Memorials, and Parks, s. 6938.

2624. How corporate powers exercised. The corporate powers can be exercised only by the board of commissioners, or in pursuance of resolutions adopted by them, unless otherwise specially provided by law.

Rev., s. 2917; Code, ss. 703.

The power to remove officers is vested in the commissioners and not in the people: *Burke v. Jenkins*, 148-25; but see provision for recall of officers, under section 2885.

In the absence of statutory regulation, a majority of a quorum may pass any ordinance or order: *LeRoy v. Elizabeth City*, 166-93.

For exercise of powers by governing body under municipal act of 1917, see article 16 of this chapter.

2625. Application and meaning of terms. This subchapter shall apply to all incorporated cities and towns where the same shall not be inconsistent with special acts of incorporation, or special laws in reference thereto, and the

word "commissioners" shall also be construed to mean "aldermen," or other governing municipal authorities. The sections relating to municipal or town elections shall apply to all cities and towns not expressly excepted by law.

Rev., s. 2918; Code, s. 3827; R. C., c. 111, s. 23.

Section referred to: *Markham v. Simpson*, 175-135. See sections 2778, 2786.

ART. 2. MUNICIPAL OFFICERS

Part 1. Commissioners

2626. Number and election. The board of commissioners of each town shall consist of not less than three nor more than seven commissioners, who shall be biennially elected by the qualified voters of the town, at the time and in the manner prescribed by law.

Rev., ss. 2917, 2919; Code, s. 3787; R. C., c. 111, s. 1.

Commissioners elected annually in the town of Murphy. Pr. Ex. Sess. 1913, c. 1.

As to who are qualified voters, see sections 2654, 2691. For number of commissioners under municipal act of 1917, see sections 2782, 2861, 2868, 2889.

2627. Number may be changed. After the first election the voters of any town may, whenever and as often as they choose, at the time of electing commissioners, and after due notice given thereof by the commissioners then in authority, by a majority of all the votes cast, alter the number of commissioners, so that the number be not more than seven nor less than three; and thenceforth the number of commissioners agreed on shall be chosen.

Rev., s. 2922; Code, s. 3791; R. C., c. 111, s. 7.

2628. Oath of office. The commissioners shall take and subscribe an oath before some person authorized by law to administer oaths that they will faithfully and impartially discharge the duties of their office, and such oath shall be filed with the mayor of such town and entered in a book kept for that purpose.

Rev., s. 2920; Code, s. 3799; R. C., c. 111, s. 12.

2629. Vacancies filled. In case of a vacancy after election in the office of commissioner the others may fill it until the next election.

Rev., s. 2921; Code, s. 3793; R. C., c. 111, s. 9.

2630. Commissioners appoint other officers and fix salaries. The board of commissioners may appoint a town constable, and such other officers and agents as may be necessary to enforce their ordinances and regulations, keep their records, and conduct their affairs; may determine the amount of their salaries or compensation; and also the compensation or salary of the mayor; may impose oaths of office upon them, and require bonds from them payable to the state, in proper penalties for the faithful discharge of their duties.

Rev., s. 2925; Code, s. 3800; R. C., c. 111, s. 13; 1862, c. 51.

For municipal health officer, see Public Health.

When a member of the board has resigned or accepted another office, his vote as a member is void: *Whitehead v. Pittman*, 165-89.

In the absence of statute or special agreement, an officer of a municipal corporation cannot recover compensation for his services: *Borden v. Goldsboro*, 173-661.

Part 2. Mayor

2631. How elected; vacancy. At the same time when commissioners are elected, the voters may by ballot, under the inspection of the same persons and under the same rules and regulations, elect a mayor of the town; and the person having the highest number of votes shall be declared elected. In case of a vacancy in the office, the commissioners may fill the same.

Rev., s. 2931; Code, s. 3794; R. C., c. 111, s. 10.

The qualifications for voting are the same as in general elections, and the claimant must be elected by a sufficient number of qualified voters: *Echerd v. Viele*, 164-122. The mayor pro tem. may exercise the powers of the office in the absence of the mayor: *State v. Thomas*, 141-791.

2632. Oath of office. The mayor, before some justice of the peace, or other person authorized by law to administer oaths, shall take and subscribe the oaths prescribed for public officers, and an oath that he will faithfully and impartially discharge the duties imposed upon him by law, which said oath shall be filed with the records of the town and be entered on the same book with the oaths of the commissioners.

Rev., s. 2932; Code, s. 3798; R. C., c. 111, s. 11.

2633. Presides at commissioners' meeting; mayor pro tem. The mayor shall preside at the meetings of the commissioners, but shall have no vote except in case of a tie; and in the event of his absence or sickness, the board of commissioners may appoint one of their number pro tempore, to exercise his duties.

Rev., s. 2933; Code, s. 3794; R. C., c. 111, s. 10.

Mayor pro tem. exercises duties of mayor in his absence: *State v. Thomas*, 141-791.

The right of the mayor to cast the deciding vote in case of a tie applies to all municipal corporations unless otherwise provided: *Markham v. Simpson*, 175-135.

For veto power of mayor, see sections 2865, 2872.

2634. Mayor's jurisdiction as a court. The mayor of every city or incorporated town is hereby constituted an inferior court, and as such court such mayor shall be a magistrate and conservator of the peace, and within the corporate limits of his city or town shall have the jurisdiction of a justice of the peace in all criminal matters arising under the laws of the state, or under the ordinances of such city or town. The rules of law regulating proceedings before a justice of the peace shall be applicable to proceedings before such mayor, and he shall be entitled to the same fees which are allowed to justices of the peace.

Rev., s. 2934; Code, s. 3818; 1871-2, c. 195; 1876-7, c. 243.

Mayor has jurisdiction to punish for contempt: *In re Deaton*, 105-59.

Mayors of towns and cities have jurisdiction of the offense of violating town or city ordinances: *State v. Wilson*, 106-718.

Act giving police court concurrent original jurisdiction of offenses cognizable by justice of the peace is valid: *State v. Lytle*, 138-738. Jurisdiction may be given to municipal courts over offenses committed beyond the corporate limits: *State v. Brown*, 159-467. Jurisdiction may also be conferred over all offenses less than felony: *State v. Dunlap*, 159-491; *State v. Shine*, 149-480.

2635. Enforce ordinances and penalties. As such court the mayor shall have authority to hear and determine all cases that may arise upon the ordinances of the city or town; to enforce penalties by issuing execution upon any adjudged

violation thereof, and to execute the laws and rules that may be made and provided by the board of commissioners of the city or town for the government and regulation of the city or town; but in all cases any person dissatisfied with the judgment of the mayor may appeal to the superior court as in case of a judgment rendered by a justice of the peace.

Rev., s. 2935; Code, s. 3819; 1876-7, c. 243, s. 2.

It is a misdemeanor to violate an ordinance of a municipal corporation, but it must be a valid ordinance: *State v. Prevo*, 178-740; *State v. Irvin*, 126-989; *State v. Crenshaw*, 94-877; see section 4174. As to valid and invalid ordinances, see section 2673.

The municipal corporation has no power to create criminal offenses, but it may pass valid ordinances, and as a means of enforcement the statute makes the violation of the ordinance a criminal offense: *School Directors v. Asheville*, 137-503; *Board of Education v. Henderson*, 126-689; *State v. Earnhardt*, 107-789.

A chief officer of a city or town has same criminal jurisdiction within corporate limits as is given to justices of the peace; but statutory requisites which confer final jurisdiction must be complied with: *Greensboro v. Shields*, 78-417.

A justice of the peace has concurrent jurisdiction with mayor of city or town of violations of town ordinances, which are made misdemeanors, and the punishment of which cannot exceed a fine of fifty dollars or imprisonment for thirty days: *State v. Cainan*, 94-880.

In a prosecution for violation of town ordinance before a mayor, defendant is not entitled to removal: *State v. Joyner*, 127-541.

Power conferred upon a mayor pro tem. "to exercise the duties" of mayor during his absence includes that of issuing warrant in criminal actions: *State v. Thomas*, 141-791.

An act of general assembly establishing special courts in cities and towns is constitutional: *Washington v. Hammond*, 76-33.

Superior court has no original jurisdiction to try indictments for violation of town ordinances: *State v. White*, 76-15.

Where one is indicted for violating city ordinance, the terms of the ordinance and the particular breach alleged should be set forth: *State v. Edens*, 85-522; *State v. Cainan*, 94-880—but not necessary to aver the authority to pass the ordinance, *State v. Merritt*, 83-677.

Defendant's rights guaranteed by constitution are preserved to him when an unrestricted appeal from mayor of town is given him by the act and trial in superior court is *de novo*; alleged errors in mayor's court may be disregarded on appeal to supreme court: *State v. Brittain*, 143-668; *State v. Whitaker*, 114-819; see *State v. Powell*, 97-417.

A conviction of violating a city ordinance punishing the disturbance of the good order and quiet of town by fighting is not a bar to a prosecution by the state for an assault: *State v. Taylor*, 133-755.

The constitution, art. 9, sec. 5, appropriates all fines for violation of the criminal laws of the state for establishing and maintaining free public schools in the several counties, whether the fines are for violation of town ordinances, made misdemeanor by section 4174, or other criminal statutes: *Board of Education v. Henderson*, 126-689.

The shifting of cars in a street in making up a train constitutes a violation of an ordinance providing that no engine or train shall be stopped on any street except at the foot of same for the reception and delivery of freight: *State v. Railroad*, 141-736.

WARRANTS. Warrant charging creation of disturbance without specifying how it was done is fatally defective: *State v. Hettrick*, 126-977.

Warrant joining two defendants charged with violation of town ordinance by being drunk in public place is fatally defective: *State v. Deaton*, 92-788.

Not necessary to set out ordinance alleged as having been violated; it is sufficient to refer to it by such indicia as point it out with sufficient certainty: *State v. Cainan*, 94-880; *State v. Merritt*, 83-677—but breach of such ordinance must also be alleged, *State v. Edens*, 85-522.

2636. May sentence to work on streets. In all cases where judgments may be entered up against any person for fines, according to the laws and ordinances of any incorporated town, and the person against whom the same is so adjudged refuses or is unable to pay such judgment, the mayor before whom such judgment

is entered may order and require such person, so convicted, to work on the streets or other public works until, at fair rates of wages, such person shall have worked out the full amount of the judgment and costs of the prosecution; and all sums received for such fines shall be paid into the treasury. No woman shall be worked on the streets.

Rev., s. 2937; Code, s. 3806; 1897, c. 270; 1899, c. 128; 1866-7, c. 13.

A fine or penalty imposed by a municipal ordinance is treated as a debt, and under article 1, section 16, of the constitution, a person from whom it is attempted to be collected is exempt from arrest, but he may be indicted and punished for the criminal offense of violation of the ordinance for which it is imposed, under the statute: *State v. Earnhardt*, 107-789.

2637. Mayor certifies ordinances on appeal. In all cases of appeal from a mayor's court to the superior or other court of appeal, when the offense charged is the violation of a town ordinance the mayor shall send with the papers in the case a true copy of the ordinance alleged to have been violated, and shall certify under his hand and seal that said ordinance was in force at the time of the alleged violation of the same.

Rev., s. 2936; 1899, c. 277.

The records of the proceedings of the board of aldermen, kept by the town clerk, are competent evidence of town ordinances: *State v. Irvin*, 126-989.

Part 3. Constable and Policemen

2638. Constable to take oath of office. The town constable shall, before some person authorized to administer oaths, take and subscribe to the oaths prescribed for public officers, and an oath that he will faithfully and impartially discharge the duties of his office according to law, which said oath shall be filed with the mayor and entered in a book with the oaths of the commissioners.

Rev., s. 2938; Code, s. 3808; R. C., c. 111, s. 20.

For appointment of special constable, see *Constables*, s. 974.

2639. Power and duties of constable. As a peace officer, the constable shall have within the town all the powers of a constable in the county; and as a ministerial officer, he shall have power to serve all civil and criminal process that may be directed to him by any court within his county, under the same regulations and penalties as prescribed by law in the case of other constables, and to enforce the ordinances and regulations of the board of commissioners as the board may direct. Whenever any process or other notice is so directed as to authorize a township constable to execute the same a town constable in that county may execute the same without any more specific direction: Provided, such town constable shall be required to give bond for performance of his duties such as is required of township constables who execute civil process.

Rev., s. 2939; Code, ss. 3808, 3810; R. C., c. 111, s. 20; 1879, c. 266; 1897, c. 519; 1899, c. 168; 1907, c. 52, s. 1.

As to powers of constables generally, see section 976. See, also, annotations under section 2642.

Where town constable arrested a person who was intoxicated, without warrant, and imprisoned him in the "lock-up" until he became sober, when constable released him, having never carried him before a magistrate or other person to have the charge investigated, he was guilty of an assault and battery: *State v. Parker*, 75-249.

In respect to arrests without warrant, constable's authority is limited to territory embraced within corporate boundaries; but when constable is acting under valid warrant from mayor of

municipality, or other duly authorized officer, he may make arrests at any place within county in which such city or town is situated: *State v. Sigman*, 106-728; *Martin v. Houck*, 141-317.

Constable is not liable on his official bond for the release of a prisoner arrested by him on void process: *Appomattox Co. v. Buffalo*, 121-37.

No authority to serve beyond limits of his town or city process directed to "constable or other lawful officer of county." To authorize him to make such service, process must be directed to him, not necessarily in his individual name as such officer, but in the name of office he holds: *Appomattox Co. v. Buffalo*, 121-37; *Baker v. Brem*, 126-367; *Davis v. Sanderlin*, 119-84.

No authority to serve any papers for the superior court except process; an appellant's case on appeal from the superior court is not process; hence, service of a case on appeal by a town constable is a nullity: *Forte v. Boone*, 114-176. A writ of attachment issued out of superior court must be addressed to the sheriff instead of a constable: *Carson v. Woodrow*, 160-144.

Town constable cannot serve a notice to take deposition in an action pending in superior court: *Cullen v. Absher*, 119-441; *Brown v. Myers*, 150-441.

2640. Constable as tax collector. The constable shall have the same power to collect the taxes imposed by the commissioners as sheriffs have to collect the taxes imposed by the county commissioners, and he may be required by the commissioners to give bond, with sufficient surety, payable to the state of North Carolina, in such sum as the commissioners may prescribe, to account for the same; upon which suit may be brought by the commissioners as upon the bonds of other officers. The bond of the constable shall be duly proved, before the mayor and commissioners, and registered in the office of the register of deeds.

Rev., s. 2940; Code, 3809; R. C., c. 111, s. 21.

Whenever authorities of town shall be commanded to levy and collect taxes to pay judgment rendered against it, they may appoint a special tax collector to collect same. But this power to appoint such collector is additional and does not abridge their right to require the collection to be made by the regular officer appointed for that purpose: *Webb v. Beaufort*, 88-496.

2641. Policemen appointed. The board of commissioners may appoint town watch or police, to be regulated by such rules as the board may prescribe.

Rev., s. 2926; Code, s. 3803; R. C., c. 111, s. 16.

Office of chief of police is such an office that a quo warranto proceeding may be brought to try the title to it: *Foard v. Hall*, 111-369—and the board of aldermen are not necessary parties defendants, *Ibid.* Not necessary to allege that relator is entitled to office or has any interest therein: *Ibid.*

2642. Policemen execute criminal process. A policeman shall have the same authority to make arrests and to execute criminal process, within the town limits, as is vested by law in a sheriff.

Rev., s. 2927; Code, s. 3811.

When an officer arrests without warrant, he is not liable if the circumstances show that he acted under reasonable belief, but the burden is upon the officer: *Sigmon v. Shell*, 165-582.

The right of a police officer to arrest when he has no warrant is confined necessarily by statute to limits of town: *Martin v. Houck*, 141-317—and when he makes such an arrest outside of limits he is guilty of assault, *Sossamon v. Cruse*, 133-470.

Where a person is fleeing from arrest, charged with a misdemeanor, and is out of control of officer, such officer is guilty of an assault if he shoots at said person: *Sossamon v. Cruse*, 133-470; *State v. Sigman*, 106-728.

If an officer is resisted in making an arrest he may use that degree of force which is necessary to proper performance of his duty; and, after accused person is arrested, officer is justified in the use of such force as may be necessary, even to taking of life, to prevent his escape, whether offense charged is a felony or misdemeanor: *State v. Sigman*, 106-728.

An officer is authorized to take such precaution for safe custody of his prisoner, such as tying or handcuffing, as in his judgment may be necessary, provided he acts in good faith and without malice: *State v. Sigman*, 106-728.

Violation of town ordinances, even in presence of policeman, does not necessarily give him a right to arrest offender: *State v. Belk*, 76-10.

Where town charter provides for appointment of a chief of police or marshal and authorizes him to execute all process directed to him by mayor or others, and declares that, in execution of such process, he shall have same power, etc., which sheriffs and constables have, service by such officer of a summons directed to "the sheriff of W. county or town constable of W. town" is valid: *Lowe v. Harris*, 121-287, distinguishing *Davis v. Sanderlin*, 119-84.

In action for false imprisonment and unlawful arrest, defendants cannot justify on ground that they were summoned by their codefendant, the chief of police, where it appears that arrest was made outside of the limits of the town, without warrant, and there was no evidence tending to show that a felony had been committed: *Martin v. Houck*, 141-317.

A municipality is not liable in damages for negligence or mistake of its policemen who arrest, without warrant, persons engaged in violating its ordinances: *Coley v. Statesville*, 121-301; *McIlhenny v. Wilmington*, 127-146.

It is competent for a town to appropriate a reasonable amount of its funds to employ counsel to defend its police officers in actions for false imprisonment: *Roper v. Laurinburg*, 90-427.

A city is not liable to one arrested on ground of having been exposed to smallpox, where officers act without malice: *Levin v. Burlington*, 129-184.

Part 4. Planning Boards

2643. Creation and duties. Every city and town in the state is authorized to create a board to be known as the Planning Board, whose duty it shall be to make careful study of the resources, possibilities and needs of the city or town, particularly with respect to the conditions which may be injurious to the public welfare or otherwise injurious, and to make plans for the development of the municipality. The governing body of such city or town desiring to establish such local planning board shall appoint not less than three nor more than five on said board.

1919, c. 23, s. 1.

2644. Board to make reports. The board shall make a report at least annually to the governing body of the city or town, giving information regarding the condition of the city or town, and any plans or proposals for the development of the city or town and estimates of the cost thereof.

1919, c. 23, s. 2.

2645. Expenses provided for. The governing body of such city or town may appropriate to such local planning board such amount as they may deem necessary to carry out the purposes of its creation, and for the improvement of the municipality, and shall provide what sums, if any, shall be paid to said board as compensation.

1919, c. 23, s. 3.

Part 5. General Qualification of Officers

2646. Must be voters in town or city. No person shall be mayor, commissioner, intendant of police, alderman or other chief officer of any city or town unless he shall be a qualified voter therein.

Rev., s. 2941; Code, s. 3796; 1870-1, c. 24, s. 3.

Under the general statute only qualified voters of towns and cities are eligible to offices therein: *Foard v. Hall*, 111-369.

Municipal body cannot deprive one of its members of his place for causes affecting his ineligibility that existed at time of election: *Ellison v. Raleigh*, 89-125.

Charter of a town requiring the officers to be elected, persons cannot claim to be *de facto* officers of that town who have never been elected, but they are mere usurpers, and the corporation is not liable for contracts made by them in the name of the town: *Keeler v. Newbern*, 61-505.

Power to remove an officer is vested in the town commissioners, to be exercised for cause and upon notice: *Burke v. Jenkins*, 148-25. For recall of elective officers, see section 2885. Power of mayor to remove officers, see sections 2864, 2870.

2647. Refusal to qualify and act. Every person elected or appointed commissioner, mayor, or town constable, who, after being duly notified, shall neglect or refuse to qualify and perform the duties of his office or appointment, shall pay twenty-five dollars, one-half to the use of the town and the other half to the use of any person who will sue for the same.

Rev., s. 2942; Code, s. 3812; R. C., c. 111, s. 22.

2648. Hold office until successor qualified. Whenever the day of election shall be altered, the officers of the corporation elected or appointed before that day shall hold their places till the day of election, and until other officers shall be elected or appointed and qualified. And they shall hold their offices in like manner when there is any failure to make the annual election.

Rev., s. 2943; Code, s. 3792; R. C., c. 111, s. 8.

ART. 3. ELECTIONS REGULATED

2649. Application of law, and exceptions. All elections held in any city or town shall be held under the following rules and regulations, except in the cities of Charlotte, Fayetteville and Greensboro, and in the town of Shelby, and in the towns in the counties of Bertie, Cabarrus, Caldwell, Catawba, Chowan, Columbus, Davidson, Edgecombe, Gaston, Lenoir, Mitchell, Nash, Pitt, Robeson, Stokes, Surry, Vance, Wayne and Wilson.

Rev., s. 2944; 1901, c. 750, ss. 1, 21; 1903, cc. 184, 218, 626, 769, 777; 1907, c. 165; Ex. Sess. 1908, c. 63; 1909, c. 365.

Section cited: *Hardee v. Henderson*, 170-572; *Hendersonville v. Jordan*, 150-35.

2650. When election held. In all cities and towns an election shall be held on Tuesday after the first Monday of May, one thousand nine hundred and five, and biennially thereafter: Provided, that the provisions of this section shall not be construed so as to change, alter or amend any clause or provision in any charter of any town or city in Harnett county providing for an annual election of the officers of such town or city.

Rev., s. 2945; 1901, c. 750, s. 19; 1907, c. 165.

2651. Polling places. There shall be at least one polling place in each ward in the town or city, if the said town or city is divided into wards; and if not divided into wards, then there shall be as many polling places as may be established by the governing body of said town or city.

Rev., s. 2946; 1901, c. 750, s. 2.

Fixing and advertising polling places is material part in municipal election: *Hendersonville v. Jordan*, 150-35.

2652. Registrars appointed. The board of commissioners shall select, at least thirty days before any city or town election, one person for each election pre-

inct, who shall act as registrar of voters for such precinct; and shall make publication of the names of the persons so selected, and of the time of the election, at the town or city hall, or at the usual place of holding the mayor's court, immediately after such appointment, and shall cause a notice to be served upon the registrars by the sheriff of the county or the township constable. If any registrar shall die or neglect to perform his duties, said governing body may appoint another in his place.

Rev., s. 2947; 1901, c. 750, s. 5; 1903, c. 613.

2653. Registrars take oath of office. Before entering upon the duties of his office each registrar shall take an oath before some person authorized by law to administer oaths to faithfully perform the duties of his office as registrar.

Rev., s. 2948; 1901, c. 750, s. 6.

Registrar is not required to be a freeholder: *Hendersonville v. Jordan*, 150-35.

2654. Registration of voters. It shall be the duty of the board of commissioners of every city and town to cause a registration to be made of all the qualified voters residing therein, under the rules and regulations prescribed for the registration of voters for general elections. And where there has been a registration of voters, the board of commissioners may, in its discretion, order a new registration of voters; and unless such new registration shall be ordered, the election shall be held under the existing registration, with such revision as is herein provided.

Rev., s. 2949; Code, s. 3795; 1901, c. 750, s. 3.

General registration of all the voters required under this section: *Hardee v. Henderson*, 170-572.

Notice of election is signed by the clerk under order of the board; and an irregularity in publishing a notice which does not prevent any voter from registering and voting will not invalidate the election: *Briggs v. Raleigh*, 166-149. The qualifications for voting are the same as in the general election: *Echerd v. Viele*, 164-122. Payment of the general state and county poll tax is required: *Ibid*.

2655. Notice of new registration. In the event a new registration is ordered the board of commissioners shall give thirty days notice thereof by advertisement in some newspaper, if there be one published in the town or city, and if there be none so published, then in three public places in the city or town.

Rev., s. 2950; 1901, c. 750, s. 4.

2656. Registration books revised. Each registrar shall be furnished with registration books, and it shall be his duty to revise the registration book of his precinct in such manner that said books shall show an accurate list of the electors previously registered in such ward or precinct and still residing therein, without requiring such electors to be registered anew.

Rev., s. 2951; 1901, c. 750, s. 6.

2657. Time for registration. Each registrar shall, between the hours of nine o'clock a.m. and five o'clock p.m. on each day (Sunday excepted) for seven days preceding the day for closing the registration books, as hereinafter provided, keep open said books for the registration of any new electors residing in the precinct, and entitled to register, whose names have never before been registered in such precinct, or do not appear in the revised list. Such books

shall be open until nine o'clock p.m. of each Saturday during such registration period and shall be closed for registration on the second Saturday before each election.

Rev., s. 2952; 1901, c. 750, s. 6.

This is for registration of new voters, and not the general registration of all the voters: *Hardee v. Henderson*, 170-572.

2658. Registration on election day. No registration shall be allowed on the day of election, but if any person shall give satisfactory evidence to the registrar and judges of election that he has become of the age of twenty-one years or otherwise has become qualified to register and vote since the registration books were closed for registration, he shall be allowed to register and vote.

Rev., s. 2953; 1901, c. 750, s. 8.

2659. Books open for challenge. On the second Saturday before the election the registration books shall be kept open at the polling place in the precinct for the inspection of the electors of the precinct, and any of such electors shall be allowed to object to the name of any person appearing on said books.

Rev., s. 2955; 1901, c. 750, s. 7.

2660. Practice in challenges. When a person is challenged the registrar shall enter upon his books opposite the name of the person objected to the word "challenged," and the registrar shall appoint a time and place, on or before the Monday immediately preceding election day, when he, together with the judges of election, shall hear and decide the objection, giving personal notice to the voter so objected to; and if for any cause personal notice cannot be given, then it shall be sufficient to leave a copy thereof at his residence. If any person challenged shall be found not duly qualified, the registrar shall erase his name from the books. They shall hear and determine the cause of challenge under the rules and regulations prescribed by the general law regulating elections for members of the general assembly.

Rev., s. 2956; 1901, c. 750, ss. 7, 9.

2661. Judges of election. The board of commissioners shall appoint, at least thirty days before any city or town election, two judges of election, who shall be of different political parties where possible, and shall be men of good character, able to read and write, at each place of holding election in said city or town, who, before entering upon the discharge of their duties, shall take an oath, before some person authorized by law to administer oaths, to conduct the election fairly and impartially, according to the constitution and laws of the state.

Rev., s. 2958; 1901, c. 750, s. 7.

Section referred to in *Hendersonville v. Jordan*, 150-35.

2662. Vacancies on election day. If any vacancy shall occur on the day of election in the office of registrar, the same shall be filled by the judges of election, and if any vacancy shall occur on that day in the office of judge the same shall be filled by the registrar; vacancies occurring at any other time shall be filled by the board of commissioners.

Rev., s. 2954; 1901, c. 750, s. 20.

2663. Judges superintend election. The judges of election shall open the polls and superintend the same until the close of election; they shall keep poll books

in which shall be entered the name of every person who shall vote, and at the close of the election they shall certify the same over their proper signatures and deposit them with the board of commissioners.

Rev., s. 2959; 1901, c. 750, s. 7.

2664. When polls open and close. The polls shall be open on the day of election from eight o'clock a.m. till sunset, and no longer; and each person whose name may be registered shall be entitled to vote.

Rev., s. 2960; 1901, c. 750, s. 10.

2665. Who may vote. All qualified electors, who shall have resided for four months immediately preceding an election within the limits of any voting precinct of a city or town, and not otherwise, shall have the right to vote in such precinct for mayor and other city or town officers.

Rev., s. 2961; 1901, c. 750, s. 9.

The same qualifications are required for voters as in general elections: *Echerd v. Viele*, 164-122. See annotations under section 2691.

2666. Ballots and ballot boxes. All ballots shall be printed or written upon white paper and shall be of the same size, without device, mutilation or ornamentation, the size of ballots to be fixed by board of commissioners at the same meeting the registrar is appointed. The governing body of the city or town shall provide for each election precinct in their respective cities or towns necessary ballot boxes in which to deposit the ballots; each of such boxes shall have an opening through the lid to admit a single folded ballot, and no more. The ballot boxes shall be kept by the judges of election for the use of the election precincts respectively; and the registrar and judges of election, before the voting begins, shall carefully examine the ballot boxes and see that there is nothing in them, and they shall be sealed or securely fastened and not be opened until the polls are closed.

Rev., s. 2962; 1901, c. 750, s. 12; 1903, c. 613, s. 2.

2667. Ballots counted. When the election shall be finished the registrar and judges of election shall open the boxes and count the ballots, reading aloud the names of the persons which shall appear on each ballot; and if there shall be two or more ballots rolled up together, or any ballot shall contain the names of more persons than the elector has the right to vote for, or shall have a device or ornament upon it, in either of these cases such ballots shall not be numbered in taking the ballots, but shall be void; and the counting of votes shall be continued without adjournment until completed, and the result thereof declared.

Rev., s. 2963; 1901, c. 750, s. 13.

2668. Registration books, where deposited. Immediately after any election the registrars shall deposit the registration books for the respective precincts with the board of commissioners.

Rev., s. 2957; 1901, c. 750, s. 11.

2669. Board of canvassers. The registrar and judges of election in each voting precinct shall appoint one of their number to attend the meeting of the board of canvassers as a member thereof, and shall deliver to the member who shall have been so appointed the original returns of the result of the election in such pre-

cinct; and the members of the board of canvassers who shall have been so appointed shall attend the meeting of the board of canvassers, and shall constitute the board of town canvassers for such election, and a majority of them shall constitute a quorum. In towns where there is only one voting precinct, the registrar and judges of election shall, at the close of the election, declare the result thereof.

Rev., s. 2964; 1901, c. 750, ss. 13, 14.

2670. Meeting of board of canvassers. The board of canvassers shall meet on the next day after the election at twelve o'clock m., at the mayor's office, and they shall each take the oath prescribed in the general law governing elections for members of the board of county canvassers.

Rev., s. 2965; 1901, c. 750, s. 15.

2671. Board determines result; tie vote. The board of canvassers shall, at their meeting, in the presence of such electors as choose to attend, open, canvass and judicially determine the result, and shall make abstracts, stating the number of legal ballots cast in each precinct for each office, the name of each person voted for and the number of votes given to each person for each different office, and shall sign the same. It shall have power and authority to pass upon judicially all the votes relative to the election and judicially determine and declare the result of the same, and shall have power and authority to send for papers and persons and examine the latter upon oath; and in case of a tie between two opposing candidates, the result shall be determined by lot. In all other respects all elections held in any town or city shall be conducted as prescribed for the election of members of the general assembly.

Rev., s. 2966; 1901, c. 750, ss. 16, 17.

In case of a tie the result is determined by lot; in county election it is for the board of elections to determine: *Bray v. Baxter*, 171-6. See section 5991.

2672. Notice of special election. No special election shall be held for any purpose in any county, township, city or town unless at least thirty days notice shall have been given of the same by advertisement in some newspaper published in said county, city or town, or by advertisement posted at the courthouse of the county and four other public places in such county, city or town.

Rev., s. 2967; 1901, c. 750, s. 24.

ART. 4. ORDINANCES AND REGULATIONS

2673. General power to make ordinances. The board of commissioners shall have power to make ordinances, rules and regulations for the better government of the town, not inconsistent with this chapter and the law of the land, as they may deem necessary; and may enforce them by imposing penalties on such as violate them; and may compel the performance of the duties imposed upon others, by suitable penalties.

Rev., s. 2923; Code, ss. 3799, 3804; R. C., c. 111, ss. 12, 17.

For proof of ordinances on appeal, see Evidence, s. 1750.

Legislature may transfer to municipal bodies created by it the duty and responsibility of exercising a portion of its own police power in such manner as commissioners may deem necessary: *State v. Austin*, 114-855; *Humphrey v. Church*, 109-132. Town authorities have power to execute police laws adopted for the government thereof: *State v. White*, 76-15.

Municipal ordinances and by-laws must be in harmony with the general laws of the state, and whenever they come in conflict with such general laws must give way: *Washington v. Hammond*, 76-33; *State v. Langston*, 88-692.

Municipal corporation is not liable for failure to pass or enforce an ordinance: *Goodwin v. Reidsville*, 160-411.

An ordinance must be reasonable and lawful, and not oppressive or discriminating. Whether it is reasonable or not is a question of law upon the facts found to exist: *Barger v. Smith*, 156-323; s. c., 160-205; *Small v. Edenton*, 146-527.

The words "entire board" in charter mean all members of board in existence and not all those provided for by charter; and where seven commissioners were elected and one resigned, passage of ordinance by vote of five members was sufficient: *Comrs. v. Trust Co.*, 143-110.

Municipal corporations may enforce their ordinances by suitable penalties, but cannot create a criminal offense; the general statute makes the violation of a valid ordinance a misdemeanor: *State v. Crenshaw*, 94-877; *State v. Earnhardt*, 107-789; *State v. Irvin*, 126-989.

The penalty for violation of municipal ordinance should be definitely fixed, and not left to the discretion of the court; nor can the ordinance punish that which is already punishable under the state law: *State v. Irvin*, 126-989; *State v. Rice*, 97-421; *State v. Worth*, 95-615; *State v. Crenshaw*, 94-877; *State v. Cainan*, 94-883; *State v. Dannenberg*, 150-799; *State v. Black*, 150-866.

City ordinance which takes from the citizen a natural and necessary right without apparent necessity, and substitutes nothing adequate to take its place, is neither reasonable in its provisions nor just in its results: *State v. Hill*, 126-1139.

VALID AND INVALID ORDINANCES. Town ordinance is not void for discriminating which prohibits a citizen from keeping hog-pens within 100 yards of the residence of another, but does not prohibit him from keeping them within like distance from his own: *State v. Hord*, 122-1092. But an ordinance prohibiting the building of a stable nearer to the residence of another than it is to the owner's residence is invalid as having no uniform standard: *State v. Bass*, 171-780.

Commissioners of a town have not power to enact an ordinance declaring it to be "unlawful for any person to abuse or insult any officer of the town, or member of the police, while in discharge of his duty," and imposing a fine of \$25 upon one convicted thereunder: *State v. Clay*, 118-1234.

An ordinance of a town requiring stores to be closed after 7:30 in the evening is invalid: *State v. Ray*, 131-814—so is an ordinance forbidding one who sells liquor to occupy his own premises between certain hours, *State v. Thomas*, 118-1221.

Where a town charter allows regulation and sale of spirituous liquors, an ordinance allowing revocation of license upon breach of certain ordinances regulating the sale, the licensee agreeing thereto upon receiving his license, is valid: *Paul v. Washington*, 134-363.

City ordinance punishing, by fine, loud and boisterous cursing and swearing in any street, house, or elsewhere in city, is valid: *State v. Cainan*, 94-880; *State v. Earnhardt*, 107-789; *State v. Warren*, 113-683; *State v. Debnam*, 98-712—and, in an indictment under this ordinance, it is not necessary to set out the words used by defendant: *State v. Cainan*, 94-880; *State v. Earnhardt*, 107-789; *State v. Warren*, 113-683; *State v. Debnam*, 98-712. Ordinance prohibiting "profane language in town" not valid: *State v. Horne*, 115-739.

Ordinance imposing a fine or penalty for selling liquor without license does not conflict with general laws of state prohibiting sale of liquor without license, and is therefore valid: *State v. Stevens*, 114-873.

Ordinance prohibiting an unmarried minor, except when acting as agent of his parent or guardian, from entering any barroom or room where spirituous, vinous or malt liquors are kept for sale, is valid, being reasonable and consistent with the laws of the state: *State v. Austin*, 114-855.

Ordinance appointing cotton weigher and prescribing that part of his fee be paid by buyer and other part by seller, and prescribing penalty forbidding all sales unless cotton weighed by him, is valid: *State v. Tyson*, 111-687. But when cotton is brought to a cotton weigher to be weighed under a town ordinance, neither the officer nor the town is liable for the loss of the cotton: *Cotton Co. v. Wilson*, 159-141.

Under a general power in a charter to suppress houses of ill-fame, a city may pass an ordinance forbidding owners to rent houses for purpose of being used as bawdy houses, or with knowledge that they will be so used by the lessee; but its authorities are not thereby empowered

to define what is a house of ill-fame, or declare a given house to be a bawdy house: *State v. Webber*, 107-962—nor to establish a rule of evidence, *Ibid.* If part of ordinance is void, all other clauses with which the invalid part is necessarily connected or which are dependent on it are also void: *Ibid.*

Town commissioners passed an ordinance requiring all male citizens, between ages of eighteen and forty-five years, to work certain number of days on the streets, and imposing fine or imprisonment for wilful refusal so to do: Held, that such ordinance is valid, and violation of it was a misdemeanor: *State v. Smith*, 103-403.

Ordinance prohibiting gambling is void, it being already prohibited by statute: *State v. McCoy*, 116-1059; *State v. Keith*, 94-933. Ordinance prohibiting disorderly conduct is valid: *State v. Sherrard*, 117-717. Ordinance prohibiting sale of second-hand clothes is void: *State v. Taft*, 118-1190—but one regulating its sale is valid, *Rosenbaum v. Newbern*, 118-83. An ordinance prohibiting the sale of nonintoxicating drinks is invalid, when not authorized in the charter: *State v. Dannenberg*, 150-799.

Ordinance prohibiting cattle and hogs from running at large valid: *Aydlett v. Eliz. City*, 121-4; *State v. Tweedy*, 115-704; *Jones v. Duncan*, 127-118; *Owen v. Williamston*, 171-57. Ordinance charging residents higher than nonresidents for impounding stock is valid: *Jones v. Duncan*, 127-118. By legislative authority an ordinance may prohibit the keeping of hogs within a fourth of a mile of the corporate limits of the town: *State v. Rice*, 158-635. May authorize policeman to kill unmuzzled dogs: *State v. Clifton*, 152-800.

An ordinance regulating or prohibiting the use of awnings, signs, etc., over the sidewalk is valid; its reasonableness is a question of law and not for the jury: *Small v. Edenton*, 146-527, overruling *State v. Higgs*, 126-1014. An ordinance may regulate the use of billboards: *State v. Staples*, 157-637; *State v. Whitlock*, 149-542.

An ordinance prohibiting sale of fish outside of market-house, except fish caught in county streams, is valid: *State v. Perry*, 151-661.

A municipal corporation may by ordinance regulate fire limits within the corporation: *State v. Lawing*, 164-492—regulate trading on Sunday, *State v. Burbage*, 172-876; *State v. Davis*, 171-809; *State v. Medlin*, 170-682—prohibit the erection of hospitals within certain limits, *Lawrence v. Nissen*, 173-359—regulate the grade of railroad tracks crossing streets, and the use of the streets in shifting cars, *R. R. v. Goldsboro*, 155-356—regulate location of telegraph and telephone lines on the street, *R. R. v. Morehead City*, 167-118.

An ordinance requiring the segregation of the races as to residence districts is invalid: *State v. Darnell*, 166-300.

The validity of an ordinance cannot be tested by an injunction: *Paul v. Washington*, 134-363. Where license is refused under an ordinance, the remedy is by mandamus, or in a proper case by payment of fees and an action to recover the money: *State v. Snipes*, 161-243.

Where authority to make certain ordinances is vested in a board of health, an ordinance passed by commissioners is invalid: *State v. Beacham*, 125-654.

2674. Power to establish and regulate markets. The board of commissioners may establish and regulate their markets, and prescribe at what place, within the corporation, shall be sold marketable things; in what manner, whether by weight or measure, may be sold grain, meal or flour (if flour be not packed in barrels), fodder, hay, or oats in straw; may erect scales for the purpose of weighing the same, appoint a weigher, fix his fees, and direct by whom they shall be paid. But it shall not be lawful for the commissioners or other authorities of any town to impose any tax whatever on wagons or carts selling farm products, garden truck, fish and oysters on the public streets thereof.

Rev., s. 2928; Code, s. 3801; R. C., c. 111, s. 14; 1879, c. 176.

See section 2794. The exercise of authority in establishing markets will not be interfered with by the court where the discretion is not arbitrary: *McIntyre v. Murphy*, 177-300. Markets being a public necessity, a town has implied power to establish and regulate them: *Hutchins v. Durham*, 118-457. It is a police power and does not of itself confer right to levy taxes: *State v. Bean*, 91-554. The town may prohibit the sale of fresh meats within the corporate limits outside of the market-house: *State v. Pendergrass*, 106-664—may prohibit sale of fish outside of market-house, *State v. Perry*, 151-661.

Town ordinance providing that all licenses to occupy stalls in a market-house may be revoked at will is in force until repealed, and may be summarily enforced at discretion of authorities: *Hutchins v. Durham*, 118-457.

Persons occupying stalls in a town market-house, under license from town, are not tenants, but licensees merely. They do not acquire rights of tenants from year to year by being permitted to hold over after period covered by their license has expired, and may be summarily ejected at discretion of proper authorities: *Ibid.*

Obstructing a street in keeping a market cart standing in the street for an hour and a half is not a nuisance per se: *State v. Edens*, 85-522.

2675. Repair streets and bridges. The board of commissioners shall provide for keeping in proper repair the streets and bridges in the town, in the manner and to the extent they may deem best; may cause such improvements in the town to be made as may be necessary, and may apportion the same equally among the inhabitants, by assessments of labor or otherwise, and the citizens shall not be liable to work on the public roads without the limits of the town. When they determine to repair or improve by labor, they may appoint an overseer and compel such persons as are liable to perform duty on the public roads to work on the streets, in the manner and under the penalties provided in the general law for the reparation of the public roads.

Rev., s. 2930; Code, s. 3803; R. C., c. 111, s. 16.

See section 2793.

Municipal corporations have the right to open public streets and to locate and construct necessary bridges over them, but the municipal authorities are the sole judges of the necessity or expediency: *Comrs. v. Raeford*, 178-337; *Waynesville v. Satterthwait*, 136-225; *Stratford v. Greensboro*, 124-127. Streets and public highways distinguished: *Waynesville v. Satterthwait*, 136-225.

The municipal authorities are charged with the duty of keeping the streets, sidewalks, drains, culverts, etc., in a reasonably safe condition, to the extent that this can be done by exercising proper and reasonable care and supervision: *Sehorn v. Charlotte*, 171-540; *Foster v. Tryon*, 169-182; *Smith v. Winston*, 162-50; *Bailey v. Winston*, 157-253; *Fitzgerald v. Concord*, 140-110; *Russell v. Monroe*, 116-720; *Bunch v. Edenton*, 90-131. In the discharge of this duty they are the judges of the necessity and exercise a wide discretion; and the courts will not interfere unless there is a manifest abuse of discretion: *Crotts v. Winston-Salem*, 170-24; *Jeffress v. Greenville*, 154-490; *Smith v. Hendersonville*, 152-617; *Tate v. Greensboro*, 114-392; *Stratford v. Greensboro*, 124-127; *Durham v. Riggsbee*, 141-128; *Spruill v. Columbia*, 153-46.

This power over streets can be delegated to a committee of the board: *Tate v. Greensboro*, 114-392.

The authorities of municipal corporations must provide the means and employ the agencies to perform the duties imposed upon them, and for neglect to do so may be liable in damages; but they are not required to perform such duties by their own labor: *Threadgill v. Comrs.*, 99-352.

Duty and power of municipal authorities to prevent and abate nuisances and obstructions in public streets are ample and complete, and they may be held liable to party injured in consequence of their dereliction: *Dillon v. Raleigh*, 124-184.

Where commissioners are empowered and required to let out repairing of streets of such town to lowest undertaker, and are authorized to lay a tax for repairing streets, and inhabitants of the town are, by same act, exempted from working on streets, it is not discretionary with such commissioners whether they will let out the streets and lay the tax, but they are indictable for failure to do so: *State v. Comrs.*, 48-399.

Where an act of a general assembly expressly authorizes the laying out a certain street across certain lands, owner of land cannot be heard to complain that street is not necessary for public purposes: *Call v. Town of Wilkesboro*, 115-337. An act authorizing the laying out of a certain street is not affected by a prior judgment of the superior court that such street is not a public necessity: *Ibid.* General assembly provided that a certain street should be located under the law providing for same in charter of town: *Held*, that this was not intended to restrict town to powers existing under its charter, but to regulate procedure in ascertaining most practical way of laying out street: *Ibid.*

FAILING TO PERFORM DUTY, LIABLE TO INDICTMENT. City authorities are liable to indictment for failing to keep streets in good repair: *State v. Dickson*, 124-871.

An indictment against commissioners of a town for failing to do their duty as such, during a certain space of time therein set out, must aver the tenure and duration of their office: *State v. Comrs.*, 48-399.

An indictment against mayor and aldermen of a city for neglect of official duty in failing to remove obstructions from a street and to keep same in repair, is fatally defective if it fails to point out the particular public duty neglected, or to refer to the statute imposing it: *State v. Fishplate*, 83-654.

CITY'S LIABILITY FOR DEFECTIVE STREETS, ETC.; FOR OBSTRUCTIONS IN STREET. The municipal corporation is liable for injury caused by its failure to exercise reasonable care to keep the streets and sidewalks in a reasonably safe condition: *Sehorn v. Charlotte*, 171-540; *Seagraves v. Winston*, 170-618; *Alexander v. Statesville*, 165-527; *Smith v. Winston*, 162-50; *Bailey v. Winston*, 157-253; *Willis v. New Bern*, 118-132; *Bunch v. Edenton*, 90-431; *Brown v. Durham*, 141-249.

Town is only responsible for negligent breach of duty, and to establish such responsibility it is not sufficient to show that a defect existed and an injury caused thereby. It must be further shown that officers "knew or by ordinary diligence might have discovered the defect, and its character was such that injuries to travelers therefrom might reasonably be anticipated": *Fitzgerald v. Concord*, 140-110; *Johnson v. Raleigh*, 156-269; *Seagraves v. Winston*, 167-206; s. c., 170-618; *Foster v. Tryon*, 169-182; *Dowell v. Raleigh*, 173-197; *Revis v. Raleigh*, 150-348. The question of notice is generally one for the jury: *Fitzgerald v. Concord*, 140-110; *Kinsey v. Kinston*, 145-106; *Foster v. Tryon*, 169-182.

The fact that a third person is responsible for the defect does not relieve the city of liability if it has failed to exercise reasonable care: *Ridge v. High Point*, 176-421; *Hardy v. Construction Co.*, 174-320; *Gregg v. Wilmington*, 155-18; *Comrs. v. Indemnity Co.*, 155-219; *Styron v. R. R.*, 161-78; *Guthrie v. Durham*, 168-573; *Conway v. Ice Co.*, 169-577; *Raleigh v. R. R.*, 129-265; *Foy v. Winston*, 126-381; *Brown v. Louisburg*, 126-701; *Dillon v. Raleigh*, 124-184. In the event of recovery against town for damages for one falling into excavation on sidewalk, it could hold the property owner responsible, as they are not joint tort feasons, and a release, for valuable consideration, to the party primarily liable, operates to discharge of the town: *Brown v. Louisburg*, 126-701. See, also, *Gregg v. Wilmington*, 155-18; *Guthrie v. Durham*, 168-573.

The fact that plaintiff knew of the defect is not negligence per se so as to prevent a recovery: *Duke v. Belhaven*, 174-95; *Darden v. Plymouth*, 166-492; *Neal v. Marion*, 129-345; *Russell v. Monroe*, 116-720.

Burden of showing defects and dangers in the public streets, causing injury, and also notice thereof, express or implied, rests upon the plaintiff: *Jones v. Greensboro*, 124-310—burden of proving contributory negligence is on the defendant, *Russell v. Monroe*, 116-720.

A town or city is not liable in damages for an injury caused through the slipping of person on its sidewalk on account of ice formed there at season of the year when such formation of ice might be reasonably anticipated: *Cresler v. Asheville*, 134-311. An ordinance requiring the owner of property to remove ice and snow from the sidewalk does not impose any civil liability for injury: *Hartsell v. Asheville*, 164-193.

Step projecting out into the sidewalk is an obstruction, and length of time of such usage will not prevent liability: *White v. New Bern*, 146-447; but see *Edwards v. Raleigh*, 150-276. Permitting overhanging dead limbs to remain so as to fall on passers-by is negligence: *Jones v. Greensboro*, 124-310. Permitting brick to be piled in street, without light, but with sufficient passway, is negligence: *Pinnix v. Durham*, 130-360.

As to action for negligence in having a defective bridge, see *Brewster v. Eliz. City*, 142-9—for permitting broken electric wires (where town owns lighting plant) to remain suspended in dangerous manner, *Fisher v. Newbern*, 140-506—for damages caused by drain being stopped up and allowed to remain until land overflowed, *Williams v. Greenville*, 130-93—for failure to protect pedestrians against sink holes made in course of improving streets, *Willis v. Newbern*, 118-132—for damages caused by fireworks display ordered by town authorities, *Love v. Raleigh*, 116-216.

In action against town for injury sustained by falling into an unguarded excavation, facts held to show that plaintiff was guilty of contributory negligence, precluding recovery: *Austin v. Charlotte*, 146-336; *Myers v. Asheville*, 165-703.

A town is required to keep a bridge suitable for such transit as may reasonably be expected: *Carter v. Leaksville*, 174-561. A bridge and embankment so constructed as to cause a large volume of water to collect in the street, causing the death of a child by drowning, renders the city liable: *Bell v. Greensboro*, 170-179.

Placing a hydrant on the edge of the sidewalk is not such an obstruction as to render the city liable for injury: *Rollins v. Winston-Salem*, 176-411. The falling of a "grandstand" erected on a town common for the convenience of the public in witnessing a parade does not render the town liable for the injury, such structure being erected with the consent but not under the direction of the town authorities: *Morgan v. Tarboro*, 174-104. A town is not liable for injury caused by persons using the street, as for playing baseball: *Goodwin v. Reidsville*, 160-411.

CHANGE OF GRADE OF STREETS. Raising or lowering the grade of a street is within the discretion of the municipal authorities, and there is no liability for injury to the adjoining property unless there is negligence: *Keener v. Asheville*, 177-1; *Bennett v. R. R.*, 170-389; *Wood v. Land Co.*, 165-367; *Hoyle v. Hickory*, 164-79; *s. c.*, 167-619; *Harper v. Lenoir*, 152-723; *Dorsey v. Henderson*, 148-423, and cases cited. But the city cannot authorize a third person to make the change: *Bennett v. R. R.*, 170-389—for effect of ratification by the city, see *Wolfe v. Pearson*, 114-621.

A city is liable for the wrongful diversion of water from the street: *Yowmans v. Hendersonville*, 175-574.

STREET OBTAINED UNDER EMINENT DOMAIN. A municipal corporation has no right of eminent domain except as conferred by its charter or the general law: *Lloyd v. Venable*, 168-531—and where land is taken for a street, without such authority, the town is liable in damages, *Ibid.*; *Quantz v. Concord*, 150-539. For general power of condemnation, see section 2792.

No notice to landowner is necessary of commissioners' intended action as to the laying out of street, but when compensation is fixed, landowner is entitled to notice and a hearing: *State v. Jones*, 139-613; *Jeffress v. Greenville*, 154-490.

As soon as commissioners, in exercise of powers delegated to them, appropriated the land to a public street, they had the right to enter and open it without awaiting the payment of damages: *Ibid.*

A street commissioner of a city has no power to appropriate and take charge of land for a sidewalk for the city: *Cannady v. Durham*, 137-72.

Condemnation of land for streets where land belonged to one for life and to others by contingent remainder: *Miller v. Asheville*, 112-759.

Right acquired by city by condemnation of street and sidewalk is confined to public necessity and to uses for which property is taken or burdened with easement, and for any additional burden placed upon servient tenement compensation must be made: *Brown v. Electric Co.*, 138-533. The opening of the street must be for public benefit: *Stratford v. Greensboro*, 124-127.

Where the statute intends the aldermen shall have time for proper deliberation, and therefore the report of a jury was postponed for one week, city did not thereby lose its right of appeal: *Sondley v. Asheville*, 110-84. Requirement in town charter that report of appraisers shall lie in the mayor's office for ten days for purposes of investigation and appeal, and that unless an appeal is taken from such report "the land so appraised shall stand condemned for the use of the town and the price fixed shall be paid," etc., applies only to the procedure for fixing price to be paid, and means that if no appeal is taken from appraised value land shall stand condemned at such value, and appeal does not postpone the right of entry: *State v. Jones*, 139-613. Provision in town charter that one appraiser shall be appointed by commissioners and landowner may appoint one and those two shall select a third, with a right of appeal to superior court, is valid, though it omits to provide for appointment of an appraiser if landowner refuses, and though all the appraisers are freeholders of town: *Ibid.*

In action for damages to buildings removed from land condemned for public use, special benefits from the improvements cannot be used as a set-off to such damages if such benefits were used as a set-off in the condemnation proceedings: *Lamb v. Elizabeth City*, 131-240.

The right of eminent domain can be exercised only in the manner provided by the statute conferring it, and if there is a special provision in the charter it is to be followed: *Clinton v. Johnson*, 174-286; *Stiles v. Franklin*, 173-651; *Eppley v. Bryson City*, 157-487.

TITLE TO STREETS; DEDICATION. For a city to establish an easement in land for a street it must show that it acquired such easement in some recognized manner, as by condemnation, dedication and acceptance, estoppel, or adverse possession for twenty years: *New Bern v. Wadsworth*, 151-309. For what amounts to a dedication, see *Tise v. Whitaker*, 146-374; *Moore v. Meroney*, 154-158.

Where municipal corporation conveys land, bounded by established streets or alleys, and the grantee enters upon and improves it, subsequent conveyance by corporation of land covered by such streets or alleys, whereby easement of appurtenant owner is interfered with, is void: *Moose v. Carson*, 104-431. Owners of town lots, under grant of town, cannot be deprived of their easement appurtenant in the streets adjacent for the benefit of the town, nor can general assembly give such power: *Ibid.*

When lots are sold with reference to a map or plat representing streets, parks, lots, etc., there is an irrevocable dedication of the streets, and the purchasers have the right to have them kept open: *Wheeler v. Construction Co.*, 170-427; *Sexton v. Elizabeth City*, 169-385; *Green v. Miller*, 161-24; *Bailliere v. Shingle Co.*, 150-627; *Davis v. Morris*, 132-435; *Conrad v. Land Co.*, 126-776; *Collins v. Land Co.*, 128-563; *Moose v. Carson*, 104-431. Acceptance by the town is not required to protect the purchasers: *Hughes v. Clark*, 134-457. And the town may accept at any time: *Bailliere v. Shingle Co.*, 150-627; *State v. Fisher*, 117-733. Purchasers without notice of such dedication will be protected: *Sexton v. Elizabeth City*, 169-385; *Green v. Miller*, 161-24.

The same rule applies where lots are sold with reference to a park, court or square: *Conrad v. Land Co.*, 126-776. But where one of lots on the map is designated as "hotel site," it is not such a dedication as prevents its use for some other purpose: *Hanes v. Land Co.*, 129-311.

A municipal corporation cannot, even with authority from the legislature, sell a street and deprive the property owner of his right therein: *Moose v. Carson*, 104-431; *Southport v. Stanly*, 125-464; *Turner v. Hillsboro*, 127-153; *Church v. Dula*, 148-262; *Moore v. Meroney*, 154-158; but see *Raleigh v. Durfey*, 163-154 (sale of land used as a sidewalk). An alley is not necessarily a street, and the public have not necessarily a right to its use: *Milliken v. Denny*, 135-19.

Before the act of 1891, title to a street could be acquired against a municipal corporation by adverse possession, but not since that act: *Threadgill v. Wadesboro*, 170-641, and cases cited. See, also, section 435 and annotations.

A municipal corporation cannot vacate a street without compensation to the property owners who have purchased with reference to it: *Moore v. Meroney*, 154-158; *Moose v. Carson*, 104-431; but see *Crowell v. Monroe*, 152-399.

In an action against a municipality for damages for appropriation of plaintiff's land for a street, defendant denied plaintiff's title: Held, that the burden of proving his ownership is upon the plaintiff: *Fuller v. Elizabeth City*, 118-25.

ABUTTING OWNERS. In absence of evidence as to ownership of fee in a street of a city, presumption is that city has an easement only, and that fee remains in abutting owner: *White v. Railroad*, 113-610. City has same rights in a street which it controls by dedication as in one which has been granted or condemned; and the rights of the abutting proprietor are no greater in such street than if it had been granted or condemned: *Tate v. Greensboro*, 114-392— and the easement of the public is only to use the land as a street: *White v. R. R.*, 113-610. Rights, powers and liability of a municipality extend equally to sidewalk as to the roadway, for both are parts of the street, and the abutting proprietor has no more right in the sidewalk than in the roadway: *Hester v. Traction Co.*, 138-288.

The owner of the land on which a street is located has every right and advantage in that part of it which is not required for public use: *White v. R. R.*, 113-610. He has a right to compensation for any additional burden placed on the land: *Ibid.*; *Staton v. R. R.*, 147-428.

The owner of a lot adjoining the street, who has acquired a right therein by reason of purchase with reference to the street, has an easement therein which cannot be interfered with without compensation: *White v. R. R.*, 113-610.

The abutting owner, who never owned the street nor acquired a right therein by contract, has a property right therein by reason of ownership of adjoining property, and is entitled to reasonable ingress and egress, light and air, and to compensation for any interference with this right: *White v. R. R.*, 113-610; *Staton v. R. R.*, 147-428; *Butler v. Tobacco Co.*, 152-416; *Hester v. Traction Co.*, 138-288.

Abutting owner has property in shade trees standing along sidewalk which the law will protect, and they may not be removed except where their removal is necessary for use of street as

a public highway: *Brown v. Electric Co.*, 138-533; *Tate v. Greensboro*, 114-392; *Wheeler v. Telephone Co.*, 172-9; *Munday v. Newton*, 167-656; *Moore v. Power Co.*, 163-300; *Jeffress v. Greenville*, 154-490; *Rosenthal v. Goldsboro*, 149-128.

An electric hoist 12 feet above the street is an obstruction which cannot be authorized by the municipal authorities: *Guano Co. v. Lumber Co.*, 168-337. Liability of owner for moving a house in the street and interfering with telephone wires: *Weeks v. Telephone Co.*, 168-468.

The use of a street for laying pipes, etc., in furnishing water, lights, etc., does not impose any additional servitude beyond those reasonably included in the dedication of all streets: *Smith v. Goldsboro*, 121-350. A street railway is not an additional burden: *Turner v. Public-Service Corp.*, 174-522; *Hester v. Traction Co.*, 138-288.

A steam railway along a street is an additional burden: *Caveness v. R. R.*, 172-305; *Staton v. R. R.*, 147-428; *White v. R. R.*, 113-610. An interurban railroad run by electricity is an additional burden: *Kirkpatrick v. Traction Co.*, 170-477. Telegraph and telephone lines are additional burdens: *Brown v. Electric Co.*, 138-533; *Hodges v. Telegraph Co.*, 133-225; *Phillips v. Telegraph Co.*, 130-513; *Wheeler v. Telephone Co.*, 172-9.

ASSESSMENT FOR IMPROVEMENTS. Power to levy special assessments is derived solely from legislature, acting either directly or through its local instrumentalities, and courts will not interfere with exercise of discretion vested in legislature as to necessity for or manner of making such assessments, unless there is want of power, or the method adopted for assessment of benefits is so clearly inequitable as to offend some constitutional principle: *Raleigh v. Peace*, 110-32; *Greensboro v. McAdoo*, 112-359; *Tarboro v. Staton*, 156-504.

Special assessments are constitutional, and are founded upon the principle that the adjoining land has received special benefit from the improvement: *Raleigh v. Peace*, 110-32; *Marion v. Pilot Mountain*, 170-118. It is considered as a branch of the taxing power: *Ibid.*

It is not essential that the legislature should fix minute details in the exercise of the power, but a definite method should be fixed to estimate the assessments, with an opportunity to the property owner to contest the amount: *Raleigh v. Peace*, 110-32—and the method prescribed must be observed, *Greensboro v. McAdoo*, 112-359.

The statute may require a taxing district to be fixed, and the expense to be estimated and apportioned: *Asheville v. Trust Co.*, 143-360—may require application by a majority of the property owners subject to assessment, *Schank v. Asheville*, 154-40—popular vote is not required, *Lewis v. Pilot Mountain*, 170-109. The assessment may be determined by actual appraisal or by the front-foot rule: *Raleigh v. Peace*, 110-32; *Hilliard v. Asheville*, 118-845; *Kinston v. Loftin*, 149-255. If, in applying any of the rules prescribed, it should appear to be manifestly unequal and oppressive, the courts may interfere: *Kinston v. Wooten*, 150-295. The law may limit the assessment to a certain per cent of the tax valuation: *Charlotte v. Brown*, 165-435. The property owner may waive the limitation: *Charlotte v. Alexander*, 173-515.

Assessments may be levied for sewers: *Justice v. Asheville*, 161-62—for pipe lines for water, *Felnet v. Canton*, 177-52.

When part of the street paving has been charged to a street railway, this should be deducted before making assessments: *Morris v. Hendersonville*, 168-400.

Reasonable notice should be given to enable the property owner to appear and contest the assessment: *Tarboro v. Staton*, 156-504; *Kinston v. Loftin*, 149-255.

The assessment and levy have the effect of a judgment and lien, and cannot be attacked collaterally; there should be objection in apt time and an appeal: *Schank v. Asheville*, 154-40. It is not a personal judgment against the owner, but a charge upon the property: *Raleigh v. Peace*, 110-32.

The roadbed and right of way of a railroad are liable to assessment for local improvements: *Comrs. v. R. R.*, 133-216.

For statutory regulations as to assessments by municipal corporations, see sections 2710 et seq., and subchapter 3, Municipal Finance Act.

2676. May abate nuisances. The board of commissioners may pass laws for abating or preventing nuisances of any kind, and for preserving the health of the citizens.

Rev., s. 2929; Code, s. 3802; R. C., c. 111, s. 15.

Require contractors to give bond. See chapter Liens, s. 2445.

May establish public hospital. See chapter Public Hospitals.

An ordinance prohibiting bawdy houses as nuisances cannot declare what shall constitute a bawdy house nor the evidence to show violation: *State v. Webber*, 107-962. An ordinance prohibiting steam sawmills in a town does not make them nuisances, and will not be enforced unless they actually become nuisances: *Barger v. Smith*, 156-323; s. c., 160-205. Dealing in second-hand clothing not necessarily a nuisance: *State v. Taft*, 118-1190. Ordinance may prohibit the keeping of hog-pens within certain limits: *State v. Hord*, 122-1092; *State v. Rice*, 158-635—or permitting hogs to run at large in the town, *Owen v. Williamston*, 171-57. Stables in a town not nuisance per se, but an ordinance may regulate their location: *State v. Bass*, 171-780.

Where by private acts a board of health is instituted in whom is vested authority to make regulations and ordinances for preservation of health to be enforced by town commissioners, the commissioners must enforce these ordinances, and are without authority to enact similar ordinances of their own: *State v. Beacham*, 125-652.

Ordinance prohibiting the swinging of gates to open on the sidewalk is valid: *Knight v. Foster*, 163-329. The municipal authorities may prohibit immoral exhibitions: *Brewer v. Wynne*, 163-319. Duty and powers of authorities to abate nuisances are ample: *Dillon v. Raleigh*, 124-184.

If a citizen is injured by erection and maintenance of a nuisance on private premises in violation of an ordinance, he has, in addition to right of criminal prosecution, a remedy either preventive by injunction or remedial by abatement: *Hull v. Roxboro*, 142-453. A municipal corporation is not liable in damages for failure to abate a nuisance, as where a building endangers other buildings from fire: *Harrington v. Greenville*, 159-632. For injuries caused by a nuisance wrongfully created in the exercise of governmental functions, a municipal corporation is liable for the diminished value of property affected thereby, but not for personal injuries: *Hines v. Rocky Mount*, 162-409, overruling *Downs v. High Point*, 115-182. See, also, *Metz v. Asheville*, 150-748; *Williams v. Greenville*, 130-93.

ART. 5. MUNICIPAL TAXATION

2677. Commissioners may levy taxes. The board of commissioners may annually levy and cause to be collected for municipal purposes a tax not exceeding fifty cents on the hundred dollars, and one dollar and fifty cents on each poll, on all persons and property within the corporation, which may be liable to taxation for state and county purposes; and may annually lay a tax on all trades, professions and franchises carried on or enjoyed within the city, unless otherwise provided by law; and may lay a tax on all such shows and exhibitions for reward as are taxed by the general assembly; and on all dogs, and on swine, horses and cattle, running at large within the town.

Rev., s. 2924; Code, s. 3800; R. C., c. 111, s. 13; 1862, c. 51.

See subchapter III, Municipal Finance Act, s. 2963.

PROPERTY AND POLL TAX. The right of taxation or assessment is a grant of sovereign power, and can only be exercised for public good, and not private benefits or for corporate gain, unless such gain be incident to public benefit: *Hutton v. Webb*, 124-749. A town has no right to impose any tax but such as is expressly authorized by its charter for purposes of revenue: *State v. Bean*, 91-554; *Winston v. Taylor*, 99-210; *Winston v. Beeson*, 135-271—and it is bound by the limitations therein, *Cobb v. Elizabeth City*, 75-1.

Towns and cities are required to base their levies upon the assessment made for state and county purposes: *Covington v. Rockingham*, 93-134; *State v. Irvin*, 126-989.

The limitations of this section do not apply to tax levy for necessary expense of water and sewer system: *Underwood v. Ashboro*, 152-641.

A tax list made up by one who is not a member of the taxing body, but who acts under its direction and as its agent, is not thereby made invalid: *Covington v. Rockingham*, 93-134.

There is no restriction upon municipal taxation except that which the legislature imposes; the equation between property and poll does not apply: *Swinson v. Mt. Olive*, 147-611; *Wingate v. Parker*, 136-369. See annotations under section 2678.

Where the town levied a tax in excess of amount allowed in the original charter, an amendment or the general law might validate the levy: *Wadesboro v. Atkinson*, 107-317. Levy of

taxes is presumed to be regular and sufficient: *Ibid.* Act authorizing levy of a tax by a city on a particular date will be construed as authorizing levy on that date or within a reasonable time thereafter: *State v. Worth*, 116-1007.

As to situs of personalty and realty for taxation, see *Winston v. Salem*, 131-404. For property subject to municipal taxation, see *Hall v. Fayetteville*, 115-281; *Wiley v. Comrs.*, 111-397; *Wood v. Edenton*, 106-151; *Redmond v. Comrs.*, 106-122.

Where a municipality has power to create a municipal debt, it has right, by necessary implication, to levy the necessary taxes to pay it. The right to create a debt carries with it the duty to pay the same: *Slocomb v. Fayetteville*, 125-362; *Charlotte v. Shepard*, 122-602.

Remedy for error in imposing taxes should be first sought by application to taxing body, upon whom ample powers are conferred for this purpose: *Covington v. Rockingham*, 93-134. Creditor is entitled to a peremptory mandamus requiring proper city authorities to levy and collect taxes upon property and polls within the city with which to pay his claim: *Broadfoot v. Fayetteville*, 124-478. It is not error in court below, in an action instituted against a municipal corporation for purpose of restraining such corporation from collecting an illegal tax, to allow all citizens, other than original plaintiff, to be made parties plaintiff: *Cobb v. Elizabeth City*, 75-1. Taxpayer may enjoin taxation to pay for opening street for benefit of individuals and not the public: *Stratford v. Greensboro*, 124-127.

See sections 2691-2693, 2813.

LICENSE OR PRIVILEGE TAXES. Tax on property and tax on privileges are distinct taxes, and both may be levied by towns under this section; and exemption from one of these taxes does not exempt from the other: *Guano Co. v. Tarboro*, 126-68.

A license fee or tax as a revenue measure must be in accordance with the statute authorizing it; as a police regulation, it must be reasonable in amount: *State v. Bean*, 91-554.

Municipality authorized to tax trades, professions, franchises and incomes is not bound to tax them uniformly as to amount: *State v. Worth*, 116-1007; *State v. Powell*, 100-525; *Rosenbaum v. Newbern*, 118-83. But reasonable classification may be made, and there must be no discrimination among persons in each class: *State v. Williams*, 158-611. Where several occupations conducted by one party, privilege tax on one does not prevent similar tax on another: *Guano Co. v. Tarboro*, 126-68. Brokers and pawnbrokers constitute distinct classes, and entirely different license taxes may be assessed upon them: *Schau v. Charlotte*, 118-733. Word "trade" when used in defining power to tax, includes any employment or business for gain or profit: *State v. Worth*, 116-1007.

Instances of licenses on trades and professions levied under different charters: Practicing attorneys, *Wilmington v. Macks*, 86-88; *Holland v. Isler*, 77-1—dealers in leaf tobacco, *Winston v. Taylor*, 99-210—manufacture and sale of ice, *State v. Worth*, 116-1007—selling and delivering pictures, *State v. Caldwell*, 127-521—tobacco buyers, *State v. Irvin*, 126-989—tax on railroads, *R. R. v. Reidsville*, 101-404.

The drummers' section of the revenue act gives party licensed the right to sell commodities mentioned in any county of the state, without being liable to county or municipal tax: *Latta v. Williams*, 87-126.

Under the charter of the city of Winston, dealers in trading stamps do not come within the provision of an ordinance taxing "gift enterprises": *Winston v. Beeson*, 135-271; *Winston v. Hudson*, 135-286.

An ordinance requiring a license of liverymen, and providing that it shall include any persons making contract for hire in town, "or carry any person with a vehicle out of the town for hire," is not only void as being unreasonable, but is unlawful as well: *Plymouth v. Cooper*, 135-1.

An ordinance imposing a tax on fertilizer agents or dealers is valid: *Guano Co. v. New Bern*, 158-354—on persons selling beef from wagons on the street, *State v. Smith*, 173-772—a tax upon soda fountains, *Drug Co. v. Lenoir*, 160-571—tax on restaurants, *State v. Snipes*, 161-243—a tax of one dollar on each cow as a tax on dairymen, *Asheville v. Nettles*, 164-315.

2678. Taxes must be uniform and ad valorem. All taxes levied by any county, city, town, or township, shall be uniform and ad valorem upon all property in the same, except property exempted by the constitution.

Rev., s. 2968; Const., Art. VII, s. 9.

The constitution provides that all taxes, whether levied for state, county, town or township purposes, shall be uniform, and allows no discrimination in favor of any class, person or interest, but requires that all things possessing value and subject of ownership shall be taxed equally, and by uniform rule: *Puitt v. Comrs.*, 94-709; *Edwards v. Cobb*, 75-1; *Jones v. Comrs.*, 107-248.

Provisions of constitution requiring taxes to be uniform apply to levying and payment of taxes, and not to the distribution of the revenue arising therefrom: *Holton v. Comrs.*, 93-430.

The provision in state constitution requiring a proportional poll and property tax does not apply to municipal corporations: *Wingate v. Parker*, 136-369.

Uniformity is not violated by a reasonable classification of those persons engaged in business and imposing the same tax upon all in each class: *State v. Williams*, 158-611; *Rosenbaum v. New Bern*, 118-83; *State v. Worth*, 116-1007; *State v. Powell*, 100-525—as by classifying merchants according to annual sales, *Mercantile Co. v. Mt. Olive*, 161-121.

2679. Poll tax limitation. The equation of taxation described in the constitution applying only to taxation levied for the ordinary purposes of the state and county, no poll tax shall be levied or collected by any city or town, except as hereinafter provided, in excess of two dollars for any or all purposes combined, and all acts levying or authorizing the levy of taxes for special purposes which contain authority to levy a poll tax in excess of two dollars in the aggregate for all purposes are hereby repealed or modified so as to restrict and provide that the poll tax for general purposes and special taxes combined shall never exceed two dollars: Provided, this section shall not be construed to affect and shall not affect the district or other special school taxes and road taxes on the poll where they are now required to be levied by law: Provided further, that this section shall not affect any special act for the sale of bonds by municipalities where said bonds have been sold or voted for or authorized on or prior to the eleventh day of March, one thousand nine hundred and seven. This section shall not apply to the counties of Halifax, Beaufort, Cleveland, New Hanover, Burke, Catawba, Union, Randolph, Orange, Edgecombe, Pasquotank, and Rowan.

1907, c. 935.

2680. Tax lists taken. The mayor, or other suitable person, shall, by order of the commissioners, take the list of taxables in the town, in such manner and at such time as the commissioners shall prescribe. If any person fail to list his taxables within the time prescribed by the commissioners, he shall be liable to a double tax.

Rev., s. 2969; Code, s. 3807; R. C., c. 111, s. 19.

Tax list made up by one who is not a member of the taxing body, but who acts under its direction and as its agent, is not thereby made invalid: *Covington v. Rockingham*, 93-134.

Tax list in hands of officer to whom it has been delivered for collection of taxes has the force of a judgment and execution: *Wilmington v. Sprunt*, 114-310. Right to add property to tax list: *Smith v. Dunn*, 160-174. Municipal corporations take the valuation made by the county authorities: *Guano Co. v. New Bern*, 172-258.

2681. Tax lists corrected. All tax lists, either county or municipal, which may be placed in the hands of any sheriff or tax collector, shall be at all times under the control of the authorities imposing the tax, and subject to be corrected or altered by them, and shall be open for inspection by the public, and upon demand by the authorities imposing the tax, or their successors in office, shall be surrendered to the lawful authorities for such inspection or correction.

Rev., s. 2970; Code, s. 3823; 1870-1, c. 177, s. 2.

2682. Taxation of municipal bonds. All laws and clauses of laws heretofore passed exempting bonds issued by any municipal corporation of the state of North Carolina from state, county or municipal taxation are hereby repealed: Provided, that nothing herein shall be construed to prevent a municipality from exempting its bonds from its own taxation.

Rev., s. 2976; 1905, c. 532.

2683. Dog tax. If any person residing in a town shall have therein any dog, and shall not return it for taxation, and shall fail to pay the tax according to law, the commissioners, at their option, may collect from the person so failing double the tax, or may treat such dog as a nuisance, and order its destruction.

Rev., s. 2971; Code, s. 3815; R. C., c. 111, s. 24.

For general dog tax, see Dogs.

Statute empowering town authorities to require payment of a tax on dogs is constitutional. It is not an ad valorem but a specific tax for the privilege of keeping a dog within town, and if not paid by owner, dog may be treated as a nuisance and killed: *Mowery v. Salisbury*, 82-175; *Newell v. Green*, 169-462.

2684. Monthly settlements by tax collector. Each town and city constable, or any other officer authorized by any town or city to collect taxes, fines or penalties, shall make a monthly settlement of all moneys coming into his hands, with the town treasurer or other officer authorized to receive the same.

Rev., s. 2972; Code, s. 3813; 1879, c. 194.

Tax collector, having accepted and acted under such levy, cannot be heard to impeach its sufficiency: *Wadesboro v. Atkinson*, 107-317.

2685. Punishment for failing to pay over taxes monthly. If any constable or collector of taxes for any town or city, or any other officer, shall fail to make settlement and full return of all moneys, penalties and fines coming into his hands each month with the town or city treasurer, or other officer authorized to receive the same, he shall be guilty of a misdemeanor.

Rev., s. 3609; Code, s. 3814; 1879, c. 194, s. 2; 1881, c. 37.

Section cited in *Guano Co. v. Tarboro*, 126-68.

2686. Annual statement of taxes. The commissioners shall annually publish an accurate statement of the taxes, levied and collected in the town, together with a statement of the amount expended by them, and for what purpose. And any board of commissioners failing to comply with this section shall forfeit and pay one hundred dollars to any person who will sue for the same.

Rev., s. 2973; Code, s. 3816; R. C., c. 111, s. 25.

Where a board of town commissioners has failed to comply with this section, their failure subjects them to penalty, from which they will not be relieved by their successors supplying the omission: *Roberts v. Southern Pines*, 125-172.

2687. Publication of receipts and disbursements. Statements showing the receipts and disbursements of public money by municipal corporations, quasi-municipal corporations, and administrative boards of limited territorial jurisdiction, under grant of power from the state, shall be regularly published, as follows:

1. The board of aldermen or other governing body of incorporated cities and towns having a population of three thousand or over shall cause to be published monthly or quarterly statements of all municipal receipts and disbursements, which shall be itemized and show from what source received and to whom and on

what account paid, and shall likewise cause to be published annually, at the end of each fiscal year, condensed and classified statements of such municipal receipts and disbursements, showing the source from which received and the account on which expended.

2. The boards of commissioners of all incorporated towns having a population of less than three thousand; boards of graded school trustees and other governing and administrative bodies of public school districts created by special act of the general assembly; county boards of education; boards of road commissioners and fence commissioners charged with the supervision, maintenance and repair of public roads and fences; the governing bodies of all other quasi-municipal corporations; all other administrative boards of limited territorial jurisdiction under grant of power from the state, charged with the receipt and disbursement of public money, and for the publication of whose receipts and disbursements no other provision is made by law, shall cause to be published annually, at the end of each fiscal year, statements of all receipts and disbursements of public money collected and expended. The statements shall be itemized in the manner provided for itemizing the monthly and quarterly statements of municipal receipts and disbursements, and shall further contain a classified summary of such receipts and disbursements, showing the source from which received and the account on which expended.

3. The statements above provided for shall be published in some newspaper having its place of publication, or which is of general circulation, in the city or town in which such public moneys are collected and expended. The cost of such publication shall not exceed one-half of one cent per word; but if no newspaper, as herein provided, will publish the statements at the rate named, the board of commissioners or other governing body shall, in their discretion, publish the statements by posting as notices at the courthouse door in the county and two other public places in the city, town, or district in which the money is collected and expended.

1911, c. 123; 1919, c. 112.

ART. 6. SALE OF MUNICIPAL PROPERTY

2688. Public sale by mayor and commissioners. The mayor and commissioners of any town shall have power at all times to sell at public outcry, after thirty days notice, to the highest bidder, any property, real or personal, belonging to any such town, and apply the proceeds as they may think best.

Rev., s. 2978; Code, s. 3824; 1872-3, c. 112.

This section does not extend to sale or lease of real estate which by terms of act of incorporation is to be held in trust for use of town, or to such real estate as is devoted to governmental purposes, as city hall, market-house, etc. A special act is necessary in such case: *Southport v. Stanly*, 125-464; *Turner v. Comrs.*, 127-154.

Legislature could not authorize sale of streets in reference to which bordering property owners had located improvements: *Southport v. Stanly*, 125-464; *Moose v. Carson*, 104-431; *Church v. Dula*, 148-262; *Moore v. Meroney*, 154-158.

2689. Sale by county commissioners. In any town where there is no mayor or commissioners, the board of county commissioners shall have the power given in the preceding section.

Rev., s. 2979; Code, s. 3825; 1872-3, c. 112, s. 2.

2690. Title made by mayor. The mayor of any town, or the chairman of any board of commissioners of any town or county, is fully authorized to make title to the purchaser of any property sold under this chapter.

Rev., s. 2980; Code, s. 3826; 1872-3, c. 112, s. 3.

ART. 7. GENERAL MUNICIPAL DEBTS

2691. Popular vote required, except for necessary expense. No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied, or collected by any officer of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.

Rev., s. 2974; Const., Art. VII, s. 7.

CONSTITUTIONAL REQUIREMENTS. To enable municipal corporation to borrow money or loan its credit for any purpose, except for its necessary expenses, there must be an act of assembly passed and ratified, as required by constitution, authorizing it to submit proposition to the people, followed by an actual submission to and ratification by a majority of the qualified voters: *Mayo v. Comrs.*, 122-5. The constitution does not prohibit the appropriation of funds in the treasury of a municipal corporation to the necessary expenses thereof—this prohibition is confined to the contracting of debts for objects there forbidden without the sanction of a majority of qualified voters: *Gardner v. New Bern*, 98-228.

It was competent for legislature by provision in railroad charter to authorize town to hold election upon issue of bonds, without in terms amending the town charter for that purpose: *Glenn v. Wray*, 126-730; *Bank v. Comrs.*, 116-339; *Jones v. Comrs.*, 107-265; *Wood v. Oxford*, 97-227.

An act annexing territory but containing no tax or debt features need not be passed according to constitutional requirement: *Lutterloh v. Fayetteville*, 149-65.

Where commissioners of a town are authorized to fund its bonded indebtedness at higher rate of interest than original bonds bore, the portion of act authorizing increased rate of interest without a vote of the electors is void as contrary to art. 7, sec. 7, of the constitution, and only the principal of the bonds and interest from maturity of bonds can be recovered: *Broadfoot v. Fayetteville*, 128-529.

When municipal corporation, by a valid act of general assembly and an affirmative vote of approval by a majority of its qualified voters, has acquired right to create a debt and issue bonds therefor (section 14, article 2, of the constitution), such authority carries with it the power to levy taxes necessary to pay such bonds and the accruing interest thereon: *Charlotte v. Shepard*, 122-602, overruling *Charlotte v. Shepard*, 120-411.

Where legislature authorized city to issue bonds for necessary expenses, upon a vote of the people, and directed that they be sold for not less than par, and popular vote was had, but bonds could not be floated at par, and a subsequent act authorized city to "issue, sell and dispose of said issue of bonds," and to pay a commission brokerage of not more than 6 per cent, their issuance created a valid indebtedness without a popular vote: *Greensboro v. Scott*, 138-180.

If an amendment in a material matter is made to bill levying tax, amended bill should be read over again three times in each house, with yea and nay vote on second and third readings entered on journals: *Glenn v. Wray*, 126-730; *Guire v. Comrs.*, 177-516; *Cottrell v. Lenoir*, 173-138; *Claywell v. Comrs.*, 173-657; *Burwell v. Lillington*, 171-94. If the amendments do not materially change the amount nor the tax required, the bonds are valid: *Wagstaff v. Highway Com.*, 177-354, and cases cited.

The usual certificate of ratification of a bill levying a tax is conclusive only of the fact of ratification, but not of a compliance with article 2, section 14, of the constitution: *Smathers v. Comrs.*, 125-480.

There is no difference between making a contract binding a municipality for a long period of years, requiring the payment of a large yearly sum, and the issuing of bonds of the municipality to run a like period: *Thrift v. Elizabeth City*, 122-31.

The legislature has the power to impose restrictions upon the contract powers of a municipal corporation, and these must be complied with: *Highway Com. v. Webb*, 152-710; *Burgin v. Smith*, 151-561.

NECESSARY EXPENSES. The term is not limited to expenses incurred for purposes absolutely necessary to the existence of the municipality: *Swindell v. Belhaven*, 173-1. Waterworks and electric lights are necessary expense: *Swindell v. Belhaven*, 173-1; *Bain v. Goldsboro*, 164-102; *Davis v. Fremont*, 135-538; *Fawcett v. Mt. Airy*, 134-125, overruling *Edgerton v. Water Co.*, 126-93; *Thrift v. Elizabeth City*, 122-31; *Mayo v. Washington*, 122-5; *Charlotte v. Shepard*, 120-411. Waterworks and sewerage system: *Hotel Co. v. Red Springs*, 157-137; *Underwood v. Ashboro*, 152-641; *Bradshaw v. High Point*, 151-517; *Greensboro v. Scott*, 138-181; *Water Co. v. Trustees*, 151-171. Cost of maintaining the streets: *Jones v. New Bern*, 152-64; *Hendersonville v. Jordan*, 150-35; *Comrs. v. Webb*, 148-120; *Tucker v. Raleigh*, 75-271; *Wilson v. Charlotte*, 74-748. Roads and bridges: *Herring v. Dixon*, 122-420; *Tate v. Comrs.*, 122-812; but compare *Comrs. v. DeRossett*, 129-275.

A municipal building is a necessary expense: *Hightower v. Raleigh*, 150-569. A market-house: *LeRoy v. Elizabeth City*, 166-93; *Swinson v. Mt. Olive*, 147-611; *Smith v. New Bern*, 70-14. Guard-house or jail: *McLin v. New Bern*, 70-12. Paying officers, etc.: *Gardner v. New Bern*, 98-228.

School buildings, support of public schools, etc., are not necessary expense for county or municipal corporation: *Snider v. Jackson*, 175-590; *Stephens v. Charlotte*, 172-564; *Moran v. Comrs.*, 168-289; *Sprague v. Comrs.*, 165-603; *Gastonia v. Bank*, 165-507; *Ellis v. Trustees*, 156-10; *Hollowell v. Borden*, 148-255; *Smith v. School Trustees*, 141-143; *Rodman v. Washington*, 122-39. School orders not a necessary expense: *Bear v. Comrs.*, 124-204. A building committee for a courthouse is not a necessary expense: *Black v. Comrs.*, 129-122. Fireworks for public celebration not a necessary expense: *Love v. Raleigh*, 116-296.

What is a necessary expense is a question of law for the court; whether it will be incurred and the reasonable cost is for the municipal authorities: *Hightower v. Raleigh*, 150-569. See annotations under section 1325.

POPULAR VOTE REQUIRED. The popular vote is required for all purposes not within the class of necessary expense, and the legislature cannot provide otherwise: *Guire v. Comrs.*, 177-516; *Bank v. Comrs.*, 116-339; *Riggsbee v. Durham*, 98-81; s. c., 99-341; *Wood v. Oxford*, 97-227.

Popular vote is not required for necessary expense, but the legislature may impose the restriction that the vote shall be taken: *Guire v. Comrs.*, 177-516; *Davis v. Lenoir*, 178-668; *Swindell v. Belhaven*, 173-1; *Cottrell v. Lenoir*, 173-138; *Bramham v. Durham*, 171-196; *Burwell v. Lillington*, 171-94; *Warsaw v. Malone*, 159-573; *Charlotte v. Trust Co.*, 159-388; *Murphy v. Webb*, 156-402; *Ellison v. Williamston*, 152-147; *Jones v. New Bern*, 152-64; *Robinson v. Goldsboro*, 135-382; *Asheville v. Webb*, 134-72; *Wadsworth v. Concord*, 133-587; *Black v. Comrs.*, 129-121.

The method of voting is within the power of the legislature, but in the absence of express direction the voter should be allowed to vote on a single proposition: *Winston v. Bank*, 158-512. An amendment to the city charter in two particulars may be voted on as one proposition: *Taylor v. Greensboro*, 175-423. It is no defect to submit an issue of bonds for several purposes as one proposition, when the whole is for necessary expense: *Briggs v. Raleigh*, 166-149; *Hotel Co. v. Red Springs*, 157-137. But when the question presented embodies two or more distinct and unrelated propositions, the voter should be given an opportunity to express his decision as to each: *Winston v. Bank*, 158-512—and the different questions may be voted on in the same box, *Smith v. Belhaven*, 150-156.

It is the duty of the municipal authorities to issue the call and give notice of the election: *Tyson v. Salisbury*, 151-468. An irregularity in giving notice or in conducting the election, which does not deprive the voter of his privilege or materially affect the result, will not invalidate the election: *Hardee v. Henderson*, 170-572; *Hill v. Skinner*, 169-405; *Briggs v. Raleigh*, 166-149; *Hendersonville v. Jordan*, 150-35.

It must appear that a majority of those who were qualified to vote voted for the proposition, unless it is a necessary expense: *Sprague v. Comrs.*, 165-603, and cases cited above.

“MAJORITY OF QUALIFIED VOTERS.” Registration list is prima facie evidence of who are qualified voters: *Young v. Hendersonville*, 129-422; *Clark v. Statesville*, 139-490. A qualified voter is one who is entitled to register as a voter, and who is also qualified to vote

after such registration: *Railroad v. Caldwell*, 72-492, 493—a registered voter being one who has lawfully registered and paid his poll tax, *Pace v. Raleigh*, 140-65. Voter must register anew, when so required, in order to be a qualified voter: *Clark v. Statesville*, 139-490. Other cases on the subject are: *Harris v. Scarborough*, 110-232; *Riggsbee v. Durham*, 99-341; *Smith v. Wilmington*, 98-343; *Wood v. Oxford*, 97-233; *McDowell v. Construction Co.*, 96-514; *Markham v. Manning*, 96-132; *Duke v. Brown*, 96-127; *Southerland v. Goldsboro*, 96-49; *Norment v. Charlotte*, 85-387.

It is sufficient if a majority of the qualified voters actually voted for the proposition, though the legislature required only a majority of the votes cast: *Riggsbee v. Durham*, 99-341; *Wood v. Oxford*, 97-227. Those who are authorized to hold the election and ascertain the result should examine the registration books and eliminate the names of all who are not entitled to vote: *Ibid.* The result of the election as declared by the proper officers is *prima facie* correct, but the courts may, upon proper action brought, ascertain and declare the true result: *Ibid.*

Words "majority of the members-elect," or "majority of the qualified voters," are used in constitutions and laws to take the exercise of a particular power out of general rule, and make assent of majority of whole number necessary: *Cotton Mills v. Comrs.*, 108-678.

If it is for a necessary expense, the legislature may require only a majority of the votes cast, or may not require a vote to be taken: *Davis v. Lenoir*, 178-668, and cases cited.

MUNICIPAL BONDS. As to conditions precedent to issuing of bonds; action by purchaser for value; injunction by taxpayer; retrospective statute, see *Belo v. Comrs.*, 76-489.

Bonds may be issued for necessary expense without popular vote: *Swindell v. Belhaven*, 173-1; *Warsaw v. Malone*, 159-573; *Murphy v. Webb*, 156-402. A succeeding board may revoke an order to issue bonds, if rights of third persons are not affected: *Lucas v. Belhaven*, 175-124.

An issue of bonds by town is valid as to the interest rate when town commissioners were vested with power to fix rate of interest, not exceeding six per cent, and records show that rate was fixed at five and one-half per cent, in discretion of commissioners: *Lumberton v. Nuveen*, 144-303; *Hotel Co. v. Red Springs*, 157-137. Date of maturity of bonds may be left to discretion of commissioners within certain periods: *Ibid.* Coupons are part of the bonds and partake of their nature: *Broadfoot v. Fayetteville*, 124-478.

That the rate of taxation is insufficient does not invalidate the bonds: *Hotel Co. v. Red Springs*, 157-137. That the county is to supplement school bonds, and there is no authority to do so, does not render bond issue void: *Moran v. Comrs.*, 168-289. Failure to provide a sinking fund does not affect validity of bonds: *Jones v. New Bern*, 152-64.

When bonds were to be issued for a railroad, and not to be delivered, but to become void, unless the road was completed within three years, there was no authority to extend the time: *McCracken v. R. R.*, 168-62.

Legislature may cure an irregularity in issuing bonds: *Kinston v. Trust Co.*, 169-207. But where the constitutional authority does not exist, no act of the municipal authorities will operate as an estoppel: *Glenn v. Wray*, 126-730; *Comrs. v. Payne*, 123-432; *Bank v. Comrs.*, 119-214; *s. c.*, 116-339; *R. R. v. Comrs.*, 109-159.

It is incumbent upon purchasers of state, county and municipal bonds to ascertain whether authority to issue them has been granted according to requirements of constitution: *Comrs. v. Snuggs*, 121-394; *Bank v. Comrs.*, 116-339, and cases therein cited.

Purchaser of municipal bonds for railroad subscription is not required, when inquiring into the election, to go further than to find, from certificate of registrar, that a majority of qualified voters of municipality had voted for subscription: *Claybrook v. Comrs.*, 117-456.

Purchaser of municipal bonds which, upon their face, refer to statute under which they are issued, is bound to take notice of statute and all its requirements: *Claybrook v. Comrs.*, 114-453; *Comrs. v. Call*, 123-308; *Lumberton v. Nuveen*, 144-303; *Highway Com. v. Malone*, 166-1—and where there is an inherent constitutional defect in statute authorizing issue of bonds or in proceedings under which they are issued, a purchaser takes with notice, and there can be no such thing as an innocent holder, *Claybrook v. Comrs.*, 114-453.

Repeal of town charter and reincorporation does not invalidate bonds of town; time between not counted on plea of statute of limitations: *Broadfoot v. Fayetteville*, 124-478.

For municipal bond issues generally, see subchapter 3, **Municipal Finance Act**.

2692. Debts paid out of tax funds. Debts contracted by a municipal corporation in pursuance of authority vested in it shall not be levied out of any prop-

erty belonging to such corporation and used by it in the discharge and execution of its corporate duties and trusts, nor out of the property or estate of any individual who may be a member of such corporation or may have property within the limits thereof. But all such debts shall be paid alone by taxation upon subjects properly taxable by such corporation: Provided, that whenever any individual, by his contract, shall become bound for such debt, or any person may become liable therefor by reason of fraud, such person may be subjected to pay said debt.

Rev., s. 2975; Code, s. 3821; 1870-1, c. 90.

See *Winslow v. Comrs.*, 64-218; *Hughes v. Comrs.*, 107-605, and cases cited; *McCless v. Meekins*, 117-34; *Ellis v. Trustees*, 156-10.

2693. **Debts limited to ten per cent of assessed values.** It shall be unlawful for any city or town to contract any debt, pledge its faith or loan its credit for the construction of railroads, the support or maintenance of internal improvements or for any special purpose whatsoever, to an extent exceeding in the aggregate ten per cent of the assessed valuation of the real and personal property situated in such city or town. And the levy of any tax to pay any such indebtedness in excess of this limitation shall be void and of no effect.

Rev., s. 2977; 1889, c. 486.

See Municipal Finance Act, subchapter III, s. 2943 (2).

This section is constitutional: *Wharton v. Greensboro*, 146-356. The limitation does not apply to debts for necessary expense: *Ibid.*; s. c., 149-62; *Underwood v. Ashboro*, 152-641; *Murphy v. Webb*, 156-402. Section referred to: *Hollowell v. Borden*, 148-255; *Cottrell v. Lenoir*, 148-137; *Bain v. Goldsboro*, 164-102.

ART. 8. PUBLIC LIBRARIES

2694. **Libraries established upon petition and popular vote.** The governing body of any incorporated city or town, upon the petition of twenty-five per cent of the registered voters thereof, shall submit the question of the establishment of a free public library to the voters at the next municipal election. If a majority of votes cast on said question be in the affirmative, the board of aldermen or town commissioners shall establish the library or reading-room and levy and cause to be collected as other general taxes are collected a special tax of not more than ten cents on the hundred dollars of the assessed value of the taxable property of such city or town and not more than thirty cents on the poll. The fund so provided shall constitute the library fund, and shall be kept separate from the other funds of the city or town, to be expended exclusively upon such library.

1911, c. 83, s. 1.

2695. **Library trustees appointed.** For the government of such library there shall be a board of six trustees appointed by the governing body of the city or town, chosen from the citizens at large with reference to their fitness for such office; and not more than one member of the board of aldermen or town commissioners shall be at any one time a member of said board. Such trustees shall hold their office for six years from their appointment, and until their successors are appointed and qualified: Provided, that upon their first appointment under this article two members shall be appointed for two years, two for four years, and two for six years, and at all subsequent appointments, made

every two years, two members shall be appointed for six years. All vacancies shall be immediately reported by the trustees to the governing body and be filled by appointment in like manner, and, if in an unexpired term, for the residue of the term only. The governing body may remove any trustee for incapacity, unfitness, misconduct, or for neglect of duty. No compensation shall be allowed any trustee.

1911, c. 83, s. 2.

2696. Powers and duties of trustees. Immediately after appointment, such board of trustees shall organize by electing one of its members as president and one as secretary-treasurer, and such other officers as it may deem necessary. The secretary-treasurer before entering upon his duties shall give bond to the municipality in an amount fixed by the board of trustees, conditioned for the faithful discharge of his official duties. The board shall adopt such by-laws, rules and regulations for its own guidance and for the government of the library as may be expedient and conformable to law. It shall have exclusive control of the expenditure of all moneys collected for or placed to the credit of the library fund, and of the supervision, care, and custody of the rooms or buildings constructed, leased, or set apart for library purposes. But all money received for such library shall be paid into the city treasury, be credited to the library fund, be kept separate from other moneys, and be paid out to the secretary-treasurer upon the authenticated requisition of the board of trustees through its proper officers. With the consent of the governing body of the city or town, it may lease and occupy, or purchase, or erect upon ground secured through gift or purchase, an appropriate building: Provided, that of the income for any one year not more than one-half may be employed for the purpose of making such lease or purchase or for erecting such building. It may appoint a librarian, assistants, and other employees, and prescribe rules for their conduct, and fix their compensation, and shall also have power to remove such appointees. It may also extend the privileges and use of such library to nonresidents upon such terms and conditions as it may prescribe.

1911, c. 83, s. 3.

2697. Annual report of trustees. On or before the thirty-first day of December of each year the board of trustees shall make a report to the governing body of the city or town, stating the condition of their trust, the various sums of money received from the library fund and all other sources, and how much money has been expended; the number of books and periodicals on hand, the number added during the year, the number lost or missing, the number of books loaned out, and the general character of such books; the number of registered users of such library, with such other statistics, information, and suggestions as it may deem of general interest.

1911, c. 83, s. 7.

2698. Power to take property by gift or devise. With the consent of the governing body of the city or town, expressed by ordinance or resolution, and within the limitations of this article as to the rate of taxation, the library board may accept any gift, grant, devise, or bequest made or offered by any person for library purposes, and may carry out the conditions of such donations. And the

city or town in all such cases is authorized to acquire a site, levy a tax, and pledge itself by ordinance or resolution to a perpetual compliance with all the terms and conditions of the gift, grant, devise, or bequest so accepted.

1911, c. 83, s. 5.

2699. Title to property vested in the city or town. All property given, granted, conveyed, donated, devised, or bequeathed to, or otherwise acquired by, any city or town for a library shall vest in and be held in the name of such city or town, and any conveyance, grant, donation, devise, bequest, or gift to or in the name of any public library board shall be deemed to have been made directly to such city or town.

1911, c. 83, s. 4.

2700. Library free. Every library established under this article shall be forever free to the use of the inhabitants of the city or town, subject to such reasonable regulations as the board of trustees may adopt.

1911, c. 83, s. 6.

2701. Ordinances for protection of library. The governing body of such city or town shall have power to pass ordinances imposing suitable penalties for the punishment of persons committing injury upon such library or the grounds or other property thereof, or for any injury to or for failure to return any book, plate, picture, engraving, map, magazine, pamphlet, or manuscript belonging to such library.

1911, c. 83, s. 8.

2702. Contract with existing libraries. The governing body of any city or town, when deemed best for the interest of the city or town, may, in lieu of supporting and maintaining a public library, enter into a contract with and make continuing appropriations of money to such library, associations or corporations as shall maintain a library or libraries, whose books shall be available without charge to the residents of such city or town, under such rules and regulations of said library associations or corporations as shall be approved by the governing body of such city or town. All money paid to such society or corporation under such contract shall be expended solely for the maintenance of such library, and for no other purpose. No city or town shall appropriate under this section in any year a total greater than one-fortieth of one per cent of the taxable value of such city or town according to the assessment of the previous year.

Nothing in this section shall be construed to abolish or abridge any power or duty conferred upon any public library established by virtue of any city or town charter or other special act, or to affect any existing local laws allowing or providing municipal aid to libraries.

1911, c. 83, ss. 9, 10; 1917, c. 215.

ART. 9. LOCAL IMPROVEMENTS

2703. Explanation of terms. In this article the term "municipality" means any city or town in the state of North Carolina now or hereafter incorporated.

"Governing body" includes the board of aldermen, board of commissioners, council, or other chief legislative body of a municipality.

“Street improvement” includes the grading, regrading, paving, repaving, macadamizing and remacadamizing of public streets and alleys, and the construction, reconstruction and altering of curbs, gutters and drains in public streets and alleys.

“Sidewalk improvement” includes the grading, construction, reconstruction and altering of sidewalks in public streets or alleys, and may include curbing and gutters.

“Local improvement” means any work undertaken under the provisions of this article, the cost of which is to be specially assessed, in whole or in part, upon property abutting directly on the work.

“Frontage” when used in reference to a lot or parcel of land abutting directly on a local improvement, means that side or limit of the lot or parcel of land which abuts directly on the improvement.

1915, c. 56, s. 1.

2704. Application and effect. This article shall apply to all municipalities. It shall not, however, repeal any special or local law or affect any proceedings under any special or local law for the making of street, sidewalk or other improvements hereby authorized, or for the raising of funds therefor, but shall be deemed to be additional and independent legislation for such purposes and to provide an alternative method of procedure for such purposes, and to be a complete act, not subject to any limitation or restriction contained in any other public or private law or laws, except as herein otherwise provided.

1915, c. 56, s. 2.

General effect of statute explained: *Cottrell v. Lenoir*, 173-138. A special act will control which limits the power of a municipal corporation and is inconsistent with this statute: *Bramham v. Durham*, 171-196.

See subchapter 3, **Municipal Finance Act**.

2705. Publication of resolution or notice. Every resolution passed pursuant to this article shall be passed in the manner prescribed by other laws for the passage of resolutions. Whenever a resolution or notice is required by this article to be published, it shall be published at least once in a newspaper published in the municipality concerned, or, if there be no such newspaper, such resolution or notice shall be posted in three public places in the municipality for at least five days.

1915, c. 56, s. 3.

2706. When petition required. Every municipality shall have power, by resolution of its governing body, upon petition made as provided in the next succeeding section, to cause local improvements to be made and to defray the expense of such improvements by local assessment, by general taxation, and by borrowing, as herein provided. No petition shall be necessary, however, for the ordering or making of private water, sewer and gas connections as hereinafter provided. Nor shall a petition be necessary for the making of sidewalk improvements in those municipalities in which by other law or laws sidewalk improvements are authorized to be made without petition.

1915, c. 56, s. 4.

2707. What petition shall contain. The petition for a local improvement shall be signed by at least a majority in number of the owners, who must represent

at least a majority of all the lineal feet of frontage of the lands (a majority in interest of owners of undivided interests in any piece of property to be deemed and treated as one person for the purpose of the petition) abutting upon the street or streets or part of a street or streets proposed to be improved. The petition shall cite this article and shall designate by a general description the local improvement to be undertaken and the street or streets or part thereof whereon the work is to be effected. The petition shall be lodged with the clerk of the municipality, who shall investigate the sufficiency thereof, submit the petition to the governing body, and certify the result of his investigation. The determination of the governing body upon the sufficiency of the petition shall be final and conclusive.

1915, c. 56, s. 5.

2708. What resolution shall contain:

1. *Designate improvements.* The preliminary resolution determining to make a local improvement shall, after its passage, be published. Such resolution shall designate by a general description the improvement to be made, and the street or streets or part or parts thereof whereon the work is to be effected, and the proportion of the cost thereof to be assessed upon abutting property and the terms and manner of the payment.

2. *Sidewalk improvements.* If such resolution shall provide for a sidewalk improvement, it may, in those municipalities in which the owners of the abutting property are required to make payment of the entire cost thereof, without petition direct that the owners of the property abutting on the improvement shall make such sidewalk improvement, and that unless the same shall be made by such owners on or before a day specified in the resolution, the governing body may cause such sidewalk improvement to be made.

3. *Affecting railroads.* If the resolution shall provide for a street improvement, it shall direct that any street railway company or other railroad company having tracks on the street or streets or part thereof to be improved shall make such street improvement, with such material and of such a character as may be approved by the governing body, in that part of such street or streets or part thereof which the governing body may prescribe, not to exceed, however, the space between the tracks, the rails of the tracks, and eighteen inches in width outside of the tracks of such company, and that unless such improvement shall be made on or before a day specified in such resolution, the governing body will cause such improvement to be made: Provided, however, that where any such company shall occupy such street or streets under a franchise or contract which otherwise provided, such franchise or contract shall not be affected by this section, except in so far as may be consistent with the provisions of such franchise or contract.

4. *Water, gas and sewer connections.* If the resolution shall provide for a street or sidewalk improvement, it may, but need not, direct that the owners of all property abutting on the improvement shall connect their several premises with water mains, gas and sewer pipes located in the street adjacent to their several premises in the manner prescribed in such resolution, and that unless such owners shall cause connection to be made on or before a day specified in such resolution, the governing body will cause the same to be made.

1915, c. 56, s. 6.

2709. Character of work and material. The governing body shall have power to determine character and type of construction and of material to be used in making a local improvement, and whether the work, where not done by owners of abutting property or by a street or other railroad company, shall be done by the forces of the municipality or by contract: Provided, that for the purposes of securing uniformity in the work the governing body shall always have the power to have all street paving done by the forces of the municipality or by contract under the provisions of this article.

1915, c. 56, s. 7.

2710. Assessments levied:

1. One-half on abutting property. One-half of the total cost of a street or sidewalk improvement made by a municipality, exclusive of so much of the cost as is incurred at street intersections and the share of railroads or street railways, shall be specially assessed upon the lots and parcels of land abutting directly on the improvements, according to the extent of their respective frontage thereon, by an equal rate per foot of such frontage, unless the petition for such street or sidewalk improvement shall request that a larger proportion of such cost, specified in the petition, be so assessed, in which case such larger proportion shall be so assessed, and the remainder of such cost shall be borne by the municipality at large; but no assessment for streets and sidewalks shall be made against abutting property on any such street or sidewalk until said street or sidewalk has been definitely laid out and the boundaries of the same definitely fixed.

2. Upon railroads. The cost of that part of a street improvement required to be borne by a railroad or street railway company, and made by the municipality after default by a railroad or street railway company in making the same, as hereinbefore provided, shall be assessed against such company, and shall be collected in the same manner as assessments are collected from abutting property owners, and such assessment shall be a lien on all of the franchises and property of such railroad or street railway company.

3. For sidewalks. The entire cost of a sidewalk improvement required to be made by owners of property abutting thereon, and made by the municipality after default by such property owners in making the same, as hereinbefore provided, shall be assessed against the lots and parcels of land abutting on that side of the street upon which the improvement is made and directly on the improvement, according to their respective frontages thereon, by an equal rate per foot of such frontage.

4. Water, gas and sewer connections. The entire cost of each water, gas and sewer connection, required to be made by the owner of the property for or in connection with which such connection was made, but made by the municipality after default by such property owner in making the same, as hereinbefore provided, shall be specially assessed against the particular lot or parcel of land for or in connection with which it was made. No lands in the municipality shall be exempt from local assessment.

1915, c. 56, s. 8; 1919, c. 86.

See annotations under section 2675, "assessment for improvements."

2711. Amount of assessment ascertained. Upon the completion of any local improvement the governing body shall compute and ascertain the total cost

thereof. In the total cost shall be included the interest paid or to be paid on notes or certificates of indebtedness issued by the municipality to pay the expense of such improvement pursuant to the provisions of this article and incident to the improvement and assessment therefor. The governing body must thereupon make an assessment of such total cost pursuant to the provisions of the preceding section, and for that purpose must make out an assessment roll in which must be entered the names of the persons assessed as far as they can ascertain the same, and the amount assessed against them, respectively, with a brief description of the lots or parcels of land assessed.

1915, c. 56, s. 9.

See annotations under section 2675, "assessment for improvements."

2712. Assessment roll filed; notice of hearing. Immediately after such assessment roll has been completed, the governing body shall cause it to be deposited in the office of the clerk of the municipality for inspection by parties interested, and shall cause to be published a notice of the completion of the assessment roll, setting forth a description in general terms of the local improvement, and the time fixed for the meeting of the governing body for the hearing of allegations and objections in respect of the special assessment, such meeting not to be earlier than ten days from the first publication or posting of said notice. Any number of assessment rolls may be included in one notice.

1915, c. 56, s. 9.

2713. Hearing and confirmation; assessment lien. At the time appointed for that purpose, or at some other time to which it may adjourn, the governing body, or a committee thereof, must hear the allegations and objections of all persons interested, who appear and may make proof in relation thereto. The governing body may thereupon correct such assessment roll, and either confirm the same or may set it aside, and provide for a new assessment. Whenever the governing body shall confirm an assessment for a local improvement, the clerk of the municipality shall enter on the minutes of the governing body the date, hour, and minute of such confirmation, and from the time of such confirmation the assessments embraced in the assessment roll shall be a lien on the real property against which the same are assessed, superior to all other liens and encumbrances. After the roll is confirmed a copy of the same must be delivered to the tax collector or other officer charged with the duty of collecting taxes.

1915, c. 56, s. 9.

See annotations under section 2675, "assessment for improvements."

2714. Appeal to the superior court. If a person assessed is dissatisfied with the amount of the charge, he may give notice within ten days after such confirmation that he takes an appeal to the next term of the superior court of the county in which the municipality is located, and shall within five days thereafter serve a statement of facts upon which he bases his appeal, but the appeal shall not delay or stop the improvements. The appeal shall be tried at the term of court as other actions at law.

1915, c. 56, s. 9.

2715. **Power to adjust assessments.** The governing body may correct, cancel or remit any assessment for a local improvement, and may remit, cancel or adjust the interest or penalties on any such assessment. The governing body has the power, when in its judgment there is any irregularity, omission, error or lack of jurisdiction in any of the proceedings relating thereto, to set aside the whole of the local assessment made by it, and thereupon to make a reassessment. In such case there shall be included, as a part of the costs of the public improvement involved, all interest paid or accrued on notes or certificates of indebtedness, or assessment bonds issued by the municipality to pay the expenses of such improvement. The proceeding shall be in all respects as in case of local assessments, and the reassessment shall have the same force as if it had originally been properly made.

1915, c. 56, s. 9.

2716. **Payment of assessment in cash or by installments.** The property owner or railroad or street railway company hereinbefore mentioned shall have the option and privilege of paying for the improvements hereinbefore provided for in cash, or if they should so elect and give notice of the fact in writing to the municipality within thirty days after the notice mentioned in next succeeding section, they shall have the option and privilege of paying the assessments in not less than five nor more than ten equal annual installments as may have been determined by the governing body in the original resolution authorizing such improvement. Such installments shall bear interest at the rate of six per centum per annum from the date of the confirmation of the assessment roll, and in case of the failure or neglect of any property owner or railroad or street railway company to pay any installment when the same shall become due and payable, then and in that event all of the installments remaining unpaid shall at once become due and payable and such property and franchises shall be sold by the municipality under the same rules, regulations, rights of redemption and savings as are now prescribed by law for the sale of land for unpaid taxes. The whole assessment may be paid at the time of paying any installment by payment of the principal and all interest accrued to that date.

1915, c. 56, s. 10.

2717. **Payment of assessments enforced.** After the expiration of twenty days from the confirmation of an assessment roll the tax collector or such other officer of the municipality as the governing body may direct so to do shall cause to be published in a newspaper published in the municipality, or if there be no such newspaper, shall cause to be posted in at least three public places therein, a notice that any assessment contained in the assessment roll, naming and describing it, may be paid to him at any time before the expiration of thirty days from the first publication of the notice without any addition. In the event the assessment be not paid within such time the same shall bear interest at the rate of six per cent per annum from the date of the confirmation of the assessment roll and shall become due and payable on the date on which taxes are payable: Provided, that where an assessment is divided into installments one installment shall become due and payable each year on the date on which taxes are due and payable.

If any assessment or installment thereof is not paid when due, it shall be subject to the same penalties as are now prescribed for unpaid taxes, in addition to the interest herein provided for.

1915, c. 56, s. 11.

See annotations under section 2675, "assessment for improvements."

2718. Assessments in case of tenant for life or years. Whenever any real estate is in the possession or enjoyment of a tenant for life, or a tenant for a term of years, and an assessment is laid or levied on said property by any city, town, county, township, municipal district, or the state, to cover the cost of permanent improvements ordered put thereon by the law or the ordinances of such city or town, township, or municipal district, such as paving streets and sidewalks, laying sewer and water lines, draining lowlands, and permanent improvements of a like character, which constitute a lien upon such property, the amount so assessed for such purposes shall be paid by the tenant for life or for years, and the remaindermen after the life estate, or the owner in fee after the expiration of tenancy for a term of years, pro rata their respective interests in said real estate.

1911, c. 7, s. 1.

2719. Interests of parties ascertained. In calculating the respective interests of a tenant for life and the remainderman in fee, the duration of the life tenancy should be ascertained and the expectation of life of the tenant as is provided by law by the mortuary table, as near as may be justly and fairly done.

1911, c. 7, s. 2.

2720. Lien of party making payment. If the assessment, after same shall be laid or levied, shall all be paid by either the tenant for life or the tenant for a term of years, or by the remainderman, or the owner in fee, the party paying more than his pro rata share of the same shall have the right to maintain an action in the nature of a suit for contribution against the delinquent party to recover from him his pro rata share of such assessment, with interest thereon from the date of such payment, and be subrogated to the right of the city, town, township, municipal district, county, or the state, to a lien on such property for the same.

1911, c. 7, s. 3.

2721. Money borrowed to be paid out of assessment. At any time before the cost of any local improvement shall be computed and ascertained as provided in this article, the governing body may from time to time by resolution authorize the treasurer to borrow money to the extent required to pay the cost of any such improvement or to repay any money borrowed under this section with interest thereon. The resolution authorizing any such loan or loans may provide for the issue of notes or certificates of indebtedness of the municipality, or both, payable either on demand or at a fixed time, not more than six months from the date thereof, and bearing interest not exceeding six per centum per annum. Said notes or certificates may be sold at public or private sale, or pledged as security for temporary loans, as the governing body may by such resolution direct. Any temporary indebtedness incurred under the authority of this section, with the interest thereon, may be paid out of moneys raised by the

issue and sale of "local improvement bonds" or "assessment bonds," or both, to be issued and sold as hereinafter provided, or may be included in the annual tax levy.

1915, c. 56, s. 12.

See Municipal Finance Act, subchapter III, ss. 2934, 2935.

2722. Assessment books prepared. After the governing body of the municipality has levied the assessment against the property abutting upon the street or streets, the city clerk or person designated shall prepare from such assessment roll and deliver to the tax collector or person designated a well bound book styled Special Assessment Book, which shall be so ruled as to conveniently show:

1. Name of owner of such property.
2. The number of lot or part of lot and the plan thereof if there be a plan.
3. The frontage of said lot.
4. The amount that has been assessed against such lot.
5. The amount of such installments and the day on which installments shall become due.

Such book shall be indexed according to the names of the owners of the property, and entries of all payments or partial payments shall be immediately entered upon said book when made, and said book shall be open to the inspection of any citizen of the municipality.

1915, c. 56, s. 13.

2723. Local improvement bonds issued. Whenever an assessment for any local improvement has been confirmed, the governing body may by resolution direct that the amount and proportion of the expense of such improvement which shall be borne by the municipality at large shall be raised by the issuance of bonds of the municipality to be known as "local improvement bonds." Such bonds shall be payable at such time or times, not exceeding thirty years from their date, as the governing body shall determine. There shall be raised annually by tax upon all the taxable property of the municipality, after the issuance of any such bonds, a sum sufficient to meet and pay the interest thereon as the same becomes due, and a sum to be paid into a sinking fund which will, together with the accumulations thereof, provide a fund sufficient to meet and pay the principal of said bonds at maturity: Provided, however, that if such bonds be made payable in annual installments substantially equal in amount, the first of which installments shall be payable within two years from the date of such bonds and the last within twenty years of such date, the governing body authorizing such bonds, in lieu of providing for a sinking fund to meet the principal of such bonds, shall cause to be raised by taxation in each year in which an installment of principal shall be payable, or in the next preceding year, an amount sufficient to meet said installment, in addition to the annual tax during the life of the bonds to provide for the payment of the interest accruing thereon. The municipality's share of two or more improvements may be included in a single issue of local improvement bonds.

1915, c. 56, s. 14.

See Municipal Finance Act, subchapter III, ss. 2939, 2940, 2941, 2959.

The fact that this indebtedness may ultimately be paid by the sale or collection of assessment bonds does not change its character as an indebtedness of the municipal corporation: *Cottrell v. Lenoir*, 173-138; *Charlotte v. Trust Co.*, 159-388.

2724. Assessment bonds issued. Whenever an assessment for any local improvement has been confirmed, and twenty days have elapsed since the first publication of notice of such confirmation, the governing body may by resolution direct that the amount and proportion of the expense of such improvement which has been assessed upon the abutting property, or any part of such expense, shall be raised by the municipality by the issuance of its bonds, to be known as "assessment bonds." Such bonds shall be made payable in not less than five and not more than ten substantially equal annual installments, the last of which shall become due not less than five nor more than ten years after the issuance of the bonds. All moneys derived from the collection of assessments upon which assessment bonds are predicated, collected after the passage of the resolution authorizing such bonds, shall be placed in a special fund, to be used only for the payment of the principal and interest of assessment bonds issued under this section, and if at the time of the annual tax levy for any year in such municipality it shall appear that such fund will be for any cause insufficient to meet the principal and interest of such bonds maturing in such year, the amount of the deficiency shall be included in such tax levy. The amount of the assessments for two or more improvements may be included in a single issue of assessment bonds.

1915, c. 56, s. 15.

See Municipal Finance Act, subchapter III, ss. 2939, 2940, 2941, 2942, 2952.

See *Cottrell v. Lenoir*, 173-138; *Charlotte v. Trust Co.*, 159-388.

2725. Form of bonds; sale. Bonds authorized to be issued by this article shall be of such denomination, bear such rate of interest, not exceeding six per centum per annum, and be payable at such places, and be in such form as the governing body may by resolution provide. Such bonds shall be signed by the mayor or other chief executive officer, and the clerk of the municipality issuing them, and shall bear the seal of such municipality. Coupons attached to such bonds shall bear the facsimile signature of one or more of said officers. Such bonds may be either coupon bonds or registered bonds, or coupon bonds with the privilege of registration as to principal only, or of conversion into bonds registered as to both principal and interest. They may be sold at public or private sale, but for not less than their par value. They shall recite that they are issued pursuant to the authority of this article and of the resolution authorizing the issuance thereof, which shall be conclusive evidence of their validity and of the regularity of their issuance.

1915, c. 56, s. 16.

See Municipal Finance Act, subchapter III, ss. 2954, 2955.

2726. Power to provide for payment. The full faith and credit of a municipality shall be pledged for the payment of the principal and interest of all of its local improvement bonds, assessment bonds, notes and other obligations issued under this article. For the purpose of paying such principal and interest the governing body shall have power to levy sufficient taxes upon all the taxable property in the municipality and to borrow money temporarily upon notes of the municipality in anticipation of taxes of the same or the succeeding fiscal year.

1915, c. 56, s. 17.

See Municipal Finance Act, subchapter III, s. 2959.

2727. Bonds issued without popular vote validated. All bonds heretofore issued or proceedings taken by any city or town in substantial compliance with the provisions of this article are hereby validated, notwithstanding that the question of issuing bonds was not submitted to the voters of such city or town, and every such city or town is authorized to continue such proceedings to issue bonds or other obligations, as provided in this article, without submitting to the voters or taxpayers of such city or town the question of issuing such bonds.

1917, c. 71; 1917, c. 113, ss. 1, 2.

See annotations under section 2691, "municipal bonds."

2728. Popular vote not required in certain cases. Notwithstanding anything contained in any law heretofore enacted, whether general, special, private, or local, it shall be lawful for any city or town to borrow money, contract debts, and issue bonds or other evidence of indebtedness for necessary expenses without the assent of the voters or taxpayers of such city or town, in all cases where the whole or at least one-fourth of the cost of the improvements or properties for which the money is borrowed, debt incurred, or bonds or other evidences of indebtedness issued, has heretofore been or is hereafter to be specially assessed upon abutting property or other property deemed benefited by the making of such improvement or the acquisition of such properties.

1917, c. 113, s. 3.

For general regulations as to issuing bonds, see subchapter III. Municipal Finance Act, and as affecting this article, see s. 2966.

See annotations under section 2691, "municipal bonds."

ART. 10. INSPECTION OF METERS

2729. Inspectors appointed. In every city or town in the state of North Carolina where is furnished, for pay, electricity, gas or water by meter measure, the governing body of the city or town may appoint some competent person to act as inspector of meters, whose duty it shall be to inspect and test such meters and to carry out the provisions of this article as herein provided.

1909, c. 150, s. 1.

2730. Time of appointment; oath, bond, and compensation. Such appointment, if made, shall be made at the first meeting in May of each year of such governing body, subject to the power of such city or town authorities to remove such appointee in the manner provided for the removal of its other appointees and to fill the vacancy caused by such removal. The compensation of such inspector shall be fixed and shall be paid by the city or town so appointing him, and such inspector shall upon his appointment take oath before the mayor of said city or town that he will faithfully perform the duties herein imposed upon him, and the governing body of the city or town may require the inspector to give bond in such sum as they may fix for the faithful discharge of his duties.

1909, c. 150, s. 2.

2731. Apparatus for testing meters provided. Every person, firm, corporation or municipality furnishing for pay electricity, gas or water by meter measure in any city or town having appointed an inspector of meters, as aforesaid,

shall provide and keep a suitable and proper apparatus for testing and proving the accuracy of the meters to be so furnished for use, by which apparatus all such meters shall be tested at their rated capacity.

1909, c. 150, s. 3.

For special provision for Durham county, see 1919, c. 158.

2732. Meters tested before installed. No person, firm, or corporation or municipality furnishing for pay electricity, gas or water by meter measure shall hereafter furnish, install and put in use any such meter in any city or town having appointed an inspector of meters, as aforesaid, until such meter shall first have been inspected and found correct by such inspector, and it shall be the duty of such inspector to test the same upon the written request of such proposed furnisher. No meter now in service shall be required to be taken out for test, except where there is doubt as to its accuracy and upon the written request of the consumer, as herein provided.

1909, c. 150, s. 4.

For special provision for Durham county, see 1919, c. 158.

2733. Inspection made upon complaint. When any consumer, by meter, of electricity, gas or water in any city or town having appointed an inspector of meters, as aforesaid, doubts the accuracy of such meter and desires to have the same tested, such consumer may file with the inspector of meters a written complaint of the meter and request that the same be tested, and shall at the same time deposit with the furnisher the sum of one dollar to cover the expense of taking out and replacing such meter, and thereupon it shall be the duty of such inspector as soon as practicable to accurately test said meter in the presence of and jointly with the authorized agent of the furnisher, and also in the presence of the complainant, if he so desires, and shall give to both the complainant and to the furnisher a written report of such test and the result thereof.

1909, c. 150, s. 5.

For special provision for Durham county, see 1919, c. 158.

2734. Repayment of deposit. If upon such test the meter is found to be incorrect, in that it registers more than two and one-half per cent too fast—that is, more than two and one-half per cent more electricity, gas or water than it should, then and in that event the furnisher shall return to the complainant the one dollar deposit and shall promptly properly adjust and repair the meter or furnish a correctly adjusted meter; but if upon such test the meter shall not register more than two and one-half per cent too fast—that is, more than two and one-half per cent more than it ought to—the one dollar deposit shall be retained by the furnisher to cover the expense of taking out and replacing the meter.

1909, c. 150, s. 6.

For special provision for Durham county, see 1919, c. 158.

2735. Adjustment of charges. If upon such test the meter shall register more than two and one-half per cent too fast, as above defined, the furnisher shall reimburse the complainant at the rate at which the meter registers too fast for a period of one month back; but if upon such test the meter shall be found to be incorrect, in that it registers more than two and one-half per cent too slow—that is, more than two and one-half per cent less electricity, gas or water than it

should—then and in that event the complainant shall, in addition to the amount already charged him, pay at once to the furnisher at the rate at which the meter is too slow for a period of one month back, and the furnisher shall have the same rights for collecting such additional sum as is provided for the collecting of the past due and unpaid bills for electricity, gas or water, as the case may be.

1909, c. 150, s. 7.

Gas and electric light bills must show reading of meters, see Commerce and Business in State, s. 5082.

Ordinance authorizing city as owner of water system to use meters or flat rate charges: *Richardson v. Greensboro*, 174-540.

2736. Standard of accuracy. Any such meter having been tested and found to be not more than two and one-half per cent too slow nor more than two and one-half per cent too fast, as above defined, shall be considered correct, and such inspector shall so mark or stamp such meter and report the same to the governing body of the city or town.

1909, c. 150, s. 8.

2737. Free access to meters. Nothing in this article shall be so construed as to prevent any furnisher of electricity, gas or water from having free access to the meters.

1909, c. 150, s. 9.

ART. 11. REGULATION OF BUILDINGS

2738. Chief of fire department. There is hereby created in the incorporated cities and towns of the state, where not already established by their charters, the office of chief of fire department.

Rev., s. 4815; 1901, c. 677, s. 1.

2739. Election and compensation. The governing body of every incorporated city and town, when no provision is made in their charters for such office, shall elect a chief of fire department, fix his term of office, prescribe his duties and obligations, and see that he is reasonably remunerated by the city or town for the services required of him by law. They may change his duties and compensation from time to time, not inconsistent with the duties prescribed in this article. Where the governing body fails or neglects to perform such duty, the insurance commissioner shall call it to their attention and if necessary bring the matter before the proper court. Nothing herein may prevent any person elected hereunder from holding some other position in the government of the city or town.

Rev., ss. 2981, 4816; 1901, c. 677, s. 2; 1905, c. 506, s. 4; 1915, c. 192, s. 1.

This is a governmental function, and a failure on the part of the city to exercise it does not render it liable in damages: *Harrington v. Greenville*, 159-632.

2740. Duties of chief of fire department. The chief of the fire department shall perform the duties required of him by this article; where such duties are not prescribed by the charters or governing body of incorporated cities and towns, it shall be his duty to preserve and care for the fire apparatus, have charge of the fighting and putting out of all fires, make annual reports to the city municipal governments, seek out and have corrected all places and conditions dangerous to the safety of the municipality from fire, look after buildings

being erected with a view to their safety from fires, and do and perform the other duties prescribed by the governing boards of the several municipalities.

Rev., ss. 4815, 4817; 1901, c. 677, ss. 1, 3.

2741. Local inspector of buildings. The chiefs of fire departments hereinbefore provided for shall also be local inspectors of buildings for the cities or towns for which they are appointed and shall perform the duties required herein and shall make all reports required by the insurance commissioner, and shall make all inspections and perform such duties as may be required by the state law or city or town ordinance or by the said insurance commissioner: Provided, however, that any city or town may appoint and reasonably remunerate a local inspector of buildings, in which case the chief of fire department shall be relieved of the duties herein imposed.

Rev., s. 2982; 1905, c. 506, s. 6; 1915, c. 192, s. 2.

2742. Town aldermen failing to appoint inspectors. If the aldermen or commissioners of any city or town shall fail or refuse to appoint a chief of the fire department, or shall fail or refuse to reasonably remunerate him, they shall be guilty of a misdemeanor. This section shall not apply to the aldermen or commissioners of any city or town, where such city or town is by law exempt from the law regulating and controlling the erection and inspection of buildings.

Rev., s. 3607; 1905, c. 506, s. 4.

2743. Town officers; inspection of buildings. If any chief of any fire department or local inspector of buildings shall fail to perform the duties required of him by law or shall give a certificate of inspection without first making the inspection required by law, or shall improperly give a certificate of inspection, he shall be guilty of a misdemeanor.

Rev., s. 3610; 1905, c. 506, s. 5; 1915, c. 192, s. 17.

2744. Electrical inspectors. The governing body of any incorporated city or town may in their discretion appoint an electrical inspector in addition to the building inspector, and when said electrical inspector is so appointed he shall do and perform all things herein set out for the building inspector to do and perform in regard to electrical wiring and certificates for same, and in such cases the building inspector shall be relieved of such duties.

Rev., s. 2983; 1905, c. 506, s. 33.

2745. Deputy inspectors. All duties imposed by this article upon the building inspector may be performed by a deputy appointed by such inspector.

Rev., s. 2984; 1905, c. 506, s. 32.

2746. Fire limits established. The governing body of all incorporated cities and towns shall pass ordinances establishing and defining fire limits, which shall include the principal business portion of the cities and towns.

Rev., s. 2985; 1905, c. 506, s. 7.

Towns by express grant of authority or under general welfare clause may impose fire limits: State v. Johnson, 114-846; State v. Lawing, 164-492; State v. Shannonhouse, 166-241.

2747. Punishment for failing to establish fire limits. If the aldermen or commissioners of any city or town shall fail or refuse to establish and define the

fire limits for such town according to law, they shall be guilty of a misdemeanor. This section shall not apply to aldermen or commissioners of those towns which are exempt from the law governing the inspection of buildings.

Rev., s. 3608; 1905, c. 506, s. 7.

2748. Building permits. Before a building is begun the owner of the property shall apply to the inspector for a permit to build. This permit shall be given in writing and shall contain a provision that the building shall be constructed according to the requirements of the building law, a copy of which shall accompany the permit. As the building progresses the inspector shall make as many inspections as may be necessary to satisfy him that the building is being constructed according to the provisions of this law. As soon as the building is completed the owner shall notify the inspector, who shall proceed at once to inspect the said building and determine whether or not the flues and the building are properly constructed in accordance with the building law. If the building meets the requirements of the building law the inspector shall then issue to the owner of the building a certificate which shall state that he has complied with the requirements of the building law as to that particular building, giving description and locality and street number if numbered. The inspector shall keep his record so that it will show readily by reference all such buildings as are approved. The inspector shall report to the insurance commissioner every person neglecting to secure such permit and certificate, and also bring the matter before the mayor, recorder or municipal court for their attention and action.

Rev., s. 2986; 1905, c. 506, s. 26; 1915, c. 192, s. 3.

Reasonable regulations as to permits may be enforced: *State v. Tenant*, 110-609. Inspector may grant permits to repair: *State v. Eubanks*, 154-628. Mandamus may issue for granting a building permit, but the city is not liable in damages: *Clinard v. Winston-Salem*, 173-356.

2749. Material used in construction of walls. The walls of all buildings in cities or towns where this article applies, other than frame or wooden buildings, shall be constructed of brick, iron or other hard, incombustible material. All rules, regulations and requirements contained in the building law, or set out in this article in regard to the erection of buildings, or any part thereof, shall apply also where any building or walls, or any part thereof, is proposed to be raised, altered, repaired or added to, in order that the objects of the law may be accomplished and deficiencies and menaces to the safety of the city or town may not be made or perpetuated.

Rev., s. 2987; 1905, c. 506, s. 9; 1915, c. 192, s. 4.

2750. Frame buildings within fire limits. Within the fire limits of cities and towns where this article applies, as established and defined, no frame or wooden building shall be hereafter erected, altered, repaired, or moved except upon the permit of the building inspector, approved by the insurance commissioner.

Rev., s. 2988; 1905, c. 506, s. 8; 1915, c. 192, s. 5.

See section 2748.

2751. Thickness of walls. The walls of warehouses, stores, factories, livery-stables, hotels or other brick or stone buildings for business purposes in cities or

towns where this article applies, except fireproof buildings where the framework is of steel, shall conform to the following schedules:

HEIGHT OF BUILDING.	MINIMUM THICKNESS IN INCHES OF WALL.				
	<i>1st</i>	<i>2d</i>	<i>3d</i>	<i>4th</i>	<i>5th</i>
One-story building -----	13	--	--	--	--
Two-story building -----	17	13	--	--	--
Three-story building -----	17	17	13	--	--
Four-story building -----	22	17	17	13	--
Five-story building -----	26	22	17	17	13

The walls of all brick or stone buildings over five stories high shall be thirteen inches thick for the top story and increasing four inches in thickness for each story below to the ground, the increased thickness of each story to be utilized for beam and girder ledges. All top story walls must extend through and eighteen inches above the roof in parapets not less than thirteen inches thick and coped with terra-cotta, stone, cast-iron or cement. Upon written application approved by the building inspector the insurance commissioner may, where he deems it advisable, allow decreased thickness in walls of concrete, or in brick walls where such thickness is compensated for by pilasters. The roofs of all buildings named in this section shall be of metal, slate or tile or gravel or other standard fireproof roofing.

Rev., s. 2989; 1905, c. 506, s. 10; 1915, c. 192, s. 6.

2752. Foundation of walls; openings and doors protected. In all buildings mentioned in the preceding section there shall be prepared a proper and substantial foundation, and no foundation shall be less than one foot below the exposed surface of the ground, and no foundation shall rest on any filling or made ground, and the breadth of the foundation of the several parts of any building shall be proportioned so that as near as practicable the pressure shall be equal on each square foot of the foundation, and cement mortar shall be used in the masonry of all foundations exposed to dampness. No opening or doorway shall be cut through a party or fire wall of a brick or stone building without a permit from the inspector, and every such door or opening shall have top, bottom and sides of stone, brick or iron, shall be closed by two sets of standard metal-covered doors (separated by the thickness of the wall) hung to rabbeted iron frames or to iron hinges in brick or stone rabbets, shall not exceed ten feet in height by eight feet in width, and every opening other than a doorway shall be protected in a manner satisfactory to the inspector.

Rev., s. 2990; 1905, c. 506, s. 11.

2753. Metallic stand-pipes required. All business buildings being more than fifty-six feet high, covering an area of more than five thousand superficial feet, also all buildings exceeding eighty feet in height, shall have a four-inch or larger metallic stand-pipe within or near the front wall extending above the roof and arranged so that engine hose can be attached from the street, such riser to have two and one-half inch hose coupling on each floor. The building inspector may, with the approval of the insurance commissioner, allow two or more stand-pipes of smaller size and proper hose coupling, provided they are of such sizes and

number as to be at least equivalent in service to the large stand-pipes required. All hose coupling shall conform to the size and pattern adopted by the fire department.

Rev., s. 2991; 1905, c. 506, s. 12; 1915, c. 192, s. 7.

2754. Construction of joists. The ends of joists or beams entering a brick wall shall be cut not less than three-inch bevel so as not to disturb the brickwork by any deflection or breaking of the joists or beams. All such joists or timbers entering a party or division wall from opposite sides shall have at least four inches of solid brickwork between the ends of such timbers or joists.

Rev., s. 2992; 1905, c. 506, s. 13.

2755. Chimneys and flues. All fireplaces and chimneys in stone or brick walls in any building hereafter erected and any chimneys or flues hereafter altered or repaired shall have the joints struck smooth on the inside, and the firebacks of all fireplaces hereafter erected shall be not less than eight inches in thickness of solid masonry, the chimney walls to be not less than four inches thick, the top of the chimney to extend not less than five feet above the roof for flat roofs and two feet above the ridge of any pitched roof. No woodwork or timber shall be placed under any fireplace or under the brickwork of any chimney. All floor beams, joists and headers shall be kept at least two inches clear of any wall enclosing a fire flue or chimney breast.

Rev., s. 2993; 1905, c. 506, s. 14.

2756. Chimneys not built on wood. No chimney shall be started or built upon a beam of wood or floor, the brickwork in all cases to start from the ground with proper foundation. In no case shall a chimney be corbeled out more than three inches from the wall, and in all cases corbeling shall consist of at least five courses of brick, the corbeling to start at least three feet below the bottom of the flue.

Rev., s. 2994; 1905, c. 506, s. 16.

2757. Construction of flues. All flues shall extend at least three feet above the roof and always above the comb of the roof, and shall be coped with well-burnt terra-cotta, stone, cast-iron or cement. In all buildings hereafter erected the stone or brickwork of all flues and the chimney shafts of all furnaces, boilers, bakers' ovens, large cooking ranges, and laundry stoves, and all flues used for similar purposes shall be at least eight inches in thickness, with the exception of smoke flues, which are lined with fire-clay lining or cast-iron. These may be four inches in thickness, but this shall not apply to metal stacks of boiler-houses where properly constructed and arranged at a safe distance from wood or other inflammable material. All buildings hereafter erected shall have smoke flues constructed either in walls of eight inches thickness or with smoke flues lined with cast-iron or fire-clay lining, the walls of which may be four inches in thickness, the lining to commence at the bottom of the flue or at the throat of the fireplace and be carried up continuously the entire height of the flue. All joints shall be closely fitted and the lining shall be built in as the flue or flues are carried up. All chimneys which shall be dangerous in any manner whatever shall be repaired and made safe or taken down.

Rev., s. 2995; 1905, c. 506, s. 17.

2758. Hanging flues. Hanging flues (that is, for the reception of stovepipes built otherwise than from the ground) shall be allowed only when built according to the following specifications: The flue shall be built four inches thick of the best hard brick, laid on flat side, never on edge, extending at least three feet above the roof and always above the comb of the roof, lined on the inside with cast-iron or fire-clay flue lining from the bottom of the flue to the extreme height of the flue, and ends of all such lining pipes being made to fit close together and the lining pipe being built in as the flue is carried up. If the flue starts at the ceiling and receives the stovepipe vertically it shall be hung on iron stirrups, bent to come flush with the bottom of ceiling joints. All flues shall have a proper and sufficient support at their base, and in no case shall they be supported even partially by contact in passing through partitions, ceilings, or roofs. Flues not lined as above shall be built from the ground eight inches thick of the best hard brick with the joints struck smooth on the inside.

Rev., s. 2996; 1905, c. 506, s. 18; 1915, c. 192, s. 8.

2759. Flues cleaned on completion of building. The flues of every building shall be properly cleaned and all rubbish removed and the flues left smooth on the inside upon the completion of the building.

Rev., s. 2997; 1905, c. 506, s. 19.

2760. Construction of stovepipes. No stovepipe shall pass through any roof, window or weatherboarding, and no stovepipe in any building with wood or combustible floors, ceiling or partitions shall enter any flue unless such pipe shall be at least twelve inches from such floors, ceiling or partitions, unless same is properly protected by metal shield, in which case the distance shall not be less than six inches. In all cases where stovepipes pass through wooden partitions of any kind or other woodwork they shall be guarded by either a double collar of metal with at least three inches air space and holes for ventilation or by a soapstone or burnt-clay ring not less than one inch in thickness extending through the partition or other woodwork. If any chimney, flue or heating apparatus on any premises shall, in the opinion of the inspector, endanger the premises, the inspector shall at once notify in writing the owner or agent of said premises. If such owner or agent fails for a period of forty-eight hours after the service of said notice upon him to make such chimney, flue or heating apparatus safe he shall be liable to a fine of not less than ten dollars nor more than fifty dollars for each day that the condition remains uncorrected.

Rev., s. 2998; 1905, c. 506, s. 20; 1915, c. 192, s. 9.

The word stovepipe refers to a metal pipe and has no application to the earthen or terracotta flues into which the pipe is inserted: *Fowle v. R. R.*, 147-491.

2761. Height of foundry chimneys. Iron cupola or other chimneys of foundries shall extend at least ten feet above the highest point of any roof within a radius of fifty feet of such cupola or chimney.

Rev., s. 2999; 1905, c. 506, s. 22.

2762. Steam pipes, how placed. No steam pipes shall be placed within two inches of any timber or woodwork unless the timber or woodwork is protected by a metal shield; then the distance shall not be less than one inch. All steam pipes passing through floors and ceilings or laths and plastered partitions shall be pro-

ected by a metal tube one inch larger in diameter than the pipe, and the space shall be filled in with mineral wool, asbestos or other incombustible material.

Rev., s. 3000; 1905, c. 506, s. 21.

2763. Electric wiring of houses. The electric wiring of houses or buildings for lighting or for other purposes shall conform to the regulations prescribed by the organization known as National Board of Fire Underwriters. In order to protect the property of citizens from the dangers incident to defective electric wiring of buildings, it shall be unlawful for any firm or corporation to allow any electric current for the purpose of illuminating any building belonging to any person, firm or corporation to be turned on without first having had an inspection made of the wiring by the building inspector and having received from the inspector a certificate approving the wiring of such building. It shall be unlawful for any person, firm or corporation engaged in the business of selling electricity to furnish any electric current for use for illuminating purposes in any building or buildings of any person, firm or corporation, unless the said building or buildings have been first inspected by the inspector of buildings and a certificate given as above provided. The fee that shall be allowed said inspector of buildings for the work of such inspection of electrical wiring shall be one dollar for each building inspected, to be paid by the person applying for the inspection.

Rev., s. 3001; 1905, c. 506, s. 23.

For special provision for inspection and fees in the town of Graham, Alamance county, see 1907, c. 673; and for special provision in Wake county, see P. L. Ex. Sess. 1913, c. 262.

2764. Quarterly inspection of buildings. Once in every three months the local inspector of buildings shall make a personal inspection of every building within the fire limits, and shall especially inspect the basement and garret, and he shall make such other inspections as may be required by the insurance commissioner and shall report to the insurance commissioner all defects found by him in any building upon a blank furnished him by the insurance commissioner. The building inspector shall notify the owner or occupant of buildings of any defects, and notify them to correct the same within a reasonable time.

Rev., s. 3002; 1905, c. 506, s. 25; 1915, c. 192, s. 10.

2765. Annual inspection of buildings. At least once in each year the local inspector shall make a general inspection of all buildings in the corporate limits and ascertain if the provisions of this article are complied with, and the local inspector alone or with the insurance commissioner or his deputy shall at all times have the right to enter any dwelling, store or other building and premises to inspect same without molestation from any one. It shall be the duty of the local building inspector to notify the occupant and owner of all premises of any defects found in this general inspection, and see that they are properly corrected.

Rev., s. 3003; 1905, c. 506, s. 29; 1915, c. 192, s. 11.

2766. Record of inspections. The local inspector shall keep the following record: A book indexed and kept so that it will show readily by reference all such buildings as are approved; that is, name and residence of owner, location of building, how it is to be occupied, date of inspection, what defects found and when remedied and date of building certificate; also a record which shall show

the date of every general inspection, defects discovered and when remedied; also a record which shall show the date, circumstances and origin of every fire that occurs, name of owner and occupant of the building in which fire originates, the kind and value of property destroyed or damaged; also a record of inspection of electrical wiring and certificate issued.

Rev., s. 3004; 1905, c. 506, s. 30.

2767. Reports of local inspectors. The local inspector shall report before the fifteenth of February of each year the number and dates of general and quarterly inspections during the year ending the thirty-first day of December upon blanks furnished by the insurance commissioner, and furnish such other information and make such other reports as shall be called for by the insurance commissioner.

Rev., s. 3005; 1905, c. 506, s. 31; 1915, c. 192, s. 12.

2768. Fees of inspector. For the inspection of every new building, or old building repaired or altered, the local inspector shall charge and collect an inspection fee before issuing the building certificate, as follows: Two dollars for each one-story mercantile storeroom, livery-stable or building for manufacturing, and fifty cents for each additional story, and for other buildings twenty-five cents per room; but the inspection fee shall in no case exceed five dollars. The building inspector shall be paid an adequate salary by the city or town for the quarterly and annual inspection of buildings as provided for in this article, and also for the duties under this section where the fees are collected and paid into the treasury of the municipality.

Rev., s. 3006; 1905, c. 506, s. 27; 1915, c. 192, s. 13.

For special provision for the town of Graham, Alamance county, see 1907, c. 673.

2769. Care of ashes, waste, etc. Ashes shall be removed in metal vessels and unless moved by city drays shall be stowed in brick, stone or metal receptacles or removed by owner to a place not less than fifteen feet from any wooden building or fence. Oily rags and waste shall be kept in closed metal vessels and shall be removed from building daily. Unslacked lime shall not be left exposed to the weather in or near a building. Stoves or ranges shall not be nearer to unprotected woodwork than two feet and the floors under them shall be protected by metal or sand box.

Rev., s. 3007; 1905, c. 506, s. 24.

2770. Ordinances to enforce the law. No provision of this article shall be held to repeal the power of any incorporated city or town to make and enforce any further rules and regulations under the powers granted in their several charters, and said cities and towns may pass ordinances for the enforcement of any provision of this article.

Rev., s. 3008; 1905, c. 506, s. 34.

Ordinance to enforce building regulations: State v. Eubanks, 154-628.

2771. Defects in buildings corrected. Whenever the local inspector finds any defects in any new building, or finds that said building is not being constructed or has not been constructed in accordance with the provisions of this law, or that an old building because of its condition is dangerous and likely to cause

a fire, it shall be his duty to notify the owner of the building of the defects or the failure to comply with this law, and the owner or builder shall immediately remedy the defect and make the building comply with the law. The owner or builder may appeal from the decision of the local inspector to the insurance commissioner.

Rev., s. 3009; 1905, c. 506, s. 28; 1915, c. 192, s. 14.

2772. Owner of building failing to comply with law. If the owner or builder erecting any new building, upon notice from the local inspector, shall fail or refuse to comply with the terms of the notice by correcting the defects pointed out in such notice, so as to make such building comply with the law as regards new buildings, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars. Every week during which any defect in the building is willfully allowed to remain after notice from the inspector shall constitute a separate and distinct offense.

Rev., s. 3798; 1905, c. 506, s. 28; 1915, c. 192, s. 18.

2773. Unsafe buildings condemned. Every building which shall appear to the inspector to be especially dangerous because of its liability to fire or in case of fire by reason of bad condition of walls, overloaded floors, defective construction, decay or other causes shall be held to be unsafe, and the inspector shall affix a notice of the dangerous character of the structure to a conspicuous place on the exterior wall of said building. No building now or hereafter built shall be altered, repaired or moved, until it has been examined and approved by the inspector as being in a good and safe condition to be altered as proposed, and the alteration, repair or change so made shall conform to the provisions of the law.

Rev., s. 3010; 1905, c. 506, s. 15; 1915, c. 192, s. 15.

Section referred to in *State v. Eubanks*, 154-628.

2774. Punishment for allowing unsafe building to stand. If the owner of any building which has been condemned as unsafe and dangerous by any local inspector, after being notified by the inspector in writing of the unsafe and dangerous character of such building, shall permit the same to stand or continue in that condition, he shall forfeit and pay a fine of not less than ten nor more than fifty dollars for each day such building continues after such notice.

Rev., s. 3802; 1905, c. 506, s. 15; 1915, c. 192, s. 19.

2775. Removing notice from condemned buildings. If any person shall remove any notice which has been affixed to any building by the local inspector of any city or town, which notice shall state the dangerous character of the building, he shall be guilty of a misdemeanor, and be fined not less than ten nor more than fifty dollars for each offense.

Rev., s. 3799; 1905, c. 506, s. 15.

2776. To what towns applied. This article shall apply only to incorporated cities and towns of over one thousand inhabitants according to the last United States census, and such other cities and towns in the state as shall by a vote of their board of aldermen or governing body adopt this article.

Rev., s. 3011; 1905, c. 506, s. 35; 1915, c. 192, s. 16.

SUBCHAPTER II. MUNICIPAL CORPORATION ACT OF 1917

ART. 12. OPERATION OF ACT

2777. Explanation of terms. The following words and phrases as used in this act shall, unless a contrary intention clearly appears, have the following meanings, respectively: The phrase "regular municipal election" shall mean the biennial election of municipal officers for which provision is made in this act. The phrase "qualified voter" shall mean any registered qualified voter. The words "officer" and "officers," when used without further qualification or description, shall mean any person or persons holding any office in the city or in charge of any department or division of the city. The said words when used in contrast with a board or members of a board, or with division heads, shall mean any of the persons in sole charge of a department of the city. The word "ordinance" shall mean an order of the governing body entitled "ordinance," and designed for the regulation of any matter within the jurisdiction of the governing body as laid down in this act. The word "city" shall mean any city, town, or incorporated village.

1917, c. 136, sub-ch. 15, s. 1.

This act was passed after the adoption of the constitutional amendment of 1916 for the purpose of providing by general law for the organization and government of cities and towns: *Kendall v. Stafford*, 178-461.

2778. Effect upon prior laws. Nothing in this act shall operate to repeal any local or special act of the general assembly of North Carolina relating to cities, towns, and incorporated villages, but all such acts shall continue in full force and effect and in concurrence herewith, unless hereafter repealed or amended in manner provided for in this act. The provisions of this act shall not be construed to repeal the provisions as to cities and towns contained in subchapter I of this chapter, except in case they are inconsistent with this act. The provisions of this act, so far as they are the same as those of existing general laws, are intended as a continuation of said laws and not as new enactments, and so far as they give general powers to cities are supplementary to and additional to the special charters of cities which have not such powers, unless inconsistent with or repugnant thereto, and a repetition of such powers if already possessed by cities by virtue of special charters. The provisions of this act shall not affect any act heretofore done, liability incurred, or right accrued or vested, or affect any suit or prosecution now pending or to be instituted to enforce any right or penalty or punish any offense. Subject to the foregoing provisions hereof, all laws or parts of laws in conflict with this act are hereby to the extent of such conflict repealed.

1917, c. 136, sub-ch. 1, s. 1.

This act does not change the provisions of existing charters: *Kendall v. Stafford*, 178-461; *Clinton v. Johnson*, 174-286.

ART. 13. ORGANIZATION UNDER THE ACT

2779. Municipal board of control. The municipal board of control shall be composed of the secretary of state, the attorney-general, and the chairman of the corporation commission. The attorney-general shall be chairman and the secretary of state shall be secretary of such board.

1917, c. 136, sub-ch. 2, s. 4.

2780. Number of persons and area included. Any number of persons, not less than fifty, at least twenty-five of whom shall be freeholders or homesteaders, and twenty-five qualified voters living in the area proposed to be incorporated, which area shall have an assessed valuation of real property of at least twenty-five thousand dollars according to the last preceding assessment for taxes, and shall not be a part of the area included in the limits of any city, town, or incorporated village already or hereafter existing, may be organized into a town upon compliance with the method herein set forth.

1917, c. 136, sub-ch. 2, s. 1.

2781. Petition filed:

1. What petition must show. A petition signed by a majority of the resident qualified electors and a majority of the resident freeholders or homesteaders of the territory proposed to be so organized shall be presented to the secretary of state of North Carolina, accurately describing such territory, with map attached, containing the names of all qualified voters therein, the assessed valuation of such territory, and the proposed name of the new town. The petition shall further be signed by at least twenty-five resident freeholders or homesteaders of the age of twenty-one years or over, at least twenty of whom are qualified voters; and further, the petition shall show the valuation of the real property of the proposed town to be at least twenty-five thousand dollars, according to the last preceding tax assessment; and the petition shall be verified by at least three of the signers who are qualified voters.

2. Order and notice for hearing. The secretary of state shall thereupon make an order prescribing the time and place for the hearing of said petition before the municipal board of control. At least thirty days before the hearing, notice of such hearing shall be published once a week for four weeks in a newspaper published in the county where such territory is situate, designated as most likely to give notice to the people of the territory proposed to be so organized or incorporated into a town; or, if no newspaper is so published, then in some newspaper of general circulation in such proposed city, town, or incorporated village; and such notice shall also be posted at the county courthouse door of such county for a like period. Such notice shall be signed by at least three of the freeholders signing the petition for the organization of the town.

1917, c. 136, sub-ch. 2, s. 2.

2782. Hearing of petition and order made:

1. Manner of hearing. Any qualified voter or taxpayer of such territory proposed to be incorporated into a town may appear at the hearing of such petition, and the matter shall be tried as an issue of fact by the municipal board of control, and no formal answer to the petition need be filed. The board may adjourn the hearing from time to time, in its discretion.

2. Order creating corporation. The municipal board of control shall file its findings of fact at the close of such hearing, and if it shall appear that the allegations of the petition are true, and that all the requirements in this article have been substantially complied with, and that the organization of such city, town, or incorporated village will better subserve the interests of said persons

and the public, the board shall enter an order creating such territory into a town, giving it the name proposed in the petition.

3. Election of officers provided for. The board of control shall provide for the place of holding the first election for mayor and commissioners; and shall designate how many commissioners shall serve, as set forth in subchapter I of this chapter, naming the number of commissioners, not less than three nor more than seven. The election of mayor and commissioners shall be under the same laws as now govern the election of mayor and commissioners in subchapter I of this chapter.

4. Filing papers; fees. All the papers in reference to the organization of any town under this article shall be filed and recorded in the office of the secretary of state, and certified copies thereof shall be filed and recorded in the office of the clerk of the superior court of the county in which the town organized is situated. The fees shall be the same as are now provided for the organization of private corporations and shall be paid out of the treasury of the city, town, or incorporated village.

5. When organization complete. Upon the approval of the board of control and the recording of the papers in the offices above mentioned, the said town shall become a municipal corporation with all the powers and subject to all the laws governing towns as set forth in subchapter I of this chapter and as in this act set forth.

1917, c. 136, sub-ch. 2, s. 3.

Section referred to: Kendall v. Stafford, 178-461.

ART. 14. POWER VESTED IN CORPORATION COMMISSION

2783. To fix rates for public utilities furnished. The corporation commission shall have full power and authority to fix and establish any and all rates which any public-service or quasi public-service corporation other than railroads using steam as a motive power shall charge or exact from any person, firm, or corporation in any city for the services rendered or commodity furnished.

1917, c. 136, sub-ch. 3, s. 1.

See sections 1035, 1066.

2784. Manner of enforcing regulations. The North Carolina corporation commission shall have the power to require such improvements and extensions to the service of public-service corporations as it may deem necessary after the investigation of any complaint of any person, corporation, or municipality as to the inadequacy of such service. Upon application being made, the corporation commission shall proceed to hear, pass on, and determine, in the manner prescribed by law, a just or reasonable rate or charge for the service or other commodity rendered or furnished; the hearing before the corporation commission shall be governed by the law as to the commission relating to the fixing of rates and rules and orders of the commission as to the enforcement thereof by the commission. The corporation commission shall have the same power and authority in hearing and passing on any matter or case under this act, enforcing or fixing of rates, supervising and regulating said corporation or otherwise under this act, as they now have under the chapter entitled Corporation Commission,

in addition to such power and authority as they now have under the general law. The failure or refusal to conform to or obey any decision, rule, regulation, or order made in such cases by the corporation commission shall subject said public-utility corporation or quasi public-utility corporation refusing or failing to comply herewith to the penalties provided in chapter, Corporation Commission, article 7.

1917, c. 136, sub-ch. 3, s. 2.

2785. Not to affect existing power. Nothing contained in this article shall be construed to deprive the corporation commission of the authority and power which it now has under the laws of North Carolina to supervise and regulate and fix the rates for public-utility corporations or quasi public-utility corporations operating or doing business in such city.

1917, c. 136, sub-ch. 3, s. 3.

ART. 15. POWERS OF MUNICIPAL CORPORATIONS

Part 1. General Powers Enumerated

2786. Powers applicable to all cities and towns. All the provisions of this article, conferring powers upon cities and towns, shall apply to all cities and towns, whether they have adopted a plan of government under this act or not. And the powers herein granted are in addition to and not in substitution for existing powers of cities and towns.

1919, c. 296.

This does not change the provisions of existing charters: Kendall v. Stafford, 178-461.

2787. Corporate powers. In addition to and coördinate with the power granted to cities in subchapter I of this chapter, and any acts affecting such cities, all cities shall have the following powers:

1. To acquire property in fee simple or a lesser interest or estate therein by purchase, gift, devise, bequest, appropriation, lease, or lease with privilege to purchase.

2. To sell, lease, hold, manage, and control such property and make all rules and regulations by ordinance or resolution which may be required to carry out fully the provisions of any conveyance, deed, or will in relation to any gift or bequest, or the provisions of any lease by which the city may acquire property.

3. To purchase, conduct, own, lease, and acquire public utilities.

4. To appropriate the money of the city for all lawful purposes.

5. To create, provide for, construct, regulate, and maintain all things in the nature of public works, buildings, and improvements.

6. To supervise, regulate, or suppress, in the interest of public morals, public recreations, amusements and entertainments, and to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people, and all nuisances and causes thereof.

7. To pass such ordinances as are expedient for maintaining and promoting the peace, good government, and welfare of the city, and the morals and happiness of its citizens, and for the performance of all municipal functions.

8. To provide for the destruction of noxious weeds, and for payment of the expense thereof by assessment or otherwise.

9. To regulate the erection of fences, billboards, signs, and other structures, and provide for the removal or repair of insecure billboards, signs, and other structures.

10. To make and enforce local police, sanitary, and other regulations.

11. To open new streets, change, widen, extend, and close any street that is now or may hereafter be opened, and adopt such ordinances for the regulation and use of the streets, squares, and parks, and other public property belonging to the city, as it may deem best for the public welfare of the citizens of the city.

12. To acquire, lay out, establish, and regulate parks within or without the corporate limits of the city for the use of the inhabitants of the same.

13. To erect, repair, and alter all public buildings.

14. To regulate, restrain, and prohibit the running or going at large of horses, mules, cattle, sheep, swine, goats, chickens, and all other animals and fowl of whatsoever description, and to authorize the distraining and impounding and sale of the same for the costs of the proceedings and the penalty incurred and to order their destruction when they cannot be sold, and to impose penalties on the owners or keepers thereof for the violation of any ordinance or regulation of said governing body, and to prevent, regulate, and control the driving of cattle, horses, and all other animals into or through the streets of the city.

15. To regulate and control plumbers and plumbing work, and to enforce efficiency in the same by examination of such plumbers and inspection of such plumbing work.

16. To regulate, control, and prohibit the keeping and management of houses or any building for the storage of gunpowder and other combustible, explosive, or dangerous materials within the city, and to regulate the keeping and conveying of the same, and to authorize and regulate the laying of pipes and the location and construction of houses, tanks, reservoirs, and pumping stations for the storage of oil and gas.

17. To regulate, control, restrict, and prohibit the use and explosion of dynamite, firecrackers, or other explosives or fireworks of any and every kind, whether included in the above enumeration or not, and the sale of same, and all noises, amusements, or other practices or performances tending to annoy or frighten persons or teams, and the collection of persons on the streets or sidewalks or other public places in the city, whether for purposes of amusement, business, curiosity, or otherwise.

18. To direct, control, and prohibit the laying of railroad and street railway tracks, turnouts, and switches in the streets, avenues, and alleys of the city unless the same shall have been authorized by ordinance, and to require that all railroads, street railways, turnouts and switches shall be so constructed as not to interfere with the drainage of the city and with the ordinary travel and use of the streets, avenues, and alleys in the city, and to construct and keep in repair suitable crossings at the intersection of streets, avenues, and alleys and ditches, sewer and culverts, where the governing body shall deem it necessary, and to direct the use and regulate the speed of locomotive engines, trains, and cars within the city.

19. To make all suitable and proper regulations in regard to the use of the streets for street cars, and to regulate the speed, running, and operation of the same so as to prevent injury or inconvenience to the public.

20. To make such rules and regulations in relation to butchers as may be necessary and proper; to establish and erect market houses, and designate, control, and regulate market places and privileges.

21. To prohibit and punish the abuse of animals.

22. To acquire, establish, and maintain cemeteries and to regulate the burial of the dead and the registration of deaths, marriages, and births.

23. To prohibit prize-fighting, cock and dog fighting.

24. To regulate, restrict, and prohibit theaters, carnivals, circuses, shows, parades, exhibitions of showmen, and shows of any kind, and the exhibition of natural or artificial curiosities, caravans, menageries, musical and hypnotic exhibitions and performances.

25. To create and administer a special fund for the relief of indigent and helpless members of the police and fire departments who have become superannuated, disabled, or injured in such service, and receive donations and bequests in aid of such fund and provide for its permanence and increase, and to prescribe and regulate the conditions under which, and the extent to which, the same shall be used for the purpose of such relief.

26. To prevent and abate nuisances, whether on public or private property.

27. To regulate and prohibit the carrying on of any business which may be dangerous or detrimental to health.

28. To condemn and remove any and all buildings in the city limits, or cause them to be removed, at the expense of the owner or owners, when dangerous to life, health, or other property, under such just rules and regulations as it may by ordinance establish; and likewise to suppress any and all other nuisances maintained in the city.

29. To provide for all inspections which may be expedient, proper, or necessary for the welfare, safety, and health of the city and its citizens, and regulate the fees for such inspection.

30. To require any or all articles of commerce or traffic to be gauged, inspected, measured, weighed, or metered, and to require every merchant, retail trader or dealer in merchandise or property of any description which is sold by weight or measure to have such weights and measures sealed and to be subject to inspection.

31. To provide for the regulation, diversion, and limitation of pedestrians and vehicular traffic upon public streets, highways, and sidewalks of the city.

32. To require the examination of all drivers of motor vehicles upon the streets and highways of the city, to prescribe fees for such examinations, and to prevent the use of such vehicles by all persons who shall not satisfactorily pass such examination.

33. To regulate the emission of smoke within the city.

34. To license, prohibit, and regulate pool and billiard rooms and dance halls, and in the interest of public morals provide for the revocation of such licenses.

35. To regulate and control electricians and electrical work and to enforce efficiency in the same by examination of such electricians and inspection of such electrical work.

36. To license and regulate all vehicles operated for hire in the city.

37. To acquire property in fee simple and to use the lands now owned in fee simple or otherwise for the purpose of establishing and maintaining new cemeteries. To abandon any cemetery which has not been used for interment purposes

within ten years, and to remove or consolidate such cemetery, so abandoned, and the monuments, tombstones, fences, walls and enclosures, and the contents of any graves therein, or any part of either, at its own expense, to or with any established cemetery maintained for interment purposes; to take possession of, convey or utilize the lands in such abandoned cemetery, or any part thereof, as may best subserve the interests of the city or town.

38. In cities or towns having a population of not less than twenty thousand inhabitants, the governing bodies may, in their discretion, create and establish a civil service with reference to any and all of the employees of such municipalities, and prescribe rules and regulations for the conduct and government of such civil service.

1917, c. 136, sub-ch. 5, s. 1; 1919, cc. 136, 237.

For enumeration of powers prior to enactment of this act, see sections 2623, 2673, 2676.

2788. **Salary of mayor and other officers.** The governing body of any city may by ordinance fix the salary of the mayor of such city or heads of departments or other officers.

1917, c. 136, sub-ch. 5, s. 6.

This does not change the provisions of existing charters so as to empower the commissioners to increase their own salaries: *Kendall v. Stafford*, 178-461.

2789. **Enumeration of powers not exclusive.** The enumeration of particular powers by this act shall not be held or deemed to be exclusive; but in addition to the powers enumerated or implied therein, or appropriate to the exercise thereof, the city shall have and may exercise all other powers which under the constitution and laws of North Carolina now are or hereafter may be granted to cities. Powers proper to be exercised, and not specially enumerated herein, shall be exercised and enforced in the manner prescribed by this act; or when not prescribed herein, in such manner as shall be provided by ordinance or resolution of the governing body.

1917, c. 136, sub-ch. 5, s. 3.

2790. **Police power extended to outside territory.** All ordinances, rules, and regulations of the city now in force, or that may hereafter be enacted by the governing body in the exercise of the police powers given to it for sanitary purposes, or for the protection of the property of the city, unless otherwise provided by the governing body, shall, in addition to applying to the territory within the city limits, apply with equal force to the territory outside of the city limits within one mile in all directions of same, and to the rights of way of all water, sewer, and electric light lines of the city without the corporate limits, and to the rights of way, without the city limits, of any street railway company, or extension thereof, operating under a franchise granted by the city, and upon all property and rights of way of the city outside the corporate limits and the above mentioned territorial limits, wheresoever the same may be located.

1917, c. 136, sub-ch. 5, s. 2.

Police power may be extended beyond the corporate limits: *State v. Rice*, 158-635.

Part 2. Power to Acquire Property

2791. **Acquisition by purchase.** When in the opinion of the governing body of any city, or other board, commission, or department of the government of such

city having and exercising or desiring to have and exercise the management and control of the streets, water, electric light, power, gas, sewerage or drainage systems, or other public utilities, parks, playgrounds, cemeteries, wharves, or markets, open-air or enclosed, which are or may by law be owned and operated or hereafter acquired by such city or by a separate association, corporation, or other organization on behalf and for the benefit of such city, any land, right of way, water right, privilege, or easement, either within or outside the city, shall be necessary for the purpose of opening, establishing, building, widening, extending, enlarging, maintaining, or operating any such streets, parks, playgrounds, cemetery, water, electric light, power, gas, sewerage or drainage systems, wharves, or other public utility so owned, operated, and maintained by or on behalf of any such city, such governing body, board, commission, or department of government of such city may purchase such land, right of way, water right, privilege, or easement from the owner or owners thereof and pay such compensation therefor as may be agreed upon.

1917, c. 136, sub-ch. 4, s. 1; 1919, c. 262.

See section 2623.

2792. By condemnation. If such governing body, board, commission or department of the government of such city are unable to agree with the owners thereof for the purchase of such land, right of way, privilege, or easement, for the purposes mentioned in the preceding section, condemnation of the same for such public use may be made in the same manner and under the same procedure as is provided in chapter Eminent Domain, article 2; and the determination of the governing body, board, commission, or department of government of such city of the land necessary for such purposes shall be conclusive.

1917, c. 136, sub-ch. 4, s. 1; 1919, c. 262.

The method of procedure prescribed in the charter must be followed: *Clinton v. Johnson*, 174-286.

Part 3. Streets and Sidewalks

2793. Power to make, improve and control. The governing body of the city shall have power to control, grade, macadamize, cleanse, and pave and repair the streets and sidewalks of the city and make such improvements thereon as it may deem best for the public good, and may provide for and regulate the lighting of the public parks, and regulate, control, license, prohibit, and prevent digging in said streets and sidewalks, or placing therein of pipes, poles, wires, fixtures, and appliances of every kind, whether on, above, or below the surface thereof, and regulate and control the use thereof by persons, animals and vehicles; to prevent, abate, and remove obstructions, encroachments, pollution or litter therein; and shall have under its government, management, and control all parks and squares within or without the city limits established by the governing body for the use of the city except as otherwise provided.

1917, c. 136, sub-ch. 10, s. 1.

See section 2675 and annotations thereunder.

Part 4. Markets

2794. Establish and control markets. The governing body of the city shall have power to provide for the establishment, maintenance, and regulation of

open-air or enclosed markets and slaughter places; may prescribe the time and place of sale of fresh meats, fish, and other marketable products therein; may rent the stalls in such manner and at such prices as it may deem best; may appoint a keeper of the market or other persons, who may summarily condemn all unsound products offered for sale in the city for food, and cause the same to be removed at the expense of the person offering it for sale.

1917, c. 136, sub-ch. 12, s. 1.

See section 2674.

Part 5. Protection of Public Health

2795. Ordinances for protection of health. The governing body of cities is hereby given, within the city limits, all the power and authority that is now or may hereafter be given by law to the county health officer or county physician, and such further powers and authority as will best preserve the health of the citizens. The governing body is hereby given power to make such rules and regulations, not inconsistent with the constitution and laws of the state, for the preservation of the health of the inhabitants of the city, as to them may seem right and proper.

1917, c. 136, sub-ch. 5, s. 4.

See sections 7067, 7068, 7069, 7070, 7071.

2796. Establish hospitals, pesthouses, quarantine, etc. The governing body may acquire, establish, and maintain a hospital or hospitals, or pesthouses, slaughter-houses, rendering plants, incinerators and crematories in the city limits or within three miles thereof; may stop, detain, examine, or keep in a pesthouse or house of detention persons having or suspected of having any infectious, contagious, or other communicable disease; may quarantine the city or any part thereof; may cause all persons in the city limits to be vaccinated; may, without incurring liabilities to the owner, remove, fumigate, or destroy furniture, bedding, clothing, or other property which may be found to be tainted or infected with any contagious or infectious disease, and may do all other proper and reasonable things to prevent or stamp out any contagious or infectious disease, and to preserve better the health of the citizens. All expenses incurred by the city in disinfecting or caring for any person or persons, by authority of this section, may be recovered by it from the person, persons, or property cared for; and when expense is incurred in caring for property, the same shall become a lien on such property. Any person who shall attempt by force, or by threat of violence, to prevent his removal or that of any other persons to the pesthouse, house of detention, or hospital, or who shall in any way interfere with any officer while performing any of the duties allowed by this article, shall be guilty of a misdemeanor.

1917, c. 136, sub-ch. 5, s. 4.

For exercise of such police power before enactment of this section, see *Levin v. Burlington*, 129-184; *Prichard v. Comrs.*, 126-908; *State v. Hay*, 126-999; *Hutchins v. Durham*, 137-68.

The town is not liable for expenses paid by the county under the county quarantine officer: *Comrs. v. Henderson*, 163-114.

2797. Elect health officer. The governing body of any city may elect a health officer and create such other offices and employments as to them may seem right and proper, and fill the same and fix their compensation.

1917, c. 136, sub-ch. 5, s. 4.

2798. **Regulate the management of hospitals.** The governing body is hereby empowered to make rules and regulations for the management and conduct of all hospitals and sanatoriums which may have for treatment any patient afflicted with any infectious, contagious, or other communicable disease, and prescribe penalties for any violation of same. Any person violating any rule or regulation of the governing body shall be guilty of a misdemeanor, and upon conviction, except as herein otherwise provided, shall be fined not more than fifty dollars or imprisoned not more than thirty days.

1917, c. 136, sub-ch. 5, s. 5.

2799. **Provide for removal of garbage.** The governing body may by ordinance provide for the removal, by wagon or carts, of all garbage, slops, and trash from the city; and when the same is not removed by the private individual in obedience to such ordinance, may require the wagons or carts to visit the houses used as residences, stores, and other places of habitation in the city, and also may require all owners or occupants of such houses who fail to remove such garbage or trash from their premises to have the garbage, slops, and trash ready and in convenient places and receptacles, and may charge for such removal the actual expense thereof.

1917, c. 136, sub-ch. 7, s. 3.

Town is not liable for injury to child caused by employee burning trash: Snider v. High Point, 168-608.

2800. **Abate or remedy menaces to health.** The governing body, or officer or officers who may be designated for this purpose by the governing body, shall have power summarily to remove, abate, or remedy, or cause to be removed, abated, or remedied, everything in the city limits, or within a mile of such limits, which is dangerous or prejudicial to the public health; and the expense of such action shall be paid by the person in default, and, if not paid, shall be a lien upon the land or premises where the trouble arose, and shall be collected as unpaid taxes.

1917, c. 136, sub-ch. 7, s. 4.

See section 2676. Improper exercise of police power: Prichard v. Comrs., 126-908. An ordinance making expense for cleaning surface closets a charge upon the property is valid: Ratchford v. Gastonia, 177-375.

Part 6. Fire Protection

2801. **Establish and maintain fire department.** The governing body shall have power to provide for the organization, equipment, maintenance and government of fire companies and a fire department; and, in its discretion, may provide for a paid fire department, and for this purpose may create any offices and employments and fix their compensation as to the governing body may seem right and proper.

1917, c. 136, sub-ch. 8, s. 1.

This is a governmental function, and the city is not liable for injury caused by defective appliance: Peterson v. Wilmington, 130-76. Where the city furnishes water for fire protection and no charge is made, the city is not liable for failure to furnish sufficient water pressure in case of fire: Howland v. Asheville, 174-749.

2802. **Establish fire limits.** The governing body may establish and maintain fire limits in the city, in which it shall be unlawful to erect, alter, and repair

wooden buildings or structures or additions thereto; it may also prohibit the removal of wooden buildings or structures of any kind into such limits, or from one place to another within the limits, and make such other regulations as may be deemed best for the prevention and extinguishment of fires.

1917, c. 136, sub-ch. 8, s. 2.

See section 2746.

2803. Regulate buildings. The governing body may make rules and regulations governing the erection and construction of buildings in the city so as to make them as safe as possible from fire.

1917, c. 136, sub-ch. 8, s. 3.

City is not liable in damages for failure to have a building removed as a fire menace: *Harrington v. Greenville*, 159-632.

2804. Fire protection for property outside city limits. The governing body may provide, install, and maintain water mains, pipes, hydrants, and buildings and equipment, either inside or outside of the city limits, for protection against fire of property outside of the city limits, and within such area as the governing body may determine, not exceeding a boundary of two miles from the city limits, under such terms and conditions as the governing body may prescribe.

1919, c. 244.

See section 4502.

Part 7. Sewerage

2805. Establish and maintain sewerage system. The governing body shall have power to acquire, provide, construct, establish, maintain and operate a system of sewerage for the city, and protect and regulate the same by adequate rules and regulations; and if it shall be necessary in obtaining proper outlets to such system to extend the same beyond the corporate limits, the governing body may condemn a right of way or rights of way to and for such outlets, and the proceedings for such condemnation shall be as herein provided for opening new streets and other purposes.

1917, c. 136, sub-ch. 7, s. 1.

In establishing a free public sewer system, the city is not liable for injury caused thereby except to property: *Metz v. Asheville*, 150-748; *Little v. Lenoir*, 151-415; *Moser v. Burlington*, 162-141; *Donnell v. Greensboro*, 164-330; *Rhodes v. Durham*, 165-679.

2806. Require connections to be made. The governing body may require all owners of improved property which may be located upon or near any line of such system of sewerage to connect with such sewerage all water-closets, bathtubs, lavatories, sinks, or drains upon their respective properties or premises, so that their contents may be made to empty into such sewer, and fix charges for such connections.

1917, c. 136, sub-ch. 7, s. 2.

Part 8. Water and Lights

2807. Establish and maintain water and light plants. The city may own and maintain its own light and waterworks system to furnish water for fire and other purposes, and light to the city and its citizens, but shall in no case be liable

for damages for a failure to furnish a sufficient supply of either water or light. And the governing body shall have power to acquire and hold rights of way, water rights, and other property, within and without the city limits.

1917, c. 136, sub-ch. 11, ss. 1, 2.

See section 2691. **No liability for failure to furnish sufficient pressure:** *Howland v. Asheville*, 174-749.

2808. Fix and enforce rates. The governing body or such board or body which has the management and control of the waterworks system in charge shall fix such uniform rates for water as is deemed best. Such body shall fix the times when the water rents shall become due and payable, and in case such rent is not paid within ten days after it becomes due and payable, the same may at any time thereafter be collected either by suit in the name of the city or by the collector of taxes for the city. Upon the failure of the owner of property for which water is furnished under the rules and regulations of such body to pay the water rents when due, then the body, or its agents or employees, may cut off the water from such property; and when so cut off it shall be unlawful for any person, firm, or corporation, other than the body or its agents or employees, to turn on the water to such property, or to use the same in connection with the property, without first having paid the water rent and obtained permission to turn on the water.

1917, c. 136, sub-ch. 11, s. 3.

2809. Separate accounts for water system. It shall be the duty of the governing body to keep a separate statement and account of the money received by the city from the waterworks system, and it shall be the duty of the said body to give preference to the waterworks system over the other departments of the city in such funds, and to provide for the proper upkeep of the waterworks system and an amount necessary for the enlargement of the waterworks system before turning over to the other departments the money so received.

1917, c. 136, sub-ch. 11, s. 4.

Part 9. Care of Cemeteries

2810. Care fund established. The governing body is authorized to create a fund to be known as the perpetual care fund for the cemeteries, for the purpose of perpetually caring for and beautifying the cemeteries, and such fund shall be kept by the city as is provided for bequests and gifts for cemetery purposes; and the governing body may make contracts with lot or space owners in the cemeteries, obligating the city to keep up and maintain said lots or spaces in perpetuity upon payment of such sum as may be fixed by the governing body; and the governing body is further authorized and empowered to accept gifts and bequests for such purposes, or upon such other trusts as the donors may prescribe; and the governing body is authorized to set aside for such perpetual care fund an amount not exceeding twenty-five per cent of the proceeds of sale of cemetery lots.

1917, c. 136, sub-ch. 9, s. 1.

2811. Application of fund. The principal of the funds appropriated by the governing body for caring for the cemeteries shall be held by the governing

body for caring for and beautifying the cemeteries and improving the same. The income from the fund heretofore or hereafter made shall be used for the purpose of carrying out contracts with the individual or space owners for the perpetual care of individual plats and spaces. Any gifts heretofore or hereafter made to and received by the city or any of its officers shall be held and used as a sacred trust fund for the purposes and upon the conditions named in such gifts or bequests, and all such funds shall be kept and invested separately and shall not be used for any other purpose, or by the city in its affairs.

1917, c. 136, sub-ch. 9, s. 1.

2812. Separate accounts kept. The city treasurer shall keep a separate account of the cemetery funds, and a still further separate account of all special gifts or bequests made by persons for and in connection with the cemeteries and particular lots therein. The governing body has the power to make rules and regulations and adopt ordinances for the carrying out of the duties imposed by this and the two preceding sections in regard to the care of cemeteries.

1917, c. 136, sub-ch. 9, s. 1.

Part 10. Municipal Taxes

2813. Provide for listing and collecting taxes. The governing body shall provide by an ordinance or otherwise means for the collection of taxes in the city and shall cause property to be listed for taxation which has not otherwise been listed as required by law.

1917, c. 136, sub-ch. 6, s. 2.

See, also, Taxation, Art. 6, Part 3.

See sections 2677-2682.

2814. Unlisted taxables entered. The officer who has charge of the collection of taxes in any city shall, after the most diligent inquiry, and by comparing his book with the county tax books, make out a list of all persons liable for poll tax, or for taxes on property, who have failed to return a list in the manner and in the time prescribed, together with the estimated value of all the property not listed, and shall enter such persons in a separate part of his book.

1917, c. 136, sub-ch. 6, s. 4.

See sections 7923-7925.

2815. Lien of taxes. The lien for taxes levied for any and all purposes in each year shall attach to all the real estate of the taxpayers within the city on the first day of May annually, and shall continue until such taxes, with any penalty and costs which shall accrue thereon, shall be paid. But there shall be no lien for taxes on the personal property of the taxpayer but from a levy thereon.

1917, c. 136, sub-ch. 6, s. 5; 1919, c. 126.

See sections 7986-7991.

2816. Power and duties of tax collector. The officer who has charge of the collection of taxes in any city shall, in the collection of taxes, be vested with the same power and authority as is given by the state to sheriffs for like purpose, and shall be subject to the same fines and penalties on failure or neglect of duty.

It shall be his duty to collect all taxes levied by the governing body, and he shall be charged with the sums appearing on the tax list as due for city taxes. He shall at no time retain in his hands over three hundred dollars for a longer time than seven days, under a penalty of ten per cent per month to be paid to the city upon all sums so unlawfully retained.

1917, c. 136, sub-ch. 6, s. 1.

See Taxation, art. 13, sec. 7992 et seq.

2817. **Settlement with tax collector.** In settlement with the city the tax collector shall be credited with all poll taxes and taxes on personal property which the governing body shall declare to be insolvent and uncollectible, and with such amounts as may be involved in suit by appeal from the ruling of the board, and he shall be charged with and shall pay over all other sums appearing on the tax list. After the accounts of the tax collector shall be audited and settled, the same shall be reported to the governing body, and when approved by it the same shall be recorded in the minute book of such body, and shall be prima facie evidence of correctness, and impeachable only for fraud or specified error.

1917, c. 136, sub-ch. 6, s. 1.

2818. **Bond of tax collector and other officers.** The governing body of the city shall require of the tax collector of the city, and any and all officers and employees, such bonds as it may deem necessary, and may pay the expenses of providing such bonds, including the bond of the mayor.

1917, c. 136, sub-ch. 6, s. 3.

2819. **License to plumbers and electricians.** The governing body may regulate and license plumbers and those engaged in the electrical wiring of buildings for light, power, or heat, and before issuing a license may require the applicant to be examined and to give bond in such sum and upon such conditions as the governing body may determine, and with such sureties as it may approve; and such body may, for incompetency on the part of such licensees or for refusal to comply with the ordinances relating to such business, or for any other good cause, revoke any license issued hereunder. No person, firm, or corporation shall do any kind of plumbing or electrical wiring of buildings without first having obtained a license from the governing body. No license issued hereunder by the governing body shall be for more than one year, and same shall not be transferable or assignable except by the permission of the governing body. And no license shall be issued, as herein provided, before the license tax shall have been paid.

1917, c. 136, sub-ch. 6, ss. 6, 7, 8, 9.

ART. 16. EXERCISE OF POWERS BY GOVERNING BODY

Part 1. Municipal Meetings

2820. **Legislative powers, how exercised.** Except as otherwise specially provided, the legislative powers of the governing body may be exercised as provided by ordinance or rule adopted by it.

1917, c. 136, sub-ch. 13, s. 1.

2821. Quorum and vote required. Every member of the governing body shall have the right to vote on any question coming before it. A majority shall constitute a quorum, and a majority vote of all members present shall be necessary to adopt any motion, resolution, or ordinance.

1917, c. 136, sub-ch. 13, s. 1.

General meaning of quorum: *Stanford v. Ellington*, 117-158. Meaning of majority: *Cotton Mills v. Comrs.*, 108-678; *Shannonhouse v. Withers*, 121-376; *Comrs. v. Trust Co.*, 143-110; *LeRoy v. Elizabeth City*, 166-93.

2822. Meetings regulated, and journal kept. The city governing body shall from time to time establish rules for its proceedings. Regular and special meetings shall be held at a time and place fixed by ordinance. All legislative sessions shall be open to the public, and every matter shall be put to a vote, the result of which shall be duly recorded. The governing body shall not by executive session or otherwise consider or vote on any question in private session. A full and accurate journal of the proceedings shall be kept, and shall be open to the inspection of any qualified registered voter of the city.

1917, c. 136, sub-ch. 13, s. 1.

Part 2. Ordinances

2823. How adopted. No ordinance shall be passed finally on the date on which it is introduced, unless by two-thirds vote of those present. No ordinance making a grant, renewal, or extension, whatever its kind or nature, of any franchise or special privilege shall be passed until voted on at two regular meetings, and no such grant, renewal, or extension shall be made otherwise than by ordinance.

1917, c. 136, sub-ch. 13, s. 3.

See section 2673.

2824. Ordinances amended or repealed. No ordinance or part thereof shall be amended or annulled except by an ordinance adopted in accordance with the provisions of this act.

1917, c. 136, sub-ch. 13, s. 4.

2825. How ordinance pleaded and proved. In all judicial proceedings it shall be sufficient to plead any ordinance of any city by caption, or by number of the section thereof and the caption, and it shall not be necessary to plead the entire ordinance or section. All printed ordinances or codes or ordinances published in book form by authority of the governing body of any city shall be admitted in evidence in all courts, and shall have the same force and effect as would the original ordinance.

1917, c. 136, sub-ch. 13, s. 14.

See sections 1750, 2637.

Part 3. Officers

2826. City clerk elected; powers and duties. The governing body shall, by a majority vote, elect a city clerk to hold office for the term of two years and until his successor is elected and qualified. He shall have such powers and perform such duties as the governing body may from time to time prescribe in addition to such duties as may be prescribed by law. He shall keep the records of the meetings. The person holding the office of city clerk at the time when any of

the plans set forth in this act shall be adopted by such city shall continue to hold office for the term for which he was elected, and until his successor is elected and qualified.

1917, c. 136, sub-ch. 13, s. 1.

2827. Vacancies filled; mayor pro tem. If a vacancy occurs in the office of the mayor or governing body, the vacancy shall be filled by the governing body of the city. If the mayor is absent or unable from any cause temporarily to perform his duties, they shall be performed by one elected by the governing body of the city for that purpose, who shall be called "mayor pro tem.," and he shall possess the powers of mayor only in matters not admitting delay, but shall have no power to make permanent appointments.

1917, c. 136, sub-ch. 13, s. 6.

See sections 2629, 2631.

2828. Bonds required. Every official, employee, or agent of any city who handles or has custody of more than one hundred dollars of such city's funds at any time shall, before assuming his duties as such, be required to enter into bond with good sureties, in an amount sufficient to protect such city, payable to such city, and conditioned upon the faithful performance of his duties and a true accounting for all funds of the city which may come into his hands, custody, or control, which bond shall be approved by the mayor and board of aldermen or other governing body and deposited with the city.

1917, c. 136, sub-ch. 13, s. 15.

2829. Information requested from mayor. The governing body at any time may request from the mayor specific information on any municipal matter within its jurisdiction, and may request him to be present to answer written questions relating thereto at a meeting to be held not earlier than one week from the date of the receipt by the mayor of such questions.

1917, c. 136, sub-ch. 13, s. 2.

Part 4. Contracts Regulated

2830. Contracts awarded on public advertisement. No contract for construction work or for the purchase of apparatus, supplies, or materials, whether the same shall be for repairs or original construction, the estimated cost of which amounts to or exceeds one thousand dollars, except in cases of special emergency involving the health or safety of the people or their property, shall be awarded unless proposals for the same shall have been invited by advertisement once in at least one newspaper of general circulation in the city, the publication to be at least one week before the time specified for the opening of said proposals. Such advertisement shall state the time and place where plans and specifications of proposed work or supplies may be had and the time and place for opening the proposals in answer to such advertisements, and shall reserve to the city the right to reject any or all such proposals. All such proposals shall be opened in public. No bill or contract shall be divided for the purpose of evading any provision of this act.

1917, c. 136, sub-ch. 13, s. 7.

Effect of statute requiring contract to be given to lowest bidder: *Sanderlin v. Luken*, 152-738.

2831. **Certain contracts in writing and secured.** All contracts made by any department, board, or commission in which the amount involved is two hundred dollars or more shall be in writing, and no such contract shall be deemed to have been made or executed until signed by the officer authorized by law to sign such contract, approved by the governing body. Any contract made as aforesaid may be required to be accompanied by a bond with sureties, or by a deposit of money, certified check, or other security for the faithful performance thereof, satisfactory to the board or official having the matter in charge, and such bonds or other securities shall be deposited with the city treasurer until the contract has been carried out in all respects; and no such contract shall be altered except by a written agreement of the contractor, the sureties on his bond, and the officer, department, or board making the contract, with the approval of the governing body.

1917, c. 136, sub-ch. 13, s. 8.

For regulation requiring municipal authorities to take bond for public contracts under act of 1913, c. 150, see *Liens*; also, *Fore v. Feimster*, 171-551.

Part 5. Control of Public Utilities

2832. **Power to establish and control public utilities.** Any city shall have the right to acquire, establish, and operate waterworks, electric lighting systems, gas systems, schools, libraries, cemeteries, market houses, wharves, play or recreation grounds, athletic grounds, parks, abattoirs, slaughter-houses, sewer systems, garbage and sewage disposal plants, auditoriums or places of amusement or entertainment, and armories. The city shall have the further right to make a civic survey of the city, establish hospitals, clinics, or dispensaries for the poor, and dispense milk for babies; shall have the power to establish a system of public charities and benevolence for the aid of the poor and destitute of the city; for the welfare of visitors from the country and elsewhere, to establish rest rooms, public water-closets and urinals, open sales places for the sale of produce, places for hitching and caring for animals and parking automobiles; and all reasonable appropriations made for the purposes above mentioned shall be binding obligations upon the city, subject to the provisions of the constitution of the state.

1917, c. 136, sub-ch. 13, s. 11.

2833. **How control exercised:**

1. *Control over departments.* The waterworks department, electric or gas light system, sewerage system, library system, park or park and tree commission system, or playground system, or any other public service owned, operated, or conducted by any city under separate organization or as a separate corporation under the control of any city in the state, which has been heretofore under the separate management and control of separate boards or corporations, may henceforth be under the management and control of the governing body of such city in the state.

2. *Departments may be abolished.* In all cities except those which have adopted Plan C or Plan D, hereafter set forth, before the governing body shall have control or management of the waterworks, electric light, sewerage system, library system, park or park and tree commission system, or playground system, or any other public service owned, operated, or conducted by such city under

separate organization or corporation, the governing body of the city, by two-thirds vote taken at two separate regular meetings of such governing body, shall pass an ordinance to the effect that the waterworks, electric or gas light system, sewerage system, library, park or park and tree commission system, or playground system, or any other public service owned, operated, or conducted by such city under separate organization or corporation, or either of them, shall be abolished and the control and management shall be under the governing body of the city.

3. *Property vested in the city.* Upon the passage by the governing body of any city of such ordinance, the waterworks, electric or gas light system, sewerage system, the library system, and the park or park and tree commission system, and any other public service owned, operated, or conducted by such city under separate organization or corporation then in existence either under separate organization or under separate management or control or under separate corporation, shall immediately become the property of the city, and all land, real estate, rights, easements, franchises, choses, and property of every kind, whether real or personal, tangible or intangible, the title of which is vested in such separate corporation or board, shall be and become vested in such city, and the boards of water commissioners, electric light commissioners, sewerage commissioners, library boards, park boards, or park and tree commission boards, or the board or commission of any other public service owned, operated, or conducted by or on behalf of such city under separate organization or corporation shall cease to exist as a corporation; and all indebtedness, bonds, or other contracts and obligations of any nature incurred by, for, or on account of the waterworks, electric or gas light system, sewerage system, library system, park or park and tree commission system, or other public utility in the name of or by such corporation, or by such city in its behalf, or by the corporation and such city jointly, shall be and become the sole obligations of such city.

4. *Same procedure in other cases.* There shall be the same procedure with reference to the library system, park or park and tree commission system, or playground system by the governing body of all cities which shall have adopted Plan C or Plan D before such control and title shall become vested as hereinbefore stated.

5. *Popular vote required.* In all cities, except those which have adopted Plan C or Plan D, hereafter set forth, before the foregoing provisions of this section shall become effective, such changes in the control and management of the waterworks, electric light, sewerage, etc., shall first be approved by a majority of the qualified voters of such municipality at any regular or special election held under the provisions of this act.

1917, c. 136, sub-ch. 13, s. 9.

2834. *Ordinances to regulate management.* The governing body of any city in the exercise of its control and management of the waterworks, electric light, sewerage system, library system, park or park and tree commission system, or any other public service owned, operated, or conducted by such city, shall have power to make rules, regulations, and ordinances in connection with the management thereof as they may deem necessary, and shall have power to enforce such rules, regulations, and ordinances.

1917, c. 136, sub-ch. 13, s. 10.

2835. Additional property acquired. The governing body of any city shall have power to acquire such additional property as it may deem necessary for a better system of waterworks, electric light, sewerage, library, park or parks, or other public service owned, operated, or conducted by such city. Upon the adoption by the governing body of any city of any one of the plans of government provided for in this act, the laws now in force in reference to the waterworks, electric light, sewerage, parks, libraries, or other public service owned, operated, or conducted by such city, shall not be repealed by this act, but shall be construed with this act and only repealed in so far as they are inconsistent with the provisions of this act.

1917, c. 136, sub-ch. 13, s. 10.

Part 6. Effect Upon Existing Regulations

2836. Existing rights and obligations not affected. All official bonds, recognizances, obligations, contracts, and all other instruments entered into or executed by or to the city before this act takes effect in any city, and all taxes, special assessments, fines, penalties, forfeitures incurred or imposed, due or owing to the city, shall be enforced and collected, and all writs, prosecutions, actions and causes of action, except as is herein otherwise provided, shall continue without abatement and remain unaffected by this act; and no legal act done by or in favor of the city shall be rendered invalid by its adoption of any plan of government provided for by this act.

1917, c. 136, sub-ch. 13, s. 5.

2837. Existing ordinances remain in force. All valid ordinances and resolutions of any city in force at the date of the ratification and not inconsistent with the provisions of this act, and all rules of procedure adopted by the governing body of any city, shall be and remain in full force and effect until repealed, annulled, or amended under the provisions of this act, or under the provisions of the charter of such city, and all laws relative to any city not in conflict with the provisions of this act shall be and remain in full force and effect.

1917, c. 136, sub-ch. 13, s. 5.

2838. Existing election laws remain in force. This act shall not repeal or impair any general, special, or local election laws now in force in any city, but such general, special, or local laws shall be and continue in full force and effect except where clearly inconsistent with and repugnant to the provisions of this act; and the municipal elections of such city shall continue to be held under and subject to the provisions of such special election laws except as herein otherwise provided: Provided, however, that in every case the governing body of any city shall have the right and power in its discretion and by an ordinance adopted by a two-thirds vote of the members of the entire governing body, to order a new registration of the voters of such city for any general, regular, or special municipal election held in such city for any purpose, unless excepted in this act.

1917, c. 136, sub-ch. 13, s. 12.

2839. General laws apply. All questions arising in the administration of the government of any city, and not provided for in this act, shall be governed by the laws of the state in such cases made and provided.

1917, c. 136, sub-ch. 13, s. 13.

ART. 17. ACCOUNTING SYSTEM

2840. **Nature of accounting system.** Accounting systems shall be devised and maintained which shall exhibit the condition of the city's assets and liabilities, the value of its several properties, and state of its several funds. Such systems shall be adequate to record in detail all transactions affecting the acquisition, custodianship, and disposition of values, including cash receipts and disbursements. The recorded facts shall be presented periodically to officials and to the public in such summaries and analytical schedules as shall be necessary to show the full effect of such transactions for each fiscal year upon the finances of the city and in relation to each department of the city government; and there shall be included distinct summaries and schedules for each public utility owned and operated by the city. In all respects, as far as the nature of the city's business permits, the accounting systems maintained shall conform to those employed by progressive business concerns and approved by the best usage. The governing body shall have power to employ accountants to assist in devising such accounting systems.

1917, c. 136, sub-ch. 14, s. 1.

2841. **Coöperation through board of control.** The board of municipal control shall investigate what amount of cost will be required to employ expert accountants to devise proper uniform accounting systems for municipalities, and shall submit to each city a statement of the cost thereof and attempt to obtain coöperation among as many of the cities of the state as possible in the payment of the cost of such systems; and in case a satisfactory arrangement can be made by such cities for the payment of such costs, then the board of municipal control shall employ such expert accountants for such purpose, and the governing body of each of the cities in the state shall have power to pay its proportion of the cost thereof and install such system.

1917, c. 136, sub-ch. 14, s. 2.

ART. 18. ADOPTION OF CITY CHARTERS

Part 1. Effect of Adoption

2842. **Continues corporation with powers according to plan.** Any city which shall adopt, in the manner hereinafter prescribed, one of the plans of government provided in this act shall thereafter be governed by the provisions thereof; and the inhabitants of such city shall continue to be a municipal corporation under the name existing at the time of such adoption, and shall have, exercise, and enjoy all the rights, immunities, powers, and privileges, and shall be subject to all the duties, liabilities, and obligations provided for herein or otherwise pertaining to or incumbent upon such city as a municipal corporation.

1917, c. 136, sub-ch. 16, s. 1.

See *Kendall v. Stafford*, 178-461.

2843. **Legislative powers not restricted.** None of the legislative powers of a city shall be abridged or impaired by the provisions of this act, but all such legislative powers shall be possessed and exercised by such body as shall be the legislative body of the city under the provisions of this act.

1917, c. 136, sub-ch. 16, s. 2.

2844. **Ordinances remain in force.** All ordinances, resolutions, orders, or other regulations of a city or of any authorized body or official thereof existing at the time when such city adopts a plan of government set forth in this act shall continue in full force and effect until annulled, repealed, modified, or superseded.

1917, c. 136, sub-ch. 16, s. 3.

2845. **Mayor and aldermen to hold no other offices.** The mayor or any member of the board of aldermen shall not hold any other office or position of profit, trust, or honor, or perform any other duties or functions than mayor or aldermen under the city government unless it shall be submitted to and approved by a majority of the qualified voters of the city at a regular or special election.

1917, c. 136, sub-ch. 16, s. 4.

2846. **Wards regulated.** The territory of any city adopting any one of the plans of government provided for in this act shall continue to be divided into the same number of wards existing at the time of such adoption, which wards shall retain their boundaries until same shall be changed under the provisions of this act: Provided, that if the plan so adopted provides for a different number and arrangement of wards from that existing at the time of such adoption, then in such event the wards of such city shall be so changed and arranged as to conform to the provisions of the plan so adopted.

1917, c. 136, sub-ch. 16, s. 5.

Part 2. Manner of Adoption

2847. **Petition filed.** A petition addressed to the board of elections of the county in which the city is situated, in the form and signed and certified as provided in the next section, may be filed with the county board of elections. The petition shall be signed by qualified voters of the city to a number equal to at least twenty-five per cent of the qualified voters at the last election next preceding the filing of the petition.

1917, c. 136, sub-ch. 16, s. 6.

2848. **Form of petition.** The petition shall be in substantially the following form:

To the County Board of Elections of _____ County:

We, the undersigned qualified voters of the city, respectfully petition your honorable body to cause to be submitted to a vote of the voters of the city of _____ the following question: "Shall the city of _____ adopt the form of government defined as Plan (A, B, C, or D), as it is desired by petitioners and consisting of (describe plan briefly, as government by a mayor and councilors elected at large, or government by a mayor and councilors elected partly at large and partly from wards or districts, or government by three commissioners, one of whom shall be the mayor, or government by a mayor and four councilors with a city manager), according to the provisions of the chapter, Municipal Corporations, in the Consolidated Statutes, articles nineteen to twenty-three, inclusive.

Or, in case it shall be desired by such petitioners that two of such plans shall be submitted, then the question may be stated as follows:

Shall the city of _____ adopt the form of government defined as Plan _____ or _____ (naming two of such plans as stated above), or remain under the present form of government?

The petition may be in the form of separate sheets, each sheet containing at the top thereof the heading above set forth, and when attached together and offered for filing the several papers shall be deemed to constitute one petition, and there shall be endorsed thereon the name and address of the person presenting the same for filing.

1917, c. 136, sub-ch. 16, s. 7.

2849. Election held. Within five days after the petition has been filed with the county board of elections, if the petition shall contain twenty-five per cent of the qualified voters as before set forth, the board of elections shall call an election in accordance with such petition. The board of elections shall cause notice of such election to be given at least once a week for four weeks in some newspaper of general circulation in the county in which the election is to be held, or at the courthouse door of the county in which the city is situated or at the door of the city or town hall, and the date of such election shall be fixed by the board not later than forty days from the receipt of such petition. The notice shall be signed by the chairman of the county board of elections, and the cost of publication thereof paid by the city. The election shall be held under, and governed and controlled by, the laws in force at the time of such election governing regular elections of such city.

1917, c. 136, sub-ch. 16, s. 8.

2850. Petitions for more than one plan. Separate petitions for the submission of more than one of such plans may be filed in the form and manner hereinbefore provided, but if petitions for the submission of more than two of such plans shall be submitted at such election, those two plans shall be submitted at the election, petitions for which shall be first filed with the county board of elections.

1917, c. 136, sub-ch. 16, s. 9.

2851. What the ballots shall contain. All ballots used in elections held upon the adoption of the plans of government herein set forth shall contain the name of the plan submitted, as Plan A, B, C, or D, or any two of such plans submitted, as the case may be, with a brief description of each plan submitted, as described in the petition, and shall also contain the existing form of government under the name "present form of government." The names of the plans and forms shall be so printed that in appropriate squares the voter may designate by a cross (X) mark only the plan or form of government for which he casts his vote; if there shall be only one plan submitted, the letter and description of such plan and the "present form of government" only shall appear, and the voter shall express his preference between such plan and the "present form of government." If there shall be two plans submitted, then each of the plans shall be denominated and described on the ballot as herein set forth, and the "present form of government" shall also appear upon the ballot, and the ballot shall be so printed that in appropriate squares the voter may designate by a cross (X) mark only the plan or form of his first choice and the plan and form of his second choice.

1917, c. 136, sub-ch. 16, s. 10.

2852. Form of ballots. Except that the crosses here shown shall be omitted, the ballots shall be printed substantially as follows:

(Form of ballot when only one plan is submitted:)

SPECIAL MUNICIPAL ELECTION

PLAN _____ (WITH BRIEF DESCRIPTION).
 PRESENT FORM OF GOVERNMENT.

(Form of ballot when two plans are submitted:)

SPECIAL MUNICIPAL ELECTION

To vote for any plan or form of government, make a cross in the appropriate square to the right of the name of such plan or form.

Note your first choice in the first column.
 Note your second choice in the second column.

Names of plans or forms.

	<i>First Choice.</i>	<i>Second Choice.</i>
PLAN _____ (with brief description).	X	
PLAN _____ (with brief description).		X
PRESENT FORM OF GOVERNMENT.		

1917, c. 136, sub-ch. 16, s. 11.

2853. **Series of ballots.** The plans and forms on all ballots shall be printed in rotation as follows: The ballots shall be printed in as many series as there are plans or forms. The whole number of ballots to be printed shall be divided by number of series and the quotient so obtained shall be the number of ballots in each series. In printing the first series of ballots the names of each plan or form shall be arranged in the alphabetical order of the letters of the plans submitted, followed by the "present form of government." After printing the first series, the first plan or form shall be placed last and the next series printed, and the process shall be so repeated until each plan shall have been printed first an equal number of times. The ballots so printed shall be then combined in tablets or packages so as to have the fewest possible ballots having the same order of plans or forms printed thereon together in the same tablet or package.

1917, c. 136, sub-ch. 16, s. 12.

2854. **How choice determined:**

1. *One plan submitted.* If only one of the plans herein set forth and the "present form of government" are submitted, the plan or form of government receiving a majority of the votes cast shall be declared the plan or form selected.

2. *More than one plan submitted.* If two of the plans herein set forth and the "present form of government" are submitted, the plan or form receiving a majority of first choice votes equal to a majority of all the ballots cast shall be declared the plan or form selected. If no plan or form shall receive such a majority, then the second choice votes received for each plan or form shall be added to its first choice votes, and the plan or form receiving the highest total of first and second choice votes equal to a majority of all ballots cast shall be declared the plan or form selected.

3. *How ballots are counted.* In counting the ballots, if two plans and the "present form of government" are submitted, the precinct officers shall enter

the total number of ballots on a tally-sheet printed therefor. They shall also carefully enter on such sheet the number of first choice and second choice votes for each plan or form of government. Only one vote shall be counted for any one plan or form on any one ballot. If two votes are cast for the same plan or form, the higher choice only shall be counted. If but one choice is voted on a ballot, it shall be counted as a first choice. If more than one cross appears in the same choice column on any ballot, they shall be counted as choices with priority as between each other in the order in which they appear in the choice column. Ballots marked with more than two crosses shall be declared void. A tie between two or more plans or forms shall be decided in favor of the one having the largest number of first choice votes.

1917, c. 136, sub-ch. 16, ss. 13, 14.

Part 3. Result of Adoption

2855. Plan to continue for two years. Should any one of the plans of government provided for in this act be adopted, the plan shall continue in force for the period of at least two years after beginning of the term of office of the officials elected thereunder; and no petition proposing a different plan shall be filed during the period of one year and six months after such adoption.

1917, c. 136, sub-ch. 16, s. 15.

2856. City officers to carry out plan. It shall be the duty of the mayor, the governing body, and the city clerk and other city officials in office, and all boards of election and all election officials, when any plan of government set forth in this act has been adopted by the qualified voters of any city or is proposed for adoption, to comply with all requirements of this act relating to such proposed adoption and to the election of the officers specified in such plan, to the end that all things may be done which are necessary for the nomination and election of the officers first to be elected under the provisions of this act and of the plan so adopted.

1917, c. 136, sub-ch. 16, s. 16.

2857. First election of officers. The first election next succeeding the adoption of any of the plans provided for by this act shall take place on Tuesday after the first Monday in May next succeeding such adoption, and thereafter the city election shall take place biennially on the Tuesday next following the first Monday in May, and the municipal year shall begin and end at ten o'clock in the morning following the day of election.

1917, c. 136, sub-ch. 16, s. 17.

2858. Time for officers to qualify. On Wednesday after the first Monday in May following the adoption of any of the plans herein provided for, and biennially thereafter, the mayor-elect and the councilors-elect or commissioners shall meet and be sworn to the faithful discharge of their duties. The oath may be administered by the city clerk or by any justice of the peace, and a certificate that such oath has been taken shall be entered on the journal of the city council. At any meeting thereafter the oath may be administered in the presence of the city council to the mayor, or to any councilor or commissioner absent from the meeting on the first Wednesday after the first Monday in May.

1917, c. 136, sub-ch. 16, s. 18.

ART. 19. DIFFERENT FORMS OF MUNICIPAL GOVERNMENT

Part 1. Plan "A." Mayor and City Council Elected at Large

2859. How it becomes operative. The method of city government herein provided for shall be known as Plan A. Upon the adoption of Plan A by a city in the manner prescribed by this act, such plan shall become operative, and its powers of government shall be exercised, as prescribed herein and in article eighteen of this chapter.

1917, c. 136, sub-ch. 16, Part II, Plan A, ss. 1, 2.

2860. Mayor's election and term of office. There shall be a mayor, elected by and from the qualified voters of the city, who shall be the chief executive officer of the city. He shall hold office for the term of two years from Wednesday after the first Monday in May following his election and until his successor is elected and qualified.

1917, c. 136, sub-ch. 16, Part II, Plan A, s. 3.

See sections 2631-2637.

2861. Number and election of city council. The legislative powers of the city shall be vested in a city council. In cities of five thousand inhabitants and under the city council shall consist of three; in cities of five thousand to ten thousand the city council shall consist of five; in cities of ten thousand to twenty thousand inhabitants, the city council shall consist of seven; and in all over twenty thousand inhabitants the city council shall consist of nine. The councilmen shall be elected at large and from the qualified voters of the city. One of its members shall be elected by the council biennially as mayor pro tem. At the first election held in a city after its adoption of Plan A, the councilors shall be elected to serve for two years from Wednesday after the Monday in May following their election and until their successors are elected and qualified, and at each biennial city election thereafter the councilors elected to fill vacancies caused by the expiration of the terms of councilors shall be elected to serve for two years. The number of inhabitants shall be determined by the last United States government census or estimate.

1917, c. 136, sub-ch. 16, Part II, Plan A, s. 4.

See sections 2626-2630.

2862. Salaries of mayor and councilmen. The mayor shall receive for his services such salary as the city council shall by ordinance determine: Provided, however, that the salary of the mayor shall be within the following limits: In cities of five thousand inhabitants and under, not less than three hundred nor more than one thousand dollars. In cities of five thousand to ten thousand inhabitants, not less than five hundred dollars nor more than fifteen hundred dollars. In cities of ten thousand to twenty-five thousand inhabitants, not less than one thousand nor more than three thousand dollars. In cities of over twenty-five thousand inhabitants, not less than two thousand nor more than thirty-five hundred dollars. The number of inhabitants shall be determined by the last United States government census or estimate. The mayor shall receive no other compensation from the city, and his salary shall not be increased

or diminished during the term for which he is elected: Provided, however, that the council first elected under this plan shall fix by ordinance the salary within the above limits of the mayor first elected hereunder and shall six months prior to the time of the expiration of its term fix by ordinance the salary within the above limits of the mayor who shall succeed the first mayor under this plan, and each council shall thereafter fix by ordinance the salary of succeeding mayors, but such ordinance shall not be binding in case another plan shall be adopted during the term of office of such council. The council may by a two-thirds vote of all its members, taken by call of the "yeas" and "nays," establish a salary for its members not exceeding two hundred dollars each a year. Such salary may be reduced, but no increase therein shall be made to take effect during the year in which the increase is voted.

1917, c. 136; sub-ch. 16, Part II, Plan A, s. 5.

In the absence of provision in the charter or general law, the officer is not entitled to compensation: *Nichols v. Edenton*, 125-13. The officer is not entitled to additional compensation for performing the duties of his office: *Davidson v. Guilford*, 152-436; *Fountain v. Pitt*, 171-113; *Borden v. Goldsboro*, 173-661. This does not change salaries under existing charters, nor authorize the commissioners to do so: *Kendall v. Stafford*, 178-461.

2863. Officers elected by city council. All heads of departments and members of municipal boards, as their present terms of office expire, shall be elected by the city council: Provided, that the city council may by two-thirds vote at any time abolish, alter, or establish such departments and boards as it may by ordinance determine. A city attorney shall be elected by the city council, and the council may also elect a city solicitor.

1917, c. 136, sub-ch. 16, Part II, Plan A, s. 5.

See section 2630.

2864. Power of removal in mayor. The mayor may, with the approval of a majority of the members of the city council, remove any head of a department or member of a board, other than governing board, before the expiration of his term of office. The person so removed shall receive a copy of the reasons for his removal, and he may, if he desires, contest the same before the city council. He shall have the right to be represented by counsel at such hearing.

1917, c. 136, sub-ch. 16, Part II, Plan A, s. 7.

For general power of removal, see *Burke v. Jenkins*, 148-25.

2865. Veto power of mayor. Every order, ordinance, resolution, and vote relative to the affairs of the city, adopted or passed by the city council, shall be presented to the mayor for his approval. If he approves it, he shall sign it; if he disapproves it, he shall return it, with his objections in writing, to the city council, which shall enter the objections at large on its records, and again consider it. If the city council, notwithstanding such disapproval of the mayor, shall again pass such order, ordinance, resolution, or vote by a two-thirds vote of all the members of the city council, it shall then be in force; but such vote shall not be taken for seven days after its return to the city council. Every such order, ordinance, resolution, and vote shall be in force if it is not returned by the mayor within ten days after it has been presented to him.

1917, c. 136, sub-ch. 16, Part II, Plan A, s. 8.

*Part 2. Plan "B." Mayor and Council Elected by Districts
and at Large*

2866. How it becomes operative. The method of city government herein provided for shall be known as Plan B. Upon the adoption of Plan B by a city in the manner prescribed by this act, such plan shall become operative, and its powers of government shall be exercised, as is prescribed herein and in article eighteen of this chapter.

1917, c. 136, sub-ch. 16, Part III, Plan B, ss. 1, 2.

2867. Mayor's election and term of office. There shall be a mayor elected by and from the qualified voters of the city, who shall be the chief executive officer of the city. He shall hold office for the term of two years from Wednesday after first Monday in May following his election and until his successor is elected and qualified, and at each biennial city election thereafter the mayor shall be elected to serve for two years.

1917, c. 136, sub-ch. 16, Part III, Plan B, s. 3.

See sections 2631-2637.

2868. City council, election and term of office. The legislative powers of the city shall be vested in a city council. One of its members shall be elected biennially as its mayor pro tem. In cities having more than seven wards the city council shall be composed of twelve members, of whom one shall be elected from each ward by and from the qualified voters of that ward, and the remaining members shall be elected by and from the qualified voters of the city. In cities having seven wards or less, the city council shall be composed of eleven members, of whom one shall be elected from each ward by and from the qualified voters of that ward, and the remaining members shall be elected by and from the qualified voters of the city. At the first election held in a city after its adoption of Plan B, the councilors elected from each ward shall be elected to serve for two years from Wednesday after first Monday in May following their election and until their successors are elected and qualified; and at each biennial city election thereafter the councilors elected to fill vacancies caused by the expiration of the terms of councilors shall be elected to serve for two years.

1917, c. 136, sub-ch. 16, Part III, Plan B, s. 4.

See sections 2626-2630.

2869. Officers elected by city council. All heads of departments and members of municipal boards, as their terms of office expire, shall be elected by the city council: Provided, that the city council may by two-thirds vote at any time abolish, alter, or establish such departments and boards as it may by ordinance determine. A city attorney shall be elected by the city council, and the council may also elect a city solicitor.

1917, c. 136, sub-ch. 16, Part III, Plan B, s. 5.

See section 2630.

2870. Power of removal in mayor. The mayor may, with the approval of a majority of the members of the city council, remove any head of a department or member of a board before the expiration of his term of office. The person so

removed shall receive a copy of the reasons for his removal, and he may, if he desires, contest the same before the city council. He shall have the right to be represented by counsel at such hearing.

1917, c. 136, sub-ch. 16, Part III, Plan B, s. 6.

See section 2864.

2871. Salaries of mayor and council. The mayor shall receive for his services such salary as the city council shall by ordinance determine: Provided, however, that the salary of the mayor shall be within the following limits: In cities of five thousand inhabitants and under, not less than three hundred dollars nor more than one thousand dollars. In cities of five thousand to ten thousand inhabitants, not less than five hundred nor more than fifteen hundred dollars. In cities of ten thousand to twenty-five thousand inhabitants, not less than one thousand nor more than three thousand dollars. In cities of over twenty-five thousand inhabitants, not less than two thousand nor more than thirty-five hundred dollars. The number of inhabitants shall be determined by the last United States government census or estimate. The mayor shall receive no other compensation from the city, and his salary shall not be increased or diminished during the term for which he is elected: Provided, however, that the council first elected under this plan shall fix by ordinance the salary within the above limits of the mayor first elected hereunder, and shall six months prior to the time of the expiration of its term fix by ordinance the salary, within the above limits, of the mayor who shall succeed the first mayor under this plan, and each council shall thereafter fix by ordinance the salary of the succeeding mayors; but such ordinance shall not be binding as to succeeding mayors in case another plan shall be adopted during the term of office of such council. The council may by two-thirds vote of all its members, taken by call of the "yeas" and "nays," establish a salary for its members not exceeding one hundred dollars each per year. Such salary may be reduced, but no increase therein shall be made to take effect during the year in which the increase is voted.

1917, c. 136, sub-ch. 16, Part III, Plan B, s. 7.

See annotations under section 2862.

2872. Veto power in mayor. Every order, ordinance, resolution, and vote relative to the affairs of the city, adopted or passed by the city council, shall be presented to the mayor for his approval. If he approves it, he shall sign it; if he disapproves it, he shall return it, with his objections in writing, to the city council, which shall enter his objections at large on its records, and again consider it. If the city council, notwithstanding such disapproval of the mayor, shall again pass such order, ordinance, resolution, or vote by a majority vote of all the members of the city council, it shall be in force; but such vote shall not be taken for seven days after its return to the city council. Every such order, ordinance, resolution, or vote shall be in force if it is not returned by the mayor within ten days after it has been presented to him.

1917, c. 136, sub-ch. 16, Part III, Plan B, s. 8.

Part 3. Plan "C." Commission Form of Government

2873. How it becomes operative. The method of city government herein provided for shall be known as Plan C. Upon the adoption of Plan C by any city

in the manner prescribed by this act, such plan shall become operative, and its powers of government shall be exercised, as is prescribed herein and in article eighteen of this chapter.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 1, ss. 1, 2.

2874. Board of commissioners governing body. The government of the city and the general management and control of all of its affairs shall be vested in a board of commissioners, which shall be elected and shall exercise its powers in the manner hereinafter set forth; and such board shall have full power and authority to enact laws and ordinances for the government and management of the city and all its departments.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 1, s. 3.

2875. Number, power and duties of commissioners. The board of commissioners shall consist of three members, one of whom shall be mayor, and all of whom shall be elected by a vote of the people as hereinafter provided. One of the commissioners shall be elected and known as commissioner of public works; one of the commissioners shall be elected and known as commissioner of public safety; and the mayor shall be known as commissioner of administration and finance. And the commissioners are hereby empowered to appoint, elect, employ, suspend, and discharge all other officers and employees necessary for the operation and management of the city government and its various departments and activities, and to make all necessary rules and regulations for their government; and full power and authority is hereby granted the board of commissioners to enact all laws and ordinances for the proper government of the city.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 4.

2876. Power and duties of mayor. The mayor shall be the chief executive officer of the city, and, subject to the supervision of the board of commissioners, shall perform all duties pertaining to such office. He shall do and perform all duties provided or prescribed by law or by the ordinances of the city not expressly delegated to any other person. He shall have general supervision and oversight over the departments and offices of the city government, and shall be the chief representative of the city, and shall report to the board any failure on the part of any of the officers of his or any other department to perform their duties, and shall preside at all meetings of the board of commissioners. He shall sign all contracts on behalf of the city unless otherwise provided by law, ordinance or resolution of the board of commissioners; he shall have charge of and cause to be prepared and published all statements and reports required by law or ordinance or by resolution of the board of commissioners.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 5.

2877. Commissioner of administration and finance:

1. Purchasing agent. The commissioner of administration and finance (who is also mayor) shall be the purchasing agent of the board of commissioners of the city, and all property, supplies, and material of every kind whatsoever shall, upon the order of the board of commissioners, be purchased by him; and when so purchased by him, the bills therefor shall be submitted to and approved by the board of commissioners before warrants are issued therefor. When such warrants are issued, they shall be signed by the commissioners and countersigned by some other person designated by the board of commissioners.

2. *Collector of taxes and other dues.* He shall collect all taxes, water rents, license fees, franchise taxes, rentals, and all other moneys which may be due or become due to the city; he shall issue license or permits as provided by law, ordinance, or resolution adopted by the board of commissioners; he shall report the failure on the part of any person, firm or corporation to pay money due the city; and he shall report to the board of commissioners any failure on the part of any person, firm, or corporation to make such reports as are required by law, ordinance, or order of the board of commissioners to be made, and he shall make such recommendations with reference thereto as he may deem proper.

3. *Supervision of accounts.* He shall have charge of and supervision over all accounts and records of the city, and accounts of all officers, agents, and departments required by law or by the board of commissioners to be kept or made. He shall regularly, at least once in three months, inspect or superintend inspection of all records or accounts required to be kept in any of the offices or departments of the city, and shall cause proper accounts and records to be kept, and proper reports to be made. He shall recommend to the board methods of modern bookkeeping for all departments, employees, and agents of the city, and shall, acting for the board of commissioners, audit or cause to be audited by an expert accountant, quarterly, the accounts of every officer or employee who does or may receive or disburse money, and shall publish or cause to be published quarterly statements showing the financial condition of the city. He shall examine or cause to be examined all accounts, payrolls, and claims before they are acted on or allowed, unless otherwise provided by law or by order of the board of commissioners.

4. *Control of employees.* He shall have control of all employees of his department, and of all other officers and employees not by law, ordinance, or resolution of the board of commissioners apportioned or assigned to some other department. The assessor, auditor, city clerk, city attorney, and their respective offices or departments, and all employees therein, and all bookkeepers and accountants are apportioned and assigned to the department of administration and finance, and shall be under the direction and supervision of the commissioner thereof.

5. *General duties.* In the absence or inability of any commissioner to act, he shall exercise temporary supervision over the department assigned to such commissioner, subject, however, to the power of the board to substitute some one else temporarily to perform any of such duties. He shall do and perform any and all other services ordered by the board and not herein expressly conferred upon some other department.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 8.

2878. Commissioner of public works:

1. *Construction of public works.* The commissioner of public works shall have authority and charge over all the public works not herein expressly given to some other department; the construction, cleansing, sprinkling, and repair of the streets and public places, the erection of buildings for the city, the making and construction of all other improvements, paving, curbing, sidewalks, bridges, viaducts, and the repair thereof. He shall approve all estimates of the city engineer of the cost of public works, and recommend to the board of commissioners the acceptance of the work done or improvement made, when completed

according to contract, and perform such other duties with reference to such other matters as may be required by law, ordinance, or order of the board of commissioners.

2. *Control of streets and public places.* The commissioner shall have supervision and control, and it shall be his duty to keep in good condition the streets, cemeteries, and public parks in the city or belonging to the city, subject to the supervision and control of the board of commissioners; he shall have control, management and direction of all public grounds, bridges, viaducts, subways, and buildings not otherwise assigned herein to some other department; he shall have supervision of the enforcement of the provisions of law and the ordinances relating to streets, public squares and places, cemeteries, and the control of the placing of billboards and street waste-paper receptacles.

3. *Control over public utilities.* He shall have supervision over the public-service utilities not otherwise assigned to some other department, and all persons, firms, or corporations rendering service in the city under any franchise, contracts, or grant made by the city or state, not otherwise assigned to some other department. He shall have control of the location of street-car tracks, telephone and telegraph wires, and other things placed by public-service corporations in, along, under, or over the streets, and shall report to the board of commissioners or city officers, as may be appointed by them to receive his reports, any failure of such person or corporation to render proper service under a franchise granted by the city or state, and shall report any failure on the part of such person, firm, or corporation to observe the requirements or conditions of such franchise, contract, or grant.

4. *Control of water system.* He shall have charge of the watersheds from which the city takes its supply of water, pumping stations, pipe lines, filtering apparatus, and all other things connected with or incident to the proper supply of water for the city; it shall be his duty to act for the city, subject to the control of the board of commissioners, in securing all rights of way and easements connected with and necessary to the supply of water for the city; he shall have supervision and control of all buildings, grounds, and apparatus connected therewith and incident to the furnishing of water for the city; he shall superintend the erection of water tanks and laying of water lines and the operation thereof.

5. *Control of departments.* The department of the city engineer, and all employees therein, the departments of streets, parks, cemeteries, buildings, and all employees in said departments, shall be under the supervision and control of the commissioner of public works; and he shall do and perform all other services ordered by the board, or that may be ordered by the board, not herein expressly conferred upon some other department.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 7.

2879. Commissioner of public safety:

1. *Charge of police force.* The commissioner of public safety shall have charge of the police force, subject to the supervision and control of the board of commissioners, and shall have power temporarily to supplant the chief of police and take charge of the department, and shall at all times have power to give directions to the officers and all employees in the police department, and his directions shall be binding upon all such officers and employees, subject only to

the control of the board of commissioners. He shall have charge of the police stations, jails, and property and apparatus connected therewith, including city ambulance and patrol wagons used in connection with his department.

2. *Control of fire department.* He shall have the supervision and control, subject to the control of the board of commissioners, of the fire department, of all firemen, officers, and employees therein or connected therewith, and of all fire stations, property and apparatus connected therewith; he shall have power to supersede temporarily the chief of the fire department, and his orders to such department and all employees therein shall be binding upon the department.

3. *Traffic regulations.* He shall be charged with the duty of enforcing all ordinances and resolutions relating to traffic on the public streets, alleys, and public ways, on and across railway lines and through and over the cemetery-ways, public parks, and other public places.

4. *Health regulations.* He shall, subject to the supervision of the board of commissioners, have control of the laws, ordinances, and orders relating to the public health and sanitation, and all health officers, employees of the city, connected with and under his department; and it shall be the duty of the board of commissioners to pass such ordinances and prescribe such rules and regulations and employ such persons as will be necessary to protect and preserve public health. He shall have control and supervision, through the health officer under his department, over public dumping grounds and dumps and city scavengers; he shall be charged, through his department, with the enforcement of all quarantine regulations, of keeping clean all streets, alleys, and public places, and with suppressing and removing conditions on private property within the city that are a menace to health or public safety. He shall be authorized to enter upon private premises for the purpose of discharging the duties imposed upon him, and he shall cause to be abated all nuisances which may endanger or affect the health of the city, and generally do all things, subject to the control of the board of commissioners, that may be necessary and expedient for the promotion of health and suppression of disease.

5. *Sewer and light systems.* He shall have control and supervision over the sewer system, and shall have charge and control over the sewer inspector and all other officers and employees connected with the department of lights and sewers. He shall have supervision and control over the lighting system of the city, and the management and direction of the lighting of the streets, alleys, and all other public places and grounds and all other places where city lights are placed; he shall be charged with the duty of seeing that all persons, firms, and corporations charged with the duty of supplying lights or waterpower perform the obligation imposed upon them by law, ordinance, or order of the board of commissioners.

6. *Control over officers.* He shall have charge of the electrical inspector, plumbing inspector, building inspector, market house and the employees connected therewith and of all apparatus and property used therein; he shall have charge, supervision and direction of all officers and employees of the city connected with and under his department. He shall perform all other services ordered by the board of commissioners, or that may be ordered by the board of commissioners, not herein expressly conferred upon some other department.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 8.

2880. Recommendations as to purchases. It shall be the duty of each commissioner to recommend to the city purchasing agent the purchase of goods and the contract for all things necessary to be contracted for in his department, and these recommendations shall be submitted to the board of commissioners for its orders with respect thereto.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 9.

2881. General powers of board of commissioners. The board of commissioners shall exercise all legislative powers, functions, and duties conferred upon the city or its officers. It shall make all orders for the doing of work or the making or construction of any improvements, bridges, or buildings. It shall levy all taxes, apportion and appropriate all funds, audit and allow all bills and accounts, payrolls, and claims, and order payment thereof. It shall make all assessments for the cost of street improvements, sidewalks, sewers, and other work, improvements, or repairs which may be specially assessed. It shall make or authorize the making of all contracts, and no contracts shall bind or be obligatory upon the city unless either made by ordinance or resolution adopted by the board of commissioners or reduced to writing and approved by the board or expressly authorized by ordinance or resolution adopted by the board. All contracts and all ordinances and resolutions making contracts or authorizing the making of contracts shall be drawn by the city attorney, or submitted to such officer before the same are made or passed. All heads of departments, agents, and employees are the agents of the board of commissioners only, and all their acts shall be subject to review and to approval or revocation by the board of commissioners. Every head of department, superintendent, agent, employee, or officer shall from time to time, as required by law or ordinance, or when requested by the board of commissioners, or whenever he shall deem necessary for the good of the public service, report to the board of commissioners in writing respecting the business of his department, office, or employment, all matters connected therewith. The board of commissioners may by ordinance or resolution assign to a head of a department, a superintendent, officer, agent, or employee, duties in respect to the business of any other department, office, or employment, and such service shall be rendered without additional compensation. The board of commissioners shall elect and have authority over the city clerk, who shall be the clerk of the board of commissioners. The board of commissioners shall have charge of all matters pertaining to public health, and shall perform all duties belonging thereto.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, ss. 10, 11.

2882. Commissioners' service exclusive. Each member of the board of commissioners shall devote his time and attention to the performance of the public duties to the exclusion of all other occupations, professions, or callings.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 2, s. 12.

2883. The initiative and referendum:

1. Ordinances submitted by petition. Any proposed ordinance may be submitted to the board of commissioners by petition signed by electors of the city equal to the number provided herein for recall of any official. The signatures, verifications, authentications, inspections, certification, amendments, and submission of such petition shall be the same as provided for the removal of officials.

2. *Duty of the board.* If the petition accompanying the proposed ordinance be signed by the requisite number of electors, and contains a request that the ordinance be passed, or submitted to a vote of the people if not passed by the board of commissioners, such board shall either:

a. Pass such ordinance without alteration within twenty days after attachment of the clerk's certificate to the accompanying petition, or

b. After the clerk shall attach to the petition accompanying such ordinance his certificate of sufficiency, the board of commissioners shall forthwith submit the question to the qualified voters at a special election called for that purpose, or to a general election occurring within ninety days after the date of the clerk's certificate. If the petition is signed by not less than ten and less than twenty-five per cent of the electors as above defined, then the board of commissioners shall within twenty days pass such ordinance without change or submit the same at the next general city election.

3. *Popular vote taken.* The ballots used when voting upon such ordinance shall contain these words: "For the Ordinance" (stating the nature of the proposed ordinance) and "Against the Ordinance" (stating the nature of the proposed ordinance). If the majority of the qualified electors voting on the proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city; and any ordinance proposed by petition, or which shall be adopted by a vote of the people, cannot be repealed or amended except by a vote of the people. Any number of proposed ordinances may be voted upon at the same election, in accordance with the provisions of this section, but there shall not be more than one special election in any period of six months for such purpose.

4. *Proposition for repeal.* The board of commissioners may submit a proposition for the repeal of any such ordinance, or for amendments thereto, to be voted upon at any succeeding general election; and should any such proposition so submitted receive a majority of the votes cast thereon at such election, such ordinance shall thereby be repealed or amended accordingly.

5. *Publication.* Whenever any ordinance or proposition is required by this act to be submitted to the voters of the city at any election, the city shall cause such ordinance or proposition to be published once in a newspaper of general circulation in the city, such publication to be not more than twenty nor less than five days before the submission of such proposition or ordinance to be voted on.

6. *When ordinance takes effect.* No ordinance passed by the board of commissioners, unless otherwise expressly provided, except an ordinance for the immediate preservation of the public peace, health, or safety, which contains a statement of its urgency and is passed by a two-thirds vote of the board of commissioners, shall go into effect before twenty days from the time of its final passage and publication, as herein provided.

7. *Action upon protest filed.* If during the twenty days a petition, signed by electors of the city equal to the number prescribed herein to be signed to a petition for the recall of any official, protesting against the passage of such ordinance, be presented to the board of commissioners, the operation of such ordinance shall thereupon be suspended, and it shall be the duty of the board of commissioners to consider such ordinance, and if the same is not entirely repealed, the board of commissioners shall submit to the qualified voters the question of the

repeal of such ordinance at an election to be held for that purpose in the manner and under the conditions herein provided for reference to voters of the question of recall of an official.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 3, s. 1.

2884. Nomination of candidates:

1. *Nomination by primaries.* All candidates to be voted for at all general municipal elections, at which time a mayor, commissioners, or any other elective officers are to be elected under the provisions of this act, shall be nominated by a primary election, and no other names shall be placed upon the general ballot except those nominated in such primary in the manner hereinafter prescribed.

2. *How primaries held.* The primary election for such nominations shall be held on the second Monday preceding all general municipal elections. The judges and other officers of election appointed for the general municipal election shall, whenever practicable, be the judges of the primary election, and it shall be held at the same place and in the same manner and under the same rules and regulations and subject to the same conditions, and the polls to be opened and closed at the same hours, as are required for the general election.

3. *Notice of candidacy.* Any person desiring to become a candidate for nomination by the primary for the office of mayor or commissioner of either of the other two departments or any other elective office shall, at least ten days prior to the primary election, file with the clerk a statement of such candidacy in substantially the following form:

STATE OF NORTH CAROLINA—COUNTY OF-----

I, -----, hereby give notice that I reside at ----- street, city of ----- county of -----, State of North Carolina; that I am a candidate for nomination to the office of (mayor, or commissioner of a particular department, or other office) to be voted upon at the primary election to be held on the ----- Monday of -----, 19-----, and I hereby request that my name be printed upon the official ballot for the nomination by such primary election for such office.
(Signed)-----

And he shall at the same time pay to the clerk, to be turned over to the city treasurer, the sum of five dollars.

4. *Publication of names.* Immediately upon the expiration of the time for filing the petition of candidates, the city clerk shall cause to be published for three successive days in a daily newspaper of general circulation in the city, in proper form, the names of the persons as they are to appear upon the primary ballots.

5. *Ballots prepared.* The clerk shall thereupon cause the primary ballots to be printed, authenticated with a facsimile of his signature. Upon the ballot the names of the candidates for mayor, arranged alphabetically, shall be placed, with a square at the left of each name, and immediately below the words, "vote for one." Following the names, likewise arranged in alphabetical order, shall appear the names of the candidates for the commissioners of the two other departments, respectively, with a square at the left of each name, and below the names of such candidates for each of the departments shall appear the words, "vote for one." Like provision shall be made for the names of candidates for each other elective office provided by law. The ballots shall be printed upon plain, sub-

stantial white paper, and shall be headed: "Candidates for nomination for mayor and commissioners of two other offices (naming them), of the city of -----, North Carolina, at the primary election," but shall have no party designation or mark whatever.

6. *Form of ballots.* The ballots shall be in substantially the following form:

(Place a cross in the square preceding the names of parties you favor as candidates for the respective positions.)

Official primary ballot. Candidates for nomination for mayor and commissioners and other offices (naming them) of the city of -----, North Carolina, at the primary election.

For Mayor (naming candidates). (Vote for one.)

For Commissioner of the Department of Public Safety (names of candidates). (Vote for one.)

For Commissioner of the Department of Public Works (names of candidates). (Vote for one.)

Official ballot. Attest:

(Signature) ----- *City Clerk.*

7. *Distribution of ballots.* Having caused ballots to be printed, the city clerk shall cause to be delivered at each polling place a number of ballots equal to twice the number of votes cast in such polling precinct at the last general municipal election for mayor.

8. *Who entitled to vote.* The persons who are qualified to vote at the succeeding municipal election shall be qualified to vote at such primary election, and shall be subject to challenge made by any resident of the city, under such rules as may be prescribed by the board of commissioners, and such challenge shall be passed upon by the judges of election and registrars: Provided, however, that the law applicable to challenge at a general municipal election shall be applicable to challenge made at such primary election.

9. *Ballots counted.* Judges of election shall, immediately upon the closing of the polls, count the ballots and ascertain the number of votes cast in such precincts for each of the candidates, and make return thereof to the city clerk, upon blanks to be furnished by the clerk, within six hours of the closing of the polls.

10. *Returns canvassed.* On the day following the primary election the city clerk, under the supervision and direction of the mayor, shall canvass such returns so received from all the polling precincts, and shall make and publish in some newspaper of general circulation in the city, at least once, the result thereof. The canvass by the city clerk shall be publicly made.

11. *Who to be candidates.* The two candidates receiving the highest number of votes for mayor, and the two candidates receiving the highest number of votes for commissioners for each of the respective departments, and the two candidates receiving the highest number of votes for any other elective office, shall be the candidates, and the only candidates whose names shall be placed upon the ballot for mayor, commissioners, and other elective offices at the next succeeding general municipal election.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 4.

2885. Recall of officials by the people:

1. *Who may be removed.* The holder of any elective office may be removed at any time by the electors qualified to vote for a successor of such incumbent.

2. *Petition filed and verified.* The procedure to effect the removal of an incumbent of an elective office shall be as follows: A petition signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least twenty-five per centum of the entire vote for all candidates for the office of mayor cast at the last preceding general municipal election, demanding an election of a successor of the person sought to be removed, shall be filed with the clerk, which petition shall contain a general statement of the ground for which the removal is sought. The signatures to the petition need not all be appended to one paper, but each signer shall add to his signature his place of residence, giving the street and number. One of the signers of each such paper shall make oath before an officer competent to administer oaths that the statements therein made are true, as he believes, and that each signature to the paper appended is the genuine signature of the person whose name it purports to be.

3. *Clerk to examine and certify sufficiency.* Within ten days from the date of filing such petition the city clerk shall examine and from the voters' register ascertain whether or not the petition is signed by the requisite number of qualified electors, and he shall attach to the petition his certificate, showing the result of such examination. If by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of the certificate. The clerk shall, within ten days after such amendment, make like examination of the amended petition, and if his certificate shall show the same to be insufficient, it shall be returned to the person filing the same; without prejudice, however, to the filing of a new petition to the same effect. If the petition shall be deemed to be sufficient, the clerk shall submit the same to the board of commissioners without delay.

4. *Board to order primary.* If the petition shall be found to be sufficient, the board of commissioners shall order and fix a date for holding a primary, as provided in cases preceding regular elections, the primary to be held not less than ten days or more than twenty days from the date of the clerk's certificate to the board of commissioners that a sufficient petition is filed. If in the primary election any candidate receives a majority of all the votes cast, he shall be declared to be elected to fill out the remainder of the term of the officer who is sought to be recalled. If there be more than two candidates in such primary and no one received a majority of all the votes cast therein, then there shall be an election held within twenty days from the date of the primary, at which election the two candidates receiving the highest vote in the primary shall be voted for. Candidates' names shall be placed on the ticket in the primary and election held, and the results canvassed, under the same rules, conditions, and regulations as are prescribed for the primaries preceding regular elections. The board of commissioners shall make or cause to be made publication for ten days of notice and all arrangements for holding such election, and the same shall be conducted, returned, and the results thereof declared in all respects as other city elections.

5. *Candidate elected succeeds to office.* The successor of any officer so removed shall hold office during the unexpired term of his predecessor. Any person sought to be removed may be a candidate to succeed himself, and unless he requests otherwise in writing, the clerk shall place his name on the official

ballot without nomination. At such election, if some other person than the incumbent is elected, the incumbent shall thereupon be deemed removed from the office upon qualification of his successor.

6. *Vacancy filled.* In case the party elected should fail to qualify within ten days after receiving notification of election, the office shall be deemed vacant, and in that event the unexpired term shall be filled by election by the board, but the commissioner removed shall not be eligible to election by the board, and the person so elected by the board shall be subject to recall as other commissioners. If the incumbent receives a majority of votes in the primary election he shall continue his office.

7. *Application of method of removal.* Such method of removal shall be cumulative and additional to any other method provided by law. In the event any officer is recalled and any person is elected as his successor, the right of recall of such successor so elected shall be as in case of an officer originally elected.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 5.

2886. *Salaries of officers.* The mayor and commissioners shall have offices at the city hall. The compensation of the mayor and commissioners shall be as follows: In cities of five thousand inhabitants and under, the mayor shall receive one thousand dollars and the commissioners each seven hundred and fifty dollars. In cities of five to ten thousand inhabitants the mayor shall receive fifteen hundred dollars and the commissioners each one thousand dollars. In cities of ten to fifteen thousand inhabitants the mayor shall receive two thousand dollars and the commissioners each fifteen hundred dollars. In cities of fifteen to twenty-five thousand inhabitants the mayor shall receive twenty-six hundred dollars and the commissioners each twenty-four hundred dollars. In cities of over twenty-five thousand inhabitants the mayor shall receive thirty-five hundred dollars and the commissioners each thirty-two hundred and fifty dollars. The number of inhabitants shall be determined by the last United States government census or estimate. Every other officer, agent, employee, and assistant of the city government shall receive such salary or compensation as the board of commissioners shall by ordinance provide, payable in equal monthly installments, unless the board shall order payments to be made at nonpayment intervals.

1917, c. 136, sub-ch. 16, Part IV, Plan C, c. 6.

See annotations under section 2862.

Part 4. Plan "D." Mayor, City Council, and City Manager

2887. *How it becomes operative.* The method of city government herein provided for shall be known as Plan D. Upon the adoption of Plan D by a city in the manner prescribed by article eighteen of this act, such plan shall become operative, and the powers of government of such city shall be exercised, as provided herein and in article eighteen.

1917, c. 136, sub-ch. 16, Part V, Plan D, ss. 1, 2.

2888. *Governing body.* The government of the city and the general management and control of all its affairs shall be vested in a city council, which shall be

elected and shall exercise its powers in the manner herein and in article eighteen set forth, except that the city manager shall have the authority hereinafter specified.

1917, c. 136, sub-ch. 16, Part V, Plan D, s. 3.

2889. Number and election of city councils. The city council shall consist of five members, who shall be elected at large by and from the qualified voters of the city for a term of two years and until their successors are elected and qualified.

1917, c. 136, sub-ch. 16, Part V, Plan D, s. 4.

2890. Power and organization of city council. All the legislative powers of the city shall be vested in the city council. The city council elected as aforesaid shall meet at ten o'clock in the forenoon on Wednesday after the first Monday of May in each year, and the members of the city council whose terms of office then begin shall severally make oath before the city clerk or justice of the peace to perform faithfully the duties of their respective offices. The city council shall thereupon be organized by the choice from its members of a mayor, who shall hold his office during the term for which he was elected a member of the city council, and a mayor pro tem., who shall hold his office during the pleasure of the city council. The organization of the city council shall take place as aforesaid, notwithstanding the absence, death, refusal to serve, or nonelection of one or more of the members: Provided, that at least three of the persons entitled to be members of the city council are present and make oath as aforesaid. Any member entitled to make the aforesaid oath, who was not present at the time fixed therefor, may make oath at any time thereafter.

1917, c. 136, sub-ch. 16, Part V, Plan D, s. 5; 1919, c. 270, s. 1.

2891. Meetings regulated. The city council shall fix suitable times for its regular meetings. The mayor, the mayor pro tem. of the city council, or any two members thereof, may at any time call a special meeting by causing a written notice, stating the time of holding such meeting and signed by a person or persons calling the same, to be delivered in hand to each member or left at his usual dwelling place at least six hours before the time of such meeting. Meetings of the city council may also be held at any time when all the members of the council are present and consent thereto.

1917, c. 136, sub-ch. 16, Part V, Plan D, s. 6.

2892. Quorum and conduct of business. A majority of the members of the city council shall constitute a quorum. Its meetings shall be public, and the mayor, who shall be the official head of the city, shall, if present, preside and shall have the same power as the other members of the council to vote upon all measures coming before it, but shall have no power of veto. In the absence of the mayor, the mayor pro tem. of the city council shall preside, and in the absence of both, a chairman pro tempore shall be chosen. The city clerk shall be ex officio clerk of the city council, and shall keep records of its proceedings; but in case of his temporary absence, or in case of a vacancy in the office, the city council may elect by ballot a temporary clerk, who shall be sworn to the faithful discharge of his duties, and may act as clerk of the city council until a city clerk is chosen and qualified. All final votes of the city council involving the expendi-

ture of fifty dollars or over shall be by yeas and nays and shall be entered on the records. On request of one member, the vote shall be by yeas and nays, and shall be entered upon the records. Three affirmative votes at least shall be necessary for the passage of any order, ordinance, resolution, or vote.

1917, c. 136, sub-ch. 16, Part V, Plan D, s. 7.

See section 2821.

2893. Vacancies in council. Vacancies in the city council shall be filled by the council for the remainder of the unexpired terms.

1917, c. 136, sub-ch. 16, Part V, Plan D, s. 8.

2894. Election of mayor. The mayor shall be elected by the city council from among its own members, and shall hold office during the term for which he has been elected to the council. In case of a vacancy in the office of mayor, the remaining members of the council shall choose from their own number his successor for the unexpired term.

1917, c. 136, sub-ch. 16, Part V, Plan D, s. 9; 1919, c. 60, s. 1, c. 270, s. 2.

2895. Salaries of mayor and council. The mayor shall receive for his services such salary as the city council shall by ordinance determine, not exceeding seven hundred dollars a year, and he shall receive no other compensation from the city. His salary shall not be increased or diminished during the term for which he is elected. The council may, by a vote of not less than three members, taken by call of the yeas and nays, establish a salary for its members not exceeding two hundred dollars a year for each. Such salary may be reduced, but no increase therein shall be made to take effect during the year in which the increase is voted.

1917, c. 136, sub-ch. 16, Part V, Plan D, s. 10.

See annotations under section 2862.

2896. City manager appointed. The city council shall appoint a city manager, who shall be the administrative head of the city government, and shall be responsible for the administration of all departments. He shall be appointed with regard to merit only, and he need not be a resident of the city when appointed. He shall hold office during the pleasure of the city council, and shall receive such compensation as it shall fix by ordinance.

1917, c. 136, sub-ch. 16, Part V, Plan D, s. 11.

2897. Power and duties of manager. The city manager shall (1) be the administrative head of the city government; (2) see that within the city the laws of the state and the ordinances, resolutions, and regulations of the council are faithfully executed; (3) attend all meetings of the council, and recommend for adoption such measures as he shall deem expedient; (4) make reports to the council from time to time upon the affairs of the city, keep the council fully advised of the city's financial condition and its future financial needs; (5) appoint and remove all heads of departments, superintendents, and other employees of the city.

1917, c. 136, sub-ch. 16, Part V, Plan D, s. 12.

2898. Appointment and removal of officers. Such city officers and employees as the council shall determine are necessary for the proper administration of the city shall be appointed by the city manager, and any such officer or employee

may be removed by him; but the city manager shall report every such appointment and removal to the council at the next meeting thereof following any such appointment or removal.

1917, c. 136, sub-ch. 16, Part V, Plan D, s. 13.

2899. Control of officers and employees. The officers and employees of the city shall perform such duties as may be required of them by the city manager, under general regulations of the city council.

1917, c. 136, sub-ch. 16, Part V, Plan D, s. 14.

2900. School system controlled. The public school system may be placed by the council under the management and control of a board of education of not less than three and not more than seven members, to be appointed by the council under such rules and regulations and with such powers and duties as the council may from time to time prescribe: Provided, however, that if any city adopting this form of government shall have, at the time of such adoption, a board of education acting under powers and regulations given it by a vote of the voters of such city, such board of education shall remain in existence and the powers and duties given it by a vote of the people shall be and remain in full force and effect, except that the appointment of the members of such board of education shall vest in the council: Provided further, that in all cases wherein the said board of education is now elected by the people, such board shall continue to be elected by the electors of the municipality at the same time and in the same manner as the city council is elected, as herein provided: Provided further, that the duties and powers of the city manager, prescribed herein in Plan D, shall not be construed as applying in any manner to the public schools, their financial management and operation. The words "board of education" shall be construed to mean and include board, school commissioners, or other similar educational board.

1919, c. 60, s. 2.

See *Taylor v. Greensboro*, 175-423.

Part 5. Plans "A" and "D," with Initiative, Referendum and Recall

2901. How submitted, and effect of adoption. There may be submitted as an addition to Plans A or D "The Initiative and Referendum" and "Recall of Officials by the People," as set forth in Plan C, in which case all references to the board of commissioners shall apply to the mayor and council, and the petition for election and the ballots shall contain the name of the plan as "Plan A, with Initiative, Referendum, and Recall"; "Plan D, with Initiative, Referendum and Recall," and such plans shall be submitted with such additions as provided in this act for the submission of such plans.

1917, c. 136, sub-ch. 16, Part VI.

ART. 20. AMENDMENT AND REPEAL OF CHARTER

2902. "Home rule" or "Local self-government." Within the limitations prescribed by the constitution and now existing or hereafter enacted general laws, any municipality may amend or repeal its charter or any part thereof or adopt a new charter. The proposal to amend, repeal, or adopt may be initiated:

(a) By the governing body of such municipality; (b) By any number of the qualified electors of such municipality not less than twenty-five per centum of qualified electors entitled to vote at the next preceding regular municipal election in such municipality.

1917, c. 136, sub-ch. 16, Part VII, s. 1.

An amendment under this article is necessary to authorize the commissioners to change salaries fixed in existing charter: Kendall v. Stafford, 178-461.

2903. Ordinances to amend or repeal charter:

1. *How adopted.* If any amendment, repeal, or adoption be initiated by the governing body of any municipality, the governing body shall at one of its regular meetings, and not less than six days after the introduction thereof, adopt by not less than a two-thirds vote of all its members an ordinance in which shall be recited in full the amendment, repeal, or adoption proposed; such ordinance shall also recite that such amendment, repeal, or adoption is, in the opinion of the governing body, for the best interests of the municipality.

2. *Publication made.* It shall direct publication over the name of the mayor or other chief officer of the municipality of a notice in substantially the following form (the blank spaces to be properly filled in):

NOTICE OF AMENDMENT TO CHARTER OF

(here insert name of municipality.)

The governing body of (here insert name of municipality) at a regular meeting held on the ----- day of -----, 19---, adopted a resolution as follows (here copy verbatim the resolution).

Dated this ----- day of -----, 19---

-----, Mayor.

3. *Submitted to vote.* The governing body shall in its resolution provide that the amendment, repeal, or adoption therein proposed shall not become effective until submitted to and approved by a majority of the votes cast at a regular municipal election or a special election called for that purpose, and such amendment, repeal or adoption shall be submitted to the qualified voters of the city at an election called and held for such purpose, or at a regular municipal election. Thereupon, if such amendment, repeal, or adoption shall have been approved by a majority of the votes cast as hereinbefore provided, such amendment, repeal, or adoption shall become effective.

4. *Manner of publication.* The notice required shall be published once a week for four successive weeks in a newspaper of general circulation in the municipality.

1917, c. 136, sub-ch. 16, Part VII, ss. 2, 8.

Upon submission of an amendment to charter under this section the form of ballot and manner of holding the election are sufficient, if the voters had an opportunity to vote: Taylor v. Greensboro, 175-423.

2904. *Officers to be voted for.* The governing body of the town, if it submits the question of amending the charter of the town at a regular election so as to provide for a different number of members constituting the governing body of the town from that number provided for in the old charter, may also order an election to be held at said regular municipal election for the commissioners or members of the governing body provided for in the proposed amended charter,

and at said election commissioners shall also be voted for as provided for under the old charter. If the proposed amendment is adopted, then the commissioners or members of the governing body elected under the proposed amendment shall constitute the governing body of the town for the ensuing term. If the proposed amendment is not adopted, the commissioners or the members of the governing body of said town elected under the provisions of the old charter shall constitute the governing body of the town for the ensuing term.

1919, c. 334.

2905. Petition for amendment or repeal of charter:

1. *Nature of petition.* If any amendment, repeal, or adoption be initiated by the qualified electors of such municipality the same shall be by a petition signed by not less than twenty-five per centum of the qualified electors entitled to vote at the next preceding regular election in such municipality. The petition shall be appropriately entitled and shall be addressed to the governing board of such municipality, and shall state in exact language the amendment, repeal, or adoption proposed; the petition need not be all on one sheet, and if on one or more than one sheet shall be verified by a freeholder in such municipality who is also a signer of such petition. The petition shall contain a request to the governing body of the municipality to submit to the qualified electors thereof the amendment, repeal, or adoption as therein stated, either at a regular election or at a special election to be called for that purpose. It shall thereupon be the duty of the clerk of such municipality to examine the petition for the purpose of ascertaining whether the same has been signed by the required number of qualified electors of the municipality, and the clerk shall certify to the governing body the result of his investigation.

2. *Submitted to vote.* Upon such certificate, it shall be the duty of the governing body to provide for submission to a vote of the amendment, repeal, or adoption proposed in the petition, either at a regular election or at a special election to be called for that purpose, and if the amendment, repeal, or adoption shall be approved by a majority of the votes cast, as hereinbefore provided, such amendment, repeal, or adoption shall become effective.

1917, c. 136, sub-ch. 16, Part VII, s. 3.

2906. *Nature of verification.* Whenever verification of any petition is provided or required to be made by this article, such verification shall consist of a written oath signed by the person making the same, which shall state in substance that the persons whose names appear signed to such petition were so signed by such persons respectively in the presence of the person making oath, and that, to the best of the knowledge and belief of the person making the oath, each of such persons is a qualified elector entitled to vote at the next preceding regular election in the municipality.

1917, c. 136, sub-ch. 16, Part VII, s. 4.

2907. *Laws controlling elections.* Whenever any election, either regular or special, is provided or required to be held under this article, such election shall be held under such laws, either general or special, as are at the time of the holding of such election in force and effect with reference to such municipality.

1917, c. 136, sub-ch. 16, Part VII, s. 5.

See *Taylor v. Greensboro*, 175-423.

2908. Several propositions voted on. Any number of amendments or repeals may be initiated by one and the same resolution or petition, and whenever under this article an election is provided or required to be held, any number of such amendments or repeals may be submitted and voted upon at one and the same election.

1917, c. 136, sub-ch. 16, Part VII, s. 6.

See *Taylor v. Greensboro*, 175-423.

2909. Limitations as to holding special elections. No special election provided or required by this article shall, except as otherwise provided in this act, be held within two months of the time of holding any regular municipal election in any municipality; not more than two special elections may be held under this article in any municipality within any one year. The elections, subject to the other provisions of this section, shall be held not less than three months from the date of the filing of the petition.

1917, c. 136, sub-ch. 16, Part VII, s. 7.

2910. Adoption or change certified and recorded. Upon the amendment, repeal, or adoption of a charter of any municipality as provided in this article, the governing body shall cause to be certified to the secretary of the municipal board of control a copy of such amendment, repeal, or adoption duly certified by its clerk and under the seal of such municipality; the copy so certified shall be recorded in the office of the secretary of state, and a copy shall be so certified by the secretary of state to the clerk of the superior court of the county in which such municipality is situated and recorded in the office of the clerk; the record therein provided for, either in the office of the secretary of state or in the office of the clerk of the superior court, shall be evidence in all the courts of this state.

1917, c. 136, sub-ch. 16, Part VII, s. 9.

2911. Adoption or change ratified by vote. Whenever any amendment, repeal, or adoption of a charter of any municipality is submitted under the provisions of this article to the qualified electors of such municipality, such amendment, repeal, or adoption shall not become effective unless and until the same shall have been approved by a majority of the votes cast at the election and the result of the election thereon canvassed, determined, and declared as provided by law.

1917, c. 136, sub-ch. 16, Part VII, s. 10.

2912. Plan not changed for two years. When any municipality shall, as provided in this act, adopt any one of the plans as set forth in this act, no amendment, repeal, or adoption of such plans shall be made until and after the expiration of two years from the date of the adoption of such plan.

1917, c. 136, sub-ch. 16, Part VII, s. 3.

ART. 21. ELECTIONS REGULATED

2913. Laws governing elections. All elections called and held by any city for any purpose under the provisions of this act shall be held under, governed and controlled by the laws in force at the time of such election governing and controlling regular and special municipal elections of such city in so far as they are applicable and not inconsistent with the provisions of this act, and where not otherwise provided by law.

1917, c. 136, sub-ch. 16, Part VIII, s. 1.

See sections 2649-2672.

2914. Publication of notice. Except as otherwise provided in this act, notice of every special election held in any city shall be published in a newspaper of general circulation in such city at least once a week for four weeks preceding the date of such election, and posted for thirty days at the door of the building in which the governing body holds its meetings and three other public places in the city. Such notice shall set forth the date and hours of such elections, the proposition to be voted on thereat, the location of the polling places, and, in the event a new registration is ordered for such election, shall so state and set forth the dates of opening and closing the registration books and the names and addresses of the several registrars in charge thereof.

1917, c. 136, sub-ch. 16, Part VIII, s. 1.

2915. Time for holding elections. If any city shall adopt any one of the plans of government provided for in this act during the year nineteen hundred and seventeen, the election of city officers under such plan shall be held on Tuesday after the first Monday in May following the adoption of such plan, and the regular municipal elections of such city shall take place biennially thereafter.

1917, c. 136, sub-ch. 16, Part VIII, s. 1.

ART. 22. GENERAL EFFECT OF ACT

2916. Not to repeal Municipal Finance Act. Nothing in this act contained shall be construed to amend or repeal any provisions of the "Municipal Finance Act," and wherever this act and the "Municipal Finance Act" conflict, the "Municipal Finance Act" shall control.

1917, c. 136, sub-ch. 16, Part VII, s. 4.

2917. Effect of unconstitutionality in part. If any part of this act shall be declared unconstitutional, it shall not affect other parts of this act.

1917, c. 136, sub-ch. 17.

SUBCHAPTER III. MUNICIPAL FINANCE ACT

ART. 23. GENERAL PROVISIONS

2918. Short title. This act may be cited as "The Municipal Finance Act."

1917, c. 138, s. 1; 1919, c. 178, s. 3 (1).

2919. Meaning of terms. In this act, unless the context otherwise requires, the expression—

"Bond ordinance" means an ordinance authorizing the issuance of bonds of a municipality;

"Clerk" means the person occupying the position of clerk or secretary of a municipality;

"Financial officer" means the chief financial officer of a municipality;

"Funding bonds" means bonds issued to pay or extend the time of payment of debts incurred before March seventh, one thousand nine hundred and seventeen, not evidenced by bonds;

"Governing body" means the board or body in which the general legislative powers of a municipality are vested;

“Local improvement” means any improvement or property the cost of which has been or is to be specially assessed in whole or in part;

“Municipality” means and includes any city, town, or incorporated village in this state now or hereafter incorporated;

“Necessary expenses” means the necessary expenses referred to in section seven of article seven of the constitution of North Carolina;

“Publication” includes posting in cases where posting is authorized by this act as substitute for publication in a newspaper;

“Refunding bonds” means bonds issued to pay or extend the time of payment of debts incurred before March seventh, one thousand nine hundred and seventeen, evidenced by bonds;

“Special assessments” means special assessments for local improvements, levied on abutting property or other property specially benefited, or on street railroad companies or other companies or individuals having tracks in streets or highways, and “specially assessed” has a corresponding meaning.

In any case where the governing body of a municipality shall be in doubt as to who is the chief financial officer herein referred to, the governing body may by resolution determine who is such chief financial officer, and such determination shall be conclusive.

1917, c. 138, s. 2; 1919, c. 178, s. 3 (2); 1919, c. 285, s. 1.

2920. Publication of ordinance and notices. An ordinance or notice required by this act to be published by a municipality shall be published in a newspaper published in the municipality, or, if no newspaper is published therein, a newspaper published in the county and circulating in the municipality, or, if there is no such newspaper, the ordinance or notice shall be posted at the door of the building in which the governing body usually holds its meetings and at three other public places in the municipality.

1917, c. 138, s. 3; 1919, c. 178, s. 3 (3).

2921. Application and construction of act. This act shall apply to all municipalities. Every provision of this act shall be construed as being qualified by constitutional provisions whenever such construction shall be necessary in order to sustain the constitutionality of any portion of this act. If any portion of this act shall be declared unconstitutional the remainder shall stand, and the portion declared unconstitutional shall be excised.

1917, c. 138, ss. 4, 5; 1919, c. 178, s. 3 (4), (5).

ART. 24. BUDGET AND APPROPRIATIONS

2922. The fiscal year. The fiscal year of every municipality shall begin either on the first day of June or on the first day of September, as the governing body of the municipality may determine.

1917, c. 138, s. 6; 1919, c. 178, s. 3 (6).

2923. Budget prepared. Not earlier than one month before nor later than one month after the beginning of each fiscal year of a municipality the governing body shall cause to be prepared a plan for financing the municipality during said

fiscal year, which plan shall be known as the budget and shall be based upon detailed estimates furnished by the several departments and other divisions of the municipal government.

1917, c. 138, s. 6; 1919, c. 178, s. 3 (6).

2924. What budget shall contain. The budget shall present the following information:

1. An itemized estimate of the appropriations necessary to be made for current expenses and for permanent improvements for each department and division of the municipal government for the fiscal year (exclusive of expenses to be paid for by means of bonds issued under article twenty-six of this chapter), for the payment of the principal and interest of debts, and for deficits of the previous fiscal year, with comparative statements in parallel columns of expenditures for corresponding items so far as possible for the two preceding fiscal years. This estimate may include a contingent fund not designated for any particular purpose not exceeding five per centum of the total estimated amount of other appropriations.

2. An itemized estimate of the taxes required and of the estimated revenues of the municipality from all other sources for the fiscal year, the unencumbered balances of the appropriations, and of the surplus revenues of the previous fiscal year, with comparative statements in parallel columns of the taxes and other revenues for the two preceding fiscal years.

3. A statement of the financial condition of the municipality; and such other information as the governing body may deem advisable to state.

1917, c. 138, s. 6; 1919, c. 178, s. 3 (6).

2925. Copy of budget filed for inspection. A copy of the budget shall be filed in the office of the clerk of the municipality for public inspection not later than ten days before its adoption by the governing body, and a public hearing shall be given thereon by the governing body before the adoption of the budget, notice of which hearing shall be published.

1917, c. 138, s. 6; 1919, c. 178, s. 3 (6).

2926. Change of fiscal year. The fiscal year may be changed by resolution of the governing body, which resolution shall declare that the fiscal year shall thereafter begin on the first day of September or June, as the case may be. A budget and appropriation ordinance shall be adopted for a period commencing at the expiration of the current fiscal year in which such resolution is passed and ending at the end of the next succeeding new fiscal year. Such a budget shall be adopted within the month preceding or the month following the beginning of such period.

1919, c. 178, s. 3 (6).

2927. Annual appropriation ordinance. Not later than one month after the beginning of the fiscal year the governing body shall pass the annual appropriation ordinance for the fiscal year, which shall be based on the budget. The total amount of appropriations shall not exceed the total of the estimated revenues, unencumbered balances and surplus receipts.

1917, c. 138, s. 7; 1919, c. 178, s. 3 (7).

2928. Appropriations made before annual ordinance. In the interval between the beginning of a fiscal year and the adoption of the annual appropriation ordinance the governing body may make appropriations for the purpose of paying fixed salaries, the principal and interest of bonded debts and other loans, the stated compensation of officers and employees and indebtedness for work performed or materials furnished under contracts made before the beginning of the fiscal year, or for the ordinary expenses of the municipality, which appropriations shall be chargeable to the appropriations in the annual appropriation ordinance for that year.

1917, c. 138, s. 8; 1919, c. 178, s. 3 (8).

2929. Amendment of appropriations. At any time after the passage of the annual appropriation ordinance, the governing body may amend such ordinance so as to authorize the transfer of balances appropriated for one purpose to another purpose, or to appropriate available revenues not included in the annual budget. The amendatory ordinance shall be published one or more times, at least one week before its final passage, with notice of the time when and place where it will be finally passed: Provided, however, that such ordinance may be passed during the last two months of a fiscal year without any previous publication or notice.

1917, c. 138, s. 9; 1919, c. 178, s. 3 (9).

2930. Balances revert for future appropriations. At the close of each fiscal year the unencumbered balance of each appropriation shall revert to the respective fund from which it was appropriated, and shall be subject to future appropriation.

1917, c. 138, s. 10; 1919, c. 178, s. 3 (10).

2931. Funds specially applied not affected. Nothing herein shall be construed to permit revenues which by statute are appropriated to a particular purpose to be appropriated to any other purpose, but such revenues shall nevertheless be included in the budget.

1917, c. 138, s. 11; 1919, c. 178, s. 3 (11).

See *McCless v. Meekins*, 117-34.

ART. 25. TEMPORARY LOANS

2932. Money borrowed to meet appropriations. A municipality may borrow money for the purpose of meeting appropriations made for the current fiscal year, in anticipation of the collection of the taxes and revenues of such fiscal year, and within the amount of such appropriations. Such loans shall be paid not later than the tenth day of October in the next succeeding fiscal year. Provision shall be made in the annual budget and annual appropriation ordinance of each fiscal year for the payment of all unpaid loans predicated upon the taxes and revenues of the previous fiscal year.

1917, c. 138, s. 12; 1919, c. 178, s. 3 (12).

2933. Money borrowed to pay judgments or interest. For the purpose of paying a judgment recovered against a municipality, or paying the principal or interest of debts due or to become due within two months and not otherwise provided adequately for, a municipality may borrow money in anticipation of the

receipt of either the revenues of the fiscal year in which the money is borrowed or the revenues of the next succeeding fiscal year. Such loans shall be paid not later than the end of such next succeeding fiscal year. In the event, however, that a judgment against a municipality amounts to more than two cents per hundred dollars of the assessed valuation of taxable property of the municipality for the year in which taxes were last levied before the recovery of the judgment, a loan to pay the judgment may be made payable in not more than five substantially equal annual installments, beginning within one year after the loan is made.

1919, c. 178, s. 3 (12).

2934. Money borrowed in anticipation of bond sales. At any time after a bond ordinance has taken effect as provided in article 26 herein, a municipality may borrow money for the purposes for which the bonds are to be issued, in anticipation of the receipt of the proceeds of the sale of the bonds, and within the maximum authorized amount of the bond issue. Such loans shall be paid not later than three years after the time of taking effect of the ordinance authorizing the bonds upon which they are predicated. The governing body may, in its discretion, retire any such loans by means of current revenues, special assessments, or other funds, in lieu of retiring them by means of bonds: Provided, however, that the governing body, before the actual retirement of any such loan by any means other than the issuance of bonds under the bond ordinance upon which such loan is predicated, shall amend or repeal such ordinance so as to reduce the authorized amount of the bond issue by the amount of the loan to be so retired. Such an amendatory or repealing ordinance shall take effect upon its passage and need not be published.

1917, c. 138, s. 13; 1919, c. 178, s. 3 (13).

2935. Notes issued for temporary loans. Notes shall be issued for all moneys borrowed under the last two sections. Such notes may be renewed from time to time, but all such renewal notes shall mature within the time limited by said sections for the payment of the original loan. They may be disposed of by public or private negotiations. No money shall be borrowed under said sections at a rate of interest exceeding six per centum per annum. The issuance of such notes shall be authorized by resolution of the governing body, which shall fix the actual or maximum face amount of the notes and the actual or maximum rate of interest to be paid upon the amount borrowed. The governing body may delegate to the financial officer or to the chief executive officer the power to fix said face amount and rate of interest within the limitations prescribed by said resolution, and the power to dispose of said notes. All such notes shall be executed in the manner provided in section 2954 of this subchapter in relation to bonds. They shall be submitted to and approved by the attorney for the municipality before they are issued, and his written approval endorsed on the notes.

1917, c. 138, s. 14; 1919, c. 178, s. 3 (14).

ART. 26. PERMANENT FINANCING

2936. Not applied to temporary loans. The provisions of this article shall not apply to temporary loans made under article twenty-five.

1917, c. 138, s. 15; 1919, c. 178, s. 3 (15).

2937. For what purposes bonds may be issued. A municipality may issue its bonds for any one or more of the following purposes:

1. To pay for any public improvement or property which it may lawfully make or acquire, or for the making or acquisition of which it may lawfully pay money, except current expenses.

2. To fund or refund a debt of the municipality incurred before March seventh, one thousand nine hundred and seventeen, which is payable at the time of passage of the ordinance authorizing bonds to fund or refund such debt, or to become payable within one year thereafter, or which, though payable more than one year thereafter, is to be canceled prior to its maturity and simultaneously with the issuance of the bonds to fund or refund such debt.

3. For any other purpose which it may lawfully undertake or for which it is authorized by law to raise money, except the payment of current expenses.

1917, c. 138, s. 16; 1919, c. 178, s. 3 (16).

2938. Ordinance for bond issue:

1. *Ordinance required.* All bonds of a municipality shall be authorized by an ordinance passed by the governing body.

2. *What ordinance must show.* The ordinance shall state:

a. In brief and general terms the purpose for which the bonds are to be issued;

b. The maximum aggregate principal amount of the bonds;

c. That a tax sufficient to pay the principal and interest of the bonds shall be annually levied and collected;

d. That a statement of the debt of the municipality has been filed with the clerk pursuant to this act and is open to public inspection;

e. The average assessed valuation of property subject to taxation by the municipality for the three fiscal years in which taxes were last levied, as shown by said statement;

f. The amount of the net debt of the municipality outstanding, authorized or to be authorized, as shown by said statement;

g. One of the following provisions:

(1) If the bonds are for funding or refunding debts incurred before March seventh, one thousand nine hundred and seventeen, or for local improvements of which at least one-fourth of the cost, exclusive of the cost of paving at street intersections, has been or is to be specially assessed, that the ordinance shall take effect upon its passage and shall not be submitted to the voters; or,

(2) If the bonds are for a purpose other than the payment of necessary expenses, or if the governing body, although not required to obtain the assent of the voters before issuing the bonds, deems it advisable to obtain such assent, that the ordinance shall take effect when approved by the voters of the municipality at an election as provided in this act; or,

(3) In any other cases, that the ordinance shall take effect thirty days after its first publication (or posting), unless in the meantime a petition for its submission to the voters is filed under this act, and that in such event it shall take effect when approved by the voters of the municipality at an election as provided in this act.

3. *When the ordinance takes effect.* A bond ordinance shall take effect at the time and upon the conditions indicated therein. If the ordinance provides that

it shall take effect upon its passage, no vote of the people shall be necessary for the issuance of the bonds.

4. *Need not specify location of improvement.* In stating the purpose of a bond issue, a bond ordinance need not specify the location of any improvement or property, or the kind of pavement or other material to be used in the construction or reconstruction of streets, highways, sidewalks, curbs, or gutters, or the kind of construction or reconstruction to be adopted for any building for which the bonds are to be issued. A description in a bond ordinance of a property or improvement, substantially in the language employed in section 2942 of this subchapter to describe such a property or improvement, shall be a sufficiently definite statement of the purpose for which the bonds authorized by the ordinance are to be issued.

1917, c. 138, s. 17; 1919, c. 178, s. 3 (17); 1919, c. 285, s. 2.

See sections 2691, 2703-2728.

2939. **Ordinance not to include unrelated purposes.** Bonds for two or more unrelated purposes, not of the same general class or character, shall not be authorized by the same ordinance: Provided, however, that bonds for two or more improvements or properties mentioned together in any one clause of subsection 3 of section 2942 of this subchapter may be treated as being for but one purpose, and may be authorized by the same bond ordinance. After two or more bond ordinances have been passed and have taken effect, the governing body may, in its discretion, cause all or any of the bonds authorized by the ordinances to be actually issued as one consolidated bond issue.

1919, c. 178, s. 3 (17); 1919, c. 285, s. 3.

2940. **Bonds may be divided into two classes and separate issues.** In the case of bonds for local improvements, the governing body may, in its discretion, divide the bonds into two classes, and into two or more separate issues, one of which classes of bonds shall be designated local improvement bonds, or by some other suitable name, and treated as being for the purpose of paying the municipality's actual or estimated share of the cost of the local improvements, and the other class shall be designated assessment bonds, or by some other suitable name, and treated as being for the purpose of paying the actual or estimated share of such cost which has been or is to be specially assessed, in anticipation of the collection of special assessments: Provided, however, that all such bonds shall be general and unconditional obligations of the municipality, payable primarily by general taxes. In any event, in the case of bonds for local improvements, the governing body shall, either in the bond ordinance or in a subsequent resolution passed before any of the bonds are issued, determine the amount of the bonds which are to be treated as being for the purpose of paying that portion, actual or estimated, of the cost of the improvements which has been or is to be assessed, or, in other words, shall determine the amount of the bonds to be issued in anticipation of the collection of special assessments. Whenever it is practicable so to do, local improvements should be financed in the first instance by means of temporary loans contracted in anticipation of the issuance of bonds, and the bonds should not be issued until the amount of the special assessments is definitely known and the property owners have had an opportunity to pay their assessments. The provisions of the last sentence are directory, and not mandatory.

1919, c. 178, s. 3 (17).

2941. Ordinance and bond issue, when petition required. In cases where a petition of property owners is required by law for the making of local improvements, a bond ordinance authorizing bonds for such local improvements may be passed before any such petition is made, but no bonds for the local improvements in respect of which such petitions are required shall be issued under the ordinance, nor shall any temporary loan be contracted in anticipation of the issuance of such bonds, unless and until such petitions are made, and then only up to the actual or estimated amount of the cost of the work petitioned for. The determination of the governing body as to the actual or estimated cost of work so petitioned for shall be conclusive in any action involving the validity of bonds or notes or other indebtedness. The bond ordinance may be made to take effect upon its passage, notwithstanding that the necessary petitions for the local improvements have not been filed: Provided, that it appears upon the face of the ordinance that one-fourth or some greater proportion of the cost, exclusive of the cost of work at street intersections, has been or is to be assessed.

1919, c. 178, s. 3 (17).

See sections 2703-2728.

2942. Determining periods for bonds to run:

1. How periods estimated. Either in the bond ordinance or in a resolution passed after the bond ordinance, but before any bonds are issued thereunder, the governing body shall, within the limits prescribed by subsection 3 of this section, determine and declare—

a. The probable period of usefulness of the improvement or property or class of improvements or properties for which the bonds are to be issued; or,

b. If the bonds are to be issued in anticipation of the collection of special assessments, the probable period at the end of which the last installment of the assessments will have been in arrears for two years, but not exceeding a period of fifteen years; or,

c. If the bonds are to be issued for funding or refunding a debt incurred before March seventh, one thousand nine hundred and seventeen, either the shortest period in which the debt can be finally paid without making it unduly burdensome upon the taxpayers of the municipality or, at the option of the governing body, the probable unexpired period of usefulness of the improvement or property for which the debt was incurred; or,

d. In the case of a consolidated bond issue comprising bonds authorized by different ordinances for different purposes, and in the case of a bond issue covering both the municipality's share and the property owners' share of the cost of a local improvement, the governing body, besides determining the several periods required to be determined as aforesaid, shall determine the average of the different periods so determined, taking into consideration the amount of bonds to be issued on account of each purpose or item in respect of which a period is determined.

The period required to be determined as aforesaid shall be computed from a date not more than one year after the time of passage of any bond ordinance authorizing the issuance of the bonds. The determination of any such period by the governing body shall be conclusive.

2. *Maturity of bonds.* The bonds must mature within the period determined as aforesaid, or, if several different periods are so determined, then within said average period.

3. *Periods of usefulness.* In determining, for the purpose of this section, the probable period of the usefulness of an improvement or property, the governing body shall not deem said period to exceed the following periods for the following improvements and properties, respectively, viz.:

- a. Sewer systems (either sanitary or surface drainage), forty years.
- b. Water supply systems, or combined water and electric light systems, or combined water, electric light, and power systems, forty years.
- c. Gas systems, thirty years.
- d. Electric light and power systems, separate or combined, thirty years.
- e. Plants for the incineration or disposal of ashes, or garbage, or refuse (other than sewage), fifteen years.
- f. Public parks (including or not including a playground as a part thereof), fifty years.
- g. Playgrounds, thirty years.

h. Buildings for purposes not stated in this section, if they are—

(1) Of frame construction, that is, a building of which the exterior walls or a portion thereof shall be constructed of wood; or a building sheathed with boards and partially or entirely covered with four inches or less of masonry or with metal sheets, twenty years;

(2) Of nonfireproof construction, that is, a building the outer walls of which are constructed of brick, stone, iron, or other hard, incombustible materials, but which in any other respect differs from a fireproof building as defined in this section, thirty years;

(3) Of fireproof construction, that is, a building the walls of which are constructed of brick, stone, iron, or other hard, incombustible materials, and in which there are no wood beams or lintels, and in which the floors, roofs, stair-halls, and public halls are built entirely of brick, stone, iron, or other hard, incombustible materials, and in which no woodwork or other inflammable material is used in any of the partitions, floorings, or ceiling (but the building shall be deemed to be of fireproof construction notwithstanding that elsewhere than in the stair-halls and entrance halls there is wooden flooring on top of the fireproof floor, and that wooden sleepers are used, and that it contains wooden handrails and treads, made of hardwood, not less than two inches thick), forty years.

i. Bridges (including retaining walls and approaches), thirty years, or, in case of wooden bridges, ten years.

j. Lands for purposes not stated in this section, forty years.

k. Constructing or reconstructing the surface of roads, streets, or highways, whether including or not including contemporaneous constructing or reconstructing of sidewalks, curbs, or gutters, or drains, or grading, if such surface—

(1) Is constructed of sand and gravel, five years;

(2) Is of water-bound macadam or penetration process, ten years;

(3) Is of bricks, blocks, sheet asphalt, bitulithic, or bituminous concrete, laid on a solid foundation, or is of concrete, twenty years.

l. Land for roads, streets, highways, or sidewalks, or grading, or constructing or reconstructing culverts, or retaining walls, or surface or subsurface drains, thirty years.

m. Constructing sidewalks, curbs, or gutters, of brick, stone, concrete or other material of similar lasting character, twenty years.

n. Installing fire or police alarms, telegraph or telephone service, or other system of communication for municipal use, thirty years.

o. Fire engines, fire trucks, hose carts, ambulances, patrol wagons, or any vehicles for use in any department of the municipality, or for the use of municipal officials, ten years.

p. Land for cemeteries, or the improvement thereof, thirty years.

q. Constructing sewer, water, gas, or other service connections, from the service main in the street to the curb or property line, when the work is done by the municipality in connection with any permanent improvement of or in any street, ten years.

r. The elimination of any grade crossing or crossings and improvements incident thereto, twenty years.

s. Equipment, apparatus, or furnishing not included in clause t or other clauses of this subsection, ten years.

t. Any improvement or property not included in other clauses of this subsection, forty years.

4. *Improvements and properties defined.* Each of the improvements and properties mentioned in clauses numbered from a to i, both inclusive, of subsection 3 above, shall be deemed to include the acquisition, construction, reconstruction, or enlargement thereof, or of any part thereof, or of buildings, lands, or rights in lands therefor, or of original furnishings, equipment, machinery, or apparatus therefor, or of the original improvement thereof. Bonds for any or all improvements or properties included in any one clause of subsection 3 above may for the purposes of this section be deemed by the governing body to be for but one improvement or property.

5. *Kind of construction determined.* If the bonds are for a building referred to in clause h of subsection 3 above, and the bond ordinance does not state the kind of construction of the building, or if the bonds are for street improvements mentioned in clause k of subsection 3 above, and the bond ordinance does not state the kind or kinds of pavement or other material to be used, then the kind of construction, or the kind or kinds of pavement or other material, as the case may be, shall be determined by resolution before any of the bonds are issued.

6. *Shortest period of payment.* In determining, for the purpose of this section, the shortest period in which a debt incurred before March seventh, one thousand nine hundred and seventeen, can be finally paid without making it unduly burdensome upon the taxpayers of the municipality, the governing body shall not deem said period to be greater than the following periods in the following cases, respectively :

a. Ten years, if funding bonds are to be issued.

b. Thirty years, if refunding bonds are to be issued, and the net debt of the municipality, as stated in the debt statement filed pursuant to section 2943, is not more than eight per centum of the average assessed valuation set forth in said statement.

c. Forty years, if refunding bonds are to be issued, and said net debt is more than eight but not more than ten per centum of said average assessed valuation.

d. Fifty years, if refunding bonds are to be issued, and said net debt is more than ten per centum of said average assessed valuation.

1917, c. 138, s. 18; 1919, c. 178, s. 3 (18).

2943. Sworn statement of indebtedness:

1. *What shall be shown.* After the introduction and before the final passage of a bond ordinance the financial officer shall make and file with the clerk a sworn statement of the debt of the municipality, showing in such detail as he may deem advisable—

a. The total amount (hereinafter referred to as the gross debt) of the outstanding floating debt incurred before March seventh, one thousand nine hundred and seventeen, the bonded debt outstanding, and the bonded debt to be incurred under ordinances or other proceedings passed, taken, or pending, exclusive of debt incurred or to be incurred in anticipation of the collection of taxes or in anticipation of the sale of bonds.

b. The total of the following amounts (hereinafter referred to as the deductions), viz.:

(1) The amount of unissued funding or refunding bonds included in the gross debt;

(2) The amount of sinking funds or other funds held for the payment of any part of the gross debt other than existing debt incurred for revenue-producing enterprises and deducted as provided in this clause;

(3) The amount (actual or estimated) of uncollected special assessments levied or to be levied on account of local improvements for which any part of the gross debt was or is to be incurred, and applicable to the payment of any part of the gross debt;

(4) The amount of bonded debt included in the gross debt and incurred within five years prior to date of said statement, or to be incurred, for water, gas, electric light or power purposes, or two or more of said purposes;

(5) The amount of bonded debt (other than bonded debt included in subdivision (4) of this clause "b") included in the gross debt and incurred for any revenue-producing enterprise owned by the municipality, which during the fiscal year immediately preceding the date of the statement, or during any period of twelve consecutive months ending not more than ninety days before said date, yielded to the municipality current net revenue, after making any necessary allowance for repairs and maintenance, in excess of the interest payable on the debt in that year or period and of the annual installment necessary to be raised in that year or period for the amortization of the debt; or, if such debt was not entirely provided for as aforesaid, it shall be stated as a deduction proportionately to the extent to which said net revenue (after making said allowance) met said interest and amortization installment during said year or period.

c. The amount (hereinafter referred to as the net debt) of the difference between the gross debt and the deductions.

d. The assessed valuation of property subject to taxation by the municipality for each of the three years in which taxes were last levied, and the average thereof.

e. The percentage that the net debt bears to said average assessed valuation.

The statement may, at the option of the financial officer, further show—

f. The total amount (hereinafter referred to as the net increase) of all bonds issued on or before March seventh, one thousand nine hundred and seventeen (including those which have been paid), or to be issued under ordinances or other proceedings passed, taken, or pending, exclusive of bonds for the payment of the portion of the cost of an improvement that has been or is to be assessed upon property benefited and exclusive of funding and refunding bonds.

g. The percentage that the net increase bears to said average assessed valuation.

2. *Limitation of ordinance.* The ordinance shall not be passed unless it appears from said statement either that the net debt does not exceed twelve and one-half per centum, in case said average assessed valuation is not more than four million dollars, or ten per centum in any other case, of said average assessed valuation, or that the net increase does not exceed three per centum of said average assessed valuation, or unless the bonds to be issued under the ordinance are for water, gas, electric light or power purposes, or two or more of said purposes, or for funding or refunding a debt incurred before March seventh, one thousand nine hundred and seventeen, and for no other purpose.

3. *Statement filed for inspection.* Such statement shall remain on file with the clerk and be open to public inspection. In any action or proceeding in any court involving the validity of bonds said statement shall be deemed to be true and to comply with the provisions of this act unless it appears (in an action or proceeding commenced within the time limited by section 2945 for the commencement thereof), first, that the representations contained therein could not by any reasonable method of computation be true, and second, that a true statement would show that the ordinance authorizing the bonds could not be passed.

4. *Annual installments estimated.* In determining, for the purpose of clause b of subsection 1 of this section, the annual installment necessary to be raised in any year for the amortization of an outstanding debt for a revenue-producing enterprise, the financial officer shall, in case the debt is not payable in annual installments, deem said annual installment to be an amount which, if thereafter annually contributed to a sinking fund for the amortization of the debt (which shall be the then existing sinking fund for said purpose, if there is one), would, with the fund and with the accumulations of interest thereon and upon the contribution thereto, such accumulation being computed at the rate of four per centum per annum, produce at the date of maturity the amount of the debt.

1917, c. 138, s. 19; 1919, c. 178, s. 3 (19); 1919, c. 285, s. 4.

2944. Publication of bond ordinance. A bond ordinance shall be published once in each of four successive weeks after its final passage, unless the ordinance provides that it shall take effect upon its passage, in which case it shall be published once. A notice substantially in the following form (the blanks being first properly filled in), with the printed or written signature of the clerk appended thereto, shall be published with the ordinance:

The foregoing ordinance was passed on the _____ day of _____, 19____, and was first published (or posted) on the _____ day of _____, 19____.

Any action or proceeding questioning the validity of said ordinance must be commenced within thirty days after its first publication (or posting).

Clerk (or Secretary).

1917, c. 138, s. 20; 1919, c. 49, s. 1; 1919, c. 178, s. 3 (20).

2945. Limitation of action to set aside ordinance. Any action or proceeding in any court to set aside a bond ordinance, or to obtain any other relief upon the ground that the ordinance is invalid, must be commenced within thirty days after the first publication of the notice aforesaid and the ordinance or supposed ordinance referred to in the notice. After the expiration of such period of limitation, no right of action or defense founded upon the invalidity of the ordinance shall be asserted, nor shall the validity of the ordinance be open to question in any court upon any ground whatever, except in an action or proceeding commenced within such period.

1917, c. 138, s. 20; 1919, c. 49, s. 1; 1919, c. 178, s. 3 (20).

For limitation as to indebtedness, see *Crayton v. Charlotte*, 175-17.

2946. Certain bond ordinances validated. No ordinance passed before the seventeenth day of February, one thousand nine hundred and nineteen, authorizing bond issues for necessary expenses under chapter one hundred and thirty-eight of the public laws of one thousand nine hundred and seventeen, known as the Municipal Finance Act, nor any bond issued or to be issued under such ordinance, shall be held invalid by reason of the fact that the ordinance provides that it shall take effect thirty days after its first publication; and this section shall be construed as applying in all respects to existing bond ordinances so providing, as well as to future ordinances.

1919, c. 49, s. 3.

2947. Ordinance requiring popular vote:

1. When vote required. If a bond ordinance provides that it shall take effect thirty days after its first publication unless a petition for its submission to the voters shall be filed in the meantime, the ordinance shall be inoperative without the approval of the voters of the municipality at an election if a petition shall be filed as provided in this section.

2. Petition filed. A petition demanding that the ordinance be submitted to the voters may be filed with the clerk within thirty days after the first publication of the ordinance. The petition shall be in writing and signed by voters of the municipality equal in number to at least thirty-three and one-third per centum of the total number of registered voters in the municipality as shown by the registration books for the last preceding election therein. The residence address of each signer shall be written after his signature. Each signature to the petition shall be verified by a statement (which may relate to a specified number of signatures) made by some adult resident freeholder of the municipality under oath before an officer competent to administer oaths, to the effect that the signature was made in his presence and is the genuine signature of the person whose name it purports to be. The petition need not contain the text of the ordinance to which it refers. The petition need not be all on one sheet, and if on more than one sheet, it shall be verified as to each sheet.

3. Sufficiency of petition. The clerk shall investigate the sufficiency of the petition and present it to the governing body with a certificate stating the result of his investigation. The governing body shall thereupon determine the sufficiency of the petition, and the determination of the governing body shall be conclusive.

1917, c. 138, s. 21; 1919, c. 49, ss. 1, 2; 1919, c. 178, s. 3 (21).

2948. Elections on bond issue:

1. *What majority required.* If a bond ordinance provides for the issuance of bonds for a purpose other than the payment of necessary expenses of the municipality, the approval of a majority of the qualified voters of the municipality, as required by the constitution of North Carolina, shall be necessary in order to make the ordinance operative. If, however, the bonds are to be issued for necessary expenses, the affirmative vote of the majority of the voters voting on the bond ordinance shall be sufficient to make it operative, in all cases where the ordinance is required by this act to be submitted to the voters.

2. *When election held.* Whenever the taking effect of an ordinance authorizing the issuance of bonds is dependent upon the approval of the ordinance by the voters of a municipality, the governing body may submit the ordinance to the voters at an election to be held not more than six months after the passage of the ordinance. The governing body may call a special election for that purpose or may submit the ordinance to the voters at the regular municipal election next succeeding the passage of the ordinance, but no such special election shall be held within two months before or after a regular election. Several ordinances or other matters may be voted upon at the same election.

3. *New registration.* The governing body of the city or town in which such election is held may, in their discretion, order a new registration of the voters for such election.

4. *Notice of election, and law governing.* A notice of the election, setting forth in full the ordinance to be voted upon, shall be published at least once not more than sixty days nor less than twenty days before the election. The provisions of law in force at the time of such election governing the registration of voters for regular municipal elections in the municipality and the conducting and canvassing of such regular municipal elections shall apply to elections required or provided for by this act.

5. *Form of ballots.* The title or a statement of the nature of each ordinance to be voted upon shall be printed on a ballot, which shall be separate from the ballot for candidates for office. Below the title or statement of the nature of each ordinance there shall be printed on two separate lines the words "for the ordinance" and "against the ordinance," respectively, with a square enclosed in ruled lines at the left of each of the two lines. At the top of the ballot there shall be printed the following words: "Notice to voters: For a vote for any ordinance submitted upon this ballot, make a X mark in the square opposite the words 'for the ordinance.' For a negative vote, make a similar mark in the square opposite the words 'against the ordinance.'"

6. *Method of voting.* If a voter makes a X mark in the square opposite the words "for the ordinance," it shall be counted as a vote approving the ordinance and the issuance of the bonds and the levying of the tax provided for by the ordinance. If a voter makes a X mark in the square opposite the words "against the ordinance," it shall be counted as a vote against the ordinance, bonds, and tax.

7. *Returns canvassed.* The officers appointed to hold the election, in making return of the result thereof, shall incorporate therein not only the number of votes cast for and against each ordinance submitted, but also the number of

voters registered and qualified to vote in the election. The board authorized to canvass the votes cast shall also canvass the number of voters registered and qualified to vote in the election, and shall judicially determine and declare the result of the election.

8. *Statement of result.* The board shall prepare a statement showing the number of votes cast for and against each ordinance submitted, and the number of voters qualified to vote in the election, and declaring the result of the election, which statement shall be signed by a majority of the members of the board and delivered to the clerk of the municipality, who shall record it in the book of ordinances of the municipality, file the original in his office, and publish it once.

9. *Limitation as to actions.* No right of action or defense founded upon the invalidity of the election shall be asserted, nor shall the validity of the election be open to question in any court upon any ground whatever, except in an action or proceeding commenced within twenty days after the publication of such statement.

1917, c. 138, s. 22; 1919, c. 178, s. 3 (22); 1919, c. 291.

See annotations under section 2691.

2949. **Preparation for issuing bonds.** At any time after the passage of a bond ordinance all steps preliminary to the actual issuance of bonds under the ordinance may be taken, but the bonds shall not be actually issued unless and until the ordinance takes effect.

1917, c. 138, s. 23; 1919, c. 178, s. 3 (23).

2950. **Within what time bonds issued.** After a bond ordinance takes effect, bonds may be issued in conformity with its provisions at any time within three years after the ordinance takes effect.

1917, c. 138, s. 24; 1919, c. 178, s. 3 (24).

2951. **Amount and nature of bonds determined.** The aggregate amount of bonds to be issued under a bond ordinance, the rate or rates of interest they shall bear, not exceeding six per centum per annum payable semiannually, and the times and place or places of payment of the principal and interest of the bonds, shall be fixed by resolution or resolutions of the governing body. The bonds may be issued either all at one time or from time to time in blocks, and different provisions may be made for different blocks.

1917, c. 138, s. 25; 1919, c. 178, s. 3 (25).

2952. **Bonded debt payable in installments.** Each bond issue made under this act shall mature in annual installments or series, the first of which shall be made payable not more than three years after the date of the first issued bonds of such issue, and the last within the period determined and declared pursuant to subsection 3 of section 2942 of this subchapter. No such installment or series shall be more than two and one-half times as great in amount as the smallest prior installment or series of the same bond issue. If all of the bonds of an issue are not issued at the same time, the bonds at any one time outstanding shall mature as aforesaid.

1917, c. 138, s. 26; 1919, c. 178, s. 3 (26).

2953. Medium and place of payment. The bonds may be made payable in such kinds of money and at such place or places within or without the state of North Carolina as the governing body may by resolution provide.

1917, c. 138, s. 27; 1919, c. 178, s. 3 (27).

2954. Formal execution of bonds. The bonds shall be issued in such form as the officers who execute them shall adopt, except as otherwise provided by the governing body. They shall be signed by two or more officers designated by the governing body, or, if the governing body makes no such designation, then by the mayor or other chief executive officer and by the financial officer of the municipality, and the corporate seal of the municipality shall be affixed to the bonds and attested by the clerk. The bonds may have coupons attached for the interest to be paid thereon, which coupons shall bear a facsimile signature of the financial officer in office at the date of the bonds or at the date of delivery thereof. The delivery of bonds so executed shall be valid notwithstanding any change in the officers or in the seal of the municipality occurring after the signing and sealing of the bonds.

1917, c. 138, s. 28; 1919, c. 178, s. 3 (28).

2955. Registration and transfer of bonds:

1. Bonds payable to bearer. Bonds issued under this act shall be payable to the bearer unless they are registered as provided in this section; and each coupon appertaining to a bond shall be payable to the bearer of the coupon.

2. Registration and effect. A municipality may keep in the office of its financial officer or in the office of a bank or trust company appointed by the governing board as bond registrar or transfer agent, a register or registers for the registration and transfer of its bonds, in which it may register any bond at the time of its issue or, at the request of the holder, thereafter. After such registration the principal and interest of the bond shall be payable to the person in whose name it is registered except in the case of a coupon bond registered as to principal only, in which case the principal shall be payable to such person, unless the bond shall be discharged from registry by being registered as payable to bearer. After registration a bond may be transferred on such register by the registered owner in person or by attorney, upon presentation to the bond registrar, accompanied by delivery of a written instrument of transfer in a form approved by the bond registrar, executed by the registered owner.

3. Registration and transfer noted on bond. Upon the registration or transfer of a bond as aforesaid, the bond registrar shall note such registration or transfer on the back of the bond. Upon the registration of a coupon bond as to both principal and interest he shall also cut off and cancel the coupons.

4. Agreement for registration. A municipality may, by recital in its bonds, agree to register the bonds as to principal only, or agree to register them as to both principal and interest, or agree to register them either as to principal only or as to both principal and interest, at the option of the bondholder.

1917, c. 138, s. 29; 1919, c. 178, s. 3 (29).

2956. Sale of bonds. All bonds of a municipality shall be sold at not less than par. They shall be advertised and sold upon sealed proposals or at public auction, unless the sale is made to a sinking fund of the municipality or is made

within thirty days after failure to receive any legally acceptable bid in response to a public offering made as provided in this section.

Whenever bonds are to be sold pursuant to advertisement there shall be published, at least once, a notice containing a description of the bonds to be sold, the place of sale, and the time of sale, or time limited for the receipt of proposals, which shall be not less than ten days after the first publication of the notice. The notice shall state that bidders must deposit with the financial officer before making their bids, or present with their bids, a certified check payable to the order of the municipality or the financial officer upon an incorporated bank or trust company, or a sum of money, for or in an amount equal to two per centum of the face amount of bonds bid for, to secure the municipality against any loss resulting from the failure of the bidder to comply with the terms of his bid.

Proposals submitted pursuant to such notices shall be opened in public, and the bonds shall be awarded to the highest bidder, unless all bids are rejected. The municipality shall have the right to reject all bids. The governing body may delegate the power to sell bonds to a committee thereof, or any two officers, one of whom shall be the financial officer; but every private sale of bonds shall be made or confirmed by the governing body. Bonds of the municipality sold out of a sinking fund of the municipality shall be sold as provided in this section, except that such bonds may be sold for less than par.

Nothing herein shall prevent a municipality from awarding its bonds to the bidder offering to take them at the lowest rate of interest, provided the notice of sale invites bidders to name the rate of interest which the bonds are to bear.

1917, c. 138, s. 30; 1919, c. 178, s. 3 (30); 1919, c. 285, s. 5.

2957. Application of funds. The proceeds of the sale of bonds issued under this act shall be used only for the purposes specified in the ordinance authorizing said bonds, and for the payment of the principal and interest of temporary loans made in anticipation of the sale of bonds: Provided, however, that if for any reason any part of such proceeds are not applied to or are not necessary for such purposes, such unexpended part of the proceeds shall be applied to the payment of the principal or interest of said bonds. The cost of preparing, issuing, and marketing bonds shall be deemed to be one of the purposes for which the bonds are issued.

1917, c. 138, s. 31; 1919, c. 178, s. 3 (31).

See *McCless v. Meekins*, 117-34.

2958. Bonds incontestable after delivery. Any bonds reciting that they are issued pursuant to this act shall in any action or proceeding involving their validity be conclusively deemed to be fully authorized by this act and to have been issued, sold, executed, and delivered in conformity herewith, and with all other provisions of statutes applicable thereto, and shall be incontestable, anything herein or in other statutes to the contrary notwithstanding, unless such action or proceeding is begun prior to the delivery of such bonds.

1917, c. 138, s. 32; 1919, c. 178, s. 3 (32).

2959. Taxes levied for payment of bonds. The full faith and credit of a municipality shall be deemed to be pledged for the punctual payment of the principal of and interest on every bond and note issued under this act, including assessment bonds or other bonds for which special funds are provided. The gov-

erning body shall annually levy and collect a tax ad valorem upon all the taxable property in the municipality sufficient to pay the principal and interest of all bonds issued under this act as such principal and interest become due: Provided, however, that such tax may be reduced by the amount of other moneys appropriated and actually available for such purpose.

So much of the net revenue derived by the municipality in any fiscal year from the operation of any revenue-producing enterprise owned by the municipality after paying all expenses of operating, managing, maintaining, repairing, enlarging, and extending such enterprise, shall be applied, first, to the payment of the interest payable in the next succeeding year on bonds issued for such enterprise, and, next, to the payment of the amount necessary to be raised by tax in such succeeding year for the payment of the principal of said bonds. All moneys derived from the collection of special assessments upon which assessment bonds or other bonds or notes are predicated, shall be placed in a special fund, and used only for the payment of such bonds or notes.

Every municipality shall have the power to levy taxes ad valorem upon all taxable property therein for the purpose of paying the principal of or the interest on any bonds or notes for the payment of which the municipality is liable, issued under any act other than this act, or for the purpose of providing a sinking fund for the payment of said principal, or for the purpose of paying the principal of or interest on any notes issued under this act.

The powers stated in this section in respect of the levy of taxes for the payment of the principal and interest of bonds and notes shall not be subject to any limitation prescribed by law upon the amount or rate of taxes which a municipality may levy. Taxes levied under this section shall be levied and collected in the same manner as other taxes are levied and collected upon property in the municipality.

1917, c. 138, s. 33; 1919, c. 178, s. 3 (33).

ART. 27. RESTRICTIONS UPON THE EXERCISE OF MUNICIPAL POWERS

2960. In borrowing or expending money. 1. No municipality shall—

- a. Make an appropriation of money except as provided in this act;
- b. Borrow money or issue bonds or notes except as provided in this act;
- c. Make an expenditure of money unless the money shall have been appropriated as provided in this act, or unless the expenditure is a payment of a judgment against the municipality or is a payment of the principal or interest of a bond or note of the municipality; or
- d. Enter into any contract involving the expenditure of money unless a sufficient appropriation shall have been made therefor, except a continuing contract to be performed in whole or in part in an ensuing fiscal year, in which case an appropriation shall be made sufficient to meet the amount to be paid in the fiscal year in which the contract is made.

2. The authorization of bonds by a municipality shall be deemed to be an appropriation of the maximum authorized amount of the bonds for the purposes for which they are to be issued.

1917, c. 138, s. 34; 1919, c. 178, s. 3 (34).

2961. Manner of passing ordinances and resolutions. Ordinances and resolutions passed pursuant to this act shall be passed in the manner provided by other

laws for the passage of ordinances and resolutions, but shall not be subject to the provisions of other laws prescribing conditions, acts, or things necessary to exist, happen, or be performed precedent to or after the passage of ordinances or resolutions in order to give them full force and effect: Provided, however, that in any municipality in which the acts of the governing body thereof involving the raising or expenditure of money as required by law to be approved by some other official board or officer of the municipality in order to make them effective, all ordinances and resolutions passed by the governing body under this act shall, unless they relate solely to elections held under this act, be so approved before they take effect.

1917, c. 138, s. 35; 1919, c. 178, s. 3 (35).

2962. Enforcement of act. Any officer of a municipality or any one or more taxable inhabitants thereof, or any creditor to whom the municipality is indebted to an amount not less than one thousand dollars may, within the periods of limitation prescribed by this and other acts, maintain an action or other proceeding against the municipality or any officer thereof to set aside or have declared invalid any illegal official act on the part of the municipality or its officers or to prevent any such act, or to compel the municipality or its officers to comply with the provisions of this and other laws relating to the municipality. The superior court of the county or district in which the municipality is situated shall have jurisdiction to enforce by mandamus, injunction, or other appropriate remedy the provisions of this act and of said laws. If any board or officer of a municipality shall be ordered by a court of competent jurisdiction to levy or collect a tax to pay a judgment or other debt, or to perform any duty required by this act to be performed by such board or officer, and shall fail to carry out such order, the court, in addition to all other remedies, may appoint its own officers or other persons to carry out such order.

1917, c. 138, s. 36; 1919, c. 178, s. 3 (36).

2963. Limitation of tax for general purposes. For the purpose of raising revenue for defraying the expenses incident to the proper government of the municipality the governing body shall have the power and is hereby authorized to levy and collect an annual ad valorem tax on all taxable property in the municipality at a rate not exceeding one dollar and twenty-five cents on the one hundred dollars valuation of said property.

1917, c. 138, s. 37; 1919, c. 178, s. 3 (37).

See sections 2677-2679.

2964. Certain taxes validated. All taxes levied by any municipality for general purposes since the enactment of chapter one hundred and thirty-eight of public laws of one thousand nine hundred and seventeen, at a rate not exceeding one dollar and twenty-five cents on the hundred dollars assessed valuation of taxable property of the municipality, are hereby ratified and validated, notwithstanding the rate exceeded one dollar on the hundred dollars assessed valuation of taxable property.

1919, c. 193.

2965. Outstanding floating debt validated, and may be funded. All floating indebtedness outstanding on the seventh day of March, one thousand nine hundred and nineteen, incurred by a municipality in good faith for necessary expenses thereof, is hereby validated, notwithstanding any want of power or au-

thority to incur indebtedness for the purpose for which such indebtedness was incurred, and notwithstanding any defect in the procedure for incurring the indebtedness, or any other defect or illegality, including a failure to observe any debt limit prescribed by law. The municipality may fund such outstanding floating indebtedness by issuing bonds under chapter one hundred and thirty-eight of the public laws of one thousand nine hundred and seventeen, the original Municipal Finance Act, in the same manner and upon the same terms and conditions as are prescribed by said act for the issuance of bonds described in said act as funding bonds, namely, bonds issued to fund indebtedness incurred before March seventh, one thousand nine hundred and seventeen, not evidenced by bonds.

1919, c. 178, s. 4.

ART. 28. GENERAL EFFECT OF MUNICIPAL FINANCE ACT

2966. Effect upon prior laws and proceedings taken. All acts and parts of acts, general or special, to the extent that they relate to the subject-matter of this act, are superseded by this act:

Provided, however, that acts and proceedings done or taken, prior to the seventh day of march, one thousand nine hundred and seventeen, by any municipality or the voters thereof or any board of officers thereof pursuant to acts or parts of acts superseded by this act shall not be affected by this act, but all such acts or proceedings similar to any acts or proceedings provided for in this act shall have the same force and effect as if done and taken pursuant to this act, and only subsequent proceedings shall be taken as provided in this act:

Provided further, that in all cases where, pursuant to acts or parts of acts so superseded, an ordinance or resolution has been passed prior to the seventh day of March, one thousand nine hundred and seventeen, authorizing the issuance of bonds or notes or calling an election for such purpose, nothing in this act shall prevent the issuance of the bonds or notes in accordance with the terms of such ordinance or resolution, and it shall not be necessary to pass the ordinance provided for in this act, and no vote of the people shall be necessary for the issuance of such bonds or notes unless they are for purposes other than the payment of necessary expenses or unless such vote shall be required by the terms of the acts or parts of acts so superseded or by the terms of the ordinance or resolution so passed:

Provided further, that this act shall not be deemed to repeal any of the provisions of subchapter one, article nine, of this chapter, except that in all matters relating to restriction of municipal power of taxation, assessment, borrowing money, contracting debts and loaning credit, the provisions of this act shall govern: Provided, that any municipality of the state may proceed under the provisions of subchapter one, article nine, of this chapter, as herein amended, notwithstanding anything contained in any law heretofore enacted, whether general, special, private, or local.

1917, c. 138, s. 38.

General effect of statute: *Crayton v. Charlotte*, 175-17.

2967. Other acts repealed; exceptions. All acts and parts of acts, general or special (passed prior to the seventh day of March, one thousand nine hundred

and nineteen), inconsistent with this act, are hereby repealed: Provided, however, that all acts and proceedings done or taken under chapter one hundred and thirty-eight of the public laws of one thousand nine hundred and seventeen, in its original form, or as amended prior to the seventh day of March, one thousand nine hundred and nineteen, shall be as valid and effectual as if done and taken under said act as it is hereby amended, and only subsequent proceedings shall be taken as provided in this amendatory act: Provided further, that this act shall not affect sections three, four, or five of chapter forty-nine of the public laws of one thousand nine hundred and nineteen.

1919, c. 178, s. 5.

2968. Proceedings under act of 1917 validated. All acts and proceedings done or taken under chapter one hundred and thirty-eight of the public laws of one thousand nine hundred and seventeen, prior to the seventeenth day of February, one thousand nine hundred and nineteen, the date of the enactment of chapter forty-nine of the public laws of one thousand nine hundred and nineteen, shall be as valid and effectual as if taken under said act as it is hereby amended, and only subsequent proceedings shall be taken as herein provided.

1919, c. 178, s. 6.

2969. General repealing clause. All laws and parts of laws, whether general, special, private, or public-local laws, regulating, restricting or relating in any way to the incurring of indebtedness of a municipality, are hereby repealed, except as otherwise expressly provided in section two thousand nine hundred and sixty-five. This act shall be in force from and after its ratification, the seventh day of March, one thousand nine hundred and nineteen.

1919, c. 178, ss. 7, 8.

CHAPTER 57

NAMES OF PERSONS

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2972. Contents of petition.

2973. Proof of good character to accompany petition.

2974. Clerk to order change; certificate and record.

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2970. Legislature may regulate change by general but not private law. The general assembly shall not have power to pass any private law to alter the name of any person, but shall have power to pass general laws regulating the same.

Rev., s. 2146; Const., Art. II, s. 11.

2971. Procedure for changing name; petition; notice. A person who wishes, for good cause shown, to change his name must file his application before the clerk of the superior court of the county in which he lives, having first given ten days notice of the application by publication at the courthouse door.

Rev., s. 2147; 1891, c. 145.

2972. Contents of petition. The applicant shall state in the application his true name, the name he desires to adopt, his reasons for desiring such change, and that his name has never been changed before by law.

Rev., s. 2147; 1891, c. 145.

2973. Proof of good character to accompany petition. The applicant shall also fill with said petition proof of his good character, which proof must be made by at least two citizens of the county who know his standing.

Rev., s. 2148; 1891, c. 145.

2974. Clerk to order change; certificate and record. If the clerk thinks that good and sufficient reason exists for the change of name, it shall be his duty to issue an order changing the name of the applicant from his true name to the name sought to be adopted. He shall issue to the applicant a certificate under his hand and seal of office, stating the change made in the applicant's name, and shall also record said application and order on the docket of special proceedings in his court.

Rev., ss. 2149, 2150; 1891, c. 145.

2975. Effect of change; only one change. When the order is made and the applicant's name changed, he is entitled to all the privileges and protection under his new name as he would have been under the old name. No person shall be allowed to change his name under this chapter but once.

Rev., ss. 2147, 2149; 1891, c. 145.

NOTE. For corporate name, see Corporations, s. 1114.

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CHAPTER 58

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ART. 1. GENERAL PROVISIONS

2976. **Definitions.** In this chapter, unless the context otherwise requires—

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counterclaim and setoff.

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.

“Instrument” means negotiable instrument.

“Issue” means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print.

Rev., s. 2340; 1899, c. 733, s. 191.

“Bearer” and “holder” defined: *Steinhilper v. Basnigh*, 153-293; *Mayers v. McRimmon*, 140-640.

2977. Person primarily liable on instrument. The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable.

Rev., s. 2342; 1899, c. 733, s. 192.

Under this section liability of surety to instrument is primary: *Rouse v. Wooten*, 140-557—but liability of guarantor is collateral and secondary, *Ibid.*, and other cases cited on page 559. Joint makers of a note are primarily liable, and have the burden of proving any matter as a release: *Roberson v. Spain*, 173-23. See, also, *Lilly v. Baker*, 88-154.

2978. What constitutes reasonable time. In determining what is reasonable time or an unreasonable time regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

Rev., s. 2343; 1899, c. 733, s. 193.

In determining what is reasonable time, regard must be had to the nature of instrument and facts of particular case: *Mfg. Co. v. Summers*, 143-102; *Yancey v. Littlejohn*, 9-525—and where check on bank in this state negotiated to party in neighboring state within five days after obtaining same, such negotiation is within reasonable time, *Mfg. Co. v. Summers*, 143-102. As to time in which check drawn on bank should be presented, where drawer, payee and drawee all residents of same place, see *Bank v. Alexander*, 84-30.

2979. When law merchant governs. In any case not provided for in this chapter the rules of the law merchant shall govern.

Rev., s. 2344; 1899, c. 733, s. 196.

2980. Acts to be done on Sunday or holiday. Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday, or on a holiday, the act may be done on the next succeeding secular or business day.

Rev., s. 2839; 1899, c. 733, s. 194.

See *Sundays and Holidays*.

2981. Application of chapter. The provisions of this chapter do not apply to negotiable instruments made and delivered prior to the eighth day of March, one thousand eight hundred and ninety-nine.

Rev., s. 2345; 1899, c. 733, s. 195.

See *Barden v. Hornthal*, 151-8.

The annotations to this chapter include many of the important decisions prior to its enactment as an aid to its interpretation. Great care should be exercised in citing these cases as authorities where this chapter changed the law.

ART. 2. FORM AND INTERPRETATION

2982. Form of negotiable instrument. An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand or at a fixed or

determinable future time; (4) must be payable to the order of a specified person or to bearer; and (5) where the instrument is addressed to a drawee, he must be named, or otherwise indicated therein with reasonable certainty.

Rev., s. 2151; 1899, c. 733, s. 1.

Instruments to be negotiable must be certain as to time of payment and amount to be paid: *Bank v. Bynum*, 84-24—must be payable in money, *Johnson v. Henderson*, 76-227—should not be dependent upon contingency, *Goodloe v. Taylor*, 10-458. A note payable "subject to the conditions" of a certain deed is not negotiable: *Pope v. Lumber Co.*, 162-206. To be negotiable a note must be payable to order or bearer: *Johnson v. Lassiter*, 155-47. Certificate of deposit is negotiable when expressed in negotiable words: *Johnson v. Henderson*, 76-227. An instrument is negotiable though it expresses a consideration for which it is given: *Bank v. Michael*, 96-53. See, also, *Myers v. Petty*, 153-462.

County and school orders are not negotiable: *Wright v. Kinney*, 123-621; *Bank v. Warlick*, 125-594. As to drafts with bills of lading attached, see *Finch v. Gregg*, 126-176, overruled in *Mason v. Cotton Co.*, 148-496.

Cases prior to this enactment holding instrument not negotiable when payable in specific articles: *Thompson v. Gaylard*, 3-150; *Tindall v. Johnston*, 2-372; *Campbell v. Mumford*, 2-398; *Wofford v. Greenlee*, 1-301—in money and specific article, or performance of specific act, *Knight v. R. R.*, 46-357; *Jamieson v. Farr*, 2-182—in bank stock, *Alexander v. Oaks*, 19-513—in "current bank notes," *State v. Corpening*, 32-58—in "current bank money," *Lacky v. Miller*, 61-26—in "current notes of state of North Carolina," *Warren v. Brown*, 64-381. See section 2987, as to payment in current money.

2983. What constitutes certainty as to sum. The sum payable is a sum certain within the meaning of this chapter, although it is to be paid (1) with interest; or (2) by stated installments; or (3) by stated installments with a provision that upon default in payment of any installment the whole shall become due; or (4) with exchange, whether at a fixed rate or at the current rate; or (5) with costs of collection or an attorney's fee in case payment shall not be made at maturity. But a provision incorporated in the instrument to pay counsel fees for collection is not enforceable, but does not affect the other terms of the instrument or the negotiability thereof.

Rev., ss. 2152, 2346; 1899, c. 733, ss. 2, 197; 1905, c. 327.

Validity of provision for attorney's fees in instrument executed and payable in another state must be determined by laws of this state: *Bank v. Land and Lumber Co.*, 128-193—and such provision in instrument will not be enforced here, *Ibid.*; *Brisco v. Norris*, 112-671; *Tinsley v. Hoskins*, 111-340. As to provision in instrument for attorney's fees with reference to jurisdiction of justice of the peace, see *Bank v. Land and Lumber Co.*, 128-193.

Section apparently nullifies old law as laid down in *Bank v. Bynum*, 84-24. As bearing upon section, see *Turner v. Boger*, 126-302; *Williams v. Rich*, 117-240.

2984. When promise is unconditional. An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional.

Rev., s. 2153; 1899, c. 733, s. 3.

As between original parties, a condition can be added at the time of its execution as to its payment: *Aden v. Doub*, 146-10; *Evans v. Freeman*, 142-61. Bonds are negotiable though a special fund may be provided for their payment: *Commissioners v. Bank*, 157-191. A statement of the transaction giving rise to the instrument does not make it conditional: *Masen v. Cotton Co.*, 148-492; *Bank v. Hatcher*, 151-359 (overruling on this point *Howard v. Kimball*, 65-175).

2985. What constitutes determinable future time. An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable (1) at a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

Rev., s. 2156; 1899, c. 733, s. 4.

Provision that upon failure to pay interest, principal shall become due and payable is valid: *Trust Co. v. Duffy*, 153-62. Waiver of forfeiture for extension of time does not prevent payee from demanding payment of principal if interest is not paid, *Ibid*.

2986. Additional provisions as affecting negotiability. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) authorizes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal, nor authorize the enforcement of an authorization to confess judgment or a waiver of homestead and personal property exemptions.

Rev., ss. 2154, 2346; 1899, c. 733, ss. 5, 197; 1905, c. 327.

For provision as to counsel fees, see above, s. 2983.

Instrument containing promise to pay money and also to clothe slave not negotiable: *Sutton v. Owen*, 65-123; *Knight v. R. R.*, 46-357. Waiver of homestead exemption is invalid: *Beavan v. Speed*, 74-544. Validity of provision waiving homestead exemption in instrument executed and payable in another state must be determined by the laws of this state: *Bank v. Land and Lumber Co.*, 128-193.

2987. Effect of omissions; seal; designation of particular money. The validity and negotiable character of an instrument are not affected by the fact that (1) it is not dated; or (2) does not specify the value given, or that any value has been given therefor; or (3) does not specify the place where it is drawn or the place where it is payable; or (4) bears a seal; or (5) designates a particular kind of current money in which payment is to be made. But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

Rev., s. 2155; 1899, c. 733, s. 6.

Instrument in form of negotiable note not vitiated by reason of being under seal: *Pate v. Brown*, 85-166. Decision prior to this enactment seeming adverse to statute: *Johnson v. Henderson*, 76-227.

2988. When payable on demand. An instrument is payable on demand (1) when it is expressed to be payable on demand, or at sight or on presentation; or (2) in which no time for payment is expressed. Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

Rev., s. 2157; 1899, c. 733, s. 7.

Instrument payable on demand is due immediately: *Caldwell v. Rodman*, 50-139.

2989. When payable to order. The instrument is payable to order when it is drawn payable to the order of a specified person, or to him or his order. It may be drawn payable to the order of (1) a payee who is not maker, drawer or drawee; or (2) the drawer or maker; or (3) the drawee; or (4) two or more payees jointly; or (5) one or some of several payees; or (6) the holder of an office for the time being. When the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.

Rev., s. 2158; 1899, c. 733, s. 8.

Section cited in *Johnson v. Lassiter*, 155-47.

2990. When payable to bearer. The instrument is payable to bearer (1) when it is expressed to be so payable; or (2) when it is payable to a person named therein or to bearer; or (3) when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the only or last indorsement is an indorsement in blank.

Rev., s. 2159; 1899, c. 733, s. 9.

An indorsement in blank does not make an instrument negotiable which was not negotiable before: *Johnson v. Lassiter*, 155-47; *Newland v. Moore*, 173-728.

2991. No formal language required. The negotiable instrument need not follow the language of this chapter, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

Rev., s. 2160; 1899, c. 733, s. 10.

2992. Presumption as to date. Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsement, as the case may be.

Rev., s. 2161; 1899, c. 733, s. 11.

2993. Antedated and postdated. The instrument is not invalid for the reason only that it is antedated or postdated, provided that this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

Rev., s. 2162; 1899, c. 733, s. 12.

2994. When date may be inserted. When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him the date so inserted is to be regarded as the true date.

Rev., s. 2163; 1899, c. 733, s. 13.

2995. When blanks may be filled. Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument

when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion be negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

Rev., s. 2164; 1899, c. 733, s. 14.

Where a person signs an instrument in blank and delivers it to another to be filled out and negotiated, maker is bound by such instrument in the hands of a bona fide holder: *Phillips v. Hensley*, 175-23; *Humphreys v. Finch*, 97-303; *McArthur v. McLeod*, 51-476; see *Wester v. Bailey*, 118-193—and bona fide holder of instrument has right to fill up blank left for payee's name with that of indorser, *Lawrence v. Mabry*, 13-473.

A person dealing with a negotiable instrument has the right to act on it as it appears on the face of it: *Citizens Nat. Bank v. Burch*, 145-316.

2996. Incomplete instrument not delivered. Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery.

Rev., s. 2165; 1899, c. 733, s. 15.

Where maker of instrument, blank as to payee's name, acknowledges same to be his after insertion of such name, he is liable thereon: *Wester v. Bailey*, 118-193.

2997. Delivery necessary; when effectual; when presumed. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery in order to be effectual must be made either by or under the authority of the party making, drawing or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

Rev., s. 2166; 1899, c. 733, s. 16.

Parol evidence is admissible between immediate parties to show the note was executed on a contingency, and failure of consideration: *Farrington v. McNeill*, 174-420—but parol evidence is not admissible to show that it is payable at a date later than the date specified in the instrument: *Cherokee Co. v. Meroney*, 173-653.

2998. Construction, where instrument is ambiguous. Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

Owens v. Ins. Co., 173-373. A note payable "with legal interest" bears interest from its date: Gholson v. King, 79-162. A bond or contract due at a certain time, "without interest," bears interest from maturity: Dowd v. R. R., 70-468. A note is negotiable where a blank is left for the rate of interest: Bank v. Roberts Bros., 168-473.

3. Where the instrument is not dated it will be considered to be dated as of the time it was issued.

4. Where there is conflict between the written and printed provisions of the instrument the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note the holder may treat it as either at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

See sections 3044, 3045.

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

Rev., ss. 1952, 2341; 1899, c. 733, s. 17.

2999. **Signature must appear; trade or assumed name.** No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

Rev., s. 2167; 1899, c. 733, s. 18.

Persons subscribing as obligors to bond are bound by the stipulations of same, whether their names are inserted in body of instrument or not: Howell v. Parsons, 89-230. One who signs in form and appearance as a principal and maker of note is bound as such to all persons who subsequently deal with the paper without knowledge of his true relation to it: Citizens Nat. Bank v. Burch, 145-316.

3000. **Signature by agent; how authority shown.** The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency.

Rev., s. 2168; 1899, c. 733, s. 19.

Indorsement may be by agent: Midgette v. Basnight, 173-18. Authority of agent to draw, accept or indorse bills, notes and checks must ordinarily be expressly conferred: Bank v. Hay, 143-326—but may be implied if execution of paper is necessary incident to business, *Ibid.*

3001. **Liability of person signing as agent.** Where the instrument contains, or a person adds to his signature, words indicating that he signed for or on behalf of the principal or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

Rev., s. 2169; 1899, c. 733, s. 20.

3002. **Effect of signature by procuration.** A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal

is bound only in case the agent so signing acted within the actual limits of his authority.

Rev., s. 2170; 1899, c. 733, s. 21.

Attorney to whom instrument sent for collection has, prima facie, no authority to indorse it in name of client, and purchaser thereof should inquire as to extent of attorney's authority: *Sherrill v. Clothing Co.*, 114-436.

3003. Effect of forged signature. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

Rev., s. 2171; 1899, c. 733, s. 23.

Bank cannot hold depositor liable on a forged check: *Yarborough v. Trust Co.*, 142-377.

ART. 3. CONSIDERATION

3004. Presumption of consideration. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.

Rev., s. 2172; 1899, c. 733, s. 24.

Instrument imports prima facie that it is founded on consideration: *Piner v. Brittain*, 165-401; *Bank v. Walser*, 162-54; *Myers v. Petty*, 153-462; *Campbell v. McCormac*, 90-491; *McArthur v. McLeod*, 51-476—but if defendant rebuts presumption, burden is upon plaintiff to show that there was consideration, *Campbell v. McCormac*, 90-491. See, also, *Columbian Conservatory v. Dickinson*, 158-207. Sealed instrument need not express consideration: *Wester v. Bailey*, 118-193.

3005. What constitutes consideration. Value is any consideration sufficient to support a simple contract. An antecedent or preëxisting debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time.

Rev., s. 2173; 1899, c. 733, s. 25.

Antecedent or preëxisting debt is sufficient consideration to constitute person a holder for value: *Smathers v. Hotel Co.*, 168-69; *Bank v. Seagroves*, 166-608; *Bank v. Oil Mills*, 150-718; *Mfg. Co. v. Summers*, 143-102; *Brooks v. Sullivan*, 129-190; *Reddick v. Jones*, 28-107—and release of dower by wife is valuable consideration for instrument executed by husband to her, *Trust Co. v. Benbow*, 135-303. See, also, *Johnson v. Rodeger*, 119-446.

3006. What constitutes a holder for value. Where value has at any time been given for the instrument the holder is deemed a holder for value in respect to all parties who became such prior to that time.

Rev., s. 2174; 1899, c. 733, s. 26.

Where plaintiff bank rediscounted note of defendant for another bank, and placed proceeds to credit of such bank, and before notice of equity of defendant, paid checks of said bank to one-half value of discount, plaintiff was purchaser for value: *Mfg. Co. v. Tierney*, 133-638; *Bank v. McNair*, 114-335—though fact that bank has given depositor credit for amount of negotiable instrument deposited in bank for collection does not constitute bank a purchaser for value, *Packing Co. v. Davis*, 118-555, and cases cited; *Worth Co. v. Feed Co.*, 172-335; *Bank v. Exum*, 163-199; *Bank v. Walser*, 162-54; *Reid v. Bank*, 159-99. When a bank is a purchaser for value of a draft transferred to it by a depositor: *Latham v. Spragins*, 162-404.

3007. When lien on instrument constitutes holder for value. Where the holder has a lien on the instrument arising either from contract or by implication of law he is deemed a holder for value to the extent of his lien.

Rev., s. 2175; 1899, c. 733, s. 27.

Where instrument negotiated before maturity to secure preëxisting debt transferee is bona fide holder to extent of debt: *Brooks v. Sullivan*, 129-190. Section cited in *Smathers v. Hotel Co.*, 162-346.

3008. Effect of want of consideration. Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

Rev., s. 2176; 1899, c. 733, s. 28.

Failure of consideration is defense as between original parties to instrument: *Piner v. Britain*, 165-401; *Bank v. Walser*, 162-54; *Washburn v. Picot*, 14-390. Absence of consideration not a defense against a holder in due course: *Hardy v. Mitchell*, 156-76.

3009. Liability of accommodation party. An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

Rev., s. 2177; 1899, c. 733, s. 29.

Where draft is an accommodation paper, drawer is primarily liable upon same: *Bank v. Bradley*, 117-526.

An accommodation indorser is discharged from liability where instrument held as collateral security is released without his knowledge, and without placing credit therefor upon accommodation paper: *Bank v. Nimocks*, 124-352. Likewise where creditor surrenders property held as security: *Carriage Co. v. Dowd*, 155-307.

If accommodation paper is a bond, which obligee refuses to accept, it is void in the hands of a third person for want of delivery, though he is a purchaser for value: *Parker v. McDowell*, 95-219.

Agreement between maker and accommodation indorser that instrument should be negotiated at bank does not affect purchaser for value and before maturity: *Parker v. Sutton*, 103-191—although he had notice of agreement at time of taking the instrument, *Ibid.*

Where an instrument is made for the purpose of enabling the maker to raise money, and is indorsed by him for that purpose, the indorsee may recover upon it, not only against the payee and indorser, but against all others who may have signed it: *Bank v. Griffin*, 107-173.

Instrument executed by partner to third person, who as surety and for accommodation of maker indorses it and receives no benefit therefrom, cannot be subject of action by firm against indorser: *Patton v. Carr*, 117-176—nor in case of death of maker of note can surviving partner maintain such action against accommodation indorser, unless firm be insolvent, *Ibid.*

Owner of a note indorsed by payees for maker's accommodation may sue any one of several indorsers without joining maker or any other indorser: *Bank v. Carr*, 121-113. See, as incidentally bearing upon section, *Lilly v. Baker*, 88-151.

ART. 4. NEGOTIATION

3010. What constitutes negotiation. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, and completed by delivery.

Rev., s. 2178; 1899, c. 733, s. 30.

Word "indorsement" defined: *Davidson v. Powell*, 114-578. Instrument payable to bearer is negotiated by delivery, and no indorsement is required: *Tyson v. Joyner*, 139-69—but instrument payable to order must be indorsed by payee, *Ibid.*; *Bank v. McEachern*, 163-333; *Steinhilper v. Basnight*, 153-293; *Myers v. Petty*, 153-462; *Woods v. Finley*, 153-497; *Mayers v. McRimmon*, 140-640; *Applegarth v. Tillery*, 105-410—and also prior indorsees, if any, or at least in blank to constitute transferee a bona fide holder, *Tyson v. Joyner*, 139-69. Signature of indorser, where indorsement required, must be proved: *Ibid.*; *Myers v. Petty*, 153-462; *Woods v. Finley*, 153-497. Indorsement made by authorized agent with rubber stamp and with intent to indorse is a valid indorsement: *Mayers v. McRimmon*, 140-640—but does not prove itself, *Ibid.*

If the note payable to order is transferred without indorsement the holder becomes the equitable owner and takes it subject to equities of the maker: *Woods v. Finley*, 153-497; *Steinhilper v. Basnight*, 153-293.

Indorsement of instrument to deceased person is nullity: *Valentine v. Holloman*, 63-475.

Distinction between assignment and indorsement pointed out in *Tyson v. Joyner*, 139-72; *Miller v. Tharel*, 75-152; *Lindsay v. Wilson*, 22-88.

As bearing upon section, see *Fairly v. McLean*, 33-158.

3011. How indorsement made. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

Rev., s. 2179; 1899, c. 733, s. 31.

Indorsement must be upon the instrument or upon a paper attached thereto: *Security Co. v. Pharmacy*, 174-655; *Midgette v. Basnight*, 173-18. Indorsement of instrument may be explained as between immediate parties: *Coffin v. Smith*, 128-252. Indorsement by rubber stamp is sufficient if authorized, but it does not prove itself: *Mayers v. McRimmon*, 140-640. As bearing upon subject-matter of section: *Drew v. Jacocks*, 6-138.

3012. Effect of indorsement by infant or corporation. The indorsement or assignment of the instrument by a corporation, an infant, or married woman passes the property therein, notwithstanding that from want of capacity the corporation, infant, or married woman may incur no liability thereon.

Rev., s. 2180; 1899, c. 733, s. 22.

Decisions as to indorsement by married women of instrument prior to passage of above section: *Vann v. Edwards*, 130-70; *Coffin v. Smith*, 128-252. Constitutionality of right of married woman to transfer negotiable instrument without husband's assent discussed in concurring opinion of Clark, C. J., in *Vann v. Edwards*, 128-427.

As to binding the separate property of a married woman, see section 2507 and annotations thereunder.

3013. Indorsement must be of entire instrument. An indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part it may be indorsed as to the residue.

Rev., s. 2181; 1899, c. 733, s. 32.

Assignment of note, to enable the assignee to sue thereon, must be made by the payee and must be for whole amount, and not for portion of note: *Martin v. Hayes*, 44-423.

3014. Kinds of indorsement. An indorsement may be either in blank or special, and it may also be either restrictive or qualified or conditional.

Rev., s. 2182; 1899, c. 733, s. 33.

Effect of indorsement in blank discussed in *Lilly v. Baker*, 88-151. As bearing upon conditional indorsement, see *Johnson v. Olive*, 60-213.

3015. Special indorsement; indorsement in blank. A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery.

Rev., s. 2183; 1899, c. 733, s. 34.

As to special indorsement, see *French v. Barney*, 23-219; *Tyson v. Joyner*, 139-69. Instrument indorsed in blank becomes payable to bearer against acceptor, drawer and prior indorsers: *Ibid.* Indorsement in blank by payee of instrument presumed to have been intended as transfer thereof: *Coffin v. Smith*, 128-255; *Davis v. Morgan*, 64-570. Parol evidence is admissible to control effect of blank indorsement as between immediate parties thereto: *Bank v. Pegram*, 118-671; *Hoffman v. Moore*, 82-313; *Davis v. Morgan*, 64-570.

Burden of proof is upon him who seeks to avoid by parol evidence the ordinary legal effect of blank indorsement: *Hoffman v. Moore*, 82-313. As between indorser in blank and remote parties without notice such parol evidence is inadmissible, and contract implied by law stands absolute: *Bank v. Pegram*, 118-671.

Where instrument, indorsed in blank, is delivered to attorney for collection, and it is transferred by him to bona fide holder without notice, transferee takes same free of equities: *Bradford v. Williams*, 91-7. Instrument payable to bearer is negotiated by delivery and no indorsement required: *Tyson v. Joyner*, 139-69. Whether a note with blank indorsement followed by special indorsement is payable to bearer, see *French v. Barney*, 23-219; section 2990.

3016. How blank indorsement changed to special indorsement. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

Rev., s. 2184; 1899, c. 733, s. 35.

Where instrument indorsed in blank, holder may make it payable to himself or any other person by filling up blank over signature: *Tyson v. Joyner*, 139-69; *Lilly v. Baker*, 88-153; *Hubbard v. Williamson*, 26-266—and this may be done at or before trial, *Tyson v. Joyner*, 139-69; *Johnson v. Hooker*, 47-30; *Hubbard v. Williamson*, 26-266—but holder cannot write over indorsement words which may change indorser's liability, *Lilly v. Baker*, 88-153—or which is inconsistent with agreement under which indorsement made, *Ibid.* If blank indorsement not filled up, instrument considered payable to bearer: *Hubbard v. Williamson*, 26-266. Indorsement of instrument in blank before indorsement of payee is made regular by subsequent indorsement of payee: *Johnson v. Hooker*, 47-30.

3017. When indorsement restrictive. An indorsement is restrictive which either (1) prohibits the further negotiation of the instrument; or (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for, or to the use of, some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

Rev., s. 2185; 1899, c. 733, s. 36.

Restrictive indorsement, such as "for collection for account of," etc., prevents transfer of title to bank to which sent for collection: *Bank v. Bank*, 119-307; *Boykin v. Bank*, 118-566; *Packing Co. v. Davis*, 118-548. Bill transferred to bank "for deposit" or "for collection" constitutes the bank an agent for the indorser: *Bank v. Oil Mills*, 150-718. A purchaser for value and without notice of a restrictive agreement will be protected: *Ibid.*

Burden upon indorser to show agreement by which liability restricted: *Davidson v. Powell*, 114-575.

See, as bearing upon section, *Drew v. Jacocks*, 6-138; *Smith v. St. Lawrence*, 2-174.

3018. Effect of restrictive indorsement; rights of indorsee. A restrictive indorsement confers upon the indorsee the right (1) to receive payment of the in-

strument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

Rev., s. 2186; 1899, c. 733, s. 37.

Restrictive indorsement, such as "for collection of account of," etc., prevents transfer of title to bank to which sent for collection: *Bank v. Bank*, 119-307; *Boykin v. Bank*, 118-566; *Packing Co. v. Davis*, 118-548—and such indorsement is notice to bank collecting instrument that correspondent bank by whom sent to them is mere agent of holder, *Boykin v. Bank*, 118-566. A negotiable instrument indorsed "for collection" is the property of the indorser, and action thereon must be in the name of the indorser: *Bank v. Exum*, 163-200; *Martin v. Mask*, 158-436; *Bank v. Boykin*, 118-566; *Abrams v. Cureton*, 74-523.

3019. Qualified indorsement. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

Rev., s. 2187; 1899, c. 733, s. 38.

Qualified indorsement does not affect negotiability: *Evans v. Freeman*, 142-61; *Bank v. Hatcher*, 151-359. A transfer of "all right, title and interest" does not affect negotiable character of note: *Ibid.*

Where indorser intends to transfer title only, he should use words "without recourse" or other phrase of similar import: *Davidson v. Powell*, 114-575. "Without recourse" does not throw suspicion on the paper nor affect negotiability, but may be a circumstance to show that value was not received by the indorser: *Bank v. Branson*, 165-344.

3020. Conditional indorsement. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same or the proceeds thereof subject to the rights of the person indorsing conditionally.

Rev., s. 2188; 1899, c. 733, s. 39.

As bearing upon subject-matter of section, see *Johnson v. Olive*, 60-213.

3021. Indorsement of instrument payable to bearer. Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

Rev., s. 2189; 1899, c. 733, s. 40.

Instrument once indorsed in blank becomes payable to bearer against acceptor, drawer and prior indorsers: *French v. Barney*, 23-219. See section 2990.

3022. Indorsement of instrument payable to two or more persons. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others.

Rev., s. 2190; 1899, c. 733, s. 41.

Surviving partner has no power, after dissolution, to renew or indorse in name of firm an instrument executed by the partnership: *Bank v. Hollingsworth*, 135-556.

3023. Effect of instrument drawn or indorsed to a person as cashier. Where an instrument is drawn or indorsed to a person as cashier or other fiscal officer of a bank or corporation it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer.

Rev., s. 2191; 1899, c. 733, s. 42.

3024. Indorsement, where payee's name misspelled. Where the name of a payee or indorsee is wrongly designated or misspelled he may indorse the instrument as there described, adding, if he think fit, his proper signature.

Rev., s. 2192; 1899, c. 733, s. 43.

3025. Indorsement in representative capacity. Where any person is under obligation to indorse in a representative capacity he may indorse in such terms as to negative personal liability.

Rev., s. 2193; 1899, c. 733, s. 44.

See, as bearing incidentally upon subject-matter of section, *Banking Co. v. Morehead*, 116-413.

3026. Presumption as to time of indorsement. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.

Rev., s. 2194; 1899, c. 733, s. 45.

The law presumes that an undated indorsement of instrument was made at date of note; *Southerland v. Fremont*, 107-565; *Tredwell v. Blount*, 86-33.

3027. Presumption as to place of indorsement. Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

Rev., s. 2195; 1899, c. 733, s. 46.

3028. Continuation of negotiable character. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

Rev., s. 2196; 1899, c. 733, s. 47.

3029. Striking out indorsement. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out and all indorsers subsequent to him are thereby relieved from liability on the instrument.

Rev., s. 2197; 1899, c. 733, s. 48.

See, as bearing upon subject-matter of section, *Smith v. Lawrence*, 2-174.

3030. Effect of transfer without indorsement. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires in addition the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

Rev., s. 2198; 1899, c. 733, s. 49.

Delivery of undorsed instrument, where indorsement necessary, passes only equitable title: *Jenkins v. Wilkinson*, 113-532; *Carpenter v. Tucker*, 98-316.

Holder producing such instrument and testifying that same was discounted by him before maturity, for value and without notice, is only equitable owner, in absence of proof that instrument had been indorsed, and holds same subject to any valid defenses open to maker: *Mayers v. McRimmon*, 140-640; *Steinhilper v. Basnight*, 153-293; *Myers v. Petty*, 153-462; *Bank v. McEachern*, 163-333.

See, as bearing upon subject-matter of section, *Baggarly v. Gaither*, 55-80; *Lackay v. Curtis*, 41-199; *Miller v. Tharel*, 75-148.

3031. When prior party may negotiate instrument. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

Rev., s. 2199; 1899, c. 733, s. 50.

Person obtaining possession of negotiable paper after indorsing it is restored to his original position, and cannot hold intermediate parties who could look to him: *Adrian v. McCaskill*, 103-182—and persons obtaining possession of paper from him with notice of this fact cannot hold intermediate indorsers liable, *Ibid*.

ART. 5. RIGHTS OF HOLDER

3032. Right of holder to sue; payment. The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument.

Rev., s. 2200; 1899, c. 733, s. 51.

As to who is a "holder," see definition in section 2976; also, see *Mayers v. McRimmon*, 140-643.

As to the rights of equitable owners to bring actions under section 446, being the real party in interest, see *Tyson v. Joyner*, 139-73; *Bresee v. Crumpton*, 121-122; *Carpenter v. Tucker*, 98-316; *Kiff v. Weaver*, 94-274; *Holly v. Holly*, 94-673; *Jackson v. Love*, 82-405; *Andrews v. McDaniel*, 68-385.

As to the presumption that the holder of a negotiable instrument is holder in due course, see *Evans v. Freeman*, 142-61, and cases cited under section 3040.

As to indorser, after payment refused to indorsee, bringing action, see *Smith v. St. Lawrence*, 2-174; *Strong v. Spear*, 2-214.

Donee causa mortis of bills, bonds and promissory notes payable to order, and not indorsed, may sue in his own name under section 400: *Kiff v. Weaver*, 94-274.

The possession of a negotiable paper by an indorsee, whether past due or not, raises the prima facie presumption that he is the true owner and for value: *Pugh v. Grant*, 86-40; but see *Loftin v. Hill*, 131-109, which seems to differ slightly; see, also, *Bank v. Burgwyn*, 108-62; *Ballinger v. Cureton*, 104-474; *Holly v. Holly*, 94-670.

3033. What constitutes holder in due course. A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact; (3) that he took it for good faith and value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Rev., s. 2201; 1899, c. 733, s. 52.

What constitutes a holder in due course: *Steel Co. v. Ford*, 173-195; *Bank v. Clark*, 172-268; *Cochran v. Smith*, 171-369; *Smathers v. Hotel Co.*, 168-69; *Bank v. Branson*, 165-344; *Bank*

v. Walser, 162-54; Hardy v. Mitchell, 161-351; s. c., 156-76; Park v. Exum, 156-228; Bank v. Fountain, 148-590—what constitutes a holder in due course, when bank takes a draft with bill of lading attached, Lumber Co. v. Childerhose, 167-34. One holding an indorsed note as collateral security may be a holder in due course: Bank v. Hill, 169-235. Indorsement without recourse does not prevent a holder from being a holder in due course: Bank v. Hatcher, 151-359.

Every holder is deemed to be a holder in due course, see section 3040 and cases cited thereunder.

A blank where the rate of interest should be does not render the instrument incomplete, nor affect negotiability: Bank v. Roberts, 168-473.

Indorsement before maturity is necessary to constitute a holder in due course: Myers v. Petty, 153-462; Mayers v. McRimmon, 140-640. Unless the instrument is payable to bearer it must be indorsed: Security Co. v. Pharmacy, 174-655. A person taking a note payable to order without indorsement is equitable owner, but not a holder in due course: Woods v. Finley, 153-497. When it is said that there is a prima facie presumption of law that a holder is the owner, that he took it for value and before dishonor in the regular course of business, reference is made to a holder by indorsement or to an instrument which was not required to be indorsed, but was negotiable by delivery: Tyson v. Joyner, 139-73. Signature of indorser must be proven before holder deemed a holder in due course: Tyson v. Joyner, 139-69; Mayers v. McRimmon, 140-640.

Bank taking draft for collection, or giving drawer credit with the understanding that if dishonored it will be charged back, is not a holder in due course; otherwise, where it is a sale of the draft and the maker is credited: Worth Co. v. Feed Co., 172-335; s. c., 173-711; Moon v. Simpson, 172-576; s. c., 170-335; Sternberg v. Crohow, 172-731; Markham-Stephens Co. v. Richmond Co., 177-364. Section cited: Yount v. Setzer, 155-213.

Cashiers' checks are classed hereunder with bills of exchange payable on demand, and if negotiated by indorsement for value and without notice and within a reasonable time the holder is a holder in due course: Mfg. Co. v. Summers, 143-102.

Decisions of interest rendered prior to this enactment: Bank v. McNair, 116-550; Burroughs v. Bank, 70-283.

As to what amounts to notice of infirmity in instrument, see section 3037.

3034. When person not deemed holder in due course. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

Rev., s. 2202; 1899, c. 733, s. 53.

As to what is a reasonable or unreasonable time, see section 2978. Where check negotiated to party residing within another state within five days after execution of same, such negotiation was within reasonable time: Mfg. Co. v. Summers, 143-103.

3035. Notice before full amount paid. Where the transferee has received notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

Rev., s. 2203; 1899, c. 733, s. 54.

As to what amounts to notice of infirmity, see section 3037. Where original consideration of instrument illegal or fraudulent, or same taken as collateral security, right of recovery by indorsee restricted to consideration paid by him before notice of fraud or amount of debt for which it is collateral: Bank v. McNair, 116-554. Section referred to: Bank v. Walser, 162-53.

3036. When title defective. The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud.

Rev., s. 2204; 1899, c. 733, s. 55.

The title is defective if instrument obtained through fraud or other unlawful means: *Moon v. Simpson*, 170-335; s. c., 172-576. Where a note is declared void by statute it is void into whosoever hands it may come: *Ward v. Sugg*, 113-489; *Glenn v. Bank*, 70-191; *Henderson v. Shannon*, 12-147—but when statute merely declares it illegal the note is good in the hands of an innocent holder: *Ward v. Sugg*, 113-489; *Glenn v. Bank*, 70-191. (Note that these decisions were rendered prior to enactment).

Indorsee for value before maturity and without notice takes clear of all equities, excepting when by statute the paper is void in whole or in part from its inception, or when the original consideration of the paper is illegal or fraudulent: *Bank v. McNair*, 116-550—but exception does not extend to notes executed without consideration, *Bank v. McNair*, 116-555.

When maker is not at liberty to object to the want of consideration against an indorsee, neither is he at liberty to object against him the illegality of consideration: *Henderson v. Shannon*, 12-148.

A note embracing usurious interest is void in the hands of innocent purchaser for value before maturity: *Faison v. Grandy*, 128-438, 126-827; *Ward v. Sugg*, 113-489; *Collier v. Nevill*, 14-30; *Ruffin v. Armstrong*, 9-419—to the extent to which the contract is usurious, *Ward v. Sugg*, 113-489—but if note valid in its inception, a subsequent usurious agreement does not avoid it, *Collier v. Nevill*, 14-30. A note to secure payment of money won at cards is void: *Calvert v. Williams*, 64-168. An old case holding that note secured by fraud and duress should be cancelled: *Meadows v. Smith*, 42-7.

Decisions as to pleadings and burden of proof in actions where this section pleaded: *Bank v. Walser*, 162-54; *Worth Co. v. Feed Co.*, 172-335; *Campbell v. Patton*, 113-481; *Loftin v. Hill*, 131-105; *Bank v. Burgwyn*, 110-267, 108-62; *Pugh v. Grant*, 86-40; see, also, section 3040.

3037. What constitutes notice of defect. To constitute a notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Rev., s. 2205; 1899, c. 733, s. 56.

Actual knowledge or circumstances indicating bad faith necessary to constitute notice of defect: *Bank v. Branson*, 165-344; *Smathers v. Hotel Co.*, 162-346; s. c., 167-469; s. c., 168-69; *Bank v. Walser*, 162-54; *Bank v. Hatcher*, 151-359—mentioning the transaction out of which the debt arose is not sufficient notice: *Ibid.*

Where purchaser of instrument has knowledge of facts and circumstances tending to show fraud on part of assignor it is his duty to inquire into character of instrument: *Loftin v. Hill*, 131-110; *Hulbert v. Douglas*, 94-122—and this being true, he is affected with knowledge of all that inquiry would disclose, *Ibid.*; *Hulbert v. Douglas*, 94-122; *Bunting v. Rieks*, 22-130—but knowledge by bona fide assignee of instrument of crookedness in business matters of assignor does not defeat title of assignee, or make it his duty to inquire relative to same, *Setzer v. Deal*, 135-428.

The fact that maker of instrument does business near assignee is immaterial on question as to whether assignee a bona fide holder, *Ibid.*

Where a note was due the president of bank, and he negotiated it before maturity to the bank, he and the cashier acting as discount committee, held that his knowledge of an infirmity in the instrument was knowledge of the bank: *LeDue v. Moore*, 111-516; but see *Bank v. Burgwyn*, 110-267.

Where the note is payable in five years, with interest payable annually, whether the failure to pay such annual interest is a dishonor of the note, quere; but such failure together with other circumstances may be considered as evidence to prove notice to holder: *Trust Co. v. Whitehead*, 165-74.

The fact that negotiator of note was a stranger and offered note for considerably less than face value, and that note was made payable at a factory of which purchaser had never heard, held not sufficient to put purchaser on his inquiry: *Farthing v. Dark*, 111-243.

As to the effect of the knowledge of agents or attorneys of infirmities in instruments upon their principals, see *Hulbert v. Douglas*, 94-122; *Dupree v. Ins. Co.*, 92-417.

Where plaintiff has become holder of the note before maturity, and for value, defendant who sets up defect in plaintiff's title must show plaintiff's actual knowledge of the defect: *Bank v. Brown*, 160-23. Burden of proving notice or bad faith hereunder is upon the maker: *Loftin v. Hill*, 131-105; see section 3040.

Some decisions prior to enactment of statute as to sufficiency of notice: *Bank v. Bank*, 116-815; *Bradford v. Williams*, 91-7.

A person dealing with a negotiable instrument has a right to act on it as it appears on the face of it: *Bank v. Burch*, 145-316.

3038. Rights of holder in due course. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

Rev., s. 2206; 1899, c. 733, s. 57.

Bona fide holder of instrument, for value, before maturity and without notice of infirmity takes same discharged of all equities and defenses existing between antecedent parties: *Bank v. Walser*, 162-54; *Bank v. Griffin*, 153-72; *Tyson v. Joyner*, 139-72; *Toms v. Jones*, 127-464; *Bank v. McNair*, 116-550; *Davidson v. Powell*, 114-575; *Parker v. Sutton*, 103-191; *Lewis v. Long*, 102-206; *Bank v. Michael*, 96-53; *Spence v. Tapscott*, 93-246; *Bradford v. Williams*, 91-7; *Tredwell v. Blount*, 86-33; *Blackmer v. Phillips*, 67-340; *Baucom v. Smith*, 66-538; *Calvert v. Williams*, 64-168; *Little v. Dunlap*, 44-40; *Myers v. Beeman*, 31-117; *Turner v. Beggarly*, 33-331; *Reddick v. Jones*, 28-107; *Henderson v. Shannon*, 12-149; *Guy v. McLean*, 12-46; *Black v. Bird*, 2-273—except where note void as treated of under section 3036.

Where defect in title is shown it is necessary for holder to show not only that he purchased for value and before maturity, but also without notice: *Smathers v. Hotel Co.*, 168-69.

In action on instrument mere introduction of same raises presumption that holder is only equitable owner, and same subject to equities or other defenses of maker against prior holders: *Tyson v. Joyner*, 139-69—and in order to render purchaser of instrument payable to order bona fide holder of title good against prior equities instrument must be specially indorsed to him by payee and prior indorsees, if any, or at least indorsed in blank, *Ibid.* Section cited: *Yount v. Setzer*, 155-213.

3039. When subject to original defenses. In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument has all the rights of such former holder in respect of all parties prior to the latter.

Rev., s. 2207; 1899, c. 733, s. 58.

Purchaser of instrument after maturity takes same subject to all defenses available against it in hands of payee: *Causey v. Snow*, 122-326; *Griffin v. Hasty*, 94-438; *Pugh v. Grant*, 86-40; *Burroughs v. Bank*, 70-283; *Little v. Dunlap*, 44-40; *Moody v. Sitton*, 37-382; *Turner v. Beggarly*, 33-331; *Haywood v. McNair*, 19-283, 14-231; *Shannon v. Henderson*, 12-149; *Black v. Bird*, 2-273.

Instruments past due, lodged with bank to secure indebtedness, are taken subject to all proper defenses by makers against original payee: *Bank v. Loughran*, 126-814.

Transferee of unindorsed instrument, unless same payable to bearer, takes instrument subject to all equities which maker has against payee: *Bresee v. Crumpton*, 121-122.

3040. Who deemed holder in due course. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a

holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

Rev., s. 2208; 1899, c. 733, s. 59.

Upon the execution of the instrument being proven, every holder is deemed *prima facie* to be holder in due course: *Steel Co. v. Ford*, 173-195; *Worth Co. v. Feed Co.*, 172-335; *Moon v. Simpson*, 170-335; *Smathers v. Hotel Co.*, 167-469; *Trust Co. v. Bank*, 167-260; *Bank v. Brown*, 160-23; *Bank v. Fountain*, 148-590; *Mfg. Co. v. Summers*, 143-109; *Evans v. Freeman*, 142-61; *Mayers v. McRimmon*, 140-643; *Loftin v. Hill*, 131-109; *Causey v. Snow*, 120-279; *Threadgill v. Comrs.*, 116-616; *Triplett v. Foster*, 115-335; *Bank v. Burgwyn*, 108-62; *Deloatch v. Vinson*, 108-147; *Applegarth v. Tillery*, 105-407; *Lewis v. Long*, 102-206; *Bank v. Bridgers*, 98-72; *Kiff v. Weaver*, 94-274; *Tredwell v. Blount*, 86-33; *Pugh v. Grant*, 86-40; *Pate v. Brown*, 85-166; *Jackson v. Love*, 82-405; *Meadows v. Cozart*, 76-450—though presumption rebuttable, *Mayers v. McRimmon*, 140-642; *Loftin v. Hill*, 131-109.

Where agent is furnished money to buy up negotiable claims against principal, and does buy them, his possession does not raise a presumption of ownership: *Threadgill v. Comrs.*, 116-616. It is unnecessary for holder to make allegation of ownership in complaint: *Deloatch v. Vinson*, 108-147. An issue, "Are defendants indebted to plaintiff, and if so, in what amount?" is sufficient to enable question of ownership of note to be passed on by jury: *Causey v. Snow*, 120-279.

THE BURDEN OF PROOF. The above section only enacts the law as it has always existed, as far as the burden of proof is concerned: *Mfg. Co. v. Summers*, 143-109. The burden is first upon the defendant to show title defective: *Bank v. Walser*, 162-54; *Evans v. Freeman*, 142-67; *Threadgill v. Comrs.*, 116-616; *Triplett v. Foster*, 115-335; *Bank v. Burgwyn*, 108-62; *Balinger v. Cureton*, 104-474; *Holly v. Holly*, 94-670; *Pugh v. Grant*, 86-40. The defendant must allege and prove fraud before the burden changes to the holder: *Bank v. Seagroves*, 166-608. Upon proof of fraud or illegality being offered burden is shifted to holder, and he must show that he received instrument *bona fide* and for value: *Discount Co. v. Baker*, 176-546; *Moon v. Simpson*, 170-335; *Wilson v. Lewis*, 170-47; *Smathers v. Hotel Co.*, 168-69; *Bank v. Branson*, 165-344; *Bank v. Drug Co.*, 166-99; *Trust Co. v. Whitehead*, 165-74; *Trust Co. v. Ellen*, 163-45; *Bank v. Exum*, 163-199; *Hardy v. Mitchell*, 161-381; s. c., 156-76; *Myers v. Petty*, 153-462; *Bank v. Burgwyn*, 110-267, 108-62; *Pugh v. Grant*, 86-40; *Meadows v. Cozart*, 76-450—but when he has shown it his *prima facie* case is restored, *Bank v. Burgwyn*, 110-267—unless circumstances under which he took instrument are shown by defendant to be such as to amount to notice of defect in same, *Ibid.* The same burden rests upon an intervener, when fraud is shown: *Latham v. Rogers*, 170-239. The *prima facie* case of holder is not rebutted by defendant's denial of ownership in answer: *Causey v. Snow*, 120-279.

Issues submitted should cover the allegations on the defect in the instrument, and the burden is upon the maker to sustain this; then it is upon the holder to prove want of notice, etc.: *Bank v. Clark*, 172-268.

Possession of unindorsed instrument raises presumption as between holder and payer that holder is owner: *Holly v. Holly*, 94-670; *Robertson v. Dunn*, 87-191—but presumption does not arise between holder and payee, who has legal title, *Ibid.*

In attachment proceedings, intervener having introduced bill of lading for property with draft attached properly indorsed, presumption is that he is purchaser for value without notice: *Mfg. Co. v. Tierney*, 133-631.

Possession of instrument by indorsee of married woman *prima facie* evidence of ownership, instrument having been in possession of husband after indorsement: *Vann v. Edwards*, 130-70 (note that action was upon instrument executed prior to enactment of section). Where evidence establishes that title of party who negotiated check to defendant was defective, burden is on defendant, claiming to be *bona fide* purchaser for value and without notice, to make good claim by greater weight of evidence: *Mfg. Co. v. Summers*, 143-103—and in action upon instrument payable to order, mere introduction of same without proof of indorsement raises presumption that holder merely equitable owner, *Mayers v. McRimmon*, 140-640; *Tyson v. Joyner*, 139-69—and same subject to equities or other defenses of maker against prior holders, *Ibid.*—also, where complaint in action by indorsee of instrument does not state that he is holder in due course, and defendant alleges that execution of instrument procured by fraud of payee, burden is on indorsee to show that he is holder in due course, *Campbell v. Patton*, 113-481.

ART. 6. LIABILITIES OF PARTIES

3041. Liability of maker. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

Rev., s. 2209; 1899, c. 733, s. 60.

3042. Liability of drawer. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

Rev., s. 2210; 1899, c. 733, s. 61.

The drawer may, by terms in the instrument or by collateral agreement, reserve the right to arrest payment: *Bank v. Oil Mills*, 150-718—but a purchaser for value without notice of the instrument will be protected, *Ibid*.

3043. Liability of acceptor. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits (1) existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument; and (2) the existence of the payee and his then capacity to indorse.

Rev., s. 2211; 1899, c. 733, s. 62.

Instrument having been accepted, drawee becomes primarily liable: *Bank v. Bradley*, 117-526. The drawee bank cannot recover from the indorser the money paid on a forged check, since bank is presumed to know signature of drawer: *Bank v. Trust Co.*, 168-605; *Woodward v. Trust Co.*, 178-184; *Yarborough v. Trust Co.*, 142-377. But if payee, who is also the indorser, knows of circumstances of signature, he is liable: *Woodward v. Trust Co.*, 178-184.

3044. When person deemed indorser. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

Rev., s. 2212; 1899, c. 733, s. 63.

A person placing his name on the back of a note is deemed an indorser unless otherwise indicated: *Meyers v. Battle*, 170-168; *Bank v. Johnston*, 169-526; *Houser v. Fayssoux*, 168-1; *Perry v. Taylor*, 148-362—and is entitled to notice of dishonor, unless waived, *Bank v. Johnston*, 169-526. Parol evidence to change such liability is not admissible: *Meyers v. Battle*, 170-168; *Bank v. Wilson*, 168-557 (*semble*).

Prior to the adoption of this act, the liability of an anomalous indorser depended upon the intention of the parties: *Barden v. Hornthal*, 151-8; *Bank v. Wilson*, 168-557. Where instrument indorsed by payee and then the name of another person appears upon it, such person deemed to be indorser: *Lilly v. Baker*, 88-151—but if party indorses note when executed, indorser ought to be held as original promisor, *Ibid.*, page 154.

3045. Liability of irregular indorser. Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties; (2) if the instrument is payable to the order of the maker

or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer; (3) if he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

Rev., s. 2213; 1899, c. 733, s. 64.

Placing signature in blank before delivery makes one an indorser: *Perry v. Taylor*, 148-362. See, as bearing upon subject-matter of section, annotations under section 3044; *Lilly v. Baker*, 88-154; *Hoffman v. Moore*, 82-313. Section merely referred to in *Rouse v. Wooten*, 140-558; *Bank v. Wilson*, 168-557.

3046. Warranty, where negotiation by delivery. Every person negotiating an instrument by delivery or by a qualified indorsement warrants (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has a good title to it; (3) that all prior parties had capacity to contract; (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities other than bills and notes.

Rev., s. 2214; 1899, c. 733, s. 65.

What the indorser warrants by his indorsement: *Smith v. Godwin*, 145-242.

3047. Liability of general indorser. Every indorser who indorses without qualification warrants to all subsequent holders in due course (1) the matters and things mentioned in subdivisions one, two and three of the next preceding section; and (2) that the instrument is at the time of his indorsement valid and subsisting. And in addition he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it.

Rev., s. 2215; 1899, c. 733, s. 66.

Where payee, whether original or by previous indorsement, transfers instrument by indorsement he becomes simply an indorser: *Davidson v. Powell*, 114-575—unless by terms of indorsement he limits his liability, *Ibid*.

What the indorsers warrant by indorsement: *Smith v. Godwin*, 145-242. These warranties refer to legal transactions, and are not intended to withdraw contracts from the operation of usury laws: *Sedbury v. Duffy*, 158-431. An indorser in blank may show by parol the agreement under which such indorsement was made, as against his indorsee and others not holders in due course: *Sykes v. Everett*, 167-600. Decision prior to enactment reviewing warranties: *Henderson v. Lemly*, 79-170. See, as incidentally bearing upon subject-matter of section, *Hill v. Shields*, 81-253.

3048. Liability of indorser, where paper negotiable by delivery. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

Rev., s. 2216; 1899, c. 733, s. 67.

3049. Order in which indorsers are liable. As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

Rev., s. 2217; 1899, c. 733, s. 68.

An indorser who pays the debt cannot recover from a subsequent indorser: *Lynch v. Loftin*, 153-270. Person obtaining possession of instrument after indorsing same is restored to original position and cannot hold liable intermediate parties who could look to him: *Adrian v. McCaskill*, 103-182—and person deriving possession of paper from him with notice of this fact is in same position, *Ibid.*

Remote indorsee of instrument not affected by agreement between payee and immediate indorsee: *Hill v. Shields*, 81-250.

3050. Liability of agent or broker. Where a broker or other agent negotiates an instrument without indorsement he incurs all the liabilities prescribed by section three thousand and forty-six, unless he discloses the name of his principal and the fact that he is acting only as agent.

Rev., s. 2218; 1899, c. 733, s. 69.

ART. 7. PRESENTMENT FOR PAYMENT

3051. Effect of want of demand on principal debtor. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

Rev., s. 2219; 1899, c. 733, s. 70.

Liability of surety is primary: *Rouse v. Wooten*, 140-557—though that of guarantor is collateral and secondary, *Ibid.* Where drawer has funds in hands of drawee he has a right to expect the instrument to be honored, and drawer is entitled to presentment of instrument in reasonable time: *Cedar Falls v. Wallace*, 83-225.

Where draft on third person given in settlement of antecedent debt it is the duty of the holder to present it and give notice of its dishonor, if not paid, and failure to do so discharges debt: *Mauney v. Coit*, 80-300.

Instrument must be presented to drawee for acceptance or payment and due notice must be given to indorser of its nonacceptance or nonpayment before action can be sustained against him: *Long v. Stephenson*, 72-569. Presentment for payment is necessary in order to bind an anomalous indorser: *Perry v. Taylor*, 148-362. Delay in presentment of certificate of deposit: *Bank v. Trust Co.*, 159-85.

If instrument be payable at particular time and place, demand at such time and place need not be averred or proven in action by holder against maker: *Nichols v. Pool*, 47-23—for failure to make such demand can only be used in defense if money was ready at time and place named, *Ibid.*

3052. Presentment, where the instrument is not payable on demand. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

Rev., s. 2220; 1899, c. 733, s. 71.

3053. What constitutes a sufficient presentment. Presentment for payment to be sufficient must be made (1) by the holder or by some person authorized to receive payment on his behalf; (2) at a reasonable hour on a business day; (3) at a proper place as herein defined; (4) to the person primarily liable on the instru-

ment, or, if he is absent or inaccessible, to any person found at the place where the presentment is made.

Rev., s. 2221; 1899, c. 733, s. 72.

Presentment of instrument must be made to drawee or acceptor, or to an authorized agent: *Burrus v. Ins. Co.*, 124-12.

3054. Place of presentment. Presentment for payment is made at the proper place (1) where a place of payment is specified in the instrument and it is there presented; (2) where no place of payment is specified, but the address of the person to make the payment is given in the instrument, and it is there presented; (3) where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment; (4) in any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

Rev., s. 2222; 1899, c. 733, s. 73.

Maker of instrument made payable on demand at a particular place is not bound to pay it until it is presented at such place: *Bank v. Bank*, 35-75—but wherever instrument made payable at specific place, presentment at such place sufficient, *Sullivan v. Mitchell*, 4-93—and presentment of instrument sufficient where it is made at residence or usual place of business of drawee, where no place is specified: *Burrus v. Ins. Co.*, 124-12.

Presentation of a draft for payment at the place of its date is sufficient demand to charge the drawer or acceptor after notice of protest, where place at which it was payable is not stated in the writing and no proof made that any particular place was agreed upon: *Wittkowski v. Smith*, 84-671.

3055. Instrument must be exhibited. The instrument must be exhibited to the person from whom payment is demanded, and, when it is paid, must be delivered up to the party paying it.

Rev., s. 2223; 1899, c. 733, s. 74.

3056. Presentment where instrument payable at bank. Where the instrument is payable at a bank presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

Rev., s. 2224; 1899, c. 733, s. 75.

Whenever instrument payable at particular bank, presentment must be made at such bank: *Sullivan v. Mitchell*, 4-93.

3057. Presentment where principal debtor is dead. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found.

Rev., s. 2225; 1899, c. 733, s. 76.

3058. Presentment to persons liable as partners. Where the persons primarily liable on the instrument are liable as partners and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

Rev., s. 2226; 1899, c. 733, s. 77.

Where instrument drawn on firm, presentment to one of its members is sufficient: *Elliott v. White*, 51-98.

3059. Presentment to joint debtors. Where there are several persons not parties primarily liable on the instrument and no place of payment is specified, presentment must be made to them all.

Rev., s. 2227; 1899, c. 733, s. 78.

3060. When presentment not required to charge the drawer. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

Rev., s. 2228; 1899, c. 733, s. 79.

Generally, if drawer of bill had no reasonable grounds to expect it to be honored, holder is not bound to strict presentment, but if drawer has funds in hands of drawee he has right to expect his bill to be honored, and drawer is entitled to presentment of his bill in reasonable time, and strict notice, if dishonored, although he knew or had reason to believe when he drew the bill that drawee was insolvent: *Cedar Falls v. Wallace*, 83-225.

3061. When presentment not required to charge the indorser. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

Rev., s. 2229; 1899, c. 733, s. 80.

When a note is payable at a bank and the maker has no funds there to meet it, presentment is not necessary: *Meyers v. Battle*, 170-168.

3062. When delay in presentment is excused. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

Rev., s. 2230; 1899, c. 733, s. 81.

3063. When presentment may be dispensed with. Presentment for payment is dispensed with (1) where after the exercise of reasonable diligence presentment as required by this chapter cannot be made; (2) where the drawee is a fictitious person; (3) by waiver of presentment, express or implied.

Rev., s. 2231; 1899, c. 733, s. 82.

Waiver of presentment: *Caldwell County v. George*, 176-602. See, as bearing upon subject-matter of section, *Moore v. Coffield*, 12-247.

3064. When instrument dishonored by nonpayment. The instrument is dishonored by nonpayment when (1) it is duly presented for payment and payment is refused or cannot be obtained; or (2) presentment is excused and the instrument is overdue and unpaid.

Rev., s. 2232; 1899, c. 733, s. 83.

3065. Liability of persons secondarily liable when instrument dishonored. Subject to the provisions of this chapter, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

Rev., s. 2233; 1899, c. 733, s. 84.

3066. Time of maturity. Every negotiable instrument is payable at the time fixed therein without grace, except as allowed by the succeeding section. When

the day of maturity falls upon Sunday or a holiday the instrument is payable on the next succeeding business day.

Rev., s. 2234; 1899, c. 733, s. 85; 1907, c. 897; 1909, c. 800, s. 1.

3067. When days of grace allowed. All bills of exchange payable within the state, at sight, in which there is an express stipulation to that effect and not otherwise, shall be entitled to days of grace as the same are allowed by the custom of merchants on foreign bills of exchange payable at the expiration of a certain period after date or sight, but no days of grace shall be allowed on any bill of exchange, promissory note, or draft payable on demand.

Rev., s. 2235; Code, s. 43; 1905, c. 327; 1907, c. 861.

See, as bearing upon subject-matter of section, *Jarvis v. McMain and Simmons*, 10-10; *Fields v. Mallett*, 10-465.

3068. How time is computed. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment.

Rev., s. 2236; 1899, c. 733, s. 86.

3069. Rule where instrument is payable at bank. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

Rev., s. 2237; 1899, c. 733, s. 87.

Note payable at bank is an order on the bank, and where the maker by express indorsement directs the bank to charge it to his account, the bank is liable, if the maker had the money in bank: *Peaslee v. Dixon*, 172-411. Section referred to: *Trust Co. v. Bank*, 166-112.

3070. What constitutes payment in due course. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

Rev., s. 2238; 1899, c. 733, s. 88.

ART. 8. NOTICE OF DISHONOR

3071. To whom notice of dishonor must be given. Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

Rev., s. 2239; 1899, c. 733, s. 89.

Where instrument dishonored, notice must be given to all who are secondarily liable as drawer and indorser: *Horton v. Wilson*, 175-533; *Barber v. Absher*, 175-602; *Bank v. Bradley*, 117-526; *Mauney v. Coit*, 80-300; *Long v. Stephenson*, 72-569; *Lilly v. Pettaway*, 73-361; *Yancey v. Littlejohn*, 9-525; *Austin v. Rodman*, 8-194. Notice of dishonor must be given to an anomalous indorser: *Perry v. Taylor*, 148-362. Notice of dishonor must be given without regard to the solvency of the drawer or maker: *Bank v. Trust Co.*, 177-254—and indorsers must have notice of dishonor even though at time of indorsement of instrument they had reason to believe and did believe that the instrument would not be paid by maker, *Denny v. Palmer*, 27-610—but surety upon instrument not discharged from liability by reason of fact that he was not given notice of its dishonor, *Rouse v. Wooten*, 140-557. Section cited: *Bank v. Johnson*, 169-526.

As to whether a party who indorses a note in blank at time the note is made is primarily or secondarily liable, see *Lilly v. Baker*, 88-154. As bearing upon section, see *Hubbard v. Troy*, 24-134; *Spear v. Atkinson*, 23-262; *Bissell v. Bozman*, 17-154.

3072. By whom notice given. The notice may be given by or on behalf of the holder or by or on behalf of any party to the instrument who might be compelled to pay to the holder, and who upon taking it up would have a right to reimbursement from the party to whom notice is given.

Rev., s. 2240; 1899, c. 733, s. 90.

Any person through whose hands instrument may have passed may give notice to drawer or prior indorser of dishonor of same: *Bank v. Seawell*, 9-560—although instrument may not at that time have been taken up by him, *Ibid*.

3073. Notice given by agent. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

Rev., s. 2241; 1899, c. 733, s. 91.

3074. Effect of notice given on behalf of holder. Where notice is given by or on behalf of the holder, it inures to the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

Rev., s. 2242; 1899, c. 733, s. 92.

3075. Effect, where notice is given by party entitled thereto. Where notice is given by or on behalf of a party entitled to give notice it inures to the benefit of the holder and all parties subsequent to the party by whom notice is given.

Rev., s. 2243; 1899, c. 733, s. 93.

3076. When agent may give notice. Where the instrument has been dishonored in the hands of an agent he may either himself give notice to the parties liable thereon or he may give notice to his principal. If he give notice to his principal he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

Rev., s. 2244; 1899, c. 733, s. 94.

3077. When notice sufficient. A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate it unless the party to whom the notice is given is in fact misled thereby.

Rev., s. 2245; 1899, c. 733, s. 95.

Notice may be signed or unsigned: *Bank v. Seawell*, 9-560—and need not be in any particular form, *Ibid*.

3078. Form of notice. The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by nonacceptance or nonpayment. It may in all cases be given by delivering it personally or through the mails.

Rev., s. 2246; 1899, c. 733, s. 96.

Notice is good if it be sufficient to put indorser upon inquiry: *Bank v. Seawell*, 9-560—and no particular form is required, as it may be oral or written or in print, *Ibid*.

3079. To whom notice may be given. Notice of dishonor may be given either to the party himself or to his agent in that behalf.

Rev., s. 2247; 1899, c. 733, s. 97.

3080. Notice when party is dead. When any party is dead and his death is known to the party giving notice, the notice must be given to a personal representative if there be one, and if with reasonable diligence he can be found. If there is no personal representative, notice may be sent to the last residence or last place of business of the deceased.

Rev., s. 2248; 1899, c. 733, s. 98.

3081. Notice to partners. When the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.

Rev., s. 2249; 1899, c. 733, s. 99.

3082. Notice to persons jointly liable. Notice to joint parties who are not partners must be given to each of them unless one of them has authority to receive such notice for the others.

Rev., s. 2250; 1899, c. 733, s. 100.

3083. Notice to bankrupt. Where a party has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of his creditors, notice may be given either to the party himself or to his trustee or assignee.

Rev., s. 2251; 1899, c. 733, s. 101.

3084. Time within which notice must be given. Notice may be given as soon as the instrument is dishonored, and, unless delay is excused as hereinafter provided, must be given within the times fixed by this chapter.

Rev., s. 2252; 1899, c. 733, s. 102.

See sections 3085, 3086.

3085. Notice where parties reside in the same place. When the person giving and the person to receive notice reside in same place notice must be given within the following times: (1) If given at the place of business of the person to receive notice it must be given before the close of business hours on the day following; (2) if given at his residence it must be given before the usual hours of rest on the day following; (3) if sent by mail it must be deposited in the postoffice in time to reach him in the usual course on the day following.

Rev., s. 2253; 1899, c. 733, s. 103.

See, as bearing upon subject-matter of section, *State Bank v. Smith*, 7-70.

3086. Notice where parties reside in different places. Where the person giving and the person to receive notice reside in different places the notice must be given within the following times: (1) If sent by mail it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter; (2) if given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail if it had been deposited in the postoffice within the time specified in the last subdivision.

Rev., s. 2254; 1899, c. 733, s. 104.

Where parties live in different places, holder must give notice of nonacceptance or nonpayment on next day: *Hubbard v. Troy*, 24-134—or by next post after day of dishonor, *Bank v.*

Bradley, 117-526; Denny v. Palmer, 27-610; Hubbard v. Troy, 24-134. Contents of notice of dishonor may be proved by parol without notice to produce original: Faribault v. Ely, 13-67.

3087. When sender deemed to have given due notice. Where notice of dishonor is duly addressed and deposited in the postoffice the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

Rev., s. 2255; 1899, c. 733, s. 105.

See Faribault v. Ely, 13-70.

3088. What constitutes deposit in postoffice. Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter-box under the control of the postoffice department.

Rev., s. 2256; 1899, c. 733, s. 106.

3089. Time of notice to antecedent parties. Where a party receives notice of dishonor he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

Rev., s. 2257; 1899, c. 733, s. 107.

3090. Where notice must be sent. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows: (1) Either to the postoffice nearest to his place of residence or to the postoffice where he is accustomed to receive his letters; or (2) if he lives in one place and has his place of business in another, notice may be sent to either place; or (3) if he be sojourning in another place notice may be sent to the place where he is sojourning. But where the notice is actually received by the party within the time specified in this chapter it will be sufficient, though not sent in accordance with requirements of this section.

Rev., s. 2258; 1899, c. 733, s. 108.

Notice of dishonor should be sent to postoffice nearest to party's address: Bank of U. S. v. Lane, 10-453—or to place of his residence, Denny v. Palmer, 27-610—but where drawer of instrument dates it at a particular place, notice of dishonor of instrument may generally be directed to him at that place, *Ibid.* See, as bearing upon section, Runyon v. Montfort, 44-371.

3091. Waiver of notice. Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied.

Rev., s. 2259; 1899, c. 733, s. 109.

By indorsing a note which contains an express waiver as to extension of time, the indorser waives the right of notice of dishonor: Bank v. Johnston, 169-526. Although protest not necessary on inland bills, yet its waiver in such cases is construed to signify as much as when applied to foreign bills: Shaw v. McNeill, 95-535—and where protest waived on inland bill and no notice given of nonacceptance and nonpayment to indorsers, held that such notice was waived by waiver of protest, *Ibid.* Where indorsee neglects to give notice, drawer or indorser will still be liable if with knowledge of all facts he promises to pay instrument: Lilly v. Pette-way, 73-358; Moore v. Tucker, 25-347.

For waiver of notice by conduct, see Shaw v. McNeill, 95-535.

3092. Who affected by waiver. Where the waiver is embodied in the instrument itself it is binding upon all parties, but where it is written above the signature of an indorser it binds him only.

Rev., s. 2260; 1899, c. 733, s. 110.

Section cited: Bank v. Johnston, 169-526.

3093. Waiver of protest. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor.

Rev., s. 2261; 1899, c. 733, s. 111.

Where protest waived on foreign bill, presentment and notice deemed to be waived also: *Shaw v. McNeill*, 95-535—and notice of dishonor on inland bill is waived by waiver of protest, *Ibid.*—but where settling partner, after dissolution of firm, gives instrument in payment of partnership debt, he cannot waive protest so as to bind former copartner, *Mauney v. Coit*, 80-300—especially where latter has been a dormant member, *Ibid.* Protest only necessary in case of foreign bills: *Shaw v. McNeill*, 95-535, and cases under section 3134.

Section cited: *Bank v. Johnston*, 169-526.

3094. When notice is dispensed with. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

Rev., s. 2262; 1899, c. 733, s. 112.

As bearing upon subject-matter of section, see *Runyon v. Montfort*, 44-371.

3095. Delay in giving notice. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

Rev., s. 2263; 1899, c. 733, s. 113.

3096. When notice need not be given to drawer. Notice of dishonor is not required to be given to the drawer in either of the following cases: (1) Where the drawer and the drawee are the same person; (2) where the drawee is a fictitious person or a person not having capacity to contract; (3) where the drawer is the person to whom the instrument is presented for payment; (4) where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument; (5) where the drawer has countermanded payment.

Rev., s. 2264; 1899, c. 733, s. 114.

Generally, if drawer of instrument has no reasonable grounds to expect it to be honored, holder is not bound to give notice of dishonor, but if drawer has funds in hands of drawee he has right to expect instrument to be honored, and drawer is entitled to strict notice of instrument dishonored, although drawer knew, or had reason to believe, when instrument was drawn, that drawer was insolvent: *Cedar Falls v. Wallace*, 83-225.

3097. When notice need not be given to indorser. Notice of dishonor is not required to be given to an indorser in either of the following cases: (1) Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument; (2) where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation.

Rev., s. 2265; 1899, c. 733, s. 115.

Although, at time of indorsement, indorser believed that instrument would not be paid by maker, such circumstance does not dispense with necessity of due notice: *Denny v. Palmer*, 27-610.

As to whether party to be treated as indorser or as one primarily liable when he indorses paper at time of its execution, see *Lilly v. Baker*, 88-154; section 3044.

3098. Notice of nonpayment where acceptance refused. Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by

nonpayment is not necessary unless in the meantime the instrument has been accepted.

Rev., s. 2266; 1899, c. 733, s. 116.

3099. Effect of omission to give notice of nonacceptance. An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission.

Rev., s. 2267; 1899, c. 733, s. 117.

3100. When protest need not be made; when it must be made. Where any negotiable instrument has been dishonored it may be protested for nonacceptance or nonpayment as the case may be, but protest is not required except in the case of foreign bills of exchange.

Rev., s. 2268; 1899, c. 733, s. 118.

Protest not necessary to fix drawer and indorsers of inland bills with liability: *Bank v. Bradley*, 117-526; *Shaw v. McNeill*, 95-535; *Hubbard v. Troy*, 24-134—though it is necessary in case of foreign bills, *Shaw v. McNeill*, 95-535.

ART. 9. DISCHARGE

3101. How instrument discharged. A negotiable instrument is discharged (1) by payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right.

Rev., s. 2269; 1899, c. 733, s. 119.

3102. Discharge of person secondarily liable. A person secondarily liable on the instrument is discharged (1) by any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved.

Rev., s. 2270; 1899, c. 733, s. 120.

An agreement to extend the time: *Roberson v. Spain*, 173-23. **Extension of time may be expressly waived in the note, and it applies to makers and indorsers:** *Bank v. Johnston*, 169-526.

3103. Right of party paying instrument. When the instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except (1) where it is payable to the order of the third person and has been paid by the drawer; and (2) where it was made or accepted for accommodation and has been paid by the party accommodated.

Rev., s. 2271; 1899, c. 733, s. 121.

Person secondarily liable may pay note and sue principal, or give notice to holder to sue: *Roberson v. Spain*, 173-23. Indorser who pays instrument of principal can only recover from latter amount actually paid: *Pace v. Robertson*, 65-550. Where instrument payable to order of third person is protested and taken up by drawer, latter cannot again put it into circulation: *Price v. Sharp*, 24-417.

3104. Renunciation by holder. The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

Rev., s. 2272; 1899, c. 733, s. 122.

3105. Unintentional cancellation; burden of proof. A cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative, but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority.

Rev., s. 2273; 1899, c. 733, s. 123.

3106. Effect of alteration of instrument. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration he may enforce payment thereof according to its original tenor.

Rev., s. 2274; 1899, c. 733, s. 124.

Material alteration vacates a bill or note except as between parties consenting thereto: *Davis v. Coleman*, 29-424—and such alteration by principal without knowledge or consent of surety discharges such surety from instrument: *Darwin v. Rippey*, 63-318.

3107. What constitutes a material alteration. Any alteration which changes (1) the date; (2) the sum payable either for principal or interest; (3) the time or place of payment; (4) the number or the relation of the parties; (5) the medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

Rev., s. 2275; 1899, c. 733, s. 125.

Cutting off name of maker of instrument and substituting another is material alteration: *Davis v. Coleman*, 29-424—as is addition of words “in specie” after word “dollars” in sealed instrument, *Darwin v. Rippey*, 63-318—but held that prefixing of words “Pleasant Valley, S. C.,” to instrument was not material alteration, *Houston v. Potts*, 64-33.

ART. 10. BILLS OF EXCHANGE

3108. Bill of exchange defined. A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

Rev., s. 2276; 1899, c. 733, s. 126.

An "acceptance" is a bill of exchange: *Sherrill v. Trust Co.*, 176-591. Section referred to: *Trust Co. v. Bank*, 166-112; *Johnson v. Lassiter*, 155-47.

For "acceptance" by banks and trust companies, see section 222.

3109. Bill not an assignment of funds in hands of drawee. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

Rev., s. 2277; 1899, c. 733, s. 127.

Section referred to: *Trust Co. v. Bank*, 166-112. See annotations under section 3171.

3110. Bill addressed to more than one drawee. A bill may be addressed to two or more drawees jointly, whether they are partners or not, but not to two or more drawees in the alternative or in succession.

Rev., s. 2278; 1899, c. 733, s. 128.

3111. Inland and foreign bills of exchange. An inland bill of exchange is a bill which is or on its face purports to be both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill the holder may treat it as an inland bill.

Rev., s. 2279; 1899, c. 733, s. 129.

When check drawn on bank is an inland bill of exchange: *Sherrill v. Trust Co.*, 176-591.

3112. When bill may be treated as promissory note. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

Rev., s. 2280; 1899, c. 733, s. 130.

When drawer and drawee are the same person, holder may treat the instrument as a bill of exchange or a note: *Sherrill v. Trust Co.*, 176-591.

3113. Referee in case of need. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need: that is to say, in case the bill is dishonored by nonacceptance or nonpayment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

Rev., s. 2281; 1899, c. 733, s. 131.

ART. 11. ACCEPTANCE

3114. Acceptance defined; how made. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

Rev., s. 2282; 1899, c. 733, s. 132.

Authority to accept instruments must ordinarily be expressly conferred upon agent: *Bank v. Hay*, 143-326—but may be implied if the execution of the paper is necessary incident to business, *Ibid.*

3115. Holder entitled to acceptance on face of bill. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored.

Rev., s. 2283; 1899, c. 733, s. 133.

3116. Acceptance by separate instrument. Where an acceptance is written on a paper other than the bill itself it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

Rev., s. 2284; 1899, c. 733, s. 134.

Letter written within reasonable time before or after date of instrument, describing it in terms not to be mistaken and promising to accept it, if shown to person who afterwards takes instrument on credit of the letter, is an acceptance of same: *Bank v. Hay*, 143-326; *Nimocks v. Woody*, 97-5.

3117. When promise to accept equivalent to acceptance. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

Rev., s. 2285; 1899, c. 733, s. 135.

Letter as an acceptance: *Bank v. Hay*, 143-326; *Nimocks v. Woody*, 97-5, under preceding section.

3118. Time allowed drawee to accept. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill, but the acceptance, if given, dates as of the day of presentation.

Rev., s. 2286; 1899, c. 733, s. 136.

Section referred to: *Trust Co. v. Bank*, 166-112.

3119. Liability of drawee retaining or destroying bill. Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same.

Rev., s. 2287; 1899, c. 733, s. 137.

Section referred to: *Trust Co. v. Bank*, 166-112.

3120. Acceptance of incomplete bill. A bill may be accepted before it has been signed by the drawer or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment. But when a bill payable after sight is dishonored by nonacceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

Rev., s. 2288; 1899, c. 733, s. 138.

3121. Kinds of acceptances. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

Rev., s. 2289; 1899, c. 733, s. 139.

For qualified acceptance, see *Wallace v. Douglass*, 116-659.

3122. What constitutes a general acceptance. An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only, and not elsewhere.

Rev., s. 2290; 1899, c. 733, s. 140.

3123. What constitutes a qualified acceptance. An acceptance is qualified which is (1) conditional; that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated; (2) partial; that is to say, an acceptance to pay part only of the amount for which the bill is drawn; (3) local; that is to say, an acceptance to pay only at a particular place; (4) qualified as to time; (5) the acceptance of some one or more of the drawees, but not of all.

Rev., s. 2291; 1899, c. 733, s. 141.

Where person accepts instrument drawn on him "payable when I receive funds to use of drawer" he becomes liable when moneys are placed to his credit, though he had not taken manual possession thereof: *Wallace v. Douglass*, 116-659.

3124. Rights of parties as to qualified acceptance. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonored by nonacceptance. When a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill unless they have expressly or impliedly authorized the holder to take a qualified acceptance or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance he must, within a reasonable time, express his dissent to the holder or he will be deemed to have assented thereto.

Rev., s. 2292; 1899, c. 733, s. 142.

ART. 12. PRESENTMENT FOR ACCEPTANCE

3125. When presentment for acceptance must be made. Presentment for acceptance must be made (1) where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or (2) where the bill expressly stipulates that it shall be presented for acceptance; or (3) where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

Rev., s. 2293; 1899, c. 733, s. 143.

3126. Failure to present in reasonable time discharges drawer and indorsers. Except as herein otherwise provided the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so the drawer and all indorsers are discharged.

Rev., s. 2294; 1899, c. 733, s. 144.

3127. How presentment made. Presentment for acceptance must be made by or on behalf of the holder, at a reasonable hour on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and (1) where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only; (2) where the drawee is dead, presentment may be made to his personal representative; (3) where the drawee has been adjudged

a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

Rev., s. 2295; 1899, c. 733, s. 145.

Instrument payable at no particular place in city or town must be presented at maker's residence or place of business: *Bank v. Lutterloh*, 95-495; *Wittkowski v. Smith*, 84-671.

3128. On what days presentment may be made. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of this chapter.

Rev., s. 2296; 1899, c. 733, s. 146; 1909, c. 800, s. 1.

3129. Presentment where time is insufficient. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

Rev., s. 2297; 1899, c. 733, s. 147.

3130. Where presentment is excused. Presentment for acceptance is excused and a bill may be treated as dishonored by nonacceptance in either of the following cases: (1) Where the drawee is dead or has absconded or is a fictitious person or a person not having capacity to contract by bill; (2) where after the exercise of reasonable diligence presentment cannot be made; (3) where, although presentment has been irregular, acceptance has been refused on some ground.

Rev., s. 2298; 1899, c. 733, s. 148.

3131. When dishonored by nonacceptance. A bill is dishonored by nonacceptance (1) when it is duly presented for acceptance and such an acceptance as is prescribed in this chapter is refused or cannot be obtained; or (2) when a presentment for acceptance is executed and the bill is not accepted.

Rev., s. 2299; 1899, c. 733, s. 149.

3132. Duty of holder, where bill not accepted. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by nonacceptance or he loses the right of recourse against the drawer and indorsers.

Rev., s. 2300; 1899, c. 733, s. 150.

3133. Rights of holder, where bill not accepted. When a bill is dishonored by nonacceptance an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary.

Rev., s. 2301; 1899, c. 733, s. 151.

ART. 13. PROTEST

3134. In what cases protest necessary. Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance; and where such a bill which had not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for

nonpayment. If it is not so protested the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest in case of dishonor is unnecessary.

Rev., s. 2302; 1899, c. 733, s. 152.

Protest necessary in case of foreign bills: *Shaw v. McNeill*, 95-535—though not necessary on inland bills, *Bank v. Bradley*, 117-526; *Shaw v. McNeill*, 95-535; *Bank v. Lutterloh*, 95-495; *Hubbard v. Troy*, 24-134.

Note executed in another state need not be protested before owner can sue indorser, such protest not being necessary in this state, and there being no evidence that protest required in state where note executed: *Bank v. Carr*, 130-479—for that common law presumed to prevail in other state, and required no protest on this note, *Ibid.*; *Gooch v. Faucett*, 122-270; *Moody v. Johnson*, 112-801.

By the law merchant protest of bill by notary public is in itself evidence: *Gordon v. Price*, 32-385.

3135. How protest made. The protest must be annexed to the bill or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify (1) the time and place of presentment; (2) the fact that presentment was made and the manner thereof; (3) the cause or reason for protesting the bill; (4) the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

Rev., s. 2303; 1899, c. 733, s. 153.

Decision prior to enactment of statute as to sufficiency of protest: *Bank v. Lutterloh*, 95-495.

3136. By whom protest made. Protest may be made by (1) a notary public; or (2) by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

Rev., s. 2304; 1899, c. 733, s. 154.

3137. When protest to be made. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted the protest may be subsequently extended as of the date of the noting.

Rev., s. 2305; 1899, c. 733, s. 155.

3138. Where protest made. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonored by nonacceptance it must be protested for nonpayment at the place where it is expressed to be payable, and no further presentment for payment to or demand on the drawee is necessary.

Rev., s. 2306; 1899, c. 733, s. 156.

3139. Protest both for nonacceptance and nonpayment. A bill which has been protested for nonacceptance may be subsequently protested for nonpayment.

Rev., s. 2307; 1899, c. 733, s. 157.

3140. Protest before maturity, where acceptor insolvent. Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

Rev., s. 2308; 1899, c. 733, s. 158.

3141. When protest dispensed with. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

Rev., s. 2309; 1899, c. 733, s. 159.

3142. Protest where bill is lost. Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

Rev., s. 2310; 1899, c. 733, s. 160.

ART. 14. ACCEPTANCE FOR HONOR

3143. When a bill may be accepted for honor. Where a bill of exchange has been protested for dishonor by nonacceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party there may be a further acceptance by a different person for the honor of another party.

Rev., s. 2311; 1899, c. 733, s. 161.

3144. How acceptance for honor made. An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

Rev., s. 2312; 1899, c. 733, s. 162.

3145. When deemed an acceptance for honor of drawer. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

Rev., s. 2313; 1899, c. 733, s. 163.

3146. Liability of acceptor for honor. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Rev., s. 2314; 1899, c. 733, s. 164.

3147. Agreement of acceptor for honor. The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee; and provided, also, that it shall have been duly presented for payment and protested for nonpayment and notice of dishonor given to him.

Rev., s. 2315; 1899, c. 733, s. 165.

3148. Maturity of bill payable after sight accepted for honor. Where a bill payable after sight is accepted for honor its maturity is calculated from the date of the noting for nonacceptance and not from the date of the acceptance for honor.

Rev., s. 2316; 1899, c. 733, s. 166.

3149. Protest of bill accepted for honor. Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for nonpayment before it is presented for payment to the acceptor for honor or referee in case of need.

Rev., s. 2317; 1899, c. 733, s. 167.

3150. How presentment for payment to acceptor for honor made. Presentment for payment to the acceptor for honor must be made as follows: (1) If it is to be presented in the place where the protest for nonpayment was made it must be presented not later than the day following its maturity; (2) if it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time in this chapter specified.

Rev., s. 2318; 1899, c. 733, s. 168.

3151. When delay in making presentment excused. The provisions of section 3062 apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

Rev., s. 2319; 1899, c. 733, s. 169.

3152. Dishonor of bill by acceptor for honor. When the bill is dishonored by the acceptor for honor it must be protested for nonpayment by him.

Rev., s. 2320; 1899, c. 733, s. 170.

ART. 15. PAYMENT FOR HONOR

3153. Who may make payment for honor. Where a bill has been protested for nonpayment any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

Rev., s. 2321; 1899, c. 733, s. 171.

3154. How payment for honor must be made. The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

Rev., s. 2322; 1899, c. 733, s. 172.

3155. Declaration before payment for honor. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

Rev., s. 2323; 1899, c. 733, s. 173.

3156. Preference of parties offering to pay for honor. Where two or more persons offer to pay a bill for the honor of different parties the person whose payment will discharge most parties to the bill is to be given the preference.

Rev., s. 2324; 1899, c. 733, s. 174.

3157. Effect on subsequent parties, where bill is paid for honor. Where a bill has been paid for honor all parties subsequent to the party for whose honor it

is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

Rev., s. 2325; 1899, c. 733, s. 175.

3158. Where holder refuses to receive payment *supra protest*. Where the holder of a bill refuses to receive payment *supra protest* he loses his right of recourse against any party who would have been discharged by such payment.

Rev., s. 2326; 1899, c. 733, s. 176.

3159. Rights of payer for honor. The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor is entitled to receive both the bill itself and the protest.

Rev., s. 2327; 1899, c. 733, s. 177.

ART. 16. BILLS IN A SET

3160. Bills in a set constitute one bill. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

Rev., s. 2328; 1899, c. 733, s. 178.

3161. Rights of holders, where different parts are negotiated. Where two or more parts of a set are negotiated to different holders in due course the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

Rev., s. 2329; 1899, c. 733, s. 179.

3162. Liability of holder who indorses two or more parts of a set to different persons. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if such parts were separate bills.

Rev., s. 2330; 1899, c. 733, s. 180.

3163. Acceptance of bills drawn in sets. The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

Rev., s. 2331; 1899, c. 733, s. 181.

3164. Payment by acceptor of bills drawn in sets. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

Rev., s. 2332; 1899, c. 733, s. 182.

3165. Effect of discharging one of a set. Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

Rev., s. 2333; 1899, c. 733, s. 183.

ART. 17. PROMISSORY NOTES AND CHECKS

3166. Negotiable promissory note defined. A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order it is not complete until indorsed by him.

Rev., s. 2334; 1899, c. 733, s. 184.

Definition of promissory note: *Perry v. Taylor*, 148-362. To be negotiable the note must be payable to order or bearer: *Newland v. Moore*, 173-728; *Johnson v. Lassiter*, 155-47. Note is not rendered nonnegotiable by reason of the fact that it is under seal: *Christian v. Parrott*, 114-215; *Bank v. Michael*, 96-53. Validity of note not affected because it sets out consideration for which given: *Bank v. Michael*, 96-53. To render a note nonnegotiable it must show upon its face that promise to pay is conditional, or the amount to be paid is uncertain: *Ibid.*; see, also, sections 2982-2987.

3167. Check defined. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided the provisions of this chapter that are applicable to a bill of exchange payable on demand apply to a check.

Rev., s. 2335; 1899, c. 733, s. 185.

Cashier's checks, whether certified or otherwise, are classed with bills of exchange payable on demand: *Mfg. Co. v. Summers*, 143-102—and stipulation stamped upon face of check that it will positively not be paid to a certain company or its agents, is valid stipulation and binding upon holder, *Bank v. Bank*, 118-783.

Section referred to: *Trust Co. v. Bank*, 166-112.

3168. Within what time a check must be presented. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

Rev., s. 2336; 1899, c. 733, s. 186.

If check negotiated by indorsement for value without notice and within reasonable time, holder can maintain position of holder in due course: *Mfg. Co. v. Summers*, 143-102.

Holder of check upon bank, drawn before but presented after bank's assignment for benefit of creditors, is not entitled to amount thereof as against assignee: *Hawes v. Blackwell*, 107-196.

Holder of check upon bank located in town of residence may present same for payment on day after it is drawn, unless holder had information of its precarious condition: *Bank v. Alexander*, 84-30.

For discussion of rights of holder as against bank, drawer of check and assignee of bank, see *Hawes v. Blackwell*, 107-196; see, also, section 3171.

Section referred to: *Trust Co. v. Bank*, 166-112.

3169. Effect of certification of check. Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance.

Rev., s. 2337; 1899, c. 733, s. 187.

Certification of a check is an acceptance by the bank: *Drewry v. Davis*, 151-295. Holder of check cannot maintain action against bank upon which check drawn until after its acceptance by bank: *Bank v. Bank*, 118-783; *Hawes v. Blackwell*, 107-202.

3170. Effect, where holder of check procures it to be certified. Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

Rev., s. 2338; 1899, c. 733, s. 188.

Having a check certified is an acceptance by the holder: *Drewry v. Davis*, 151-295.

3171. Check not assignment of funds. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.

Rev., s. 2339; 1899, c. 733, s. 189.

Depositor is creditor of bank, his deposit becoming part of general fund, the property of bank, and subject to assignment by bank: *Hawes v. Blackwell*, 107-196—and though holder of check is, to the extent of his check, assignee of depositor's debt due him by bank, yet he has no lien upon deposit for amount of check, though payee or holder of check has an interest in deposit as against drawer, subject to bank's right to pay outstanding checks before notice, *Ibid.*

Giving of check upon bank is not, unless it is accepted by bank, an assignment of claim of depositor, and passes no title, legal or equitable, to his money on deposit in such bank: *Perry v. Bank*, 131-117. Action cannot be sustained against bank by payee of check unless check is accepted or certified by bank: *Trust Co. v. Bank*, 166-112; *Perry v. Bank*, 131-119; *Bank v. Bank*, 118-783; *Hawes v. Blackwell*, 107-202—though drawer has funds on deposit sufficient for its payment against which bank has no claim, *Perry v. Bank*, 131-117.

CHAPTER 59

NOTARIES

- 3172. Appointment and commission; term of office.
- 3173. To qualify before clerk; record of qualification.
- 3174. Clerks notaries ex officio; may certify own seals.
- 3175. Powers of notaries.
- 3176. May exercise powers in any county.
- 3177. Expiration of commission to be stated after signature.
- 3178. Fees of notaries.
- 3179. Notarial seal.

3172. **Appointment and commission; term of office.** The governor may, from time to time, at his discretion, appoint one or more fit persons in every county to act as notaries public, and shall issue to each a commission. They shall hold their office for two years from and after the date of their appointment.

Rev., ss. 2347, 2348; Code, ss. 3304, 3305.

A notary public is an officer, and a woman cannot therefore be a notary: *State v. Knight*, 169-333.

3173. **To qualify before clerk; record of qualification.** Upon exhibiting their commission to the clerk of the superior court of the county in which they are to act, the notaries shall be duly qualified by taking before said clerk an oath of office, and the oaths prescribed for officers. A certificate of the commission shall be deposited with the clerk and filed among the records, and he shall note on his minutes the qualification of the notary public.

Rev., ss. 2347, 2348; Code, ss. 3304, 3305.

See *State v. Knight*, 169-333.

3174. **Clerks notaries ex officio; may certify own seals.** The clerks of the superior court may act as notaries public, in their several counties, by virtue of their office as clerks, and may certify their notarial acts under the seals of their respective courts.

Rev., s. 2349; Code, s. 3306; R. C., c. 75, s. 3; 1833, c. 7, ss. 1, 2.

Clerk of superior court as notary: *Lawrence v. Hodges*, 92-672.

3175. **Powers of notaries.** Notaries public, in and out of the state, have power to take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds and other instruments of writing, to take depositions and to administer oaths and affirmations in matters incident or belonging to the duties of their office, and to take affidavits to be used before a court, judge or other officer, within the state, and have power to take the privy examination of *femes covert*.

Rev., s. 2350; Code, s. 3307; 1866, c. 30; 1879, c. 128.

For power to take acknowledgments and privy examinations of married women, see sections 997, 1000, 3293. For power as commissioner of affidavits, see section 840. For protest of notes, bills, etc., by notary, see section 3136. Power to take depositions, section 1809. Probate after expiration of commission is void, but act of *de facto* officer is effectual as to third persons: *Hughes v. Long*, 119-52; *Gilliam v. Reddick*, 26-368. The taking of acknowledgment of a deed by a justice of the peace, commissioner, or notary public is a judicial or at least a quasi-judicial act: *Long v. Crews*, 113-256; *Piland v. Taylor*, 113-1; *Paul v. Carpenter*, 70-502;

see, also, *State v. Knight*, 169-333. **Registration upon an acknowledgment before an officer not authorized to take it is not even notice to creditors and subsequent purchasers:** *Long v. Crews*, 113-256, and cases cited; see, also, *Bank v. Redwine*, 171-559.

An officer interested in a deed, either as party, trustee or cestui que trust, is disqualified to take acknowledgment of its execution: *Long v. Crews*, 113-256; *Lance v. Tainter*, 137-249; *Joines v. Johnson*, 133-487; *McAllister v. Purcell*, 124-262; *Blanton v. Bostic*, 126-421; *Land Co. v. Jennett*, 128-3; *Freeman v. Person*, 106-251; but see *Trenwith v. Smallwood*, 111-132. The fact that officer taking acknowledgment or proof is employed by grantee does not invalidate unless such officer has an interest in it himself: *Smith v. Lumber Co.*, 144-47; *Bank v. Ireland*, 122-571.

3176. May exercise powers in any county. Notaries public have full power and authority to perform the functions of their office in any and all counties of the state, and full faith and credit shall be given to any of their official acts where-soever the same shall be made and done.

Rev., s. 2351; 1891, c. 248.

3177. Expiration of commission to be stated after signature. Notaries public shall state after each official signature by them the date of the expiration of their commissions; but the failure to do so shall not thereby invalidate their official acts.

Rev., s. 2351a.

3178. Fees of notaries. Notaries public and other persons acting as such shall be allowed the sum of fifty cents for protesting for nonacceptance or for nonpayment, or for both when done at the same time, any order, draft, note, bond or bill or any other thing necessary to be protested, and the sum of ten cents for each notice sent in connection therewith. For other necessary services, where no fee is fixed, they shall be allowed twenty cents for every ninety words. Cases of protest concerning vessels or other cargoes shall not be affected by this section.

Rev., s. 2800; Code, s. 3749; 1889, c. 446; 1895, c. 296; 1903, c. 734.

Fees of notaries are created and regulated entirely by statute: *Cider and Vinegar Co. v. Carroll*, 124-555.

3179. Notarial seal. Official acts by notaries public shall be attested by their notarial seals.

Rev., s. 2352.

Name is not necessary part of seal: *Deans v. Pate*, 114-194. Jurat of pleadings without seal is invalid: *Tucker v. Life Assn.*, 112-796.

CHAPTER 60

NUISANCES AGAINST PUBLIC MORALS

- 3180. What are nuisances under this chapter.
- 3181. Action for abatement; injunction.
- 3182. When triable; evidence; dismissal of complaint.
- 3183. Violation of injunction; punishment.
- 3184. Order abating nuisance; what it shall contain.
- 3185. Application of proceeds of sale.
- 3186. How order of abatement may be canceled.
- 3187. Attorney's fees may be taxed as costs.

3180. What are nuisances under this chapter. Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, prostitution, gambling, or illegal sale of whiskey is guilty of nuisance, and the building, erection, or place, or the ground itself, in or upon which such lewdness, assignation, prostitution, gambling, or illegal sale of liquor is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.

1919, c. 288; P. L. 1913, c. 761, s. 25.

See *State v. Webber*, 107-962; *Godwin v. Telephone Co.*, 136-258; *State v. Boyd*, 175-791; *State v. Price*, 175-804. See **section 4347**.

3181. Action for abatement; injunction. Whenever a nuisance is kept, maintained, or exists as defined in this chapter, the city prosecuting attorney, the solicitor, or any citizen of the county may maintain civil action in the name of the state of North Carolina upon the relation of such city prosecuting attorney, solicitor, or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists. In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor, alleging that the nuisance complained of exists, allow a temporary writ of injunction without bond, if it shall be made to appear to the satisfaction of the judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as complainant may elect, unless the judge, by previous order, shall have directed the form and manner in which it shall be presented. When an injunction has been granted it shall be binding on the defendant throughout the county in which it was issued, and any violation of the provisions of injunction herein provided shall be a contempt, as hereinafter provided.

1919, c. 288; P. L. 1919, c. 761, s. 26.

3182. When triable; evidence; dismissal of complaint. The action when brought shall be triable at the first term of court after service of the summons has been made, and in such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen, it shall not be dismissed except upon a sworn statement made by the complainant and his attorney, setting forth the reason why the action should be dismissed, and the dismissal approved by the city prosecuting attorney, or solicitor, in writing or in open court. If the court

is of the opinion that the action ought not to be dismissed, he may direct the city prosecuting attorney, or the solicitor, to prosecute said action to judgment; and if the action continued more than one term of court, any citizen of the county, or the county attorney, may be substituted for the complaining party and prosecute said action to judgment. If the action is brought by a citizen, and the court finds there was no reasonable ground or cause of said action, the costs may be taxed to such citizen.

1919, c. 288; P. L. 1913, c. 761, s. 27.

Evidence admissible in such cases, see section 4347.

3183. Violation of injunction; punishment. In case of the violation of any injunction granted under the provisions of this chapter, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred or more than one thousand dollars, or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment.

1919, c. 288; P. L. 1913, c. 761, s. 28.

3184. Order abating nuisance; what it shall contain. If the existence of the nuisance be established in an action as provided in this chapter, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the cause, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released. If any person shall break and enter, or use said building, erection, or place so directed to be closed, he shall be punished as for contempt, as provided in the preceding section. For moving and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court.

1919, c. 288; P. L. 1913, c. 761, s. 29.

For forfeiture of property for violation of statutes, see *Daniels v. Homer*, 139-219; *Skinner v. Thomas*, 171-98.

3185. Application of proceeds of sale. The proceeds of the sale of the personal property as provided in the preceding section shall be applied in the payment of the costs of the action and abatement, and the balance, if any, shall be paid to the defendant.

1919, c. 288; P. L. 1913, c. 761, s. 30.

3186. How order of abatement may be canceled. If the owner appears and pays all cost of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk of the superior court, conditioned that he will immediately abate said nuisance, and prevent the same from being established or kept within a period of one year thereafter, the court may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner,

and said order of abatement canceled so far as same may relate to said property; and if the proceeding be a civil action, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law.

1919, c. 288; P. L. 1913, c. 761, s. 31.

3187. Attorney's fees may be taxed as costs. The court shall tax as part of the cost in any action brought hereunder such fee for the attorney prosecuting the action or proceedings as may in the court's discretion be reasonable remuneration for the services performed by such attorney.

1919, c. 288; P. L. 1913, c. 761, s. 32.

CHAPTER 61

OATHS

ART. 1. GENERAL PROVISIONS.

- 3188. Oaths to be administered with solemnity.
- 3189. Administration of oath upon the Gospels.
- 3190. Administration of oath with uplifted hand.
- 3191. Affirmation of Quakers and others.
- 3192. Oaths of corporations.
- 3193. Oath to support constitution of United States; all officers to take.
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- 3195. When deputies may administer.
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- 3197. When county surveyors may administer oaths.
- 3198. Certain oaths validated.

ART. 2. FORMS OF OFFICIAL AND OTHER OATHS.

- 3199. Oaths of sundry persons; forms.

ART. 1. GENERAL PROVISIONS

3188. Oaths to be administered with solemnity. Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, such oaths, therefore, ought to be taken and administered with the utmost solemnity.

Rev., s. 2353; R. C., c. 76, s. 1; 1777, c. 108, s. 2.

This section applies to manner of taking and administering oath, as well as to substance: *Pearre v. Folb*, 123-239; *State v. Davis*, 69-383.

One who believes in the existence of a Supreme Being and that God will punish in this world for every sin committed, though he does not believe in punishment after death, is competent to be sworn: *Shaw v. Moore*, 49-25. For further discussion as to competency of witness to take the oath, see *State v. Pitt*, 166-268. The ruling of the judge as to competency of witness to take the oath is conclusive: *Ibid*.

An oath administered to a juror in the manner prescribed by statute is sufficient; the juror need not repeat the words, "So help me, God": *State v. Paylor*, 89-539.

The taking of an oath of office is a mere incident and constitutes no part of the office, and the office may exist without it: *Bryan v. Patrick*, 124-662; *Clark v. Stanley*, 66-59.

An oath to support the constitution of the state and of the United States is required of officers, but not of placemen: *Worthy v. Barrett*, 63-199.

No objection after verdict to manner of juror's oath: *State v. Council*, 129-517—or to failure to swear a witness, *State v. Gee*, 92-756—or to swearing of an atheist, *State v. Davis*, 80-412.

3189. Administration of oath upon the Gospels. Judges and justices of the peace, and other persons who may be empowered to administer oaths, shall (except in the cases in this chapter excepted) require the party sworn to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has imprecated on his own head; and he shall kiss the Holy Gospel, as a seal of confirmation to the said engagements.

Rev., s. 2354; Code, s. 3309; R. C., c. 76, s. 1; 1777, c. 108, s. 2.

The manner of swearing is the form adapted to the religious belief of the general mass of citizens for the sake of convenience and uniformity: *State v. Pitt*, 166-268, citing *Shaw v. Moore*, 49-25.

Statute must be strictly followed: *Pearre v. Folb*, 123-239; *State v. Owen*, 72-612; *State v. Davis*, 69-383. The administration of an oath to a witness is an official act of the court, and it being shown affirmatively that an oath was administered to the defendant in open court on the Bible, it is presumed that it is rightly done: *State v. Mace*, 86-668. The administration of an oath is a ministerial act, and may be done by any one in the presence and by the direction of the court, but is the act of the court: *State v. Knight*, 84-789; *State v. Mace*, 86-668; *Rowland v. Thompson*, 65-110. The coroner, and not a justice of the peace, is the one authorized to administer oaths in a coroner's inquest: *State v. Knight*, 84-389. Irregular for deputy sheriff to swear appraisers of homestead: *Oates v. Munday*, 127-444. Deputy clerk may take affidavit in claim and delivery proceedings: *Jackson v. Buchanan*, 89-74. Where words "you swear" were omitted by clerk, which was reprehensible, under the circumstances of this case it did not vitiate the oath: *State v. Owen*, 72-605.

As to cases excepted in above section, see sections 3190, 3191.

3190. Administration of oath with uplifted hand. When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel; and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely:

I, A. B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known (etc., as the words of the oath may be).

Rev., s. 2355; Code, s. 3310; R. C., c. 76, s. 2; 1777, c. 108, s. 3.

If usual form of oath upon Holy Evangelists is dispensed with, and an appeal or affirmation is substituted, it must appear that the person who affirmed had conscientious scruples, else the appeal or affirmation is invalid: *State v. Davis*, 69-385.

As to the validity of the oath administered to an elector by the registrar where elector only affirms by uplifted hand, see *DeBerry v. Nicholson*, 102-465; see, also, section 5940.

When a witness comes before a tribunal to be sworn it is to be presumed that he has settled the point with himself in what manner he will be sworn, and he should make it known to the officer of the court; and should he be sworn with uplifted hand, though not conscientiously scrupulous of swearing on the Gospels, and depose falsely, he subjects himself to the pains and penalties of perjury: *State v. Whisenhurst*, 9-458; see sections 4264-4267.

For interpretation of word "oath" to mean "affirmation," see section 3939.

3191. Affirmation of Quakers and others. The solemn affirmation of Quakers, Moravians, Dunkers and Mennonites, made in the manner heretofore used and accustomed, shall be admitted as evidence in all civil and criminal actions; and in all cases where they are required to take an oath to support the constitution of the state, or of the United States, or an oath of office, they shall make their solemn affirmation in the words of the oath beginning after the word "swear"; which affirmation shall be effectual to all intents and purposes.

Rev., s. 2356; Code, s. 3311; R. C., c. 76, s. 3; 1777, c. 108, s. 4; 1777, c. 115, s. 42; 1819, c. 1019; 1821, c. 1112.

3192. Oaths of corporations. In all cases where a corporation is appointed administrator, executor, collector, or to any other fiduciary position, of which fiduciary an oath is required by law, such oath may be taken by such corporation by and through any officer or agent of said corporation who is authorized by law to

verify pleadings in behalf of such corporation; and any oath so taken shall be valid as the oath of such corporation. Any oath heretofore taken in the manner aforesaid in behalf of a corporation as such fiduciary is hereby validated as the oath of such corporation.

1919, c. 89, ss. 1, 2.

3193. Oath to support constitution of United States; all officers take. All members of the general assembly, and all officers who shall be elected or appointed to any office of trust or profit within the state, shall, agreeably to act of congress, take the following oath or affirmation:

I, A. B., do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States; so help me, God.

Which oath shall be taken before they enter upon the execution of the duties of the office.

Rev., s. 2357; Code, s. 3313; R. C., c. 76, s. 5; 1791, c. 342, s. 2.

Public officers who have not taken the required oaths of office are not entitled to the salaries attached to such offices: *Wiley v. Worth*, 61-171. The taking of an oath of office is a mere incident and constitutes no part of the office, and the office may exist without it: *Bryan v. Patrick*, 124-662; *Clark v. Stanley*, 66-59. An oath to support the constitution of the state and of the United States is required of officers, but not of placemen: *Worthy v. Barrett*, 63-199.

As to what is an office or place of trust or profit hereunder, see *Wooten v. Smith*, 145-476; *Doyle v. Raleigh*, 89-136; *Ellison v. Raleigh*, 89-125; *Barnhill v. Thompson*, 122-495; *Clark v. Stanley*, 66-59.

3194. Oath or affirmation to support state constitution; all officers to take. Every member of the general assembly, and every person who shall be chosen or appointed to hold any office of trust or profit in the state, shall, before taking his seat or entering upon the execution of the office, take and subscribe the following oath or affirmation:

I, A. B., do solemnly and sincerely swear (or affirm) that I will be faithful and bear true allegiance to the state of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the constitution of said state, not inconsistent with the constitution of the United States, to the best of my knowledge and ability; so help me, God.

Where such person shall be of the people called Quakers, Moravians, Mennonites or Dunkers, he shall take and subscribe the following affirmation:

I, A. B., do solemnly and sincerely declare and affirm that I will truly and faithfully demean myself as a peaceful citizen of North Carolina; that I will be subject to the powers and authorities that are or may be established for the good government thereof, not inconsistent with the constitution of the state and constitution of the United States, either by yielding an active or passive obedience thereto, and that I will not abet or join the enemies of the state, by any means, in any conspiracy whatever, against the state; that I will disclose and make known to the legislative, executive or judicial powers of the state all treasonable conspiracies which I shall know to be made or intended against the state.

Rev., s. 2358; Code, s. 3312; R. C., c. 76, s. 4; 1781, c. 342, s. 1.

See annotations under section 3193.

3195. When deputies may administer. In all cases where any civil officer, in the discharge of his duties, is permitted by the law to administer an oath, the deputy of such officer, when discharging such duties, shall have authority to

administer it, provided he is a sworn officer; and the oath thus administered by the deputy shall be as obligatory as if administered by the principal officer, and shall be attended with the same penalties in case of false swearing.

Rev., s. 2359; Code, s. 3316; R. C., c. 76, s. 7; 1836, c. 27, s. 2.

3196. Administration by certain officers. The chairman of the board of county commissioners and the chairman of the board of education of the several counties may administer oaths in any matter or hearing before their respective boards.

Rev., s. 2362; 1899, c. 89; 1889, c. 529.

For power of sheriff to administer oath in homestead allotment, see section 730. For power of register of deeds to administer oaths, see section 2500.

3197. When county surveyors may administer oaths. The county surveyors of the several counties are empowered to administer oaths to all such persons as are required by law to be sworn in making partition of real estate, in laying off widows' dower, in establishing boundaries and in surveying vacant lands under warrants.

Rev., s. 2361; Code, s. 3314; 1881, c. 144.

3198. Certain oaths validated. All oaths and affidavits made prior to the first day of March, nineteen hundred and fifteen, administered by authorized officers to persons with uplifted hands be and the same are hereby validated and made as legal and binding as if administered to persons laying hands on and kissing the Holy Evangelists of Almighty God, whether said oaths and affidavits were made by persons conscientiously scrupulous of taking a "book oath" or not, and whether such oaths and affidavits were made in other respects in strict compliance with section 3189 of this chapter: Provided, that this section shall not affect the rights of the parties in actions now pending nor in any manner affect prosecutions for perjury claimed to have been heretofore committed.

Rev., s. 2363; 1899, c. 50; 1915, c. 3.

ART. 2. FORMS OF OFFICIAL AND OTHER OATHS

3199. Oaths of sundry persons; forms. The oaths of office to be taken by the several persons hereafter named shall be in the words following the names of said persons respectively:

ADMINISTRATOR

You swear (or affirm) that you believe A. B. died without leaving any last will and testament; that you will well and truly administer all and singular the goods and chattels, rights and credits of the said A. B., and a true and perfect inventory thereof return according to law; and that all other duties appertaining to the charge reposed in you, you will well and truly perform, according to law, and with your best skill and ability; so help you, God.

ATTORNEY AT LAW

I, A. B., do swear (or affirm) that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability; so help me, God.

ATTORNEY-GENERAL, STATE SOLICITORS AND COUNTY ATTORNEYS

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of attorney-general (solicitor for the state or attorney for the state in the county of -----); I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability; so help me, God.

AUDITOR

I, A. B., do solemnly swear (or affirm) that I will well and truly execute the trust reposed in me as auditor, without favor or partiality, according to law, to the best of my knowledge and ability; so help me, God.

BOOK DEBT OATH

You swear (or affirm) that the matter in dispute is a book account; that you have no means to prove the delivery of such articles, as you propose to prove by your own oath, or any of them, but by yourself; and you further swear that the account rendered by you is just and true; and that you have given all just credits; so help you, God.

BOOK DEBT OATH FOR ADMINISTRATOR

You, as executor or administrator of A. B., swear (or affirm) that you verily believe this account to be just and true, and that there are no witnesses, to your knowledge, capable of proving the delivery of the articles therein charged; and that you found the book or account so stated, and do not know of any other or further credit to be given than what is therein given; so help you, God.

CLERK OF THE SUPREME COURT

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will give, to any person whatsoever, any gratuity, gift, fee or reward, in consideration of my appointment to the office of clerk of the supreme court of North Carolina; nor have I sold or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in this state; I do further swear that I will execute the office of clerk of the supreme court without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

CLERK OF THE SUPERIOR COURT

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will I give, to any person whatsoever, any gratuity, fee, gift or reward, in consideration of my election or appointment to the office of clerk of the superior court for the county of -----; nor have I sold, or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in the state; and I do further swear that I will execute the office of clerk of the superior court for the county of ----- without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

COMMISSIONERS ALLOTING A YEAR'S PROVISIONS

You and each of you swear (or affirm) that you will lay off and allot to the petitioner a year's provisions for herself and family, according to law, and with your best skill and ability; so help you, God.

COMMISSIONERS DIVIDING AND ALLOTING REAL ESTATE

You and each of you swear (or affirm) that, in the partition of the real estate now about to be made by you, you will do equal and impartial justice among the several claimants, according to their several rights, and agreeably to law; so help you, God.

COMMISSIONER OF WRECKS

I, A. B., do solemnly swear (or affirm) that I will truly and faithfully discharge the duties of a commissioner of wrecks, for the district of -----, in the county of -----, according to law; so help me, God.

CONSTABLE

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of constable; I will see and cause the peace of the state to be well and truly preserved and kept, according to my power; I will arrest all such persons as, in my sight, shall ride or go armed offensively, or shall commit or make any riot, affray or

other breach of the peace; I will do my best endeavor, upon complaint to me made, to apprehend all felons and rioters or persons riotously assembled, and if any such offenders shall make resistance with force, I will make hue and cry, and will pursue them according to law, and will faithfully and without delay execute and return all lawful precepts to me directed; I will well and truly, according to my knowledge, power and ability, do and execute all other things belonging to the office of constable, so long as I shall continue in office; so help me, God.

COTTON WEIGHER FOR PUBLIC

I, -----, public weigher for the city of ----- (or as the case may be), do solemnly swear that I will justly, impartially and without any deduction, except as may be allowed by law, weigh all cotton that may be brought to me for that purpose, and tender a true account thereof to the parties concerned, if required so to do; so help me, God.

ENTRY-TAKER

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of entry-taker for the county of ----- according to law; so help me, God.

EXECUTOR

You swear (or affirm) that you believe this writing to be and contain the last will and testament of A. B., deceased; and that you will well and truly execute the same by first paying his debts and then his legacies, as far as the said estate shall extend or the law shall charge you; and that you will well and faithfully execute the office of an executor, agreeably to the trust and confidence reposed in you, and according to law; so help you, God.

FINANCE COMMITTEE

I, A. B., do solemnly swear (or affirm) that I will diligently inquire into all matters relating to the receipts and disbursements of county funds and a true report make, without partiality; so help me, God.

GRAND JURY—FOREMAN OF

You, as foreman of this grand inquest for the body of this county, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the state's counsel, your fellows' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave any one unpresented for fear, favor or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.

GRAND JURORS

The same oath which your foreman hath taken on his part, you and each of you shall well and truly observe and keep on your part; so help you, God.

GRAND JURY—OFFICER OF

You swear (or affirm) that you will faithfully carry all papers sent from the court to the grand jury, or from the grand jury to the court, without alteration or erasement, and without disclosing the contents thereof; so help you, God.

JURY—OFFICER OF

You swear (or affirm) that you will keep every person, sworn on this jury, together in some private or convenient place, without meat or drink (water excepted). You shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

JURY, IN A CAPITAL CASE

You swear (or affirm) that you will well and truly try, and true deliverance make, between the state and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence; so help you, God.

JURY, IN CRIMINAL ACTIONS NOT CAPITAL

You and each of you swear (or affirm) that you will well and truly try all issues in criminal actions which shall come before you during this term, and true verdicts give according to the evidence thereon; so help you, God.

(The same oath to talesmen, by using the word "day" instead of "term.")

JURY, IN CIVIL ACTIONS

You and each of you swear (or affirm) that you will well and truly try all civil actions which shall come before you during this term, and true verdicts give according to the evidence; so help you, God.

(The same oath to talesmen, by using the word "day" instead of "term.")

JURY, LAYING OFF DOWER

You and each of you swear (or affirm) that you will, without partiality and according to your best judgment, lay off and allot to A. B., widow of C. D., such dower in the lands of said C. D. as by law she is entitled to; so help you, God.

JURY, LAYING OFF ROADS AND ASSESSING DAMAGES

I, A. B., do solemnly swear (or affirm) that I will lay out the road, directed to be laid out by the board of commissioners of the county, to the greatest ease and advantage of the inhabitants, and with as little prejudice to the owners of land over which the same shall be laid out as may be; and will truly and impartially assess the damages which may be awarded by me for injuries done to lands, by the laying out of said road, without favor, affection, malice or hatred, to the best of my skill and knowledge; so help me, God.

JUDGE OF THE SUPREME COURT

I, A. B., do solemnly swear (or affirm) that in my office of justice of the supreme court of North Carolina I will administer justice without respect to persons, and do equal right to the poor and the rich, to the state and to individuals; and that I will honestly, faithfully and impartially perform all the duties of the said office according to the best of my abilities, and agreeably to the constitution and laws of the state; so help me, God.

JUDGE OF THE SUPERIOR COURT

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the state of North Carolina in the office of judge of the superior court of the said state; I will do equal law and right to all persons, rich and poor, without having regard to any person. I will not wittingly or willingly take, by myself or by any other person, any fee, gift, gratuity or reward whatsoever, for any matter or thing by me to be done by virtue of my office, except the fees and salary by law appointed; I will not maintain, by myself or by any other person, privately or openly, any plea or quarrel depending in any of the said courts; I will not delay any person of common right by reason of any letter or command from any person or persons in authority to me directed, or for any other cause whatsoever; and in case any letter or orders come to me contrary to law, I will proceed to enforce the law, such letters or order notwithstanding; I will not appoint any person to be clerk of any of the said courts but such of the candidates as appear to me sufficiently qualified for that office; and in all such appointments I will nominate without reward, hope of reward, prejudice, favor or partiality or any other sinister motive whatsoever; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

JUSTICE OF THE PEACE

I, A. B., do solemnly swear (or affirm) that as a justice of the peace of the county of -----, in all articles in the commission to me directed, I will do equal right to the poor and the rich, to the best of my judgment and according to the laws of the state; I will not, privately or openly, by myself or any other person, be of counsel in any quarrel or suit depending before me; the fines and ameracements that shall happen to be made, and the forfeitures that shall be incurred, I will cause to be duly entered without concealment;

I will not wittingly or willingly take, by myself or by any other person for me, any fee, gift, gratuity or reward whatsoever for any matter or thing by me to be done by virtue of my office, except such fees as are or may be directed and limited by statute; but well and truly I will perform my office of justice of the peace; I will not delay any person of common right, by reason of any letter or order from any person in authority to me directed, or for any other cause whatever; and if any letter or order come to me contrary to law I will proceed to enforce the law, such letter or order notwithstanding. I will not direct or cause to be directed to the parties any warrant by me made, but will direct all such warrants to the sheriffs or constables of the county, or the other officers or ministers of the state, or other indifferent persons, to do execution thereof; and finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, and according to the best of my skill and judgment, do equal and impartial justice to the public and to individuals; so help me, God.

REGISTER OF DEEDS

I, A. B., do solemnly swear (or affirm) that I will faithfully and truly, according to the best of my skill and ability, execute the duties of the office of register of deeds for the county of -----, in all things according to law: so help me, God.

SECRETARY OF STATE

I, A. B., do swear (or affirm) that I will, in all respects, faithfully and honestly execute the office of secretary of state of the state of North Carolina, during my continuance in office, according to law; so help me, God.

SHERIFF

I, A. B., do solemnly swear (or affirm) that I will execute the office of sheriff of ----- county to the best of my knowledge and ability, agreeably to law; and that I will not take, accept or receive, directly or indirectly, any fee, gift, bribe, gratuity or reward whatsoever, for returning any man to serve as a juror or for making any false return on any process to me directed; so help me, God.

STANDARD KEEPER

I, A. B., do swear (or affirm) that I will not stamp, seal or give any certificate for any steelyards, weights or measures, but such as shall, as near as possible, agree with the standard in my keeping; and that I will, in all respects, truly and faithfully discharge and execute the power and trust by law reposed in me, to the best of my ability and capacity; so help me, God.

STATE TREASURER

I, A. B., do swear (or affirm) that, according to the best of my abilities and judgment, I will execute impartially the office of state treasurer, in all things according to law, and account for the public taxes; and I will not, directly or indirectly, apply the public money to any other use than by law directed; so help me, God.

STRAY VALUERS

You swear (or affirm) that you will well and truly view and appraise the stray, now to be valued by you, without favor or partiality, according to your skill and ability; so help you, God.

SURVEYOR FOR A COUNTY

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of surveyor for the county of -----, according to law; so help me, God.

TREASURER FOR A COUNTY

I, A. B., do solemnly swear (or affirm) that, according to the best of my skill and ability, I will execute impartially the office of treasurer for the county of -----, in all things according to law; that I will duly and faithfully account for all public moneys that may come into my hands, and will not, directly or indirectly, apply the same, or any part thereof, to any other use than by law directed; so help me, God.

WITNESS TO DEPOSE BEFORE THE GRAND JURY

You swear (or affirm) that the evidence you shall give to the grand jury, upon this bill of indictment against A. B., shall be the truth, the whole truth, and nothing but the truth; so help you, God.

WITNESS IN A CAPITAL TRIAL

You swear (or affirm) that the evidence you shall give to the court and jury in this trial, between the state and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

WITNESS IN A CRIMINAL ACTION

You swear (or affirm) that the evidence you shall give to the court and jury in this action between the state and A. B. shall be the truth, the whole truth, and nothing but the truth; so help you, God.

WITNESS IN CIVIL CASES

You swear (or affirm) that the evidence you shall give to the court and jury in this cause now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

WITNESS TO PROVE A WILL

You swear (or affirm) that you saw C. D. execute (or heard him acknowledge the execution of) this writing as his last will and testament; that you attested it in his presence and at his request; and that at the time of its execution (or at the time the execution was acknowledged) he was, in your opinion, of sound mind and disposing memory; so help you, God.

GENERAL OATH

Any officer of the state or of any county or township, the form of whose oath is not given above, shall take an oath in the following form:

I, A. B., do swear (or affirm) that I will well and truly execute the duties of the office of _____ according to the best of my skill and ability, according to law; so help me, God.

Rev., s. 2360; Code, ss. 3057, 3315; 1903, c. 604; 1874-5, c. 58, s. 2; R. C., c. 76, s. 6.

CHAPTER 62

OFFICES AND PUBLIC OFFICERS

ART. 1. GENERAL PROVISIONS.

- 3200. No person shall hold more than one office.
- 3201. Holding office contrary to the constitution; penalty.
- 3202. Bargains for office void.
- 3203. Oath required before acting; penalty.
- 3204. Persons admitted to office deemed to hold lawfully.
- 3205. Officer to hold until successor qualified.
- 3206. Citizen to recover funds of county or town retained by delinquent official.
- 3207. Local: Officers compensated from fees to render statement; penalty; proceeds to school fund.

ART. 2. REMOVAL OF UNFIT OFFICERS.

- 3208. Officers subject to removal; for what offenses.
- 3209. Petition for removal; county attorney to prosecute.
- 3210. Petition filed with clerk; what it shall contain; answer.
- 3211. Suspension pending hearing; how vacancies filled.
- 3212. Precedence on calendar; costs.

ART. 1. GENERAL PROVISIONS

3200. No person shall hold more than one office. No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this state, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this state, or be eligible to a seat in either house of the general assembly; Provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes.

Rev., s. 2364; Const., Art. XIV, s. 7.

One man may not hold two offices: *Downtin v. Beardsley*, 126-119.

Legislature may attach additional duties to an existing office and it may afterwards lop off those duties and assign them to a new office, leaving the original office as it was before the additional duties were attached to it, and original officer must not claim both offices: *Ibid*.

But adding new duties to an office already in existence is not creating a new office: *McCullers v. Comrs.*, 158-75. And for the judge to appoint an attorney, who is federal officer, to prosecute temporarily for the solicitor is not holding two offices: *State v. Wood*, 175-809.

Acceptance of a second office by one already holding a public office operates ipso facto to vacate the first. While the officer has right to elect which he will retain, his election is deemed made when he accepts and qualifies for the second: *Barnhill v. Thompson*, 122-493; *Midgett v. Gray*, 158-133; s. c., 159-443; *Whitehead v. Pittman*, 165-89.

The question of holding two public offices at the same time does not depend as at common law upon incompatibility alone, but upon the constitution: *Barnhill v. Thompson*, 122-493.

A public office is not property; and this applies both to constitutional and statutory offices. The reason the legislature cannot abolish constitutional as well as statutory offices lies in the fact that the constitution itself has made provision for them, and not because there is any property in them: *Mial v. Ellington*, 134-138, overruling *Hoke v. Henderson*, 15-1, and cases based upon its ruling on these points.

“OFFICE OR PLACE OF TRUST OR PROFIT” INTERPRETED. As to the difference between “offices or places of trust or profit” and mere administrative agencies, see *Wooten v. Smith*, 145-476; *Groves v. Barden*, 169-8; *Clark v. Stanley*, 66-59; *Doyle v. Raleigh*, 89-136; *Barnhill v. Thompson*, 122-495; *Ellison v. Raleigh*, 89-125.

Under this section the "office or place of trust or profit" referred to means a public position involving a delegation to the individual of some part of the sovereign functions of the government to be exercised for the public benefit: *Wooten v. Smith*, 145-476; *Doyle v. Raleigh*, 89-136.

The true test of a public office is that it is a parcel of the administration of government, civil or military, or is itself created directly by the lawmaking power: *Eliason v. Coleman*, 86-236.

A public office is an agency of the state, and the person whose duty it is to perform this agency is a public officer: *Wooten v. Smith*, 145-476; *Day's case*, 124-362.

An employment by the state not connected with government, and not requiring any action as agent for the state, is not an office: *Nichols v. McKee*, 68-429; *Welker v. Bledsoe*, 68-457.

The distinction between officers and placemen is that the former is required to take an oath to support the constitutions of the state and the United States, while the latter are not: *Worthy v. Barrett*, 63-199.

A public office is a public trust, and public officers are merely the agents of the people: *State v. Godwin*, 123-697; *Basket v. Moss*, 115-457.

Where a statute imposes certain duties to be performed by an officer after expiration of term of office, their performance does not constitute a place or office of trust or profit so as to disqualify the former officer from holding another office at the same time: *McNeill v. Somers*, 96-467.

The following have been held to be offices: A director of a state institution, *Nichols v. McKee*, 68-429; *Welker v. Bledsoe*, 68-457—a policeman, *McIlhenny v. Wilmington*, 127-146—a county commissioner, *Barnhill v. Thompson*, 122-493—a member of county board of education, *Ibid.*—a county surveyor, *Dowtin v. Beardsley*, 126-119—county superintendent of roads, *Ibid.*—clerk superior court, *White v. Murray*, 126-156—chief of police, *Foard v. Hall*, 111-369—member of school committee, *Midgett v. Gray*, 159-443—commissioner of sinking fund in a municipal corporation, *Borden v. Goldsboro*, 173-661—deputy clerk of superior court, *Bank v. Redwine*, 171-559—a notary public, *State v. Knight*, 169-333—rural mail carrier, *Groves v. Barden*, 169-8.

A justice of the peace is an officer, but he is not excluded from holding another office: *State v. Lord*, 145-479.

A public administrator is not one holding an office within the meaning of this section: *Wooten v. Smith*, 145-476—nor is a deputy sheriff, *Railroad v. Fisher*, 109-1—nor is a member of a special investigating committee of the legislature a public officer such as would, under this section, oust him as member of the general assembly, *Bank v. Worth*, 117-152—nor a night watchman of a public building, *Doyle v. Raleigh*, 89-136—nor a mail contractor, or carrier for such contractor, *State v. Boone*, 132-1107.

3201. Holding office contrary to the constitution; penalty. If any person presumes to hold any office, or place of trust or profit, or is elected to a seat in either house of the general assembly, contrary to the seventh section of the fourteenth article of the constitution of the state, he shall forfeit and pay two hundred dollars to any person who will sue for the same.

Rev., s. 2365; Code, s. 1870; R. C., c. 77, s. 1; 1790, c. 319; 1792, c. 366; 1793, c. 393; 1796, c. 450; 1811, c. 811.

See *Groves v. Barden*, 169-8.

3202. Bargains for office void. All bargains, bonds and assurances made or given for the purchase or sale of any office whatsoever, the sale of which is contrary to law, shall be void.

Rev., s. 2366; Code, s. 1871; R. C., c. 77, s. 2; 5 and 6 Edw. VI, c. 16, s. 3.

Contracts to procure appointment to office are void, or to resign office in another's favor, traffic in public offices being against good morals and contrary to public policy: *Basket v. Moss*, 115-448.

Section 3959 prohibits a sheriff from letting to farm, in any manner, his county or part of it: *Cansler v. Penland*, 126-793, 125-578.

3203. Oath required before acting; penalty. Every officer and other person required to take an oath of office, or an oath for the faithful discharge of any duty imposed on him, and also the oath appointed for such as hold any office of trust or profit in the state, shall take all said oaths before entering on the duties of the office, or the duties imposed on such person, on pain of forfeiting five hundred dollars to the use of the poor of the county in or for which the office is to be used, and of being ejected from his office or place by proper proceedings for that purpose.

Rev., s. 2367; Code, s. 1873; R. C., c. 77, s. 4.

The taking of the oath of office is not indispensable, for the office may exist without it; it is a mere incident and constitutes no part of the office: *Bryan v. Patrick*, 124-662; *Midgett v. Gray*, 159-443; *Clark v. Stanley*, 66-59—and this is true also as to the salary or fees, *Ibid*.

3204. Persons admitted to office deemed to hold lawfully. Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void.

Rev., s. 2368; Code, s. 1872; R. C., c. 77, s. 3; 1844, c. 38, s. 2; 1848, c. 64, s. 1; Const., Art. IV, s. 25.

For penalty for acting as officer without giving bond, see *Bonds*, s. 325.

For quo warranto proceedings to test the title to a public office, see sections 869-887. One who professes to be the incumbent of an office and performs the duties of the same is estopped from denying the legality of his appointment: *State v. Long*, 76-254. A provision for an appointment to office "biennially" *ex vi termini* implies a two years term of office: *Bryan v. Patrick*, 124-651.

Legislature may, within reasonable limits, change the duties and diminish the emoluments of a constitutional office if the public welfare requires it to be done, and to this the incumbent must submit: *Fortune v. Comrs.*, 140-331, and cases therein cited.

An officer appointed for a definite time to a legislative office has no vested property therein or contract right thereto of which the legislature cannot deprive him: *Mial v. Ellington*, 134-131 (overruling *Hoke v. Henderson*, 15-1); see "office-holding cases" annotated under section 870.

A *de jure* officer is one who is in or entitled to the office as a right, while a *de facto* officer is one who discharges the duties of the office under color of title: *State ex rel. Norfleet v. Staton*, 73-546. *De facto* officer distinguished from a mere usurper: *Whitehead v. Pittman*, 165-89. There must be a legal office before one is a *de facto* officer: *State v. Shuford*, 128-591. Acts of *de facto* officers who exercise their office for considerable length of time are as effectual when they concern rights of third persons as if they were officers *de jure*: *Hughes v. Long*, 119-52; *DeBerry v. Nicholson*, 102-475; *State v. Davis*, 109-782; *State v. Lewis*, 107-967.

To constitute one an officer *de facto* there must be an actual exercise of the office and acquiescence of public authority long enough to cause, in the mind of a citizen, a strong presumption that officer was duly appointed: *Hughes v. Long*, 119-52. When it appears or is admitted that an act was not done by an officer *de jure*, it is incumbent upon the party relying upon the validity of his act to show that he was an officer *de facto*: *Ibid*.

Where an appointment is made by a *de facto* officer, holding an office to which is annexed the appointing power, such an appointee holds a title to the office against the appointee of a *de jure* officer subsequently made: *Baker v. Hobgood*, 126-149; *St. George v. Hardie*, 147-88.

Where there are two rival boards, both *de facto* and both exercising as far as possible the duties of the office, and each makes an appointment the same day to the same place, in such case the appointee of the *de facto* board which is subsequently adjudged to be the *de jure* board clearly has the title: *Baker v. Hobgood*, 126-149. When both officers are acting and claiming to be *de facto*, possession by the *de jure* officer excludes the consideration of any other claim: *Ibid*.

A clerk who held over from the day of general election, to wit, the first Thursday in August, until the first Monday in the ensuing September, when his successor was installed, was at least clerk de facto, and his acts cannot be collaterally impeached, and are valid as between third parties: *Threadgill v. R. R.*, 73-178.

3205. Officer to hold until successor qualified. All officers shall continue in their respective offices until their successors are elected or appointed, and duly qualified.

Rev., s. 2368; Code, s. 1872; R. C., c. 77, s. 3; 1848, c. 64, s. 2.

Unless otherwise provided, an officer duly appointed to fill a vacancy holds only until his successor is duly appointed or elected and qualifies: *Markham v. Simpson*, 175-135; *Salisbury v. Croom*, 167-223.

Where vacancy occurred in the office of superior court clerk, the appointee of the judge holds only until the next election at which members of the general assembly are chosen: *Rodwell v. Rowland*, 137-617, overruling *Deloatch v. Rogers*, 86-357.

3206. Citizen to recover funds of county or town retained by delinquent official. When an official of a county, city or town is liable upon his bond for unlawfully and wrongfully retaining by virtue of his office a fund, or a part thereof, to which the county, city or town is entitled, any citizen and taxpayer may, in his own name for the benefit of the county, city or town, institute suit and recover from the delinquent official the fund so retained. Any county commissioners, aldermen, councilmen or governing board who fraudulently, wrongfully and unlawfully permit an official so to retain funds shall be personally liable therefor; any citizen and taxpayer may, in his own name for the benefit of the county, city or town, institute suit and recover from such county commissioners, aldermen, councilmen or governing board, the fund so retained. Before instituting suit under this section, the citizen and taxpayer shall file a statement before the county commissioners, treasurer, or other officers authorized by law to institute the suit, setting forth the fund alleged to be retained or permitted to be retained, and demanding that suit be instituted by the authorities authorized to sue within sixty days. The citizen and taxpayer so suing shall receive one-third part, up to the sum of five hundred dollars, of the amount recovered, to indemnify him for his services, but the amount received by the taxpayer and citizen as indemnity shall in no case exceed five hundred dollars.

1913, c. 80.

This applies to money collected before the act was passed; and without such statute a taxpayer may, in a proper case, maintain an action to recover public funds: *Waddill v. Masten*, 172-582.

3207. Local: Officers compensated from fees to render statement; penalty; proceeds to school fund. Every clerk of the superior court, register of deeds, sheriff, coroner, surveyor, or other county officer, whose compensation for services performed shall be derived from fees, shall render to the board of county commissioners of their respective counties, on the first Monday in December of each year, a statement, verified under oath, showing: first, the total gross amount of all fees collected during the preceding fiscal year; second, the total amount paid out during the preceding fiscal year for clerical or office assistance. Any county officer, subject to this section, who refuses or fails to file such report as above provided, on or before the first Monday in December, shall be subject to a fine of twenty-five dollars and ten dollars additional for each day or fraction of a day

such failure shall continue. The board of county commissioners shall assess and collect the penalty above provided for, and apply same to the general school fund of the county. The first report under this section shall be for the fiscal year beginning December twelfth, one thousand nine hundred and thirteen.

This section applies only to the counties of Anson, Bertie, Bladen, Carteret, Chowan, Currituck, Duplin, Halifax, Harnett, Haywood, Hertford, Johnston, Jones, Moore, Pender, Perquimans, Pitt, Randolph, Richmond, Rowan, Scotland, Union, Vance, Warren, Washington, Wayne, Wilson.

1913, c. 97; Ex. Sess. 1913, c. 10.

Action by taxpayer to enforce the payment of fees collected: *Waddill v. Masten*, 172-584. Where sheriff's office was placed on a salary basis by special act, and fees and commissions were to be paid over to treasurer, this applied to uncollected taxes in the hands of the sheriff upon reelection: *Mills v. Deaton*, 170-386—but where such an act takes effect from the expiration of the terms of present incumbents, it will not apply to taxes in the hands of retiring sheriff, *Comrs. v. Bain*, 173-377.

ART. 2. REMOVAL OF UNFIT OFFICERS

3208. Officers subject to removal; for what offenses. Any city prosecuting attorney, any sheriff, police officer, or constable, shall be removed from office by the judge of the superior court upon charges made in writing, and hearing thereunder, for the following cause:

First. For willful or habitual neglect or refusal to perform the duties of his office.

Second. For willful misconduct or maladministration in office.

Third. For corruption.

Fourth. For extortion.

Fifth. Upon conviction of a felony.

Sixth. For intoxication, or upon conviction of being intoxicated.

1919, c. 288; P. L. 1913, c. 761, s. 20.

3209. Petition for removal; county attorney to prosecute. The complaint or petition shall be entitled in the name of the state of North Carolina, and may be filed upon the relation of any five qualified electors of the county in which the person charged is an officer, upon the approval of the county attorney of such county, or the solicitor of the district, or by any such officer upon his own motion. It shall be the duty of the county attorney or solicitor to appear and prosecute this proceeding.

1919, c. 288; P. L. 1913, c. 761, s. 21.

3210. Petition filed with clerk; what it shall contain; answer. The accused shall be named as defendant, and the petition shall be signed by some elector, or by such officer. The petition shall state the charges against the accused, and may be amended, and shall be filed in the office of the clerk of the superior court of the county in which the person charged is an officer. The accused may at any time prior to the time fixed for hearing file in the office of the clerk of the superior court his answer, which shall be verified.

1919, c. 288; P. L. 1913, c. 761, s. 22.

3211. Suspension pending hearing; how vacancy filled. Upon the filing of the petition in the office of the clerk of the superior court, and the presentation of the

same to the judge, the judge may suspend the accused from office if in his judgment sufficient cause appear from the petition and affidavit, or affidavits, which may be presented in support of the charges contained therein. In case of suspension, as herein provided, the temporary vacancy shall be filled in the manner provided by law for filling of the vacancies in such office.

1919, c. 288; P. L. 1913, c. 761, s. 23.

3212. Precedence on calendar; costs. In the trial of the cause in the superior court the cause shall be advanced and take precedence over all other causes upon the court calendar, and shall be heard at the next term after the petition is filed, provided the proceedings are filed in said court in time for said action to be heard. The superior court shall fix the time of hearing. If the final termination of such proceedings be favorable to any accused officer, said officer shall be allowed the reasonable and necessary expense, including a reasonable attorney fee, to be fixed by the judge, he has incurred in making his defense, by the county, if he be a county officer, or by the city or town in which he holds office, if he be a city officer. If the action is instituted upon the complaint of citizens as herein provided, and it appears to the court that there was no reasonable cause for filing the complaint, the costs may be taxed against the complaining parties.

1919, c. 288; P. L. 1913, c. 761, s. 24.

CHAPTER 63

PARTITION

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ART. 1. PARTITION OF REAL PROPERTY

3213. Partition is a special proceeding. Partition under this chapter shall be by special proceeding, and the procedure shall be the same in all respects as prescribed by law in special proceedings, except as modified herein.

Rev., s. 2485; Code, s. 1923; 1868-9, c. 122, s. 33.

Procedure same as in other special proceedings, see *Skinner v. Carter*, 108-106; *Capps v. Capps*, 85-408.

This chapter does not apply to case where tenants in common have by contract agreed upon terms as to manner and extent of partition: *Keener v. Den*, 73-132.

Cases where partition by consent: *Harrison v. Ray*, 108-215; *Carson v. Carson*, 122-645; *Camp Mfg. Co. v. Liverman*, 123-7; *Fort v. Allen*, 110-183—or where land partitioned according to provision of will, *Midgett v. Midgett*, 117-8; *McClure v. Taylor*, 109-641; *Hays v. Davis*, 105-482; *Cheatham v. Crews*, 83-313.

3214. Venue in partition. The proceedings for partition, actual or by sale, must be instituted in the county where the land lies. If the land to be partitioned lies in more than one county, the proceedings may be instituted in either of the counties.

Rev., s. 2486; Code, s. 1898; 1868-9, c. 122, s. 7.

3215. Petition by cotenant. One or more persons claiming real estate as joint tenants or tenants in common may have partition by petition to the superior court.

Rev., s. 2487; Code, s. 1892; 1868-9, c. 122, s. 1.

WHO ARE PROPER PARTIES. Persons having reversionary interest in land are necessary parties in proceeding hereunder, as well as life tenant: *Bell v. Adams*, 81-118. Every tenant in common must be made party, as the whole tract shall be partitioned or sold—though shares may be allotted to some of the tenants, while a sale may be decreed as to others: *Brooks v. Austin*, 95-474. Contingent remaindermen, not represented either by guardian or by attorney, and not named in the process, pleadings or decree, are not bound by proceedings for partition instituted by the other remaindermen and life tenant: *Whitesides v. Cooper*, 115-570. Mother and only living children cannot represent as a class a child en ventre sa mere in partition proceedings of lands of which father died seized, so as to pass inheritance of unborn child to purchaser: *Deal v. Sexton*, 144-157. Widow entitled to dower in land, and administratrix of tenant in common are necessary parties to petition for partition: *Gregory v. Gregory*, 69-522. Where there are contingent interests to be affected by partition proceedings, partition will be decreed if there is some one before the court to represent such interests: *Overman v. Tate*, 114-571. A proceeding in partition does not bind an infant who is not made a party nor properly represented: *Vick v. Tripp*, 153-90—but he may ratify by dealing with property after coming of age, *Vick v. Wooten*, 171-121.

Where petition alleges tenancy in common as to one tract and the answer alleges that the tenancy in common also extends to another tract, the court will direct partition as to both; but not when third persons are also interested in one tract and not in the other: *Luther v. Luther*, 157-499.

AS TO THE PETITION. Allegation of possession not vitally essential to petition for partition: *Alexander v. Gibbon*, 118-796; overruling *Alsbrook v. Reid*, 89-151; but see *Wood v. Sugg*, 91-93—nor is averment of title, *Graves v. Barrett*, 126-267. It is not necessary to verify a petition: *Lindsay v. Beaman*, 128-189. Allegation in petition hereunder that defendant has an estate in certain number of acres of said land is insufficient: *Baum v. Shooting Club*, 96-310. Petition for partition which asks division of several separate and distinct tracts of land not held by same tenants in common is multifarious: *Simpson v. Wallace*, 83-477. While petition for partition is defective which does not set forth that petitioners are tenants in common and in possession of land, yet omission of allegation does not deprive clerk of jurisdiction hereunder: *Godwin v. Early*, 114-11; *McGill v. Buie*, 106-242; *Alsbrook v. Reid*, 89-151. As to sufficiency of demurrer to petition, see *McGill v. Buie*, 106-242.

WHERE PLEA OF "SOLE SEIZIN" ENTERED. In petition hereunder title not in issue unless defendant pleads sole seizin: *Graves v. Barrett*, 126-267. Effect of plea of sole seizin hereunder is practically to convert proceeding into action of ejectment and to bring into operation rules of proof and estoppel applicable to that action: *Ditmore v. Rexford*, 165-620; *Sipe v. Herman*, 161-107; *Alexander v. Gibbon*, 118-796; *Honeycutt v. Brooks*, 116-788; *Hatcher v. Hatcher*, 127-201; *Shannon v. Lamb*, 126-47; *Cox v. Lumber Co.*, 124-80. **One**

pleading sole seizin must have defense bond: *Gill v. Porter*, 174-569; *Copper v. Warlick*, 109-672. If the plea of "sole seizin" is not put in before the order of partition is made, it will be considered as waived, and the parties to the proceeding will be taken to be tenants in common: *Wright v. McCormick*, 69-14. What amounts to a plea of "sole seizin": *Gregory v. Pinnix*, 158-147. Under a plea of sole seizin the plaintiff has the burden of proof to make out a prima facie case of tenancy in common: *Lester v. Harward*, 173-83.

GENERALLY. Where plea of sole seizin not set up, parties, for purpose of proceedings, are to be taken as tenants in common, and only inquiry is as to interest owned: *Graves v. Barrett*, 126-267.

Where petitioner merely alleged ownership of five-eighths, evidence tending to show mutual mistake in deed under which defendant claimed was properly excluded: *Buchanan v. Harrington*, 141-39—but petitioner might have alleged mutual mistake by amendment in the superior court after case had been transferred, *Ibid*.

Tenants in common are entitled to partition as of right: *Holmes v. Holmes*, 55-334. Deed conveying a tract of land (describing it) upon which there was a mineral spring, to several persons "one-eighth share of said mineral waters" each, and containing a provision that one of the vendees and his "heirs and assigns are to have free access to said springs," creates a simple estate in common, of which partition may be made: *Foreman v. Hough*, 98-388.

Order appointing commissioners is interlocutory and not appealable: *Navigation Co. v. Worrell*, 133-93. Ruling of trial court affirming clerk's order for actual partition of land is not reviewable: *Navigation Co. v. Worrell*, 133-93.

Effect of allotment between four out of six tenants in common: *Carson v. R. R.*, 128-98.

Where defendant in partition fails to ask for jury trial until after clerk has ordered partition he thereby waives the right thereto: *Navigation Co. v. Worrell*, 133-93.

For annotations on statute of limitations barring tenants in common of land, see section 430.

Where there has been ouster, or where defendant controverts plaintiff's title, cotenant may bring action for partition to term instead of before clerk: *Harris v. Wright*, 118-422; *Jones v. Cohen*, 82-75; *Withrow v. Biggerstaff*, 82-82.

No legal partition can be made between tenants in common without deed or writing: *Rhea v. Craig*, 141-602—nor where married women and infants are interested, *Camp Mfg. Co. v. Liverman*, 123-7.

Where it appears to court in proceeding hereunder that it may become necessary to sell lands for assets, it should stay partition until personal representative can have reasonable opportunity to apply for license: *Garrison v. Cox*, 99-478—but personal representative cannot apply for sale in partition proceeding, *Ibid*.

Where land of ancestor partitioned within two years after letters of administration, same continues liable to payment of ancestor's debts: *McArtan v. McLaughlin*, 88-391; see *Hinton v. Whitehurst*, 75-178, 73-157, 71-66.

Court will not adjudicate in proceeding for partition conflicting claim of title set up by defendant, so as to exclude him by estoppel: *Simpson v. Wallace*, 83-477.

Where property is held by trustees elected by several churches, and duly incorporated, one or more of such churches not entitled to a partition of the property: *Church v. Trustees*, 158-119. The plaintiff cannot take a nonsuit in partition proceeding without the consent of the other parties: *Haddock v. Stocks*, 167-70. Where the will provided for a partition of the land by the executors between two tenants in common for life, with remainder to their children, a parol partition in which the parties hold their shares for 20 years will be sustained: *Collier v. Paper Corporation*, 172-74. Plaintiff cannot maintain a suit for partition when he has no vested interest: *Makely v. Shore*, 175-121.

3216. Surface and minerals in separate owners; partitions distinct. When the title to the mineral interests in any land has become separated from the surface in ownership, the tenants in common or joint tenants of such mineral interests may have partition of the same, distinct from the surface, and without joining as parties the owner or owners of the surface; and the tenants in common or joint tenants of the surface may have partition of the same, in manner provided by law, distinct from the mineral interests and without joining as parties

the owner or owners of the mineral interests. In all instances where the mineral interests and surface interests have thus become separated in ownership, the owner or owners of the mineral interests shall not be compelled to join in a partition of the surface interests, nor shall the owner or owners of the surface interests be compelled to join in a partition of the mineral interests, nor shall the rights of either owner be prejudiced by a partition of the other interests.

Rev., s. 2488; 1905, c. 90.

3217. Petition by judgment creditor of cotenant; assignment of homestead. When any person owns a judgment duly docketed in the superior court of a county wherein the judgment debtor owns an undivided interest in fee in land as a tenant in common, or joint tenant, and the judgment creditor desires to lay off the homestead of the judgment debtor in the land and sell the excess, if any, to satisfy his judgment, the judgment creditor may institute before the clerk of the court of the county wherein the land lies a special proceeding for partition of the land between the tenants in common, making the judgment debtor, the other tenants in common and all other interested persons parties to the proceeding by summons. The proceeding shall then be in all other respects conducted as other special proceedings for the partition of land between tenants in common. Upon the actual partition of the land the judgment creditor may sue out execution on his judgment, as allowed by law, and have the homestead of the judgment debtor allotted to him and sell the excess, as in other cases where the homestead is allotted under execution. The remedy provided for in this section shall not deprive the judgment creditor of any other remedy in law or in equity which he may have for the enforcement of his judgment lien.

Rev., s. 2489; 1905, c. 429.

Allotment of homestead in land held as tenant in common, before this section enacted: *Kelly v. McLeod*, 165-382.

3218. Unknown parties; summons and representation. If, upon the filing of a petition for partition, it be made to appear to the court by affidavit or otherwise that there are any persons interested in the premises whose names are unknown to and cannot after due diligence be ascertained by the petitioner, the court shall order notices to be given to all such persons by a publication of the petition, or of the substance thereof, with the order of the court thereon, in one or more newspapers to be designated in the order. If after such general notice by publication any person interested in the premises and entitled to notice fails to appear, the court shall in its discretion appoint some disinterested person to represent the owner of any shares in the property to be divided, the ownership of which is unknown and unrepresented.

Rev., s. 2490; 1887, c. 284.

It is within the discretion of the court to appoint some one to represent the interest of unknown persons: *Lawrence v. Hardy*, 151-123. The proceeding being quasi in rem, the court acquires jurisdiction by publication, and when the proceedings are regular an innocent purchaser acquires a good title: *Ibid.* Practice where unknown parties are interested: *Thompson v. Rospigliosi*, 162-145. Unknown parties may be brought into the proceeding as provided in this section: *Ryder v. Oates*, 173-569—and if contingent interests are to be sold, a proceeding before the clerk carried by appeal to the judge at term gives the power to proceed as under section 1744, *Ibid.* This section is not a violation of the "due process" clause of the constitution: *Lawrence v. Hardy*, 151-123.

3219. Commissioners appointed. The superior court shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common, or joint tenants.

Rev., s. 2487; Code, s. 1892; 1868-9, c. 122, s. 1.

See cases cited under section 3215, ante.

3220. Oath of commissioners. The commissioners shall be sworn by a justice of the peace, or other person authorized to administer oaths, to do justice among the tenants in common, in respect to such partition, according to their best skill and ability.

Rev., s. 2492; Code, s. 1893; 1868-9, c. 122, s. 2.

3221. Delay or neglect of commissioner penalized. If, after accepting the trust, any of the commissioners unreasonably delay or neglect to execute the same, every such delinquent commissioner shall be liable for contempt and may be removed, and shall be further liable to a penalty of fifty dollars, to be recovered by the petitioner.

Rev., s. 2498; Code, s. 1901; 1868-9, c. 122, s. 10.

3222. Commissioners to meet and make partition; equalizing shares. The commissioners, who shall be summoned by the sheriff, or any constable, must meet on the premises and partition the same among the tenants in common, or joint tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition.

Rev., s. 2491; Code, s. 1894; 1887, c. 284, s. 2; 1868-9, c. 122, s. 3.

Partition is made according to value and not the acreage: *Lee v. Montague*, 173-226.

Clerk should not be commissioner: *Evans v. Cullens*, 122-55; see section 3242. Where three commissioners are appointed to partition land, the action of any two of them is valid: *Thompson v. Shemwell*, 93-222. Where one tenant in common has improved part of land in good faith, he is entitled to have it allowed to him at a valuation made without regard to improvement: *Holt v. Couch*, 125-456; *Pipkin v. Pipkin*, 120-161; *Collett v. Henderson*, 80-337; *Pope v. Whitehead*, 68-191.

Where two of three commissioners appointed to make partition met on the premises and in the presence of both parties to the action proceeded to fill vacancy occasioned by absence of third commissioner, neither party making objection thereto: Held, that it is too late to except on that account after commissioners have partitioned land and filed report: *Simmons v. Fosue*, 81-86.

OWELTY OF PARTITION ALLOWED. In partition of land equality must be had by compensation in money for the deficiency, according to the value of the land at the time of the division. The right to such compensation arises out of an implied warranty attaching to each share from all the others: *Cheatham v. Crews*, 88-38. It is a general rule that where a cotenant claims an equality of benefit, he must submit to an equality of burden, fairly incurred in good faith: *Holt v. Couch*, 125-456. The sum charged upon one share in favor of another share of less value, for equality in the division, is a charge in rem, and if not paid, subjects the land charged to sale, whether in the hands of the owner or of his heirs, to whom it descends cum onere: *Powell v. Weathington*, 124-40. Owelty is not a mere debt secured by lien; debtor is tenant in common with holder of share in whose favor decree is entered to extent of charge, until same be satisfied: *In re Walker*, 107-340. Discharge in bankruptcy does not cancel

charge of owelty against land of bankrupt: *In re Walker*, 107-340. Owelty of partition is not discharged by the execution of a note for the same; the land remains the primary debtor: *Dobbin v. Rex*, 106-444. Party acquiring land on which a charge rests for equality of partition takes same cum onere, and statute of limitations cannot avail him as against purchasers at sale made under a venditioni exponas duly ordered in partition proceedings: *Ibid.*

If a parol sale of an expectancy followed by partition is afterwards set aside at suit of vendor, his share should be charged with the purchase money received, and also with its proportion of the enhanced value by reason of the betterments placed thereon: *Tucker v. Markland*, 101-422.

Where one lot is charged with the payment of owelty, payment is not suspended except in case of infants: *Turpin v. Kelly*, 85-399.

Equity is effected among tenants in common either by assigning the improved part to him who improves it, at its value before improvements are made, or, if that cannot be done, then by a reasonable allowance for enhanced value of the property: *Holt v. Couch*, 125-456. If property is not susceptible of being divided, court will order an account before partition of proceeds of sale is made, and provide for a suitable compensation for improvements: *Ibid.*

Charges upon land for equality of partition follow the land into the hands of all persons to whom it may come, and they are held to be affected by constructive notice: *Ruffin v. Cox*, 71-253.

OWELTY OF PARTITION ENFORCED. Proper remedy for enforcing owelty is by execution, formerly by venditioni exponas: *Smith, ex parte*, 134-499; *Newsome v. Harrell*, 168-295—and by civil action when partition is by agreement, *Ibid.* Execution will not be allowed to issue to satisfy owelty of partition until the confirmation of commissioner's report: *In re Ausborn*, 122-42. On motion for execution for owelty, plea of payment and counterclaim are issues, not questions of fact: *Goode v. Rogers*, 126-62.

A party to a proceeding in which a venditioni exponas is issued to sell land to pay a charge resting on it for equality of partition cannot contest the validity of a sale made under such ven. ex.: *Dobbin v. Rex*, 106-444. In an action to collect owelty, defendant may set up as counterclaim any damage he may have sustained by having been evicted from a part of his share in the land by a superior title: *Huntley v. Cline*, 93-458.

A proceeding for leave to issue execution on a judgment charging land with owelty in partition is an "action" within the meaning of the statute of limitations: *Smith, ex parte*, 134-495. The issuing of an execution on a decree charging owelty in partition is barred within ten years: *Ibid.*; *Newsome v. Harrell*, 168-295. The statute of presumptions barred in ten years claims for owelty charged prior to 1868: *Herman v. Watts*, 107-646.

It is not admissible for the creditor to obtain a personal judgment against debtor for the sum charged as owelty in partition: *Halso v. Cole*, 82-161; *Waring v. Wadsworth*, 80-345. Where land is sold under several executions, some for personal debts and others to enforce owelty of partition, latter claims have priority in distribution of proceeds: *Thompson v. Peebles*, 85-418.

The widow of the party upon whose land the charge is placed is not necessary party to an action brought to recover the sum charged: *Ruffin v. Cox*, 71-253. The dower in the land charged with the payment of a certain sum cannot be called upon until it is ascertained that the remaining two-thirds and the reversion in the one-third assigned for dower is insufficient to pay off the encumbrance of owelty: *Ibid.* The existence of a life estate does not prevent bringing action for enforcement of charge: *Newsome v. Harrell*, 168-295.

3223. Owelty to bear interest. The sums of money due from the more valuable dividends shall bear interest until paid.

Rev.. s. 2496; Code, s. 1899; 1868-9, c. 122, s. 8.

For annotations as to owelty of partition and how to enforce payment, see sections 3215, 3222. See *Turpin v. Kelly*, 85-399.

3224. Owelty from infant's share due at majority. When a minor to whom a more valuable dividend shall fall is charged with the payment of any sum, the money shall not be payable until such minor arrives at the age of twenty-one years, but the general guardian, if there be one, must pay such sum whenever

assets shall come into his hands, and in case the general guardian has assets which he did not so apply, he shall pay out of his own proper estate any interest that may have accrued in consequence of such failure.

Rev., s. 2497; Code, s. 1900; 1868-9, c. 122, s. 9.

Section postpones collection of owelty only where parties to proceedings are infants; it does not apply where share, after division, descends to infant heirs of owner: *Powell v. Weatherington*, 124-40.

Section referred to in *Jones v. Cameron*, 81-154; *Turpin v. Kelly*, 85-399.

3225. Partition where shareowners unknown or title disputed. If there are any of the tenants in common, or joint tenants, whose names are not known or whose title is in dispute, the share or shares of such persons shall be set off together as one parcel. If, in any partition proceeding, two or more appear as defendants claiming the same share of the premises to be divided, or if any part of the share claimed by the petitioner is disputed by any defendant or defendants, it shall not be necessary to decide on their respective claims before the court shall order the partition or sale to be made, but the partition or sale shall be made, and the controversy between the contesting parties may be afterwards decided either in the same or an independent proceeding.

Rev., ss. 2491, 2511; Code, s. 1894; 1868-9, c. 122, s. 3; 1887, c. 284, ss. 2, 4.

See cases under section 3222 ante.

3226. Dower claims settled on partition; dower valued. When there is dower or right of dower on any land, petitioned to be sold or divided in severalty by actual partition, the woman entitled to dower or right of dower therein may join in the petition. The land to be divided in severalty shall be allotted to the tenants in common, or joint tenants, subject to the dower right or dower, and either may be asked and assigned at the same time that partition thereof is made and by same commissioners. On a decree of sale, the interest of one-third of the proceeds shall be secured and paid to her annually; or in lieu of such annual interest, the value of an annuity of six per cent on such third, during her probable life, shall be ascertained and paid to her absolutely out of the proceeds.

Rev., s. 2517; Code, s. 1909; 1893, c. 341; 1868-9, c. 122, s. 18.

Where there is a petition to sell land for partition, and one of the defendants is a widow entitled to dower and the other defendants are infants, the dower should be assigned before the land is sold: *Seaman v. Seaman*, 129-293.

Practice in partition where widow entitled to dower in the land: *Winstead and Pass*, ex parte, 92-703; *Dudley v. Tyson*, 167-67.

Widow entitled to dower in land and administratrix of tenant in common are necessary parties to petition for partition: *Gregory v. Gregory*, 69-522.

In partition, dower may be assigned in the land partitioned: *Baggett v. Jackson*, 160-26. The proceeding for dower cannot be attacked collaterally in a partition proceeding: *Ibid.*, citing *Tyson v. Beleher*, 102-112, and *Coffin v. Cook*, 106-376.

3227. Partial partition; balance sold or left in common. In all proceedings under this chapter actual partition may be made of a part of the land sought to be partitioned and a sale of the remainder, or a part only, of any land held by tenants in common, or joint tenants, may be partitioned and the remainder held in cotenancy.

Rev., s. 2506; 1887, c. 214, s. 1.

Part of land may be sold for partition and part divided: *Taylor v. Carrow*, 156-6.

This does not authorize a sale of a fractional part of the land, leaving the rest to be held in common: *Patillo v. Lytle*, 158-92.

3228. Report of commissioners; contents; filing. The commissioners, within a reasonable time, not exceeding sixty days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust and describing particularly the land or parcels of land divided, and the share allotted to each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the superior court clerk.

Rev., s. 2494; Code, s. 1896; 1868-9, c. 122, s. 5.

Two commissioners signing the report is sufficient: *Thompson v. Shemwell*, 93-224; *Simmons v. Foscue*, 81-86. When commissioners to partition land make and file their report their duties are ended, and they are functi officio, unless they act under a new order of the court: *Clinard v. Brummell*, 130-547.

Clerk has jurisdiction to correct mistakes in partition proceedings where no equitable ingredient involved: *Wahab v. Smith*, 82-229. As to remedy for the correction of a mistake in running a dividing line after final judgment in partition has been entered, see *Thomson v. Shemwell*, 89-283.

As to owelty of partition, see section 3222.

EXCEPTIONS TO REPORT; HEARING AND CONFIRMATION. Exceptions to report of commissioners appointed to make partition of land must be filed within twenty days after report is filed: *Floyd v. Rook*, 128-10.

Exceptions to commissioner's report, backed by affidavits of inequality in division upon which a motion for redivision is based, do not raise issues of fact for trial by jury, but questions of fact to be determined by court: *McMillan v. McMillan*, 123-577; *Beekwith*, ex parte, 124-111.

Where commissioners appointed were ordered to report evidence taken before them and their findings of fact, and failed to do so, it was error to confirm their report as to division of lands in the face of an exception thereto on the ground that they ignored order of court: *Pipkin v. Pipkin*, 120-161. The omission by the commissioners to state affirmatively that allotments in their opinion, were equal in value, affects the substantial rights of the parties; and clerk or judge may set it aside with directions either that commissioners make a reallocation or that others be appointed to do so: *Skinner v. Carter*, 108-106.

On hearing exceptions to report of commissioners, court should hear evidence impeaching fairness of partition, and set same aside if evidence sufficient: *Simmons v. Foscue*, 81-86. Refusal of court to hear affidavits upon motion to confirm report is a matter of discretion and not reviewable: *Skinner v. Carter*, 108-106. And appeal from an order setting aside report will not be dismissed as premature: *Skinner v. Carter*, 108-106. From an order of clerk setting aside report and ordering redivision, an appeal lies to the judge, and if no error in law is committed, decision of judge cannot be reversed: *McMillan v. McMillan*, 123-577; *Simmons v. Foscue*, 81-86.

Case where claimed wrong land was divided: *Wright v. McCormick*, 69-14.

ATTACKING THE PROCEEDINGS. As to attacking partition proceedings for irregularity, see *Rose v. Davis*, 140-269.

Where infant defendants are served with summons in proceedings for partition and guardian ad litem is appointed, judgment affirming sale cannot be set aside in collateral proceeding for alleged fraud or irregularity: *Smith v. Gray*, 116-311.

In an action to set aside partition proceedings where no fraud was alleged to have taken place and the facts alleged as ground for setting aside should have been known at time of proceedings, plaintiffs are estopped, and equity will not aid them, although some of present plaintiffs, at time of partition, were under disability: *Grantham v. Kennedy*, 91-148.

Decrees set aside for inequality at instance of defendant served by publication: *Rhodes v. Rhodes*, 125-191.

Where proceedings had been begun and guardian ad litem appointed for infants, and all steps had been taken except the signing of the final decree, the infants, having come of age in the meantime, could not reopen the cause: *Williams v. Williams*, 94-732.

A direct proceeding to attack a judgment in partition for fraud can be brought by a motion in the cause: *Murray v. Southerland*, 125-177; *Rhodes v. Rhodes*, 125-193; *Tuttle v. Tuttle*, 146-484; *Turner v. Davis*, 163-38.

A decree in partition proceedings reciting that it was rendered on the merits will not be construed to be a judgment of nonsuit because it orders that petition be dismissed: *Weeks v. McPhail*, 129-73.

The clerk may correct a mistake in making a premature order of partition by revoking the order and docketing the case in superior court: *Little v. Duncan*, 149-84.

3229. Map embodying survey to accompany report. The commissioners are authorized to employ the county surveyor or, in his absence or if he be connected with the parties, some other surveyor, who shall make out a map of the premises showing the quantity, courses and distances of each share, which map shall accompany and form a part of the report of the commissioners.

Rev., s. 2493; Code, s. 1895; 1868-9, c. 122, s. 4.

3230. Confirmation and impeachment of report. If no exception to the report of the commissioners is filed within twenty days, the same shall be confirmed. Any party after confirmation may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby.

Rev., s. 2494; Code, s. 1896; 1868-9, c. 122, s. 5.

See cases under section 3228.

3231. Report and confirmation enrolled and registered; effect. Such report, when confirmed, together with the decree of confirmation, shall be enrolled and certified to the register of deeds and registered in the office of the county where such real estate is situated, and shall be binding among and between the claimants, their heirs and assigns.

Rev., s. 2495; Code, s. 1897; 1868-9, c. 122, s. 6.

A decree in partition operates as an estoppel upon parties and privies: *Nobles v. Nobles*, 177-243; *Olds v. Cedar Works*, 173-161; *Propst v. Caldwell*, 172-594; *Weston v. Lumber Co.*, 162-165; s. e., 169-398; *Buchanan v. Harrington*, 152-333; *Weeks v. McPhail*, 129-73. It is binding on parties thereto as against an after-acquired title: *Carter v. White*, 134-466—but not as to matters not adjudicated in the proceeding, *Gillam v. Edmonson*, 154-127.

One who joins an infant in a petition for partition is bound by the judgment, though it is not approved by the judge: *Lindsay v. Beaman*, 128-189. The proceedings are admissible in evidence though not properly recorded: *Ibid.* Record of partition is color of title: *Ibid.*

No title passes by the decree, only unity of possession is dissolved and title vests in severalty: *Carter v. White*, 131-16; *Harrington v. Rawls*, 131-39; *Lindsay v. Beaman*, 128-189. A deed in partition conveys no title, but only severs the unity of possession: *Stallings v. Walker*, 176-321; *Weston v. Lumber Co.*, 162-165.

When land is incorporated in a petition and assigned in partition, with the knowledge and consent of parties, an administrator of one of the parties is estopped to deny that the land was so included: *Lindsay v. Beaman*, 128-189.

When there has been a partition of land among the heirs of ancestor, as tenants in common, they hold by descent and not by purchase: *Carson v. Carson*, 122-645; *Harrison v. Ray*, 108-215.

When the report of commissioners is filed, confirmed and registered, they cannot change it without order of court: *Clinard v. Brummel*, 130-547.

When the report is registered and the record is destroyed and it is registered again under section 366, a certified copy is color of title: *Hill v. Lane*, 149-267.

A decree in partition reciting that it was rendered on the merits will not be construed as a judgment of nonsuit because it orders that petition be dismissed: *Weeks v. McPhail*, 129-73.

3232. Clerk to docket owelty charges; no release of land and no lien. In case owelty of partition is charged in favor of certain parts of said land and against

certain other parts, the clerk shall enter on the judgment docket the said owelty charges in like manner as judgments are entered on said docket, persons to whom parts are allotted in favor of which owelty is charged being marked plaintiffs on the judgment docket, and persons to whom parts are allotted against which owelty is charged being marked defendants on said docket; that said entry on said docket shall contain the title of the special proceeding in which the land was partitioned, and shall refer to the book and page in which the said special proceeding is recorded; that when said owelty charges are paid, said entry upon the judgment docket shall be marked satisfied in like manner as judgments are canceled and marked satisfied; and the clerk shall be entitled to the same fees for entering such judgment of owelty as he is entitled to for docketing other judgments: Provided, that the docketing of said owelty charges as hereinbefore set out shall not have the effect of releasing the land from the owelty charged in said special proceeding: Provided, any judgment docketed under this section shall not be a lien on any property whatever, except that upon which said owelty is made a specific charge.

1911, c. 9, s. 1.

ART. 2. PARTITION SALES OF REAL PROPERTY

3233. Sale in lieu of partition. Whenever it appears by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof.

Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31.

Right to actual partition exists where a division can be made without injury to the interests of the parties: *Gillespie v. Allison*, 115-548—if division cannot be made without such injury, the court should order a sale, *Holt v. Couch*, 125-456; *Bragg v. Lyon*, 93-153; *Trull v. Rice*, 85-327; *Gregory v. Gregory*, 69-522.

Whether there should be actual partition or a sale is a question of fact to be decided by the court: *Vanderbilt v. Roberts*, 162-273; *Taylor v. Carrow*, 156-6; *Ledbetter v. Pinner*, 120-455. On appeal to the judge, he may render judgment or remand the case to the clerk for proper order: *Ledbetter v. Pinner*, 120-456.

In a petition for sale, if one of defendants is a widow entitled to dower and other defendants are infants, dower should be assigned before sale: *Seaman v. Seaman*, 129-293.

A petition to sell land for assets amounts to notice to a purchaser under a proceeding by heirs for sale for partition: *Harris v. Davenport*, 132-697.

3234. Remainder or reversion sold for partition; outstanding life estate. The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common or joint tenants shall be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate.

Rev., s. 2508; 1887, c. 214, s. 2.

Under this section a remainderman or reversioner after a life estate may have partition either by actual division or by sale: *Baggett v. Jackson*, 160-26; *Gillespie v. Allison*, 115-542. But this does not apply to contingent remainders or other future conditional interests unless all persons who may by any possibility be interested unite in asking for the decree: *Aydlett v. Pendleton*, 111-28; see section 1744.

This applies to vested interests: *Vinson v. Wise*, 159-653—but not when it appears that life tenant has right to control, *Makely v. Shore*, 175-121.

Where land subject to estate during widowhood was sold for partition, the proceeds could not be divided between widow and remaindermen, against the will of remaindermen, but would remain as real estate until the termination of estate during widowhood: *Gillespie v. Allison*, 117-512.

3235. Life tenant as party; valuation of life estate. In all proceedings for partition of land whereon there is a life estate, the life tenant may join in the proceeding and on a sale the interest on the value of the share of the life tenant shall be received and paid to such life tenant annually; or in lieu of such annual interest, the value of such share during the probable life of such life tenant shall be ascertained and paid out of the proceeds to such life tenant absolutely.

Rev., s. 2509; 1887, c. 214, s. 3.

See section 3226. This section does not apply to an estate during widowhood: *Gillespie v. Allison*, 117-512. That one of tenants is seized of estate for life and the others are seized in fee is no bar to action for partition: *McEachern v. Gilchrist*, 75-196.

Where land is held in trust to allow the daughter to occupy and enjoy rents for life, with power of sale for reinvestment, with remainder over, upon a sale made the daughter is not entitled to have the life estate valued and paid over in money: *Braddy v. Dail*, 156-30.

3236. Sale of standing timber on partition; valuation of life estate. When two or more persons own, as tenants in common, joint tenants, or copartners, a tract of land, either in possession, or in remainder or reversion, subject to a life estate, on which there may be standing timber trees, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, for partition among the owners thereof, including the life tenant, upon such terms as the court may order, and under like proceedings as are now prescribed by law for the sale of land for partition: Provided, that when the land is subject to a life estate, the life tenant shall be made a party to the proceedings, and shall be entitled to receive his portion of the net proceeds of sales, to be ascertained under the mortuary tables established by law.

Rev., s. 2510; 1895, c. 187.

3237. Sale of mineral interests on partition. In case of the partition of mineral interests, in all instances where it is made to appear to the court that it would be for the best interests of the tenants in common, or joint tenants, of such interests to have the same sold, or if actual partition of the same cannot be had without injury to some or all of such tenants (in common), then it is lawful for and the duty of the court to order a sale of such mineral interests and a division of the proceeds as the interests of the parties may appear.

Rev., s. 2507; 1905, c. 90, s. 2.

3238. Sale of land required for public use on cotenant's petition. When the lands of joint tenants or tenants in common are required for public purposes, one or more of such tenants, or their guardian for them, may file a petition verified by oath, in the superior court of the county where the lands or any part of them lie, setting forth therein that the lands are required for public purposes, and that their interests would be promoted by a sale thereof. Whereupon the court, all proper parties being before it, and the facts alleged in the petition being ascertained to be true, shall order a sale of such lands, or so much thereof as may be necessary, in the manner and on the terms it deems expedient. The expenses, fees and costs of this proceeding shall be paid in the discretion of the court.

Rev., s. 2518; Code, s. 1907; 1868-9, c. 122, s. 16.

3239. Manner and terms of partition sale. The sale shall be made by some person appointed by the court, on such terms as to size of lots, place or manner of sale, time of credit and security for payment of purchase money, as may be most advantageous to the parties concerned.

Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31.

The court has power to order a private sale under proper circumstances: *Ryder v. Oates*, 173-569; *Thompson v. Rospigliosi*, 162-145—and this may be by first directing a sale and authorizing a private bid, or by recognizing a bid already made: *Wooten v. Cunningham*, 171-123.

3240. Notice of partition sale. The notice of sale, under this proceeding, shall be the same as required by law on sales of real estate by sheriff under execution.

Rev., s. 2514; Code, s. 1905; 1868-9, c. 122, s. 14.

See section 687 et seq.

3241. Title made to purchaser; effect of deed. On the coming in of the report of sale, and confirmation thereof, and payment of the purchase money, the title shall be made to the purchaser or purchasers at such time and by such person as the court may direct, and in all cases where the persons in possession have been made parties to the proceeding, the court may grant an order for possession. And the deed of the officer or person designated to make such sale shall convey to the purchaser such title and estate in the property as tenants in common, or joint tenants, had.

Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31.

Until confirmation is made no title vests in purchaser, though deed is executed: *Patillo v. Lytle*, 158-92; *Taylor v. Carrow*, 156-6. A commissioner's deed in a sale for partition conveys only such title as the tenants in common had: *Jordan v. Faulkner*, 168-466.

When a nonresident minor is a party, represented by guardian, and the proceedings are regular, the purchaser at partition sale gets a good title: *Credle v. Baugham*, 152-18.

When commissioner is ordered to make deed to purchaser upon payment of purchase money, it means when the money is actually paid: *Taylor v. Carrow*, 156-6; *Macay*, ex parte, 84-59. The absence of the word "commissioner" after the signature to a deed does not affect its validity: *McLean v. Patterson*, 84-429.

When land is ordered to be sold at judicial sale, it is under control of court until title is made to purchaser under order of court: *Kemp v. Kemp*, 85-491; *Lord v. Meroney*, 79-14. A payment made by purchaser to the guardian of one of the tenants in common is proper: *Howerton v. Sexton*, 104-75.

An innocent purchaser will be protected if it appears that the court had jurisdiction of the parties and the subject-matter: *Rackley v. Roberts*, 147-201.

Where purchaser complied with terms of sale and deed was made to his wife and registered, though bid was not assigned, creditors cannot have wife declared a trustee for husband, in absence of fraud or preëxisting debts: *Evans v. Cullens*, 122-55.

3242. Who appointed to sell. The court may authorize any officer thereof, or any other competent person, to be designated in the decree of sale, to sell the real estate under this proceeding; but no clerk of any court shall appoint himself or his deputy to make sale of real property or other property in any proceeding before him.

Rev., s. 2513; Code, s. 1906; 1868-9, c. 122, s. 15; 1899, c. 161.

Clerk should not appoint himself commissioner to sell: *Evans v. Cullens*, 122-55.

3243. Report of sale; filing; confirmation and impeachment. Such officer or person shall file his report of sale, giving full particulars thereof, within ten days

after the sale, in the office of the clerk of the superior court, and if no exception thereto is filed within twenty days, the same shall be confirmed. Any party, after the confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby.

Rev., s. 2513; Code, s. 1906; 1899, c. 161; 1868-9, c. 122, s. 15.

See section 3228.

Until there has been a final decree of confirmation, the court may in a proper case make an order for partition or sale: *Taylor v. Carrow*, 156-6.

The court may set aside a sale for partition where it appears that the commissioner failed to comply with order of court as to terms, and where there was a mistake as to the area of the land: *Blue v. Blue*, 79-69.

No notice to the parties is required for confirmation, but the sale is confirmed unless objection is made or advanced bid filed within twenty days: *Upchurch v. Upchurch*, 173-88.

A resale will be ordered when the first sale is made under circumstances calculated to arouse suspicion: *Camp Mfg. Co. v. Liverman*, 123-7. A tenant in common in control of premises, if appointed commissioner to sell, cannot purchase directly or indirectly at such sale: *Tuttle v. Tuttle*, 146-484.

That next friend of an infant has an adverse interest will not be sufficient to disturb the decree, unless fraud is shown: *Ivey v. McKinnon*, 84-651. An infant, after coming of age, may ratify an irregular sale by accepting the benefits: *Smith v. Gray*, 116-311. It is not improper for a guardian to purchase at partition sale of ward's land when he is a cotenant and it is necessary to protect his interest: *Credle v. Baugham*, 152-18.

It is within the discretion of the court to order a resale upon an advanced bid of ten per cent: *Sutton v. Craddock*, 174-274; *Upchurch v. Upchurch*, 173-88; *Thompson v. Rospigliosi*, 162-145; *Uzzle v. Weil*, 151-131. See section 2591.

The time required for filing objections applies to public and private sales ordered by the court: *Thompson v. Rospigliosi*, 162-145—and this does not interfere with the power of the court to set aside the sale and order a resale upon an advanced bid, *Upchurch v. Upchurch*, 173-88; *Ex parte Garrett*, 174-343.

An unregistered deed made by some of the tenants in common is not good as against a deed by the same parties and for the same interest, subsequently made and registered, after decree of sale but before confirmation: *McLean v. Leitch*, 152-266.

Proceedings hereunder cannot be attacked collaterally, but it must be by petition or motion in the cause: *Patillo v. Lytle*, 158-92; *Campbell v. Farley*, 158-42; *Bailey v. Hopkins*, 152-748; *Hargrave v. Wilson*, 148-439; *Rackley v. Roberts*, 147-201; *Tuttle v. Tuttle*, 146-484; *Rhodes v. Rhodes*, 125-193; *Murray v. Southerland*, 125-175; *Smith v. Gray*, 116-311; *Wilson v. Chichester*, 107-386.

Judgment on purchase-money note may be had by motion in the cause: *Lord v. Beard*, 79-5.

3244. Shares in proceeds to cotenants secured. Upon confirmation of the report, the court shall secure to each tenant in common, or joint tenant, his ratable share in severalty of the proceeds of sale.

Rev., s. 2513; Code, s. 1921; 1868-9, c. 122, s. 31.

3245. Shares to persons unknown or not sui juris secured. When a sale is made under this chapter, and any party to the proceedings be an infant, a married woman, non compos mentis, imprisoned, or beyond the limits of the state, or when the name of any tenant in common is not known, it is the duty of the court to decree the share of such party, in the proceeds of sale, to be so invested or settled that the same may be secured to such party or his real representative.

Rev., s. 2516; Code, s. 1908; 1887, c. 284, s. 3; 1868-9, c. 122, s. 17.

Administrator of a deceased ward is not entitled to recover, in an action against the administrator of the deceased guardian, moneys which came into the guardian's hands as proceeds of real estate belonging to ward sold under a decree of court for partition: *Allison v. Robinson*, 78-222.

Purchaser for value without notice is not affected by failure of court to retain and invest funds to protect right of unknown persons: *Lawrence v. Hardy*, 151-123.

In case of persons under disability the conversion from realty to personalty by sale for partition does not take effect until the parties entitled can exercise their right of election: *McLean v. Leitch*, 152-266; *Hall v. Short*, 81-273—as to others not under disability the conversion takes effect from confirmation of the sale, *Ibid*.

ART. 3. PARTITION OF LANDS IN TWO STATES

3246. **Petition to partition lands in two states descended or devised.** Whenever on the death of any person his lands in this state, and in another state, descend or are devised to several persons, who, by the law of this and the other state, hold in the lands undivided estates as tenants in common, or by any other undivided tenancy, and such heirs or devisees cannot, without suit, have partition for want of consent, or because of inability in any of the cotenants, then, if such deceased person was at the time of his death a resident of the state, or not then a resident of any of the states in which his lands lie, and in the last case the most valuable part of such lands lie in this state, such heir or devisee, or any person claiming under him, may file a petition in the superior court for the county where the deceased resided at his death, or where any part of the land lies in this state, setting forth all the lands in which the plaintiff has an undivided estate, without and within the state, described by their names and boundaries, or by the adjoining tracts, and also the estate the deceased had in them, and the supposed value of the lands in each state, and the share, in severalty, to which the plaintiff and each of his cotenants is entitled under the laws of the several states, and praying for partition to be made of all the tracts, according to their respective interests. The material facts set forth in the petition shall be verified by the affidavit of the plaintiff or his guardian, or other person, at the discretion of the court; and all persons concerned in interest in the lands shall be made parties, according to the practice of the superior court in this state.

Rev., s. 2499; Code, s. 1911; 1868-9, c. 122, s. 20.

3247. **Court may decree partition.** On the hearing of the petition, the court may decree a partition; and shall allot in severalty to each tenant his just share of the lands, according to the value of his interest in the same, by the laws of the several states in which they are situated.

Rev., s. 2500; Code, s. 1912; 1868-9, c. 122, s. 21.

3248. **Commissioners appointed; how partition made; report and confirmation.** The court making such decree shall issue a commission to three respectable freeholders in this or any other state where any part of the land may lie, unconnected by blood or interest with the parties, directing them or a majority of them to make partition between the cotenants, plaintiffs and defendants in said petition, and to assign each his respective share in the value, in severalty, in any tract or tracts, in any or all the states. Before making the allotment the commissioners shall make a valuation of all the lands held by the cotenants in all the said states; and where they cannot, without injury to the value of some shares, make an exact division of the lands, they shall charge the more valuable dividends with money to be paid to the tenants of a less valuable dividend to make equality of partition. They shall report their proceedings as they may be directed, and the report shall contain a valuation of all the estate in this and

the other states, and the division among the cotenants according to such valuation. The court may confirm such report, or on sufficient cause shown may correct and alter, or set it aside and order a new commission.

Rev., s. 2501; Code, s. 1913; 1868-9, c. 122, s. 22.

3249. Provisions as to owelty. Where any sum is charged on a more valuable dividend, it shall be a charge on the land into whose hands soever it may come, although it may be taken without notice, and shall bear interest at a rate not greater than allowed in this state. The tenant of the larger dividend may discharge himself from accruing interest by paying the whole amount due at any time. The court may direct, if the tenant taking such a dividend is an infant, that the sum charged shall not be paid till a future day.

Rev., s. 2501; Code, s. 1913; 1868-9, c. 122, s. 22.

3250. Final decree; enrollment and registry; service on parties; effect. The court shall, upon the confirmation of any report of the commissioners, make a final decree. And where all the parties are within the jurisdiction of this court, the court shall, by the usual proceedings, direct and compel the parties to execute and deliver deeds and assurances, sufficient, by the laws of this state and the other states, to give the partition full force and validity in all the states; and in case any of the parties are under such disabilities that they cannot execute such assurances, or are without the jurisdiction of the court, then the court, upon receiving evidence from the plaintiff that, by a law of the other state in which lie the parts of the lands described in the petition to be without this state, the decree can have effect thereon, shall direct the decree to be enrolled, and a copy of it shall be registered in the register's office of all the counties within this state where any of the lands lie; and a copy shall also be furnished to the plaintiff or other party interested, duly certified, to the end that, as to the lands without this state, it may be carried into effect in the state in which the said lands may be, in such manner as said state may direct; and on satisfactory evidence being made to the court in this state that the decree may have full effect by the law of such other state, the court in this state shall by its decree declare the partition in the land in this state to be final and conclusive. The decree shall be firm and irreversible, as hereinafter provided; and shall, on registration as aforesaid, pass to the tenants the title in severalty to the lands in this state in the same manner as if all the land mentioned in the decree were situate within this state.

Rev., s. 2501; Code, s. 1913; 1868-9, c. 122, s. 22.

3251. Effectuating decree of sister state; enrollment; registry and confirmation; effect. Where real estate may be partly in this state and partly in another state, and the deceased person from whom it was derived by descent or devise was, at the time of his death, a resident of some other state, or was a resident of none of the states in which he held lands, and in this last case the lands of which he was seized in this state were of less value than the lands of which he was seized in any other state, the courts of the state in which such deceased person had his residence at his death, or in which he held lands of greater value than those he held in this state, shall have full power and authority, under any law passed by the legislature of such state substantially in accordance with the provisions herein made on this subject, to decree partition of the lands in this state, together

with those within such other state, in the same manner as if the whole real estate were within the jurisdiction of such court, and in the same manner as the courts in this state are directed and authorized to do by the preceding section, as to the lands of deceased persons resident here at their death, or leaving lands of greater value here than in any other state. In case any person having an interest in the final decree, made as aforesaid in another state, as to lands in this state, shall, within twelve months after the same may be entered up in the courts of said state, produce the records and proceedings of such courts of record duly certified to a superior court of any county in this state where any of the lands of this state lie, the court, on petition *ex parte* in such case, shall order such proceedings to be entered of record in the court of this state, and order that the said decree shall be of the same force and validity as if it had been a decree of the court in this state in which the petition is filed, upon a petition and regular proceedings had thereon, and the decree of the court of such other state, and the proceedings on it by petition in the superior court in this state confirming it and giving it validity, being enrolled in the said court of this state and registered in all the counties where the lands lie in this state, shall pass the lands in this state, according to the decree, and shall vest estates in severalty therein declared, as to said lands, in the same manner and with the same effect in law as if the lands in this state had been so allotted on a petition for partition, according to the provisions of the former sections of this chapter.

Rev., s. 2502; Code, s. 1914; 1868-9, c. 122, s. 23.

3252. When court may decide whether statute passed in another state. Where a copy of a decree and proceedings of a suit in any other state are produced, as in the preceding section, and also when it is necessary for a superior court to be certified that its decree of a partition of lands without this state and within the territory of another state can have effect herein, it is competent for the judge of the superior court before which the existence of a law in such other state is to be proved, to decide whether any act of the legislature of such state has been passed.

Rev., s. 2503; Code, s. 1915; 1868-9, c. 122, s. 24.

ART. 4. PARTITION OF PERSONAL PROPERTY

3253. Personal property may be partitioned; commissioners appointed. When any persons entitled as tenants in common, or joint tenants, of personal property desire to have a division of the same, they, or either of them, may file a petition in the superior court for that purpose; and the court, if it think the petitioners entitled to relief, shall appoint three disinterested commissioners, who, being first duly sworn, shall proceed within twenty days after notice of their appointment to divide such property as nearly equal as possible among the tenants in common, or joint tenants.

Rev., s. 2504; Code, s. 1917; 1868-9, c. 122, s. 27.

Remedy of a tenant in common to recover his interest in specific goods is by partition: *Powell v. Hill*, 64-169; *Grim v. Wicker*, 80-344.

One tenant in common or joint owner of personal property cannot maintain action against other tenant or owner to recover exclusive possession of property: *Thompson v. Silverthorne*, 142-13, and cases cited.

If, pending a proceeding for partition of personalty, defendant threatens destruction or removal of property, court on application might enjoin him or appoint receiver: *Ibid*.

3254. Report of commissioners. The commissioners shall report their proceedings under the hands of any two of them, and shall file their report in the office of the clerk of the superior court within five days after the partition was made.

Rev., s. 2505; Code, s. 1918; 1868-9, c. 122, s. 28.

Section referred to in *Best v. Dunn*, 126-560; *Clement v. Ireland*, 129-222.

3255. Sale of personal property on partition; report of officer. If a division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested, and a sale thereof is deemed necessary, the court shall order a sale to be made by some officer of the court or other competent person, who shall file his report of sale in the office of the clerk of the court within ten days after sale.

Rev., s. 2519; Code, s. 1919; 1868-9, c. 122, s. 29.

3256. Confirmation and impeachment of reports of commissioners or officer. If no exception to the report of the commissioners making partition, or to the report of the officer making sale, as the case may be, is filed within twenty days, the same shall be confirmed. Any party, after confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby.

Rev., ss. 2505, 2519; Code, ss. 1918, 1919; 1868-9, c. 122, ss. 28, 29.

3257. Notice of sale of personal property. The sale shall be made after twenty days notice, by advertisement in three or more public places in the county, and shall be on such terms as the court may direct.

Rev., s. 2520; Code, s. 1920; 1868-9, c. 122, s. 30.

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CHAPTER 64

PARTNERSHIP

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ART. 1. LIMITED PARTNERSHIP

3258. Purposes for which formed. Limited partnerships for the transaction of any mercantile, manufacturing or mechanical business within the state may be formed by two or more persons, upon the terms and with the rights and powers and subject to the conditions and liabilities in this chapter; but its provisions shall not be construed to authorize any such partnership for the conducting of a banking or insurance business, other than writing or soliciting insurance.

Rev., s. 2521; Code, s. 3088; 1860-1, c. 28.

See *Johnson v. Bernheim*, 76-139, 86-339.

Where liability of defendant, sued in a justice's court as a general partner of a partnership indebted to plaintiff, depended upon legal sufficiency of articles of limited partnership and matters connected with their registration and publication, and there being no equities to adjust, justice had jurisdiction: *Davis v. Sanderlin*, 119-84.

Section referred to in *Supply Co. v. Lyon*, 173-445.

3259. General and special partners; liability. Such partnerships may consist of one or more persons, who are general partners, and are jointly and severally responsible as partners are now by law, and of one or more persons, who contribute in actual cash payments a specific sum as capital to the common stock, who are called special partners, and who are not liable for the debts of the partnership beyond the funds so contributed to the capital.

Rev., s. 2522; Code, s. 3089; 1860-1, c. 28, s. 2.

3260. Certificate filed; contents. The persons desirous of forming such partnership must make and severally sign a certificate containing: First, the name or firm under which such partnership is to be conducted; second, the general nature of the business to be transacted; third, the names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence; fourth, the amount of capital which each special partner has contributed to the common stock; fifth, the period at which such partnership is to commence and terminate.

Rev., s. 2523; Code, s. 3090; 1860-1, c. 28, s. 3.

3261. Certificate proved and registered. The certificate must be acknowledged or proved before some one competent to take the probate of deeds and ordered registered in the same manner as provided for deeds, and must be registered in the county in which the principal place of business of such partnership is situated. If the partnership has places of business in different counties, a transcript of the certificate and acknowledgment certified by the register must be registered and filed in the register's office of each of such counties.

Rev., s. 2524; Code, ss. 3091, 3092; 1860-1, c. 28, ss. 4, 5.

3262. Affidavit as to cash payment. At the time the certificate is ordered to be registered an affidavit of one or more of the general partners shall be made before the officer taking such acknowledgment, stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock have been actually in good faith paid in cash, and the affidavit so made shall be registered with the original certificate.

Rev., s. 2525; Code, s. 3093; 1860-1, c. 28, s. 6.

3263. Probate and registration necessary. No such partnership shall be deemed to have been formed until such certificate and affidavit have been made, acknowledged, or proved, and registered as required in the preceding sections.

Rev., s. 2526; Code, s. 3094; 1860-1, c. 28, s. 7.

3264. Effect of false statement. If any false statement is made in such certificate or affidavit, all the persons interested in such partnership shall be liable as general partners.

Rev., s. 2527; Code, s. 3095; 1860-1, c. 28, s. 8.

3265. Terms of partnership published. The terms of the partnership must be published immediately after its formation for six successive weeks, in at least one newspaper in the same county or near the place of said partnership business, and if such publication be not made, the partnership shall be deemed general.

Rev., s. 2528; Code, s. 3096; 1860-1, c. 28, s. 9.

Publication of terms of partnership in a newspaper is indispensable in order to constitute a limited partnership; if such publication be omitted the partnership is general: *Davis v. Sanderlin*, 119-84. See, also, *Supply Co. v. Lyon*, 173-445.

3266. Proof of publication. Affidavits of such publication, made by the proprietor of such newspaper in which the same is published, may be filed with the clerk of the superior court of the county in which such business is conducted, and shall be evidence of the fact.

Rev., s. 2529; Code, s. 3097; 1860-1, c. 28, s. 10.

3267. Requirements for renewals and continuances. Every renewal or continuance of such partnership beyond the time originally fixed for its duration must be certified, acknowledged and registered, and an affidavit of a general partner made and filed, and notice given by publication as required for its original formation, and every such partnership which is otherwise continued must be deemed a general partnership: Provided, the affidavit herein required may state that the amount of cash therein specified had been originally paid in good faith, and that it is represented by goods or merchandise then on hand, and has not been impaired in the course of trade.

Rev., s. 2530; Code, s. 3098; 1860-1, c. 28, s. 11.

3268. Alteration deemed a dissolution. Every alteration which is made in the names of the partners, in the nature of the business, in the capital or shares thereof or in any other matter specified in the original certificate must be deemed a dissolution of the partnership; and any such partnership which is in any manner carried on after such alteration has been made must be deemed a general partnership, unless renewed as a special partnership, according to the preceding sections.

Rev., s. 2531; Code, s. 3099; 1860-1, c. 28, s. 12.

3269. Name of firm. The business of the partnership must be conducted under a firm, in which the names of the general partners only are inserted, without the addition of the word "company" or any other general term, except the word "limited"; and if the name of any special partner is used in the firm with his privity, he shall be deemed a general partner.

Rev., s. 2532; Code, s. 3100; 1899, c. 75; 1860-1, c. 28, s. 13.

3270. Actions as in general partnership. Suits in relation to the business of the partnership may be brought and conducted by and against the general partner in the same manner as if there was no special partner.

Rev., s. 2533; Code, s. 3101; 1860-1, c. 28, s. 14.

3271. Special stock not withdrawn nor reduced. No part of the sum which any special partner has contributed to the capital stock must be withdrawn by or paid to him in the shape of dividends, profits or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest does not reduce the original amount of such capital; and if, after the payment of such interest, any profit remain to be divided, he may receive his portion of such profits.

Rev., s. 2534; Code, s. 3102; 1860-1, c. 28, s. 15.

3272. Depleted capital restored. If it appears by the payment of interest or profits to any special partner that the original capital has been reduced, the partner receiving the same is bound to restore the amount necessary to make good his share of the capital without interest.

Rev., s. 2535; Code, s. 3103; 1860-1, c. 28, s. 16.

3273. Rights of special partner. A special partner may from time to time examine into the state and progress of the partnership concern; he may advise as to its management and act as attorney at law, but must not transact any other of the partnership business, nor be employed for that purpose as agent or otherwise; and if he interfere contrary to this section he is deemed a general partner.

Rev., s. 2536; Code, s. 3104; 1860-1, c. 28, s. 17.

3274. Accounting inter se. The general partners are liable to account to each other, and to the special partners, for their management of the partnership, as other partners.

Rev., s. 2537; Code, s. 3105; 1860-1, c. 28, s. 18.

3275. Special partner as a creditor in insolvency. In case of the bankruptcy or insolvency of the partnership, no special partner, under any circumstances, is to be allowed to claim as a creditor until the claims of all the other creditors of the partnership are satisfied.

Rev., s. 2538; Code, s. 3107; 1860-1, c. 28, s. 20.

3276. Notice of dissolution. No dissolution of such partnership by the acts of the parties must take place before the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of its dissolution has been registered in the register's office in which the original certificate was registered, and published once a week for four successive weeks in the nearest newspaper to each of the places where the partnership transacts its business.

Rev., s. 2539; Code, s. 3108; 1860-1, c. 28, s. 21.

ART. 2. SURVIVING PARTNERS

3277. Surviving partner to give bond. Upon the death of any member of a partnership, the surviving partner shall, within thirty days, execute before the clerk of the superior court of the county where the partnership business was conducted, a bond payable to the state of North Carolina, with sufficient surety conditioned upon the faithful performance of his duties in the settlement of the partnership affairs. The amount of such bond shall be fixed by the clerk of the court; and the settlement of the estate and the liability of the bond shall be the same as under the law governing administrators and their bonds.

1915, c. 227, ss. 1, 2, 3.

3278. Effect of failure to give bond. Upon the failure of the surviving partner to execute the bond provided for in the preceding section, the clerk of the superior court shall, upon application of any person interested in the estate of the deceased partner, appoint a collector of the partnership, who shall be governed by the same law governing an administrator of a deceased person.

1915, c. 227, s. 4.

3279. Surviving partner and personal representative make inventory. When a member of any partnership dies the surviving partner, within sixty days after the death of the deceased partner, together with the personal representative of the deceased partner, shall make out a full and complete inventory of the assets of the partnership, including real estate, if there be any, together with a schedule of the debts and liabilities thereof, a copy of which inventory and schedule shall be retained by the surviving partner, and a copy thereof shall be furnished to the personal representative of the deceased partner.

Rev., s. 2540; 1901, c. 640.

This section is not retroactive: *Bank v. Hodgin*, 129-247.

Death of a partner, in absence of any stipulation in an agreement to the contrary, works an immediate dissolution, and title to assets vests in surviving partner, impressed with a trust to close up partnership business, pay debts, and turn over to his personal representative the share of deceased partner: *Walker v. Miller*, 139-448; *Sherrod v. Mayo*, 156-144; *Weisel v. Cobb*, 114-22.

After dissolution of firm by death of one of the partners, it is the duty of the surviving partner to settle up the joint estate in the manner most conducive to the interest of all concerned: *Calvert v. Miller*, 94-600; *Hodgin v. Bank*, 128-110.

An arrangement between distributees and legatees to permit their property, with consent and coöperation of personal representatives of deceased partners, to remain in common and to be used for their joint benefit, adopting name of old firm, constitutes a partnership: *Walker v. Miller*, 139-448.

Surviving partner who assigns partnership property of insolvent firm to pay his own debts pro rata with those of firm cannot be allowed to testify that he did not thereby intend to defraud firm creditors: *Commission Co. v. Porter*, 122-692.

Where one of the members of a firm was constituted as general managing agent by the articles of partnership, and upon the death of one partner, his executor consented to a continuance of the business: Held, that manager became agent of the executor, as well as of the other surviving members: *Patterson v. Lilly*, 90-82.

In an action for goods sold to a firm, the testimony of one partner, who admitted his liability by failing to answer, that the goods were furnished by the plaintiff on the order of the firm, is not competent as against the executor of the deceased partner or as against the firm: *Moore v. Palmer*, 132-969; *Fertilizer Co. v. Rippy*, 124-643.

Notice of dissolution is not necessary to prevent liability for future contracts attaching to estate of deceased or surviving partner: *Bank v. Hollingsworth*, 135-556.

Where an administrator of one alleged to have been a partner in a certain concern is sued upon a partnership obligation, the surviving partner is incompetent to testify that defendant's intestate was a partner: *Moore v. Palmer*, 132-969; *Fertilizer Co. v. Rippy*, 124-643, 123-656; *Lion v. Pender*, 118-147; *Sykes v. Parker*, 95-232.

3280. When personal representative may take inventory; receiver. If the surviving partner neglect or refuse to have such inventory made, the personal representative of the deceased partner may have the same made in accordance with the provisions of the preceding section. Should any surviving partner fail to take such an inventory or refuse to allow the personal representative of the deceased partner's estate to do so, such personal representative of the deceased partner's estate may forthwith apply to a court of competent jurisdiction for the appointment of a receiver for such partnership, who shall thereupon proceed to wind up the same and dispose of the assets thereof in accordance with law.

Rev., s. 2541; 1901, c. 640, s. 2.

An assignment by a surviving partner of an insolvent firm for an indefinite term, assignee to have right to employ servants and to replenish stock and out of proceeds to pay firm debts and also to pay individual debts of survivor pro rata, is fraudulent as against creditors: *Commission Co. v. Porter*, 122-692—a receiver might be appointed to administer partnership assets, though deed was not set aside, *Ibid.*

Where surviving partner conveyed assets to assignee to settle estate, it was duty of assignee, notwithstanding a contrary custom in the town where the business had been conducted, to charge and collect interest on all good overdue accounts from the end of a year after dissolution of partnership, and is liable to surviving partner for his failure to do so: *Weisel v. Cobb*, 118-11. Assignee is chargeable with interest on moneys of a partnership collected by him for the surviving partner and kept after twelve months from the time he assumed the trust until he disbursed it: *Ibid.* Compensation of assignee of a surviving partner appointed to settle partnership: *Ibid.*

In case of danger of misapplication by surviving partner of partnership funds, courts may, in behalf of representatives of a deceased partner, restrain by injunction surviving partner from such acts or grant other proper relief: *Hodgin v. Bank*, 128-111.

Where surviving partner is appointed receiver of firm, he cannot maintain an action against one who, as surety and for accommodation of deceased partner, endorsed latter's note, which was discounted by the firm, if it appear that the assets of the partnership are sufficient to pay its debts and leave a surplus, against deceased partner's share of which the note can be charged: *Patton v. Carr*, 117-176.

3281. Notice to creditors. Every surviving partner, within thirty days after the death of the deceased partner, shall notify all persons having claims against the partnership which were in existence at the time of the death of the deceased partner, to exhibit the same to the surviving partner within twelve months from the date of first publication of such notice. The notice shall be published once a week for four weeks in a newspaper (if there be any) published in the county where the partnership existed. If there should be no newspaper published in the county, then the notice shall be posted at the courthouse and four other public places in the county.

Rev., s. 2542; 1901, c. 640, s. 3.

3282. Debts paid pro rata; liens. All debts and demands against a copartnership, where one partner has died, shall be paid pro rata, except debts which are a specific lien on property belonging to the partnership.

Rev., s. 2543; 1901, c. 640, s. 4.

Claim of surviving partner upon proceeds of sale of deceased partner's half of real estate (here mill property) to reimburse him to the amount of half the expenditures incurred in the conduct of joint business and improvements put upon the property, constitute a prior encumbrance, and must be paid to the postponement of creditors of the deceased partner: *Mendenhall v. Benbow*, 84-646.

Creditors advancing money to surviving partner, in good faith, to enable him to finish work and use up raw material, are entitled to pay out of partnership assets: *Calvert v. Miller*, 94-600; see *Howell v. Mfg. Co.*, 116-806.

Surety of a deceased partner on a debt due to the partnership has the right to compel the application of such deceased partner's share of assets in the hands of surviving partner to payment of debt in exoneration of such surety's liability: *Patton v. Carr*, 117-176.

While a surviving partner cannot enter into contracts or create liabilities which will bind estate of deceased partner, yet he is not bound to sacrifice the interest of the firm, and if he contract debts, bona fide, for the interest of the common property, he may pay them out of the common fund: *Calvert v. Miller*, 94-600.

In a suit by a surviving partner for a firm debt, a personal debt of such survivor may be pleaded as a set-off: *Hogg v. Ashe*, 2-471; *Norment v. Johnston*, 32-90—but a debt of the deceased partner cannot be so pleaded, *Norment v. Johnston*, 32-89.

A bank cannot apply deposit standing in name of surviving partner to the payment of partnership debts: *Hodgin v. Bank*, 125-503.

Note executed by a member of a partnership to a third party who, as surety and for the accommodation of the maker, endorses it and receives no benefit from it, cannot be subject of an action at law against indorser by the firm, nor, in case of death of maker of note, can surviving partner maintain an action on note against accommodation indorser unless firm be insolvent: *Patton v. Carr*, 117-176.

A surviving partner who, more than two years after dissolution of firm, indorsed a note in firm name for renewal of notes outstanding similarly indorsed, was individually liable on such indorsement, though it did not bind firm: *Bank v. Hollingsworth*, 135-556.

3283. **Effect of failure to present claim in twelve months.** In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the surviving partner shall not be chargeable for any assets that he may have paid in satisfaction of any debts before such action was commenced, nor shall any costs be recovered in such action against the surviving partner.

Rev., s. 2544; 1901, c. 640, s. 5.

3284. **Procedure for purchase by surviving partner:**

1. *Appraisal of property.* The surviving partner may, if he so desire, make application to the clerk of the superior court of the county in which the partnership existed, after first giving notice to the executor or administrator of the time of the hearing of such application, for the appointment of three judicious, disinterested appraisers, one of whom may be named by the surviving partner, one by the representative of the deceased partner's estate, and the third named by the two appraisers selected, whose duty it shall be to make out under oath a full and complete inventory and appraisal of the entire assets of the partnership, including real estate if there be any, together with a schedule of the debts and liabilities thereof, and to deliver the same to the surviving partner; they shall also deliver a copy to the executor or administrator, and file a copy with the clerk of the court.

2. *Surviving partner may purchase.* The surviving partner may, with the consent of the executor or administrator of the deceased partner and the approval of the clerk of the superior court by whom such executor or administrator was appointed, purchase the interest of such deceased partner in the partnership assets at the appraised value thereof, including the good will of the business, first deducting therefrom the debts and liabilities of the partnership, for cash or upon giving to the executor or administrator his promissory note or notes, with good approved security, and satisfactory to the executor or administrator, for the payment of the interest of such deceased partner in the partnership assets.

3. *Surviving partner to give bond.* In case the surviving partner shall avail himself of the privilege of purchasing such interest as provided for in this section, he shall give bond to the executor or administrator with surety for the payment of the debts and liabilities of the partnership, and for the performance of all contracts for which the partnership is liable.

4. *Sale of real estate.* In case of such sale of the real estate belonging to the partnership, the title to the real estate so purchased shall not pass until the sale thereof has been reported to and confirmed by the clerk of the superior court of the county in which the partnership was located, in a special proceeding to which the widow and heirs at law or devisees of the deceased partner are duly made parties.

Rev., s. 2545; 1901, c. 640, s. 6; 1911, c. 12.

3285. **Surviving partner to account and settle.** In case the surviving partner shall not avail himself of the privilege of purchasing the interest of the deceased

partner, he shall, within twelve months from the death of the deceased partner, file with the clerk of the superior court of the county where the partnership was located, an account, under oath, stating his action as surviving partner, and shall come to a settlement with the executor or administrator of the deceased partner: Provided, that the clerk of the superior court shall have power, upon good cause shown, to extend the time within which said final settlement shall be made. The surviving partner for his services in settling the partnership estate shall receive commissions to be allowed by the court, and in no case to exceed five per cent out of the share of the deceased partner.

Rev., s. 2546; 1901, c. 640, s. 7.

In the absence of evidence to the contrary, each partner is presumed to be equally interested in the joint business: *Worthy v. Brower*, 93-344; *Taylor v. Taylor*, 6-70.

Where the surviving partner acts in good faith in his fiduciary character he cannot be charged with loss: *Thompson v. Rogers*, 69-357.

In stating an account between an executor and surviving partner of testator, it is not error to charge surviving partner with the value of a note, due testator of plaintiff individually, if such note arose from or grew out of the business of the copartnership: *Royster v. Johnson*, 73-474.

A surviving partner has no power, after dissolution, to renew or endorse a firm note in the name of the firm: *Bank v. Hollingsworth*, 135-556.

Surviving partner of insolvent firm is not entitled to have his personal property exemption paid out of partnership assets: *Commission Co. v. Porter*, 122-692.

3286. Accounting compelled. In case any surviving partner fails to come to a settlement with the executor or admintsrator of the deceased partner within the time prescribed by law, the clerk of the superior court may, at the instance of such executor, administrator or other person interested in such deceased partnership estate, cite the surviving partners to a final settlement as provided for by law in the case of executors and administrators.

Rev., s. 2547; 1901, c. 640, s. 8.

3287. Settlement otherwise provided for. When the original articles of partnership in force at the death of any partner or the will of a deceased partner make provision for the settlement of the deceased partner's interest in the partnership, and for a disposition thereof different from that provided for in this chapter, the interest of such deceased partner in the partnership shall be settled and disposed of in accordance with the provisions of such articles of partnership or of such will.

Rev., s. 2545; 1901, c. 640, s. 6.

ART. 3. BUSINESS UNDER ASSUMED NAME REGULATED

3288. Certificate filed; contents. No person shall hereafter carry on, conduct or transact business in this state under assumed name, or under any designation, name or style other than the real name of the individual owning, conducting or transacting such business, unless such person shall file in the office of the clerk of the superior court of the county in which such person owns, conducts or transacts, or intends to own, conduct or transact such business, or maintain an office or place of business, a certificate setting forth the name under which such business owned is or is to be conducted or transacted, and the true or real full name of the person owning, conducting or transacting the same, with the home

and postoffice address of such person. The certificate shall be executed and duly acknowledged by the person so owning, conducting or intending to conduct such business: Provided, that the selling of goods by sample or through traveling agents or traveling salesmen, or by means of orders forwarded by the purchaser through the mails, shall not be construed for the purpose of this section as conducting or transacting business so as to require the filing of such certificates.

1913, c. 77, s. 1.

This section, being highly penal in its nature, is to be strictly construed: *Jennette v. Copper-smith*, 176-82; *Price v. Edwards*, 178-493. It was intended to protect third persons in dealing with such partnerships, and does not apply to dealings between the partners themselves: *Price v. Edwards*, 178-493.

Where the title of the business containing the surname of the proprietors is such as to afford a reasonable guide to a correct knowledge of the individuals composing the firm, it is not an "assumed name" within this section: *Befarah v. Spell*, 176-193; *Jennette v. Coppersmith*, 176-82.

3289. Index of certificates kept by clerk. The several clerks of the superior court of this state shall keep an alphabetical index of all persons filing certificates provided for herein, and for the indexing and filing of such certificates they shall receive a fee of twenty-five cents. A copy of such certificates duly certified to by the clerk in whose office the same shall be filed shall be presumptive evidence in all courts of law in this state of the facts therein contained.

1913, c. 77, s. 2.

3290. Corporations and limited partnerships not affected. This article shall in no way affect or apply to any corporation created and organized under the laws of this state, or to any corporation organized under the laws of any other state and lawfully doing business in this state, nor shall it in any manner affect the right of any persons to form limited partnerships as provided by the laws of this state.

1913, c. 77, s. 3.

3291. Violation of article misdemeanor. Any person owning, carrying on or conducting or transacting business as aforesaid, who shall fail to comply with the provisions of this article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars or imprisonment in the county jail for a term of not exceeding thirty days: Provided, however, that the failure of any person or persons owning, carrying on, or conducting or transacting business as aforesaid, to comply with the provisions of this article shall not prevent a recovery by said person or persons in any civil action brought in any of the courts of this state.

1913, c. 77, s. 4; 1919, c. 2.

Violation of the provisions as to business under assumed name would prevent a recovery upon a contract: *Courtney v. Parker*, 173-479—changed by act of 1919, c. 2.

3292. Person trading as "company" or "agent" to disclose real parties; married woman not disclosing, a free trader. If any person shall transact business as trader or merchant, with the addition of the words "factor," "agent," "& Company" or "& Co.," or shall conduct such business under any name or style other than his own, except in case of a corporation, and fail to dis-

close the name of his principal or partner by a sign placed conspicuously at the place wherein such business is conducted; or if any married woman conducts such business through her husband or any other agent, or if a husband or agent of any married woman conducts such business for her without displaying the Christian name of such married woman, and the fact that she is a feme covert, by a sign placed conspicuously at the place wherein such business is conducted, then all the property, stock of goods and merchandise, and choses in action purchased, used and contracted in the course of such business shall, as to creditors, be liable for the debts contracted in the course of such business by the person in charge of same. A married woman conducting such business as aforesaid without complying with the provisions of this section shall for all purposes be deemed and treated, as to all debts contracted in the course of such business, as a free trader as fully as if she had in all respects complied with the provisions of law for a registered free trader: Provided, this section shall not apply to any person transacting business under license as an auctioneer, broker, or commission merchant; in all actions under this section it is incumbent on such trader, merchant or married woman to prove compliance with the same.

Rev., s. 2118; 1905, c. 443.

Section is constitutional: *Scott v. Ferguson*, 152-346. The purpose of the section is to prevent a married woman from conducting business by her husband or other agent in such a way as to mislead creditors: *Weld v. Shop Co.*, 147-588.

Stock of goods belonging to the wife and in the hands of her husband as agent is liable for debts for goods sold to the husband: *Scott v. Ferguson*, 152-346—and an action may be brought in a justice's court, *Ibid.* This section applies to a married woman as a member of a firm, the name of which does not disclose the fact of coverture: *Stone Co. v. McLamb*, 153-378—and a mortgage executed by the manager of such firm is valid, *Ibid.*

This section does not apply where goods were sold to the wife, not a free trader, by agent of creditors who knew the husband and was by him referred to the wife: *Weld v. Shop Co.*, 147-588.

The husband is not liable under this section when the wife's name is disclosed by proper sign, unless he has been guilty of fraud: *Morse v. Schultz*, 156-165. Failing to comply with this section does not deprive the married woman of her right to exemptions: *Grocery Co. v. Bails*, 177-298.

CHAPTER 65

PROBATE AND REGISTRATION

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ART. 1. PROBATE

3293. **Officials of state authorized to take probate.** The execution of all deeds of conveyance, contracts to buy, sell or convey lands, mortgages, deeds of trust, assignments, powers of attorney, covenants to stand seized to the use of another, leases for more than three years, releases and any and all instruments and writings of whatsoever nature and kind which are required or allowed by law to be registered in the office of the register of deeds or which may hereafter be required or allowed by law to be so registered, may be proved or acknowledged before any one of the following officials of this state: the several justices of the supreme court, the several judges of the superior court, commissioners of affidavits appointed by the governor of this state, the clerk of the supreme court, the several clerks of the superior court, the deputy clerks of the superior court, the several clerks of the criminal courts, notaries public, and the several justices of the peace.

Rev., s. 989; Code, s. 1246; 1899, c. 235; 1895, c. 161, ss. 1, 3; 1897, c. 87.

For powers of commissioners of affidavits, see section 967—of clerks of courts of other states, see section 968. For forms of acknowledgment and proof, see sections 3322-3328.

The taking of acknowledgment of a deed by a justice of the peace, commissioner, or notary public is a judicial, or at least a quasi-judicial, act: *Long v. Crews*, 113-256; *Piland v. Taylor*, 113-1; *Paul v. Carpenter*, 70-502; *State v. Knight*, 169-333. Registration upon an acknowledgment before an officer not authorized to take it is not even notice to creditors and subsequent purchasers: *Long v. Crews*, 113-256, and cases cited. Commissioner of deeds of this state is not required to affix seal to certificate acknowledging execution of deed conveying land in this state: *Johnson v. Duvall*, 135-642—nor is it necessary for seal to be affixed to certificate by any officer unless at the time the statute required it, *Westfelt v. Adams*, 131-379; but see section 3297.

Cases of interest hereunder where acknowledgment or proof of execution taken before judge of superior court: *Wright v. Player*, 72-94—before commissioner of affidavits, *Johnson v. Duvall*, 135-642; *Barcello v. Hapgood*, 118-712; *Buggy Co. v. Pegram*, 102-540; *Simmons v. Gholson*, 50-401—before clerk of superior court, *Trenwith v. Smallwood*, 111-132; *Ferebee v. Hinton*, 102-99; see section 3299—before clerk of county court, *Strickland v. Draughan*, 88-315; *Starke v. Etheridge*, 71-240; *Johnson v. Pendergrass*, 49-479—before deputy clerk of county court, *Piland v. Taylor*, 113-1; *Coltrane v. Lamb*, 109-209—before justice of the peace, *Spruce Co. v. Hunnicutt*, 166-202; *Hatcher v. Hatcher*, 127-200; *Gaskins v. Allen*, 137-426; *Williams v. Kerr*, 113-309—before notary public, *Smith v. Lumber Co.*, 144-47; *Lance v. Tainter*, 137-249; *Long v. Crews*, 113-256; *Hughes v. Long*, 119-52—before old court of pleas and quarter sessions or county court, *Coltrane v. Lamb*, 109-209; *Sellers v. Sellers*, 98-13;

Robbins v. Harris, 96-557—before provost marshal of New Bern while city under federal authority, Paul v. Carpenter, 70-502—before commissioner authorized by old county court, Skinner v. Fletcher, 23-313; Fenner v. Jasper, 18-34.

It is not required that the justice of the peace subscribe the probate; it is sufficient if his name appears in the body of it: Brown v. Hutcheson, 155-205. Probate taken by a de facto officer is valid: Spruce Co. v. Hunnicutt, 166-202.

Certificate of probate by proper officer must be accepted as true when comes up collaterally, and recitals cannot be disproved nor omissions supplied by extraneous proof: Wynne v. Small, 102-133. Distinction between probates by clerks of courts and commissioners of affidavits pointed out in Evans v. Etheridge, 99-43. Justice of peace cannot correct certificate to deed after term of office has expired: Cook v. Pittman, 144-530—nor can probate officer afterwards change the certificate except to show what was done at the time, Butler v. Butler, 169-584.

Proceeding to establish and declare probate of deed where probate had been lost or destroyed: Mills v. McDaniel, 161-112; s. c., 155-249.

AS TO DISQUALIFICATIONS TO TAKE ACKNOWLEDGMENT OR PROOF. An officer interested in a deed, either as party, trustee or cestui que trust, is disqualified to take acknowledgment of its execution: Long v. Crews, 113-256; Lance v. Tainter, 137-249; Joines v. Johnson, 133-487; McAllister v. Purcell, 124-262; Blanton v. Bostic, 126-421; Land Co. v. Jennett, 128-3; Freeman v. Person, 106-251; but see Trenwith v. Smallwood, 111-132. The probate is valid if the incapacity does not appear in the record: Spruce Co. v. Hunnicutt, 166-202. The fact that officer taking acknowledgment or proof is employed by grantee does not invalidate unless such officer has an interest in it himself: Smith v. Lumber Co., 144-47; Bank v. Ireland, 122-571. The interest to disqualify a probate officer must be a pecuniary interest, and not a mere relationship to the parties: Hinton v. Hall, 166-477; Holmes v. Carr, 163-122. Clerk of court cannot take proofs outside of state: Ferree v. Hinton, 102-99; see section 3298. Deputy clerks of superior court could not take proof of execution, or make orders concerning registration of instruments prior to enactment of chapter 161, acts of 1895: Tatom v. White, 95-453. A probate taken by a woman as a notary or a deputy clerk is invalid: Bank v. Redwine, 171-559; State v. Knight, 169-333; but see Nicholson v. Lumber Co., 160-33. A probate taken by a commissioner of deeds of another state, not authorized by law of this state, is invalid: Wood v. Lewey, 153-401; Shingle Mills v. Lumber Co., 171-410.

3294. Officials of the United States, foreign countries, and sister states. The execution of all such instruments and writings as are permitted or required by law to be registered may be proved or acknowledged before any one of the following officials of the United States, of the District of Columbia, of the several states and territories of the United States, of countries under the dominion of the United States and of foreign countries: Any judge of a court of record, any clerk of a court of record, any notary public, any commissioner of deeds, any mayor or chief magistrate of an incorporated town or city, any ambassador, minister, consul, vice consul, consul general, vice consul general, or commercial agent of the United States, any justice of the peace of any state or territory of the United States. If the proof or acknowledgment of the execution of an instrument is had before a justice of the peace of any state of the United States other than this state or of any territory of the United States, the certificate of such justice of the peace shall be accompanied by a certificate of the clerk of some court of record of the county in which such justice of the peace resides, which certificate of the clerk shall be under his hand and official seal, to the effect that such justice of the peace was at the time the certificate of such justice bears date an acting justice of the peace of such county and state or territory and that the genuine signature of such justice of the peace is set to such certificate.

Rev., s. 990; 1899, c. 235, s. 5; 1905, c. 451; 1913, c. 39, s. 1; Ex. Sess. 1913, c. 72, s. 1.

See sections 963, 967, 968, 3175, 3176.

A clerical error in designating the officer taking the probate will not invalidate it: Powers v. Baker, 152-718. It must appear that the officer is one authorized by the law of this state

to take probate: *Shingle Mills v. Lumber Co.*, 171-410; *Wood v. Lewey*, 153-402—but probate taken in another state before a notary who is a woman is valid: *Nicholson v. Lumber Co.*, 160-33. For form of probate by notary in another state, see *Kleybolte v. Timber Co.*, 151-635; *Deans v. Pate*, 114-194.

3295. Commissioner appointed by clerk for nonresident maker. When it appears to the clerk of the superior court of any county that any person nonresident of this state desires to acknowledge a power of attorney, deed or other conveyance touching any real estate situated in the county of said clerk, he shall issue a commission to a commissioner for receiving such acknowledgment, or taking such proof, and said commissioner may likewise take the acknowledgment and privy examination of a married woman separate and apart from her husband, touching her assent to any power of attorney, deeds or other conveyances, touching real estate in said county. The commissioner shall make certificate of the acknowledgments or proof and privy examination made by him, and shall return the same to the clerk of the superior court, whereupon he shall adjudge that such conveyance, power of attorney or other instrument is duly acknowledged or proved, and that such examination is in due form, and shall order the same to be registered.

Rev., s. 991; Code, s. 1258; 1869-70, c. 185.

3296. By justice of peace of other than registering county. If the proof of acknowledgment of any instrument is had before a justice of the peace of any county other than the county in which such instrument is offered for registration, the certificate of proof or acknowledgment made by such justice of the peace shall be accompanied by the certificate of the clerk of the superior court of the county in which said justice of the peace resides, that such justice of the peace was at the time his certificate bears date an acting justice of the peace of such county, and that such justice's genuine signature is set to his certificate. The certificate of the clerk of the superior court herein provided for shall be under his hand and official seal.

Rev., s. 992; 1899, c. 235, s. 4.

Consult *Lineberger v. Tidwell*, 104-506.

3297. When seal of officer necessary to probate. When proof or acknowledgment of the execution of any instrument by any maker of such instrument, whether a married woman or other person or corporation, is had before any official authorized by law to take such proof and acknowledgment, and such official has an official seal, he shall set his official seal to his certificate. If the official before whom the instrument is proved or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the instrument is proved or acknowledged before the clerk or deputy clerk of the superior court of the county in which the instrument is to be registered, the official seal shall not be necessary.

Rev., s. 993; 1899, c. 235, s. 8.

Omission by justice to attach seal to certificate of proof of execution of deed and of privy examination of wife will not invalidate his action otherwise regular: *Lineberger v. Tidwell*, 104-506. Certificate of probate need not have seal if same not required by statute at date of execution or registration of deed: *Westfelt v. Adams*, 131-379. Seal of justice of the peace not essential to validity of assignment for creditors: *Friedenwald Co. v. Sparger*, 128-446. Seal of commissioner of affidavit not essential to valid probate in the instance referred to

in *Johnson v. Duvall*, 135-642. Where the certificate recites that it is given under seal, but no seal appears to be indicated on the record, it will be presumed that the original certificate was under seal: *Johnson v. Lumber Co.*, 147-249.

3298. Officials may act although land or maker's residence elsewhere. The execution of all instruments required or permitted by law to be registered may be proved or acknowledged before any of the officials authorized by law to take probates, regardless of the county in this state in which the subject-matter of the instrument may be situated and regardless of the domicile, residence or citizenship of the person who executes such instrument, or of the domicile, residence or citizenship of the person to whom or for whose benefit such instrument may be made.

Rev., s. 994; 1899, c. 235, s. 13.

Consult the following decisions prior to this enactment: *Dixon v. Robbins*, 114-102; *Lewis v. Roper*, 109-19; *Darden v. Steamboat Co.*, 107-437; *Davis v. Higgins*, 91-382.

3299. Probate where clerk is a party. All instruments required or permitted by law to be registered to which clerks of the superior court are parties or in which such clerks are interested may be proved or acknowledged and privy examination of any married woman, when necessary, taken before any justice of the peace of the county of said clerk, which clerk may then, under his hand and official seal, certify to the genuineness thereof, or before any judge of the superior court or justice of the supreme court, and the instrument probated and ordered to be registered by such judge or justice of the peace in like manner as is provided by law for probates by clerks of the superior court in other cases.

Rev., s. 995; 1891, c. 102; 1893, c. 3; 1913, c. 148, s. 1.

See sections 3305, 3343. Probate of deed by officer who is party thereto or interested therein is a nullity: *Land Co. v. Jennett*, 128-3; *Lance v. Tainter*, 137-249; *Long v. Crews*, 113-256; *Freeman v. Person*, 106-251; *McAllister v. Purecell*, 124-262; *Blanton v. Bostic*, 126-421; *Joines v. Johnson*, 133-487; *Gregory v. Ellis*, 82-225—but probate and private examination taken before officer not invalid simply because he is related to one of the parties, *Hinton v. Hall*, 166-478; *Holmes v. Carr*, 163-122; *McAllister v. Purecell*, 124-262—or is subscribing witness to deed, *Trenwith v. Smallwood*, 111-132.

Decisions prior to enactment of section which are not now the law: *White v. Connelly*, 105-65; *Turner v. Connelly*, 105-72.

3300. Attorney in action not to probate papers therein. No practicing attorney at law has power to administer any oath to a person to any paper writing to be used in any legal proceeding in which he appears as attorney.

Rev., s. 2350; Ex. Sess. 1908, c. 105, s. 2.

See section 3175.

3301. Probates before stockholders in building and loan associations. No acknowledgment or proof of execution, including the privy examination of any married woman, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association shall hereafter be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination, is a stockholder in said building and loan association. This section does not authorize any officer or director of a building and loan association to take acknowledgments, proofs and privy examinations.

1913, c. 110, ss. 1, 3.

3302. Subpœnas to maker and subscribing witnesses. The grantee or other party to an instrument required or allowed by law to be registered may at his own expense obtain from the clerk of the superior court of the county in which the instrument is required to be registered a subpœna for any or all of the makers of or subscribing witnesses to such instrument, commanding such maker or subscribing witness to appear before such clerk at his office at a certain time to give evidence concerning the execution of the instrument. The subpœna shall be directed to the sheriff of the county in which the person upon whom it is to be served resides. If any person refuses to obey such subpœna he is liable to a fine of forty dollars or to be attached for contempt by the clerk, upon its being made to appear to the satisfaction of the clerk that such disobedience was intentional, under the same rules of law as are prescribed in the cases of other defaulting witnesses.

Rev., s. 996; Code, s. 1268; 1899, c. 235, s. 16; 1897, c. 28.

Where there is subscribing witness to deed, its execution may be proved by such witness without the acknowledgment of maker: *Shaffer v. Hahn*, 111-1. Law attaches peculiar importance to testimony of subscribing witnesses: *Smith v. Smith*, 108-365. See section 3303.

3303. Proof of attested writing. If an instrument required or permitted by law to be registered has a subscribing witness and such witness is dead or out of the state, or of unsound mind, the execution of the same may be proved before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of such subscribing witness or of the handwriting of the maker, but this shall not be proof of the execution of instruments by married women.

Rev., s. 997; 1899, c. 235, s. 12.

Consult the following decisions prior to enactment of section: *Simpson v. Simpson*, 93-373; *Howell v. Ray*, 92-510; *Davis v. Higgins*, 91-382; *Black v. Justice*, 86-504; *Miller v. Hahn*, 84-226; *Burnett v. Thompson*, 35-379.

As to how to prove handwriting hereunder and as to who is competent to prove it, see *Ratliff v. Ratliff*, 131-425; *Bivings v. Gosnell*, 141-341; *Abernethy v. Yount*, 138-337; *State v. DeGraff*, 113-688; *Anderson v. Logan*, 99-474; *Tuttle v. Rainey*, 98-513; *Hussey v. Kirkman*, 95-63; *Angier v. Howard*, 94-27; *Howell v. Ray*, 92-510; *State v. Gay*, 94-814; *Davis v. Higgins*, 91-382; *Black v. Justice*, 86-504; *Yates v. Yates*, 76-142; *Barwick v. Wood*, 48-306; *McKonkey v. Gaylord*, 46-94; *Carrier v. Hampton*, 33-307; *Black v. Wright*, 31-447; *Pope v. Askew*, 23-16; *Beverly v. Williams*, 20-378; *State v. Allen*, 8-6. See sections 1782, 1784.

3304. Proof of unattested writing. If an instrument required or permitted by law to be registered has no subscribing witness, the execution of the same may be proved before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of the maker, but this shall not apply to proof of execution of instruments by married women.

Rev., s. 998; 1899, c. 235, s. 11.

As to proving handwriting, see cases cited under section 3303. Where parties to instrument having no subscribing witness are nonresidents except one, instrument may be probated upon proof of handwriting of nonresident by resident party: *Leroy v. Jacobosky*, 136-443. Consult following decisions prior to this enactment: *Love v. Harbin*, 87-249; *Black v. Justice*, 86-504.

3305. Clerk to pass on certificate and order registration. When the proof or acknowledgment of the execution of any instrument, required or permitted by law to be registered, is had before any other official than the clerk or deputy clerk of the superior court of the county in which such instrument is offered for

registration, the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration shall, before the same is registered, examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears that the instrument has been duly proved or acknowledged and the certificate or certificates to that effect are in due form, he shall so adjudge, and shall order the instrument to be registered, together with the certificates. If the clerk of the superior court is a party to or interested in such instrument such adjudication and order of registration shall be made by his deputy or by the clerk of the superior court of some other county of this state, or by some justice of the supreme court of this state or some judge of the superior court of this state. The acknowledgment of such instruments may also be made before a justice of the peace of said county, and the adjudication of the sufficiency of the certificate of said justice may be made by said clerk or his deputy.

Rev., s. 999; 1899, c. 235, s. 7; 1905, c. 414.

For proper registration where probate is taken before another officer, the clerk should pass upon the certificate of probate and order registration: *Buchanan v. Hedden*, 169-222—but order of registration does not seem to be required when the probate is taken by the clerk, *Lumber Co. v. Branch*, 158-251. In the following cases it was held that the provision that the clerk should pass upon the certificate of probate and order registration was directory only: *Heath v. Lane*, 176-119; *Darden v. Steamboat Co.*, 107-437; *Ferrabee v. Hinton*, 102-99; *Young v. Jackson*, 92-144; *Holmes v. Marshall*, 72-37.

A substantial compliance with this section is required: *Kleybolte v. Timber Co.*, 151-635. In a conveyance by a married woman the clerk should adjudge and certify that the certificate of the probate officer is in due form and according to law: *Johnson v. Lumber Co.*, 147-249—it is sufficient to adjudge that the probate is correct, *Cozad v. McAden*, 150-206. Form of clerk's adjudication when probate is taken by commissioner of deeds: *Ibid.* Registration of instrument upon probate by commissioner of affidavits, without the clerk's adjudication, is invalid as against creditors and purchasers for value: *Evans v. Etheridge*, 99-43.

Adjudication of clerk that certificate of probate is correct and sufficient is presumed to be true, but it may be rebutted by competent evidence: *Hughes v. Long*, 119-52. It is not necessary that the certificate of probate within the state should be registered, unless the statute so requires: *Perry v. Bragg*, 111-159.

For decisions prior to enactment of section, see *White v. Connelly*, 105-65; *Turner v. Connelly*, 105-72; *Tatom v. White*, 95-453.

3306. Probate of husband's deed where wife insane. When a deed executed by a married man whose wife is insane or a lunatic, and whose homestead has been allotted, together with the certificate of the clerk of the superior court or with the certificate of the superintendent of the insane institution of the state where the wife is confined in conformity to section 1004 under the chapter Conveyances, is offered for probate before the clerk of the superior court of the county in which the land conveyed is situated, and the execution of such deed is acknowledged or proved, the clerk shall adjudge whether the certificate of the superintendent or the clerk is in due form, and if adjudged to be in due form he shall order the registration of the deed and certificate.

Rev., s. 1000; 1905, c. 138, s. 2; 1919, c. 20.

3307. Probate of corporate deeds, where corporation has ceased to exist. It is competent for the clerk of the superior court in any county in this state, on proof before him upon the oath and examination of the subscribing witness to any contract or instrument required to be registered under the laws of this state, to adjudge and order that such contract or instrument be registered as by

law provided, when such contract or instrument is signed by any corporation in its corporate name by its president, and when such corporation has been out of existence for more than ten years when the said contract or instrument is offered for probate and registration, and when the grantee and those claiming under any such grantee have been in the uninterrupted possession of the property described in said contract or instrument since the date of its execution; and said contract or instrument so probated and registered shall be as effective to all intents and purposes as if signed, sealed, and acknowledged, or proven, as provided under the existing laws of this state.

1911, c. 44, s. 1.

ART. 2. REGISTRATION

3308. Probate and registration sufficient without livery. All deeds, contracts or leases, before registration, except those executed prior to January first, one thousand eight hundred and seventy, shall be acknowledged by the grantor, lessor or the person executing the same, or their signature proven on oath by one or more witnesses in the manner prescribed by law, and all deeds executed and registered according to law shall be valid, and pass title and estates without livery of seizin, attornment or other ceremony.

Rev., s. 979; Code, s. 1245; 1885, c. 147, s. 3; 29 Ch. II, c. 3; R. C., c. 37, s. 1; 1715, c. 7; 1756, c. 58, s. 3; 1838-9, c. 33; 1905, c. 277.

Section not applicable to grants: *Richards v. Lumber Co.*, 158-54; *Janney v. Blackwell*, 138-440; *Wyman v. Taylor*, 124-426; *Ray v. Stewart*, 105-472; see section 7579.

Necessity of acknowledgment or proof of execution before registration of instrument set forth in *Duke v. Markham*, 105-137, and cases cited; *Todd v. Outlaw*, 79-237, and cases cited; *Williams v. Griffin*, 49-31; *King v. McRackan*, 168-621, and cases cited.

Proper probate and registration of deed necessary to pass legal title: *Respass v. Jones*, 102-5; *Anderson v. Logan*, 99-474; *Southerland v. Hunter*, 93-310; *Phifer v. Barnhart*, 88-333; *Triplett v. Witherspoon*, 74-475; *Wilson v. Sparks*, 72-209—and this without livery of seizin, attornment or other ceremony, *Jones v. Jones*, 164-320; *Rowland v. Rowland*, 93-221; *Hinton v. Moore*, 139-47; *Edwards v. Dickinson*, 102-522; *Savage v. Lee*, 90-320; *Mayo v. Jones*, 78-404; *Hogan v. Strayhorn*, 65-283; *Ivey v. Granberry*, 66-223.

It is necessary that instrument be probated and registered in order that it may be competent as evidence: *Brown v. Hutchinson*, 155-205, and cases cited; *Avent v. Arrington*, 105-389; *Jennings v. Reeves*, 101-450; *White v. Holly*, 91-68; *Phifer v. Barnhart*, 88-333; *Triplett v. Witherspoon*, 74-476; *Wilson v. Sparks*, 72-209; *Walker v. Coltraine*, 41-79—but this does not apply to use of deeds in evidence to show color of title, *Janney v. Robbins*, 141-403; *Collins v. Davis*, 132-111; *Allen v. Burch*, 142-528; *Avent v. Arrington*, 105-377; *Hunter v. Kelly*, 92-285. As to when unregistered deed is color of title, see annotations under section 428.

The registration of a deed is presumed to be correct: *Cochran v. Imp. Co.*, 127-386. From the fact of registration it is presumed that delivery of deed was made and that maker meant to part with title: *Belk v. Belk*, 175-69; *Smithwick v. Moore*, 145-110; *Wetherington v. Williams*, 134-276; *Helms v. Austin*, 116-751; *Avent v. Arrington*, 105-377—also presumed that deed was probated, *Cochran v. Imp. Co.*, 127-386—and that the probate was regular, *Ibid.* Where first probate is not sufficient to identify the grantors, the defect may be cured by a second probate: *Hutton v. Horton*, 178-548.

Unregistered deed passes only equitable title, which may be converted into legal title by registration: *Phillips v. Hodges*, 109-248; *Austin v. King*, 91-286; *Davis v. Inscoe*, 84-403.

Title of grantor is divested from time of delivery of deed which is subsequently registered: *Gadsby v. Dyer*, 91-311; *Phifer v. Barnhart*, 88-333—the registration relating back to the delivery, *Wilson v. Sparks*, 72-209; *King v. Portis*, 81-384; *Isler v. Foy*, 66-551; *Brown v. Hutchinson*, 155-205.

Section merely referred to: *Haire v. Haire*, 141-89; *Jordan v. Furnace Co.*, 126-143; *Presnell v. Garrison*, 122-597; *Linker v. Long*, 64-298.

3309. Conveyances, contracts to convey, and leases of land. No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lies: Provided, the provisions of this section shall not apply to contracts, leases or deeds executed prior to March first, one thousand eight hundred and eighty-five, until the first day of January, one thousand eight hundred and eighty-six; and no purchase from any such donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to the first day of December, one thousand eight hundred and eighty-five, when the person holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person or by his tenant, at the time of the execution of such second deed, or when the person claiming under or taking such second deed had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person holding or claiming thereunder.

Rev., s. 980; Code, s. 1245; 1885, c. 147, s. 1.

PURPOSE OF STATUTE. This section, known as the "Connor act, of 1885," was intended to place deeds and contracts to convey upon the same footing, as to registration, as mortgages and deeds of trust under section 3311: *Wood v. Tinsley*, 138-507; *Hinton v. Moore*, 139-43; *Collins v. Davis*, 132-106; *Hooker v. Nichols*, 116-187; *Allen v. Bolen*, 114-560; *Long v. Crews*, 113-256.

This section and section 1006 were both intended to prevent fraud, and must be construed together with that view: *Austin v. Staten*, 126-783. Section will be construed in accordance with principles adopted in construction of sections 3311, 3312: *Francis v. Herren*, 101-497.

"Unregistered deed" is used in the broad sense of conveyance: *McNeill v. Allen*, 146-283. This section did not apply to deeds executed before December 1, 1885, until January 1, 1886: *Ibid.*; *Cowen v. Withrow*, 116-771; *Cozad v. McAden*, 148-10; *Phillips v. Hodges*, 109-248.

EFFECT OF REGISTRATION. Conveyances and contracts to convey are valid between the parties without registration: *Proffitt v. Ins. Co.*, 176-680; *Plaster Co. v. Plaster Co.*, 156-455; *Combes v. Adams*, 150-64; *Morton v. Lumber Co.*, 144-31; *Hinton v. Moore*, 139-46; *Wallace v. Cohen*, 111-103; *Leggett v. Bullock*, 44-283—and same principle applies to unregistered assignment of mortgages, *Morton v. Lumber Co.*, 144-31. Section does not apply to deeds without valuable consideration: *Buchanan v. Clark*, 164-56; *Thompson v. Thomas*, 163-500; *Tyner v. Barnes*, 142-110—nor to registration of grants, *Wyman v. Taylor*, 124-426; and sections 7578, 7579. This section does not apply to wills: *Harris v. Lumber Co.*, 147-631.

Registration is intended to protect the rights of creditors and purchasers: *Weston v. Lumber Co.*, 160-263. Conveyances and contracts hereunder good as against creditors and purchasers for value from date of their registration: *Bell v. Couch*, 132-350; *Collins v. Davis*, 132-109; *Hallyburton v. Slagle*, 130-485; *Weaver v. Chunn*, 99-433; *Ijames v. Gaither*, 93-361; *Blevins v. Barker*, 75-436; *Robinson v. Willoughby*, 70-358. Where plaintiff is purchaser for value under registered conveyance, his title cannot be defeated by proof of prior conveyance lost before registration: *Hinton v. Moore*, 139-44—and parol evidence of such unregistered conveyance inadmissible, *Ibid.* Section applicable where grantee in deed fails to have same recorded until after probate of will of grantor devising same lands and the registration of deed for same land from devisee to purchaser for value: *Bell v. Couch*, 132-346. Sheriff's deed for land duly registered takes precedence of similar deed which, though dated first and made in pursuance of prior sale, was registered later: *Hooker v. Nichols*, 116-157; *Cowen v. Withrow*, 109-636. Unregistered release of timber interest in land by mortgagee is invalid as against registered deed of purchaser at mortgage sale: *Barber v. Wadsworth*, 115-30.

When conveyance or contract to convey is not registered until after docketing of judgment against grantor, though executed prior to same, grantee takes subject to lien of judgment: *Tarboro v. Micks*, 118-162; *Bostic v. Young*, 116-766; *Francis v. Herren*, 101-507; *Trust Co. v. Sterchie*, 169-21; *Realty Co. v. Carter*, 170-5. Deed executed prior to passage of section, but not registered until after registration of mortgage from same grantor, competent evidence

to show title in grantee, he being in possession before passage of section: *Laton v. Crowell*, 136-377. Decree in suit for specific performance directing conveyance and reciting that its effect should be to convey title need not be recorded under this section: *Skinner v. Terry*, 134-305. Under amendment of 1910 to the Bankruptcy act, the trustee's title has priority over an unregistered deed: *Lynch v. Johnson*, 170-110; s. c., 171-611. For effect of section upon parol trusts, equitable right to correction, and other equities, see *Pritchard v. Williams*, 175-319; *Sills v. Ford*, 171-733; *Wood v. Tinsley*, 138-507. Failure to register a deed does not invalidate it, but it is postponed or subordinated to the rights of creditors acquiring liens by proper proceedings and the rights of purchasers for value: *Tyner v. Barnes*, 142-110; *Francis v. Herren*, 101-497. Where man executed and delivered deed to tract of land prior to marriage, which was not recorded until after his death, his widow not entitled to dower: *Haire v. Haire*, 141-88. Of two deeds from a common source of title, the first registered has priority: *Mintz v. Russ*, 161-538.

An unregistered deed is not color of title where both parties claim under the same grantor, nor against a subsequent deed for valuable consideration which has been registered first; but in other cases it is color of title: *King v. McRackan*, 168-621; *Moore v. Johnson*, 162-266; *Gore v. McPherson*, 161-638; *Brown v. Hutchinson*, 155-205; *Janney v. Robbins*, 141-400; *Collins v. Davis*, 132-106; *Austin v. Staten*, 126-783; *Utley v. R. R.*, 119-720; *Avent v. Arrington*, 105-377. See section 428 and annotations. Contracts to convey land may be read in evidence without registration: *Hargrove v. Adcock*, 111-166; but see *Brown v. Hutchinson*, 155-205, and cases cited under section 3308.

There is no limitation as to time within which a deed is to be registered: *Brown v. Hutchinson*, 155-205; *Hallyburton v. Slagle*, 130-482; *Sellers v. Sellers*, 98-13. Deed must be registered in the county where the land is situated: *Weston v. Lumber Co.*, 160-263.

Where acknowledgment of deed void, registration thereof also void: *Lance v. Tainter*, 137-249; *Long v. Crews*, 113-256; *Southerland v. Hunter*, 93-310—as is registration upon unauthorized or essentially defective probate, *King v. McRackan*, 168-621; *Withrell v. Murphy*, 154-82; *Allen v. Burch*, 142-524; *Barrett v. Barrett*, 120-129; *Anderson v. Logan*, 99-474. Where proof of execution of deed or other instrument requiring registration has been duly made in this state, not necessary that fact of probate should be registered, unless statute so directs: *Perry v. Bragg*, 111-159. Not necessary that there should be an imitation of seal in registration: *Power Co. v. Power Co.*, 168-219. Indexing and cross-indexing necessary for registration: *Mfg. Co. v. Hester*, 177-609; *Fowle v. Ham*, 176-12; *Ely v. Norman*, 175-294; overruling *Davis v. Whitaker*, 114-279, but having only prospective effect. Where probate and registration of deed under which defendant's claim was defective, reprobate and reregistration after plaintiff's title accrued, and after institution of action, can have no effect: *Bernhardt v. Brown*, 122-587.

Filing in register's office is sufficient: *McHan v. Dorsey*, 173-694; *Smith v. Lumber Co.*, 144-47; *Glanton v. Jacobs*, 117-428; *Davis v. Whitaker*, 114-279; *Parker v. Scott*, 64-118; *McKinnon v. McLean*, 19-79; *Metts v. Bright*, 20-311. What effect the necessity for indexing and cross-indexing will have, see cases in preceding paragraph. A paper is filed when it is delivered to the officer and received by him for the purpose of registration: *Power Co. v. Power Co.*, 175-668—but delivery to register outside of his office is not a filing: *McHan v. Dorsey*, 173-694.

NOTICE. Only registration is sufficient notice: *Allen v. R. R.*, 171-339. No notice, however full and formal, can take the place of registration under this section: *Fertilizer Co. v. Lane*, 173-184; *Lynch v. Johnson*, 170-110; *Sexton v. Elizabeth City*, 169-385; *Burwell v. Chapman*, 159-209; *Wood v. Lewey*, 153-401; *Harris v. Lumber Co.*, 147-631; *Tremaine v. Williams*, 144-114; *Collins v. Davis*, 132-106; *Blalock v. Strain*, 122-283; *Patterson v. Mills*, 121-267, and cases cited; *Hinton v. Leigh*, 102-28; *Blevins v. Barker*, 75-436. Recorded option on lands given by duly empowered executors is notice of its terms only, and time within which should be exercised: *Trogden v. Williams*, 144-192—and unregistered waiver of time limit by executors in consenting to execute deed thereafter is inoperative against purchaser for value under sufficiently and subsequently registered conveyance made by proper persons, *Trogden v. Williams*, 144-192. Provisions of section that no purchase from bargainor or lessor shall pass title as against unregistered deed executed before December 1, 1885, of which purchaser had actual or constructive notice, applies to purchase at sale under execution: *Cowen v. Withrow*, 116-771, 112-736, 111-306, 109-636. One who goes into possession of land under parol contract

to convey cannot hold land until repaid purchase money and for improvements as against purchaser for value from vendor, holding under duly registered conveyance, although purchaser had notice of contract: *Wood v. Tinsley*, 138-507.

Registration of deed showing probate, including private examination of wife, and order of registration, and names of grantors, but omitting copy of signatures at end of instrument, is sufficient notice under section: *Smith v. Lumber Co.*, 144-47—as is also case where seal not recorded, *Power Co. v. Power Co.*, 168-219; *Heath v. Cotton Mills*, 115-202. Filing for registration is in law the registration and is sufficient notice: *McHan v. Dorsey*, 173-694, and other cases cited supra under “effect of registration.”

In absence of fraud, actual notice of prior unregistered mortgage or contract to convey executed since December 1, 1885, cannot affect the rights of subsequent purchaser for value whose deed or mortgage duly registered: *Maddox v. Arp*, 114-585; *Wallace v. Cohen*, 111-103; *Bank v. Mfg. Co.*, 96-298; *Fleming v. Burgin*, 37-584; *Collins v. Davis*, 132-106. Actual notice to agent of unregistered deed executed prior to December 1, 1885, is actual notice to principal: *Cowan v. Withrow*, 111-306. Registration of prior voluntary deed is notice to subsequent purchaser: *Taylor v. Eatman*, 92-601.

Possession of land is not sufficient if unregistered deed executed after December 1, 1885: *Lanier v. Lumber Co.*, 177-200; *Smith v. Fuller*, 152-7; *Tremaine v. Williams*, 144-114; *Collins v. Davis*, 132-106; *Allen v. Bolen*, 114-560. For law prior to this section, see *Bost v. Setzer*, 87-187.

Section merely referred to: *Janney v. Blackwell*, 138-440; *Wainwright v. Bobbitt*, 127-274; *Fortescue v. Crawford*, 105-30.

3310. Unregistered deeds prior to January, 1885, registered on affidavit. Any person holding any unregistered deed or claiming title thereunder, executed prior to the first day of January, one thousand eight hundred and eighty-five, may have the same registered without proof of the execution thereof by making an affidavit, before the officer having jurisdiction to take probate of such deed, that the grantor, bargainor or maker of such deed, and the witnesses thereto, are dead or cannot be found, that he cannot make proof of their handwriting, and that affiant believes such deed to be a bona fide deed and executed by the grantor therein named. This section shall not interfere with vested rights nor shall a deed so admitted to record be used as evidence in any action now pending. Said affidavit shall be written upon or attached to such deed, and the same, together with such deed, shall be entitled to registration in the same manner and with the same effect as if proved in the manner prescribed by law for other deeds.

Rev., s. 981; 1885, c. 147, s. 2; 1905, c. 277; 1913, c. 116; 1915, cc. 13, 90.

Probate of deed dated prior to January 1, 1870, defective where does not appear by affidavit that affiant believes such deed to be a bona fide deed and executed by grantor named therein: *Allen v. Burch*, 142-524.

3311. Deeds of trust and mortgages, real and personal. No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies; or in case of personal estate, where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor resides out of the state, then in the county where the said personal estate, or some part of the same, is situated; or in case of choses in action, where the donee, bargainee or mortgagee resides. For the purposes mentioned in this section the principal place of business of a domestic corporation is its residence.

Rev., s. 982; Code, s. 1254; R. C., c. 37, s. 22; 1829, c. 20; 1909, c. 874, s. 1.

REGISTRATION OF MORTGAGES. Registration of a mortgage is to protect the mortgagee and not the mortgagor: *Smith v. Fuller*, 152-7. As between the parties, a mortgage is valid without registration: *McBrayer v. Harrill*, 152-712; *Wallace v. Cohen*, 111-103; *Deal v. Palmer*, 72-582; *Leggett v. Bullock*, 44-283.

Words "at law" defined in *Hooker v. Nichols*, 116-157; *Fleming v. Burgin*, 37-584. Deeds of trust and mortgages are of no validity as against purchasers for value and creditors unless registered; and have effect only from registration: *Freeman v. Croom*, 172-524; *Dew v. Pyke*, 145-303; *Bostic v. Young*, 116-770; *Robinson v. Willoughby*, 70-358; *McCoy v. Lassiter*, 95-88; *Deal v. Palmer*, 72-582; *Dukes v. Jones*, 51-14; *Fleming v. Burgin*, 37-584; *Cowan v. Green*, 9-384. Registration of mortgage upon proper probate is notice to the world of existence thereof and of nature and extent of charge created by it: *Harper v. Edwards*, 115-246; *Woody v. Jones*, 113-253; *Ijames v. Gaither*, 93-358; *Weathersbee v. Farrar*, 97-106; *Parker v. Banks*, 79-480—and no notice, however full and formal, will dispense with such notice by registration, *Fertilizer Co. v. Lane*, 173-184; *Blalock v. Strain*, 122-283; *Hooker v. Nichols*, 116-160; *Quinnerly v. Quinnerly*, 114-145; *Killebrew v. Hines*, 104-182; *Hinton v. Leigh*, 102-28; *Blevins v. Barker*, 75-436; *Dewey v. Littlejohn*, 37-495; *Fleming v. Burgin*, 37-584.

Mortgage or trust deed duly proven and registered is good against a prior mortgage not registered: *Quinnerly v. Quinnerly*, 114-145; *Allen v. Bolen*, 114-565; *Wallace v. Cohen*, 111-103; *Hinton v. Leigh*, 102-28; *Bank v. Mfg. Co.*, 96-298; *Moore v. Ragland*, 74-343; *Robinson v. Willoughby*, 70-358; *Fleming v. Burgin*, 37-584—even though second mortgagee knew of existence of first mortgage, *Bank v. Mfg. Co.*, 96-298; *Quinnerly v. Quinnerly*, 114-145—unless, however, second mortgagee prevented by fraud the registration of first mortgage, *Bank v. Mfg. Co.*, 96-298; *Fleming v. Burgin*, 37-584. Where mortgage registered before prior trust deed securing purchase money recites the prior encumbrance, such purchase money must be paid by mortgagee from proceeds of land: *Bank v. Vass*, 130-590; *Hinton v. Leigh*, 102-28. A deed for land and a mortgage to secure the purchase money constitute one act, and such mortgage executed and registered at the same time with the deed will have priority over the purchaser's second mortgage, though registered first: *Hinton v. Hicks*, 156-24.

A registry of mortgage is not void because of clerical mistakes made by register in transcribing which do not affect sense and provision as to amount secured, description of property, etc., or obscure meaning of instrument: *Royster v. Lane*, 118-156. A reference in a mortgage to note secured by it, without specifying its contents, is sufficient to put subsequent purchasers upon inquiry and to charge them with notice: *Harper v. Edwards*, 115-246. Duly registered mortgage passes legal title to mortgagee, and levy and sale of property for taxes due by mortgagor do not carry title to purchaser divested of lien of mortgage: *Woody v. Jones*, 113-253.

Deed of trust by a corporation, duly registered, is a prior lien to that of a subsequently docketed judgment in an action on contract: *Clement v. King*, 152-456. For priority of other judgment liens, see sections 1138, 1140. A mortgage by a corporation is not invalid because register failed to indicate the seal on the record: *Edwards v. Supply Co.*, 150-171.

Mortgagees of property to secure preëxisting debts are purchasers for value under this section and will be protected by prior registration: *Odom v. Clark*, 146-544; *Bank v. Cox*, 171-76. Canceled mortgages as against creditors are inoperative and creditor secured thereby can claim no liens or priorities thereunder: *Bank v. Mfg. Co.*, 96-298. Deeds in trust and mortgages are, as between parties thereto, when registered, effectual from their delivery: *Brem v. Lockhart*, 93-191. Conveyance of chose in action in trust to pay debt is within section: *Smith v. Washington*, 16-318. As to sufficiency of instrument as a mortgage under this section, see *Skinner v. Cox*, 15-59; *Chemical Co. v. Johnson*, 98-123; *Harris v. Jones*, 83-317.

Section embraces only those deeds of trust which are intended as securities for debts: *Saunders v. Ferrell*, 23-96—and not deeds of settlement between husband and wife in which property is conveyed to trustee in trust for wife, such instruments being embraced under section 3314: *Ibid.*; also, *Green v. Kornegay*, 49-66. In contest between trustee under deed and creditor of maker in attachment proceedings, lien of former begins from time at which deed delivered to register, that of latter from time when summons personally served upon debtor: *Parker v. Scott*, 64-118. Deed in trust duly executed by husband, but not registered until after death, operates to defeat widow's claim of dower: *Norwood v. Marrow*, 20-578—for widow in respect to such claim is neither creditor nor purchaser for value under section, *Ibid.*

Registration deemed to be done on day of delivery to register, as noted by him on deed: *McKinnon v. McLean*, 19-79—deemed to be complete from time when register commences same, *Metts v. Bright*, 20-311. Where deed in trust delivered to register, who immediately com-

menced registration of same, and justice's execution obtained two hours later, trust deed has priority over levy under execution: *Metts v. Bright*, 20-311. But a mortgage delivered to register out of his office is not properly filed for registration until taken to the office and marked for registration: *McHan v. Dorsey*, 173-694. Indexing and cross-indexing are held to be necessary, and it seems that the mortgagee must see that this is done: *Ely v. Norman*, 175-294; *Fowle v. Ham*, 176-12; *Mfg. Co. v. Hester*, 177-609; overruling *Davis v. Whitaker*, 114-279.

Mortgage deed conveying land which is not registered in county where land lies is not valid against creditors or purchasers: *King v. Portis*, 77-25—and where purchaser at foreclosure sale obtains deed for tract of land lying in two counties, and mortgage under which sold was registered only in one, such deed conveys no title as against creditors or purchasers for value as to part of land lying in other county, *Ibid*.

CHATTEL MORTGAGES. Agreement between parties to chattel mortgage for substitution of other property for that conveyed in mortgage, while good as between parties, is not mortgage so as to give lien in preference to creditors and purchasers for value: *Blalock v. Strain*, 122-283. Contract creating lien upon stock and prospective products of business to secure capital for operation of business is valid chattel mortgage: *Brown v. Dail*, 117-41. No particular words of conveyance necessary to the execution of mortgage of personal property: *Williamson v. Bitting*, 159-321; *Frick v. Hilliard*, 95-117—for at common law mortgages of personal property were not required to be reduced to writing, *Butts v. Screws*, 95-215—an oral chattel mortgage is valid between the parties: *Odom v. Clark*, 146-544—and section only requires them to be reduced to writing and registered as affecting creditors and purchasers for value, *Ibid*.—but same are good inter partes without registration, *Williams v. Jones*, 95-504. Sufficient form to constitute chattel mortgage: *Ely v. Norman*, 175-294; *Harris v. Allen*, 104-86. A recital in a chattel mortgage that there is no encumbrance except a certain amount due a piano company is not sufficient notice to take the place of registration: *Piano Co. v. Spruill*, 150-168.

Mortgage on personalty must be registered in the county where the mortgagor resides, unless he is nonresident, then in the county where the property is situated: *Foy v. Hurley*, 172-575; *Sloan Bros. v. Sawyer-Felder Co.*, 175-657; *Weaver v. Chunn*, 99-431. It is not notice if registered in wrong county: *Bank v. Cox*, 171-76; *Weaver v. Chunn*, 99-431. Where mortgage upon personalty was registered in county in which mortgagor resided, not necessary, in case of his removal to another, to register mortgage in such other county: *Harris v. Allen*, 104-86. Mortgage upon crop registered in county in which land lies and to which mortgagor contemplated removing, and subsequently removed after registration of instrument, is properly registered: *Harris v. Jones*, 83-317.

No particular book is designated for the registration, and it is sufficient if the instrument is properly indexed and cross-indexed: *Ely v. Norman*, 175-294; *Williamson v. Bitting*, 159-321.

Mortgage both of land and personal property may be registered after death of mortgagor: *Williams v. Jones*, 95-504.

Where duly enrolled, a vessel used entirely in the state was mortgaged and recorded as required by act of congress, but was not registered as required by section, such recording is valid: *Lawrence v. Hodges*, 92-672.

Pledge of personal property not included within words or meaning of section: *Doak v. Bank of State*, 28-309. Distinction between pledge and mortgage of personal property pointed out in *Doak v. Bank*, 28-309; *McCoy v. Lassiter*, 95-88.

For fertilizer contract held not to be within section, see *Chemical Co. v. Johnson*, 98-123. Where two mortgages on personalty, and first mortgagee advances money in excess of mortgage to save property and prepares same for market, he is not entitled to amount of such excess against second mortgagee: *Weathersbee v. Farrar*, 97-106. Right to retain or retake property which is included in an unregistered mortgage: *Springs v. Cole*, 171-418; *Taylor v. Mills*, 148-415. For a general discussion of the section, see *Wood v. Tinsley*, 138-509; *Collins v. Davis*, 132-107; *McKinnon v. McLean*, 19-79.

Section merely referred to: *Hinton v. Moore*, 139-47; *Lance v. Tainter*, 137-250; *Barrington v. Skinner*, 117-52; *Love v. Crews*, 113-258; *Harrell v. Godwin*, 102-351; *Francis v. Herren*, 101-497; *Evans v. Etheridge*, 99-46; *Brem v. Loekhart*, 93-193; *Todd v. Outlaw*, 79-235; *Barrett v. Cole*, 49-41; *McCoy v. Wood*, 70-128; *Edwards v. Thompson*, 71-181; *Starke v. Etheridge*, 71-244; *Womble v. Battle*, 38-190.

3312. Conditional sales of personal property. All conditional sales of personal property in which the title is retained by the bargainor shall be reduced to writing and registered in the same manner, for the same fees and with the same legal effect as is provided for chattel mortgages, in the county where the purchaser resides, or, in case the purchaser shall reside out of the state, then in the county where the personal estate or some part thereof is situated, or in case of choses in action, where the donee, bargainee or mortgagee resides.

Rev., s. 983; Code, s. 1275; 1891, c. 240; 1883, c. 342.

For power of sale, see section 2587.

WHAT IS A CONDITIONAL SALE. A conditional sale is a sale upon condition, in which purchaser sustains relation of mortgagor and seller the relation of mortgagee: *Mfg. Co. v. Gray*, 121-170. As to whether contract a conditional sale or lease depends upon purpose of parties as expressed in instrument: *Hamilton v. Highlands*, 144-279; *Empire Drill Co. v. Allison*, 94-548. Where firm agrees to sell goods for part of profits, it is not a conditional sale: *Lance v. Butler*, 135-419. Contract for lease of personal property, upon payment of rent, property to belong to lessee upon last payment of rent, is conditional sale: *Clark v. Hill*, 117-11; *Mfg. Co. v. Gray*, 121-170; *Barrington v. Skinner*, 117-47; *Puffer v. Lucas*, 112-377. In order to constitute conditional sale, essential that title to property should remain in vendor: *Frick v. Hilliard*, 95-117. Where title to property retained until purchase money paid, no title to property passes, although description of chattel in instrument is wrong: *Harris v. Woodard*, 96-232.

For contracts construed to be conditional sales, see *Whitlock v. Lumber Co.*, 145-120; *Hamilton v. Highlands*, 144-279; *Wilcox v. Cherry*, 123-82, overruling *Foreman v. Drake*, 98-311; *Blalock v. Strain*, 122-283; *Block v. Dowd*, 120-402; *Tufts v. Griffin*, 107-49; *Vasser v. Buxton*, 86-335; *Clayton v. Hester*, 80-275; *Parris v. Roberts*, 34-268; *Ellison v. Jones*, 26-48. Where transaction doubtful as to whether parties intended mortgage or conditional sale, courts will construe same as mortgage: *Watkins v. Williams*, 123-170; *Poindexter v. McCannon*, 16-373. For contracts held not to be conditional sales, see *Lance v. Butler*, 135-419; *Frick v. Hilliard*, 95-117; *Millbiser v. Erdman*, 98-292; *Chemical Co. v. Johnson*, 98-123.

REGISTRATION REQUIRED. A conditional sale is valid against creditors and purchasers for value only from registration: *Observer Co. v. Little*, 175-42; *Fulp v. Power Co.*, 157-157; *Clark v. Hill*, 117-11; *Blalock v. Strain*, 122-283; *Glasecock v. Hazell*, 109-148; *Foreman v. Drake*, 98-311; *Butts v. Screws*, 95-215; *Brem v. Lockhart*, 93-191. This means creditors who have taken some steps to reach the property: *Observer Co. v. Little*, 175-42. Section places conditional sales on same footing as chattel mortgages, and only protects creditors and purchasers: *Thomas v. Cooksey*, 130-151; *Butts v. Screws*, 95-215. As between the parties to the contract a conditional sale is valid without registration, and the contract may be oral: *Kornegay v. Kornegay*, 109-188; *Butts v. Screws*, 95-215.

Where personalty is sold under conditional sale and the same is not registered, a prior registered mortgage covering after-acquired property will not have priority: *Dry Kiln Co. v. Ellington*, 172-481; *Cox v. Lighting Co.*, 151-62; *Lumber Co. v. Lumber Co.*, 150-282. An unregistered conditional sale is invalid as against an assignment for the benefit of creditors duly registered: *Starr v. Wharton*, 177-323—and also as against the rights of trustee in bankruptcy since amendment of 1910, *Hinton v. Williams*, 170-115. In a conditional sale of a cotton gin, attaching the gin to the land does not change it from personalty to realty: *Lancaster v. Ins. Co.*, 153-285. Conditional sale was not required to be registered at common law, and the court will presume that the common law is in force in another state: *Carriage Co. v. Dowd*, 155-307. Conditional sale of personal property made to husband, registered after his death, takes precedence over allotment of year's allowance to widow which included such property, made after registration: *Hinkle v. Green*, 125-489. Where contract put in shape of lease for purpose of evading registration laws, or with other unlawful intention, same will not be upheld as such to prejudice of innocent purchasers: *Wilcox v. Cherry*, 123-79, overruling upon this point *Foreman v. Drake*, 98-311.

A conditional sale of personal property is properly registered in county where purchaser resides: *Barrington v. Skinner*, 117-47—and if he remove to another county with the property it need not be recorded in latter county, *Ibid*.

3313. Conditional sales or leases of railroad property. When any railroad equipment and rolling stock is sold, leased or loaned on the condition that the title to the same, notwithstanding the possession and use of the same by the vendee, lessee, or bailee, shall remain in the vendor, lessor or bailor until the terms of the contract, as to the payment of the installments, amounts or rentals payable, or the performance of other obligations thereunder, shall have been fully complied with, such contract shall be invalid as to any subsequent judgment creditor, or any subsequent purchaser for a valuable consideration without notice, unless—

1. The same is evidenced by writing duly acknowledged before some person authorized to take acknowledgments of deeds.

2. Such writing is registered as mortgages are registered, in the office of the register of deeds in at least one county in which such vendee, lessee or bailee does business.

3. Each locomotive or car so sold, leased or loaned has the name of the vendor, lessor, or bailor, or the assignee of such vendor, lessor or bailor plainly marked upon both sides thereof, followed by the word owner, lessor, bailor or assignee, as the case may be.

This section shall not apply to or invalidate any contract made before the twelfth day of March, one thousand eight hundred and eighty-three.

Rev., s. 984; Code, s. 2006; 1883, c. 416; 1907, c. 150, s. 1.

3314. Marriage settlements. All marriage settlements and other marriage contracts, whereby any money or other estate is secured to the wife or husband, shall be proved or acknowledged and registered in the same manner as deeds for lands, and shall be valid against creditors and purchasers for value only from registration.

Rev., s. 985; Code, ss. 1269, 1270, 1281; 1885, c. 147; R. C., c. 37, ss. 24, 25; 1785, c. 238; 1871-2, c. 193, s. 12.

As to what is a marriage settlement, see *Sullivan v. Powers*, 100-27; *Walton v. Parish*, 95-259; *Teague v. Downs*, 69-287. Deeds of settlement in trust for wife and children, proved and registered three years after execution, valid only as against creditors whose debts contracted after such registration: *Johnston v. Malcolm*, 59-120. Registration of marriage settlement, embracing personal property of married woman, properly made in county where such woman resided and the property was at time of execution of instrument: *Latham v. Bowen*, 52-337. Antenuptial contract between husband domiciled in this state and wife domiciled in another state, securing property in such state to wife, and there duly recorded, is good against creditors of husband, although property subsequently removed to this state: *Hicks v. Skinner*, 71-539.

As bearing upon section, see *Smith v. Garey*, 22-46. Section merely referred to: *Dew v. Pyke*, 145-303; *Credle v. Carrawan*, 64-425.

3315. Deeds of gift. All deeds of gift of any estate of any nature shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void, and shall be good against creditors and purchasers for value only from the time of registration.

Rev., s. 986; Code, s. 1252; 1885, c. 147; R. C., c. 37, s. 18; 1789, c. 315, s. 2.

Registration of prior voluntary deed is notice to subsequent purchaser: *Taylor v. Eatman*, 92-601. For discussion of section, see *Dew v. Pyke*, 145-303. Case under an old section: *Hancock v. Hovey*, 1-152.

3316. Deeds of easements. All persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights of way and easements of

any character whatsoever shall record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated. Where such deeds and agreements may have been acquired, but no use has been made thereof, the person, firm, or corporation holding such instrument, or any assignment thereof, shall not be required to record them until within ninety days after the beginning of the use of the easements granted thereby. If after ninety days from the beginning of the easement granted by such deeds and agreements the person, firm, or corporation holding such deeds or agreements has not recorded the same in the office of the register of deeds of the county where the land affected is situated, then the grantor in the said deed or agreement may, after ten days notice in writing served and returned by the sheriff or other officer of the county upon the said person, firm, or corporation holding such lease or agreement, file a copy of the said lease or agreement for registration in the office of the register of deeds of the county where the original should have been recorded, but such copy of the lease or agreement shall have attached thereto the written notice above referred to, showing the service and return of the sheriff or other officer. The registration of such copy shall have the same force and effect as the original would have had if recorded: Provided, said copy shall be duly probated before being registered.

Nothing in this section shall require the registration of the following classes of instruments or conveyances, to wit:

1. It shall not apply to any deed or instrument executed prior to January first, one thousand nine hundred and ten.

2. It shall not apply to any deed or instrument so defectively executed or witnessed that it cannot by law be admitted to probate or registration, provided that such deed or instrument was executed prior to the ratification of this act.

3. It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts.

4. It shall not apply to local telephone companies, operating exclusively within the state, or to agreements about alley-ways.

Any person, firm, or corporation knowingly and willfully violating this section shall be guilty of a misdemeanor, and each day's continuance of this violation shall be a separate offense.

This section shall not apply to Alleghany, Harnett, Lee, Surry and Wilkes counties.

1917, c. 148; 1919, c. 107.

3317. Powers of attorney. Every power of attorney, wherever made or concerning whatsoever matter, may, on acknowledgment or proof of the same before any competent official, be registered in the county wherein the property or estate which it concerns is situate, if such power of attorney relate to the conveyance thereof; if it does not relate to the conveyance of any estate or property, then in the county in which the attorney resides or the business is to be transacted.

Rev., s. 987; Code, s. 1249; 1899, c. 235, s. 15.

As to sufficiency of power of attorney to convey realty, see *Caddell v. Allen*, 99-542. Power of attorney given by feme covert to dismiss action concerning her land need not be registered to give it validity: *Hollingworth v. Harman*, 83-153.

3318. Plats and subdivisions. Any person, firm, or corporation, owning land in this state, who may desire to subdivide the same into smaller tracts or lots for the purpose of sale or other purpose, may have a plat or subdivision of such land recorded in the office of the register of deeds of the county in which such land or any part thereof is situated, upon proof upon oath by the surveyor making such plat or subdivision that the same is in all respects correct and was prepared from an actual survey by him made, giving the date of such survey and the variation of the magnetic needle. Such plats or subdivisions when so proven, and probated as deeds and other conveyances, shall be recorded either by transcribing a correct copy thereof upon or by permanently attaching the original to the records, or in a book to be designated the Book of Plats; and when so recorded shall be duly indexed.

1911, c. 55, s. 2.

3319. Certified copies may be registered; used as evidence. A duly certified copy of any deed or writing required or allowed to be registered may be registered in any county; and the registry or duly certified copy of any deed or writing when registered in the county where the land is situate may be given in evidence in any court of the state.

Rev., s. 988; Code, s. 1253; 1858-9, c. 18, s. 2.

For records of court to prove deed, see sections 376, 377.

Certified copy of deed is evidence of its probate and registration: Strickland v. Draughan, 88-315; Love v. Harbin, 87-249—but same may be rebutted by evidence to contrary, Love v. Harbin, 87-249. **Copy of the record of a grant is admissible in evidence without accounting for original:** Lumber Co. v. Lumber Co., 169-80.

Conveyances cannot be introduced in evidence until proved and registered: Brown v. Hutchinson, 155-205; Jennings v. Reeves, 101-450; Avent v. Arrington, 105-389; White v. Holly, 91-68; Phifer v. Barnhardt, 88-333; Triplett v. Witherspoon, 74-475; Wilson v. Sparks, 72-209; Walker v. Coltraine, 41-79. **As to contracts to convey, see Hargrove v. Adeock, 111-166. When certificate of probate is not sufficient to entitle instrument to registration, if one make it part of his pleadings, he waives question of admissibility:** Avent v. Arrington, 105-377.

Fact that deed has been three times probated and registered does not affect its competency as evidence: Bell v. Couch, 132-346.

Deed improperly proven and registered was, on trial, attempted to be proven as at common law, but could not be so proven unless deed was in court: Hatcher v. Hatcher, 127-201.

3320. Register to fill in deeds on blank forms with lines. Registers of deeds shall, in registering deeds and other instruments, where printed skeletons or forms are used by the register, fill all spaces left blank in such skeletons or forms by drawing or stamping a line or lines in ink through such blank spaces.

1911, c. 6, s. 1.

3321. Errors in registration corrected on petition to clerk. Every person who discovers that there is an error in the registration of his grant, conveyance, bill of sale or other instrument of writing, may prefer a petition to the clerk of the superior court of the county in which said writing is registered, in the same manner as is directed for petitioners to correct errors in grants or patents, and if on hearing the same before said clerk it appears that errors have been committed, the clerk shall order the register of the county to correct such errors and make the record conformable to the original. The petitioner must notify his grantor and every person claiming title to or having lands adjoining those men-

tioned in the petition, thirty days previous to preferring the same. Any person dissatisfied with the judgment may appeal to the superior court as in other cases.

Rev., s. 1008; Code, s. 1266; R. C., c. 37, s. 28; 1790, c. 326, ss. 2, 3, 4.

Section provides for correction of errors in registration by petition and proceeding wherein interested persons and adjoining landowners are made parties, and in such cases statutory proceeding is exclusive: Hopper v. Justice, 111-418. Register of deeds has power and it is his duty to correct any error he may have made in registration of deed either by inserting any omitted matter or by registration of entire instrument: Sellers v. Sellers, 98-13; Brown v. Hutchinson, 155-205. Where by mistake or oversight of makers of deed same incorrectly written, grantors have no equity to call upon grantee to correct mistake on books of register, as they have ample remedy under this section: Oldham v. Bank, 85-240.

ART. 3. FORMS OF ACKNOWLEDGMENT, PROBATE AND ORDER OF REGISTRATION

3322. Adjudication and order of registration. The form of adjudication and order of registration required by section 3305 shall be substantially as follows:

North Carolina, _____ County.

The foregoing (or annexed) certificate of (here give name and official title of the officer signing the certificate passed upon) is adjudged to be correct. Let the instrument and the certificate be registered.

This _____ day of _____, A. D. _____

(Official seal.) _____
(Signature of officer.)

But the order of registration may be substantially in the form: "Let the same with this certificate be registered."

Rev., ss. 1001, 1010; 1899, c. 235, s. 7; 1905, c. 344.

See annotations under section 3305. Where proof of execution of instrument duly made within the state, not necessary that certificate or fact of probate should be registered, unless statute at that time otherwise directed: Perry v. Bragg, 111-159; Cochran v. Imp. Co., 127-386; Freeman v. Hatley, 48-115; Love v. Harbin, 87-253; Starke v. Etheridge, 71-243. The word "jurat" means proved, and is sufficient evidence of probate: Moore v. Quickle, 159-129.

3323. Acknowledgment by grantor. Where the instrument is acknowledged by the grantor or maker, the form of acknowledgment shall be in substance as follows:

North Carolina, _____ County.

I (here give the name of the official and his official title), do hereby certify that (here give the name of the grantor or maker) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal this the _____ day of _____ (year).

(Official seal.) _____
(Signature of officer.)

Rev., s. 1002.

As to probating officer affixing seal, see section 3297. The name of the justice of the peace in the body of certificate instead of subscribed is sufficient: Brown v. Hutchinson, 155-205.

3324. Private examination of wife. When an instrument purports to be signed by a married woman, the form of certificate of her acknowledgment and private examination before any officer authorized to take the same shall be in substance as follows:

North Carolina, ----- County.

I (here give name of the official and his official title), do hereby certify that (here give name of the married woman who executed the instrument), wife of (here give husband's name), personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument; and the said (here give married woman's name), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and (when an official seal is required by law) official seal, this ---- (day of month), A. D. ----- (year).

(Official seal.) ----- (Signature of officer.)

Rev., s. 1003; 1899, c. 235, s. 8; 1901, c. 637.

See under section 997. Private examination of married woman which sets out that she signed deed of her own free will and accord, and without any compulsion of her husband, is sufficient without adding words "and doth voluntarily assent thereto": Robbins v. Harris, 96-557.

3325. Husband's acknowledgment and wife's examination before same officer.

Where the instrument is acknowledged by both husband and wife or by other grantor before the same officer the form of acknowledgment shall be in substance as follows:

North Carolina, ----- County.

I (here give name of official and his official title), do hereby certify that (here give name of the grantors whose acknowledgment is being taken) personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument, and the said (here give name of the married woman or women), wife (or wives) of (here give name of husband or husbands), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and (when an official seal is required by law) official seal, this---- (day of month), A. D. ----- (year).

(Official seal.) ----- (Signature of officer.)

Rev., s. 1004; 1899, c. 235, s. 8; 1901, c. 299.

See cases under section 997. Omission of justice to attach seal to certificate of proof of execution of deed and privy examination of wife will not invalidate his action otherwise regular, the section requiring him to attach seal being directory only: Lineberger v. Tidwell, 104-506. Statute does not require clerk to order registration except when probate is taken by another officer: Buchanan v. Hedden, 169-222; Lumber Co. v. Branch, 158-251—and this is held to be only directory in Heath v. Lane, 176-119; Darden v. Steamboat Co., 107-437. See sections 3305, 3332.

3326. Corporate conveyances. The following forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate which would be deemed sufficient in law. If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:

North Carolina, ----- County.

This ---- day of -----, A. D. -----, personally came before me (here give the name and official title of the officer who signs this certificate). A. B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C. D., who is the president (or presiding member or trustee), and also with E. F. and G. H., two

other members of said corporation; and that he, the said A. B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation thereto, and that he, the said subscribing witness, signed his name as such subscribing witness thereto in their presence. Witness my hand and (when an official seal is required by law) official seal, this ____ day of _____ (year).

(Official seal.) _____
 (Signature of officer.)

If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

North Carolina, _____ County.

This ____ day of _____, A. D. _____, personally came before me (here give name and official title of the officer who signs the certificate) A. B. (here give the name of the attesting secretary or assistant secretary), who, being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C. D., who is the president of said corporation, and that he, the said A. B., is the secretary (or assistant secretary) of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A. B., secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he, the said A. B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the ____ day of _____ (year).

(Official seal.) _____
 (Signature of officer.)

North Carolina, _____ County.

This is to certify that on the ____ day of _____, 19____, before me personally came _____ (president, vice-president, secretary or assistant secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that _____ is the president (or vice-president), and _____ is the secretary (or assistant secretary) of the _____, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the ____ day of _____ (year).

(Official seal.) _____
 (Signature of officer.)

If the deed or other instrument is executed by the signature of the president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This ____ day of _____, A. D. _____, personally came before me (here give name and official title of the officer who signs the certificate) A. B., who, being by me duly sworn, says that he is president (presiding member or trustee) of the _____ Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of the company, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A. B. acknowledged the said writing to be the act and deed of said corporation.

(Official seal.) _____
 (Signature of officer.)

If the officer before whom the same is proven be the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration, he shall add to the foregoing certificate the following: "Let the instrument with the certificate be registered."

Rev., s. 1005; 1899, c. 235, s. 17; 1901, c. 2, s. 110; 1905, c. 114; 1907, c. 927, s. 1.

For validation of corporate probates, see sections 3352-3356. Probate of deed of corporation by acknowledgment of individuals instead of its officers is void: Bernhardt v. Brown, 122-587. The forms given indicate that it must appear by oath that the seal affixed is the corporate seal, and that it was affixed by an officer of the corporation; mere acknowledgment of signatures by the officers is insufficient: Withrell v. Murphy, 154-82. A substantial compliance with this section is sufficient: Spruce Co. v. Hunnicutt, 166-202. Sufficient probate of corporation deed by subscribing witness: Power Co. v. Power Co., 168-219.

This section seems to imply the power of board of directors to mortgage the corporate property: Wall v. Rothrock, 171-388.

As bearing on section: Clark v. Hodge, 116-761; Heath v. Cotton Mills, 115-202; Duke v. Markham, 105-131; Clayton v. Clagle, 97-302.

3327. Clerk's certificate upon probate by justice of peace. When the proof or acknowledgment of any instrument is had before a justice of the peace of some other state or territory of the United States, or before a justice of the peace of this state, but of a county different from that in which the instrument is offered for registration, the form of certificate as to his official position and signature shall be substantially as follows:

North Carolina, ----- County.

I, A. B. (here give name and official title of a clerk of a court of record), do hereby certify that C. D. (here give the name of the justice of the peace taking the proof, etc.), was at the time of signing the foregoing (or annexed) certificate an acting justice of the peace in and for the county of ----- and state (or territory) of -----, and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this ---- day of-----

A. D. -----

(Official seal.) ----- (Signature of officer.)

Rev., s. 1006; 1899, c. 235, s. 8.

3328. Clerk's certificate upon probate by nonresident official without seal. When the proof or acknowledgment of any instrument is had before any official of some other state, territory or country and such official has no official seal, then the certificate of such official shall be accompanied by the certificate of a clerk of a court of record of the state, territory or country in which the official taking the proof or acknowledgment resides, of the official position and signature of such official; such certificate of the clerk shall be under his hand and official seal and shall be in substance as follows:

-----County.

I, A. B. (here give name and official title of the clerk of a court of record as provided herein), do hereby certify that C. D. (here give name of the official taking the proof, etc.) was at the time of signing the foregoing (or annexed) certificate a (here give the official title of the officer taking proof, etc.) in and for the county of ----- and state of ----- (or other political division of the state, territory or country, as the case may be), and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this ---- day of-----

A. D. -----

(Official seal.) ----- (Signature of Clerk.)

Rev., s. 1007; 1899, c. 235, s. 8.

ART. 4. CURATIVE STATUTES; ACKNOWLEDGMENTS; PROBATES;
REGISTRATION

3329. **Defective order of registration; "same" for "this instrument."** Where instruments were admitted to registration prior to March 2, 1905, and the clerk's order for the registration used the word "same" in place of "this instrument," the said registrations are good and valid.

Rev., s. 1010; 1905, c. 344.

3330. **Clerk's certificate failing to pass on all prior certificates.** When it appears that the clerk of the superior court or other officer having the power to probate deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a prior date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates or orders, but not all of them, but has admitted the same deed or other instrument to probate, it shall be conclusively presumed that he has passed upon all the certificates of said deed or instrument necessary to the admission of the same to probate, and the certificate of said clerk or other probating officer shall be deemed sufficient and the probate and registration of said deed or instrument is hereby made and declared valid for all intents and purposes.

1917, c. 237.

3331. **Defective certification or adjudication of clerk, etc., admitting to registration.** In all cases where, prior to January first, nineteen hundred and nineteen, instruments by law required or authorized to be registered, with certificates showing the acknowledgment or proof of execution thereof as required by the laws of the state of North Carolina, have been ordered registered by the clerk of the superior court or other officer qualified to pass upon probates and admit instruments to registration, and actually put upon the books in the office of the register of deeds as if properly proven and ordered to be registered, all such probates and registrations are hereby validated and made as good and sufficient as though such instruments had been in all respects properly proved and recorded, notwithstanding the failure of clerks or other officers qualified to pass upon the proofs or acknowledgments of instruments and to admit such instruments to registration to adjudge or certify that said instruments were duly proven, and notwithstanding the failure of such officers to adjudge or certify that the certificates of proof or acknowledgment of said instruments were correct or in due form. This act shall not affect any suit, action, or proceeding pending in the courts of this state March 10, 1919, and shall not impair vested rights.

1919, c. 248.

3332. **Order of registration omitted.** In every case where it appears from the records of the office of the register of deeds of any county in this state that the execution of a deed of conveyance was duly acknowledged before the clerk or deputy clerk of the superior court of such county and the certificate of such officer taking the acknowledgment was made complete except that the order of registration was omitted, and such deed, with the certificate of such officer, was duly registered without any order of registration, any and all such probates and registrations are hereby validated, and the records of such deeds of convey-

ance may be read in evidence upon the trial or hearing of any cause with the same force and effect as if the same had been duly ordered registered. This section only applies to deeds so acknowledged and registered prior to January first, one thousand nine hundred and fifteen. Suits pending October 13, 1913, are not affected by this section.

1911, c. 91; 1911, c. 166; 1913, c. 61; Ex. Sess. 1913, c. 73; 1915, c. 179, s. 1.

3333. Official deeds omitting seals. All deeds executed prior to January first, nineteen hundred and ten, by any sheriff, commissioner, or other officer authorized to execute a deed, by virtue of his office or appointment, wherein the officer has omitted to affix a seal after his signature, shall be good and valid nevertheless. This section does not apply to actions pending March 8, 1907.

1907, c. 807; 1917, c. 69, s. 1.

See section 8031, tax deed.

3334. Probates omitting official seals. In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this state, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this state, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," "notarial seal," or words of similar import, and no such seal appears of record, then all such acknowledgments, private examinations or other proofs of such deeds, mortgages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to March 11, 1907, before a notary whose term had expired. This section does not apply to litigation pending February 16, 1915.

Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36.

3335. Registrations by register's clerks or deputies. All registration of deeds and other instruments heretofore made by the several registers of deeds of the several counties of the state by their deputies and clerks, and signed in the name of the register of deeds by a deputy or clerk, and when said registration is in all other respects regular, are hereby validated and declared of the same force and effect as if signed in the name of the register and not by a deputy or clerk. This section does not affect litigation pending March 8, 1911, in any state or federal court or any suit in substantial renewal of any pending litigation.

1911, c. 184, s. 1.

3336. Before officer in wrong capacity or out of jurisdiction. All deeds, conveyances, or other instruments permitted by law to be registered in this state, which have been probated or ordered to be registered previous to January first, one thousand nine hundred and thirteen, before any officer of this or any other state or country, authorized by law to take acknowledgments or to order registration, where the certificate of the probate or order of registration is sufficient in

form, but appears to have been certified by the officer in some capacity other than that in which such officer was authorized to act, or appears to have been made out of the county or district authorized by law, but within the state, and where the instrument with such certificate has been recorded in the proper county, are hereby declared to have been duly proved, probated and recorded, and to be valid. This section does not affect actions pending March 11, 1913.

Rev., ss. 1017, 1030; 1913, c. 125, s. 1.

Statute validates irregular probates as between parties, and as to third persons from passage of same: *Williams v. Kerr*, 113-310; *Barrett v. Barrett*, 120-127; *Gordon v. Collett*, 107-362—but does not validate such probates as to third persons whose rights had already accrued prior to enactment of section, *Williams v. Kerr*, 113-310; *Barrett v. Barrett*, 120-127.

3337. Before justices of peace, where clerk's certificate or order or registration defective. In every case where it appears from the record of the office of any register of deeds in this state that a justice of the peace in this state has taken and certified the proof of any instrument required by law to be registered, or the privy examination of a married woman thereto, and the deed and certificate have been registered, prior to the first day of January, one thousand nine hundred and seven, in the county where the lands described in the instrument are located, without or with a defective certificate of the clerk of the official character of the justice, or as to the genuineness of his signature, or without the order of registration of the clerk, or his adjudication of due probate, or with a defective adjudication thereof, such proofs, certificates and registration are validated; but as against creditors or purchasers from donor, bargainor or lessor, only from February first, nineteen hundred and seven.

1907, c. 83, s. 1.

3338. Probates on proof of handwriting of maker refusing to acknowledge. All registrations of instruments, prior to February fifth, one thousand eight hundred and ninety-seven, permitted or required by law to be registered, which were ordered to registration upon proof of the handwriting of the grantor or maker who refused to acknowledge the execution, are hereby validated.

Rev., s. 1026; 1897, c. 28.

3339. Before judges supreme or superior courts or clerks before 1889. Whenever the judges of the supreme or the superior court, or the clerks or deputy clerks of the superior court, or courts of pleas and quarter sessions, mistaking their powers, have essayed previously to the first day of January, one thousand eight hundred and eighty-nine, to take the probate of any instrument required or allowed by law to be registered, and the privy examination of *femes covert*, whose names are signed to such deeds, and have ordered said deeds to registration, and the same have been registered, all such probates, privy examinations and registrations are validated.

Rev., s. 1009; Code, s. 1260; 1871-2, c. 200, s. 1; 1889, c. 252; 1891, c. 484.

Section validates probates of deeds and privy examination taken before deputy clerk of superior court prior to January 1, 1889, and it is immaterial whether deputy clerk, in making probate, signed as deputy clerk or merely signed name of clerk thereto: *Gordon v. Collett*, 107-362.

Section constitutional and valid if rights of third persons have not accrued, but it would not divest title of party acquired by subsequent deed from same grantor which is registered prior to enactment of curative statute: *Gordon v. Collett*, 107-362; *Barrett v. Barrett*, 120-127; *Williams v. Kerr*, 113-310; *White v. Connelly*, 105-65; *Tatom v. White*, 95-453.

Section does not validate probate of deed taken by clerk of superior court who is grantee in same: *Freeman v. Person*, 106-251; *White v. Connelly*, 105-71. This section validates probate taken by court of pleas and quarter sessions in wrong county: *Weston v. Lumber Co.*, 160-263.

Original section before amendment validated all probates of deeds before officers named therein prior to February 12, 1872, and registration made in pursuance of such probates are embraced within operation of same, although made after that date, but before enactment of Code of 1883: *Tatom v. White*, 95-453.

3340. Before clerks of inferior courts. All probates and orders of registration made by and taken before any clerk of any inferior or criminal court prior to the twentieth day of February, one thousand eight hundred and eighty-five, and valid in form and substance, shall be valid and effectual, and all deeds, mortgages or other instruments requiring registration, registered upon such probate and order of registration, shall be valid. This section shall apply only to the counties of Halifax, Northampton, Hertford, Buncombe, Mecklenburg, Granville, Beaufort, Lenoir, Robeson, Cumberland, Ashe, Martin, Wayne, Greene, Iredell, Bertie, Edgecombe, Duplin and New Hanover. This section applies to probates and private examinations taken before the clerks of the criminal court of Buncombe prior to February second, one thousand eight hundred and ninety-three.

Rev., ss. 1020, 1021; 1885, cc. 105, 108; 1889, c. 143; 1889, c. 463.

3341. Before de facto officers of Greene county. The probate of all instruments requiring registration made by Alexander Taylor while acting as and being the de facto clerk of the superior court of Greene county during the month of December, one thousand eight hundred and ninety-eight, and during the year one thousand eight hundred and ninety-nine, are hereby declared valid; and the registration of all instruments requiring registration as made by W. E. Murphrey while acting as the de facto register of deeds of Greene county during the month of December, one thousand eight hundred and ninety-eight, and during the year one thousand eight hundred and ninety-nine, are declared valid.

Rev., s. 1029; 1901, c. 369.

3342. Order of registration by judge, where clerk party. All deeds, mortgages or other instruments which prior to the twentieth day of January, one thousand eight hundred and ninety-three, have been probated by a justice of the peace and ordered to registration by a judge of the superior court or justice of the supreme court, to which clerks of the superior court are parties, are hereby confirmed, and the probates and orders for registration declared to be valid.

Rev., s. 1011; 1893, c. 3, s. 2.

3343. Order of registration by interested clerk. The probate and registration of all deeds, mortgages and other instruments requiring registration, prior to the fourth day of March, one thousand nine hundred and eight, to which the clerks of the superior courts are parties or in which they have an interest, and which have been registered on the order of such clerks on proof of acknowledgment taken before such clerks, justices of the peace or notaries public, be and the same are hereby declared valid. This section shall not affect pending actions.

Rev., s. 1015; 1891, c. 102; 1899, c. 258; 1905, c. 427; 1907, c. 1003, s. 2; Ex. Sess. 1908, c. 105, s. 1.

See sections 3293, 3299.

3344. Probates before interested notaries. The proof and acknowledgment of instruments required by law to be registered in the office of the register of deeds of a county, and all privy examinations of a feme covert to such instruments made before any notary public on or since March eleventh, one thousand nine hundred and seven, are hereby declared valid and sufficient, notwithstanding the notary may have been interested as attorney, counsel or otherwise in such instruments.

Ex. Sess. 1908, c. 105, s. 2.

3345. Probates before officer of interested corporation. In all cases when acknowledgment of proof of any conveyance has been taken before a clerk of superior court, justice of the peace or notary public, who was at the time a stockholder or officer in any corporation, bank or other institution which was a party to such instrument, the certificates of such clerk, justice of the peace, or notary public shall be held valid, and are so declared.

Rev., s. 1015; 1907, c. 1003, s. 1.

3346. Probates before stockholders and directors of building and loan associations. No acknowledgment or proof of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association, prior to the first day of January, one thousand nine hundred and thirteen, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination was a stockholder or director in said building and loan association; but such proofs and acknowledgment and the registration thereof, if in all other respects valid, are declared to be valid. Nor shall the registration of any such instrument ordered to be registered be held invalid by reason of the fact that the clerk or deputy clerk ordering the registration was a stockholder or director in any building and loan association whose indebtedness is secured thereby.

Ex. Sess. 1913, c. 41.

3347. Clerk's deeds, where clerk appointed himself to sell. All deeds made by any clerk of the superior court of any county or his deputy, prior to the first day of January, one thousand nine hundred and five, in any proceeding before him in which he has appointed himself or his deputy to make sale of real property or other property are hereby validated.

1911, c. 146, s. 1.

3348. Certificate of wife's "previous" examination. All probates of deeds, letters of attorney or other instruments requiring registration to which married women were parties, had and taken prior to the fourteenth day of February, one thousand eight hundred and ninety-three, in which probate it appears that such married women were "previously examined" instead of "privately examined," are hereby validated and confirmed.

Rev., s. 1016; 1893, c. 130.

3349. Probates of husband and wife in wrong order. All probates prior to the sixth day of March, one thousand eight hundred and ninety-three, of instruments executed by a husband and wife in which the probate as to the husband has been taken before or subsequent to the privy examination of his wife are validated.

Rev., s. 1017; 1893, c. 293.

As to validity or invalidity of legislation validating such probates, see *Barrett v. Barrett*, 120-127. Section embraces cases where execution of deed by husband was proved by subscribing witness, and not by technical "acknowledgment" of husband, *Ibid.* Section referred to in *Cook v. Pittman*, 144-531.

3350. Probates of husband and wife before different officers. Where, prior to the second day of March, one thousand eight hundred and ninety-five, the probate of a deed or other instrument, executed by husband and wife, has been taken as to the husband and the wife by different officers having the power to take probates of deeds, whether both officers reside in this state or one in this state and the other in another state, or foreign country, the said probate, in the cases mentioned, shall be valid to all intents and purposes, and all deeds and other instruments required to be registered, and which have been ordered to registration by the proper officer in this state, and upon such probate or probates, and have been registered, shall be taken and considered as duly registered, and the word "probate," as used in this section, shall include privy examination of the wife. This section does not affect actions pending January 25, 1907.

Rev., s. 1018; 1895, c. 120; 1907, c. 34, s. 1.

3351. Wife free trader; no examination or husband's assent. In all cases prior to the twenty-fourth day of September, nineteen hundred and thirteen, where a married woman who was at the time a free trader by her husband's consent has executed and delivered a deed conveying her land, without her privy examination having been taken, and without the written assent of her husband other than his written assent contained in the instrument making her a free trader, such deed shall be valid and effectual to convey her land as if she had been, at the time of the execution and delivery of such deed, a feme sole. This section does not validate such deed where it would affect the title to land or property of purchasers or their grantees or assignees from such married woman and free trader subsequent to the execution of such deed.

Ex. Sess. 1913, c. 54, s. 1.

3352. By president and attested by treasurer under corporate seal. All deeds and conveyances for lands in this state, made by any corporation of this state, which have heretofore been proved or acknowledged before any notary public in any other state, or before any commissioner of deeds and affidavits for the state of North Carolina in any other state, and sealed with the common seal of the corporation and attested by the treasurer, are hereby ratified and declared to be good and valid deeds for all purposes. Where such deeds have been executed for the corporation by its president and attested, sealed and acknowledged or probated as aforesaid, and the acknowledgment or probate has been duly adjudged sufficient by any deputy clerk and ordered registered, the acknowledgment, probate and registration are ratified, and said deed is declared valid. Such deeds, or certified copies thereof, may be used as evidence of title to the lands therein conveyed in the trial of any suits in any of the courts of this state where the title of said lands shall come in controversy.

Rev., s. 1028; 1905, c. 307.

See section 1134.

3353. By president and attested by witness before January, 1900. All deeds and conveyances for land in this state, made prior to January first, one thousand

nine hundred, by the president of any corporation duly chartered under the laws of this state, and attested by a witness, is hereby declared to be a good and valid deed by such corporation for all purposes, and shall be admitted to probate and registration and shall pass title to the property therein conveyed to the grantee as fully as if said deed were executed according to provisions and forms of law in force in this state at the date of the execution of said deed. This section does not apply to suits pending March 8, 1909.

1909, c. 859, s. 1.

3354. Corporate name not affixed, but signed otherwise prior to January, 1919. In all cases prior to the first day of January, one thousand nine hundred and nineteen, where any deed conveying lands purported to be executed by a corporation, but the corporate name was in fact not affixed to said deed, but same was signed by the president and secretary of said corporation, or by the president and two members of the governing body of said corporation, and said deed has been registered in the county where the land conveyed by said deed is located, said defective execution above described shall be and the same is hereby declared to be in all respects valid, and such deed shall be deemed to be in all respects the deed of said corporation.

1919, c. 53, s. 1.

3355. Probated and registered on oath of subscribing witness. In all cases prior to the first day of January, one thousand nine hundred and nineteen, where any deed conveying lands was executed by a corporation, and said deed was probated and ordered registered upon the oath and examination of a subscribing witness, by the clerk of the superior court of the county in which the land conveyed by said deed is located, and said deed has been duly registered by the register of deeds of said county, such probate and order of registration shall be, and the same is hereby, declared to be in all respects valid.

1919, c. 53, s. 2.

3356. Proof of corporate articles before officer authorized to probate. All proofs of articles of agreement for the creation of corporations which were, prior to the eighteenth day of February, one thousand nine hundred and one, made before any officer who was at that time authorized by the law to take proofs and acknowledgments of deeds and mortgages are ratified.

Rev., s. 1027; 1901, c. 170.

See section 1134.

3357. Before officials of wrong state. In all cases where the acknowledgment, examination and probate of any deed, mortgage, power of attorney or other instrument required or authorized to be registered has been taken before any judge, clerk of a court of record, notary public having a notarial seal, mayor of a city having a seal, or justice of the peace of a state other than the state in which the grantor, maker or subscribing witness resided at the time of the execution, acknowledgment, examination or probate thereof, and such acknowledgment, examination or probate is in other respects according to law, and such instrument has been duly ordered to registration and has been registered, then such acknowledgment, examination, probate and registration are hereby in all respects made valid and binding. This section applies to probates and acknowl-

edgments of deputy clerks of other states when such probate and acknowledgment has been attested by the official seal of said office and adjudged sufficient and in due form of law by the clerk of the court in the state where the instrument is required to be registered. This section does not affect any suit pending March 6, 1905.

Rev., s. 1013; 1905, c. 505.

3358. Before notaries and clerks in other states. All deeds and conveyances made for lands in this state which have, previous to February fifteenth, one thousand eight hundred and eighty-three, been proved before a notary public or clerk of a court of record, or before a court of record, not including mayor's court, of any other state, where such proof has been duly certified by such notary or clerk under his official seal, or the seal of the court, or in accordance with the act of congress regulating the certifying of records of the courts of one state to another state, or under the seal of such courts, and such deed or conveyance, with the certificate, has been registered in the office of register of deeds in the book of records thereof for the county in which such lands were situate at the time of such registration, are declared to be validly registered, and the proof and registration is adjudged valid. All deeds and conveyances so proved, certified and registered, or certified copies of the same, may be used as evidence of title for the lands on the trial of any suit in any courts where title to the lands come into controversy.

Rev., ss. 1022, 1023; Code, ss. 1262, 1263; 1883, c. 129, ss. 1, 2; 1885, c. 11; 1915, c. 213.

See section 3319. Legislature has power to validate probates when no vested rights are impaired: *Penland v. Barnard*, 146-378. This section fails to include commissioner of deeds: *Cozad v. McAden*, 148-10, but see section 3362.

3359. Acknowledgment by resident taken out of state. When prior to the ninth day of March, one thousand eight hundred and ninety-five, a deed or mortgage executed by a resident of this state has been proved or acknowledged by the maker thereof before a notary public of any other state of the United States, and has been ordered to be registered by the clerk of the superior court of the county in which the land conveyed is situated, and said deed or mortgage has been registered, such registration is valid.

Rev., s. 1019; 1895, c. 181.

3360. Before deputy clerks of courts of other states. Where any deed or conveyance of lands in this state, executed prior to January first, one thousand nine hundred and thirteen, has been acknowledged by the grantor or the privy examination of any married woman has been taken before the deputy clerk of a court of record of any other state, and the certificate of acknowledgment and privy examination is otherwise sufficient under the laws of this state, except that it appears to have been signed in the name of the clerk of said court, by the deputy clerk, and the seal of the court has been affixed thereto, and such certificate has been duly approved by the clerk of the superior court of this state in the county where the lands conveyed are situated and the instrument ordered to be recorded, such certificate and probate and the registration made thereon is validated, and the conveyance, if otherwise sufficient, is declared valid. This section does not apply to any litigation pending March 6, 1913.

1913, c. 57, ss. 1, 2.

3361. Sister state probates without governor's authentication. In all cases where any deed concerning lands or any power of attorney for the conveyance of the same, or any other instrument required or allowed to be registered, has been, prior to the twenty-ninth day of January, one thousand nine hundred and one, acknowledged by the grantor therein, or proved and the private examination of any married woman, who was a party thereto, taken according to law, before any judge of a supreme, superior or circuit court of any other state or territory of the United States where the parties to such instrument resided, and the certificate of such judge as to such acknowledgment, probate or private examination, and also the certificate of the secretary of state of said state or territory instead of the governor thereof (as required by the laws of this state then in force) that the judge, before whom the acknowledgment or probate and private examination were taken, was at the time of taking the same a judge as aforesaid, are attached to said deed, or other instrument, and the said deed or other instrument, having said certificates attached, has been exhibited before the former judge of probate, or the clerk of the superior court of the county in which the property is situated, and such acknowledgment, or probate and private examination have been adjudged by him to be sufficient and said deed or other instrument ordered to be registered and has been registered accordingly, such probate and registration shall be valid. Nothing herein contained affects the rights of third parties who are purchasers for value, without notice, from the grantor in such deed or other instrument.

Rev. s. 1014; 1901, c. 39.

3362. Before commissioners of deeds. Any deed or other instrument permitted by law to be registered, and which has prior to the third day of March, one thousand nine hundred and thirteen, been proved or acknowledged before a commissioner of deeds, is validated; and its registration is authorized and validated. Nothing in this section affects litigation pending March 3, 1913.

1913, c. 39, s. 2.

3363. Foreign probates omitting seals. In all cases where the acknowledgment, privy examination or other proof of the execution of any instrument authorized or required to be registered has been taken by or before any ambassador, minister, consul, vice consul, vice consul general or commercial agent of the United States in any country beyond the limits of the United States, and such instrument has heretofore been recorded in any county in this state, but the official before whom it was taken has omitted to attach his seal of office, or it does not appear of record that such seal was attached to the instrument, or such official has certified the same as under his "official seal" or seal of his office, or words of similar import, and no such seal appears of record, then all such acknowledgments, privy examinations or other proof of such instruments, and the registration thereof, are hereby made in all respects valid, and such instruments, after the ratification hereof, shall be competent to be read in evidence. This section does not apply to suits pending March 7, 1913.

1913, c. 69, s. 1.

3364. Before consuls general. Any deed or other instrument permitted by law to be registered, and which has prior to the thirteenth day of October, nineteen

hundred and thirteen, been proved or acknowledged before a "consul general," is validated; and its registration is authorized and validated. This section does not affect litigation pending October 13, 1913.

Ex. Sess. 1913, c. 72, s. 2.

3365. Before vice consuls and vice consuls general. The order for registration by the clerk of the superior court and the registration thereof of all deeds of conveyance and other instruments in any county of this state prior to January first, one thousand nine hundred and five, upon the certificate of any vice consul or vice consul general of the United States residing in a foreign country, certifying in due form under his name and the official seal of the United States consul or United States consul general of the same place and country where such vice consul or vice consul general resided and acted, that he has taken the proof or acknowledgments of the parties to such instruments, together with the privy examinations of married women parties thereto, are hereby, together with such proof and acknowledgments, privy examinations and certificates, validated.

Rev., s. 1024; 1905, c. 451, s. 2.

Section not valid against duly registered deed from same grantor or a lien acquired against grantor before validating act: Powers v. Baker, 152-718.

3366. Before masters in chancery. All probates, acknowledgments, and private examinations of deeds and conveyances of land heretofore taken before masters in equity or masters in chancery in any other state are declared to be valid, and all registrations of such deeds or conveyances upon such probates, acknowledgments and private examinations, or any of them, are hereby declared to be sufficient. All such deeds and conveyances and registration thereof, and all certified copies of such registrations, shall be received in evidence or otherwise used in the same manner and with the same force and effect as other deeds and conveyances with probates, acknowledgments, or private examinations made in accordance with provisions of statutes of this state in force at the time and as registrations thereof and certified copies of such registrations. This section does not apply to any suit pending in the courts of this state or of the United States on February 15, 1911. Nothing in this section contained shall have effect to deprive any one of any legal rights acquired, before its passage, from the grantors in such deeds or conveyances subsequently to their execution, where the deeds or conveyances by which such rights were acquired have been duly acknowledged or probated and registered.

1911, c. 10.

CHAPTER 66

PROHIBITION

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ART. 1. MANUFACTURE AND SALE OF INTOXICATING LIQUORS

3367. Unlawful to manufacture or sell. It is unlawful for any person, firm or corporation to manufacture or in any manner make, or sell, or otherwise dispose of, for gain, any spirituous, vinous, fermented or malt liquors or intoxicating bitters within the state of North Carolina: Provided, that wines and ciders may be manufactured or made from grapes, berries or fruits, and wine sold at the place of manufacture only, and only in sealed or crated packages containing not less than two and one-half gallons per package; but no wine, when sold, shall be drunk upon the premises where sold, nor shall the package containing the same be opened on the premises: Provided further, that nothing herein contained shall be construed to prevent the sale of cider, in any quantity, by the manufacturer from fruits grown on his lands within the state of North Carolina; nor to prevent the sale of wine to any minister of religion or other officer of a church to be used for religious or sacramental purposes.

Rev., ss. 2058, 2058 (b), 2061; 1908, c. 71, ss. 1, 5; 1915, c. 97, s. 8.

Legislature may pass laws prohibiting sale of liquor within any designated locality: *State v. Piner*, 141-760, and cases cited on page 762; *Guy v. Comrs.*, 122-471—no one having a vested right in such traffic, *Guy v. Comrs.*, 122-471.

When the liquid, by common knowledge and observation, is intoxicating, the court may so declare; but if it is doubtful whether or not it be so, then the question of fact is raised for the jury: *State v. Piner*, 141-763; *State v. Parker*, 139-588, and cases cited; *State v. Packer*, 80-439; *State v. Lowry*, 74-121.

Sale of cider made from fruits grown on owner's premises not prohibited: *State v. Williams*, 172-973.

What amounts to a sale, discussion of Wilson act and the Webb-Kenyon act: *State v. Cardwell*, 166-309—in case of liquors furnished for club, *State v. Colonial Club*, 154-177—aiding and abetting in the sale of liquor, *State v. Denton*, 154-641; *State v. Winner*, 153-602. Sale by allowing customers to wait on themselves: *State v. Potect*, 86-612; *State v. McMinn*, 83-668—to members of a club by having steward take care of liquors and dispense them, *State v. Neis*, 108-787; *State v. Lockyear*, 95-633—by agents, *State v. Kittelle*, 110-560; *State v. Neal*, 133-689; *State v. Taylor*, 89-577; *State v. Smith*, 117-809; *State v. McNeeley*, 60-234. Exchange of liquor is a sale: *State v. Mitchell*, 156-659. Defendant is guilty where he sold to one employed by the officer: *State v. Smith*, 152-798.

Where distiller outside of territory sold to party inside of territory and delivered it, guilty: *State v. Sykes*, 104-694. Where drug clerk sells liquor without knowledge and against orders of owner, the owner is not guilty: *State v. Neal*, 133-689. Law presumes the unlawful intent from the selling; and it is no defense that defendant did not in fact intend to violate the law: *State v. Piner*, 141-760; *State v. Downs*, 116-1064—but defendant may show that in good faith he did not know the drink to be intoxicating, *State v. Powell*, 141-780. Case under statute against selling "drinks containing alcohol," *State v. Parker*, 139-586. Receipt of order by one within prohibition territory and filling same by delivering to depot, also within said territory, guilty: *State v. Groves*, 121-632. Delivering liquor and receiving the price within prohibited territory: *State v. Johnston*, 139-640.

It is not a sale simply to order liquor for another from a liquor house at his request: *State v. Bailey*, 168-168; *State v. Cardwell*, 166-309; *State v. Wilkerson*, 164-431; *State v. Watkins*, 164-425; *State v. Allen*, 161-226; *State v. Whisenant*, 149-515.

A contract for the sale of intoxicating drinks is illegal and will not be enforced: *Pfeifer v. Drug Co.*, 171-214; *Bluthenthal v. Kennedy*, 165-372; *Pfeifer v. Israel*, 161-409; *Vinegar Co. v. Hawn*, 149-355.

Legislature has power to change rules of evidence and declare that certain facts or conditions when shown shall constitute prima facie evidence of guilt: *State v. Wilkerson*, 164-431; *State v. Russell*, 164-482; *State v. Barrett*, 138-630; *State v. Dowdy*, 145-432—therefore a statute making the keeping of a certain quantity of liquor prima facie evidence of keeping it with intent to sell is valid, *Ibid.*; *State v. Dowdy*, 145-432; *State v. Tisdale*, 145-422; *State v. McIntyre*, 139-601; *State v. Williams*, 146-618—but statute does not operate when indictment

does not specify name of person to whom sold, *State v. Tisdale*, 145-422. Such statute does not violate the provision of the federal constitution prohibiting the denial to any person the equal protection of the law: *State v. Barrett*, 138-630—*quere*: Whether it is within the power of the legislature to make the mere ownership or possession of whiskey in itself a crime: *State v. McIntyre*, 139-599. See section 3379.

3368. Intoxicating liquors defined. All liquors or mixtures thereof, by whatever name called, that will produce intoxication shall be construed and held to be intoxicating liquors within the meaning of this article: Provided, that medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia and National Formulary which contain no more alcohol than is necessary to extract the medicinal properties of the drugs contained in such preparations, and no more alcohol than is necessary to hold the medicinal agents in solution, and which are manufactured and sold as medicines and not as beverages, shall not be held or construed to be or to come within the meaning or provisions of this article.

1908, c. 71, s. 2.

Wine is an intoxicating liquor: *State v. Piner*, 141-763; *State v. Packer*, 80-439; *State v. Scott*, 116-1012; *State v. Giersch*, 98-720—as are also brandy peaches under certain circumstances, *State v. Scott*, 116-1012—also what is known as “singlings,” *State v. Summey*, 60-496—also lager beer and all other liquors, whether produced by fermentation or distillation, which by their free use produce intoxication, *State v. Giersch*, 98-720—and also drinks containing such an amount of alcohol as would make a man drunk if freely used, *State v. Parker*, 139-587.

3369. Place of delivery place of sale. The place where delivery of any intoxicating liquors is made in the state of North Carolina shall be construed and held to be the place of sale thereof, and any station or other place within the state to which any person shall ship or convey any intoxicating liquors for the purpose of delivering or carrying the same to a purchaser shall be construed to be the place of sale.

Rev., s. 2080; 1908, c. 71, s. 4; 1915, c. 97, s. 8.

Legislature had power to enact this section: *State v. Herring*, 145-418; *State v. Patterson*, 134-612. An indictment at the place of delivery of liquor is not prohibited by the sixth amendment to the constitution of the United States: *State v. Patterson*, 134-612. Delivery of liquors by club manager to members of club is not a sale: *State v. Colonial Club*, 154-177. This section does not apply to sale fully consummated in another state and subject to interstate commerce regulation: *State v. Allen*, 161-226 (before Webb-Kenyon law); see *State v. R. R.*, 169-295.

3370. Unlawful to solicit orders for liquor. It is unlawful for any person, for himself or as agent or traveling salesman for any person, firm or corporation, to solicit orders or proposals of purchase of intoxicating liquors by the jug or bottle or otherwise within the state of North Carolina.

1908, c. 118, s. 1.

Section cited in *Pfeifer v. Israel*, 161-409; *State v. Cardwell*, 166-309.

3371. Unlawful sale through agents. If any person unlawfully and illegally procures and delivers any spirituous or malt liquors to another, he shall be deemed and held in law to be the agent of the person selling said spirituous and malt liquors, and shall be guilty of a misdemeanor and shall be punished in the discretion of the court. When the solicitor of any judicial district has good

reason to believe that liquor has been manufactured or sold contrary to law within any county in his district, and believes that any person has knowledge of the existence and establishment of any illicit distillery, or that any person has sold liquor illegally, then it is lawful for the solicitor to apply to the clerk of the superior court of the county wherein the offense is supposed to have been committed to issue subpoenas for the person so having knowledge of said offenses to appear before the next grand jury drawn for the county, there to testify upon oath what he may know touching the existence, establishment and whereabouts of said distillery or persons who have sold intoxicating liquors contrary to law, and shall give the names and personal description of the keepers thereof, and such evidence, when so obtained, shall be considered and held in law as an information on oath upon which the grand jury shall make presentment, as provided by law, in other cases. If any officer shall fail or refuse to use due diligence in the execution of the provisions of this section, he shall be guilty of laches in office and such failure be cause for removal from office.

Rev., ss. 3526, 3534; 1905, c. 498, ss. 6, 7, 8.

One buying for another in unprohibited territory and delivering in prohibited territory is guilty: *State v. Johnson*, 139-640; *State v. Bailey*, 168-168. It is not a sale when club manager simply holds liquor in deposit for club members: *State v. Colonial Club*, 154-177. This section contemplates an illegal sale, and defendant must be agent of seller in such sale: *State v. Wilkerson*, 164-432; *State v. Burchfield*, 149-537; *State v. Whisenant*, 149-515; *State v. Allen*, 161-226.

3372. Social clubs using liquors. No corporation, club, association, or person shall directly or indirectly keep or maintain, alone or by association with others, or by any other means, or shall in any manner aid, assist, or abet others in keeping or maintaining a clubroom or other place where intoxicating liquors are received, kept, or stored for barter, sale, exchange, distribution, or division among the members of any such club or association or aggregation of persons, or to or among any other persons by any means whatever, or shall act as agents in ordering, procuring, buying, storing, or keeping intoxicating liquors for any such purpose: Provided, this section shall not apply to churches using wines for sacramental purposes, or to hospitals or asylums keeping intoxicating liquors for medical purposes.

1911, c. 133, s. 1; 1915, c. 97, s. 8.

Section changes rule in *State v. Colonial Club*, 154-177.

ART. 2. SALE OF NEAR-BEER AND OTHER SPECIFIED DRINKS

3373. Unlawful to sell near-beer and other mixed drinks. It is unlawful for any person, firm or corporation to sell or dispose of, for gain, near-beer, beerine, or other spirituous, vinous, or malt liquors, or mixtures of any kind, and under whatsoever name called, that shall contain alcohol, or cocaine, or morphine, or other opium derivative, except as herein provided.

1911, c. 35, s. 1.

3374. Must allow package to be taken away. It is unlawful for any person, firm or corporation, who is engaged in the sale of any kind of drinks, to refuse to allow any person to carry away from the place where such drinks are being sold or offered for sale, any package or quantity of any size of the drink which has

been bought and paid for; and if any person, firm or corporation shall refuse to allow the package or quantity of such drink to be carried away from the place of sale, it shall be prima facie evidence of the violation of this article.

1911, c. 35, s. 2.

3375. Construction of article. This article shall not be construed to forbid the sale of cocaine or morphine or other opium derivative to any registered pharmacist, or to forbid the sale of cocaine, morphine, or other opium derivative by a licensed pharmacist upon a written prescription by a regularly licensed physician or surgeon. This article shall not apply to the sale of domestic wines when sold in quantity of not less than two and one-half gallons in sealed packages or crated, on the premises where manufactured, or to the sale of cider in any quantity by the manufacturer from fruits grown on his land within the state of North Carolina, or to the sale of wine to any minister of religion or other officer of a church when such wine is bought for religious or sacramental purposes, or to the sale of flavoring extracts or essences when sold as such, or to the sale of medical preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia and National Formulary which contain no more alcohol than is necessary to extract the medical properties of the drug contained in such preparations, and no more alcohol than is necessary to hold the medical agents in solution, and which are manufactured and sold as medicines and not as beverages, or to the sale of any medical preparation which is manufactured, sold, and used as a medicine and not as a beverage, or to the sale of carbonated drinks that contain no more than one-tenth of one per cent of alcohol, and in which drinks a flavoring agent is used, in the manufacture of which flavoring agent alcohol is used to dissolve and hold in solution or to extract from the crude material the flavoring agent.

1911, c. 35, s. 3; 1915, c. 97, s. 8.

For regulation of sale of cocaine, etc., see Medicine and Allied Occupations.

For the sale of wines and ciders under this section, see *State v. Hicks*, 174-802; *State v. Williams*, 172-973. Invalid town ordinance as to sale of "near-beer": *State v. Dannenberg*, 150-799.

ART. 3. MANUFACTURE AND SALE OF MALT

3376. Unlawful to make or sell malt. It is unlawful for any person, firm or corporation, or any agent, officer or employee thereof, to manufacture or sell malt, such as is used in the manufacture of spirituous liquors, in the state of North Carolina.

1915, c. 91, s. 1.

3377. Transportation companies to keep record. All express companies, railroad companies, or other transportation companies, doing business in this state, are required to keep a separate record of all shipments of such malt, in which shall be entered, immediately upon receipt thereof, the name of the person to whom shipped, the amount of each shipment, the date when received and the date when delivered, and by whom delivered and to whom delivered, which record shall be open for the inspection of any officer of the state, county or municipality any time during business hours of the company.

1915, c. 91, s. 2.

ART. 4. SEARCH AND SEIZURE LAW

3378. Handling liquor for gain. It is unlawful for any person, firm, corporation, or association, by whatever name called, to engage in the business of selling, exchanging, bartering, giving away for the purpose of direct or indirect gain, or otherwise handling spirituous, vinous or malt liquors in the state of North Carolina.

1913, c. 44, s. 1.

See annotations under section 3367. The original act contained an exception in favor of druggists, but it was not necessary for the indictment to negative this exception: *State v. Moore*, 166-284.

3379. Keeping liquor for sale; evidence. It is unlawful for any person, firm, association or corporation, by whatever name called, to have or keep in possession, for the purpose of sale, any spirituous, vinous or malt liquors, and proof of any one of the following facts shall constitute prima facie evidence of the violation of this section:

1. The possession of a license from the government of the United States to sell or manufacture intoxicating liquors; or
2. The possession of more than one gallon of spirituous liquors at any one time, whether in one or more places; or
3. The possession of more than three gallons of vinous liquors at any one time, whether in one or more places; or
4. The possession of more than five gallons of malt liquors at any one time, whether in one or more places; or
5. The delivery to such person, firm, association or corporation of more than five gallons of spirituous or vinous liquors, or more than twenty gallons of malt liquors within any four successive weeks, whether in one or more places; or
6. The possession of intoxicating liquors as samples to obtain orders thereon: Provided, that this section shall not prohibit any person from keeping in his possession wines and ciders in any quantity where such wines and ciders have been manufactured from grapes or fruit grown on the premises of the person in whose possession such wines and ciders may be.

1913, c. 44, s. 2; 1915, c. 97, s. 8.

This section is constitutional: *State v. Cathey*, 170-794; *State v. Randall*, 170-757; *State v. Denton*, 164-531; *State v. Russell*, 164-482; *State v. Wilkerson*, 164-431.

Possession of specified quantity as evidence of purpose to sell: *State v. Simons*, 178-679; *State v. Baldwin*, 178-693; *State v. Bush*, 177-551. Possession may be actual or constructive: *State v. Lee*, 164-533. The having in possession for the purpose of sale is the offense: *State v. Davis*, 168-144; *State v. Blauntia*, 170-749; *State v. Wilkerson*, 164-431.

The existence of any of the facts mentioned in section is prima facie evidence, but this does not shift the burden of proof to the defendant: *State v. Wilkerson*, 164-431; *State v. Russell*, 164-482; *State v. Denton*, 164-530; *State v. Blauntia*, 170-749; *State v. Randall*, 170-757; *State v. Bean*, 175-748.

Offense may be within jurisdiction of recorder's court: *State v. Denton*, 164-530.

3380. Search and seizure upon complaint and warrant. Upon the filing of complaint, under oath, by a reputable citizen, or information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized by law to issue warrants, charging that any person, firm, corporation or association, by whatever name called, has in possession, at a place or places specified, more than one gallon of

spirituous or vinous liquors or more than five gallons of malt liquors for the purpose of sale, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such complaint or information, and if more than one gallon of spirituous or vinous liquors or more than five gallons of malt liquors be found in any such place or places, to seize and take into his custody all such intoxicating liquors described in the complaint or information, and seize and take into his custody all glasses, bottles, kegs, pumps, bars or other equipment used in the business of selling intoxicating liquors which may be found at such place or places, and safely keep the same subject to the orders of the court. The complaint or information shall describe the place or places to be searched with sufficient particularity to identify the same, and shall describe the intoxicating liquors or other property alleged to be used in carrying on the business of selling intoxicating liquors as particularly as practicable, and any description, however general, that will enable the officer executing the warrant to identify the property seized shall be deemed sufficient. All spirituous, vinous or malt liquors seized under this section shall be held and upon acquittal of the person so charged shall be returned to such person, and upon conviction, or upon default of appearance, shall be destroyed.

1913, c. 44, s. 3.

See annotations under section 3379.

3381. Unlawful to handle draft connected with receipt for liquor. It is unlawful for any bank incorporated under the laws of this state, or national bank, or any individual, firm or association, to present, collect or in any wise handle any draft, bill of exchange or order to pay money, to which draft, bill of exchange or order to pay money is attached a bill of lading, or order, or receipt for intoxicating liquors, or which draft is enclosed with, connected with, or in any way related to, directly or indirectly, any bill of lading, order or receipt for intoxicating liquors.

1913, c. 44, s. 4.

3382. Transportation companies to keep record. All express companies, railroad companies, or other transportation companies doing business in this state are required hereby to keep a separate book in which shall be entered immediately upon receipt thereof the name of the person to whom the liquor is shipped, the amount and kind received, and the date when received, the date when delivered, by whom delivered, and to whom delivered, after which record shall be a blank space, in which the consignee shall be required to sign his name, or if he cannot write, shall make his mark in the presence of a witness, before such liquor is delivered to such consignee, and which book shall be open for inspection to any officer or citizen of the state, county, or municipality any time during business hours of the company, and such book shall constitute prima facie evidence of the facts therein and will be admissible in any of the courts of this state. Any express company, railroad company, or other transportation company or any employee or agent of any express company, railroad company, or other transportation company violating the provisions of this section shall be guilty of a misdemeanor: Provided, upon the filing of a certificate signed by a reputable physician or two reputable citizens that the consignee is unable, by reason of sickness or infirmities of age, to appear in person, then the company

is authorized to deliver any package to the agent of the consignee, and the agent shall sign the name of the consignee and his own name, and the certificate shall be filed of record.

1913, c. 44, s. 5.

Right of any citizen to inspect the books of common carrier for this purpose: *State v. R. R.*, 169-295.

3383. Indictment and proof. In indictments for violating the first section of this article, it shall not be necessary to allege a sale to a particular person, and the violation of law may be proved by circumstantial evidence as well as by direct evidence.

1913, c. 44, s. 6.

It is not necessary to allege a sale to a particular person: *State v. Brown*, 170-714. Section is constitutional: *Ibid.* Before this act it was necessary to allege a sale to a particular person or to some person unknown to the jurors: *State v. Tisdale*, 145-422; *State v. Dowdy*, 145-432—and to prove such allegation, *State v. Watkins*, 164-425. For evidence, see annotations under section 3380.

ART. 5. DELIVERY AND RECEIVING REGULATED

3384. Amount delivered restricted. It is unlawful for any person, firm or corporation, or any agent, officer or employee thereof, to ship, transport, carry or deliver, in any manner or by any means whatsoever, for hire or otherwise, in any one package or at any one time from a point within or without this state to any person, firm or corporation in this state any spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart, or any malt liquors in a quantity greater than five gallons; and it is unlawful for any spirituous or vinous liquors or intoxicating bitters so shipped, transported, carried or delivered in any one package to be contained in more than one receptacle.

1915, c. 97, s. 1.

This section is constitutional: *State v. Little*, 171-805; *State v. Carpenter*, 173-767; *State v. Poythress*, 174-809—and creates two offenses, one for transporting more than one quart in one package or at one time, and the other for transporting in any quantity where the packages are in more than one receptacle, that is, each package shall be carried for its owner as a separate parcel, *Ibid.*

One who brings into the state four quarts of liquor, in separate vessels, each for a separate person, and not for sale, does not violate this section: *State v. Little*, 171-805—nor when one transports his own liquor, not for the purpose of sale, and gives another a drink, *State v. Coleman*, 178-757.

Effect of *Webb-Kenyon* law explained: *State v. R. R.*, 169-295; *Glenn v. Express Co.*, 170-286.

Common carrier is not required to accept for shipment more than one quart for one person: *Glenn v. Express Co.*, 170-286.

A local statute prohibiting the delivery of any intoxicating beverages within a certain territory is valid: *State v. Express Co.*, 173-753.

3385. Amount received restricted. It is unlawful for any person, firm or corporation at any one time, or in any one package, to receive at a point within the state of North Carolina for his use or for the use of any person, firm or corporation, or for any other purpose, any spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart or any malt liquors in a quantity greater than five gallons.

1915, c. 97, s. 2.

See annotations under section 3384.

3386. Fifteen days between receipts. It is unlawful for any person, firm or corporation, during the space of fifteen consecutive days, to receive any spirituous or vinous liquors or intoxicating bitters in a quantity or quantities totaling more than one quart, or any malt liquors in a quantity greater than five gallons: Provided, that the provisions of this and the two preceding sections shall not apply to the receipt by a common carrier for transportation to a point in another state where delivery is not forbidden by the laws of such state.

1915, c. 97, s. 3.

Common carrier not required to deliver more than one quart to one person in fifteen days: *Glenn v. Express Co.*, 170-286.

3387. Malt liquors defined. The words "malt liquors" as used in this article shall be construed to include only such malt liquors as contain not to exceed five per centum of alcohol, and any malt liquors containing more than five per centum of alcohol shall be held to be "spirituous liquors" within the meaning of this article.

1915, c. 97, s. 4.

3388. No order in fictitious name or in name of another. It is unlawful for any person to order in a fictitious name or in the name of another any spirituous or vinous or malt liquors or intoxicating bitters or to receive for himself any spirituous or vinous or malt liquors or intoxicating bitters so ordered or shipped.

1915, c. 97, s. 5.

3389. To allow use of name forbidden. It is unlawful for any person to allow or in any way permit the use of his name in the ordering for another or the delivery to another of any spirituous or vinous or malt liquors or intoxicating bitters.

1915, c. 97, s. 6.

3390. To serve liquors with meals forbidden. It is unlawful for any person, firm or corporation to serve with meals, or otherwise, any spirituous, vinous, fermented or malt liquors or intoxicating bitters where any charge is made for such meal or service.

1915, c. 97, s. 7.

Where a person has been convicted under this section and the liquors have been seized and ordered to be destroyed, he cannot maintain claim and delivery to recover them: *Felia v. Belton*, 170-112.

3391. Sale by druggists prohibited. All laws authorizing or allowing the sale of spirituous, vinous, or malt liquors or intoxicating bitters by any medical depository, druggist or pharmacist are hereby repealed, and it shall be unlawful for any medical depository, druggist or pharmacist to sell or otherwise dispose of for gain any spirituous, vinous, fermented or malt liquors or intoxicating bitters.

1915, c. 97, s. 8.

3392. Application of provisions of this article. The provisions of this article shall not apply to grain alcohol received by duly licensed physicians, druggists, dental surgeons, college, university and state laboratories, and manufacturers of medicine, when intended to be used in compounding, mixing, or pre-

servicing medicines or medical preparations, or for surgical purposes, when obtained as hereinafter provided: Provided, however, that nothing contained in this article shall prohibit the importation into the state of North Carolina and the delivery and possession in the state for use in industry, manufactures, and arts of any denatured alcohol or other denatured spirits, which are compounded and made in accordance with the formulæ prescribed by acts of congress of the United States and regulations made under authority thereof by the treasury department of the United States and the commissioner of internal revenue thereof, and which are not now subject to internal revenue tax levied by the government of the United States: Provided further, that this article shall not apply to wines and liquors required and used by hospitals or sanatoria bona fide established and maintained for the treatment of patients addicted to the use of liquor, morphine, opium, cocaine, or other deleterious drugs, when the same are administered to patients actually in such hospitals or sanatoria for treatment, and when the same are administered as an essential part of the particular system or method of treatment and exclusively by or under the direction of a duly licensed and registered physician of good moral character and standing.

1915, c. 97, s. 9.

3393. Vinous liquors for sacramental purposes. It shall be lawful for any duly ordained minister of the gospel who is in charge of a church and at the head of a congregation in this state, to receive in the space of ninety consecutive days a quantity of vinous liquors not greater than three gallons for use in sacramental purposes only, and it shall be lawful for him to receive same in one or more packages or one or more receptacles.

1919, c. 241.

3394. Permit to obtain alcohol for certain purposes. Manufacturers of medicine, duly licensed physicians, hospitals, dental surgeons, college, university, and state laboratories and druggists may make written application to the clerk of the superior court of the county for a permit to receive by transportation by a common carrier grain alcohol intended to be used for surgical purposes and in compounding, mixing, or preserving medicines and medical preparations. Such permit shall then be granted by the clerk or his duly appointed deputy, who shall affix the seal of his office thereto, and the permit shall contain the name of the applicant to whom the shipment is to be delivered, the place from which the shipment is to be made, the amount to be shipped, and the date of the granting of the permit. The permit shall be executed in duplicate. The original shall be delivered to the applicant to be sent by him to the shipper, to be pasted on the outside of the package containing alcohol.

1915, c. 97, s. 10.

3395. Permit attached to package. A permit, issued as above, when attached to and plainly affixed in a conspicuous place to any package or parcel containing grain alcohol transported within this state, shall authorize any common carrier within the state to transport the package or parcel to which such permit is attached or affixed, containing only alcohol mentioned in the permit, and to deliver the same to the person, firm or corporation to which such permit was issued.

1915, c. 97, s. 11.

3396. Duplicate permit filed with clerk. The duplicate copy of the permit, together with the application therefor, as hereinbefore provided, shall be filed in the office of the clerk of the superior court chronologically and alphabetically with regard to the name of the applicant, and the application and permit shall at all times be subject to the inspection of any citizen or officer of the state, county, or municipality; and for his services the clerk of the superior court shall be entitled to a fee of fifty cents, to be paid by the applicant.

1915, c. 97, s. 12.

3397. Construction of article. Nothing in this article shall be construed to impair or repeal any laws prohibiting the sale of intoxicating liquors or any laws making the place of delivery the place of sale, nor shall it be construed to repeal any laws prohibiting the transportation, delivery, or receipt of intoxicating liquors in any county or counties in this state.

1915, c. 97, s. 14.

This does not repeal local laws prohibiting the sale of liquor: *State v. Russell*, 164-482— but does repeal a local law permitting the sale in violation of the general law, *State v. Johnson*, 170-685.

ART. 6. SEIZURE AND FORFEITURE OF PROPERTY

3398. Duty of sheriff to seize distilleries. It is the duty of the sheriff of each county in the state and of the police of each incorporated town or city in the state to search for and seize any distillery or apparatus used for the manufacture of intoxicating liquors in violation of the laws of North Carolina, and to deliver the same, with any materials used for making such liquors found on the premises, to the board of county commissioners, who shall confiscate the same and shall cause the distillery to be cut up and destroyed, in their presence or in the presence of a committee of the board, and who may dispose of the material, including the copper or other material from the destroyed still or apparatus, in such manner as they may deem proper.

Rev., s. 3533; 1905, c. 498, s. 2; 1907, c. 807, s. 1.

3399. Duty of officers to destroy liquor and arrest offenders. It is the duty of the sheriff and other officers mentioned in the preceding section to seize and then and there destroy any and all liquors which may be found at any distillery for the manufacture of intoxicating liquors in violation of law, and to arrest and hold for trial all persons found on the premises engaged in distilling or aiding or abetting in the manufacture or sale of intoxicating liquors.

Rev., s. 3533; 1905, c. 498, ss. 4, 5; 1909, c. 807, s. 2.

3400. Officer failing to discharge duty removed from office. If any officer mentioned in the two preceding sections shall fail or refuse to use due diligence in the execution of the provisions of such sections, after being informed of violation thereof, he shall be guilty of laches in office and such failure be cause for removal therefrom.

Rev., s. 3526; 1905, c. 498, s. 8.

3401. Fee for seizure. For every distillery seized under this article the sheriff or other police officer shall receive the sum of twenty dollars, which shall be allowed by the commissioners of the county in which the seizure was made:

Provided, that the commissioners shall not pay this amount if they are satisfied, after due investigation, that the seizure of the distillery was not bona fide made.

1909, c. 807, s. 3; 1911, c. 45, s. 1.

3402. Claimant may sue for fee. The person making the seizure may institute an action before the proper court for the amount claimed under and by virtue of the seizure; then the matter may be inquired into on its merits and judgment rendered accordingly.

1911, c. 45, s. 2.

3403. Seizure of vehicle used in conveying liquor. If any person, firm or corporation shall have or keep in possession any spirituous, vinous or malt liquors in violation of law, the sheriff or other officer of any county, city or town, who shall seize such liquors by any authority provided by law, is hereby authorized and required to seize and take into his custody any vessel, boat, cart, carriage, automobile and all horses and other animals or things used in conveying, concealing or removing such spirituous, vinous or malt liquors, and safely keep the same until the guilt or innocence of the defendant has been determined upon his trial for the violation of any such law making it unlawful to so keep in possession any spirituous, vinous or malt liquors, and upon conviction of a violation of the law, the defendant shall forfeit and lose all right, title and interest in and to the property so seized; and it shall be the duty of the sheriff having in possession the vessel, boat, cart, carriage, automobile and all horses and other animals or things so used in conveying, concealing or removing such spirituous, vinous or malt liquors, to advertise and sell same under the laws governing the sale of personal property under execution.

1915, c. 197, s. 1.

This is a valid exercise of police power, but it will not affect the rights of innocent third persons in the property seized: *Skinner v. Thomas*, 171-98.

3404. Notice to owner to claim property. In the event the sheriff or other officer shall, at the time of seizing spirituous, vinous or malt liquors, fail to capture or arrest the owner or party in possession and so using the vessel, boat, cart, carriage, automobile and all horses and other animals or thing to convey, conceal or remove such spirituous, vinous or malt liquors, he shall advertise for the owner to come forward and institute the proper proceeding to secure possession of the property, and upon the failure of any person to so come forward and surrender himself to the sheriff to the end that the question of whether the property was used as set out in this article, and upon the failure of such person to come forward, if an individual, in person, and make such claim within thirty days after such notice shall have appeared in at least one issue of some newspaper published in the county where such seizure was made, and after such notice and time the sheriff shall advertise such property so seized for sale and sell as provided in the preceding section.

1915, c. 197, s. 2.

An appeal from an order directing sheriff to hold the property until the case is tried is premature: *Richardson v. Hobgood*, 170-37.

3405. Proceeds of sale applied to school fund. The proceeds derived from the sale of such property, after paying for the reasonable expense of such sale, shall

be paid by the sheriff to the county treasurer, and be applied by the treasurer to the credit of the public school fund of the county.

1915, c. 197, s. 3.

ART. 7. GENERAL PROVISIONS

3406. No witness privileged. No person shall be excused from testifying on any prosecution for violating any law against the sale or manufacture of intoxicating liquors, but no discovery made by such person shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned for the offense done or participated in by him.

1913, c. 44, s. 7.

3407. Allowing distillery to be operated on land. If any person shall knowingly permit or allow any distillery or other apparatus for the making or distilling of spirituous liquors to be set up for operation or to be operated on lands in his possession or control, he shall be guilty of a misdemeanor and shall be punished in the discretion of the court.

Rev., s. 3533; 1905, c. 498, s. 2.

Defendant is guilty if he furnishes the place, or allows his premises to be used, for carrying on the distilling: *State v. Jones*, 175-709—or if he allows liquor to be sold on his premises he is guilty of aiding and abetting, *State v. Denton*, 154-641.

3408. Federal license as evidence. The possession of a license or the issuance to any person of a license to manufacture, rectify or sell, at wholesale or retail, spirituous or malt liquors by the United States government or any officer thereof in any county, city or town where the manufacture, sale or rectification of spirituous or malt liquors is forbidden by the laws of this state shall be prima facie evidence that the person having such license, or to whom the same was issued, is guilty of doing the act permitted by such license in violation of the laws of this state. On the trial of any person charged with the violation of any such laws, it shall be competent to prove that such a license is in the possession of or has been issued to such person, by the testimony of any witness who has personally examined the records of the government office where the official record of such licenses is kept.

Rev., s. 2060; 1905, c. 339, s. 5; 1907, c. 931.

This is a valid exercise of the power of the legislature to change rules of evidence: *State v. Boynton*, 155-456; *State v. Dowdy*, 145-432—but this will not cure a defect in the bill which makes the charge too indefinite, *State v. Tisdale*, 145-422.

3409. Manufacturing liquor a felony. It is unlawful for any person to distil, manufacture, or in any manner make, or for any person to aid, assist, or abet any such person in distilling, manufacturing, or in any manner making any spirituous or malt liquors or intoxicating bitters within the state of North Carolina; but this shall not be understood as prohibiting the manufacture of wines and cider in the manner and under the conditions which are now or may hereafter be provided by law. Any person or persons violating the provisions of this section shall, for the first conviction, be guilty of a misdemeanor, and, upon conviction or confession of guilt, punished in the discretion of the court; for the second or any subsequent conviction said person or persons shall be guilty of a

felony, and, upon conviction or confession in open court, shall be imprisoned in the state prison for not less than one year and not exceeding five years, in the discretion of the court.

1917, c. 157; 1919, c. 4.

Sufficient evidence to convict of engaging in distilling, or aiding and abetting in the same: State v. Killian, 178-753; State v. Ogleston, 177-541; State v. Jones, 175-709; State v. Horner, 174-788.

Local act making a sale of liquor a felony does not affect prior sales: State v. Mull, 178-748.

3410. Other violations a misdemeanor. Any person violating any of the provisions of this chapter, except as specified in the preceding section, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

1908, c. 71, s. 8; 1908, c. 118, s. 2; 1911, c. 35, s. 3; 1911, c. 133, s. 1; 1913, c. 44, ss. 1, 4; 1915, c. 91, s. 3; 1915, c. 97, s. 13.

For what constitutes the violations, see the various sections supra.

INDICTMENT. Should charge sale as made "wilfully and unlawfully": State v. Powell, 141-780. Need not specify the kind of "intoxicating liquors": State v. Parker, 80-439; State v. Downs, 116-1064. Must negative possession of a license: State v. Holder, 133-709. Need not negative, in this case, the fact that liquors were manufactured from fruits raised on land of defendant: State v. Burton, 138-575. Need not specify statutes under which brought: State v. Wallace, 94-827; State v. Snow, 117-778; State v. Downs, 116-1064—nor negative the fact that it comes within an exception to the statute, *Ibid.*—and where it refers to a wrong statute it is mere surplusage, State v. Snow, 117-778. Must aver a sale to a particular person, or to a person to jurors unknown: State v. Tisdale, 145-422; State v. Stamey, 71-202; State v. Faucett, 20-108; see State v. Tucker, 127-539—but see State v. Brown, 170-714, and section 3383. The warrant or bill should charge the particular ordinance or law violated: State v. Lunsford, 150-862.

When two counts on the bill of indictment allege "an unlawful sale to person or persons to jurors unknown," it is sufficient to support general verdict of guilty, though coupled with a third count which may be defective: State v. Dowdy, 145-432. Other cases of interest: State v. Parker, 91-652; State v. Chambers, 93-600.

3411. Local laws not repealed. Nothing in this chapter shall operate to repeal any of the local or special acts of the general assembly of North Carolina prohibiting the manufacture or sale or other disposition of any of the liquors mentioned in this chapter, or any laws for the enforcement of the same, but all such acts shall continue in full force and effect and in concurrence herewith, and indictment or prosecution may be had either under this chapter or under any special or local act relating to the same subject.

1908, c. 71, s. 7; 1913, c. 44, s. 8.

Repeals by implication or construction are not favored, and they should not be extended so as to include cases not within the intention of the legislature: State v. Perkins, 141-797; State v. Sutton, 100-474. The repeal in any case will be measured by the extent of the conflict or the inconsistency between the acts, and if any part of the earlier act can stand as not superseded or affected by the later one, it will not be repealed: State v. Perkins, 141-797. If the legislature enacts a law in the terms of a former one, and at the same time repeals the former, this amounts to a reaffirmance and not a repeal of the former law: State v. Sutton, 100-474. An act making it unlawful to sell any drink containing alcohol is not repealed by an act which prohibits the sale of spirituous, vinous, or malt liquors or other intoxicating drinks and repeals all previous statutes in conflict: State v. Parker, 139-586.

By express provision, local acts prohibiting manufacture, sale or disposition of liquor were not repealed: State v. Herring, 145-418; State v. Russell, 164-482; State v. Johnson, 170-685. But a prior local law, so far as it permits the sale of liquor in violation of the general law, is repealed: State v. Johnson, 170-685.

CHAPTER 67

RAILROADS AND OTHER CARRIERS

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- 3490. Rates on leased or controlled lines.
- 3491. Violation of passenger rates misdemeanor.
- 3492. Accepting or giving free transportation illegally misdemeanor.
- 3493. Power of corporation commission over rates limited.
- 3494. Separate accommodations for different races.
- 3495. Certain carriers may be exempted from requirement.
- 3496. Use of same coach in emergencies.
- 3497. Penalty for failing to provide separate coaches.
- 3498. Facilities for exchange of mileage required.
- 3499. Application of requirement for exchange of mileage.
- 3500. Penalty for failure to provide mileage-exchange facilities.
- 3501. Right to check baggage on mileage books.
- 3502. Corporation commission may regulate the checking of baggage on mileage tickets.
- 3503. Unused tickets to be redeemed.
- 3504. Ticket may be refused intoxicated person; prohibited entry misdemeanor.
- 3505. Entering cars after being forbidden misdemeanor.
- 3506. Riding in first-class cabin with second-class ticket misdemeanor.
- 3507. Passenger refusing to pay fare and violating rules may be ejected.
- 3508. Beating way on trains misdemeanor; venue.
- 3509. Injury while on platform or in other prohibited places.
- 3510. Checking baggage; liability for loss.
- 3511. Cars and toilets to be kept clean.
- 3512. Evidence of failure to order cleaning of cars; violation of orders misdemeanor.

ART. 11. CARRIAGE OF FREIGHT.

- 3513. Freight rates to be posted.
- 3514. No charge in excess of printed tariffs; refunding overcharge; penalty.

- 3515. Penalty for failure to receive and forward freight tendered.
- 3516. Penalty for failure to transport within reasonable time.
- 3517. Flume companies exercising right of eminent domain become common carriers.
- 3518. Freight charges to be at legal rates; penalty for failure to deliver to consignee on tender of same.
- 3519. Charging unreasonable freight rates misdemeanor.
- 3520. Allowing or accepting rebates or pooling freights misdemeanor.
- 3521. Partial charges for partial deliveries.
- 3522. Placing cars for loading.
- 3523. Baggage and freight to be carefully handled.
- 3524. Claims for loss of or damage to goods; filing and adjustment.
- 3525. Existing remedies to continue.
- 3526. Carrier's right against prior carrier.
- 3527. Regulation of demurrage.
- 3528. Shipments of livestock on Scuppernong river regulated; violation of regulations misdemeanor.
- 3529. Carload shipments of watermelons regulated; violation of regulations misdemeanor.
- 3530. Express companies to settle promptly for cash-on-delivery shipments; penalty.
- 3531. Failure to place name on produce shipped misdemeanor.
- 3532. Unclaimed freight to be sold.
- 3533. Sale of unclaimed perishable freight.
- 3534. Funds from unclaimed freight to be paid to state university.

ART. 12. STREET AND INTERURBAN RAILWAYS.

- 3535. May build and maintain water-power plants.
- 3536. Separate accommodations for different races; failure to provide misdemeanor.
- 3537. Passengers to take certain seats; violation of requirement misdemeanor.
- 3538. No liability for mistake in assigning passenger to wrong seat.
- 3539. Misconduct on car; riding on front platform misdemeanor.
- 3540. Passenger riding on rear platform assumes risk; copies of section to be posted.
- 3541. Street cars to have vestibule fronts; failure to provide them misdemeanor.
- 3542. Street cars to have fenders; failure to provide them misdemeanor.

ART. 1. GENERAL PROVISIONS

3412. **Application to existing railroads; special charters.** All existing railroad corporations within this state shall respectively have and possess all the powers and privileges contained in this chapter; and they shall be subject to all the duties, liabilities and provisions of this chapter not inconsistent with their charters. This chapter shall govern and control, anything in any special act of assembly creating a railroad corporation to the contrary notwithstanding, unless in the act of the general assembly creating the corporation the section or sections of this chapter intended to be repealed shall be specially referred to by number and, as such, specially repealed.

Rev., s. 2566; Code, ss. 701, 1982; 1871-2, c. 138, s. 45.

This section is construed not to affect subsequent legislation in conflict with it: *Power Co. v. Power Co.*, 171-248; *R. R. v. Ferguson*, 169-70.

It is the policy of the legislature that the provisions of this chapter shall not in any material particular be repealed by implication; therefore the charter of a railroad company using such words as "this company shall be allowed to condemn land under the same rules and regulations as the N. C. Railroad Co." does not alter the effect of this section: *R. R. v. R. R.*, 106-16; *Livermon v. R. R.*, 109-52.

Case referring to, but not construing, section: *Rumbough v. Imp. Co.*, 106-461.

3413. **Roads not to be established unless authorized by law.** If any person or corporation, not being expressly authorized thereto, shall make or establish any canal, turnpike, tramroad, railroad or plankroad, with the intent that the same shall be used to transport passengers other than such persons, or the members of

such corporation, or to transport any productions, fabrics or manufactures other than their own, the person or corporation so offending, and using the same for any such purpose, shall forfeit and pay fifty dollars for every person and article of produce so transported.

This section shall not apply to any narrow-gauge railroad, tramroad or toll road made and established and maintained solely by the owner of the lands upon which said road may be, the principal business of which is the transportation of logs, lumber and articles for the owners of such railroad or tramroad: Provided, that the corporation commission shall have power to authorize lumber companies, having logging roads, to transport all kinds of commodities other than their own and passengers and to charge therefor reasonable rates to be approved by said commission.

Rev., s. 2598; Code, s. 1717; R. C., c. 61, s. 37; 1874-5, c. 83; 1901, c. 282; 1907, c. 531; 1911, c. 160; 1915, c. 6.

In a contract for purchase of timber at a reduced price under a promise to build a railroad, the purchasers not having authority to build the road will not prevent a recovery for the value of the timber: *Herring v. Lumber Co.*, 159-382.

It seems that where a corporation is authorized to cut and haul lumber to market it may incidentally haul the goods of another: *Gruber v. R. R.*, 92-1.

3414. Conductor and certain other employees to wear badges. Every conductor, baggagemaster, engineer, brakeman or other servant of any railroad corporation employed on a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office and the initial letters of the title of the corporation by which he is employed. No conductor or collector without such badge shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office; and no officer or servant without such badge shall have authority to meddle or interfere with any passenger, his baggage or property.

Rev., s. 2604; Code, s. 1958; 1871-2, c. 138, s. 30.

3415. Actions for penalties to be in name of state. All penalties imposed by this chapter may, unless otherwise provided, be sued for in the name of the state.

Rev., s. 2647; Code, s. 1976; 1885, c. 221.

An action for penalty under section 3516 is not brought in the name of the state; and if this were required the name of the state could be added by amendment: *Robertson v. R. R.*, 148-323.

3416. Discrimination in charges misdemeanor. If any common carrier shall directly or indirectly by special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of law than it charges, demands or collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions; or shall make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever; or shall subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or

unreasonable prejudice or disadvantage in any respect whatsoever, such person or corporation shall be upon conviction thereof fined not less than one thousand nor more than five thousand dollars for each and every offense.

Rev., s. 3749; 1899, c. 164, s. 13.

This section is to be construed with section 3417.

Railroad company is indictable for placing an embargo on its customer to discriminate against him or those dealing with him: *Garrison v. R. R.*, 150-575. A railroad in the hands of a receiver is not criminally liable for the acts of the receiver: *State v. R. R.*, 152-785.

See generally: *Lumber Co. v. R. R.*, 136-479, 141-171. Compare with decisions under a similar statute: *McGowan v. R. R.*, 95-417; *McLean v. R. R.*, 96-1.

3417. Discrimination by rebate or reduced charges, misdemeanor. Any railroad company doing business in the state, or officer or agent thereof, who shall give to any person or shipper any advantage over another person or shipper under like circumstances, by way of any rebate or reduced rate not authorized by law or by the North Carolina corporation commission, or which shall make charges for shipments of freight in violation of the law as to railroad freight rates, contained in article 5 of the chapter Corporation Commission, or shall willfully discriminate in the matter of service in favor of one person or corporation against another in like circumstances, shall be guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not less than one hundred dollars and such officer or agent shall be fined or imprisoned or both, in the discretion of the court; and any shipper or consignee of any freight in the state of North Carolina who shall knowingly accept any rebate or other consideration or service from any railroad company which is not allowed or given other shippers or consignees under like or similar circumstances, and which is not allowed by law, shall be guilty of a misdemeanor, and fined or imprisoned in the discretion of the court.

1907, c. 217, s. 2.

Railroad in hands of receiver is not criminally liable for acts of receiver: *State v. R. R.*, 152-785.

3418. Discrimination against connecting lines and violation of certain rules of the corporation commission misdemeanor. If any common carrier shall not afford all reasonable, proper and equal facilities for the interchange of traffic between its respective lines and for the forwarding and delivering of passengers and freights to and from its several lines and those connecting therewith, or shall discriminate in its rates and charges against such connecting lines, or if any connecting line shall not make as close connection as practicable for the convenience of the traveling public, or shall not obey all rules and regulations made by the corporation commission relating to trackage, it shall be punished by a fine of not less than five hundred dollars nor exceeding five thousand dollars for each and every offense.

Rev., s. 3751; 1899, c. 164, s. 21.

3419. Discrimination against the Atlantic and North Carolina railroad misdemeanor; venue. If any railroad in North Carolina shall discriminate against the freights received from the Atlantic and North Carolina railroad, or shall make rates by which, either directly or indirectly, by rebates or otherwise, freights may be delivered at less rates when received from other points than from points along the Atlantic and North Carolina railroad in proportion to distance hauled,

it shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars for each and every violation thereof. An indictment for the misdemeanor may be found and tried in the courts where the goods were either shipped or delivered, but the court in which the indictment for the offense is first found shall have exclusive jurisdiction.

Rev., s. 3750; 1889, c. 358.

ART. 2. INCORPORATION, OFFICERS, AND STOCK OF RAILROADS

3420. **Articles of association; contents; signature; filing.** Any number of persons, not less than six, at least one of whom shall be a citizen and resident of this state, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed for the like public use; and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the road is to be constructed or maintained and operated, the length of such road as near as may be, and the name of each county in this state through or into which it is made or intended to be made, the amount of the capital stock of the company, which shall not be less than five thousand dollars for every mile of road constructed or proposed to be constructed, and the number of shares of which the capital stock shall consist, and the names and places of residence of six directors of the company, at least one of whom shall be a citizen and resident of this state, upon whom legal process may be served, who shall manage its affairs for the first year, or until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in the company. On compliance with the provisions of the succeeding section, such articles of association may be filed in the office of the secretary of state, who shall indorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to railroad corporations by this chapter.

Rev., s. 2548; Code, s. 1932; 1871-2, c. 138; 1905, c. 187; 1907, c. 472, ss. 1, 2.

As to formation and powers of private corporations, see chapter Corporations.

Existence of railroad corporation cannot be attacked collaterally or questioned in action brought by it to condemn land: *R. R. v. Lumber Co.*, 114-690—but where articles of incorporation are, upon their face, void, trial court will so declare: *R. R. v. Stroud*, 132-413. Filing and recording by secretary of state of articles of association of proposed railroad company, if not such as required by law, is a nullity: *Ibid.*

Letters of incorporation are evidence, but not the only evidence, to prove fact of incorporation: *Carolina Iron Co. v. Abernathy*, 94-545; *Marshall v. Bank*, 108-639; see section 3422.

Railroad corporations can only be created by compliance with statutory provisions, but sections 3420-3422 do not apply to method of continuing their existence: *Bradley v. R. R.*, 119-927 (Appendix).

Articles of association must show compliance with provisions of statute as to amount of capital stock subscribed and paid in: *R. R. v. Stroud*, 132-413.

Persons associated shall be corporation from time of filing certificate in office of secretary of state: *Street Rwy. v. R. R.*, 142-433.

3421. Prerequisites of filing; stock subscription; affidavit of directors; payment of fees. Such articles of association shall not be filed and recorded in the office of the secretary of state until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, and five per cent paid thereon in good faith, and in cash, to the directors named in the articles of association; nor until there is indorsed thereon or annexed thereto an affidavit made by at least three of the directors named in such articles, that the amount of stock required by this section has been in good faith subscribed and five per cent paid in cash thereon as aforesaid, and that it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association, which affidavit shall be recorded with the articles of association, as aforesaid; nor until said directors shall pay the taxes and fees provided for under the chapter Corporations, Article 11, entitled Taxes and Fees.

Rev., s. 2549; Code, s. 1933; 1871-2, c. 138, s. 2; 1905, c. 168.

Filing and recording articles of association by secretary of state not in compliance with this section is a nullity: *R. R. v. Stroud*, 132-413.

3422. Copy of articles evidence of incorporation. A copy of any articles of association filed and recorded in pursuance of this article and of the record thereof, with a copy of the affidavit aforesaid indorsed thereon or annexed thereto, and certified to be a copy by the secretary of state, shall be presumptive evidence of the incorporation of such company, and of the facts therein stated.

Rev., s. 2550; Code, s. 1934; 1871-2, c. 138, s. 3.

Records themselves are also competent evidence: *Iron Co. v. Abernathy*, 94-545. **Certified copy of letter of incorporation prima facie evidence of incorporation and organization:** *Marshall v. Bank*, 108-639. **Charter of foreign corporation, how proved:** *Barcello v. Hapgood*, 118-712.

3423. Opening of subscription books. When such articles of association and affidavit are filed and recorded in the office of the secretary of state, the directors named in such articles of association may, in case the whole of the capital stock is not before subscribed, open books of subscription to fill up the capital stock of the company in such places and after giving such notice as they may deem expedient, and may continue to receive subscriptions until the whole of the capital stock is subscribed.

Rev., s. 2551; Code, s. 1935; 1871-2, c. 138, s. 4.

3424. How stock paid for; forfeiture for nonpayment. The directors may require the subscribers to the capital stock of the company to pay the amounts by them respectively subscribed in such manner and in such installments as they may deem proper. If any stockholder shall neglect to pay any installment as required by a resolution of the board of directors, the said board shall be authorized to declare his stock and all previous payments thereon forfeited for the use of the company, but they shall not declare it so forfeited until they shall have caused a notice in writing to be served on him personally, or the same to be deposited in the postoffice, properly directed to him at the postoffice nearest his usual place of residence, stating that he is required to make such payment at the time and place specified in such notice, and that if he fails to make the same, his stock and all previous payments thereon will be forfeited for the use of the

company, which notice shall be served as aforesaid at least sixty days previous to the day on which payment is required to be made.

Rev., s. 2554; Code, s. 1938; 1871-2, c. 138, s. 7.

See section 1159. **Subscription must be paid in money or money's worth:** *Hobgood v. Ehlen*, 141-352; *Foundry Co. v. Killian*, 99-506.

3425. Increase of capital stock. In case the capital stock of any railroad company is found to be insufficient for constructing and operating its road, such company may, with the concurrence of two-thirds in amount of all its stockholders, increase its capital stock from time to time to any amount required for the purposes aforesaid. Such increase must be sanctioned by a vote in person or by proxy of two-thirds in amount of all the stockholders of the company, at a meeting of such stockholders called by the directors of the company for that purpose, by a notice in writing to each stockholder, to be served on him personally or by depositing the same, properly folded and directed to him at the post-office nearest his usual place of residence, in the postoffice at least twenty days prior to such meeting. Such notice must state the time and place of the meeting and its object and the amount to which it is proposed to increase the capital stock. The proceedings of such meeting must be entered on the minutes of the proceedings of the company, and thereupon the capital stock of the company may be increased to the amount sanctioned by a vote of two-thirds in amount of all the stockholders of the company aforesaid.

Rev., s. 2555; Code, s. 1939; 1871-2, c. 138, s. 9.

3426. Liability for unpaid stock to laborers; notice to stockholder. Each stockholder of any such company shall be individually liable to the creditors of such company to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company until the whole amount of the capital stock so held by him shall have been paid to the company, and all the stockholders of any such company shall be jointly and severally liable for the debts due or owing to any of its laborers and servants, other than contractors, for personal services for thirty days service performed for such company, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such execution shall be the amount recoverable with costs against such stockholder. Before such laborer or servant shall charge such stockholders for such thirty days service he shall give them notice in writing within twenty days after the performance of such service that he intends to hold them liable, and shall commence such action therefor within thirty days after the return of such execution unsatisfied as above mentioned; and every such stockholder, against whom any such recovery by such laborer or servant shall have been had, shall have a right to recover the same of the other stockholders in such corporation in ratable proportion to the amount of the stock they shall respectively hold with himself.

Rev., s. 2556; Code, s. 1940; 1871-2, c. 138, s. 10.

3427. Liability of trustees and other fiduciaries holding stock. No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company. The estates in the hands of such executor, administrator, guardian or trustee shall be liable in like man-

ner and to the same extent as the testator or intestate or the ward or person interested in such trust fund would have been if he had been living and competent to act and hold the same stock in his own name, and a person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly.

Rev., s. 2557; Code, s. 1941; 1871-2, c. 138, s. 11.

3428. Directors and presidents. There shall be a board of six directors, one of whom shall be elected president, of every corporation formed under this article, to manage its affairs. The directors shall be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue in office until others are elected in their places. In the election of directors each stockholder shall be entitled to one vote personally or by proxy on every share held by him thirty days previous to any such election, and vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. The inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association. No person shall be a director or president unless he shall be a stockholder owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen; and at every election of directors the books and papers of such company shall be exhibited to the meeting, if a majority of the stockholders present shall require it.

Rev., s. 2552; Code, s. 1936; 1871-2, c. 138, s. 5.

For annotations as to powers and duties of directors of corporations generally, see section 1144.

For organization upon sale of road, see section 3462.

3429. Appointment of officers and agents. The president and directors shall appoint a treasurer and secretary and such other officers and agents as shall be prescribed by the by-laws.

Rev., s. 2553; Code, s. 1937; 1871-2, c. 138, s. 6.

3430. Officials to account to successors. The president and directors of the several railroads, and all persons acting under them, are hereby required upon demand to account with the president and directors elected or appointed to succeed them, and shall transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company.

Rev., s. 2648; Code, s. 2001; 1870-1, c. 72, ss. 1, 3.

ART. 3. COUNTY SUBSCRIPTIONS IN AID OF RAILROADS

3431. Counties may subscribe stock. The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company when necessary to aid in the construction of any railroad in which the citizens of the county may have an interest.

Rev., s. 2558; Code, s. 1996; 1868-9, c. 171, s. 1.

For issuance of bonds by cities and towns, see chapter **Municipal Corporations**.

For election on issuance of bonds, see sections 3432, 3433.

For collection of taxes with which to pay bonds, see section 3435.

Act of general assembly authorizing county to take stock in railroad, and to determine question by popular vote, and tax themselves to pay for it, is constitutional: *Hill v. Comrs.*, 67-367; *Alexander v. Comrs.*, 67-332; *Caldwell v. Justices*, 57-323.

Adoption of new constitution, with restrictions as to issue of municipal bonds, annulled all special powers remaining unexecuted and not granted in strict conformity with its requirements: *Comrs. v. Payne*, 123-432; *Comrs. v. Call*, 123-308.

An act of the general assembly authorizing levy of requisite taxes to pay municipal bonds and in force when bonds are issued, enters into and becomes part of contract under which bonds are delivered and taken, and cannot be annulled by subsequent legislation: *McCless v. Meekins*, 117-34.

Stock owned by county not subject to execution to satisfy debt of an individual: *Hughes v. Comrs.*, 107-598.

Competent for legislature, by a retrospective statute, to validate an irregular or defective execution of a power by the authorities of a municipal corporation acting under a former statute, where no contract is impaired and the rights of third persons are not injuriously affected: *Belo v. Comrs.*, 76-489.

Words "majority of the members elect" or "majority of the qualified voters" are used in constitutions and laws to take the exercise of a particular power out of general rule, and make assent of majority of whole number necessary: *Cotton Mills v. Comrs.*, 108-678.

The people, and not the legislature, have power to contract a debt to aid in the construction of a railroad: *Galloway v. Jenkins*, 63-147; *University R. R. Co. v. Holden*, 63-410.

Taxpayer, for sufficient cause, can intervene, in apt time, and enjoin the issuing of municipal bonds, but this must be done before bonds are issued and negotiated and pass into circulation as commercial securities: *Belo v. Comrs.*, 76-489.

An act "authorizing and empowering" county commissioners to issue bonds is mandatory: *Jones v. Comrs.*, 137-579, overruling *Jones v. Comrs.*, 135-218; *Bank v. Comrs.*, 135-230.

When authority to issue municipal bonds upon the performance of certain conditions precedent is conferred by statute upon a particular tribunal, such tribunal has the sole power to determine if the conditions have been performed: *Belo v. Comrs.*, 76-489.

VALIDITY OF BONDS. For constitutional provisions, see state constitution, article 2, section 14; article 7, section 7.

Legislation authorizing creation of county indebtedness must conform to constitutional requirement: *Graves v. Comrs.*, 135-49; *Comrs. v. Call*, 123-308; *Rodman v. Washington*, 122-39; *Charlotte v. Shepard*, 120-411, 122-602; *Comrs. v. Snuggs*, 121-394; *Bank v. Comrs.*, 119-214.

If amendment in a material matter is made to bill, amended bill should be read over again three times in each house, with yea and nay vote on second and third readings entered on journals: *Cottrell v. Lenoir*, 173-138; *Glenn v. Wray*, 126-730. Every act of general assembly levying a tax shall state special object to which it is to be applied: *McCless v. Meekins*, 117-34.

Journals of general assembly may be introduced in evidence to show whether or not constitutional requirements have been met, and these are conclusive as against printed statute and enrolled act: *Comrs. v. Snuggs*, 121-394 (following *Bank v. Comrs.*, 119-214, and distinguishing *Carr v. Coke*, 116-223).

Where recitals in railroad bonds are that they were issued under a particular act of the legislature, burden of validating them is on party alleging their validity: *Graves v. Comrs.*, 135-49.

It is essential to validity of bonds issued in aid of railroads, or other similar enterprises, by counties, townships and other municipal organizations, that proposition shall have first had assent of majority of qualified voters in territory affected, to be duly ascertained by election regularly held for that purpose: *R. R. v. Comrs.*, 109-159; *Claybrook v. Comrs.*, 114-453; see annotations under section 3432.

Records showing that proposition to issue bonds was submitted after thirty days notice, and that a majority of qualified registered electors voted in the affirmative, are conclusive evidence that will of majority was so expressed: *Bank v. Comrs.*, 116-339.

It is not valid defense that county issued its own bonds to pay subscription to railroad stock instead of negotiating a loan, as empowered to do by the act: *Street v. Comrs.*, 70-644.

A general act authorizing counties to issue bonds for railroad purposes would be invalid, especially when it is necessary to exceed constitutional limitation to pay interest or principal: *Comrs. v. Payne*, 123-432. If bonds issued were invalid, new bonds in renewal are equally invalid: *Ibid.*

County has no power to issue bonds and levy a tax for their payment in aid of a railroad not begun before adoption of constitution of 1868: *Comrs. v. Snuggs*, 121-394—they being limited to “aid in the completion of any railroad,” etc., *Ibid.*; *Comrs. v. Call*, 123-308; but see *Comrs. v. Coler*, 190 U. S., 437 (note the present section refers to “construction” in place of “completion”).

Although contracts made, based upon subscription, validity of election can be contested: *Goforth v. Construction Co.*, 96-535.

Where legislature authorized issue of bonds in aid of railroad, and provided for payment by taxation, but did not provide for election, and election was held in conformity to existing election laws relating to borrowing of money by municipalities, bonds issued pursuant to such election are valid in hands of bona fide owner: *Bank v. Comrs.*, 116-339.

As to whether funding bonds can be issued without a vote of the people, see *Asheville v. Webb*, 134-72; *McCless v. Meekins*, 117-34.

For discussion of validity of county railroad bonds, see *Wilkes v. Coler*, 190 U. S., 107; *Stanly Comrs. v. Coler*, 190 U. S., 437.

PURCHASER OF BONDS. It is incumbent upon purchasers of state, county and municipal bonds to ascertain whether authority to issue them has been granted according to requirements of constitution: *Comrs. v. Snuggs*, 121-394; *Bank v. Comrs.*, 116-339, and cases therein cited. If the bonds refer to statute under which they are issued, purchaser is bound to take notice of statute and all its requirements: *Claybrook v. Comrs.*, 114-453; *Comrs. v. Call*, 123-308—and where there is an inherent constitutional defect in statute authorizing issue of bonds or in proceedings under which they are issued, a purchaser takes with notice, and cannot be an innocent holder: *Claybrook v. Comrs.*, 114-453. Purchaser may rely upon certificate of registrar and the finding of commissioners as to the result of the popular vote: *Ibid.*

TOWNSHIP BONDS. County commissioners are not authorized to issue bonds on credit of a township for construction of a railroad: *Graves v. Comrs.*, 135-49.

General assembly may empower a township, with sanction of its qualified voters, to aid in construction of railroad by levying taxes and contracting debt to raise money for that purpose: *Brown v. Comrs.*, 100-92.

Act of assembly directing that county taxes, which might be levied upon property and franchise of railroad company in certain township, should be applied, as far as necessary, to payment of interest on bonds issued by such township in aid of railroad, is constitutional: *Brown v. Comrs.*, 100-92—as is also act requiring county commissioners to set apart the taxes derived from such railroad property to be used in building roads, bridges, etc., in such township (bonds being paid off) until township is repaid amount it has expended, *Jones v. Comrs.*, 143-59.

Action to declare void an election held to allow certain townships to subscribe stock to a railroad company, on account of irregularities, could be brought, being equitable in its nature, even though no remedy was given by statute; and while no statute of limitation is applicable, still such action should be brought within reasonable time, and before rights of innocent third parties have intervened: *Jones v. Comrs.*, 107-248.

Where township has voted bonds in aid of a railroad to be constructed on a designated line, and subsequently legislature enacts that company “may” change its route, and that, upon petition by taxpayers of township, an election shall be held on question whether or not bonds previously issued shall be used in aid of the construction of new route, county commissioners will be enjoined from ordering such election where it appears that company has contracted for construction of road upon original route and is pushing work to completion: *R. R. v. Comrs.*, 108-56.

Where upon vote taken the township issued bonds in support of railroad, but bonds were to be held by county commissioners and to be canceled if road was not completed and in operation within three years, the county commissioners had no authority to deliver the bonds nor to extend the time: *McCracken v. R. R.*, 168-62.

ESTOPPEL. Payment of interest from year to year on bonds is not an estoppel, and does not validate them: *Comrs. v. Payne*, 123-432; *Glenn v. Wray*, 126-730.

That the county, township or other municipal organization, in which a void election was held, appointed an agent, who made a subscription of stock on behalf of his principal, that organization acted and was recognized as a stockholder in corporation in aid of which bonds were to be issued, and that latter made contracts with third parties, relying upon validity of transaction, will not operate as an estoppel, such acts being *ultra vires*: *R. R. v. Comrs.*, 109-159.

A town is estopped by the compromise of a valid liability for a smaller sum; but not when the original obligation was not authorized in the manner provided by the constitution: *Bank v. Comrs.*, 116-339; s. c., 119-214.

Fact that action to impeach validity of bonds on ground of irregularity in election was brought and failed is no estoppel to a second action to impeach their validity on ground that act authorizing election was not properly passed: *Glenn v. Wray*, 126-730.

In action by bona fide purchaser for value against county, upon a bond issued by former county court, under an act of legislature, records of such court are conclusive upon county and constitute an estoppel in pais: *Belo v. Comrs.*, 76-489.

County bond stating on its face the act under which it is issued is notice to holder, and estops him from controverting statement: *Comrs. v. Call*, 123-308.

3432. Election on question of county aid. The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition, this shall be entered of record, which record shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. If a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company: Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper.

Rev., s. 2559; Code, s. 1997; 1868-9, c. 171, s. 2.

The fact that petitioners styled themselves "voters and taxpayers," while special act required a petition by "resident taxpayers," was immaterial: *Claybrook v. Comrs.*, 114-453.

Where legislature provides no election machinery for town bond election under special act, general laws relating to such elections are applicable: *Bank v. Comrs.*, 116-339.

Where question of subscription to two different railway corporations is to be submitted to a vote, it is improper and irregular to submit them as a single proposition at same election and on same ballot: *Goforth v. Construction Co.*, 96-535.

For discussion of proper method of conducting election and declaring result under laws of 1887, ch. 87, to incorporate Roanoke and Southern Rwy., see *Claybrook v. Comrs.*, 114-453, 117-456—of conducting election under laws of 1887, ch. 89, see *R. R. v. Comrs.*, 116-563.

Where law declared that those in favor should vote "Subscription" and those opposed "No subscription," it is immaterial that electors voted "For subscription" and "Against subscription": *Claybrook v. Comrs.*, 114-453. Fact that county commissioners canvassed returns of election second day thereafter instead of third, as provided by statute, is immaterial: *Ibid.* Election is not vitiated by fact that, through mistake, another date for it was copied in minutes of county commissioners: *Ibid.*

Where returns of such election ascertained only that "a majority of votes cast was in favor of subscription," and declaration to that effect was made by county commissioners, constitutional requirement had not been observed: *R. R. v. Comrs.*, 109-159; *Glenn v. Wray*, 126-734, and cases cited.

Statement by county commissioners that "after due canvass, the foregoing returns of election are correct, and said board hereby approve said returns," is not a declaration that a majority of qualified voters favored the subscription: *Claybrook v. Comrs.*, 114-453.

Where power is conferred to open, conduct and declare result of an election, action of those charged therewith in that respect is final and conclusive until it is reversed by some proper action brought to impeach it, and courts will not interfere by injunction to prevent them from ascertaining and promulgating result: *Bynum v. Comrs.*, 101-412; see *Norment v. Charlotte*, 85-387; *Simpson v. Comrs.*, 84-158.

WHO ARE "QUALIFIED VOTERS" HEREUNDER. Registration list is prima facie evidence of who are qualified voters: *Clark v. Statesville*, 139-490. A qualified voter is one who is entitled to register as a voter, and who is also qualified to vote after such registration: *R. R. v. Caldwell*, 72-492, 493—a registered voter being one who has lawfully registered and paid his poll tax, *Pace v. Raleigh*, 140-65. Voter must register anew, when so required, in order to be a qualified voter: *Clark v. Statesville*, 139-490. Other cases on the subject: *Harris v. Scarborough*, 110-232; *Smith v. Wilmington*, 98-343; *Wood v. Oxford*, 97-233; *McDowell v. Construction Co.*, 96-514; *Markham v. Manning*, 96-132; *Duke v. Brown*, 96-127; *Southerland v. Goldsboro*, 96-49.

3433. Conduct of election. All elections ordered under the preceding section shall be held by the sheriff under the laws and regulations provided for the election of members of the general assembly. The votes shall be compared by the boards of county commissioners, who shall make a record of the same.

Rev., s. 2560; Code, s. 1998; 1868-9, c. 171, s. 3.

3434. Interest on bonds. In case the county shall subscribe the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of six per cent, when the principal on said bonds shall be payable and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of paying the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on such bonds.

Rev., s. 2561; Code, s. 1999; 1868-9, c. 171, s. 4.

Action to enjoin payment of interest on county bonds by treasurer, complaint defective: *Comrs. v. Williams*, 135-660. **Payment of interest from year to year on bonds is not an estoppel and does not validate them:** *Comrs. v. Payne*, 123-432; *Glenn v. Wray*, 126-730.

Cases referring to, but not construing, section: *Comrs. v. Call*, 123-308; *Comrs. v. Snuggs*, 121-395. See, also, annotations under section 3431.

3435. Collection and disposition of taxes authorized. The taxes authorized by this article to be raised for the payment of interest or principal shall be collected by the sheriff in like manner as other state taxes, and be paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners as directed by this article.

Rev., s. 2562; Code, s. 2000; 1868-9, c. 171, s. 5.

Taxpayer, for himself and other taxpayers, can enjoin collection of an unconstitutional tax: *Galloway v. Jenkins*, 63-147; *London v. Wilmington*, 78-109; *Graves v. Comrs.*, 135-49. **And an innocent holder of the invalid bonds cannot enforce reimbursement:** *Graves v. Comrs.*, 135-49.

A county, when it contracts a debt, pledges its faith, or loans its credit, must levy taxes necessary to raise revenue for such purposes upon all property in the same, except such property as is exempted from taxation: *Jones v. Comrs.*, 107-248—but the equation and limitation of taxation established by constitution applies only to taxes levied for ordinary purposes of state and counties, and as to levies of taxes for such purposes, it must be observed, *Ibid.*

Where neither declaration of result of election by commissioners nor recitals in bonds show that a majority of voters of town voted in favor of subscription, purchasers of bonds, though bona fide and for value, will not be protected in a suit by taxpayers to restrain collection of taxes to pay same, unless jury shall find that question is affirmative: *Claybrook v. Comrs.*, 114-453.

Validity of a special railroad tax cannot be questioned, in action on sheriff's bond for failure to account for it, especially when it has been collected. If statute authorizing tax were unconstitutional, or otherwise invalid, sheriff could not be permitted to retain money illegally collected under color of his office: *McGuire v. Williams*, 123-349.

Cases referring to, but not construing, section: *Comrs. v. Snuggs*, 121-395; *Comrs. v. Payne*, 123-432; *Comrs. v. Call*, 123-308.

ART. 4. TOWNSHIP SUBSCRIPTIONS IN AID OF RAILROADS

3436. **Townships may subscribe stock.** The board of commissioners of the several counties of the state shall have power to subscribe stock for the use and benefit of any township in their several counties, when necessary to aid in the construction of any railroad, which is now or may be hereafter incorporated under the laws of this state, in which the citizens of such county may have an interest.

1917, c. 64, s. 1.

This statute confers the power which did not exist in *Graves v. Comrs.*, 135-49. The county commissioners are agents for the townships: *McCracken v. R. R.*, 168-62.

3437. **Election on question of township aid.** The board of commissioners of any county proposing to take stock, for the use and benefit of any township, as mentioned in the preceding section, shall meet and agree upon the amount to be subscribed for such township, and if a majority of the board shall vote for the proposition, this shall be entered of record, which record shall show the amount proposed to be subscribed, and for what township, to what company, and whether in bonds, money or other property; and thereupon the board shall order an election, to be held upon a notice of not less than thirty days, in each and every township for whose use and benefit such subscription is proposed to be made, for the purpose of voting for or against the proposition to subscribe the amount agreed on by the board of commissioners. If a majority of the qualified voters of the township for whose use and benefit such subscription is proposed to be made shall vote in favor of the proposition, the board of county commissioners through their chairman shall have power to subscribe the amount of stock proposed by them, and submitted to the voters, for the use and benefit of such township, subject to all the rules, regulations, and restrictions of other stockholders in such railroad company: Provided, that the township, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as it may think proper.

1917, c. 64, s. 2.

3438. **Conduct of election; canvass of votes.** All elections ordered under the preceding section shall be held by the sheriff of the county in which such township is located, under such laws and regulations as are now or may hereafter be provided for the election of members of the general assembly. The votes of each township for whose use and benefit subscription under this article is proposed to be made shall be compared and the results of such election determined by the board of commissioners of the county in which such township is located, who shall make a record of the same.

1917, c. 64, s. 3.

3439. **Bond issue; special tax.** In case the township shall authorize, at the election herein provided for, a subscription of the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of six per cent, when the principal of such bonds shall be payable, and at what place, and shall also fix the time and place for paying interest, and shall also determine the mode and manner of paying the same. The board of commissioners shall, in order to provide for the payment of the bonds and interest

thereon authorized to be issued by this article, compute and levy each year at the time of levying the county and state taxes a sufficient tax upon the property in any township authorizing the issuing of bonds under this article to pay the interest on the bonds issued on account of and for the use and benefit of such township, and shall also levy a sufficient tax to create a sinking fund to provide for the payment of such bonds at maturity. Such taxes shall be levied and collected annually and under the same laws and regulations as shall be in force for levying and collecting other county taxes.

1917, c. 64, s. 4.

3440. Levy, collection, and disposition of tax. The tax authorized by this article to be raised for the payment of interest and principal shall be levied by the board of commissioners of the county in which such township is located, at such times as is now or hereafter may be fixed for levying state and other county taxes, against the taxable property located in such township, in addition to the regular state and county taxes assessable against such property. The tax shall be collected by the sheriff or tax collector or other collecting officer of the county in which such township is located in like manner as state taxes are collected, and shall be paid into the hands of the county treasurer, to be used by the chairman of the board of commissioners as directed by this article.

1917, c. 64, s. 5.

3441. Tax to be kept separate. The taxes levied and collected under the provisions of this article shall be kept separate and apart from all other state and county taxes levied and collected in the county in which such township shall be located.

1917, c. 64, s. 6.

Tax levied and collected for a special purpose is to be applied only to such purpose: McCless v. Meekins, 117-34.

3442. Townships may subscribe to purchase of railroad corporations. The board of commissioners of the several counties of the state shall have power to make subscriptions, for the use and benefit of any township in their several counties, for the purpose of purchasing or aiding in the purchase of any railroad corporation now or hereafter incorporated under the laws of this state which shall be dissolved or whose property and franchises are proposed to be sold privately or under execution, judicial decree, deed in trust, mortgage, or other conveyance, and all the provisions of this article shall apply as fully and as well to such subscriptions as they do to subscriptions to stock to aid in the construction of railroads.

1917, c. 64, s. 1; 1919, c. 130, s. 1.

3443. Election on question of purchase; proxies to represent stock. The county commissioners shall, upon the petition of one-fourth of the qualified voters of any township mentioned in the preceding section, order an election and submit the question of such subscription according to the terms of the petition. At such election five persons shall be chosen as proxies to represent such stock, if the vote shall be in favor of the subscription, in all respects as fully as if private promoters, corporators or holders of such stock. They shall be eligible to the position of director or other office in the corporation. They shall hold

office until the first Monday in December following the next general election and until their successors chosen at such general election shall qualify. Such proxies shall be chosen at the general election every two years as township officers are. They shall have authority, alone, if sole purchasers, and with the proxies from other townships and others participating in the purchase, if not acting alone, to purchase such railroad property and franchise, and shall constitute a new corporation upon compliance with law as in other cases of a dissolution and sale of railroad property and franchise.

1917, c. 64, s. 2; 1919, c. 130, s. 2.

ART. 5. POWERS AND LIABILITIES

3444. Powers of railroad corporations enumerated. Every railroad corporation shall have power:

1. *To survey and enter on land.* To cause such examination and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.

As between two companies, the first location belongs to the first one which defines and marks its route and adopts same for its permanent location by authoritative corporate action: *Street Rwy. v. R. R.*, 142-430, and cases cited.

For right of entry upon land, see section 1707.

2. *To condemn land under eminent domain.* To appropriate land and rights therein by condemnation, as provided in the chapter Eminent Domain.

See section 1706 et seq.

3. *To take property by grant.* To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.

Railroads can acquire real estate only by statutory authority, and they are not authorized to acquire land by entry and grant: *Wallace v. Moore*, 178-114.

4. *To purchase and hold property.* To purchase and hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad and the stations and other accommodations necessary to accomplish the object of its incorporation.

Cannot acquire land by entry and grant: *Wallace v. Moore*, 178-114.

5. *To grade and construct road.* To lay out its road, not exceeding one hundred feet in width, and to construct the same; to take, for the purpose of cuttings and embankments, as much more land as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in the chapter Eminent Domain.

Railroad company can change grade of its roadbed or can remove it to any point on its right of way: *Brinkley v. R. R.*, 135-654—and may extend its use of the right of way as the necessities of the company require it, *Tighe v. R. R.*, 176-239; *R. R. v. Bunting*, 168-579; *Hendrix v. R. R.*, 162-9; *R. R. v. Olive*, 142-257.

6. *To intersect with highways and waterways.* To construct its road across, along or upon any stream of water, water-course, street, highway, plankroad, turnpike, railroad or canal which the route of its road shall intersect or touch; but the company shall restore the stream or water-course, street, highway, plankroad or turnpike road, thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this chapter contained shall be construed to authorize the erection of any bridge or any other obstruction across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstructions may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any streets in any city without the assent of the corporation of such city.

For duty of railroad to construct bridges and maintain same which it has necessitated building, see section 3797—to construct and maintain draws in bridges, see section 3800—to provide new highways when old one interfered with, see sections 3448, 3449—to provide cattle-guards, see section 3454.

Penalty for failure to maintain crossing, see section 3454—to keep up certain bridges, see section 3797.

Municipal authorities may grant the right to a railroad to use the streets for legitimate railroad purposes: *Griffin v. R. R.*, 150-312.

One railroad may acquire right of way over another railroad: *R. R. v. R. R.*, 161-531; s. c., 165-425.

Railroad must make crossing as safe and convenient as if railroad had not been built: *Raper v. R. R.*, 126-563—may make change in county road that does not necessarily impair its usefulness, *Brinkley v. R. R.*, 135-654.

“Highways” might include any road used by the public as a mill or church road and in going to town: *Goforth v. R. R.*, 144-570; *Herndon v. R. R.*, 161-650; *Tate v. R. R.*, 168-523.

If railroad crossing over neighborhood road is kept in dangerous condition, causing mule to fall and injure plaintiff, he is entitled to recover: *Goforth v. R. R.*, 144-570.

7. *To intersect with other railroads.* To cross, intersect, join and unite its railroad with any other railroad before constructed, at any point on its route, and upon the grounds of such other company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the object of its connections. Every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid, and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court as is provided in the chapter Eminent Domain.

Where railroad empowered to connect with another railroad at a certain city, the word “at” does not necessarily mean “in” the city: *Purifoy v. R. R.*, 108-100.

One road cannot enter on right of way of another for purpose of connecting therewith without previous agreement or condemnation proceedings: *R. R. v. R. R.*, 104-658; *R. R. v. R. R.*, 161-531; s. c., 165-425. Parol agreement to allow one railroad company to extend its track on right of way of another, for purpose of connecting therewith, is a mere license, revocable at will of licensor, and will not operate as an estoppel although licensee has entered and made valuable improvements: *R. R. v. R. R.*, 104-658.

8. *To transport persons and property.* To take and convey persons and property on its railroad by the power or force of steam, electricity or animals, or by any mechanical power, and to receive compensation therefor.

Charter of company conferring right to transport passengers and freight, and giving power to “farm out” right of transportation, authorizes company to execute valid lease of its property and franchises to another railroad company: *Hill v. R. R.*, 143-539.

9. *To erect stations and other buildings.* To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of its passengers, freight and business.

10. *To borrow money, issue bonds and execute mortgages.* From time to time to borrow such sums of money as may be necessary for completing and finishing or operating its railroad, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchises and to secure the payment of any debt contracted by the company for the purposes aforesaid, and the directors of the company may confer on any holder of any bond issued for money borrowed, as aforesaid, the right to convert the principal due or owing thereon into stock of such company at any time under such regulations as the directors may see fit to adopt.

Railroad corporation has power to contract debts, and every corporation possessing such power must also have power to acknowledge its indebtedness under its corporate seal, that is, to make and issue its bonds: Comrs. v. R. R., 77-289. As to interest, usury, see *Ibid.*; also, chapter Interest.

11. *To lease rails.* To lease iron rails to any person or corporation for such time and upon such terms as may be agreed on by the contracting parties, and upon the termination of the lease by expiration, forfeiture or surrender, to take possession of and remove the rails so leased as if they had never been laid.

12. *To establish hotels and eating houses.* To purchase, lease, hold, operate or maintain eating-houses, hotels and restaurants for the accommodation of the traveling public along the line of its road.

Rev., ss. 2567, 2575; Code, s. 1957; 1887, c. 341; 1889, c. 518; 1871-2, c. 138, s. 29.

3445. **Power to aid in construction of connecting and branch lines.** Any railroad or other transportation company shall have the right to aid in the construction of any railroad or branch railroad in this or an adjoining state connected with it directly or indirectly, if the construction of such railroad or branch railroad is authorized by law.

Rev., s. 2567, subsec. 12; 1885, c. 108, s. 1.

3446. **Power to seize fuel.** If any railroad or other transportation company finds it necessary, in order to prevent delays in the transportation of freight or passengers, to take possession of coal, wood, or other fuel not its own property and convert it to its own use without an agreement with the owner thereof, it shall notify such owner within three days of such taking that his property has been appropriated, giving the date thereof, and shall, within a period of thirty days, pay for such coal, wood or other fuel at the invoice price at place of shipment, plus twenty-five per cent. Should the transportation company fail to notify the consignee or owner within such three days or pay for the coal, wood or other fuel at the invoice price at place of shipment, plus twenty-five per cent as above provided, within thirty days after converting the same to its own use, it shall in addition forfeit to the party aggrieved the sum of twenty-five dollars for the first day of failure to notify such consignee of the appropriation of the fuel, or its failure to pay for the same, and five dollars for each day thereafter in which it shall fail to notify such consignee or pay for the same.

Rev., s. 2617; 1903, c. 590, s. 4; 1907, c. 467.

3447. **Agreements for through freight and travel.** The directors representing the stock held in the various railroad corporations are hereby authorized and empowered to enter into such agreements and terms with each other as to secure through freight and travel without the expense of transfer of freight, or breaking the bulk thereof, at different points along the lines, and for this purpose may use the road or roads and the rolling stock of such corporations or companies on such terms as may be agreed upon by them.

Rev., s. 2640; Code, s. 1995; 1866-7, c. 105.

3448. **Intersection with highways.** Whenever the track of a railroad shall cross a highway, turnpike or plankroad, such highway, turnpike or plankroad may be carried under or over the track, as may be found most expedient; and in cases where an embankment or cutting shall make a change in the line of such highway, turnpike or plankroad desirable, then such corporation may take such additional lands for the construction of the road, highway, turnpike or plankroad on such new line as may be deemed requisite by the directors. Unless the land so taken shall be purchased for the purposes aforesaid, compensation therefor shall be ascertained in the manner prescribed in the chapter Eminent Domain, and duly made by such corporation to the owners and persons interested in such land. The same when so taken shall become a part of such intersecting highway, turnpike or plankroad in such manner and by such tenure as the adjacent parts of the same highway, turnpike or plankroad may be held for highway purposes.

Rev., s. 2568; Code, s. 1954; 1871-2, c. 138, s. 26.

For liability of railroad, etc., to keep up bridges and crossings, see sections 3797, 3800.

“Highways” might include any road used by the public as a mill and church road and in going to town: *Goforth v. R. R.*, 144-570; *Herndon v. R. R.*, 161-650; *Tate v. R. R.*, 168-523.

By negligent construction is meant such an improper construction of crossing, whether arising from negligence, indifference or motives of economy, as unnecessarily increases danger of using public highway: *Edwards v. R. R.*, 129-79; *Raper v. R. R.*, 126-563. Railroad company may make a change in a county road that does not necessarily impair its usefulness: *Brinkley v. R. R.*, 135-654.

Crossing which the public have been habitually permitted to use is treated as a public highway crossing, and it is competent to prove the custom of defendant and the public in using it: *Bradley v. R. R.*, 126-735.

One is warranted in assuming that railroad company has discharged its duty to the public by keeping crossing in safe condition: *Tankard v. R. R.*, 117-560; *Denmark v. R. R.*, 107-185; *McAdoo v. R. R.*, 105-140; *Scott v. R. R.*, 96-428.

If railroad crossing over neighborhood road is kept in dangerous condition, causing mule to fall and injure plaintiff, he is entitled to recover: *Goforth v. R. R.*, 144-570.

3449. **Obstructing highways; defective crossings; failure to repair after notice misdemeanor.** Whenever, in their construction, the works of any railroad corporation shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same. If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing body of the county, city, town, township or road district having charge, control or oversight of such roads, streets or thoroughfares may give to such railroad notice, in writing, directing it to place any such crossing in good

condition, so that persons may cross and property be safely transported across the same. If the railroad corporation shall fail to put such crossing in a safe condition for the passage of persons and property within thirty days from and after the service of the notice, it shall be guilty of a misdemeanor and shall be punished in the discretion of the court. Each calendar month which shall elapse after the giving of the notice and before the placing of such crossing in repair shall be a separate offense. This section shall in no wise be construed to abrogate, repeal or otherwise affect any existing law now applicable to railroad corporations with respect to highway and street crossings; but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law.

Rev., s. 2569; Code, s. 1710; R. C., c. 61, s. 30; 1874-5, c. 83; 1915, c. 250, ss. 1, 2.

“Established roads or ways” means “recognized and customarily used roads and ways, less than highways”: *Tate v. R. R.*, 168-523; *Goforth v. R. R.*, 144-569. Road crossing kept negligently, plaintiff injured, entitled to recover: *Ibid.*

Cases referring to, but not construing, section: *State v. Lumber Co.*, 109-860; *Bass v. Navigation Co.*, 111-455; *Tighe v. R. R.*, 176-239.

3450. Service of notice of defective crossings. The notice required by the preceding section may be served upon the agent of the offending railroad located nearest to the defective or dangerous crossing about which the notice is given, or it may be served upon the section master whose section includes such crossing. Such notice may be served by delivering a copy to such agent or section master, or by letter properly stamped, registered and addressed to either of such persons.

1915, c. 250, s. 1.

3451. Change in location of highways. In order to prevent the frequent crossing of such road or ways, or in cases where it may be necessary to occupy the same, the corporation may change the roads and ways so as to avoid such crossing and occupation, and to such points as may be deemed expedient.

Rev., s. 2570; Code, s. 1711; R. C., c. 61, s. 31; 1874-5, c. 83.

Railroad company may make change in a county road that does not necessarily impair its usefulness: *Brinkley v. R. R.*, 135-654.

3452. Damages due to change in location. For any injury done to the lands of persons by taking them under the preceding section, the value thereof shall be assessed in like manner as is provided for assessing damages to real estate for taking lands under the chapter Eminent Domain.

Rev., s. 2571; Code, s. 1712; R. C., c. 61, s. 32; 1874-5, c. 83.

3453. Old road not to be impeded until new road is made. Before any part of an established road or way shall be impeded by any railroad corporation, the new road or way shall be prepared and made equally good with the portion proposed to be discontinued; and then the same shall be deemed a part of the original road or way, and shall be kept up and repaired as before the change.

Rev., s. 2572; Code, s. 1713; R. C., c. 61, s. 33; 1874-5, c. 83.

3454. Cattle-guards and private crossings; failure to erect and maintain misdemeanor. Every incorporated company owning, operating or constructing, or which shall hereafter own, operate or construct, or any company which shall hereafter be incorporated and shall own, operate or construct any railroad

passing through and over the land of any person now enclosed, or which may hereafter become enclosed, shall, at its own expense, construct and constantly maintain, in good and safe condition, good and sufficient cattle-guards at the points of entrance upon and exit from such enclosed land, and shall also make and keep in constant repair crossings to any plantation road thereupon. Every railroad corporation which shall fail to erect and constantly maintain the cattle-guards and crossings provided for by this section shall be liable to an action for damages to any party aggrieved, and shall be guilty of a misdemeanor and fined in the discretion of the court.

So far as this section relates to cattle-guards, the corporation commission is hereby authorized, directed and empowered to adopt such good and sufficient make of cattle-guard now upon the market as is best suited for turning stock. When such guard is selected, approved and authorized by the commission any company operating in this state which shall procure, install and maintain and keep in good and safe condition on its line of road such guard so selected by the commission shall be deemed and held in all suits, actions or proceedings in all the courts of this state to have complied with the conditions of this section in installing a good and sufficient cattle-guard: Provided, that any railroad company operating in this state may make application to the commission to adopt for its road any particular brand or make of cattle-guard, and if the commission shall approve and authorize the use of such guard, it shall, if kept and maintained in good and sufficient condition at all times by such railroad company, be deemed and held in all actions, suits or proceedings in any court of this state a good and sufficient cattle-guard.

Rev., ss. 2601, 3753; Code, s. 1975; 1883, c. 394, ss. 1, 2, 3; 1915, c. 127.

When a railroad obtains a deed to right of way with parol agreement to construct cattle-guards, the statute of frauds will not be a defense: *Herndon v. R. R.*, 161-650.

See annotations under section 3448. Railroad companies must maintain a safe and convenient crossing at roads and streets, making it, as far as they can, as safe and convenient to the public as it would have been had railroad not been built: *Raper v. R. R.*, 126-563. See *State v. Lumber Co.*, 109-860. Section cited in *Allen v. R. R.*, 102-389; *Hodges v. R. R.*, 105-172; *Allen v. R. R.*, 106-526; *Hinkle v. R. R.*, 109-481; *Carter v. R. R.*, 126-443; *Tate v. R. R.*, 168-523.

3455. Change of route of railroad. The directors of any railroad corporation may by a vote of two-thirds of their whole number at any time alter or change the route, or any part of the route, of their road, if it shall appear to them that the line can be improved thereby, and they shall have the same right and power to acquire title to any lands required for the purposes of the company in such altered or changed route, as if the road had been located there in the first instance; but no such alteration shall be made in any city or town after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the corporate authorities of such city or town. In case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. When any route or line is abandoned in the exercise of the power herein granted, full compensation shall be made by the company for all money, labor, bonds or material contributed to the construction of the road-bed or its superstructure by those so interested by their contributions in the abandoned route or line. All the provisions of this chapter relative

to the first location and to acquiring title to land shall apply to every such new or altered portion of the route.

Rev., s. 2573; Code, s. 1953; 1871-2, c. 138, s. 25; 1889, c. 391; 1893, c. 396, s. 3.

Variations in route do not affect identity of the corporate body, and right to exemption from taxation is retained: *R. R. v. Comrs.*, 88-519.

Vote of two-thirds of corporate authorities is not required when change of route ordered by corporation commission: *Dewey v. R. R.*, 142-392. Right to change route of railroad need not be given in charter; it may be given by special enactment or by the general railroad law: *Ibid.*

A railroad company has a right to change grade of its roadbed or to remove it to any point on its right of way: *Brinkley v. R. R.*, 135-654.

For changing route to go to union depot, see section 1042.

3456. Forfeiture for failure to begin or complete railroad. If any railroad corporation shall not within three years after its articles of association are filed and recorded in the office of the secretary of state, or the passage of its charter, begin the construction of its road and expend thereon ten per cent of the amount of its capital, or shall not finish the road and put it in operation in ten years from the time of filing its articles of association or passage of its charter as aforesaid, its corporate existence and powers shall cease.

Rev., s. 2564; Code, s. 1980; 1871-2, c. 138, s. 43; Ex. Sess. 1908, c. 142.

See annotations under sections 1185, 1187.

What amounts to an abandonment and how the question may be raised: *Power Co. v. Power Co.*, 175-668.

Failure of railroad company to organize under act of incorporation within two years prescribed does not prevent valid organization thereafter, unless forfeiture has been declared in proceedings instituted by state: *R. R. v. Olive*, 142-257.

If legislature, with knowledge of grounds of forfeiture, by act remits penalty and continues its existence or deals with corporation as lawfully existing, such conduct is waiver of forfeiture: *Atty.-Gen. v. R. R.*, 28-469.

Attorney-general cannot of his own motion bring action to vacate charter: *Atty.-Gen. v. R. R.*, 134-481.

Existence of railroad corporation cannot be attacked collaterally or questioned in action brought by it to condemn land: *R. R. v. Lumber Co.*, 114-690—but where articles of incorporation are upon their face void, trial court will so declare, *R. R. v. Stroud*, 132-413.

3457. Secretary of state may extend time to begin railroad in certain cases. In all cases where railroad companies have been chartered by the act of the general assembly during or subsequent to the session of one thousand nine hundred and eleven, but where construction work has not begun in accordance with the provisions of preceding section, it shall be lawful for and the duty of the secretary of state, upon application of any such railroad company and the payment to the state of the same fees as provided in section 1218 of the Consolidated Statutes, to extend from time to time for periods of two years the time within which to begin construction work as required by the preceding section; and the fact of extending the time by the secretary of state, as herein provided, shall, for the period of such extension, fully and to all intents and purposes, renew corporate existence and corporate powers as fully as the same are conferred in the original charter.

1919, c. 19.

3458. Forfeiture for preferences to shippers. In the event of any contract having been entered into by any railroad company in this state with any person or

company, whereby preferences or exclusive rights of transportation, either in priority or in arrangements, are given to such person or company, the attorney-general is hereby instructed to institute proceedings against such railroad company for a forfeiture of its charter.

Rev., s. 2563; Code, s. 1969; 1865-6, resolution ratified December 14, 1865.

For actions by the attorney-general to forfeit charters of corporations, see chapter Corporations, s. 1187.

ART. 6. LEASE, SALE, AND REORGANIZATION

3459. Lessee of noncompeting railroad may acquire its stock; merger of lessor. Any railroad corporation or its successors, being the lessee of the road of any other noncompeting railroad corporation, may take a surrender or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do, to be entered on their minutes, become ex officio the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof as provided by law; and whenever the whole of such capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the secretary of state under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the corporation whose stock shall have been so surrendered or transferred shall thereupon vest in and be held and enjoyed by the corporation to whom such surrender or transfer shall have been made, and as fully and entirely, without charge or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the corporation to whom the surrender or transfer of such stock shall have been made in the corporate name of such corporation. But the property, rights, franchises and profits of every corporation so surrendered, transferred or leased shall hereafter always be liable to taxation, and shall never be exempt therefrom. The rights of any stockholder not so surrendering or transferring his stock shall not be in any way affected thereby, nor shall existing liabilities or the rights of creditors of the corporation where stock shall have been so surrendered or transferred be in any way affected or impaired by this section.

Rev., s. 2574; Code, s. 1994; 1871-2, c. 138, s. 57; Ex. Sess. 1908, c. 119, s. 2.

Law forming new corporation out of two existing corporations governs and controls its corporate functions and rights: *R. R. v. Comrs.*, 88-519. Act authorizing consolidation of railroad companies upon vote of majority of stockholders, allowing actual value for stock in lieu of stock in consolidated company, is valid: *Spencer v. R. R.*, 137-107. Under act 1901, ch. 168, authorizing consolidation of certain railroads, the rights and powers of the several companies vested in the consolidated corporation: *R. R. v. Olive*, 142-257; *Thomason v. R. R.*, 142-318.

For discussion of right of railroad to lease property, regulation of meetings for that purpose and rights of stockholders, see *Hill v. R. R.*, 143-539; see, also, section 3461.

Act of 1913, c. 516, authorizing merger of certain railroads construed: *Reid v. R. R.*, 162-355.

3460. **Lease or merger of competing carrier declared a misdemeanor.** No railroad or other transportation company or its officers, now or hereafter doing business in this state, shall purchase, lease, absorb, take over, buy stock in, merge with or in any way secure an interest in a competing line of railroad or other transportation company, nor shall any railroad or other transportation company or its officers enter into any contract, agreement or understanding with a competing line of railroad or other transportation company calculated to defeat or which may defeat or lessen competition in this state. All such contracts, purchases or sales shall be void. Any violation of this section shall make the corporation or person so offending guilty of a misdemeanor, and on conviction the offender shall be fined in the discretion of the court. This section shall not prevent railroads independently owned and operated in this state, and not exceeding one hundred miles in length, from selling their roads and property.

Ex. Sess. 1908, c. 119, ss. 2, 3.

3461. **Acquisition of interest in or lease of noncompeting branch or connecting lines.** Any railroad or other transportation company may acquire and hold or guarantee, or endorse the bonds or stocks of, or may lease any railroad or branch railroad, or other transportation line in this or adjoining state connecting with it directly or indirectly. But no railroad or other transportation company or its officers shall acquire, hold or guarantee the bonds or stock of, or lease or be leased to, or purchase or buy or consolidate with or be merged into, any parallel or competing railroad or other transportation company, nor shall any railroad or other transportation company or its officers sell any of its stock or bonds to any holding or voting company or its officers, whereby such consolidation or merger may be effected, and any such purchase, contract, merger or sale shall be void. This provision shall not prevent railroads independently owned and operated in this state, and not exceeding one hundred miles in length, from selling their roads and property.

Rev. s. 2567, subsec. 13; 1885, c. 108, s. 2; 1908, c. 119, ss. 1, 3.

Where lessor railroad company is sued jointly with lessee company for damages caused by alleged negligence of lessee, and after verdict lessor moves for judgment upon verdict, but makes no motion for new trial, and both motions are refused, and both defendants appeal from judgment rendered against them, granting new trial to lessee vacates judgment as to both defendants: *Tillett v. R. R.*, 115-662.

Where lease of property of railroad company extends beyond time fixed by charter for corporate existence of lessor, such lease is valid for period of corporate life of lessor, and will extend beyond that period if charter is renewed, and lessor's corporate existence is thereby extended, and by this process it may endure for the full term: *Hill v. R. R.*, 143-539.

Lessor of railroad is liable for negligence of lessee in operation of road: *Harden v. R. R.*, 129-354; *Raleigh v. R. R.*, 129-265; *Perry v. R. R.*, 128-473; *Pierce v. R. R.*, 124-93; *Benton v. R. R.*, 122-1009; *Norton v. R. R.*, 122-937; *Kinney v. R. R.*, 122-961; *James v. R. R.*, 121-528; *Tillett v. R. R.*, 118-1043; *Logan v. R. R.*, 116-940; *Aycock v. R. R.*, 89-321; *Smith v. R. R.*, 130-344; *Brown v. R. R.*, 131-455; *Hill v. R. R.*, 178-607.

3462. **Purchaser at mortgage or execution sale of railroads may incorporate.** Whenever the purchaser of the real estate, track and fixtures of any railroad corporation which has heretofore been sold, or may hereafter be sold, by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court, shall acquire title to the same in the manner prescribed by law, such purchaser may associate with him any number of per-

sons, and make and acknowledge and file articles of association as prescribed in this chapter. Such purchaser and his associates shall thereupon be a new corporation, with all the powers, privileges and franchises and subject to all of the provisions of this chapter.

Rev., s. 2552; Code, s. 1936; 1871-2, c. 138, s. 5.

See section 3428.

Railroad is not in all respects a public highway, but it is the subject of private property, and in that character is liable to be sold unless sale be forbidden by legislature; not franchise, but land itself constituting the road: *State v. Rives*, 27-297.

On foreclosure of mortgage given by railroad company, purchaser takes rights that company had acquired in relation to its rights of way under its charter: *Barker v. R. R.*, 137-214.

Railroad corporation is not dissolved by sale of its road: *State v. Rives*, 27-297.

Another corporation must be provided before sale shall have effect of dissolution: *James v. R. R.*, 121-523. Purchase of Western North Carolina Railroad by Southern did not result in dissolution of former road: *Ibid.*

See *Julian v. Trust Co.*, 193 U. S., 93.

3463. On dissolution or sale of railroads purchaser becomes a corporation. When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation upon compliance with law.

Rev., s. 2565; Code, s. 2005.

For reorganization after judicial sale, etc., see section 1221 et seq.

For effect of sale prior to enactment, see *State v. Rives*, 27-297.

Corporate property and franchise must be sold together: *James v. R. R.*, 121-527; *Bradley v. R. R.*, 119-927 (Appx.); *Pipe and Foundry Co. v. Howland*, 111-625; *Gooch v. McGee*, 83-59. Sale of railroad under second mortgage, and conveyance thereunder subject to first mortgage, does not extinguish corporate existence of company: *James v. R. R.*, 121-523—nor release corporation from liability to public for manner in which railroad operated, *Ibid.*—and in order that sale should work dissolution, another corporation must take the place and assume obligations of old corporation, *Ibid.*—though, when this is done, corporation will be domestic corporation, *Ibid.* See, also, *Julian v. Trust Co.*, 193 U. S., 93. Upon foreclosure of mortgage of railroad, purchaser takes rights acquired by company in relation to right of way under charter: *Barker v. R. R.*, 137-214; *Hendrick v. R. R.*, 101-617.

Effect of sale of the Western North Carolina Railroad Company franchises and property under second mortgage, subject to first mortgage which was assumed by purchaser, was to place purchaser (the Southern Railway Company) in place of mortgagor in its relation to trustee of first mortgage, with right to run and operate road as agent of mortgagor; but old corporation was not extinguished, but is still in existence and liable for damages caused by maladministration of agent, which liability can be enforced against property which it allows the "Southern" to use: *James v. R. R.*, 121-523. Sale and conveyance of property and franchises of Western North Carolina Railroad Company made by a special master to Southern Railway Company, a foreign corporation, under decree of foreclosure of second mortgage, subject to an existing first mortgage, did not ipso facto make the purchaser a domestic corporation, nor did such sale and purchase make Western North Carolina Railroad an integral part of the Southern Railway corporation: *Ibid.*

ART. 7. LIABILITY OF RAILROADS FOR INJURIES TO EMPLOYEES

3464. Common carrier defined. The term "common carrier," as used in this article, shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier.

1913, c. 6, s. 5.

3465. Fellow-servant rule abrogated; defective machinery. Any servant or employee of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company, by the negligence, carelessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void.

Rev., s. 2646; 1897 (Pr.), c. 56; 1915, c. 256.

APPLICATION OF STATUTE. This section, known as the "Fellow-Servant Act," enacted in 1897, is an unconditional abrogation of the doctrines of fellow-servant and assumption of risk as applied to railroads: *Coley v. R. R.*, 129-407; *Bloxham v. Timber Corp.*, 172-37. As a result of the ruling in *Hobbs v. R. R.*, 107-1, this section was enacted: *Nicholson v. R. R.*, 138-516.

The section is constitutional: *Nicholson v. R. R.*, 138-517; *Coley v. R. R.*, 128-534, 129-407; *Kinney v. R. R.*, 122-961; *Wright v. R. R.*, 123-280; *Hancock v. R. R.*, 124-222. Court will take notice of this section without being pleaded: *Hancock v. R. R.*, 124-222.

It applies to all railroads in operation, whether run by steam or electricity: *Goodman v. Power Co.*, 174-661; *Nicholson v. R. R.*, 138-516. When a railroad is in operation for the statute to apply: *McDonald v. R. R.*, 165-622. It applies to lumber or logging roads: *Hemp-hill v. Lumber Co.*, 141-487; *Liles v. Lumber Co.*, 142-39; *Bird v. Leather Co.*, 143-283; *Wright v. R. R.*, 151-529; *Bissell v. Lumber Co.*, 152-123; *Goodman v. Power Co.*, 174-661—to a street railway, *Brookshire v. Electric Co.*, 152-669.

It does not apply to a railroad in course of construction: *Nicholson v. R. R.*, 138-516; *O'Neal v. R. R.*, 152-404; *Bailey v. Meadows Co.*, 152-603—and it applies only to railroads, *Wade v. Contracting Co.*, 149-177; *Hipp v. Fiber Co.*, 152-745. It does not apply to injuries sustained by servant of an independent contractor of a railroad company by reason of negligence of a fellow-servant: *Avery v. R. R.*, 137-130.

This section is applicable to employee of "any railroad operating in this state," and is not limited to injuries received in this state: *Williams v. R. R.*, 128-286. It will not be presumed that doctrine of nonliability for acts of fellow-servants obtains in another state: *Ibid.*

This section has the effect of making all coemployees of railroad companies agents and vice-principals of the company so far as fixing the company with responsibility for their negligence is concerned: *Fitzgerald v. R. R.*, 141-534. Fellow-servant law applies to all railroad employees, whether injured while running trains or rendering any other service: *Sigman v. R. R.*, 135-181.

Under Fellow-Servant Act, which operates on all employees of railroad companies, whether in superior, equal or subordinate positions, if plaintiff, a hostler of defendant, was injured as proximate cause of negligence of his helpers in shoveling coal from a car into a tender, defendant is responsible: *Fitzgerald v. R. R.*, 141-530.

By contract of service made in North Carolina, the provisions of the Fellow-Servant Act must be read into the contract, and there being no evidence that service was to be performed altogether in another state, it would seem that relative rights and liabilities of parties are fixed by terms of contract: *Miller v. R. R.*, 141-49.

The contention that Fellow-Servant Act applies to defendant in this case cannot be determined where its answer denied that it owned or operated the logging railroad, and no appropriate issues were submitted: *Tanner v. Lumber Co.*, 140-475.

This section applies to an injury suffered by any employee in any department of work of a railroad which is being operated, but does not apply to an employee engaged in building a trestle for extension of railroad, at a point some miles from track on which trains are being operated: *Nicholson v. R. R.*, 138-516—nor to one engaged in work at lumber yard and not connected with the work of transportation, *Twiddy v. Lumber Co.*, 154-237.

In an action against a railroad company for wrongfully causing death of engineer, question whether it and another road were partners in operating part of road on which deceased was killed was properly submitted to jury: *Harrill v. R. R.*, 135-601.

Where a person is agent or servant of two roads, and through his negligence another servant is injured, either or both roads would be liable: *Moore v. R. R.*, 165-439. Person employed by railroad company to load express hauled by company is not a fellow-servant of an employee of express company: *Hopper v. Express Co.*, 133-375.

DEFECTIVE APPLIANCES, ETC. Failure to furnish suitable appliances is continuing negligence which excludes the defense of contributory negligence, such failure being the proximate cause of the injury: *Troxler v. R. R.*, 124-189. Railroad must furnish appliances which are approved and in general use: *Hines v. Lumber Co.*, 174-294. Instances: Automatic coupler, *Montgomery v. R. R.*, 163-597; defective ladder, *Mincey v. R. R.*, 161-467; safe crossing for removing crossties, *Wells v. R. R.*, 161-368; detached car on steep grade, *Mumpower v. R. R.*, 174-742; tree falling on train, *Bloxham v. Timber Corp.*, 172-37; defective step to engine, *Urquhart v. R. R.*, 156-582; defective engine, *Biles v. R. R.*, 139-528; defective sand-dryer, *Walker v. R. R.*, 135-738; "kicking cars" or "flying switch," *Kenney v. R. R.*, 165-99; *Worley v. R. R.*, 169-105; allowing ice to accumulate around pump, *Renn v. R. R.*, 170-128. The term "ways" refers to roadways and objective conditions: *Pigford v. R. R.*, 160-93.

The rule of care is not so strict in case of ordinary tools and everyday conditions requiring no special preparation or foresight, and where there is no reason to suppose an injury would result: *Bunn v. R. R.*, 169-648; *Mercer v. R. R.*, 154-399; *Dunn v. R. R.*, 151-313; *Lynch v. R. R.*, 164-249—as in case of cross-piece to hold lumber loaded on car, *Wallace v. R. R.*, 141-646. When employee directed to make repairs uses defective implement in such a way as to cause injury, employer is not liable: *Mathis v. R. R.*, 144-162.

The railroad is not liable for accidental injury: *Morris v. R. R.*, 171-533; *Lloyd v. R. R.*, 168-646; *Simpson v. R. R.*, 154-51; *Lassiter v. R. R.*, 150-483, and cases cited.

ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE. The two principles distinguished: *Coley v. R. R.*, 129-407; *Pigford v. R. R.*, 160-93; *Horton v. R. R.*, 162-424. Assumption of risk is not a defense under this section: *Urquhart v. R. R.*, 156-582; *Biles v. R. R.*, 143-78; *Mott v. R. R.*, 131-234; *Thomas v. R. R.*, 129-392; *Cogdell v. R. R.*, 129-398; *Coley v. R. R.*, 128-534; s. c., 129-407. Contributory negligence is a valid defense: *Pigford v. R. R.*, 160-93; *Fry v. R. R.*, 159-357; *Coley v. R. R.*, 129-407. It must be pleaded, and the burden is on the defendant, see section 523.

Where defendant failed to furnish a safe appliance it was negligence per se, continuing up to the time of the injury, and neither assumption of risk nor contributory negligence would be a defense: *Greenlee v. R. R.*, 122-977; *Troxler v. R. R.*, 124-189; *Hairston v. Leather Co.*, 143-512. Continuing to work under such conditions is not assumption of risk nor contributory negligence unless it is so obviously dangerous that no prudent man would subject himself to the risk: *Coley v. R. R.*, 129-407; *Hamilton v. Lumber Co.*, 156-520; *Pigford v. R. R.*, 160-93; *Horton v. R. R.*, 162-424. When jury finds there was no contributory negligence, it is immaterial what fellow-servant caused the injury: *Kinney v. R. R.*, 122-961. See annotations under sections 3467, 3468.

ACTION FOR DAMAGES. An action may be brought in the state court against a railroad in the hands of a federal receiver or against the purchaser of such road: *Lassiter v. R. R.*, 163-19.

The rule for estimating damages is to give the present worth of the difference in plaintiff's earning capacity caused by the injury: *Fry v. R. R.*, 159-357, and cases cited. For effect of relief department, see section 3469. For damages for wrongful death, see sections 160, 161.

3466. Injuries through fellow-servants or defective appliances. Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or in the case of the death of such employee, to his or her personal representative, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engine, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

1913, c. 6, s. 1.

The act of 1913 is substantially the same as the Federal Employer's Liability Act: *Sears v. R. R.*, 169-446. For annotations on negligence, appliances, etc., see section 3465.

The federal statute supersedes the state statute in cases involving interstate commerce: *Jones v. R. R.*, 176-260; *Renn v. R. R.*, 170-128. The federal and state courts have concurrent jurisdiction, and which statute will apply depends upon whether the train or employee was engaged in interstate commerce: *West v. R. R.*, 174-125; *Renn v. R. R.*, 170-128. When the train or employee is engaged in interstate commerce: *Capps v. R. R.*, 178-558; *Sears v. R. R.*, 169-446; *Saunders v. R. R.*, 167-375; *Lloyd v. R. R.*, 166-24; *Zachary v. R. R.*, 156-496, reversed in 232 U. S., 248.

The statutes are not the same in the beneficiaries in case of death: *Horton v. R. R.*, 175-472; *Kenney v. R. R.*, 167-14; *Raines v. R. R.*, 169-189; *Dooley v. R. R.*, 163-454—nor in the manner of estimating damages, *Ibid.*; *Irvin v. R. R.*, 164-5; *Ferebee v. R. R.*, 167-290. See sections 160, 161.

Time within which action is to be brought: *King v. R. R.*, 176-301; *Belch v. R. R.*, 176-22; *Burnett v. R. R.*, 163-186.

3467. Contributory negligence no bar, but mitigates damages. In all actions hereafter brought against any common carrier by railroad to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, however, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

1913, c. 6, s. 2.

This abolishes contributory negligence as an absolute defense and adopts the doctrine of comparative negligence, reducing the damage: *Davis v. R. R.*, 175-648; *Parks v. Tanning Co.*, 175-29; *Williams v. R. R.*, 168-360; *Sears v. R. R.*, 169-446; *Ingle v. R. R.*, 167-636. It applies only to common carriers by railroad and not to roads engaged only in hauling lumber or timber: *Williams v. Mfg. Co.*, 175-226.

Contributory negligence should be pleaded: *Fleming v. R. R.*, 160-197—but a separate issue is not required, *Gray v. R. R.*, 167-433; *Lloyd v. R. R.*, 166-24—nor does it change the rule of last clear chance, *Gray v. R. R.*, 167-433.

Manner of estimating damages: *Davis v. R. R.*, 175-648; *Tilghman v. R. R.*, 167-163, 237 U. S., 500.

3468. Assumption of risk as defense. In any action brought against any common carrier under or by virtue of any of the provisions of this article to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee, or the death or injury was caused by negligence.

1913, c. 6, s. 3.

See annotations under section 3465. Assumption of risk and contributory negligence explained: *Horton v. R. R.*, 175-472; *Jones v. R. R.*, 176-260; *King v. R. R.*, 176-301; *Wallace v. Power Co.*, 176-558; *Gaddy v. R. R.*, 175-515; *Horton v. R. R.*, 169-108, 162-424, 157-146, 233 U. S., 492. In case of injury caused by street car failing to provide a suitable fender, neither assumption of risk nor contributory negligence is a defense: *Smith v. Electric Co.*, 173-489.

3469. Contracts and rules exempting from liability void; set-off. Any contract, rule, regulation or device whatsoever, the purpose and intent of which

shall be to enable any common carrier by railroad to exempt itself from any liability created by this article, shall to that extent be void: Provided, that in any action brought against such common carrier, under and by virtue of any of the provisions of this article, such common carrier may set off therein any sum it has contributed or paid to any insurance or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which such action was brought.

1913, c. 6, s. 4.

Acceptance of benefits under relief department does not prevent a recovery: *Barden v. R. R.*, 152-318; *Wacksmith v. R. R.*, 157-34; *King v. R. R.*, 157-44; *Burnett v. R. R.*, 163-186; *Herring v. R. R.*, 168-555.

3470. Provisions of this article applicable to logging roads and tramroads. The provisions in this article relating to liability for damages shall also apply to logging roads and tramroads.

1919, c. 275.

Cases decided before enactment of section, showing application to logging roads: *Bissell v. Lumber Co.*, 152-123; *Roberson v. Lumber Co.*, 154-328; *Twiddy v. Lumber Co.*, 154-237; *Hamilton v. Lumber Co.*, 156-519; *Jackson v. Lumber Co.*, 158-317; *Bloxham v. Timber Corp.*, 172-37.

ART. 8. CONSTRUCTION AND OPERATION OF RAILROADS

3471. Map of route to be served with summons for condemnation. Whenever it shall become necessary to condemn any land for the purposes of a railroad, at the time that the summons for such condemnation is served there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the height of the embankments on the land so sought to be condemned, and at what points on such land such cuts and embankments are located. This section shall not apply to street railways.

Rev., s. 2599; Code, s. 1952; 1893, c. 396, s. 2; 1901, c. 6, s. 3; 1871-2, c. 138, s. 24.

Failure to serve a map and profile with the summons in condemnation proceedings may be cured by amendment: *State v. Wells*, 142-590.

3472. Map of railroad to be made and filed. Every railroad corporation shall, within a reasonable time after its road shall be constructed, cause to be made a map and profile thereof, and of the land taken or obtained for the use thereof, and shall file the same in the office of the corporation commission. Every such map shall be drawn on a scale and on paper to be designated by the corporation commission, and shall be certified and signed by the president or engineer of such corporation.

Rev., s. 2600; Code, s. 1977; 1871-2, c. 138, s. 41.

The filing of a map and profile of route of railroad and of land condemned for its use with corporation commission is for information of that body, and is not required as part of a correct and completed location: *Fayetteville Street Rwy. v. R. R.*, 142-423. **Where line of railroad is clearly defined by existence of old roadbed which is entered on and staked out by agents of company, and route so marked is approved and adopted by directors as its permanent location, a survey by engineer is not essential:** *Ibid.*

Profile required to be filed must show whether there will be any "fills" or "cuts" on the land sought to be condemned: *R. R. v. Stroud*, 132-413. **Where railroad was completed through locus in quo prior to act of 1872, it was not necessary to validity of location that map of route should be filed:** *Purifoy v. R. R.*, 108-100.

3473. Joint construction by railroads having same location. Whenever two railroad companies shall, for a portion of their respective lines, embrace the same location of line, they may by agreement provide for the construction of so much of said line as is common to both of them, by one of the companies, and for the manner and terms upon which the business thereon shall be performed. Upon the making of such an agreement, the company that is not to construct the part of the line which is common to both may terminate its line at the point of intersection, and may reduce its capital to a sum of not less than five thousand dollars for each mile of the road proposed to be constructed.

Rev., s. 2602; Code, s. 1983; 1871-2, c. 138, s. 46.

3474. Construction of part of line in another state. Whenever after due examination it shall be ascertained by the directors of any railroad company that a part of the line of railroad proposed to be made between any two points in this state ought to be located and constructed in an adjoining state, it may be so located and constructed by a vote of two-thirds of all the directors. The sections of such railroad within this state shall be considered a connected line, and the directors may reduce the capital specified to such amount as may be deemed proper, but not less than the amount required by law for the number of miles of railroad to be actually constructed in this state.

Rev., s. 2603; Code, s. 1984; 1871-2, c. 138, s. 47.

3475. Carriage must be according to public schedule. Every railroad corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads and at usual stopping places established for receiving and discharging way passengers and freights for that train, and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises.

Rev., s. 2611; Code, s. 1963; 1871-2, c. 138, s. 35.

REGULATIONS FOR PASSENGER TRAINS. Railroad company has a right, and it is its duty, to establish and enforce reasonable rules for government and direction of trains; and of such, passenger must inform himself and conform thereto: *Britton v. R. R.*, 88-536; *McRae v. R. R.*, 88-526. Corporation commission may require railroad to have train arrive at certain station on road at certain schedule time so as to connect with train of another company: *Corporation Com. v. R. R.*, 137-1. Defendant company is liable for consequences of mismanagement of train in charge of employees of another company using its track with defendant's knowledge and consent: *Ayeock v. R. R.*, 89-321.

Railroad company is liable for injury resulting from failure to provide a reasonably safe place and opportunity for passengers to get on and off trains: *Browne v. R. R.*, 108-34; *Smith v. R. R.*, 147-448; *Wagner v. R. R.*, 147-315; *Roberts v. R. R.*, 155-79; *Kearney v. R. R.*, 158-522; *Leggett v. R. R.*, 168-366; *Thomas v. R. R.*, 173-494—conductor should warn passengers of danger, *Penny v. R. R.*, 153-296—and allow reasonable time for getting on and off, *Browne v. R. R.*, 108-34; *Tillett v. R. R.*, 118-1031, 116-937, 115-662; *Cable v. R. R.*, 122-892. Passenger getting on or off moving train may be guilty of contributory negligence: *Ibid.*

Railroads have reasonable control over their waiting-rooms and right to establish regulations for opening and closing of same; they are not lodging places: *Phillips v. R. R.*, 124-123. A regulation which requires the opening of waiting-rooms not less than thirty minutes before arrival of trains, and their closing after departure of trains, is a reasonable regulation for

accommodation of passengers; the case of delayed trains and through passengers might form exceptions to rule: *Ibid.*

Regulation that person purchasing tickets for an excursion shall travel upon train provided for that special purpose, and not upon a regular train, is reasonable regulation: *McRae v. R. R.*, 88-526.

Where defendant undertook to furnish plaintiff transportation on its log train to and from "quarters," it was its duty to see that such transportation was rendered as reasonably safe as character of it would admit: *Tanner v. Lumber Co.*, 140-475.

In case of a trespasser on the train, the railroad company is liable for the wrongful acts of its servants: *Pierce v. R. R.*, 124-83.

Reasonable regulations and reasonable care for safety of passengers applies to street railways: *Brown v. Power Co.*, 171-555.

WHO ARE PASSENGERS. Contract of carriage by common carrier begins when passenger comes upon carrier's premises or conveyance with purpose of buying ticket within reasonable time, or after having purchased ticket, and relation once constituted continues until journey contracted for is concluded, and passenger has left or has had reasonable time to leave such premises: *Hansley v. R. R.*, 115-602; *Tillett v. R. R.*, 115-662; *s. c.*, 118-1031; *Phillips v. R. R.*, 124-123; *Seawell v. R. R.*, 132-856; *s. c.*, 133-515.

A section master, riding from his place of work to his home, is not a passenger: *Wright v. R. R.*, 122-852.

A person in charge of cattle on a car is a passenger: *Osborne v. R. R.*, 175-594.

A passenger leaving a train temporarily for a lawful purpose at an intermediate station does not lose his rights as a passenger: *Wallace v. R. R.*, 174-171. A purchaser of a ticket who takes the wrong train by reason of information from the porter is a passenger: *Bullock v. R. R.*, 152-66.

PASSENGER ENTITLED TO PROTECTION. A carrier of passengers is not an insurer, as is a carrier of goods. His liability is based on negligence, and not on a warranty of passenger's freedom from all accidents and vicissitudes of journey: *Marable v. R. R.*, 142-557. Arm struck by mail pouch: *McCord v. R. R.*, 134-53—passenger shot while leaving car, *Penny v. R. R.*, 133-221—passenger struck by valise of another passenger, *Fritz v. R. R.*, 132-829.

Conduct of employee of carrier inflicting violence on passenger, though act be outside of scope of his authority, or even wilful and malicious, subjects carrier to liability in damages just as fully as if carrier had encouraged commission of act: *Williams v. Gill*, 122-967; *Strother v. R. R.*, 123-197; *Hutchinson v. R. R.*, 140-123. Rotten eggs thrown at passenger, company liable: *Seawell v. R. R.*, 132-856, 133-515.

Company owes to every passenger duty of protecting him from violence and assaults of his fellow passengers or intruders, and will be held responsible for its own or its servants' neglect in the premises, when same might have been foreseen and prevented by exercise of proper care: *Britton v. R. R.*, 88-536; *Bedsale v. R. R.*, 151-152; *Penny v. R. R.*, 153-296; *Berry v. R. R.*, 155-287; *Pride v. R. R.*, 176-594. A railroad company is liable for failure to have sufficient police force on excursion train to protect passengers: *Stanley v. R. R.*, 160-323.

A pullman car is not a common carrier in every respect, but it owes the duty of protecting its passengers: *Garrett v. R. R.*, 172-737.

When passenger's weak or helpless condition is known to conductor, or assistance is requested, carrier is liable for failure to render assistance: *Graham v. R. R.*, 174-1. For wrongful ejection from train, see section 3507.

FAILURE TO STOP FOR PASSENGERS. Where plaintiff purchased ticket at regular station before time advertised for arrival and departure of trains at that place, and was in readiness to get aboard, but train ran by, making no effort to stop, although it had room in its cars for plaintiff, he would be entitled to punitive damages, in absence of sufficient excuse shown by defendant: *Purcell v. R. R.*, 108-414.

Common carrier of passengers is under no obligation to delay departure of trains, or to look after safety of persons who attempt to enter them, when they have been stopped long enough to allow passengers to embark and disembark; but it may be liable for injuries incurred by one who, by invitation or command of persons in charge of trains, attempts to get on or off while cars are in motion: *Browne v. R. R.*, 108-34.

Carrier is liable for failure to stop for passenger at flag station when proper signal is given: *Brown v. R. R.*, 174-694; *Thomas v. R. R.*, 122-1005.

Carrier is liable for failure to stop for passenger to get off at station to which he has bought a ticket: *Elliott v. R. R.*, 166-481—even when train is not scheduled to stop, if passenger gets on train through fault of carrier, *Hutchinson v. R. R.*, 140-123.

When conductor fails to stop train, but directs passenger to get off while train is moving, the question of contributory negligence is for the jury: *Owens v. R. R.*, 152-439; *Browne v. R. R.*, 108-34.

ACTION FOR DAMAGES. Person who has sustained injuries by reason of failure of railroad company to furnish proper means of transportation or operate its trains as required by statute may bring an action on contract, or in tort, independent of statute: *Purcell v. R. R.*, 108-414; *Puett v. R. R.*, 141-332; *Peanut Co. v. R. R.*, 155-148.

When passenger is delayed or carried contrary to agreement, so as to lead to failure to accomplish object of trip, he is entitled to recover sum paid for ticket, with interest thereon, together with compensation for time lost in trip and, in some instances, reasonable cost of reaching his destination by means of some other conveyance: *Hansley v. R. R.*, 115-602. Amount recoverable for breach of contract of carriage is limited to damage supposed to have been in contemplation of parties and actually caused by such breach, and measure of damage is ordinarily not materially different whether defendant fails to comply with contract through inability or wilfully disregards it: *Ibid.* See, also, *Peanut Co. v. R. R.*, 155-148.

When the refusal to take on or discharge a passenger, where he is entitled to be received or discharged, is reckless and wanton, punitive damages may be recovered: *Hutchinson v. R. R.*, 140-127; *Purcell v. R. R.*, 108-417; *Hansley v. R. R.*, 117-570; *Coleman v. R. R.*, 138-355— or for insult or mistreatment of passenger by employee, *Strother v. R. R.*, 123-197; *Williams v. Gill*, 122-967. Punitive damages will not be awarded against a railroad company where, by reason of defective equipments, it failed to carry a person, to whom it had sold excursion ticket, back to his starting point, when only injuries complained of were inconveniences, delay and disappointment, and there was no proof of bad motive on part of defendant: *Hansley v. R. R.*, 115-602, overruling *Purcell v. R. R.*, 108-414, on that point.

3476. Arrangement of cars in passenger trains. In forming a passenger train, baggage, freight, merchandise or lumber cars shall not be placed in rear of the passenger cars, except in case of accident, or when the cars are provided with automatic couplers or brakes. If any officer or agent of a railroad company, in forming a passenger train, shall direct or knowingly suffer an arrangement of the cars different from the one herein provided for, he shall be guilty of a misdemeanor: Provided, the criminal liability hereby imposed shall not apply to officers and agents of the Wilmington sea-coast railroad company.

Rev., ss. 2612, 3747; Code, s. 1971: 1871-2, c. 138; 1893, c. 331; 1895, c. 212.

3477. Unauthorized manufacture or sale of switch-lock keys misdemeanor. It shall be unlawful for any person to make, manufacture, sell or give away to any other person any duplicate key to any lock used by any railroad company in this state on its switches or switch tracks, except upon the written order of that officer of such railroad company whose duty it is to distribute and issue switch-lock keys to the employees of such railroad company. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court.

1909, c. 795.

3478. Willful injury to railroad property misdemeanor. If any person shall willfully do or cause to be done any act or acts whatever whereby any building, construction or work of any railroad corporation, or any engine, machine or structure or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, he shall be guilty of a misdemeanor.

Rev., s. 3756; Code, s. 1974: 1871-2, c. 138, s. 39.

3479. Headlights on locomotives on main lines. Every company, corporation, lessee, manager or receiver owning or operating a railroad in this state is hereby required to equip and maintain and use upon every locomotive in operation in railroad service on main lines in this state an electric or power headlight of at least one thousand five hundred candlepower, measured without the aid of a reflector. This section shall not apply to locomotive engines regularly used in switching cars or trains, to locomotive engines used exclusively between sunup and sundown, and to locomotive engines going to and returning from repair shops when ordered in for repairs; neither shall this section apply to independently owned and operated railroad companies in this state whose mileage of road in this state is one hundred and twenty-five miles or less, nor to railroad companies having only lines extending into this state, no one of which is one hundred miles in length in this state. The corporation commission may relieve from the operation of this section such locomotives and roads, or parts or sections or branches of roads, upon which the said corporation commission may deem electric or power headlights not advisable. Should an engine start on a trip with the headlight in good working condition, and from some unavoidable cause such headlight becomes disabled and cannot be repaired on the line of the road on which such run is being made, there shall be nothing in this section to prevent such engine from continuing on its trip, and the railroad company shall not be liable for prosecution on account of such failure to repair. Any company, corporation, lessee, manager or receiver violating the provisions of this section shall be guilty of a misdemeanor.

1909, c. 446.

Running a train without headlight is negligence: *Horne v. R. R.*, 170-645; *Barnes v. R. R.*, 168-512; *McNeill v. R. R.*, 167-390; *Griffin v. R. R.*, 166-624; *Powers v. R. R.*, 166-599—and it is also a misdemeanor, *Ibid.*

3480. Operation of trains on Sunday misdemeanor; exceptions. No railroad company shall permit the loading or unloading of any freight car on Sunday; nor shall it permit any car, train of cars or locomotive to be run on Sunday on any railroad, save in case of accident, except such as may be run for the purpose of transporting the United States mails, passengers with their baggage and ordinary express freight in express cars exclusively, and except such as may be run for the purpose of transporting fruits, vegetables, livestock and perishable freights. Where there are not sufficient cars of livestock or other perishable freights to make a complete train, or section of a train, the company may add other cars to complete the same. Solid trains, made up of through freight cars, reaching on Sunday any point upon any railroad in North Carolina and destined for some point or points beyond the limits of the state of North Carolina, may be continued as a solid through freight train along the line of such railroad through the state of North Carolina, without stopping the train for other purposes than to take on fuel and receive necessary running orders. The word Sunday in this section shall be construed to embrace only that portion of the day between sunrise and sunset. Trains in transitu, having started on Saturday, may, in order to reach the terminus or shops, run until nine o'clock a.m. on Sunday, but not later, nor for any other purpose than to reach the terminus or shops. Any railroad company violating the provisions of this section shall be guilty of a misdemeanor in each county in which such car, train of cars, or locomotive shall

run, or in which any such freight car shall be loaded or unloaded, and upon conviction shall be fined not less than five hundred dollars for each offense.

Rev., ss. 2613, 3844; Code, s. 1973; 1879, cc. 97, 203; 1885, c. 92; 1897, c. 126; 1901, c. 444; 1909, c. 285.

This section is constitutional, and does not interfere with interstate commerce in the absence of federal legislation: *State v. R. R.*, 119-814. Sufficient evidence to show violation: *Ibid.*; *State v. R. R.*, 149-470.

That train was running in violation of this section does not render carrier liable for injury, unless otherwise liable: *Davis v. R. R.*, 170-582. When running trains or shifting cars near a church may become a nuisance: *Taylor v. R. R.*, 145-400.

Railroads are not entitled to exclude Sunday, on account of this section, in the calculation of the number of days delay of transportation of freight: *Davis v. R. R.*, 145-207; *Watson v. R. R.*, 145-236; *Keeter v. R. R.*, 86-346; but see *Wall v. R. R.*, 147-407.

3481. Operation of fast mail trains. The corporation commission is hereby empowered, whenever it shall appear wise and proper to do so, to authorize any railroad company to run one or more fast mail trains over its road, which shall stop only at such stations on the line of the road as may be designated by the company: Provided, that in addition to such fast mail train such railroad company shall run at least one passenger train in each direction over its road on every day except Sunday, which shall stop at every station on the road at which passengers may wish to be taken up or put off: Provided further, that nothing in this section shall be construed as preventing the running of local passenger trains on Sunday.

Rev., s. 2614; 1893, c. 97.

It is a reasonable regulation of defendant that certain trains shall not stop at all stations, provided there are enough to serve purposes of local travel: *Hutchinson v. R. R.*, 140-123.

3482. Negligence presumed from killing livestock. When any cattle or other livestock shall be killed or injured by the engine or cars running upon any railroad, it shall be prima facie evidence of negligence on the part of the railroad company in any action for damages against such company: Provided, that no person shall be allowed the benefit of this section unless he shall bring his action within six months after his cause of action shall have accrued.

Rev., s. 2645; Code, s. 2326; 1856-7, c. 7.

APPLICATION OF SECTION. Section applies to killing animals in town as well as in the country, and in stock-law and nonstock-law territory: *Shepard v. R. R.*, 140-391; *Roberts v. R. R.*, 88-560; *Farmer v. R. R.*, 88-564—whether animal hitched to wagon or not, *Borden v. R. R.*, 175-177; *Hanford v. R. R.*, 167-277; *Randall v. R. R.*, 107-748; s. c., 104-410. Does not apply to killing geese: *James v. R. R.*, 166-572—nor turkeys, *Lewis v. R. R.*, 163-33.

Presumption of negligence arises only when action is brought within six months of killing: *Borden v. R. R.*, 175-177; *Fleming v. R. R.*, 168-248; *Bethea v. R. R.*, 106-279; *Carlton v. R. R.*, 104-365; *Randall v. R. R.*, 104-410, 107-748; *Mesic v. R. R.*, 120-489; *Wilson v. R. R.*, 90-69; *Pippen v. R. R.*, 75-54—and burden of proving it is not upon plaintiff: *Carlton v. R. R.*, 104-365.

PRESUMPTION MAY BE REBUTTED. This presumption may be rebutted by showing that in fact there was no negligence: *Hanford v. R. R.*, 167-277; *Bethea v. R. R.*, 106-279; *Battle v. R. R.*, 66-343; *Pippen v. R. R.*, 75-54. Whether or not there is negligence is generally a question for the jury: *Borden v. R. R.*, 175-177; *Briley v. R. R.*, 174-785; *Davis v. R. R.*, 134-300. When facts are fully disclosed and there is no controversy as to them, court must decide whether they make out case of negligence, and when they fail to do so, defendant cannot be held liable: *Doggett v. R. R.*, 81-459; *Durham v. R. R.*, 82-352; *Mesic v. R. R.*, 120-489; *Randall v. R. R.*, 104-410; *Hardison v. R. R.*, 120-492. Where killing of stock by railroad is

admitted or proven, trial judge may instruct jury that a certain state of facts, if believed by them, would rebut presumption of negligence, but not that certain evidence, though uncontradicted, would do so: *Baker v. R. R.*, 133-31.

Negligence may be rebutted by showing that defendant kept a proper lookout upon the track, and that after discovering the animal every reasonable effort was made to prevent the injury: *Seawell v. R. R.*, 106-272; *Carlton v. R. R.*, 104-365; *Snowden v. R. R.*, 95-93; *Winston v. R. R.*, 90-66; *Doggett v. R. R.*, 81-459; *Proctor v. R. R.*, 72-579; *Jones v. R. R.*, 70-626; *Battle v. R. R.*, 66-343; *Montgomery v. R. R.*, 51-464.

Proof that plaintiff's cow was seen near defendant company's railway track, with one of its legs broken, about time that two trains had passed over road, is some evidence in support of plaintiff's claim for damages: *Boing v. R. R.*, 87-360.

OWNER'S CONTRIBUTORY NEGLIGENCE. If owner of cattle permit them to stray off and get upon track of railroad and they are killed or hurt, railroad company is not liable unless train was being carelessly run, or by exercise of proper care after animals were discovered injury could have been avoided or prevented: *Doggett v. R. R.*, 81-459. Where plaintiff permitted animal to wander upon defendant's track, he is not guilty of contributory negligence: *Bethea v. R. R.*, 106-279; *Farmer v. R. R.*, 88-564. And that animal was within stock-law territory and at large is no excuse for killing: *Roberts v. R. R.*, 88-560.

ART. 9. RAILROAD POLICE

3483. **Railway conductors and station agents declared special police.** All passenger conductors of railroad trains and station or depot agents are hereby declared to be special police of the state of North Carolina, with full power and authority to make arrests for offenses committed in their presence or view, or for felony, or on sworn complaint for misdemeanor, except that the conductors shall have such power only on board of their respective trains or their railroad right of way, and the agents at their respective stations; and such conductors and agents may cause any person so arrested by them to be detained and delivered to the proper authority for trial as soon as possible. Nothing contained in the provisions of this section shall have the effect to relieve any such railroad company from any civil liability now existing by statute or under the common law for the act or acts of such conductors, station or depot agents, in unlawfully exercising or attempting to exercise the powers herein conferred.

1907, c. 470, ss. 3, 4.

Conductors and employees on trains must wear badges, see s. 3414.

Section referred to in *Brown v. R. R.*, 161-573.

3484. **Governor may appoint and commission railroad police.** Any corporation operating a railroad on which steam or electricity is used as the motive power or any electric or waterpower company or construction company may apply to the governor to commission such persons as the corporation or company may designate to act as policemen for it. The governor upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to the persons so appointed a commission to act as such policemen.

Rev., ss. 2605, 2606; Code, ss. 1988, 1989; 1871-2, c. 138, ss. 51, 52; 1907, c. 128, s. 1.

Section referred to in *Stanley v. R. R.*, 160-323.

3485. **Oath, bond, and powers of railroad police.** Every policeman so appointed shall, before entering upon the duties of his office, take and subscribe the usual oath. Such oath, with a copy of the commission, shall be filed with

the corporation commission and a certificate thereof by its clerk shall be filed with the clerk of each county through or into which the railroad for which such policeman is appointed may run or in which the company may be engaged in work, and in which it is intended he shall act, and such policemen shall severally possess within the limits of the county all the powers of policemen in the several towns, cities and villages in which they shall be so authorized to act as aforesaid: Provided, that every policeman appointed under this and the preceding section shall, before entering upon the duties of his office, enter into bond in the sum of five hundred dollars, payable to the state of North Carolina, conditioned for the faithful performance of the duties of his office, with good and sufficient surety, to be passed upon and accepted by and filed with the corporation commission.

Rev., s. 2607; Code, s. 1990; 1871-2, c. 138, s. 53; 1907, c. 128, s. 2; 1907, c. 462.

3486. Railroad police to wear badges. Such railroad police shall, when on duty, severally wear a metallic shield with the words "Railway Police" and the name of the corporation for which appointed inscribed thereon, and this shield shall always be worn in plain view except when such police are employed as detectives.

Rev., s. 2608; Code, s. 1991; 1871-2, c. 138, s. 54.

3487. Compensation of railroad police. The compensation of such police shall be paid by the companies for which the policemen are respectively appointed, as may be agreed on between them.

Rev., s. 2609; Code, s. 1992; 1871-2, c. 138, s. 55.

3488. Police powers cease on company's filing notice. Whenever any company shall no longer require the services of any policeman so appointed as aforesaid, it may file a notice to that effect in the several offices in which notice of such appointment was originally filed, and thereupon the power of such officer shall cease and be determined.

Rev., s. 2610; Code, s. 1993; 1871-2, c. 138, s. 56.

ART. 10. CARRIAGE OF PASSENGERS

3489. Railroad passenger rates established. No railroad company doing business as a common carrier of passengers in the state of North Carolina shall, except as herein provided, charge, demand or receive for transporting any passenger and his or her baggage, not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its road in North Carolina, a rate in excess of two and one-half cents per mile; and for transporting children under twelve years and over five years old, one-half of the rate above prescribed. For transporting children under five years old, accompanied by any person paying fare, no charge whatever shall be made. Where the amount of the ticket at the prescribed rate would amount to any figure between two multiples of five, the price of the ticket shall be the multiple of five which is nearest the price of the ticket at the rate above mentioned; or, in the event that the amount is equidistant between the multiples of five, the price charged for the ticket shall be on the basis of the higher of those two multiples of five. No charge less than ten cents shall be required. Independently owned

and operated railroad companies in North Carolina, whose mileage of road in the state is one hundred miles or less, may charge a rate not exceeding three cents per mile; and independently owned and operated railroad companies in North Carolina, whose mileage of road in the state is ten miles or less, may charge the same rate which is now in existence on such roads. This provision shall not extend to branch lines of railroad companies controlling over one hundred miles of road, whether chartered in or out of the state. Newly constructed railroads, or the portion of railroad which may be newly constructed, shall be exempt from the operation of this section for two years after completion, to the extent that they may charge a rate in no case to exceed three cents per mile. A charge of fifteen cents may be added to the fare of any passenger when the same is paid on the train, if the ticket might have been procured within a reasonable time before the departure of the train.

Ex. Sess. 1908, c. 144, s. 1.

As to who is a passenger, and what are his rights, see section 3475. For passenger rate case under act of 1907, c. 216, see *State v. R. R.*, 145-495.

When a person, having paid his fare, is on a train with a child whose fare is not paid, conductor cannot put such person off with the child without returning his ticket or compensation for unused part: *Lankford v. R. R.*, 165-653.

For the passenger to have the right to transportation of baggage free of charge, and to hold carrier liable for same, it is necessary that the baggage be on the same train, unless prevented by default or negligence of carrier: *Perry v. R. R.*, 171-158. For further annotations as to liability for baggage, see sections 3510, 3523.

3490. Rates on leased or controlled lines. In the case that any railroad company operating as a common carrier of passengers in the state of North Carolina is owned, controlled or operated by lease or other agreement by any other railroad company doing business in the state, the rate for carrying passengers thereon shall be determined for such railroad company by the rate prescribed by the preceding section for the railroad company which owns, controls or operates the same.

Ex. Sess. 1908, c. 144, s. 2.

3491. Violations of passenger rates misdemeanor. Any railroad company violating any of the provisions of the two preceding sections, or counseling, ordering or directing any employee, agent or servant to violate any of such provisions, by charging, demanding or receiving any rate greater than that fixed by such section, shall be guilty of a misdemeanor, and on conviction shall be fined not less than five hundred dollars nor more than five thousand dollars; and any agent, servant or employee of any railroad company who shall violate either of the two preceding sections shall be guilty of a misdemeanor, and on conviction shall be fined or imprisoned, or both, in the discretion of the court.

Ex. Sess. 1908, c. 144, s. 3.

See s. 3519 of this chapter for a similar provision relative to excessive freight rates.

For decision under act of 1907, c. 216, see *State v. R. R.*, 145-495.

3492. Accepting or giving free transportation illegally misdemeanor. Any persons, except those permitted by law, who accept free transportation shall be guilty of a misdemeanor, and on conviction shall be fined or imprisoned, or both, in the discretion of the court; and any railroad, or its employees or agents, giving free transportation of any kind whatsoever, except that permitted by law,

shall be guilty of a misdemeanor, and on conviction shall be fined not less than five hundred dollars nor more than two thousand dollars for each offense.

Ex. Sess. 1908, c. 144, s. 4.

For cases prior to enactment of this section, see *State v. R. R.*, 122-1052; *McNeill v. R. R.*, 135-682, 132-510.

3493. Powers of corporation commission over rates limited. The corporation commission shall have no power to change, alter, modify or in any way affect the enforcement or operation of any of the provisions of the preceding sections of this article, except as the same shall be therein specifically authorized, or the enforcement of any penalties for violating the provisions thereof.

Ex. Sess. 1908, c. 144, s. 7.

3494. Separate accommodations for different races. All railroad and steamboat companies engaged as common carriers in the transportation of passengers for hire, other than street railways, shall provide separate but equal accommodations for the white and colored races at passenger stations or waiting-rooms, and also on all trains and steamboats carrying passengers. Such accommodations may be furnished by railroad companies either by separate passenger cars or by compartments in passenger cars, which shall be provided by the railroads under the supervision and direction of the corporation commission: Provided, that this shall not apply to relief trains in cases of accident, to Pullman or sleeping cars, or through express trains that do not stop at all stations and are not used ordinarily for traveling from station to station, to negro servants in attendance on their employers, to officers or guards transporting prisoners, nor to prisoners so transported.

Rev., s. 2619; 1899, c. 384; 1901, c. 213.

Right of railroad company to assign white and colored passengers to separate, though not unequal, accommodations is recognized by courts: *Britton v. R. R.*, 88-536. Company cannot relieve itself of responsibility for injuries received by passenger where it was shown that such rules were not enforced, but their observance left discretionary with passenger: *Ibid.*

It is not a violation of this section, if separate cars are furnished, but conductor directs some white passengers to go into colored car: *Merritt v. R. R.*, 152-281. Section does not apply in case of officer in charge of a prisoner: *Huff v. R. R.*, 171-203.

Liability for failure to provide comfortable waiting-room and separate rooms for the races: *Hipps v. R. R.*, 177-472.

3495. Certain carriers may be exempted from requirement. The corporation commission is hereby authorized to exempt from the provisions of the preceding section steamboats, branch lines and narrow-gauge railroads and mixed trains carrying both freight and passengers, if in its judgment the enforcement of the same be unnecessary to secure the comfort of passengers by reason of the light volume of passenger traffic, or the small number of colored passenger travelers on such steamboats, narrow-gauge railroads, branch lines or mixed trains.

Rev., s. 2620; 1899, c. 384, s. 2; 1901, c. 213.

3496. Use of same coach in emergencies. When any coach or compartment car for either race shall be completely filled at a station where no extra coach or car can be had, and the increased number of passengers could not be foreseen, the conductor in charge of such train may assign and set apart a portion of a car or compartment assigned for passengers of one race to passengers of the other race.

Rev., s. 2621; 1899, c. 384, s. 3.

3497. **Penalty for failing to provide separate coaches.** Any railroad or steamboat company failing to comply in good faith with the provisions of the three preceding sections shall be liable to a penalty of one hundred dollars per day, to be recovered in an action brought against such company by any passenger on any train or boat of any railroad or steamboat company which is required by this chapter to furnish separate accommodations to the races, who has been furnished accommodations on such railroad train or steamboat only in a car or compartment with a person of a different race in violation of law.

Rev., s. 2622; 1899, c. 384, s. 5.

Railroad is not liable to penalty where separate cars are furnished, but conductor directs some white passengers to go into colored car; *Merritt v. R. R.*, 152-281.

3498. **Facilities for exchange of mileage required.** All railroad companies of one hundred miles or more in length doing business in whole or in part in the state of North Carolina are hereby required to provide and keep at all depots in cities or towns of two thousand and over in population, as fixed by the United States census of the year one thousand nine hundred and ten, two windows opening in the waiting-room for passengers of the race using the greatest amount of mileage or coupon books, for the sale or exchange of fares on all passenger trains in North Carolina. One of such windows shall be used for the sale of cash fares exclusively, and the other for the sale and exchange of mileage or coupon books. Each window is to be attended by an agent whose duty it shall be to wait upon the traveling public, during the hours now prescribed, for the sale of cash-fare tickets and the sale and exchange of mileage or coupon books. Over each such window shall be kept a sign, painted in plain letters, "Mileage Exchange" and "Cash Fares," respectively: Provided, that the provisions of this section shall not apply to any railroad company in North Carolina, as aforesaid, selling mileage or coupon books at a rate of not more than two cents per mile and pulling or taking the same on the train: Provided further, that all the provisions of this section shall apply to the following railroad junctions in this state, irrespective of population, namely: Dunn, Selma, Maxton, Hamlet, Norlina, and Sanford.

1911, c. 41, s. 1.

The railroad must furnish reasonable opportunity for holder of mileage book to make exchange for ticket: *Harvey v. R. R.*, 153-567; *Dorsett v. R. R.*, 156-439; *Mason v. R. R.*, 159-183; *McNairy v. R. R.*, 172-505.

3499. **Application of requirement for exchange of mileage.** The corporation commission shall upon complaint, and in its discretion, apply the provisions of the preceding section to railroad junctions not named in the second proviso of that section and to depots in cities and towns of less than two thousand population. The commission may in like manner exempt, in its discretion, depots in cities and towns of over two thousand population from the operation of that section. When the requirements of the preceding section are so applied by the commission, then all of the provisions of this article having to do with the sale and use of mileage-books shall extend to and include all railroad companies thereby affected, and such companies shall be subject to all of the penalties prescribed for a failure to comply with such provisions.

1911, c. 41, s. 2.

3500. Penalty for failure to provide mileage-exchange facilities. Any railroad company failing to comply in good faith with the provisions of the two preceding sections shall be liable to a penalty of fifty dollars per day for each city or town where such failure occurs that is covered by the provisions of those sections, or taken in by the corporation commission as therein provided, to be recovered by any passenger demanding cash-fare or mileage tickets at any depot in any such city or town in an action brought by such passenger.

1911, c. 41, s. 3.

3501. Right to check baggage on mileage books. Any legal holder of a mileage book shall be privileged to have his baggage checked before the exchange of mileage for a ticket entitling such holder to transportation upon the surrender of the baggage slip forming a part of such mileage-book for the requisite number of miles and the payment of all proper excess-baggage charges.

1911, c. 41, s. 4.

3502. Corporation commission may regulate the checking of baggage on mileage tickets. The corporation commission is hereby empowered and directed to take into consideration the provisions of the preceding section and promulgate such rules and regulations, with regard to checking baggage on mileage tickets, as, in the opinion of the commission, shall be necessary and proper to safeguard and protect both the convenience of passengers and the rights of railroad companies; and such rules and regulations of the commission, when so promulgated, shall have the same force and effect as if they were a part of such section.

1911, c. 124, s. 1.

3503. Unused tickets to be redeemed. When any round-trip ticket is sold by a railroad or other transportation company, it shall be the duty of such company to redeem the unused portion of said ticket by allowing to the holder thereof the difference between the cost thereof and the price of a one-way ticket between the stations for which such round-trip ticket was sold. Whenever any one-way or regular ticket is sold by a railroad or other transportation company, and not used by the purchaser, it shall be the duty of the company selling the ticket to redeem it at the price paid for it. All railroad and other transportation companies shall redeem in money all mileage tickets known as five-hundred, thousand and two-thousand mile tickets, sold by them, if presented within a year from the date of the sale, when as much as fifty per centum of such ticket has been used by the purchaser, by paying the same price per mile paid for it, or shall allow the original holder to ride it out.

Rev., s. 2627; 1891, c. 290; 1893, c. 249; 1895, c. 83, ss. 2, 3; 1897, c. 418.

3504. Ticket may be refused intoxicated person; prohibited entry misdemeanor. The ticket agent of any railroad, steamboat or other transportation company shall at all times have power to refuse to sell a ticket to any person applying for the same who may at the time be intoxicated. The conductor, captain or other person in charge of any railroad car, steamboat or other conveyance for the use of the traveling public shall at all times have power to prevent any intoxicated person from entering such car, boat or other conveyance. If any intoxicated person, after being forbidden by the conductor, captain or other per-

son having charge of any such railroad train, steamboat or other conveyance for the use of the traveling public, shall enter such train, boat or other conveyance, he shall be guilty of a misdemeanor.

Rev., ss. 2625, 2626, 3757; 1885, c. 358, ss. 1, 2, 3.

Refusal to allow person with ticket to board train because he was intoxicated subjects railroad company to exemplary damages, if such refusal was made with malice, undue force, or insult: *Story v. R. R.*, 133-59.

3505. Entering cars after being forbidden misdemeanor. No person shall enter any railroad passenger car, baggage car, mail car or caboose car, or go upon the platform of such cars, after being forbidden so to do by the conductor, his assistants, the baggage-master or other person in charge of such cars, unless the person enter such cars or go upon such platforms as a passenger or in some official capacity authorized by law, or on business with a passenger or some official or employee of the railroad, or for some other like purpose. Any person violating this section shall be guilty of a misdemeanor and shall be fined not exceeding ten dollars.

Rev., s. 3752; Code, s. 1979; 1883, c. 351.

3506. Riding in first-class cabin with second-class ticket misdemeanor. If any passenger purchasing or holding a second-class ticket, after being requested or directed by any captain or other officer in charge of any steamboat in this state, riding in any first-class cabin, refuses to pay the difference between a first-class and a second-class fare or rate, or refuses to go into the second-class cabin, when there shall be a comfortable second-class cabin on such steamboat, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any justice of the peace in the county where such offense is committed shall have jurisdiction of the offense, upon sworn complaint of any officer of such steamboat company.

Rev., s. 3761; 1903, c. 795.

3507. Passenger refusing to pay fare and violating rules may be ejected. If any passenger shall refuse to pay his fare, or violate the rules of a railroad corporation, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place or near any dwelling-house, as the conductor shall elect, on stopping the train.

Rev., s. 2629; Code, s. 1962; 1871-2, c. 138, s. 34.

Regulation of carrier is reasonable which requires passengers to procure tickets before entering car, and where this requirement is duly made known and reasonable opportunities are afforded for complying with it, it may be enforced either by expulsion from train or by requiring payment of higher rate than ticket fare: *Ammons v. R. R.*, 138-555; *Herbst v. Power Co.*, 161-457.

If, without having afforded reasonable opportunity to passenger to provide himself with ticket, carrier should eject him upon his refusal to pay additional charge for carriage without ticket, when he is ready and offers to pay his fare at ticket rate, his expulsion will be illegal, and he may recover damages for trespass, and his right of recovery cannot be made to depend upon conductor's knowledge or ignorance of fact that agent had no tickets for sale: *Ammons v. R. R.*, 138-555—and he may recover punitive damages if his expulsion is attended with circumstances of rudeness, insult, or such treatment as tends to humiliate him; *Ibid.*; *Tomlinson v. R. R.*, 107-327; *Allen v. R. R.*, 119-710; *McNairy v. R. R.*, 172-505.

Conductor of railroad train is authorized to expel without using unnecessary force one who refuses to pay regular fare, provided that ejected person is not wilfully and wantonly exposed to danger of life and limb: *Roseman v. R. R.*, 112-709—and carrier is not liable if the person ejected was intoxicated and conductor had reasonable ground to believe he could take care of himself, *Ibid.*

One who boarded a train, and upon offering ticket to station at which train was not scheduled to stop and refusing to pay fare to next station at which train would stop, was ejected from train, cannot recover punitive damages where ejection was done without insolence or undue force: *Allen v. R. R.*, 119-710.

The purchaser of a ticket has a right to rely upon the statement of the railroad agent as to trains, connections, etc., and if agent is mistaken and the passenger is ejected, the railroad is liable: *Creech v. R. R.*, 174-61; *Hallman v. R. R.*, 169-127; *Norman v. R. R.*, 161-330; *Mace v. R. R.*, 151-404; *Bullock v. R. R.*, 152-66.

A mileage book is a contract and the holder must comply with the terms, if reasonable opportunity is given, or he may be ejected: *McNairy v. R. R.*, 172-505; *Mason v. R. R.*, 159-183; *Dorsett v. R. R.*, 156-439; *Harvey v. R. R.*, 153-567.

Where conductor failed to return ticket to passenger to be used on another train, and the passenger was ejected for want of ticket, the railroad is liable: *Sawyer v. R. R.*, 171-13.

Where a person who has paid his fare is on a train with a child whose fare is not paid, conductor cannot put such person off with the child without returning ticket or compensation for unused part: *Lankford v. R. R.*, 165-653.

Where plaintiff shipped horses by express, with agreement that he should ride in same car, he cannot ride in passenger coach without paying his fare: *Teeter v. Express Co.*, 172-616—person riding in a baggage car, with a ticket which he has not presented, may be ejected, *McGraw v. R. R.*, 135-264.

Where a person who has ridden some distance without a ticket gets off at a regular station and purchases a ticket, it seems that conductor cannot accept ticket and then put him off for failure to pay for the distance traveled: *Mott v. R. R.*, 164-367; *Pickens v. R. R.*, 104-312.

Conductor may refuse to accept fare after he has been put to trouble of stopping train for failure to pay: *Pickens v. R. R.*, 104-312—and passenger is not required to pay the fare wrongfully demanded in order to avoid being ejected, *Sawyer v. R. R.*, 171-13; *McNairy v. R. R.*, 172-505; *Harvey v. R. R.*, 153-567.

Railroad is liable if conductor ejects a person from train in an improper manner, even when fare is not paid: *Lee v. R. R.*, 176-95—or if he puts him off at an improper place, not at a regular station or near a dwelling-house, *Mott v. R. R.*, 164-367; *Bullock v. R. R.*, 152-66.

3508. Beating way on trains misdemeanor; venue. If any person, other than a railroad employee in the discharge of his duty, without authority from the conductor of the train or by permission of the engineer, and with the intention of being transported free and without paying the usual fare for such transportation, rides or attempts to ride on top of any car, coach, engine or tender, on any railroad in this state, or on the draw-heads between cars, or under cars, on truss rods, or trucks, or in any freight car, or on a platform of any baggage car, express car or mail car on any train, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars or imprisoned not more than thirty days. Any person charged with a violation of this section may be tried in any county in this state through which such train may pass carrying such person, or in any county in which such violation may have occurred or may be discovered.

Rev., s. 3748; 1899, c. 625; 1905, c. 32.

3509. Injury while on platform or in other prohibited places. In case any passenger on any railroad shall be injured while on the platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside its passenger cars

then in the train, such company shall not be liable for the injury: Provided, such company at the time furnish room inside its passenger cars sufficient for the proper accommodation of its passengers.

Rev., s. 2628; Code, s. 1978; 1871-2, c. 138, s. 42.

By virtue of this section, a rule of railroad company prohibiting passengers from going on platform while train in motion is given, when statute complied with, the force and effect of law of state: *Shaw v. R. R.*, 143-312. That plaintiff was on the platform of the car will not prevent a recovery unless that was the proximate cause of the injury: *Kearney v. R. R.*, 158-522; *Bane v. R. R.*, 176-247. See, also, *Wagner v. R. R.*, 147-315; *Smith v. R. R.*, 147-448.

3510. Checking baggage; liability for loss. A check shall be affixed to every parcel of baggage when taken for transportation by the agent or servant of any railroad corporation, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to the passenger or person delivering the same on his behalf; and if such check be refused on demand, the corporation shall pay to such passenger the sum of ten dollars, to be recovered in a civil action; and further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare the same shall be refunded by the conductor in charge of the train, and on producing the check, if his baggage shall not be delivered to him, he may, by an action, recover the value of such trunk or baggage.

Rev., s. 2623; Code, s. 1970; 1871-2, c. 138, s. 36.

See section 3523.

3511. Cars and toilets to be kept clean. Every person or railroad company, whether incorporated or not, engaged in the regular business of carrying passengers on his or its railroad cars in this state, shall have such cars cleaned, brushed, dusted and the windows washed, if needed, at least once each day, and shall in each car, in which male and female passengers are carried, have therein a toilet-room for each sex, and have the same kept clean and decent. Any person or corporation engaged in the business aforesaid who shall willfully or negligently fail or refuse to give orders to his or its agent in charge of such cars to comply with the requirements of this section, shall forfeit twenty dollars for each day of such failure or refusal, to be recovered by any person suing therefor.

1907, c. 474, ss. 1, 2.

3512. Evidence of failure to order cleaning of cars; violation of orders misdemeanor. The willful or negligent refusal or the failure on the part of the conductor or manager of any passenger car named in the preceding section to comply with such section shall be received as evidence of failure or refusal of such person or railroad company to give the orders therein provided for. Moreover, such conductor or manager shall be guilty of a misdemeanor if he fail or refuse to carry out such orders of the persons or company mentioned in the preceding section.

1907, c. 474, s. 3.

ART. 11. CARRIAGE OF FREIGHT

3513. Freight rates to be posted. It shall be the duty of every railroad or other transportation company to keep posted in a conspicuous place in its

depots or other places where freight is received for shipment a list of its charges for carrying freight, specifying name of place, class of freight and charge for carrying the same. Such charges shall not be increased without giving fifteen days notice. Any company represented by an agent who refuses to comply with this section shall be liable to a penalty of not less than fifty nor more than one hundred dollars.

Rev., s. 2630; Code, s. 1965; 1879, c. 182, s. 2.

See chapter Corporation Commission, s. 1074, where provision is made for the publication by the corporation commission of both freight and passenger rates.

Publication and posting of rates under interstate act, and effect of charging more than published rate: *Hardware Co. v. R. R.*, 170-395; *Peanut Co. v. R. R.*, 166-62. Railroad is entitled to rate fixed for freight, notwithstanding any agreement for a different rate: *R. R. v. Latham*, 176-417.

3514. No charge in excess of printed tariffs; refunding overcharge; penalty. No railroad, steamboat, express or other transportation company engaged in the carriage of freight and no telegraph company or telephone company shall demand, collect or receive for any service rendered or to be rendered in the transportation of property or transmission of messages more than the rates appearing in the printed tariff of such company in force at the time such service is rendered, or more than is allowed by law. In case of any overcharge, contrary to the provisions of this section, the person aggrieved may file with any agent of the company collecting or receiving greater compensation than the amount allowed a written demand, supported by a paid freight bill and an original bill of lading or duplicate thereof for refund of overcharge, and a maximum period of sixty days shall be allowed such company to pay claims filed under this section. Any company failing to refund such overcharge within the time allowed shall forfeit to the party aggrieved the sum of twenty-five dollars for the first day and five dollars per day for each day's delay thereafter until said overcharge is paid, together with all costs incurred by the party aggrieved: Provided, the total forfeiture shall not exceed one hundred dollars.

Rev., ss. 2642, 2643, 2644; 1903, c. 590, ss. 1, 2.

OVERCHARGE. Legislature has power to impose regulations upon public-service corporations, and this section applies to all persons or corporations engaged in transportation of freight as common carriers: *Efland v. R. R.*, 146-135. Presumption is that common carriers obey the law, and make and observe the lists of charges thus required to be made, while they continue current and unchanged: *Freight Discrimination Cases*, 95-434.

Carrying freight to different destination without direction of owner does not entitle the carrier to additional charge: *Hall v. R. R.*, 173-108. The railroad is required to collect the fixed rate, and consignee cannot avoid payment by refusing to take goods: *R. R. v. Iron Works*, 172-188. Collecting full charge upon "short" delivery is an overcharge: *Cottrell v. R. R.*, 141-383.

DEMAND FOR REFUND. This section does not apply to interstate commerce: *Hardware Co. v. R. R.*, 170-395.

What is a sufficient demand: *Tilley v. R. R.*, 172-363; *Efland v. R. R.*, 146-129.

PENALTY. This section is constitutional: *Iron Works v. R. R.*, 148-469; *Morris v. Express Co.*, 146-167—and it must be strictly construed, *Cox v. R. R.*, 148-459.

This is a valid regulation, and not an interference with interstate commerce: *Hardware Co. v. R. R.*, 170-395; *Supply Co. v. R. R.*, 166-82; *Thurston v. R. R.*, 165-598.

Consignee, having paid the freight, is proper party to sue for penalty: *Tilley v. R. R.*, 172-363. The amount of recovery on claim for damages does not affect liability for penalty, since this is given to enforce performance of carrier's duty: *Tilley v. R. R.*, 172-363; *Supply Co.*

v. R. R., 166-82; *Efand v. R. R.*, 146-129, 135. Action lies after payment to recover the overcharge: *Mfg. Co. v. R. R.*, 106-207.

Evidence to prove overcharge: *Scull v. R. R.*, 144-180; *Pump Co. v. R. R.*, 138-300. Liability of connecting lines: *Mfg. Co. v. R. R.*, 106-207; *Pump Co. v. R. R.*, 138-300.

3515. Penalty for failure to receive and forward freight tendered. Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a sidetrack, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day such company refuses to receive such shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment.

Rev., s. 2631; Code, s. 1964; 1903, cc. 444, 693.

TENDER AND REFUSAL. What is a sufficient tender to give rise to penalty: *Olive v. R. R.*, 152-279; *Cotton Mills v. R. R.*, 150-608; *Garrison v. R. R.*, 150-575; *Cox v. R. R.*, 148-459. There must be a tender, actual or constructive, on each day, and each day's refusal is a separate offense: *Bane v. R. R.*, 171-328; *Lumber Co. v. R. R.*, 152-70; *Carter v. R. R.*, 126-437; *Currie v. R. R.*, 135-535.

Words "whenever tendered" can only be qualified by supplying the ellipsis, "within the usual hours adopted by the public for the transaction of such business at the place where tender is made": *Alsop v. Express Co.*, 104-278—and it does not depend upon a private regulation of the carrier, *Ibid.* The goods must be in a condition for shipment, and a railroad is not liable for failure to accept and transport unbaled hay: *Tilley v. R. R.*, 162-37.

When goods are delivered to carrier for shipment, presumption is that they are received for shipment and not for storage, and burden is upon company to show that it received goods as a warehouseman and not as carrier: *Berry v. R. R.*, 122-1002.

Failure to issue a bill of lading is a refusal to receive the goods: *Tilley v. R. R.*, 162-37; *Twitty v. R. R.*, 141-355.

The terms "a regular depot" or "station," in this section, contemplate fixed and established places on line of railroad or other transportation company equipped with suitable buildings and furnished with necessary officers and servants for the regular transaction of business, for the receipt and delivery of freights, and the comfort and convenience of passengers: *Land v. R. R.*, 104-48. Stopping for mails or passengers, but not at regular station and not having an agent's office or regular agent in charge, would not constitute the place a regular depot or station: *Ibid.*; *Kellogg v. R. R.*, 100-158.

LIABILITY FOR PENALTY. Being a penalty statute, it must be strictly construed: *Cox v. R. R.*, 148-459.

In an action for damages caused by delay in shipment of goods it is immaterial whether action is brought in assumpsit, upon breach of contract, or in case for violation of a common-law duty, or on a tort based on a contract: *Parker v. R. R.*, 131-335.

When article refused to be received and forwarded as freight is cattle, a separate penalty of \$50 for each head may be recovered, and if the aggregate of penalties exceeds \$200, superior court has jurisdiction: *Carter v. R. R.*, 126-437. Each day's delay is a separate offense: *Bane v. R. R.*, 171-328; *Lumber Co. v. R. R.*, 152-70; *Currie v. R. R.*, 135-535.

The shipper or owner is the party aggrieved and entitled to sue for the penalty: *Lumber Co. v. R. R.*, 152-70; *McRaekan v. R. R.*, 150-331; *Reid v. R. R.*, 149-423. The defendant may set up as a defense that unavoidable conditions prevented transportation: *Hardware Co. v. R. R.*, 150-703; *Garrison v. R. R.*, 150-575—but an embargo against consignee will not be a defense, *Ibid.*; *Cotton Mills v. R. R.*, 150-612.

In *Reid v. R. R.*, 149-423, and s. c., 153-490, citing numerous cases, it was held that this was not an interference with interstate commerce, and that penalty applied to an interstate shipment. This was reversed in same case in 222 U. S., 424.

3516. Penalty for failure to transport within reasonable time. It shall be unlawful for any railroad company, steamboat company, express company or other transportation company doing business in this state to omit or neglect to transport within a reasonable time any goods, merchandise or other articles of value received by it for shipment and billed to or from any place in the state of North Carolina, unless otherwise agreed upon between the company and the shipper, or unless the same be burned, stolen or otherwise destroyed, or unless otherwise provided by the North Carolina corporation commission

Any company violating any of the provisions of this section shall forfeit to the party aggrieved the sum of fifteen dollars for the first day and two dollars for each succeeding day of such unlawful detention or neglect where such shipment is made in carload lots, and in less quantities there shall be a forfeiture in like manner of ten dollars for the first day and one dollar for each succeeding day, but the forfeiture shall not be collected for a period exceeding thirty days.

In reckoning what is a reasonable time for such transportation, it shall be considered that such transportation company has transported freight within a reasonable time if it has done so in the ordinary time required for transporting such articles of freight between the receiving and shipping stations. A delay of two days at the initial point and forty-eight hours at one intermediate point for each hundred miles of distance or fraction thereof over which such freight is to be transported shall not be charged against the transportation company as unreasonable and shall be held to be prima facie reasonable, and a failure to transport within such time shall be held prima facie unreasonable. This section shall be construed to refer not only to delay in starting the freight from the station where it is received, but to require the delivery at its destination within the time specified: Provided, that if such delay shall be due to causes which could not in the exercise of ordinary care have been foreseen, and which were unavoidable, then upon the establishment of these facts to the satisfaction of the justice of the peace or jury trying the cause, the defendant transportation company shall be relieved from any penalty for delay in the transportation of freight, but it shall not be relieved from the costs of such action. In all actions to recover penalties against a transportation company under this section, the burden of proof shall be upon the transportation company to show where the delay, if any, occurred.

Rev., s. 2632; 1903, c. 590, s. 3; 1905, c. 545; 1907, cc. 217, 461.

History and purpose of statutes prescribing penalties for delay in transporting freight: *Grocery Co. v. R. R.*, 136-398. Statute constitutional and valid: *Owens v. Hines*, 178-325; *Wall v. R. R.*, 147-407; *Davis v. R. R.*, 147-68; *Rollins v. R. R.*, 146-153; *Cardwell v. R. R.*, 146-218; *Grocery Co. v. R. R.*, 136-396; *Walker v. R. R.*, 137-163; *Katzenstein v. R. R.*, 84-688; *Branch v. R. R.*, 77-347. Penalty imposed is solely to enforce a common-law and admitted duty, and is within legislative authority: *Stone v. R. R.*, 144-220. Penalty statutes must be strictly construed: *Alexander v. R. R.*, 144-93; *Cox v. R. R.*, 148-459. This section is declaratory of the common law, and does not exclude any defense as to delay in transportation that could properly be made thereunder: *Stone v. R. R.*, 144-220. Rigid rule of common law relative to liability of common carriers should not be applied to a case involving violation of a penal statute: *Whitehead v. R. R.*, 87-256. Rule of law that common carriers are bound as insurers does not extend to time of delivery: *Boner v. Steamboat Co.*, 46-211.

Bill of lading is prima facie evidence of receipt of shipment, but not when entire shipment is under control of shipper: *Peele v. R. R.*, 149-390—clause in bill of lading for shipment “at

convenience of company'' will not excuse delay, *Branch v. R. R.*, 88-573—a mismarking three packages is not excuse for failing to ship a fourth, *Grocery Co. v. R. R.*, 136-396. Goods must be offered for shipment within a reasonable time: *Shaw v. Express Co.*, 171-216.

Cases before adoption of section or amendments thereto: *Walker v. R. R.*, 137-163; *McGowan v. R. R.*, 95-417; *Katzenstein v. R. R.*, 84-688.

DUTY OF CARRIER AS TO SHIPMENT OF FREIGHT. It is duty of common carrier to provide sufficient means of transportation for all freight and passengers which its business naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of obligation if, by use of reasonable foresight, it could have been provided for: *Purcell v. R. R.*, 108-414; *Keeter v. R. R.*, 86-346; *Branch v. R. R.*, 77-347.

The only duty assumed by a carrier of freight under a bill of lading is to transport articles to destination within a reasonable time if on its own line, and if not, to transport and deliver to next connecting carrier: *Watson v. R. R.*, 145-236; *McGowan v. R. R.*, 95-417.

The carrier's liability ceases when the goods arrive at their destination, notice is given to consignee, and a reasonable time for delivery; then the liability is that of warehouseman: *Wall v. R. R.*, 147-407; *Poythress v. R. R.*, 148-391; *Bank v. R. R.*, 153-346—but delivery must be at a place reasonably accessible, *Mfg. Co. v. R. R.*, 152-665.

ACTION FOR DELAY. An action for the penalty may be joined with an action for lost shipment: *Robertson v. R. R.*, 148-323. Action for penalty is *ex contractu*: *Katzenstein v. R. R.*, 84-688; *Doughty v. R. R.*, 78-22—in shipment of cattle, each animal involves a separate penalty, *Carter v. R. R.*, 129-213.

The complaint should state the facts giving rise to the penalty: *Stone v. R. R.*, 144-220. The questions of delay and amount of recovery are for the jury upon proper issues submitted: *Ice Co. v. R. R.*, 147-61, 66; *Hamrick v. R. R.*, 146-185; *Jenkins v. R. R.*, 146-178; *Wall v. R. R.*, 147-407; *Alexander v. R. R.*, 144-93. Practice in justice's court in case of penalty against foreign corporation: *Allen-Fleming Co. v. R. R.*, 145-37.

PARTY AGGRIEVED. This section allowing party aggrieved to recover a penalty for unreasonable delay in the transportation of goods is constitutional as a valid exercise of police power: *Rollins v. R. R.*, 146-153; *Cardwell v. R. R.*, 146-218.

Action should be brought in the name of the party aggrieved, and not in the name of the state: *Robertson v. R. R.*, 148-323. The party aggrieved is one whose legal right is denied, and the penalty is enforceable independent of pecuniary injury: *Summers v. R. R.*, 138-295.

In an ordinary delivery of goods to the carrier upon an open bill of lading it is considered a delivery to the consignee, and he is the only party to sue: *Buggy Co. v. R. R.*, 152-119; *Gaskins v. R. R.*, 151-18; *Stone v. R. R.*, 144-220; *Hunter v. Randolph*, 128-91. But when the bill is in the name of the consignor, or other circumstances show that he retained control over the property, he is the proper party to sue: *Trading Co. v. R. R.*, 178-175; *Aydlett v. R. R.*, 172-47; *Withrow v. R. R.*, 159-222; *Elliott v. R. R.*, 155-235; *Mfg. Co. v. R. R.*, 149-261; *Robertson v. R. R.*, 148-323; *Davis v. R. R.*, 147-68; *Cardwell v. R. R.*, 146-218; *Rollins v. R. R.*, 146-153; *Summers v. R. R.*, 138-295.

BURDEN OF PROOF. One suing a carrier for the penalty imposed has the burden of proving the issue of failure to transport within the ordinary time required: *Jenkins v. R. R.*, 146-178; *Hamrick v. R. R.*, 146-185; *Watson v. R. R.*, 145-236; *Alexander v. R. R.*, 144-93.

Burden of proof is upon defendant to show reasonableness in delays beyond ordinary or reasonable time prescribed: *Stone v. R. R.*, 144-220—or an agreement excusing delay, *Whitehead v. R. R.*, 87-256—or when shipped "subject to delay," the exercise of reasonable diligence to avoid delay, *Parker v. R. R.*, 133-335—or that goods were destroyed without carrier's fault, *Robertson v. R. R.*, 148-323.

Burden of proof in case of connecting carriers: *Watson v. R. R.*, 145-236; *Furn. Co. v. Express Co.*, 144-639.

"ORDINARY" AND "REASONABLE" TIME. This section simply changes the rule of evidence as to proof of "reasonable time": *Stone v. R. R.*, 144-220. The words "ordinary time" mean the regular customary time within which, by the facilities in general use for the performance of the duty of carrying goods, the carriage should be completed: *Jenkins v. R. R.*, 146-178. This section makes failure to transport within ordinary time *prima facie* unreasonable, and where transportation is not within ordinary time, carrier is liable for the penalty imposed, less two days at the initial point and forty-eight hours at one intermediate point for each one hundred miles; but the two days at the initial point and forty-eight hours

at each intermediate point are not the standards by which reasonable time is measured: *Jenkins v. R. R.*, 146-178.

The question of ordinary time and of reasonable time is for the jury, to be determined from the circumstances presented: *Wall v. R. R.*, 147-407; *Alexander v. R. R.*, 144-93; *Robertson v. R. R.*, 148-323; *Rollins v. R. R.*, 146-153. Fourteen days to transport goods 277 miles, unreasonable: *Meredith v. R. R.*, 137-478—21 days for 58 miles, *Watson v. R. R.*, 145-236—12 days for 25 miles, *Rollins v. R. R.*, 146-153—14 days from Erie, Pa., to Lenoir, N. C., *Furn. Co. v. Express Co.*, 144-639. Where delay is at initial point, the question of ordinary time for transportation is immaterial: *Rollins v. R. R.*, 146-153.

“Five days” means five full running days exclusive of the day of delivery and the day of shipment: *Branch v. R. R.*, 88-571 (number of days changed by amendment).

“INTERMEDIATE POINTS.” This section does not authorize carrier to hold freight at each intermediate point the extreme limit, without any necessity for detaining it at all: *Meredith v. R. R.*, 137-478.

The 48 hours allowance to a carrier for delay at intermediate points is for change of cars if necessary, and for unloading and reloading: *Watson v. R. R.*, 145-236.

A station of defendant's railroad which was terminus of two other railroads was not an intermediate point with reference to freight not transferred to the other lines, but shipped through on defendant's line to points beyond: *Davis & Hooks v. R. R.*, 145-207.

Right of railroad to time allowed when not taken for purposes specified, discussed by Clark, C. J., in *Davis v. R. R.*, 145-207; *Watson v. R. R.*, 145-236. In less than carload shipments, point of transfer from one car to another is an “intermediate point”: *Collection Agency v. R. R.*, 147-593.

A point at which a car is transferred from main line of defendant's system to a branch line is an “intermediate point”: *Wall v. R. R.*, 147-407.

SUNDAY NOT EXCLUDED. Sundays and holidays are not excluded in ascertaining the number of days delay: *Wall v. R. R.*, 147-407.

Where one of the two days next after the delivery of freight to a carrier for transportation was Sunday, such day was properly deducted in ascertaining whether the freight was transported within a reasonable time, not as Sunday, but as one of the two initial days of nonaction which carrier was entitled to before it was required to begin transportation: *Collection Agency v. R. R.*, 147-593; *Davis & Hooks v. R. R.*, 145-207; *Watson v. R. R.*, 145-236; *Keeter v. R. R.*, 86-346.

INTRASTATE SHIPMENTS. This section applies only to intrastate shipments: *Bivens v. R. R.*, 176-414; *Marble Co. v. R. R.*, 147-53. What is an intrastate shipment as between two points within the state: *Ibid.*; *Ice Co. v. R. R.*, 147-61; *Hockfield v. R. R.*, 150-419. See, also, *Bagg v. R. R.*, 109-279.

In a shipment from one point in the state to another point in the state, through an adjoining state, the company is liable for loss through negligence, but not for the penalty: *Bivens v. R. R.*, 176-414. A contract limiting the carrier's liability for negligence would not be valid under the *Cummins* amendment: *Ibid.*

POWER OF CORPORATION COMMISSION. This section gives the commission right to fix time allowed as free time for intermediate points and to make reasonable regulations as to time of transit: *Summers v. R. R.*, 138-295. Corporation commission has no power to change time allowed as free time at point of shipment, nor to alter penalties fixed by this section: *Ibid.*

3517. Flume companies exercising right of eminent domain become common carriers. All flume companies availing themselves of the right of eminent domain under the provisions of the chapter Eminent Domain shall become public carriers of freight, for the purposes for which they are adapted, and shall be under the direction, control and supervision of the corporation commission in the same manner and for the same purposes as is by law provided for other public carriers of freight.

1907, c. 39, s. 4.

The provisions of this section are applicable in Duplin county to standard-gauge and narrow-gauge roads, logging or otherwise, more than five miles in length, in operation for five years prior to March 8, 1911. See 1911, c. 214.

3518. Freight charges to be at legal rates; penalty for failure to deliver to consignee on tender of same. All common carriers doing business in this state shall settle their freight charges according to the rate stipulated in the bill of lading, provided the rate therein stipulated be in conformity with the classifications and rates made and filed with the interstate commerce commission in case of shipments from without the state and with those of the corporation commission of this state in case of shipments wholly within this state, by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carriers to inform any consignee of the correct amount due for freight according to such classification and rates. Upon payment or tender of the amount due on any shipment which has arrived at its destination according to such classification and rates, such common carrier shall deliver the freight in question to the consignee. Any failure or refusal to comply with the provisions hereof shall subject such carrier so failing or refusing to a penalty of fifty dollars for each such failure or refusal, to be recovered by any consignee aggrieved by any suit in any court of competent jurisdiction.

Rev., s. 2633; 1905. c. 330.

Section is constitutional: *Iron Works v. R. R.*, 148-469; *Harrill v. R. R.*, 144-532—and it must be strictly construed, *Cox v. R. R.*, 148-459. Common carrier may demand prepayment of freight charges before shipment to any station, and from one shipper, though not required of others: *Randall v. R. R.*, 108-612; *Allen v. R. R.*, 100-397.

Where railroad corporation chartered by another state leases railroad chartered by this state, it is bound to observe and obey all laws of this state regulating business of transportation: *Freight Discrimination Cases*, 95-434.

Section imposes only one penalty for refusal of railroad company to deliver freight upon demand and tender of charges, and it is not cumulative upon more than one demand for same offense: *Harrill v. R. R.*, 144-532.

It is no defense for defendant company to show its agent did not know correct amount of the charges because of failure to file its schedule of rates, under requirement of interstate commerce act, or that bill of lading showing such charges had not been received with goods at their destination, in usual course of its business: *Harrill v. R. R.*, 144-532.

When plaintiff ordered one car, and company furnished two or more smaller cars, the rate must be same for shipment: *Furniture Co. v. R. R.*, 162-138. Carrier is liable for loss caused by failure to furnish suitable car: *Forrester v. R. R.*, 147-553.

BILL OF LADING. Bill of lading is both a contract and receipt; as a contract to carry and deliver goods upon terms and conditions specified in instrument, it cannot be explained by parol testimony so as to alter its legal effect, in absence of fraud or mistake, but as a receipt or acknowledgment of quantity, character or condition of articles, it may be explained, varied or contradicted like any other receipt: *Mfg. Co. v. R. R.*, 121-514.

Bill of lading only determines conditions upon which freight is to be transported after it passes under its control, and it does not abrogate or annul any contract made by common carrier before it was issued in regard to receiving and forwarding freight: *Hamilton v. R. R.*, 96-398.

Delivery of bill of lading is not necessary to make carrier liable as such for goods sent to it for shipment: *Berry v. R. R.*, 122-1002; *Smith v. R. R.*, 163-143; *McConnell v. R. R.*, 163-504; *Davis v. R. R.*, 172-209; *McRary v. R. R.*, 174-563. Under Carmack amendment the carrier is required to issue a bill of lading, and the terms are uniform: *Bryan v. R. R.*, 174-177. See, also, *Uniform Bills of Lading*, section 280 et seq.

While railroad has the right to demand the bill of lading, the burden is on railroad to show failure to deliver for want of bill of lading: *Jeans v. R. R.*, 164-224. A bill of lading requiring order of third person must have proper order or indorsement for delivery of goods: *Killingsworth v. R. R.*, 171-47. Upon a bill of lading "order notify," the consignor may claim the goods, if carried to wrong place: *Hall v. R. R.*, 173-108.

Carrier is not liable on bill of lading issued when goods were not received: *Bank v. R. R.*, 175-415; but see Bills of Lading Act, section 304.

STIPULATIONS AS TO VALUE. Bill of lading is prima facie evidence of actual value of property therein named: *Gardner v. R. R.*, 127-293. Common carrier can make a valid agreement, fixing value of shipments, in case of loss by its negligence, if such agreements be reasonable or based on valuable consideration, and it must clearly appear that such was the intention of parties, and burden to prove it is on the carrier: *Ibid.*

Common carrier cannot by contract restrict liability for negligence, and limiting the value of property in a bill of lading will not prevent a recovery of the actual value: *Gardner v. R. R.*, 127-293; *Everett v. R. R.*, 138-68; *Stringfield v. R. R.*, 152-125; *Breeding Assn. v. R. R.*, 152-345; *Kissenger v. Fitzgerald*, 152-247; *Harden v. R. R.*, 157-238; *Stehli v. Express Co.*, 160-493; *Kime v. R. R.*, 160-457; s. c., 156-451; *Cooper v. R. R.*, 161-400; *Horse Exchange v. R. R.*, 171-65; *Pendergraph v. Express Co.*, 178-344; *Mule Co. v. R. R.*, 160-215, overruling *Jones v. R. R.*, 148-449, and *Winslow v. R. R.*, 151-250.

The same rule was held to apply to interstate shipments in *Mule Co. v. R. R.*, 160-215; *Stehli v. Express Co.*, 160-493; but this was reversed in the first case in 238 U. S., 605, and the limitation recognized, *Horse Exchange v. R. R.*, 171-65. The common-law rule was restored by Cummins amendment: *Bivens v. R. R.*, 176-414.

Other stipulations held to be invalid: "Subject to delay," *Parker v. R. R.*, 133-335—"at company's convenience," *Whitehead v. R. R.*, 87-255—"goods numbered or marked with initials," *McGowan v. R. R.*, 95-417. See Bills of Lading Act, section 303.

STIPULATIONS AS TO NOTICE, ETC. Stipulation that notice of claim should be presented within thirty days was held to be unreasonable and invalid: *Watch Case Co. v. Express Co.*, 120-351; *Cigar Co. v. Express Co.*, 120-348; *Mfg. Co. v. R. R.*, 128-280; *Deans v. R. R.*, 152-171—but sixty days is reasonable, *Ibid.*—four months is reasonable, *Forney v. R. R.*, 167-641; *Culbreth v. R. R.*, 169-723.

When the notice is reasonable, the plaintiff must show compliance: *Smith v. R. R.*, 174-111—but such notice may be waived upon proof of actual knowledge, *Kime v. R. R.*, 153-398, 156-451, 160-464; *Baldwin v. R. R.*, 170-12; *Mewborn v. R. R.*, 170-205; *Horse Exchange v. R. R.*, 171-65; *Schloss v. R. R.*, 171-350; *Reynolds v. Express Co.*, 172-487. The amount of loss need not be specified in the notice: *McRary v. R. R.*, 174-563.

Under Cummins amendment to Carmack Act, in interstate shipments, notice is not necessary to a recovery when the loss occurs through negligence in transportation: *Mann v. Transportation Co.*, 176-104, changing the rule given in *Bryan v. R. R.*, 174-177; *Taft v. R. R.*, 174-211; *McRary v. R. R.*, 174-563.

Stipulation that any claim for damage shall be adjusted before removal from station, and claim therefor made in thirty days to "trace agent" of the carrier, is unreasonable: *Capehart v. R. R.*, 81-438. But in shipment of livestock, a stipulation that written notice of claim for damage shall be given to carrier before property is removed is reasonable: *Duvall v. R. R.*, 167-24.

ACTION FOR DAMAGES AND PENALTY. Action for penalty and for injury or loss of property may be joined; and payment of loss does not discharge the penalty: *Stationery Co. v. Express Co.*, 152-342; *Rabon v. R. R.*, 149-59; *Albritton v. R. R.*, 148-485; *Robertson v. R. R.*, 148-323.

When consignor and when consignee may sue as the party aggrieved: *Myers v. R. R.*, 171-190; *Bank v. R. R.*, 153-346; *Buggy Co. v. R. R.*, 152-119; *Gaskins v. R. R.*, 151-18; *Box Factory v. R. R.*, 148-421.

The plaintiff makes out a prima facie case by proof of shipment and loss or injury, and the carrier must show that it is not liable: *Mitchell v. R. R.*, 124-236; *Hinkle v. R. R.*, 126-932.

The penalty is not an interference with interstate commerce: *Jeans v. R. R.*, 164-224; *Hockfield v. R. R.*, 150-419. Penalty cannot be enforced for nondelivery of an illegal shipment: *Smith v. Express Co.*, 166-155.

3519. Charging unreasonable freight rates misdemeanor. If any railroad company doing business in this state shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of freight of any description, or for the use and transportation of any railroad car upon its track or any of the branches thereof or upon any railroad in this state

which has the right, license or permission to use, operate or control the same, it shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five hundred nor more than five thousand dollars.

Rev., s. 3768; 1899, c. 164, s. 12.

See s. 3491 of this chapter for a similar provision relative to excessive passenger rates.

3520. Allowing or accepting rebates or pooling freights misdemeanor. If any person shall be concerned in pooling freights or shall directly or indirectly allow or accept rebates on freights he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one thousand dollars or imprisoned not less than twelve months.

Rev., s. 3762; Code, s. 1968; 1879, c. 237, s. 2.

Section cited in Freight Discrimination Cases, 95-445.

3521. Partial charges for partial deliveries. Whenever any freight of any kind shall be received by any common carrier in this state to be delivered to any consignee in this state, and a portion of the same shall not have been received at the place of destination, it shall not be lawful for the carrier to demand any part of the charges for freight or transportation due for such portion of the shipment as shall not have reached the place of destination. The carrier shall be required to deliver to the consignee such portion of the consignment as shall have been received upon the payment or tender of the freight charges due upon such portion. But nothing in this section shall be construed as interfering with, or depriving a consignor, or other person having authority, of his rights of stoppage in transitu.

Rev., s. 2641; 1893, c. 495.

3522. Placing cars for loading. Whenever any person, firm or corporation intending to ship freight makes a written application to any railroad company for cars to be loaded in carload lots with any kind of freight embraced in the tariffs of the company, stating in the application the character of the freight, the number of cars wanted, the station, depot, siding, wharf or boat-landing on the line of the company whence the shipment is to be moved, and its final destination, the railroad company shall furnish the cars within four days from seven o'clock a.m., the day following such application. The application must be delivered to the agent of the railroad company at the station at or nearest the point of shipment. Any railroad company failing to furnish the cars named in such written application shall be subject to a penalty of five dollars per car per day for each car not furnished, to be recovered by the person, firm or corporation making application: Provided, that the railroad company, before furnishing the cars upon such application, may require the person, firm or corporation applying for the same to deposit five dollars for each car so demanded at the time the application is made, which deposit of five dollars for each car may be retained by the said railroad company as a forfeit for trackage in case the car or cars are not loaded within forty-eight hours after notice of the placement of car or cars in accordance with demand: Provided, that the corporation commission may excuse from the penalties imposed by this section independent lines not owned, operated, or controlled by any other line or system when trackage is less than one hundred miles.

1907, c. 217, s. 3.

Carrier is entitled to reasonable notice when cars are to be placed for shipments: *Futch v. R. R.*, 178-282. A written application by a shipper to a carrier for a freight car to be furnished within two days is not a compliance with rule 9 of the corporation commission: *McDuffie v. R. R.*, 145-397. Failure to make the application does not prevent liability for damages, but only for penalty: *Bell v. R. R.*, 163-180.

A railroad company must furnish suitable cars for perishable goods accepted for shipment: *McConnell v. R. R.*, 144-87; *Forrester v. R. R.*, 147-553.

Damages for failure to furnish cars for interstate shipment may be recovered in state court: *Smart v. R. R.*, 173-650.

3523. Baggage and freight to be carefully handled. All railroad and steamboat companies shall handle with care all baggage and freights placed with them for transportation, and they shall be liable in damages for any and all injuries to the baggage or freight of persons from whom they have collected fare or charged freight, while the same is under their control. Upon proof of injury to baggage or freight in the possession or under the control of any such company it shall be presumed that the injury was caused by the negligence of the company.

Rev., s. 2624; 1897, c. 46.

Common carrier cannot contract with passenger against loss of baggage by its negligence: *Thomas v. R. R.*, 131-590; *Cooper v. R. R.*, 161-400.

Baggage is delivered and accepted when it is taken to the place where it is the custom to receive baggage, and notice is given to the person apparently in charge for the carrier: *Williams v. R. R.*, 155-260. Purchasing a ticket is not always necessary: *Ibid.*

While obligation of carrier of passengers is limited to ordinary baggage, yet if it knowingly permits passenger, either with or without payment of extra charge, to take articles as baggage which are not properly such, it will be liable for their loss or for damage to them, though it may have been without any fault: *Trouser Co. v. R. R.*, 139-392. When baggage has arrived at destination and has been deposited at customary place of delivery and kept there sufficient time for passenger to claim and remove same, company's liability as common carrier ceases, and it is thereafter liable only as warehouseman, and bound to use of ordinary care: *Ibid.*

The carrier's liability as insurer for baggage applies only when it is carried on same train with owner, unless the failure to carry it on such train is due to the fault of carrier; otherwise the carrier is liable only as gratuitous bailee: *Perry v. R. R.*, 171-158; *Kindley v. R. R.*, 151-207.

3524. Claims for loss of or damage to goods; filing and adjustment. Every claim for loss of or damage to property while in possession of a common carrier, including every express company, firm or corporation doing an express business within the state, shall be adjusted and paid within ninety days in case of shipments wholly within the state, and within four months in case of shipments from without the state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment, or point of delivery to another common carrier, by the consignee, or at the point of origin by the consignor, when it shall appear that the consignor was the owner of the shipment: Provided, that no such claim shall be filed until after the arrival of the shipment, or some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof.

In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within

the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee aggrieved (or consignor, when it shall appear that the consignor was the owner of the property at the time of shipment and at the time of suit, and is, therefore, the party aggrieved), in any court of competent jurisdiction: Provided, that unless such consignee or consignor recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid; and that no penalty shall be recoverable under the provisions of this section where claims have been filed by both the consignor and consignee, unless the time herein provided has elapsed after the withdrawal of one of the claims.

Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto, and for the penalties herein provided for, may be united in the same complaint.

Rev., s. 2634; 1907, c. 983; 1911, c. 139.

FILING CLAIM. The purpose is to give the carrier notice of loss: *Hinkle v. R. R.*, 126-932. Demand for damages must be in writing: *Thompson v. Express Co.*, 147-343—and must be filed within the time required, if that is reasonable, *Phillips v. R. R.*, 172-86; *Grocery Co. v. R. R.*, 170-241; *Currie v. R. R.*, 156-432. It is sufficient if notice of claim is given to carrier causing loss: *Aydlett v. R. R.*, 172-47—or to initial carrier, *Gillikin v. R. R.*, 174-137. Burden is on defendant to show that claim was not filed or that it was excessive: *Rabon v. R. R.*, 149-59.

PROOF OF LOSS. By proving delivery to carrier for transportation and a loss or injury of the property the owner makes a prima facie case of negligence: *Osborne v. R. R.*, 175-594; *Everett v. R. R.*, 138-68; *Hinkle v. R. R.*, 126-932; *Mitchell v. R. R.*, 124-236—burden is then upon the carrier to show that liability does not exist, *Ibid.*; *Mfg. Co. v. R. R.*, 121-514.

CONNECTING CARRIERS. Where carrier accepts goods for transportation, in absence of a special contract, it assumes duty of safely carrying, within a reasonable time, the goods to the end of its line, and delivering them in like condition to connecting carrier: *Meredith v. R. R.*, 137-478; *Knott v. R. R.*, 98-73; *Lindley v. R. R.*, 88-547.

Among connecting lines of railway, that one in whose hands goods are found damaged is presumed to have caused the damage, and burden is upon it to rebut presumption: *Mfg. Co. v. R. R.*, 128-280; *Mfg. Co. v. R. R.*, 121-514; *Meredith v. R. R.*, 137-478; *Everett v. R. R.*, 138-68; *Mitchell v. R. R.*, 124-236; *Boss v. R. R.*, 156-70. Upon proof that any carrier on the route received the goods in good condition, the burden is upon such carrier to show delivery in same condition to the next carrier or to consignee: *Lyon v. R. R.*, 165-143; *Meredith v. R. R.*, 137-478; *Mitchell v. R. R.*, 124-236; *Beville v. R. R.*, 159-227. Liability of initial and connecting carriers for failure to furnish suitable cars: *Lucas v. R. R.*, 165-264; *Kime v. R. R.*, 160-457.

What is sufficient evidence in case of connecting carriers, see *Mfg. Co. v. R. R.*, 128-280; *Knott v. R. R.*, 98-73.

Where two or more common carriers unite in forming an association creating a through line for transportation of freight, with through bills of lading, freight charges to be divided according to the respective mileage of the companies, they become copartnership and each line is liable for any damage resulting on any part of through line, notwithstanding a provision in the bill of lading that each company shall be liable only for loss or damage occurring on its own line: *Rocky Mount Mills v. R. R.*, 119-693.

Liability of initial and connecting carriers in interstate shipments: *Trading Co. v. R. R.*, 178-175; *Paper Box Co. v. R. R.*, 177-351; *Price v. R. R.*, 173-394; *Aydlett v. R. R.*, 172-47; *Mewborn v. R. R.*, 170-205; *Brinson v. R. R.*, 169-425.

ACTION FOR DAMAGES AND PENALTY. Under usual conditions, the owner must receive the goods in the damaged condition, unless it amounts to a total loss, and hold the carrier liable for the loss: *Wilkins v. R. R.*, 160-54. The penalty is not dependent upon the value of property lost: *Sumrell v. R. R.*, 152-269.

Penalty may be recovered by the real owner, though shipment was in name of his agent: *Horton v. R. R.*, 170-383. The assignee of the consignee may be entitled to damages for loss, but not to the penalty: *Grocery Co. v. R. R.*, 170-241.

Penalty under this section cannot apply to interstate shipments: *Morphis v. Express Co.*, 167-139; *Jeans v. R. R.*, 164-224.

3525. Existing remedies to continue. The preceding section shall not deprive any consignee of any rights or remedies now existing against common carriers in regard to freight charges or claims for loss or damage to freight, but shall be deemed and held as creating an additional liability upon such common carriers.

Rev., s. 2635; 1905, c. 330, s. 5.

Common-law remedies against common carriers exist in addition to that given in sections 3524, 3516: *Parker v. R. R.*, 133-335; *Meredith v. R. R.*, 137-478; *Bell v. R. R.*, 163-180.

Person who has sustained injuries by reason of failure of railroad company to provide proper means of transportation or operate its trains as required by statute may bring an action on contract, or in tort, independent of statute: *Purcell v. R. R.*, 108-414; *Peanut Co. v. R. R.*, 155-148.

Liability of carrier as insurer continues unless restricted by special contract: *McConnell v. R. R.*, 163-504. Action for damages for loss of potatoes by freezing: *Bivens v. R. R.*, 176-414—for injury to shipment of livestock, *Teeter v. Express Co.*, 172-616—for failure to provide proper means for loading and unloading livestock, *Meeder v. R. R.*, 173-70—for delay in shipment, *Bell v. R. R.*, 163-180; *Branch v. R. R.*, 88-570; *Foard v. R. R.*, 53-235.

Consignee cannot refuse to accept goods and sue for value, unless there is a total loss: *Whittington v. R. R.*, 172-501; *Holloman v. R. R.*, 172-372; *Wilkins v. R. R.*, 160-54.

Liability of carrier changes to that of warehouseman when goods arrive, notice is given to consignee, and a reasonable time allowed to take them away: *Poythress v. R. R.*, 148-391.

3526. Carrier's right against prior carrier. Any common carrier, upon complying with the provisions of the two preceding sections, shall have all the rights and remedies herein provided for against a common carrier from which it receives the freight in question.

Rev., s. 2636; 1905, c. 330, s. 3.

3527. Regulation of demurrage. No railroad or other transportation company doing business in the state shall make any charge on account of demurrage while a car, whether the same be a refrigerator car or not, is being loaded for shipment, until it has remained at the place of loading for forty-eight hours from the time it has been so placed; but the corporation commission may change this provision, if it considers it unreasonable, under the power vested in it under the chapter Corporation Commission, to make regulations as to demurrage and the loading of cars.

Ex. Sess. 1913, c. 55.

3528. Shipment of livestock on Scuppernong river regulated; violation of regulations misdemeanor. If any transportation company or common carrier shall receive livestock for shipment at any of the landings or shipping points on Scuppernong river, Columbia excepted, between the hours of sunset and sunrise, or shall during the time any livestock may be held for shipment at any landing or shipping point on such river, Columbia excepted, fail to keep the same in a covered pound or inclosure, supplied with necessary food and drinking water, and at all times in full view of the public, such transportation company, common carrier, or the agent of either, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court.

Rev., s. 3675; 1903, c. 283.

See *State v. R. R.*, 141-846.

3529. Carload shipments of watermelons regulated; violation of regulations misdemeanor. It shall be the duty of all common carriers to furnish the weights of all carload shipments of watermelons originating within the state to the shippers thereof within forty-eight hours after receipt of the same. Any common carrier violating the provisions of this section shall upon conviction be fined ten dollars for each offense.

Ex. Sess. 1913, c. 68.

3530. Express companies to settle promptly for cash-on-delivery shipments; penalty. Every express company which shall fail to make settlement with the consignor of a cash-on-delivery shipment, either by payment of the moneys stipulated to be collected upon the delivery of the articles so shipped or by the return to such consignor of the article so shipped, within twenty days after demand made by the consignor and payment or tender of payment by him of the lawful charges for transportation, shall forfeit and pay to such consignor a penalty of twenty-five dollars, where the value of the shipment is twenty-five dollars or less, and, where the value of the shipment is over twenty-five dollars, a penalty equal to the value of the shipment; the penalty not to exceed fifty dollars in any case: Provided, no penalty shall be collectible where the shipments, through no act of negligence of the company, is burned, stolen or otherwise destroyed: Provided further, that the penalties here named shall not be in derogation of any right the consignor may now have to recover of the company damages for the loss of any cash-on-delivery shipment or for negligent delay in handling the same.

1909, c. 866.

3531. Failure to place name on produce shipped misdemeanor. Any person, firm or corporation selling or offering for sale or consignment any barrel, crate, box, case, package or other receptacle containing any berries, fruit, melons, potatoes, vegetables, truck or other produce of any kind whatsoever, to be shipped to any point within or without the state of North Carolina, without the true name of the grower or packer either written, printed, stamped or otherwise placed thereon in distinct and legible characters, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, that this section shall not apply to railroads, express companies and other transportation companies selling or offering for sale, for transportation or storage charges or any other charges accruing to such railroads, express companies or other transportation companies, any barrel, crate, box, case, package, or other receptacle containing berries, fruit, melons, potatoes, vegetables, truck or other produce.

1915, c. 193.

3532. Unclaimed freight to be sold. Every railroad, steamboat, express or other transportation company which shall have had unclaimed freight, not perishable, in its possession for a period of six months, may proceed to sell the same at public auction, and out of the proceeds may retain the charges of transportation and storage of such freight and the expenses of the advertisement and sale thereof; but no such sale shall be made until the expiration of four weeks from the first publication of notice of such sale in a state paper and also in a newspaper published at or nearest the place at which such freight was directed

to be left, and also at the place where such sale is to take place. The expenses incurred for advertising shall be a lien upon such freight in a ratable proportion according to the value of each article, package or parcel, if more than one.

Rev., s. 2637; Code, s. 1985; 1871-2, c. 138, s. 48.

Since this remedy is provided, the carrier may charge storage only for such time as may be reasonably necessary to proceed under this section: *R. R. v. Iron Works*, 172-188. It applies to interstate and intrastate shipments: *Ibid.* Storage charges are allowed for service rendered in taking care of the goods, and carrier may retain the goods to enforce payment: *Holloman v. R. R.*, 172-372.

3533. Sale of unclaimed perishable freight. In case such unclaimed freight shall in its nature be perishable, then the same may be sold as soon as it can be, on giving the notice required in the preceding section, after its receipt at the place where it was directed to be left.

Rev., s. 2638; Code, s. 1986; 1871-2, c. 138, s. 49.

3534. Funds from unclaimed freight to be paid to state university. Such railroad, steamboat, express or other transportation company shall make an entry of the balance of the proceeds of the sale, if any, of each parcel of freight owned by or consigned to the same person, as near as can be ascertained, and at any time within five years thereafter shall refund any surplus so retained to the owner of such freight, his heirs or assigns, on satisfactory proof of such ownership; if no person shall claim the surplus within five years, such surplus shall be paid to the state university.

Rev., s. 2639; Code, s. 1987; 1871-2, c. 138, s. 50.

ART. 12. STREET AND INTERURBAN RAILWAYS

3535. May build and maintain water-power plants. Where any street or interurban railway company owns lands on one or both sides of a stream which can be used in developing a water-power, and desires to erect and maintain a water-power plant for the purpose of generating electricity to be used in operating such railway, then such railway company shall have the power to erect, maintain and operate such water-power plant for such purpose, and may build, maintain and operate any and all dams, ponds, canals, bridges, ferries, aqueducts, flumes, water-ways, wasteways, reservoirs, and all works, machinery, houses, shops and buildings necessary for the use and operation of a water-power plant for generating electricity. Whenever such company shall not own the entire water-front, or all of the lands, water rights, or other easements necessary to be used in fully developing such water-power, it shall have the power to acquire any other lands, water rights or easements which may be needed to fully develop such water-power; and if the company cannot agree with the owners for the purchase of such lands, water rights or other easements, the same may be condemned by the railway company for that purpose, and the procedure shall be the same as that provided for the condemnation of lands for railroads: Provided, that no dwelling-house, yard, garden, orchard or burial-ground shall be condemned for such purpose: Provided further, that such company shall not have the power to condemn any water-power, right or property of any person, firm or corporation engaged in the actual service of the general public, where such power, right or

property is being used or held to be used or to be developed for use in connection with or in addition to any power actually used by such person, firm or corporation serving the general public. Any surplus electric power generated by any plant erected under the provisions of this section may be sold by such company upon reasonable terms.

1907, c. 302; 1913, c. 94.

For construction of section, see *R. R. v. Oates*, 164-167; *R. R. v. Light and Power Co.*, 169-471; s. c., 171-314.

3536. Separate accommodations for different races; failure to provide misdemeanor. All street, interurban and suburban railway companies, engaged as common carriers in the transportation of passengers for hire in the state of North Carolina, shall provide and set apart so much of the front portion of each car operated by them as shall be necessary, for occupation by the white passengers therein, and shall likewise provide and set apart so much of the rear part of such car as shall be necessary, for occupation by the colored passengers therein, and shall require as far as practicable the white and colored passengers to occupy the respective parts of such car so set apart for each of them. The provisions of this section shall not apply to nurses or attendants of children or of the sick or infirm of a different race, while in attendance upon such children or such sick or infirm persons. Any officer, agent or other employee of any street railway company who shall willfully violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court.

1907, c. 850, ss. 1, 5, 7; 1909, c. 851.

3537. Passengers to take certain seats; violation of requirement misdemeanor. Any white person entering a street-car for the purpose of becoming a passenger therein shall, if necessary to carry out the purposes of the preceding section, occupy the first vacant seat or unoccupied space in the aisle nearest the front of the car, and any colored person entering such car for a like purpose shall occupy the first vacant seat or unoccupied space in the aisle nearest the rear end of the car: Provided, however, that no contiguous seats on the same bench shall be occupied by white and colored passengers at the same time unless or until all of the other seats in the car shall be occupied. Any person willfully violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. He may also be ejected from the car by the conductor and other agent or agents charged with the operation of such car, who are hereby invested with police powers to carry out the provisions of this section.

1907, c. 850, ss. 2, 6.

3538. No liability for mistake in assigning passenger to wrong seat. No street, suburban or interurban railway company, its agents, servants or employees, shall be liable to any person on account of any mistake in the designation of any passenger to a seat or part of a car set apart for passengers of the other race.

1907, c. 850, s. 8.

3539. Misconduct on car; riding on front platform misdemeanor. It shall be unlawful for any passenger to expectorate upon the floor or any other part of

any street-car, or to use, while thereon, any loud, profane or indecent language, or to make any insulting or disparaging remark to or about any other passenger or person thereon within his or her hearing. It shall likewise be unlawful for any passenger to stand willfully upon the front platform, fender, bumper, running-board or steps of such car while the same is in motion, whether such passenger has or has not paid the usual fare for riding on such car. Any person willfully violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. He may also be ejected from the car by the conductor and other agent or agents charged with the operation of such car, who are hereby invested with police powers to carry out the provisions of this section.

1907, c. 850, ss. 3, 6.

3540. Passenger riding on rear platform assumes risk; copies of section to be posted. Any passenger who shall ride upon the rear platform of any street-car in motion, when there is room for such passenger either to sit or stand inside the car, shall be deemed to have assumed all the risks of being injured while so riding, as the result of any act of the street-car company: Provided, that such company shall make it appear that such passenger would not have been injured had he been on the inside of said car: Provided further, that before any street, interurban or suburban railway shall be allowed to invoke the provisions of this section it shall have copies thereof printed and framed and one copy hung in each end of all cars operated on its lines, and shall further have a placard hung in a conspicuous place on the rear of such cars, which shall read as follows: "Passengers are warned not to ride on this platform," and a placard hung on each side of open cars in a conspicuous place, which shall read as follows: "Passengers are warned not to ride on the running-board."

1907, c. 850, s. 4.

3541. Street-cars to have vestibule fronts; failure to provide them misdemeanor. All street passenger railway companies shall use vestibule fronts, of frontage not less than four feet, on all passenger cars run by them on their lines during the latter half of the month of November and during the months of December, January, February and March of each year: Provided, that such companies shall not be required to close the sides of the vestibules: Provided further, that such companies may use cars without vestibule fronts in cases of temporary emergency in suitable weather, not to exceed four days in any one month within the period herein prescribed for the use of vestibule fronts. The corporation commission is hereby authorized to make exemptions from the provisions of this section in cases where in their judgment the enforcement of this section is unnecessary. Any such company that shall refuse or fail to comply with the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each day of such refusal or failure.

Rev., ss. 2615, 3800; 1901, c. 743.

Street cars must use every reasonable precaution to protect passengers in getting on and off the cars: *Wood v. Public Corp.*, 174-697. A violation of this section does not render the carrier liable unless some causal connection with the injury is shown: *Rich v. Electric Co.*, 152-689.

3542. Street-cars to have fenders; failure to provide them misdemeanor. All street passenger railway companies shall use practical fenders in front of all passenger cars run by them. The corporation commission is hereby authorized to make exemptions from the provisions of this section in cases where in their judgment the enforcement of this section is unnecessary. Any such company that shall refuse or fail to comply with the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each day of such refusal or failure.

Rev., ss. 2616, 3801; 1901, c. 743, s. 2.

Failure to provide fenders, as required by this section, is negligence: *Smith v. Electric Co.*, 173-489; *Ingle v. Power Co.*, 172-751; *Smith v. R. R.*, 162-30; *Henderson v. Traction Co.*, 132-779.

In an action for killing of dog by street car, it is not competent to show condition of fenders on particular cars other than the one by which dog was killed, it being shown that fenders were different on different cars: *Moore v. Electric Co.*, 136-554.

A statute which requires all street railway companies to put fenders in front of cars and provides that corporation commission may "make exemptions" does not authorize an exemption of all street railway companies, as this amounts to a suspension of statute: *Henderson v. Traction Co.*, 132-779.

CHAPTER 68

REGISTER OF DEEDS

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ART. 1. THE OFFICE

3543. **Election and term of office.** In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the general assembly, a register of deeds.

Rev., s. 2650; Const., Art. VII, s. 1.

The office of register of deeds is constitutional, but the duties are statutory, and the legislature may, within reasonable limits, change the duties and diminish the emoluments of the office, if the public welfare requires it: *Fortune v. Comrs.*, 140-322.

3544. **Oath of office.** The register of deeds shall take the oath of office on the first Monday of December next after his election, before the board of county commissioners.

Rev., s. 2652; Code, s. 3647; 1868, c. 35, s. 2; 1876-7, c. 276, s. 5.

For form of oath see section 3199.

3545. **Bond required.** Every register of deeds shall give bond with sufficient surety, to be approved by the board of county commissioners, in a sum not exceeding ten thousand dollars, payable to the state, and conditioned for the safe keeping of the books and records, and for the faithful discharge of the duties of his office, and shall renew his bond annually on the first Monday in December.

Rev., s. 301; Code, s. 3648; 1868, c. 35, s. 3; 1876-7, c. 276, s. 5; 1899, c. 54, s. 52.

Bond in Dare county, \$3,000. 1907, c. 75.

THE BOND. Proper construction of condition in bond; see *Kivett v. Young*, 106-567, and cases there cited; also, *Cole v. Patterson*, 97-365; *Joyner v. Roberts*, 112-111. Failing to give bond, office vacated: *Cole v. Patterson*, 97-360.

ACTIONS ON THE BOND. For wrongly issuing marriage license: *Furr v. Johnson*, 140-157; *Joyner v. Roberts*, 112-111; also see under section 2503. For failing to properly index recorded mortgage: *Daniel v. Grizzard*, 117-105. For wrongly recording amount in a mortgage: *Kivett v. Young*, 106-567. For actions on official bonds generally, see sections 354 and 356.

3546. Vacancy in office. When a vacancy occurs from any cause in the office of register of deeds, the board of county commissioners shall fill such vacancy by the appointment of a successor for the unexpired term, who shall qualify and give bond as required by law.

Rev., s. 2651; Code, s. 3649; 1868, c. 35, s. 4.

See, also, section 1297.

3547. Deputies may be appointed. The registers of deeds of the several counties in this state are hereby authorized and empowered to appoint deputies, whose acts as such shall be valid and for which the registers of deeds shall officially be responsible. They shall file the certificate of the appointment of the deputy in the office of the clerk of the superior court, who shall record the same.

1909, c. 628, s. 1.

For special acts for the appointment of deputies in certain counties, see *Dare*, 1907, c. 393; *Durham*, 1909, c. 91; *Person*, 1909, c. 546.

3548. Office at courthouse. The register shall keep his office at the courthouse unless the board of county commissioners shall deem it impracticable.

Rev., s. 2653; Code, s. 3650; 1868, c. 35, s. 5.

3549. Attendance at office. The board of county commissioners may fix by order, to be entered on their records, what days of each week, and at what hours of each day, the register of deeds shall attend at his office in person or by deputy, and he shall give his attendance accordingly.

Rev., s. 2654; Code, s. 3651; 1868, c. 35, s. 6.

Register of deeds should permit all persons to inspect the records committed to his custody, but he is not required, without the payment of proper fees, to allow any one to make copies or abstracts therefrom: *Newton v. Fisher*, 98-20.

3550. Official seal. The office of register of deeds for every county in the state shall have and use an official seal, which seal shall be provided by the county commissioners of the several counties, and shall be of the same size and design as the seals now used by the clerk of the superior court, with the words "Office of Register of Deeds," the name of the county and the letters "North Carolina" surrounding the figures.

Rev., s. 2649; 1893, c. 119, s. 1.

ART. 2. THE DUTIES

3551. Apply to clerk for instruments for registration. The register of deeds shall at least once a week apply to the clerk of the superior court of his county for all instruments of writing admitted to probate, and then remaining in the office of such clerk for registration, and also for all fees for registration due thereon; which fees the clerk of the superior court shall receive for the register.

Rev., s. 2655; Code, s. 3652; 1868, c. 35, s. 7.

3552. Failure of clerk to deliver papers. In case the clerk fails to deliver such instruments of writing, and pay over such fees as are prescribed in the preceding section, on application of the register, the clerk shall forfeit and pay to the register one hundred dollars for every such failure; for which sum judgment may be entered at any time by the judge of the superior court, on motion in behalf of the register, on a notice of ten days thereof to the clerk.

Rev., s. 2656; Code, s. 3653; 1868, c. 35, s. 8.

3553. Registration of instruments. The register of deeds shall register all instruments in writing delivered to him for registration within twenty days after such delivery, except mortgages and deeds in trust, or other instruments made to secure the payment of money, which he shall register forthwith after delivery to him. He shall indorse on each deed in trust and mortgage the day on which it is presented to him for registration, and such indorsement shall be entered on his books and form a part of the registration, and he shall register such deeds in trust and mortgages in the order of time in which they are presented to him.

Rev., s. 2658; Code, s. 3654; R. C. c. 37, s. 23; 1868, c. 35, s. 9.

As to registration of deeds, contracts to convey, and leases of land, see sections 3308, 3309—of mortgages and deeds of trust, see section 3311—of conditional sales of personal property, see section 3312—of conditional sales of railroad property, see section 3313—of marriage settlements and other marriage contracts, see section 3314—of deeds of gift, see section 3315—of powers of attorney, see section 3317—of certified copies of any deed or writing which is required or allowed to be registered, see section 3319. For registration of deeds as notice to the world, see annotations under section 3309.

The reason for the enactment of this section was the insufficiency of the old law: *Moore v. Ragland*, 74-348.

A deed may be registered at any time after probate and order made for registration: *Sellers v. Sellers*, 98-13—there being no limitation as to time: *Hallyburton v. Slagle*, 130-484; *Brown v. Hutchinson*, 155-205.

Certificates of registration made by registers of deeds are prima facie evidence of the facts therein recited: *Sellers v. Sellers*, 98-13.

Registration hereunder means a registration complete and perfect, so that it may serve all the purposes of the law in protecting the rights of parties directly interested and give notice truly to the public: *Kivett v. Young*, 106-570. A register of deeds has the power and it is his duty to correct any error he may have made in the registration of a deed, either by inserting any omitted matter or by a reregistration of the entire instrument: *Sellers v. Sellers*, 98-13; *Brown v. Hutchinson*, 155-205.

The filing of a deed for registration has the effect of registration: *Smith v. Lumber Co.*, 144-47; *Davis v. Whitaker*, 114-280; *Glanton v. Jacobs*, 117-428, and cases cited on page 429. See below as to indexing. A paper is filed for registration when it is delivered to the register and received by him for that purpose: *Power Co. v. Power Co.*, 175-668—but a delivery to the register outside of his office is not sufficient until he returns and makes proper entry in his office, *McHan v. Dorsey*, 173-694. Register need not mark deed filed for registration until his fees are paid: *Cunninggim v. Peterson*, 109-33—and where he holds instrument until such fees are paid and on the day they are paid marks it filed as of the day it was first handed to him, it only operates as notice from the day the fees were paid and the endorsement actually made, *Ibid.* Such endorsement is not essential to registration, and when made is not conclusive but only prima facie evidence of the facts therein recited: *Ibid.*

Where register received a deed of trust and, without noting the time of filing thereon, forthwith began registering same, and two hours afterward an execution was levied upon the property conveyed: *Held*, that the time of filing could be proved by parol, and it had priority over the levy: *Metts v. Bright*, 20-311.

Where deed was delivered to register at 10 o'clock a. m., December 20, 1866, and was actually registered January 28, 1867, and the summons for the garnishee was left at his residence at 8 o'clock a. m., December 20, 1866, but not actually received by him until the evening of that day: *Held*, that the lien under the deed had priority: *Parker v. Scott*, 64-118.

Indexing and cross-indexing are essential to the registration of a deed: *Mfg. Co. v. Hester*, 177-609; *Fowle v. Ham*, 176-12; *Ely v. Norman*, 175-294, overruling *Davis v. Whitaker*, 114-280, that filing for registration is sufficient. Register is liable for failure to index and cross-index an instrument: *Mfg. Co. v. Hester*, 177-609.

ERRORS IN REGISTRATION HELD NOT TO INVALIDATE. Registration in which names of the parties were wrongly recorded in premises and in description of property, but otherwise regular, was held good: *Royster v. Lane*, 118-156. A registry is not void because of clerical mistake made in transcribing, which does not affect the sense and the provision as to amount secured, description of property, etc., or obscure the meaning of the instrument: *Ibid.*

Where, in the registration, no signatures to the instrument were copied by the register, but names of the parties appeared in the body of the instrument and in the acknowledgment as copied, registration is valid: *Smith v. Lumber Co.*, 144-47.

Where register failed to copy the seal attached to the signature to the instrument it does not invalidate the registry, if the fact that a seal was affixed appears in the body thereof: *Broadwell v. Morgan*, 142-475; *Heath v. Cotton Mills*, 115-202; *Power Co. v. Power Co.*, 168-219; *Edwards v. Supply Co.*, 150-173.

3554. Certify and register copies. When a deed, mortgage, or other conveyance conveying real estate situate in two or more counties is presented for registration duly probated and a copy thereof is presented with the same, the register shall compare the copy with the original, and if it be a true copy thereof he shall certify the same, and thereupon the register shall endorse the original deed or conveyance as duly registered in his county, designating the book in which the same is registered, and deliver the original deed to the party entitled thereto and register the same from the certified copy thereof to be retained by him for that purpose.

Rev., s. 2657; 1899, c. 302.

3555. Liability for failure to register. In case of his failure to register any deed or other instrument within the time and in the manner required by the preceding section, the register shall be liable, in an action on his official bond, to the party injured by such delay.

Rev., s. 2659; Code, s. 3660; 1868, c. 35, s. 10.

For bond and liabilities thereon, see section 3545. The registration of a deed is presumed to be correct: *Cochran v. Improvement Co.*, 127-386. Liability for wrongly recording amount in a mortgage: *Kivett v. Young*, 106-567.

Under section 461, an action for a penalty against a register of deeds and the surety on his official bond abates by the death of the officer: *Wallace v. McPherson*, 139-297.

3556. Papers filed alphabetically. The register shall keep in files alphabetically labeled all original instruments delivered to him for registration, and on application for such originals by any person entitled to their custody, he shall deliver the same.

Rev., s. 2660; Code, s. 3661; 1868, c. 35, s. 11.

3557. Transcribe and index books. The board of county commissioners, when they deem it necessary, may direct the register of deeds to transcribe and index such of the books in the register's office as from decay or other cause may require to be transcribed and indexed. They may allow him such compensation at the expense of the county for this work as they think just. The books when so transcribed and approved by the board shall be public records as the original books, and copies therefrom may be certified accordingly.

Rev., s. 2661; Code, s. 3662; 1868, c. 35, s. 12.

3558. Number of survey in grants registered. The register of deeds in each county in this state, when grants have been registered without the number of tract or survey, shall place in the registration of the grants the number of the tract or survey, when the same shall be furnished him by the grantee or other person; and in registering any grant he shall register the number of the tract or survey.

Rev., s. 2662; 1889, c. 522, s. 2.

For requirement to register surveys, see State Lands, s. 7570.

3559. Certificate of survey registered. It shall be the duty of the register of deeds in each county, when any grant is presented for registration with a certificate of survey attached, to register such certificate of survey, together with all indorsements thereon, together with said grant, and a record of any certificate of survey so made shall be read in evidence in any action or proceeding: Provided, the failure to register such certificate of survey shall not invalidate the registration of the grant.

Rev., s. 2663; 1905, c. 243.

3560. General index kept. The board of county commissioners, at the expense of the county, shall cause to be made and consolidated into one book a general index of all the deeds and other documents in the register's office, and the register shall afterwards keep up such index without any additional compensation.

Rev., s. 2664; Code, s. 3663; 1868, c. 35, s. 13.

3561. Index and cross-index of registered instruments. The register of deeds shall provide and keep in his office full and complete alphabetical indexes of the names of the parties to all liens, grants, deeds, mortgages, bonds and other instruments of writing required or authorized to be registered; such indexes to be kept in well-bound books, and shall state in full the names of all the parties, whether grantors, grantees, vendors, vendees, obligors or obligees, and shall be indexed and cross-indexed, within twenty-four hours after registering any instrument, so as to show the name of each party under the appropriate letter of the alphabet; and reference shall be made, opposite each name, to the page, title or number of the book in which is registered any instrument. A violation of this section shall be a misdemeanor.

Rev., ss. 2665, 3600; Code, s. 3664; 1899, c. 501; 1876-7, c. 93, s. 1.

The register is liable on his bond for failure to index and cross-index an instrument: *Mfg. Co. v. Hester*, 177-609; *Daniel v. Grizzard*, 117-105—but such failure must be the proximate cause of loss to the claimant: *Mfg. Co. v. Hester*, 177-609.

Section construed in *Davis v. Whitaker*, 114-280, which has been overruled in *Ely v. Norman*, 175-294; *Fowle v. Ham*, 176-12; *Mfg. Co. v. Hester*, 177-609. Surveys to be indexed, see section 7570.

3562. Clerk to board of commissioners. The register of deeds is ex officio clerk of the board of county commissioners, and as such shall perform the duties imposed by law or by order of the said board.

Rev., s. 2666; Code, s. 3656; 1868, c. 35, s. 15; Const., Art. VII, s. 2.

For duty in regard to official reports, see section 957. For general duty as clerk of board, see sections 1309-1311.

This is not a separate office, but a part of the duties of the register: *State v. George*, 157-602. See sections 7930-7932.

3563. Notices to certain officers served by mail. The register of deeds shall serve by mail all notices issued by the board of county commissioners to justices of the peace, road overseers and school committeemen, in lieu of the service by the sheriff, and shall receive as his compensation his actual expenses for mailing, and nothing more.

Rev., s. 2667; Code, s. 3657; 1879, c. 328, ss. 1, 3.

3564. Make out tax lists. The register shall make out the tax lists as directed by law, under the supervision of the board of county commissioners.

Rev., s. 2668; Code, s. 3658; 1868, c. 35, s. 16.

See sections 7930-7932.

3565. Keep list of statutes authorizing special tax. The register of deeds in each county, or the auditor in those counties having county auditors, must keep on file and subject to inspection by the public a list of the statutes authorizing a special tax levy in their respective counties, showing the year in which such special tax levy was authorized by the general assembly of North Carolina and the chapter of the public laws containing the authority for such special levy. Upon payment of a fee of one dollar the register of deeds or county auditor shall furnish to any one making application therefor a certified copy of said list of statutes.

1917, c. 182.

3566. Duties unperformed at expiration of term. Whenever, upon the termination for any cause of the term of office of the register of deeds, it appears that he has failed to perform any of the duties of his office, the board of commissioners shall cause the same to be performed by another person or the successor of any such defaulting register. Such person or successor shall receive for his compensation the fees allowed for such services, and if any portion of the compensation has been paid to such defaulting register, the same may be recovered by the board of county commissioners, by suit on his official bond, for the benefit of the county or person injured thereby.

Rev., s. 2669; Code, s. 3655; 1868, c. 35, s. 14.

3567. Register of deeds failing to discharge duties; penalty. If any register of deeds fails to perform any of the duties imposed or authorized by law, he shall be guilty of a misdemeanor, and besides other punishments at the discretion of the court, he shall be removed from office.

Rev., s. 3599; Code, s. 3659; 1868, c. 35, s. 18.

Register is not liable under this section for issuing marriage license when one of parties is under eighteen: *State v. Snuggs*, 85-541. Compare *Holt v. McLean*, 75-347.

For duty of register of deeds to issue license to threshers of wheat, to require reports therefrom, and to make reports to commissioner of agriculture, see Commerce and Business in the State, Art. 2.

Failure to perform duty a misdemeanor, section 4384. Entry-taker ex officio, section 7553. Duty as to strays, section 3951 et seq. Duties in regard to marriage license, sections 2503-2505. Duty in regard to mortgage given by clerk of superior court in lieu of bond, section 349.

CHAPTER 69

RELIGIOUS SOCIETIES

- 3568. Trustees may be appointed and removed.
- 3569. Trustees may hold property.
- 3570. Title to lands vested in trustees, or in societies.
- 3571. Trustees may convey property.
- 3572. House on vacant land vests title.

3568. Trustees may be appointed and removed. The conference, synod, convention or other ecclesiastical body representing any church or religious denomination within the state, as also the religious societies and congregations within the state, may from time to time and at any time appoint in such manner as such body, society or congregation may deem proper, a suitable number of persons as trustees for such church, denomination, religious society, or congregation. The body appointing may remove such trustees or any of them, and fill all vacancies caused by death or otherwise.

Rev., ss. 2670, 2671; Code, ss. 3667, 3668; R. C., c. 97; 1796, c. 457, ss. 1, 2; 1844, c. 47; 1848, c. 76.

The provisions of this chapter apply only to church property and not to property held in trust for a "Baptist church and for the education of the youths of colored race": *Thornton v. Harris*, 140-498—does not apply to educational institutions, only to religious societies, *Allen v. Baskerville*, 123-126. There is no provision in our laws for donations to be employed in any general system of diffusing knowledge of Christianity throughout the earth: *Bridges v. Pleasants*, 39-26.

A religious society may appoint trustees and remove them at will, or appoint additional trustees: *Conference v. Allen*, 156-524; *Nash v. Sutton*, 117-231.

An individual member or a duly appointed trustee of a religious society may maintain an action for removal of faithless trustees who have deprived society of property held by them in trust: *Nash v. Sutton*, 117-231. Judgment may be so framed as to appoint plaintiff trustee instead of trustees so removed, and to direct conveyance of legal title of property to him to be held in trust for use and benefit of society and to convey it as such society may direct: *Ibid.* It is a misjoinder for a trustee of religious society in a special proceeding to demand judgment that certain other trustees should be removed, and that a lost deed should be set up and a trust therein declared: *Ibid.*

CONTESTS BETWEEN RIVAL BOARDS AND CONGREGATIONS. The place of meeting for worship and for transaction of business is not material, when congregation is not required by its laws to meet in any particular house or place, except that members thereof shall reside, and meetings thereof shall be held, in the city of Raleigh: *Perry v. Tupper*, 74-722.

In a contest between two committees, each claiming to be the rightful board of trustees, to hold same title in trust for same beneficial owner, title does not come in controversy: *Thornton v. Harris*, 140-498.

What amounts to voluntary withdrawal of members from religious association is question of law: *Perry v. Tupper*, 74-722.

Contests between churches of somewhat similar names over question of ownership of devise or conveyance: *Gold v. Cozart*, 173-612; *Tilley v. Ellis*, 119-233; *Simmons v. Allison*, 118-763.

Devise to a diocese, which was divided, is also divided: *Diocese v. Diocese*, 102-442.

3569. Trustees may hold property. The trustees and their successors have power to receive donations, and to purchase, take and hold property, real and personal, in trust for such church or denomination, religious society or congregation; and they may sue or be sued in all proper actions, for or on account of the donations and property so held or claimed by them, and for and on account of any matters relating thereto. They shall be accountable to the churches, denomi-

nations, societies and congregations for the use and management of such property, and shall surrender it to any person authorized to demand it.

Rev., ss. 2670, 2671; Code, ss. 3667, 3668; R. C., c. 97; 1796. c. 457, ss. 1, 3; 1844, c. 47; 1848, c. 76.

The trustees appointed by a religious society are only agents, and have no property interest as against the society: *Conference v. Allen*, 156-524—they represent a quasi-corporation and are accountable to congregation for use and management of church property: *Lord v. Hardie*, 82-241.

A congregation taking possession of church cannot contest validity of mortgage given by trustees for purchase money on ground that it was ultra vires: *Rountree v. Blount*, 129-25.

Pastor of church recovered judgment against trustees of said church for salary, and execution was levied upon communion service: Held, it was not liable to seizure and sale under execution: *Lord v. Hardie*, 82-241.

Building committee of church not liable individually for injury to one engaged in building it: *Wilson v. Clark*, 110-364.

Trustees are liable for goods ordered by one of their number and used by them in building church, even though order was not authorized: *Tull v. Trustees*, 75-424.

ACTIONS BY TRUSTEES OR BY MEMBERS. Where testator provides for building a fence around a certain chapel cemetery, the trustees of the chapel are the proper parties to require of executor performance of provision to build such fence: *Cabe v. Banhook*, 127-424.

Title is vested in trustees individually, and they may recover at law, though in writ and declaration they style themselves "trustees": *Walker v. Fawcett*, 29-44.

It is only when suit is brought by persons who claim as "successors" that question arises whether original bargainees were duly chosen trustees of a religious congregation, and whether persons suing were also duly chosen trustees, so as to give them legally the character of "successors" to former, and thereby vest in them title to property, which is necessary to support an action: *Ibid.*

Where conveyance is made to A, B, and C, for a certain tract of land, as trustees for the Methodist Episcopal Church, they may bring trespass against wrongdoers, though they may not have been appointed trustees according to law: *Ibid.*

In absence of trustees and a governing body authorized to appoint, any member of a religious society has such a beneficial interest as will enable him, in behalf of fellow members, to maintain such action as may be necessary to protect their common interest: *Nash v. Sutton*, 109-550.

Trustees of a religious society cannot recover, in action for alleged nuisance near premises used as place of worship and residence of pastor, for any physical suffering by pastor or members of congregation: *Taylor v. R. R.*, 145-400.

For construction of trusts, see section 3570.

3570. Title to lands vested in trustees, or in societies. All glebes, lands and tenements, heretofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or religious denomination, religious society or congregation within the state for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, society or congregation for which the glebes, lands, tenements, property and estate were so purchased, given, granted or devised, or for which such churches, chapels or other houses of public worship were built; and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of such churches, denominations, societies and congregations, for their several use, according to the intent expressed in the conveyance, gift, grant or will; and in case there shall be no trustees, then in such churches, denominations, societies and congregations, respectively, according to such intent.

Rev., s. 2672; Code, s. 3665; R. C., c. 97, s. 1; 1776, c. 107; 1796, c. 457, s. 4.

By act of 1796, religious societies or their trustees have not a general capacity of acquisition; they can only take for the use of the society: *Trustees v. Dickenson*, 12-189. Even if a deed is insufficient to convey title, a religious society may acquire title by adverse possession: *Gold v. Cozart*, 173-612.

Where a testator bequeathed property in trust for support of minister of associate seceding party, "who shall preach at the seceding congregation meeting-house called Gilead," and a majority of that congregation, being of a different denomination, refused to permit such minister to officiate in their church, a trust resulted, although associate seceding party offered to build another church near one mentioned by testator: *McAuley v. Wilson*, 16-276.

Recital in a deed conveying land to vestry and wardens of church, that it was made "for purpose of aiding in establishment of home for indigent widows or orphans, or in promotion of any other charitable or religious objects to which property may be appropriated" by grantee, creates no trust, and grantee can convey perfect title: *St. James v. Bagley*, 138-384. A grantor can impose conditions and make title dependent upon performance; but if he makes no condition, but expresses motive which induces him to execute deed, legal effect of granting words cannot be controlled by language indicating grantor's motive: *Ibid.* When it is doubtful whether language in a grant operates as declaration of trust, court will examine entire deed, relation of parties, etc., to enable it to gather intention of grantor: *Ibid.* In order to create a trust it must appear that the words were intended to be imperative; and when the property is given absolutely and without restriction, a trust is not to be lightly imposed upon mere words of recommendation and confidence: *Ibid.*

A provision in a will that church is to be built from certain funds will not fail because there is not sufficient amount to build church as large as directed: *Paine v. Forney*, 128-237. A specific trust will not be superimposed upon a title conveyed to a religious congregation, authorizing courts to interfere and control their management and disposition of property, unless this is clear intent of grantor expressed in language which should be construed as imperative: *Hayes v. Franklin*, 141-599. A bequest for religious charity must, in this state, be to some definite purpose, and to some body or association or persons having a legal existence and with capacity to take; or at least must be to some such body on which the legislature shall, within a reasonable time, confer a capacity to take: *Bridges v. Pleasants*, 39-26.

The doctrine of execution *cy pres* does not prevail in this state: *McAuley v. Wilson*, 16-276; *Holland v. Peck*, 37-255; *Bridges v. Pleasants*, 39-26; *White v. University*, 39-19.

Cases of interest hereunder in which devises, bequests and other conveyances for religious, charitable, or educational purposes are construed, or where doctrines as to such trust estates generally treated: *Gold v. Cozart*, 173-612; *In re Murray's Will*, 141-589; *Hayes v. Franklin*, 141-599; *Witherington v. Herring*, 140-495; *Thornton v. Harris*, 140-498; *Allen v. Baskerville*, 123-126; *Keith v. Scales*, 124-497; *St. James v. Bagley*, 138-384; *Freeman v. Freeman*, 141-97; *Bond v. Mfg. Co.*, 140-381; *Paine v. Forney*, 128-237; *Baptist University v. Borden*, 132-476; *Brewer v. University*, 110-26; *United Brethren v. Comrs.*, 115-489; *Tilley v. Ellis*, 119-233; *Simmons v. Allison*, 118-763; *Diocese v. Diocese*, 102-442; *Holland v. Peck*, 37-255; *University v. Gatling*, 81-508; *McKethan v. Ray*, 71-166; *Miller v. Atkinson*, 63-537; *Taylor v. Bible Society*, 42-201; *Bridges v. Pleasants*, 39-26; *Hester v. Hester*, 37-330; *Stanley v. McGowen*, 37-9; *Wardens of the Poor v. Gerard*, 37-210; *White v. University*, 39-19; *McAuley v. Wilson*, 16-276; *Trustees v. Dickenson*, 12-189.

3571. Trustees may convey property. The trustees of any religious body may mortgage or sell and convey in fee simple any land owned by such body, when directed so to do by such church, congregation, society or denomination, or its committee, board or body having charge of its finances, and all such conveyances so made or heretofore made, or hereafter to be made, shall be effective to pass the land in fee simple to the purchaser or to the mortgagee for the purposes in such conveyances or mortgage expressed; and they may sell or mortgage its personal property.

Rev., s. 2673; 1855, c. 384; 1889, c. 484.

Where land was conveyed to officers and members of church for purpose of keeping and maintaining a church for worship, and all privileges and appurtenances thereto belonging, court will not restrain officers of church from leasing small portion of lot for term of years for

erecting a store, the rent payable to said officers, on ground that officers are committing a breach of trust and acting contrary to terms of deed: *Hayes v. Franklin*, 141-599.

A religious society owning land may sell and convey under this section: *Gold v. Cozart*, 173-612. A devise of land for the purpose of providing a rectory construed to permit a sale to effectuate the purpose; but if not, the court in the exercise of equity powers may order a sale: *Church v. Ange*, 161-315.

Other cases of interest: *St. James v. Bagley*, 138-384; *Nash v. Sutton*, 109-550; *College v. Riddle*, 165-211.

3572. House on vacant land vests title. All houses and edifices erected for public religious worship on vacant lands, or on lands of the state not for other purposes intended or appropriated, together with two acres adjoining the same, shall hereafter be held and kept sacred for divine worship, to and for the use of the society by which the same was originally established.

Rev., s. 2674; Code, s. 3666; R. C., c. 97, s. 2; 1778, c. 132, s. 6.

For disturbing religious meetings, and like offenses, see Crimes, Arts. 24, 32.

CHAPTER 70

ROADS AND HIGHWAYS

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ART. 1. STATE HIGHWAY COMMISSION AND STATE HIGHWAY FUND*Part 1. State Highway Commission*

3573. State highway commission established. A state highway commission is hereby established, whose duties it shall be to assist the counties in developing a state and county system of highways as set forth more specifically hereinafter.
1915, c. 113, s. 1.

3574. How commission constituted. At the expiration of the terms of office of the members of the state highway commission as at present organized, the state highway commission shall consist of four members, to be appointed by the governor, and one of the said commissioners shall be from the western, one from the central, and one from the eastern portion of the state, and one from the state at large, such appointments to be confirmed by the senate at the present session of the general assembly; two of whom shall be appointed for two years from April first, one thousand nine hundred and nineteen; one for four years from April first, one thousand nine hundred and nineteen, and one for six years from April first, one thousand nine hundred and nineteen, their successors in office to be appointed for a term of six years each; such appointments to be confirmed by the senate. No member of the senate shall be eligible for such appointment. One of the members of the state highway commission shall always be a member of the minority party. The governor shall, at the time of making said appointments, designate one of the members of said commission as chairman, and said member shall be known and designated as the state highway commissioner. The state highway commissioner shall be a practical business man and shall give his entire time to the work of the commission, and shall receive as compensation and salary therefor such amount as may be fixed by the governor, not to exceed five thousand five hundred dollars per annum, and his actual traveling expenses. The said state highway commissioner shall be vested with all the authority of the said commission whenever the same is not in session. The highway commission shall determine the time of its meetings and make such rules and regulations as shall be necessary for carrying out the provisions of this article. The members of the state highway commission, other than the state highway commissioner, shall receive ten dollars per day and actual expenses while engaged in the discharge of the duties of their offices.

1919, c. 189, ss. 13, 19.

3575. Governor to fill vacancies. The governor shall fill all vacancies in the commission caused by death or otherwise, and he shall have the power to remove any member for due cause.

1915, c. 113, s. 3.

3576. Bond. The members of the state highway commission shall, before entering upon the discharge of their duties, each give a bond to be fixed and approved by the governor, conditioned upon the faithful discharge of the duties of their offices and the full and proper accounting for all public property coming into their possession or under their control. The premium on said bond or bonds shall be paid out of the state highway fund.

1919, c. 189, s. 14.

3577. Offices and supplies. The state highway commission shall furnish and provide suitable offices for itself in the city of Raleigh and shall provide itself with the necessary supplies, fixtures and stationery, and pay for the same out of the state highway fund.

1919, c. 189, s. 15.

3578. Assistants and clerks. The state highway commission may employ such assistants and clerks as in its opinion the needs of the state demand. The salaries paid such assistants and clerks shall be determined by the state highway commission.

1915, c. 113, s. 6.

3579. State highway engineer; term. The commission shall appoint a civil engineer well versed in the science of road building and maintenance, who shall be the state highway engineer, whose compensation shall be fixed by the state highway commission. The term of office of the state highway engineer shall be six years from the date of his appointment, unless removed from office for due cause by the highway commission.

1915, c. 113, s. 4.

3580. Duties of highway engineer. Upon the written request to the state highway commission of the road officials of any county desiring to avail themselves of the services of the highway engineer on the terms of this article, for advice in regard to the improvement of any bridge, road, roads or section thereof, the highway engineer, under the direction of the state highway commission, shall survey or have surveyed such bridge, road, roads, or sections of road, and shall prepare, or have prepared, such maps, profiles, plans and specifications as are necessary in his judgment to determine the cost of the proper improvement of such bridge, road, roads, or sections of road; and these, together with the estimated cost, shall be presented to the board of county commissioners or other officials in authority, who made the request for such information, at their next regular meeting held after the completion of such surveys and estimates. If such bridge, road, roads, or section of road shall thereafter be built by the county officials it shall be constructed according to the plans and specifications as furnished by the highway engineer. In the event that the construction work on any such bridge, road, roads, or section of road is not started within twelve months after the highway engineer makes his report to the county officials, the county officials shall, and are hereby directed to, reimburse the state highway commission for the expense incurred by its office in obtaining the information furnished the county officials. Should, however, the construction be taken up at a later date, the state highway commission when the highway engineer takes charge of the actual construction shall return said amount to the county officials. The highway engi-

neer, or his duly authorized assistants, shall have entire charge of the location, construction, and maintenance of all roads, bridges, etc., constructed under this section. The state highway engineer shall keep an accurate record of all costs and expenditures of his office. He shall supply, as directed by the highway commission, technical information regarding roads to any citizen or officer in the state, and shall, from time to time, publish for public use such information as will be generally useful for road improvements. Such publications shall be printed at the expense of the state, as other public documents.

1915, c. 113, s. 7.

3581. Location of roads. In the location of roads provided for in the preceding section, the highway engineer shall so locate them as to serve the needs of the people in the immediate section in so far as this would not conflict with such roads being links in the system of state highways.

1915, c. 113, s. 9.

3582. State highway system. The state highway engineer, as directed by the state highway commission, shall from time to time make surveys, prepare plans, profiles, specifications, and estimates of the cost of a system of highways connecting by the most direct and practicable route all the county-seats and principal cities of the state. He shall make a detailed report to the state highway commission of the mileage and cost in each county. He shall state the type of road suitable for each section. He shall give the average number and class of teams which each section of road is at present accommodating and the probable increase in traffic which would follow improvements as recommended by him.

1915, c. 113, s. 8.

3583. When commission may meet in counties. The state highway commission shall, upon written request of the county commissioners of any county, call an open meeting to be held at the office of the county commissioners within such county, for the purpose of affording instruction relative to matters pertaining to road and bridge construction, maintenance and repairs. Such meeting shall be conducted by the state highway engineer or one of his assistants designated for the purpose by the state highway engineer. Upon receipt of the notice of the date of such meeting from the state highway commission, the county commissioners shall call such meeting on the date set by the state highway commission, and shall be present themselves and notify the county engineer, the commissioners of each township and the superintendent of each road district within the county to be present at such meetings, in person. Each of the county, township and road district officials above mentioned shall be paid the regular per diem allowance, in the usual manner, for the actual time in attendance at such meetings. The members of the commission when employed in any manner required of them under this article shall receive their actual expenses.

1915, c. 113, s. 11.

3584. Coöperation with federal government and other states. It shall also be the duty of the state highway commission, where possible, to coöperate with the state highway commissions of other states and with the federal government in the correlation of roads so as to form a system of intercounty, interstate, and national highways.

1915, c. 113, s. 12.

3585. Acceptance of Federal Aid Road Act. The state of North Carolina, through its general assembly, hereby assents to the provisions of the act of congress known as the Federal Aid Road Act, approved July eleventh, nineteen hundred and sixteen, entitled "An act to provide that the United States shall aid the states in the construction of rural post-roads, and for other purposes." (Thirty-ninth United States Statutes at Large, p. 355).

1917, c. 22.

3586. Powers of commission to meet requirements of Federal Aid Road Act. Such powers as are necessary to comply with the conditions and requirements of the Federal Aid Road Law and the rules and regulations adopted by the secretary of agriculture of the United States to carry out the provisions thereof, and also any powers conferred under the provisions of this article on county authorities which are not inconsistent or in conflict with the federal requirements, be, and are hereby, expressly conferred upon and vested in the state highway commission.

The state highway commission is also authorized to enter into all contracts and agreements with the United States government relating to the construction and maintenance of rural post-roads under the provisions of said act of congress; and is authorized to receive and disburse such funds as the state may be entitled to receive from the federal government under the provisions of the said Federal Aid Road Act, and is authorized to receive and disburse such funds as may be appropriated by counties, individuals, or other sources for coöperative road work in this state.

1917, c. 22, s. 1; 1919, c. 189, s. 18.

3587. Appropriation. The sum of ten thousand dollars annually, or so much thereof as may be necessary, is hereby appropriated out of moneys in the state treasury not otherwise appropriated for the purpose of carrying out the provisions of this article.

1915, c. 113, s. 13.

3588. Accounts and records to be kept. The full account of each project undertaken by the state highway commission under the provisions of this article shall be kept by or under the direction of the state highway commission or its authorized representative, to ascertain at any time the expenditures on and the liabilities against the project, and, separately, the condition of the ten per cent fund, provided for below in this article; and also records of contract and force account work. The accounts and records, together with all the supporting documents, shall be open at all times to the inspection of the governor or the road authorities of any county furnishing one-fourth of cost of construction, as provided by this article, or their authorized representatives, and copies thereof shall be furnished upon request.

1919, c. 189, s. 16.

3589. Reports to general assembly. The state highway commission shall, on or before the tenth day of the convening of each regular session of the general assembly, make a full detailed report to the general assembly, showing the construction and maintenance work done in each county, the type of such work, the cost of the same, and such other data as may be of public interest in connection

with the work of the said highway commission. The books and accounts of the state highway commission shall be audited at least once a year by a certified public accountant designated by the governor, and the report of the certified accountant shall be made a part of and accompany the report of the state highway commission to the general assembly as herein provided.

1919, c. 189, s. 17.

Part 2. State Highway System and Fund from Motor Taxes

3590. State highway fund; sources and object. For the purpose of constructing and maintaining a system of state highways and post-roads, the funds collected by the state as a license tax on automobiles, motor cars, motorcycles, motor trucks or other vehicles from which the state does now or may hereafter collect a license tax, shall, after the expense of collecting has been deducted as herein provided, be paid to the state treasurer, and by him kept as a special fund to be known as the "State Highway Fund," for the construction and maintenance of a system of state highways, which shall be constructed so as to form a system of modern highways acceptable to the United States government, connecting by the most practicable routes the various county-seats and other principal towns of every county in the state.

1919, c. 189, s. 1.

3591. Convict labor on state highway system. All convicts, either state or county, that can be arranged for by agreement with the state prison board or between the various county authorities and state highway commission, as the case may be, may be worked on this system of state highways and on the production of material for said highways. The care and discipline of such prisoners shall be as provided by the prison laws of the state.

1919, c. 189, s. 2.

3592. Location, construction, and cost of state highways. The location, construction and maintenance of the highways which are to be constructed by the state highway commission under this article are to be determined upon and the work done by the state highway commission, and all surveys, plans, specifications, and estimates shall be made by the highway commission. Whenever any one or more of the counties of the state shall agree to furnish one-fourth the cost of the construction of that portion of the state highway system contemplated by this article, which will be in or run through such county or counties, preference shall be given by the state highway commission in beginning the construction of the highway or highways in or running through such county or counties; and whenever any county shall notify the state highway commission that it will and is prepared to furnish one-fourth the cost of construction of that portion of the state highway system which will be in or run through such county or counties, it shall be the duty of the state highway commission to proceed to such county or counties as early as practicable and determine upon the location of the highway or highways in or running through such county or counties which will be a part of the state highway system and make the necessary surveys, plans, specifications, and estimates, and, if this be accepted by the proper county authorities, proceed with the construction of the highway or highways as soon as necessary funds are available; the one-fourth to be paid by such county or counties, to be

held by the road authorities, subject to the order of the state highway commission, to be paid as the work progresses. Under this arrangement one-fourth the cost will be paid by the county or counties, one-fourth from the state highway fund, and one-half from the federal aid fund. In constructing the highway or highways the state highway commission may make and enter into contracts for such construction work with any county or counties of the state, or with contractors, or have the work done under its supervision, endeavoring to have the same done as cheaply as possible. The said construction work and labor shall be done under the direct supervision of the state highway commission, subject to the inspection and approval of the secretary of agriculture of the United States or his authorized representative and in accordance with the rules and regulations made pursuant to the Federal Aid Road Law. The state highway commission may, in its discretion, from time to time apply for and secure federal aid and make payments on said construction as the same progresses in the pro rata part of the value of the labor and material which have been actually put into such construction in compliance with said plans and specifications. The state highway commission shall cooperate with the counties in obtaining material and labor to be used on any project under the provisions of this article.

1919, cc. 321, 189, s. 3.

3593. Counties, etc., may use available road funds. The several counties, townships, and road districts, in order to provide their one-fourth of the cost of constructing said system of state highways, as contemplated by this article, within their respective territories, may in their discretion use such road funds as they may have available or may provide same under and pursuant to any law now in force or hereafter enacted, and the construction and improvement of the said system of state highways is hereby declared to be a necessary public expense of the several counties, townships, and road districts as to such portion of same as may be located within their respective bounds, under the provisions of this article. And the financial cooperation of the respective counties, townships, and road districts shall be under agreement entered into between the local county, township, or road district officials and the state highway commission, which agreements shall conform with the requirements of the federal government and the provisions of this article not inconsistent with the federal requirements.

1919, c. 189, s. 4.

3594. Counties may use unexpended motor taxes. The funds heretofore collected to be expended in the several counties of the state under the provisions of chapter one hundred and forty, public laws of one thousand nine hundred and seventeen, being the law regulating motor vehicles, now remaining unexpended, shall be paid by the state highway commission to the counties to which such funds belong under the provisions of said chapter, to be by the county road authorities used as a county fund under the provisions of this article for the construction and maintenance of the state highway or highways in said counties as herein provided, which use shall be subject to any of the agreements and contracts now in force between the federal government or the various counties and the state highway commission.

1919, c. 189, s. 7.

Laws of 1917, c. 140, s. 7, provides that at least seventy per cent of the amount of automobile fees collected in any county should be expended in the county from which the fees were collected.

3595. All funds of state highway commission converted into road fund; apportionment. All funds collected under the provisions of this article or hereafter collected under the provisions of the chapter of the Consolidated Statutes entitled Motor Vehicles, and all property and funds of the state highway commission, except as provided in preceding section, shall be converted into the state highway fund and apportioned by the state highway commission under the provisions of this article.

1919, c. 189, s. 8.

3596. Short-term loans authorized to supplement road fund. If the state highway fund provided by this article shall be insufficient to enable the state, in coöperation with the counties and subdivisions thereof, to advantageously avail itself of the federal aid to the fullest extent, then the state treasurer, upon the advice of the governor and council of state, shall from time to time negotiate and secure a short-term loan for such amount as may be necessary to meet the available federal aid, and no more, upon the best terms obtainable, and execute the note or notes of the state therefor, and place the money so obtained to the credit of the said state highway fund, to be apportioned by the state highway commission as other moneys in said fund and as herein provided.

1919, c. 189, s. 9.

3597. Ten per cent of fund held for administrative purposes. So much, not to exceed ten per centum, of the state highway fund, as provided in this article for any registration year as the state highway commission may estimate to be necessary for administering the provisions of this article, shall be deducted for that purpose, available until expended. Within sixty days after the close of each registration year the state highway commission shall determine what part, if any, of the sums theretofore deducted for administering the provisions of this article will not be needed for that purpose, and said sum shall be returned to the state highway fund.

1919, c. 189, s. 10.

3598. Rights of way to be furnished by counties, etc. The rights of way for the construction of the system of state highways provided for in this article shall be furnished by the counties, townships, or road districts in which same are located, without cost to the state, and the cost of engineering shall be paid for by the state out of the highway fund.

1919, c. 189, s. 11.

3599. Roadside trees provided for. The state highway commission and the state forester may coöperate with the county, township, or district road authorities in the proper selection, planting and protection of roadside trees, and the state highway commission is hereby empowered to make all necessary rules and regulations for the protection of the state highways and the roadside trees herein provided for.

1919, c. 189, s. 12.

ART. 2. STATE FUND FOR COUNTY ROAD LOANS

3600. Semiannual road loan fund; state bonds for; first issue. For the purpose of creating a semiannual road fund, not to exceed four hundred thousand

dollars, to be used by the several counties of the state for permanent road improvement upon the terms herein prescribed, the state treasurer is hereby authorized and directed to issue bonds of the state of North Carolina, payable forty-one years after date of issue, which bonds shall be issued semiannually on the first days of January and July of each year. On the first day of July following the ratification of this article the state treasurer shall issue bonds to an amount not to exceed four hundred thousand dollars, which bonds shall bear interest at a rate not exceeding four per cent per annum from date of issue until paid, which interest shall be payable semiannually on the first days of January and July of each year so long as any portion of said bonds shall remain due and unpaid.

1917, c. 6, s. 1; 1919, c. 115.

The purpose of this article is to enable the state to aid in road building in different localities by an exchange of bonds: *Comrs. v. Lacy*, State Treas., 174-141.

3601. Loans to counties. The proceeds received by the state treasurer from the sale of said bonds shall be loaned to the several counties of the state, as hereinafter provided, to be used by said counties in the construction of macadam, sand-clay, or other surfaced roads.

1917, c. 6, s. 2; 1919, c. 115.

3602. Counties pay interest to treasurer; how such interest used. Said counties shall pay to the state treasurer five per cent interest per annum on the amount so loaned, to be paid semiannually on the first days of December and June of each year, for a period of forty-one years, or for such time thereafter as may hereinafter be required. From the five per cent interest received on such county bonds the state treasurer shall pay the four per cent interest on the state bonds issued for this purpose, and the surplus shall become a part of the semi-annual road fund herein provided for.

1917, c. 6, s. 3; 1919, c. 115.

3603. Second bond issue; disposition of surplus. On January first following the first issue of bonds under this article the state treasurer shall issue like bonds to an amount sufficient, when added to said surplus, to make an available fund of four hundred thousand dollars, or so much thereof as may be necessary, to meet the demands made for loans, which said sum shall be loaned in the same manner as the proceeds arising from the first sale of bonds. Said bonds shall be the same in all respects as those first issued, and shall run for a period of forty-one years from date of issue, and bear interest at a like rate, which interest shall be payable on the first days of January and July of each year. If sufficient applications for loans to counties shall not be made under the provisions of this article to take up the surplus at any time, the state treasurer is authorized to loan such remaining surplus, in such manner as he may deem best, at a rate of not less than five per cent per annum, payable semiannually on the first day of December and June of each year.

1917, c. 6, s. 4; 1919, c. 115.

3604. Successive issues and loans. Each six months thereafter, for a period of forty-one years, the state treasurer shall issue bonds of the same class, to run for a period of forty-one years from date of issue, to an amount sufficient, when

added to said surplus, to create a fund of four hundred thousand dollars, or so much thereof as may be demanded, which amounts shall be loaned to the counties applying therefor under the conditions herein imposed.

1917, c. 6, s. 5; 1919, c. 115.

3605. Payment and retirement of bonds provided for. At the expiration of said period of forty-one years the state treasurer shall retire all of said bonds, as they mature, from the surplus remaining each six months after paying the semiannual interest on the bonds outstanding.

1917, c. 6, s. 6; 1919, c. 115.

3606. Formal requirements as to bonds and coupons; sales. The bonds authorized and directed to be issued by this article shall be coupon bonds, and of the denominations of one hundred dollars, five hundred dollars, and one thousand dollars each, as may be determined by the said state treasurer, and shall be signed by the governor and the state treasurer, and sealed with the great seal of the state, and shall be known as "North Carolina Highway Bonds." The coupons thereon may be signed by the State Treasurer alone, or may have a facsimile of his signature printed, engraved, or lithographed thereon; and the said bonds shall in all other respects be in such form as the state treasurer may direct, and the coupons thereon shall, after maturity, be received in payment of all taxes, debts, dues, licenses, funds, and demands due the state of North Carolina of any kind whatsoever which shall be expressed on the face of said bonds. Before selling the bonds herein authorized to be issued, the treasurer shall advertise the sale and invite sealed bids in such a manner as in his judgment may seem to be most effectual to secure the best price. He is authorized to accept bids for the entire issue or any part thereof, and where the advantages are equal, he shall give the preference of purchase to the citizens of North Carolina; and he is authorized to sell the bonds herein authorized in such manner as in his judgment will produce the best price. Any premium received by the state treasurer from the sale of the bonds shall become a part of the surplus or sinking fund herein provided for.

1917, c. 6, s. 7; 1919, c. 115.

3607. Exemption from taxation. The said bonds and coupons shall be exempt from all state, county, or municipal taxation or assessment, direct or indirect, general or special, whether imposed for purpose of general revenue or otherwise, and the interest thereon shall not be subject to taxation as for income nor shall said bond and coupons be subject to taxation when constituting a part of the surplus or capital stock of any bank, trust company, or other corporation, but when constituting a part of such surplus or capital stock shall be deducted from the total assets in order to ascertain the taxable value of such shares.

1917, c. 6, s. 8; 1919, c. 115.

See *Comrs. v. Lacy*, State Treas., 174-141.

3608. County election on question of state aid. When as many as twenty-five per centum of the voters registered at the preceding general election in any county of the state shall sign and present a petition to the board of commissioners of such county, requesting said board to call an election for the purpose of securing state aid for the construction of highways in such county, under the

provisions of this article, specifying in such petition the amount to be so borrowed and asking that the special tax necessary to meet the payments herein provided for be levied and collected and used for said purpose, if a majority of the votes cast shall favor such loan, said board shall call an election for that purpose, which shall be held on the second Tuesday in April or the second Tuesday in October of that year. A special registration of voters shall be required before any such election is held. Such registration and election shall be conducted under the provisions of the general election law. When calling said election, the board of commissioners shall specify in such call the amount to be voted upon, accompanied by a statement to the effect that a favorable vote thereon shall carry the power and duty on the part of such board of commissioners to levy and collect the special tax herein required for the purposes herein named, and such election shall be conducted in the same manner, as near as may be, as elections for members of the general assembly. At such election those qualified voters who are in favor of securing state aid for road building shall vote a ballot upon which is written or printed the words "For good roads," and those who oppose such state aid shall vote a ballot upon which is written or printed the words "Against good roads." The result of said election shall be certified by the returning board to the board of county commissioners.

1917, c. 6, ss. 10, 11; 1919, c. 115.

See *Comrs. v. Lacy, State Treas.*, 174-141.

3609. County to give bond to state for amount voted; discharge of bond. If a majority of the votes cast shall be "For good roads," the board of commissioners of such county shall execute a bond payable to the state of North Carolina, in form to be approved by the state treasurer and attorney-general, for the amount so voted, which bond shall be signed by the chairman of the board of county commissioners and countersigned by the register of deeds, and sealed with the seal of the county, and shall be immediately delivered to the state treasurer. Said bond shall obligate said county to pay to the state treasurer five per cent interest per annum on the amount thus loaned, payable semiannually on the first days of December and June of each year for a period of forty-one years. At the expiration of forty-one years said county bond shall be returned by the state treasurer, and said county shall be discharged from further liability on said bond: Provided, that if upon the maturity of any series of state bonds issued in pursuance of this article the state shall not have sufficient funds to retire the same derived from the difference in interest herein provided, owing to its inability to keep such difference in interest continually invested, or on account of expenses or delay incident to its investment, then and in that event any such deficiency shall be made good by the counties participating in the original proceeds of any such state bonds in proportion to the amount of such proceeds received by any such county.

1917, c. 6, s. 11; 1919, c. 115.

See *Comrs. v. Lacy, State Treas.*, 174-141.

3610. Interest due from county; special tax; penalties for delinquency. Said interest shall constitute a special state tax, which shall be collected and accounted for under the same penalties as other state taxes, except that the state treasurer shall also be required to collect, in addition to said five per cent to be paid semi-

annually, a penalty of one-half of one per cent of the interest due for each day the same shall remain unpaid after the first days of December and June of each year. One-half of such penalty shall be paid by the county and one-half by the sheriff of such delinquent county. If any county which has obtained money from the state under the provisions of this article shall fail or refuse to pay the interest due on such loan or loans for a period of thirty days, the amount due by such county, together with the penalty, shall at once become due and payable, and the state treasurer is authorized to proceed to collect the same from such delinquent county.

1917, c. 6, s. 12; 1919, c. 115.

3611. County files estimates and accounts with treasurer. At the time of filing said bond with the state treasurer said board of commissioners shall also file an estimate of the amount of money which will be actually needed for the following six months; and semiannually thereafter, on the first days of May and November, they shall file with said treasurer an estimate of the amount needed for the ensuing six months until said loan has been exhausted. Each six months after securing a state loan the board of county commissioners shall publish a sworn statement showing in detail all receipts and expenditures, to whom paid and for what purpose, during the preceding six months, which shall also be filed with the state treasurer.

1917, c. 6, s. 13; 1919, c. 115.

3612. Adjustment of aggregate of loans to amount of semiannual fund. If the aggregate of the estimates by the several boards of commissioners which vote for state aid under this article shall exceed the sum of four hundred thousand dollars, the state treasurer shall reduce all loans pro rata for the following six months. If such estimates shall not amount to four hundred thousand dollars, then the bonds to be issued and sold for that period shall be reduced accordingly.

1917, c. 6, s. 14; 1919, c. 115.

3613. Times when loans made; limit of aggregate loans. From the first to the thirtieth days of January and July of each year, and at no other time, the state treasurer shall loan to the several counties which have complied with the provisions of this act the amounts asked for by each: Provided, that interest shall be charged and collected from the first day of the month: Provided further, that the aggregate of such loans shall not exceed four hundred thousand dollars; and each six months thereafter, at the time herein prescribed, for a period of forty-one years and as long thereafter as the amount so loaned is unpaid, said counties shall pay to the state treasurer five per cent interest on the amount so loaned.

1917, c. 6, s. 15; 1919, c. 115.

3614. Additional loans. Additional loans may be made to counties within the limit prescribed by this article if another election shall have been held therefor as is herein provided, and if a majority of the votes cast shall have been "For good roads."

1917, c. 6, s. 16; 1919, c. 115.

3615. Second election when first unfavorable. If a majority of the votes cast at any such election shall be "Against good roads," no loan shall be made to

that county: Provided, however, that said board of commissioners shall order another election for the same purpose after the lapse of one year upon having presented to it a petition signed by twenty-five per cent of the voters as herein provided.

1917, c. 6, s. 17; 1919, c. 115.

3616. County "Road Loan Tax"; maintenance tax. There shall be levied by the proper authorities in each county accepting a loan, as provided for in this article, at the same time other taxes are levied, a special annual tax for a period of forty-one years, to be known as the "Road Loan Tax," which shall be sufficient to pay, and which shall be collected by the sheriff and be used in paying, the semiannual interest on said loan or loans at five per centum per annum. Said tax shall be sufficient to cover the cost of collection and disbursement and the penalty herein provided for, in case such penalty should be incurred, in addition to the five per centum per annum, which shall be paid to the state treasurer by the sheriff of the county semiannually on the first days of December and June of each year. And a vote authorizing the issuance of bonds under this article shall be understood and construed to authorize and empower a levy of said tax. There shall also be annually levied by said board of county commissioners at the times herein specified a separate special tax for the maintenance of the roads built from moneys procured under the provisions of this article, which special tax shall be sufficient, after paying the costs of collection and disbursement, to equal each year, for the first four years after such loan is made, four per centum of the amount so borrowed; each year for the next four years, eight per centum of the amount so borrowed; and thereafter, each year, ten per centum of the amount so borrowed, so long as any of said loan remains due and unpaid to the state. If any board of county commissioners whose duty it is to levy any tax or taxes under the provisions of this article shall fail or refuse to make such levy, or to make such rate of levy as is required by this article, they and each of the members thereof shall be guilty of a misdemeanor, and, upon conviction, shall be fined personally and severally not less than two hundred dollars each, nor more than one thousand dollars each, or be imprisoned not exceeding one year, in the discretion of the court.

1917, c. 6, s. 18; 1919, c. 115.

3617. County loan limited by its indebtedness. No county shall be allowed to borrow money under the provisions of this article to an amount which, added to the other bonded indebtedness, exceeds six per cent of the assessed valuation of the property of the county.

1917, c. 6, s. 19; 1919, c. 115.

3618. Article available to townships and road districts; conditions. Townships, and road districts created by special act of the general assembly, may avail themselves of the benefits of this article upon compliance with the requirements herein set out: Provided, that the bond or undertaking filed with the state treasurer shall be executed by the board or boards of county commissioners of the county or counties in which such township or road district is situated. Such bond or undertaking shall specify that it is given on behalf of such township or road district only. It shall not be a liability in any wise against the county; and the special taxes shall be levied and collected out of the township or road district

named, and not out of the county. It shall be the duty of such commissioners to levy, and the duty of the sheriff to collect, such special taxes and make payment thereof in the manner and under the penalty set out in this article.

1917, c. 6, s. 20; 1919, c. 115.

This section, as originally written, was held to be unconstitutional in that it required bonds of the county to be issued for road expense in the township: *Comrs. v. Lacy*, State Treas., 174-141—so where township bonds were to have the guaranty of the county commissioners, *Comrs. v. Boring*, 175-105. This was amended as above by act of 1919.

County commissioners may act as agents for townships in issuing bonds: *Comrs. v. Boring*, 175-105.

ART. 3. ROAD IMPROVEMENT WITH FEDERAL COÖPERATION

3619. County bonds for road improvement with federal coöperation. The board of county commissioners of every county in this state is hereby authorized, upon the conditions and subject to the limitations and restrictions hereinafter set forth, to issue bonds of the county from time to time for the purpose of paying the county's share of the cost of constructing or improving public roads in the county at the joint expense of the federal government and the county, or at the joint expense of the federal government, the state, and the county, under agreement between the secretary of agriculture of the United States and the state highway commission of North Carolina.

1919, c. 312, s. 1.

Section referred to in *Martin County v. Trust Co.*, 178-26.

3620. Annual tax to pay bonds and interest authorized. The board of county commissioners of every county in this state is hereby authorized to levy annually a special tax ad valorem upon all taxable property in the county for the special purpose of paying the principal and interest of all bonds issued by the county under this article, as such principal and interest become due, which tax shall be in an amount sufficient for said purpose and in addition to all other taxes authorized to be levied by said board.

1919, c. 312, s. 2.

See *Martin County v. Trust Co.*, 178-26.

3621. Bonds to mature serially within thirty years. Each issue of bonds made by a county under the provisions of this article shall so mature that the aggregate principal amount of the issue shall be payable in annual installments, beginning not more than three years after the date of the bonds of such issue and ending not more than thirty years after such date. No such installment shall be more than two and one-half times as great in amount as the smallest prior installment of the same bond issue. If all bonds of any one issue are not delivered simultaneously, the bonds of such issue outstanding at any one time shall mature as aforesaid.

1919, c. 312, s. 3.

3622. Form of bonds and coupons; interest limit; delivery. Said bonds shall be issued in such form and denominations, and with such provisions as to time, place, and medium of payment of principal and interest, as the board of county commissioners of the county issuing the bonds may determine, subject to the limitations and restrictions of this article. The bonds shall bear interest at a

rate not exceeding six per centum per annum, payable semiannually. They may be either coupon bonds or registered bonds; and, if issued in coupon form, may be made registerable as to principal or as to both principal and interest. They shall be signed by the chairman of the board of county commissioners of the county issuing them, and the county seal shall be affixed to the bonds and attested by the clerk of said board; and the coupons of such bonds shall bear the printed, or lithographed, or engraved facsimile signature of the chairman of said board of county commissioners who is in office at the date of the bonds. The delivery of bonds signed as aforesaid by officers in office at the time of such signing shall be valid notwithstanding any changes in officers occurring after such signing.

1919, c. 312, s. 4.

3623. Sale of bonds. Said bonds shall be sold in the manner provided in the Municipal Finance Act for the sale of bonds of cities and towns. They shall not be sold for less than par and accrued interest.

1919, c. 312, s. 5.

The Municipal Finance Act is subchapter III of Municipal Corporations.

3624. Proceeds of sale a separate fund. The proceeds of the sale of said bonds shall be placed in a separate fund and used only for the purposes for which the bonds were issued.

1919, c. 312, s. 6.

3625. Highway commission certifies county's share of cost for bonds. Whenever a board of county commissioners proposes to issue any bonds under this article said board shall obtain from the state highway commission of North Carolina a certificate stating the amount of the county's share of the cost of the road improvements for which the bonds are to be issued, as such share is estimated by said commission, and no bonds shall be issued under this article in an amount exceeding such share as estimated by said commission. For the purposes of this article, the cost of acquiring rights of way for roads for which bonds are hereby authorized to be issued and the amount of any incidental damages to adjoining property, due to construction work, shall be treated as a part of the county's share of the cost of constructing the roads and may be paid out of the proceeds of the sale of such bonds.

1919, c. 312, s. 7.

3626. "Road" includes bridges and culverts. The term "road," as used in this article, shall include bridges and culverts in all cases where bridges and culverts are to be constructed or improved as a part of a road for which bonds are hereby authorized to be issued and the federal government is to bear a part of the expense of constructing or improving such bridges or culverts.

1919, c. 312, s. 7.

See *Martin County v. Trust Co.*, 178-26.

3627. Temporary notes of county in anticipation of bonds. Whenever a board of county commissioners shall have obtained from the state highway commission a certificate showing the amount of bonds which may be issued by the county as provided in this article, it shall be lawful for the board of county commissioners to issue notes of the county in anticipation of the issuance of bonds under this article. Such notes may run for periods of not exceeding one year, and may be

renewed from time to time by the issuance of new notes: Provided, however, that no such notes shall continue to be issued more than two years after the date of the highway commission's certificate upon which they are predicated. The board of county commissioners may, if it deems it advisable, retire such notes or any of them by means of taxation or any available funds of the county, and the board of county commissioners is hereby authorized to levy in any year a special tax ad valorem on all taxable property in the county, for the special purpose of paying such notes. In case any such notes are retired by any means other than the issuance of bonds under this article, the amount of bonds which may be issued shall be reduced by the amount of notes so retired.

1919, c. 312, s. 8.

3628. Special county tax for maintaining federal-aided roads. The board of county commissioners of every county is hereby authorized to levy annually a special tax ad valorem upon all taxable property of the county for the special purpose of maintaining any public road constructed or improved with the aid of the federal government under an agreement between the secretary of agriculture of the United States and the state highway commission of North Carolina, which tax may be in an amount sufficient for said purpose and in addition to all other taxes authorized to be levied by such board of county commissioners.

1919, c. 312, s. 9.

3629. Proceeds of other county road bonds made available. The board of county commissioners of every county is hereby authorized to use, for the same purposes for which bonds are hereby authorized to be issued, the proceeds of the sale of any bonds of the county issued for road purposes under any act other than this article, and also any other funds of the county which may lawfully be used for constructing or improving public roads of the county.

1919, c. 312, s. 10.

3630. Road authorities of county may contract with highway commission. The board or body in any county having charge and control of the county roads in the county (whether such board or body be the board of county commissioners or a road commission or other separate body) may enter into agreements with the state highway commission of North Carolina to cause the county to issue bonds or levy taxes under this article. If such an agreement is made by a board or body other than the board of county commissioners, the board of county commissioners may carry out the provisions of the agreement.

1919, c. 312, s. 11.

3631. Provision for use of bonds of townships, etc. The board or body having charge and control of the public roads of any county is hereby authorized, by agreement with the state highway commission of North Carolina, to use the proceeds of the sale of any bonds of any road district or township in the county, issued for road purposes, for the same purposes for which county bonds are hereby authorized to be issued: Provided, the road commissioners or other authorities issuing such road district or township bonds join in or consent to such an agreement, which they are hereby authorized to do; and Provided, the road to be constructed or improved by means of said moneys is situated within such road district or township.

1919, c. 312, s. 12.

3632. Construction of article and powers granted. The powers granted by this article are granted in addition to and not in substitution for existing powers of counties, and are not subject to any limitation or restriction contained in any other law: Provided, however, that this article shall be construed as a supplement to any other act passed at the present session of the general assembly providing a plan for meeting any offer on the part of the federal government to provide funds for the construction or improvement of roads in this state, and all provisions of any such other act relating to the expenditure of moneys for road purposes shall apply to the expenditure of moneys raised under the provisions of this article or authorized by it to be used for the purposes herein stated. This section shall not be construed as authorizing the issuance of the road district or township bonds herein referred to, nor shall section 3631 of this article be construed as authorizing the issuance of any bonds other than bonds of a county, payable by general tax upon the county at large. This section deals only with the application of the proceeds of the sale of road district and township bonds, the issuance of which is authorized by some other law.

1919, c. 312, s. 13.

3633. In certain counties article applicable only if adopted at special election. In the counties of Alexander, Anson, Ashe, Avery, Bladen, Catawba, Cherokee, Clay, Cumberland, Franklin, Gates, Graham, Halifax, Haywood, Hertford, Hyde, Jones, Macon, Mitchell, Orange, Pitt, Polk, Rowan, Rutherford, Stanly, Surry, Swain, Transylvania, Tyrrell, Warren, and Washington the provisions of this article, in so far as they authorize the issuance of county bonds or notes, or the levying of a special tax for paying county bonds or notes, or the levying of a special tax for maintaining roads, shall not be in force unless and until the question of adopting the provisions of this article shall be submitted to the qualified voters of the county at an election, and a majority of the qualified voters of the county voting on said question shall vote in favor of adopting the provisions of this article.

The board of county commissioners of any of said counties may cause a special election to be held for said purpose at such time as may be designated by said board. Said board shall cause a notice of said election to be posted at the courthouse door of the county at least thirty days before the election, and to be published once in each of the four successive weeks immediately preceding the election. The board of county commissioners shall name the registrars and judges of election for the voting precincts of the county for said election, and shall cause to be printed a sufficient number of ballots for use at the election. At said election the voters who are in favor of the adoption of the provisions of this act shall vote a ballot on which shall be written or printed, "For the adoption of the Federal Aid Act"; and the voters who are opposed to the adoption of the provisions of this act shall vote a ballot on which shall be written or printed the words, "Against the adoption of the Federal Aid Act." At the close of the election the votes shall be counted and returns thereof made to the board of county commissioners, for which purpose said board shall cause blank abstracts to be printed and furnished to the registrars and judges of election.

On the first Thursday following the election said board of county commissioners shall meet as a canvassing board, shall receive the returns of said election, shall judicially pass upon the returns, and shall judicially determine and declare the

result of said election, all of which shall be recorded in the records of said board. The returns shall be executed in duplicate, and one copy shall be delivered to the board of county commissioners as aforesaid, and the other filed with the clerk of the superior court of the county. In all respects other than those herein mentioned said special election shall be held and conducted and the qualifications of voters at said election determined, as nearly as may be practicable, in accordance with the general law relating to the holding and conducting of elections for members of the general assembly and the determination of the qualifications of voters at such elections. The expense of holding said special election shall be paid out of the general funds of the county.

The board of county commissioners shall cause a notice containing a brief statement of the result of said election as determined by the board to be published at least once in a newspaper published in the county. No right of action or defense founded upon any invalidity of said election shall be asserted, nor shall the validity of said election be open to question in any court upon any ground whatever, except in an action or proceeding commenced within thirty days after the first publication of said notice: Provided, however, that a copy of this sentence shall be incorporated in said notice. The board of county commissioners may, in its discretion, order a new registration for said special election, but such new registration shall not be necessary unless ordered by the board. Upon the determination, made as aforesaid, by the board of county commissioners, that a majority of the qualified voters voting upon said question voted in favor of adopting the provisions of this article, then all of the provisions of this article shall be in force in the county so adopting them.

Sections 3629, 3631, and 3632 of this article shall be operative in all counties of this state from and after the 11th day of March, 1919.

1919, c. 312, s. 13a.

ART. 4. GENERAL ROAD IMPROVEMENT; ROAD COMMISSIONS; BONDS AND TAXES

Part 1. Bond Issues, Special Taxes and Funds

3634. County issue of road bonds; petition and election; approved by state commission; bond limit. Bonds may and shall be issued by the board of county commissioners of any county for the purpose of laying out and opening, altering, or improving the public roads and bridges of county under the conditions and provisions hereinafter provided. The board of county commissioners of any county, upon the petition of one hundred freeholders of the county petitioning for an election for a bond issue, shall make an order providing for holding an election at the next election of county officers, or at any time not less than thirty days from the date of such order, which shall be designated therein, to open the polls and take the sense of the qualified voters of the county on the question of whether the board of county commissioners of such county shall issue bonds for such purpose. The petition must include the amount of bonds it is proposed to issue and the approximate number of miles of road that it is proposed to improve by such bond issue. No election shall be held until the board of county commissioners has been notified by the state highway commission in writing that the

amount of bonds proposed to be issued will be sufficient to construct or reconstruct, alter or improve approximately the number of miles of road proposed to be improved, reconstructed, or altered, as set out in the petition.

1917, c. 284, s. 1; 1919, c. 12, s. 1; 1919, c. 68.

The act of 1917, c. 284 (included in this article), is prospective in its nature and does not modify or repeal local acts: *Rankin v. Gaston County*, 173-683.

The bond issue provided for, being for a necessary expense, does not require the popular vote except when specially provided for, and the vote on bond issue is sufficient to authorize the levy of a tax: *Parvin v. Comrs.*, 177-508.

This section does not violate the constitution, article 2, section 29, since it is a general law for the establishment of roads, etc., for the whole county: *Ibid.* See, also, *Brown v. Comrs.*, 173-598; *Mills v. Comrs.*, 175-215; *Martin County v. Trust Co.*, 178-26.

3635. Powers vested in road commission. Whenever it is stated in the petition to the board of county commissioners praying for a bond issue for road work, as is authorized in the preceding section, that the bonds thus authorized shall be issued and sold by the county road commission hereinafter created by this article, or the existing road commission of the county in which the petition for road bonds is made, then the said county road commission or other road commission or board having charge of the road work in said county is hereby vested with all the power, rights, and authority now vested in the board of county commissioners of said county for issuing and selling the road bonds, as authorized in the petition, and said county road commission or other commission or board having charge of the road work in the county shall proceed to issue and sell bonds called for in the petition as hereinafter provided.

1917, c. 284, s. 2; 1919, c. 68.

3636. Apportionment by townships of funds from bond sale. Whenever it is stated in the petition to the board of county commissioners praying for a bond issue for road work that the funds derived from the sale of such bonds shall be expended by the county road commission or other commission or board having charge of the road work of said county in the various townships composing the county, in proportion to the assessed tax valuation of each township, then whenever bonds are issued by the board of county commissioners or county road commission, as provided, the county road commission shall apportion the funds arising from the sale of said bonds and use same in the several townships of the county issuing said bonds, as nearly as may be in proportion to the assessed tax valuation of said township, the intention being that each township shall receive and have expended on roads within its borders, or on roads built for its benefit, a fair and equitable proportion of the money arising from the bond issue authorized by this article. The purchasers of said bonds shall not be required to see to the application of such funds.

1917, c. 284, s. 3; 1919, c. 68.

3637. Special road tax; petition and election; tax limit; approval of state commission. The board of county commissioners of any county, upon the petition of one hundred freeholders of said county petitioning the board of county commissioners to levy a special road tax for carrying on the road work of said county, shall make an order requiring an election to be held at the time of election of county officers, or at any other time not less than thirty days from the date of such order, which shall be designated therein, to open the polls and take

the sense of the qualified voters of the county on the question whether the board of county commissioners shall levy a tax for such purpose. The petition for such election must state the maximum rate for which such special road tax is to be levied, which rate shall not exceed fifty cents on the hundred dollars worth of property according to the last tax list and one dollar and fifty cents on the poll, observing at all times the constitutional equation: Provided, the petition also states approximately the number of miles of road to be improved by such special road tax and the length of time for which such special road tax shall be levied. The board of county commissioners, before calling such election, must be notified by the state highway commission in writing that the amount of money to be raised annually by the special road tax proposed will be sufficient to maintain and operate with economy a construction force suitable for the work proposed or will be sufficient to secure for the county reasonable contract prices for the work to be done, and that within the time named and for the amount thus to be raised the approximate number of miles of road can be built that is named in the petition.

1917, c. 284, s. 4; 1919, c. 68.

This tax is for a special purpose, and the special approval of the legislature is found in this general statute: *Parvin v. Comrs.*, 177-508, distinguishing *R. R. v. Cherokee County*, 177-86. The constitutional limitation of taxation may be exceeded for the special purpose designated: *Ibid.*; *Martin County v. Trust Co.*, 178-26.

3638. When bond issues by townships authorized. At the end of three months after the seventh of March, nineteen hundred and seventeen, in any county that has not taken advantage of the provisions of this article and issued bonds as provided in section 3634 of this chapter, or levied a special tax as provided in the preceding section, then any township may proceed to take advantage of the provisions hereinafter set forth.

1917, c. 284, s. 5; 1919, c. 68.

3639. Petition from township; election; approval of commission; bond limit. The board of county commissioners of any county, upon the petition of twenty-five freeholders of said township of said county for a bond issue for the construction or reconstruction of the public roads and bridges of said township, shall make an order providing for holding an election at the next election of county officers, or at any other time not less than thirty days from the date of such order, which shall be designated therein, to open the polls and take the sense of the qualified voters of the township on the question of whether the board of county commissioners of such county shall issue bonds for such township for the purpose stated in the petition. The petition must state the amount of bonds it is proposed to issue and the approximate number of miles of road that it is proposed to improve by such bond issue. No election shall be held until the board of county commissioners has been notified by the state highway commission in writing that the amount of bonds proposed to be issued will be sufficient to construct or reconstruct, alter or improve, approximately the number of miles of road proposed to be constructed, reconstructed, or altered as set out in the petition.

1917, c. 284, s. 6; 1919, c. 68; 1919, c. 12, s. 2.

The county commissioners may act as agents of the townships in issuing bonds: *Comrs. v. Boring*, 175-105; *Edwards v. Comrs.*, 170-448.

3640. Special road tax for townships; tax limit; approval of commission. The board of county commissioners of any county, upon the petition of twenty-five freeholders of any township of any county petitioning the board of county commissioners to levy a special road tax for carrying on the road work of the township, shall make an order requiring an election to be held at the next election of county officers or at any other time not less than thirty days from the date of such order, which shall be designated therein, to open the polls and take the sense of the qualified voters of the township on the question whether the board of county commissioners shall levy a tax for such purposes. The petition for such election must state the maximum rate for which such special road tax is to be levied, which rate shall not exceed fifty cents on the one hundred dollars worth of property, according to the last tax list, and one dollar and fifty cents on the poll, observing at all times the constitutional equation. The petition must also state approximately the number of miles of road to be improved by said special road tax and the length of time for which such special road tax shall be levied. The board of county commissioners, before calling such election, must be notified by the state highway commission, in writing, that the amount of money to be raised annually by the special road tax proposed will be sufficient to maintain and operate with economy a construction force suitable for the work proposed, or will be sufficient to secure for the county reasonable contract prices for the work to be done, and that within the time named, and for the amount thus to be raised, the approximate number of miles of road can be built that is named in this petition.

1917, c. 284. s. 7; 1919, c. 68.

3641. Bond issues in counties having township bond issues. The board of county commissioners of any county in which township bonds have been issued and sold for the construction of roads shall, upon petition of one hundred freeholders of said county petitioning for an election for a bond issue for road construction, make an order providing for holding an election at the next election of county officers or at any other time not less than thirty days from the date of such order, which shall be designated therein, to open the polls and take the sense of the qualified voters of the county on the question of whether the board of county commissioners of such county shall issue bonds for the purpose of providing funds for taking over the township bonds already issued for road purposes and of providing an additional amount with which to construct additional roads in such county. Such petition must state the amount of bonds which it is proposed to issue in excess of the amount required to cover the township bond issue, and also the approximate number of miles that it is proposed to improve by such bond issue. No election shall be held until the board of county commissioners has been notified by the state highway commission in writing that the amount of bonds proposed to be issued for road construction work will be sufficient to construct, reconstruct, or alter approximately the number of miles of road proposed to be improved by said bond issue. The maximum amount of bonds issued under this article in such county, together with all the bonds previously issued and remaining unpaid by such county, shall in no case exceed an amount equal to ten per cent of the total assessed valuation of the county. The township in which the bonds have been issued and which are taken over by the

county shall not be subject to any additional tax on account of the county bonds issued to refund or buy in said township bonds, but shall be liable for its pro rata portion of the county bonds.

1917, c. 284, s. 8; 1919, c. 68.

3642. Bonds and taxes by road districts. Whenever there has been established in any county or counties of this state a road district, composed of one or more townships in one or more counties, or parts of one or more townships in one or more counties, such road district is herewith granted the same rights and privileges in regard to the issuing of bonds or levying of special road tax as is given to townships under the provisions of this article.

1917, c. 284, s. 9; 1919, c. 68.

3643. Petition and election for county road commission. Upon the petition of one hundred freeholders of any county petitioning for the creation of a county road commission, the board of county commissioners of said county shall make an order providing for holding an election at the next election of county officers or at any other time not less than thirty days from the date of said order, which shall be designated therein, to open the polls and take the sense of the qualified voters of the county on the question of whether there shall be created in said county a county road commission. In the event that the majority of votes cast shall be for the creation of a county road commission at any election herein provided for, after the result has been declared and recorded as herein provided for there shall be and there is herewith created in said county a county road commission as provided hereinafter.

1917, c. 284, s. 10; 1919, c. 68.

3644. Qualified voters defined; law governing elections; registration; ballots; returns. The qualified voters at any special election held under the provisions of this article, until otherwise provided by general law, shall be those qualified to vote at the preceding regular November election and those who may have become of age and qualified since the preceding regular November election, except those who by commission of crimes or by removal from the district or county or for other legal causes have disqualified themselves to vote. Any election held under the provisions of this article shall be conducted in the same manner as is now or may hereafter be prescribed by law for holding elections for the members of the general assembly, except as herein provided. The said board of county commissioners shall appoint the registrars of election, the judges or inspectors, and any other election officers, and registration and challenge of voters shall be conducted in the same manner as is now or may hereafter be provided for the election of members of the general assembly; and said county commissioners may or may not order a new registration for any or all of said elections.

At any special election held under the provisions of this article for a bond issue, the ballots tendered and cast by the voters shall have written or printed upon them "For road bond issue" or "Against road bond issue," and all electors who favor the issuing of said bonds shall vote a ballot written or printed thereon "For road bond issue," and those opposed to the issuing of the bonds shall vote a ballot written or printed thereon "Against road bond issue"; and at any special election held under the provisions of this article, providing for a special road tax,

the ballots tendered and cast by the voters shall have written or printed upon them "For special road tax" or "Against special road tax," and all electors who favor the levying of said special road tax shall vote a ballot written or printed thereon "For special road tax" and those opposed to levying the special road tax shall vote a ballot written or printed thereon "Against special road tax"; and at any special election held under the provisions of this article, providing for the creation of a county road commission, the ballots tendered and cast by the voters shall have written or printed upon them "For county road commission" or "Against county road commission"; and all electors who favor the creating of a county road commission shall vote a ballot written or printed thereon "For county road commission," and those opposed to creating a county road commission shall vote a ballot written or printed thereon "Against county road commission."

The vote shall be counted at the close of the polls and returned to the board of county commissioners or clerk of the board on the Thursday next following the election, and the board shall tabulate and declare the result of the election not later than its next regular meeting following the return of the vote of the election, all of which shall be recorded in the minutes of the board of county commissioners, and no other recording and declaring of the result of the election shall be necessary. The result of the vote shall be counted, declared, and reported to the board of county commissioners as prescribed by law in the election of the members of the general assembly.

1917, c. 284, s. 11; 1919, c. 68.

3645. When bonds to be issued. In the event that the majority of the votes cast shall be "For road bond issue" at any election herein provided for, after the result has been declared and recorded as aforesaid the board of county commissioners or county road commission, as authorized, of the county at its next regular meeting shall proceed to carry out the wishes of the voters as expressed at such election, as hereinafter provided in this article.

1917, c. 284, s. 12; 1919, c. 68.

3646. Levy of special road tax. In the event that the majority of the votes cast shall be "For special road tax" at any election herein provided for, after the result has been declared and recorded as aforesaid the board of county commissioners of the county at its next regular meeting shall proceed to carry out the wishes of the voters as expressed at such election, as hereinafter provided for in this article.

1917, c. 284, s. 13; 1919, c. 68.

3647. County road commission created. In the event that the majority of the votes cast shall be "For county road commission" at any election herein provided for, after the result has been declared and recorded as aforesaid the board of county commissioners at its next regular meeting shall proceed to carry out the wishes of the voters as expressed at such election, as hereinafter provided for in this article.

1917, c. 284, s. 14; 1919, c. 68.

3648. Advertisement and sale of bonds; when noncompliance not to invalidate bonds. The board of county commissioners, or county road commission, or other

commission of any county which is authorized to issue county, township, or road district bonds under the provisions of this article, shall then proceed with the least possible delay to issue such bonds in such denominations and of such class and for such term as may be deemed best by said board of county commissioners or other said commission. In making sale of the bonds authorized by this article, advertisement of same shall be made in a recognized financial paper of the country, or a newspaper of state-wide circulation, as well as in a local paper, for at least thirty days prior to receiving of bids by the board of county commissioners or county road commission. The advertisement shall state the date, the time and the place for the opening of bids, and the advertisement shall also state that all bids must be accompanied by certified check properly vouched for by a local bank, if any, of the county in which sale is to be consummated and for which bonds are issued; but if there is no bank in said county, then by any solvent bank in a neighboring county, and the amount of said check to be determined by the board of county commissioners or county road commission of the county proposing to issue the bonds. The state highway commission must be notified by the board of county commissioners or county road commission of the date, place, and time of sale of bonds authorized to be sold under this article, in order that the state highway commission, if it so desires, may have a representative present who shall act in an advisory capacity with the board of county commissioners in the sale of the bonds. The noncompliance with the conditions herein required shall not be construed to invalidate the bonds issued which may have passed into the hands of innocent purchasers for value and without notice. No bonds shall be sold for less than their par value.

1917, c. 284, s. 15; 1919, c. 68.

3649. State or federal aid. If any act shall be passed at this or any subsequent session of the general assembly authorizing the state to loan money to the counties to aid in the building or improving of public roads, taking county bonds as collateral for said loan, or if any provision shall be made for the federal government to loan money to the county for the purpose as stated above, then the board of county commissioners or county road commission is hereby authorized and empowered to avail themselves of the privileges and benefits of any such act.

1917, c. 284, s. 16; 1919, c. 68.

3650. No fees allowed officers. In selling the bonds and in handling the funds derived from the sale of the bonds, and in turning same over to the bank or banks of the county hereinafter authorized to be the depository of such funds, the board of county commissioners, the county road commission, or the treasurer of the county shall not be allowed any fees for handling such funds.

1917, c. 284, s. 17; 1919, c. 68.

3651. Levy of tax for interest on bonds; misappropriation punished. When any bonds are issued under the provisions of this article, the board of county commissioners shall levy annually the first Monday in May, or at such time as county taxes are levied, a special tax for the county, township, or road district, of such an amount on the one hundred dollars of property and on the poll as will provide a sufficient sum with which to pay the interest due on the bonds issued and pay whatever part of the principal of the bond issue may become due that year, and also to set aside the amount necessary to provide an adequate sink-

ing fund with which to redeem or buy in the bonds. The taxes so levied shall be collected as other taxes and shall be kept as a separate fund, to be applied for the purposes as stated above, and it shall be a misdemeanor for the members of the board of county commissioners to use such fund for any other purpose.

1917, c. 284, s. 18; 1919, c. 68.

3652. Levy of special road tax. The board of county commissioners of any county which is authorized to levy a special road tax for county, township, or road district road work under the provisions of this article shall, beginning with the first Monday in May after the election authorizing such levy, proceed to levy each year, on the first Monday in May or at such time as county taxes are levied, the special road tax authorized by the election and for the number of years stated in the petition calling for the election.

1917, c. 284, s. 19; 1919, c. 68.

3653. Emergency fund or bonds provided for; limit. Wherever in any county, township, or road district a condition exists in connection with the location, construction, reconstruction, maintenance, or repair of the roads of said county or township or road district such that in the judgment of the county road commission or any other similar road commission or board having charge of the roads and bridges of the county, township, or road district, the fund available for such condition is insufficient for the work demanded, then, on application of the county road commission or any other similar road commission or board of the county, township, or road district, the board of county commissioners shall appropriate from the general fund of the county, or shall issue short-time notes or bonds in sufficient amount for the work required. The amounts of such fund or bonds issued shall not in any one year exceed one per cent of the taxable valuation, both real and personal, of the county, township, or road district.

1917, c. 284, s. 20; 1919, c. 68.

3654. Fund for maintenance of roads. Whenever the board of county commissioners or county road commission of any county under the provisions of this article has issued and sold bonds or has levied a special road tax, it shall levy an additional special maintenance tax sufficient to raise an amount equal to not less than one or more than four per cent of the par value of said bonds issued for the road work of the county, township, or road district, or the amount that has been raised by the said special road tax, to be used for the purpose of maintaining the roads built through the expenditure of the funds raised from such bond issue or from such special road tax. The money thus raised shall be deposited by the sheriff to the credit of the county road commission hereinafter provided for in said bank or banks authorized to receive funds under the provisions of this article. This money shall be deposited as a maintenance fund, to be expended only for the maintenance of the roads constructed under the authority of this article.

1917, c. 284, s. 21; 1919, c. 68.

3655. Depository for road funds. All moneys derived from the sale of bonds authorized and sold under the provisions of this article or from the levy of the special road tax authorized under the provisions of this article shall be deposited by the board of county commissioners in such solvent bank or banks, if any, of

said county, or if there is no bank in said county, then in any solvent bank in a neighboring county as will pay the highest rate of interest on daily balances as may be determined by the board of county commissioners; said moneys to be deposited in said bank or banks to the credit of the county road commission hereinafter provided for, and to be drawn upon by said commission as hereinafter directed.

1917, c. 284, s. 22; 1919, c. 68.

3656. Other funds deposited. Any other moneys, in whatever way collected or appropriated, which are designed to be used for the construction or maintenance of the roads of any county, township, or road district in which bonds for road work within such county, township, or road district have been issued and sold or in which special road tax for road improvement has been levied under the provisions of this article, shall be deposited in the same bank or banks as heretofore provided in which the moneys obtained from the bond issue or special road tax are deposited, and these moneys shall be deposited to the credit of the county road commission hereinafter provided for, and shall be drawn upon by said commission as hereinafter directed.

1917, c. 284, s. 23; 1919, c. 68.

3657. Monthly statements by depositories. The bank or banks in which the said road moneys designated in this article are deposited shall prepare monthly statements showing the amounts paid, to whom paid, and for what purposes, and submit same to the said county road commission, and the said road commission shall have said monthly statement posted at the courthouse door of such county.

1917, c. 284, s. 24; 1919, c. 68.

Part 2. County Road Commission and Road Management

3658. County road commission. Whenever a bond issue or a levy of a special road tax or the appointment of a county road commission is authorized as hereinbefore provided in this article, there shall be and there is herewith created in such county, except as hereinafter provided, a county road commission to be composed of either three or five members, one of whom shall be at all times a member of the minority political party of the county, and who shall be appointed by the board of county commissioners. Should the board of county commissioners decide to appoint three men, in making the first appointments one member shall be appointed for two years, one for four years, and one for six years. Should the board decide to appoint five men, in making the first appointments one member shall be appointed for two years, two for four years, and two for six years. Thereafter all appointments shall be for six years. Nothing in this law shall be so construed as to prevent the reappointment of a member of this commission at the expiration of his term. Each member of the county road commission shall take and subscribe an oath before the clerk of the court of his county for the faithful performance of his duties as a member of the said commission: Provided, however, that when in any petition authorized by this article it is stated that the board of county commissioners or road commission or board already existing in such county shall have charge of the road work of such county, township, or road district, then the board of county commissioners shall not appoint a new county road commission as set forth in this section, but the said

commission or board mentioned in the said petition shall become the county road commission for carrying out the purpose of this article.

1917, c. 284, s. 25; 1919, c. 12, s. 3; 1919, c. 68.

Under P. L. 1913, c. 441, it was held that the requirement that members of the commission be of different political parties was directory and did not affect the right to the office: *Cole v. Sanders*, 174-112. The legislature may create special road commission and confer upon it powers formerly exercised by the county commissioners: *Comrs. v. Comrs.*, 165-632; *Hargrave v. Comrs.*, 168-626.

3659. County commissioners appoint township road commissioners in certain cases. Whenever a bond issue or a levy of a special road tax is authorized or has been authorized, as hereinbefore provided in this article, for any township in any county where one or more townships have heretofore voted bonds for the working of the public roads under special acts or under acts other than this article, and the working of the roads of said township is under the charge of a township commission, and no county road commission is in existence or has been appointed under this article, in such case the county commissioners may appoint a township road commission for such township, to be composed of three members, one of whom shall be at all times a member of the minority political party of the township. Township commissioners so appointed shall be appointed for the same term and in the same manner as is hereinbefore provided for the appointment of the county road commission, and such township commission shall have in said township, and for the purpose of working the roads of said township, all the rights, powers and privileges in this article given, granted and conferred upon the county road commission.

1919, c. 37.

The requirement that members of commission should be of different political parties held to be directory: *Cole v. Sanders*, 174-112. Legislature may establish special road commission for townships and road districts: *Trustees v. Webb*, 155-379; *Woodall v. Highway Com.*, 176-377.

3660. Extension of jurisdiction of commission. Wherever a township or road district has taken advantage of the provisions of this article, so that a county commission has been created and appointed and has charge of the road work of such township or road district, and there should be in the same county in which such township or road district is located another or other townships which avail themselves of the privileges of this article, there shall be no additional county road commission appointed by the board of county commissioners as provided for herein, but the county road commission already appointed shall have charge of the road work in the additional township or townships or road district or districts of said county that may come under the provisions of this article.

1917, c. 284, s. 26; 1919, c. 68.

3661. Corporate powers; use of road funds. The county road commission and its successors in office are and they are hereby constituted a body corporate under and by virtue of the laws of North Carolina and by this article, under the name and style of County Road Commission, and shall have all powers and authority granted to corporations of like nature by the laws of North Carolina, and by that name may sue and be sued, make contracts, acquire real and personal property by gift or devise, hold, exchange, and sell the same, and exercise such other rights and privileges as are incident to other municipal corporations of like nature,

such as the condemnation of land for the construction, widening or changing of any roads in the county, and such other powers as are necessary to carry out any and all the provisions of this article. The said county road commission shall use the funds derived from the sale of bonds or by levy of special tax, or whatever way derived, as authorized by this article, to locate, construct, reconstruct, surface, repair, improve, and maintain the public highways and bridges in the county, township, or road district under their jurisdiction; shall purchase such materials and purchase and hold, or contract for the use of, such tools, machinery, implements, and teams as they may deem necessary for carrying on the road work of said county or township, and perform such other duties as are hereinafter provided for by this article.

1917, c. 284, s. 27; 1919, c. 68.

3662. Duties and powers of county road commissions. It shall be the duty of the said county road commission to take charge of laying out, opening, altering, maintaining, or discontinuing of any and all roads of said county, or of such roads as may be stated in the petition, authorizing the issuing of bonds or of levying special road tax or the formation of a county road commission, that are now maintained or may be maintained by the county as public roads; and it is hereby vested with all powers, rights, and authority now vested in the board of county commissioners and other commissions or boards or other road officials of said county for the general supervision of such roads of said county, and for the construction and repair thereof, by contract or otherwise, as may be deemed best: Provided, that if the bonds issued or the special road tax levied under the provisions of this article applies only to a township or road district, then the duties of the county road commission shall only apply to said township or road district.

1917, c. 284, s. 28; 1919, c. 68.

3663. Organization of road commissions; compensation of commissioners. The county road commission shall biennially from the date of its organization elect a chairman and a secretary, who shall hold office for two years and until their successors shall be elected and qualified. All moneys expended by said commission shall be by draft upon the bank or banks which are depositories for the said road fund, and said drafts shall be signed by the secretary and countersigned by the chairman, and shall show upon their face the purpose for which the money is expended. The members of the said county road commission shall receive pay only when acting jointly as a road commission, and such compensation shall be the same as paid to the members of the board of county commissioners of said county.

1917, c. 284, s. 29; 1919, c. 68.

3664. Vacancies filled. In case of any vacancy caused by death, resignation or otherwise, of any member of the county road commission, such vacancy shall be filled by the board of county commissioners for the unexpired term, as provided above for regular appointments.

1919, c. 284, s. 30; 1919, c. 68.

3665. Continuation of existing road management. Those counties or townships or road districts, coming under the provisions of this article, which already have a road commission, or other commission or board which has charge of the road work, or in which the board of county commissioners have charge of the road

work, and desire to retain such commission or board to have charge of the road work of said county, township, or road district, then such desire shall be stated in the petition praying for a bond election or special road tax; and if the bond election or special road tax is passed, then said board of county commissioners, or other board or commission stated in the petition, shall become the county road commission for all the purposes of this article, and shall be required to perform the duties that the county road commission created by this article is authorized to perform; if, however, no desire is stated in the petition praying for a bond election or special road tax that an existing road commission or board or the board of county commissioners shall retain charge of or have charge of the road work in such county, township, or road district, then in that event the county road commission authorized by this article shall be appointed by the board of county commissioners, and such appointment shall abolish the said county, township, or district road commission or board; but all the rights and authority conferred upon such commission or board herewith abolished are hereby conferred upon the county road commission herein enacted.

1917, c. 284, s. 31; 1919, c. 68.

3666. Road engineer to keep books and accounts. The county road commission is authorized to employ an expert road engineer at such compensation as may be fixed by said county road commission. The county road engineer, however appointed, may request, at any time, the advice of the state highway engineer in solving any problem that may arise, either technical, economical, or otherwise, that may be deemed by him to be of benefit to the county, and such advice shall be without any expense to the county or township. It shall be the duty of the engineer of the county, township, or road district coming under the provisions of this article to keep or have kept the necessary books and accounts showing in detail the expenditure for all work done through money derived by bonds issued or special road tax levied for road work in such county, township, or road district. The engineer shall keep or have kept in suitable way a cost accounting system showing the unit cost of various items entering into the construction of the roads, showing when and where the various elements of cost entering into the said work were used, giving the name of the road and the nearest station number to culverts, bridges, etc. It shall be his duty to keep approximate yardage costs, and approximate classification of the materials moved in all excavations made for the purpose of building such roads.

1917, c. 284, s. 32; 1919, c. 68.

3667. Assessments of damages and benefits. In opening new highways, widening and straightening old roads and repairing same, the county road commission created by this article, or any other road commission or board, or the board of county commissioners, having charge of the road work in any county, township, or road district, or the state highway commission, is hereby authorized through its agents to enter upon any land and locate and build such highways. If the said commission or board and the owner or owners of said land cannot agree as to the damages, if any, the said commission or board shall, after sixty days after said highway is completed, cause to be summoned three disinterested freeholders of said county, who shall go upon the land and assess the damages and benefits under the general law as it now exists. Before entering upon lands as authorized by this section it shall be the duty of the said commission or board to serve

notice upon the owner or owners of said land, notifying them that the highway is to be located upon said land under authority of this article. In assessing the damages sustained by any landowner, the jury shall take into consideration the special benefits, if any, accruing to the landowner, and in determining such benefits consideration shall be given to the benefits the landowner has derived from the fact that any old road right of way has reverted back to said landowner by reason of the relocation and construction of the new road; and if such benefits shall exceed the damages, then the amount of such excess of benefits shall be assessed against the landowner and shall constitute a lien upon the land adjoining the road, and shall be collected by the sheriff in the same way as public taxes. No suit shall be instituted by the landowner for damages on account of location of the road under this article or the taking of timber or material until after sixty days after the completion of the road across the lands of such landowner, and no suit shall be brought by any landowner unless the same is commenced within six months after the completion of the road by or across the lands of the claimant. Either party may appeal to the superior court for the assessment of damages and benefits, where the matter shall be heard by the court and jury *de novo*. No cost shall be awarded against any county or township upon appeals when the recovery awarded through such appeal is not more favorable to appellant than the award of the referees.

1917, c. 284, s. 33; 1919, c. 68.

The individual commissioners are not liable, and the owner must seek compensation in the manner provided in the statute: *Marshall v. Hastings*, 174-480 (decision under special act). See section 3763.

3668. Entry on land for material; obstruction of drains or ditches. The county road commission created by this article, or any other road commission or board, or the board of county commissioners, having charge of the road work in any county, township, or road district, or the state highway commission, is hereby authorized through its agents to enter upon any land in said county, to cut and carry away any timber except trees or groves on improved land planted or left for shade or ornament, dig or cause to be dug and carry away any gravel, sand, clay, dirt, or stone which may be necessary for the proper repair and construction of roads in said county, and make or cause to be made such drains or ditches upon any land adjoining or lying near any road in said county that the said commission or board may deem necessary for the better condition of the road; and the drains and ditches so made shall not be obstructed by the occupants of such lands or any other person; and any person obstructing such drains or ditches shall be guilty of a misdemeanor. Before entering upon land as authorized by this section, it shall be the duty of the said commission or board, through its representatives, to serve notice upon the owner or owners of said land, notifying them that certain material authorized to be taken by this section is required for the road work.

1917, c. 284, s. 34; 1919, c. 68.

The county is not liable for the wrongful act of the officers in taking stone from a quarry: *Keenan v. Comrs.*, 167-356. See sections 3817, 3818.

3669. Cutting timber shading roads. The county road commission or other commission or board having charge of the road work in any county, township, or road district, or the state highway commission, through its agents is hereby

authorized to enter upon any land adjoining or bordering on any county road and cut the trees on such land for a distance in width of not over thirty feet from the edge of the right of way of said road; but such cutting must be necessary for the maintenance of the road, and trees or groves on improved land planted or left for shade or ornament shall not be cut. Due compensation shall be made for any damage sustained by the landowner, to be ascertained under the rules and regulations provided in the second section preceding.

1917, c. 284, s. 35; 1919, c. 68.

3670. Claims for timber or material. The owner of any land from which any timber or other material has been removed may present to the authorities his claim therefor in writing, and upon such presentment it shall be the duty of the said authorities to set a day not later than thirty days thereafter for the purpose of hearing and determining such claim. Upon the hearing and determination thereof, the claimant may appeal to the superior court of said county to have his cause tried as in other civil cases.

1917, c. 284, s. 36; 1919, c. 68.

See sections 3817, 3818.

3671. Width, alignment, and grade of highways. The highways in any county, township, or road district constructed or improved under this article shall have a right of way of not less than forty feet, except where the road authorities or state highway commission deem it impracticable to acquire such width, and in such cases the width shall be as determined by said authorities. The alignment of the road shall be as straight as practicable and with no grade over four and one-half per cent, except as such grade is considered impracticable by the road engineer.

1917, c. 284, s. 37; 1917, c. 68.

3672. Deposit of money; transfer of equipment. Any moneys on hand in any county treasury or in the hands of any county treasurer or in any township or road district treasury, or in the hands of any township treasurer, to the credit of the road funds of such county or township or road district at the time the location, construction, repair, and maintenance of the public roads in said county, township, or road district comes under the provisions of this article, shall be turned over to the bank or banks designated as the depository for the road fund of said county or township or road district by the board of county commissioners, or other authorities having charge of such funds, and shall become part of said road fund and shall be expended for the construction of the roads in said county, township, or road district as provided in this article. Whenever the construction of the roads of any county or township or road district comes under the provisions of this article, any teams, material, machinery, tools, supplies, or any property whatsoever belonging to the county or township or road district, shall be turned over to the county road commission herein provided for, to be used by them for and in whatever way they deem best in constructing or improving the roads of said county or township or road district: Provided, that when the bonds issued or special road tax levied only applies to a township or road district, then only such teams, materials, machinery, tools, supplies, or other property as belong to said township or road district shall be turned over to the county road commission.

1917, c. 284, s. 38; 1919, c. 68.

3673. County-line roads. When the proper location of any public road is such as to cause it to run along the dividing line between two counties or to traverse first a part of one county and then a part of the other county, thus making the road a "county-line road," then a representative or representatives of the county road commission of each county, or, in case the county has no road commission, then of the board of county commissioners, shall, together with representative of the state highway commission, meet on the first Wednesday in March or as soon thereafter as practicable of each year and determine the amount necessary to maintain for the succeeding year the said "county-line road" in a proper manner, and also determine the best method of expending such sum in the most economical manner to accomplish the desired result; and each county commission shall then provide from the road funds at its disposal an amount equal to one-half of that previously determined as necessary to maintain said road in a proper manner, and shall use such sum in the maintenance of said road in such manner as is determined by the representatives of said commissions. In case the county commission desires and requests in writing that the state highway commission supervise and take charge of the maintenance of said "county-line road," then the said sum provided for the maintenance of said road by the said county commissions shall be placed by the said commissions at the disposal of the state highway commission, to be used for the maintenance of the road.

1917, c. 284, s. 39; 1919, c. 68.

3674. Construction by one county of county-line roads. When the survey for the location of a road is completed and it is found that the road when constructed will follow the dividing line between two counties or traverse first a part of one county and then a part of the other county, and thus making such a road a "county-line road," and satisfactory arrangements cannot be made between the road officials of the two interested counties for the construction of said "county-line road," then the road officials of the county desiring the construction of said road are hereby authorized to build said road, including that portion wholly within the other county, and pay for same out of the road funds of their county, and the road thus constructed shall become a public road of both counties and shall be maintained as provided in the preceding section for "county-line roads."

1917, c. 284, s. 40; 1919, c. 68.

3675. Extension of work to adjoining counties. When the county road commission or any other commission or board that has charge of the road work of any county has built a road to a county line of an adjoining county, which does not contain any connecting road, or if such connecting road is one that is in poor condition, and thus, there is a gap between the said county line to a good road in the adjoining county, and satisfactory arrangements cannot be made between the road officials of the two interested counties for the construction of a road connecting the two roads mentioned above, then the county road commission or other commission or board having charge of the road work of the county desiring the construction of said road in order to make said connection, and when necessary the board of county commissioners, are herewith authorized to build said connecting road in the adjoining county and pay the cost of such construction out of the road or other funds of the county desiring the construc-

tion of said road, and the road thus constructed shall become a public road of the county in which it is located, and shall be maintained by said county in which it is located in a manner to be approved by the state highway commission.

1917, c. 284, s. 41; 1919, c. 68.

3676. Work by county commission in municipalities. The county road commission provided for in this article, and any other commission or board having in charge the road work in any county or township of said county, or in any road district, is herewith authorized to expend a portion of the funds available for road work in said county, township, or road district upon the public roads of any incorporated town within said county, township, or road district having a population, as shown by the latest available federal census, of less than twenty-five hundred, and that portion of any street or road in an incorporated city or town having a population of twenty-five hundred or more, along which the houses average more than two hundred feet apart, whenever in their judgment the construction of such road within said incorporated city or town is to the interest of the county, township, or road district: Provided, that the board of aldermen or other governing body of said city or town agrees that the county road commission or other commission or board having charge of the road work for the county, township, or road district, have full charge of the road work in said city or town as authorized by this section.

1917, c. 284, s. 42; 1919, c. 68.

3677. Free labor required on roads. In those counties where the able-bodied men are required to work a certain number of days on the public roads of the county or township of such county, the labor of such men shall be under the jurisdiction and supervision of the county road commission, and the men shall be worked at such time and in such manner as said road commission may direct, in conformity with the county or township law governing such labor, except in so far as the following provisions amend such laws:

1. All able-bodied men of any county or township that are subject to work on the public roads of said county or township may be called out by the county road commission to work on such roads any time during the year for three consecutive days until the required number of days are worked out, and the work-year shall begin with the first day of January.

2. No man shall be called upon for more days work than is prescribed in the act authorizing such labor in said county or township.

3. Any able-bodied man required to work on the roads may, in lieu thereof, pay to the chairman of the county road commission a sum equal to seventy-five cents per day for the number of days he may be required to work; and in such case he shall be relieved from all labor on the roads.

4. Such sum is paid to the county road commission prior to the time he is called upon to work the roads.

5. Any able-bodied man subject to work on the road who fails to report for work at the time called upon by the county road commission, or refuses to work as required by the county road commission, and has not paid to the county road commission the required sum in lieu of such labor, unless prevented from reporting for such duty by illness or other cause beyond his control, shall be guilty of

a misdemeanor, and upon conviction shall be fined not less than five dollars or more than twenty-five dollars, or imprisoned not less than five or more than ten days.

1917, c. 284, s. 43; 1919, c. 68.

See sections 3806-3811.

3678. Prisoners on roads. Any person in any county that has a county road commission appointed under the provisions of this article, who shall be convicted in any of the courts of said county, superior, justice's or mayor's courts, and sentenced to work on the public roads, shall be assigned into the custody and control of the county road commission by the board of county commissioners, when said board is so requested by the county road commission. Said prisoners while in the custody and under the control of the said county road commission shall be employed on such road work as may be deemed best by the county road commission, and the expense of maintaining and guarding said convicts while so employed may be paid by the board of county commissioners out of the general fund of the county upon vouchers approved by the chairman and secretary of the county road commission. The county road commission shall have direct supervision of the care, feeding, and clothing of said prisoners, and shall provide the necessary sleeping quarters and camps necessary for the proper care of said prisoners. All prisoners' camps shall be maintained in a sanitary manner approved by the state board of health. The county road commission is also authorized, in their care and working of convicts, to divide the prisoners into classes or groups according to the character of the prisoner, and work any and all such prisoners as they deem best without guards and without stripes. Prisoners worked in this manner, without guards and stripes, shall be known as "honor prisoners," and shall be entitled to receive a reduction of at least twenty-five per cent and not more than fifty per cent of the time they are sentenced for satisfactory work and good behavior.

1917, c. 284, s. 44; 1919, c. 68.

3679. Road statistics. As it is necessary for the state highway commission to know as accurately as possible the number of miles and type of construction of the roads in each county in order to enable the state highway commission to supply the secretary of agriculture of the United States with the information he desires in connection with the operation of the Federal Aid Road Act, and to enable the state highway commission to carry on its work most efficiently and effectively, the chairman of the county road commission, or the chairman of whatever board or commission that has charge of the road work in such county or township of each and all the counties and townships of the state, is herewith authorized and directed to furnish to the state highway commission, upon blanks to be provided by said state highway commission, the number of miles of each type of road constructed, number of bonds issued, and amount of tax levied, and such other information and statistics regarding the road work of the county or township under his jurisdiction as the state highway commission may deem necessary.

1917, c. 284, s. 45; 1919, c. 68.

3680. Guard railings. The county road commission of any county, or whatever board has charge of the roads and road work of any county or township or

road district in said county, are herewith authorized and directed to provide suitable means to insure the safety of the public traveling over the roads of such county, township, or road district, by erecting, whenever it is considered necessary, substantial railings, walls, or other suitable structures for this purpose. If road officials of said county or township or road district fail to provide such satisfactory measures of insuring the safety of those traveling the roads of such county, township, or road district, then upon petition of twenty freeholders of the county, township, or road district who are frequent patrons of the road in question, the said county road commission, or whatever commission or board has charge of the road work of said county, township, or road district, shall, within ten days after receipt of said petition, begin erecting such satisfactory railing, wall, or other suitable structure for this purpose: Provided, that if in the judgment of the county road commission, or whatever commission or board has charge of the road work of said county, such railings, walls, or other suitable structures are not needed, then they shall advise with the state highway commission, and if such commission deems such railings, walls, or other suitable structure necessary for the protection of the patrons of the said road, the county road commission or other said commission or board shall erect such railings, walls, or other suitable structures as called for in the petition.

1917, c. 284, s. 46; 1919, c. 68.

Part 3. Road Institutes

3681. Road institutes. The members of the county road commission of any county, or the members of whatever commission or board who have charge of the road work in any county, township, or road district, are herewith authorized to attend the road institute held annually at the University of North Carolina, and the county road commission of any county, or whatever commission or board has charge of the road work in any county, township, or road district, are herewith authorized to detail any and all persons employed by said county in connection with the road work of said county, township, or road district to attend said institute, when in their judgment such attendance will inure to the benefit of the road work of said county, township, or road district; and the said road commission, or other commission or board, is herewith authorized to pay the expenses of the members of said county road commission or board, and other persons detailed to attend said road institute, out of the funds of the said county, township, or road district.

1917, c. 284, s. 47; 1919, c. 68.

Part 4. Road Districts

3682. Creation of road districts. Whenever it is desired to create a road district in any county, and provide funds for the location, construction, reconstruction, or maintenance of roads within such district, such road district may be created in the following manner: Upon petition of twenty-five freeholders living within the area of a proposed road district, which petition shall give the boundaries of the proposed district, together with the amount of bonds it is desired to issue for the district, or the amount of special tax it is desired to levy upon the proposed district, and when said petition is presented to the board of county commissioners it shall be the duty of the board of county commissioners of any

county, upon receipt of such petition, to provide for holding an election at the next election of county officers, or at any other time not less than thirty days from the date of such order, which shall be designated therein, to open the polls and take the sense of the qualified voters living within the boundaries of the proposed road district on the question of whether the board of county commissioners of said county in which the proposed road district is located shall issue the bonds called for in the petition, or levy the special tax called for in the petition, provided that there is included in the petition the approximate number of miles of road it is proposed to improve by such bond issue or special tax; but no election shall be held until the board of county commissioners has been notified by the state highway commission in writing that the amount of bonds proposed to be issued or special road tax proposed to be levied will be sufficient to construct, alter, or improve approximately the number of miles of road proposed to be improved: Provided, that the approximate amount of bonds proposed to be issued as called for in the petition, together with all bonds previously issued and remaining unpaid by said county for which the property of the road district is liable, shall in no case exceed an amount equal to ten per cent of the total assessed valuation of the area included within the proposed road district.

In case the petition for a road district calls for an election, the board of county commissioners shall proceed to call, hold, and report the election as hereinbefore provided for in the election in townships; and in case the result of the election is in favor of road bond issue or special road tax, then the said board of county commissioners shall declare the road district created, and proceed to carry out the wishes of the people of the district in regard to the issuing of bonds or the levying of special tax heretofore provided for townships or road districts.

1917, c. 284, s. 48; 1919, c. 68.

The legislature may, by special act, create a special road district, which may include a municipal corporation, and may place the election machinery for such special district in the hands of the municipal corporation: *Woodall v. Highway Com.*, 176-377. It may create such special district even for one road: *Ibid.*—and determine the manner of issuing and selling bonds, *Ibid.*

Who are to be considered freeholders in a petition for special tax, see section 1746.

3683. Special road district; apportionment of assessments. A county road commission of any county, or whatever commission or board has charge of the road work of any county, shall have authority and power as hereinafter provided to cause to be relocated, constructed, reconstructed, or improved any public road of the county, or any part of such road, upon petition signed by the owners of sixty per cent of the land area in each and every subdivision hereinafter provided for; and the board of county commissioners are authorized and directed as hereinafter provided to levy and cause to be collected an assessment upon all lots, tracts, and parcels of land specially benefited by such improvement, for paying two-thirds of the cost and expense thereof, as hereinafter provided, which assessment shall become a first lien upon all property liable therefor prior and superior to all other liens and encumbrances, and to provide for the payment of such assessment either on the immediate payment plan or by installments, and to issue local road district warrants or bonds for such installments.

1917, c. 284, s. 49; 1919, c. 68.

3684. Petition for improvement of adjoining roads. The owners of sixty per cent of the land area in each and every subdivision hereafter provided for adjoin-

ing such county road or part thereof sought to be improved in any county in this state may present to the county road commission or whatever commission or board that has charge of the road work of any county, a petition setting forth that the petitioners are such owners, and that they desire such road or part thereof to be improved under the provisions of this article, the particular road or portion thereof sought to be improved, the kind and nature of the improvement desired, and the mode of payment of the assessments to be levied for defraying the cost and expenses of such improvement, and the maximum cost of the proposed improvement.

1917, c. 284, s. 50; 1919, c. 68.

3685. Procedure upon petition for special road district, or road improvement. Upon the presentation of a petition as provided in the two preceding sections, the county road commission, or whatever commission or board has charge of the road work of any county, shall forthwith proceed to carry out the wishes of the petitioners: Provided, that before the county road commission, or whatever commission or board has charge of the road work of any county, shall act upon said petition the register of deeds shall certify to the commission that the petition represents at least sixty per cent of the land area in each and every subdivision hereinafter provided for adjoining the county road proposed to be improved; and that the county road commission, or whatever commission or board has charge of the road work of any county, shall, through its engineer, examine and survey and make plans and specifications and estimate of the cost of such construction and improvement as is desired by the petitioners; and if two-thirds of the estimated cost of such improvement is greater than the amount stated in the petition, then the county road commission, or whatever commission or board has charge of the road work of any county, shall reject such petition, except that they are authorized to do the work petitioned for. The total assessment charged against the property owners shall not be greater than the amount named in the petition.

The engineer shall examine and determine the lands that will be specially benefited by such improvement and which should be included within the local district to be assessed to defray the cost and expense of such improvement and to prepare the estimate rolls as hereinafter provided; the engineer shall also determine the cost of right of way, if any, for that portion of the road that it is necessary to relocate. As soon as the engineer has completed his report he shall present same to the county road commission, or whatever commission or board that has charge of the road work of such county, at their next meeting.

1917, c. 284, s. 51; 1919, c. 68.

3686. Local road districts constituted; apportionment of assessment. Such local road districts shall be constituted and the boundaries thereof fixed as follows: The road or portion thereof to be improved, coterminous with the improvement, shall be the central line through the district, and the bordering lands on each side, and within a distance of half a mile from the margin of said road and coterminous with the construction work or improvement, shall be included in and constitute the body of the local road district, and shall be subject to assessment to the extent above provided.

For the purpose of making an equitable apportionment of the assessment, such local road district shall be divided longitudinally into three parts, as fol-

lows: All land on both sides of said road, or portion thereof, to be improved, and within a distance of eight hundred and eighty feet from the margins thereof, shall constitute the first subdivision; all the land outside of the first subdivision and within eight hundred and eighty feet from the exterior margins thereof shall constitute the second subdivision; and all the land outside of said second subdivision and within eight hundred and eighty feet from the exterior margins thereof shall constitute the third subdivision. Each separate tract or parcel of land in said first subdivision shall be assessed and be subject to a charge for a proportional part of forty-five per cent of not over two-thirds of the cost of the construction work or improvement of said road, including said incidental expenses, and it shall be subject to a lien therefor until it shall be paid; each separate tract or parcel of land in said second subdivision shall be assessed and subject to a charge for a proportional part of thirty-five per cent of not over two-thirds of the cost and expense of said construction work or improvement, and be subject to a lien therefor until it shall be paid; each tract or parcel of land in said third subdivision shall be assessed and subject to a charge for a proportional part of twenty per cent of not over two-thirds of the cost and expense of said construction work or improvement, and be subject to a lien therefor until it shall be paid.

The charge upon the several separate tracts or parcels of land in each subdivision shall be assessed ratably according to the front foot plan, that is to say, one foot of longitude measured along the road constituting the center of such improvement district and extending latitudinally across the subdivision shall be taken as the unit by which to determine the proportion of the assessment, so that a unit in each subdivision will be eight hundred and eighty square feet of superficial area. If the areas of said subdivisions are not equal to each other, the rates fixed for each subdivision shall be fixed on the basis that the benefit conferred on eight hundred and eighty square feet of land in subdivisions first, second, and third are related to each other as are the numbers forty-five, thirty-five, and twenty, respectively. This section is to imply that the property on each side of said road shall bear one-third of the cost and the county one-third.

1917, c. 284, s. 52; 1919, c. 68.

3687. Report of engineer; creation of district. The county road commission, or whatever commission or board has charge of the road work of any county, shall at their next meeting after the completion of the engineer's report relating to local road districts, consider such report, and if it shall appear from said report that the whole amount of the cost and expense of said construction or improvement, and, together with any cost for right of way chargeable as a lien against the property specially benefited within such local road district, comes within the amount specified in the petition, the said county road commission, or whatever commission or board has charge of the road work of any county, shall make and enter upon their records an order that the said improvement be made, and creating such local road district for the payment of said cost and expenses of making said improvement, by special assessment of the property in said district specially benefited according to said engineer's report, be known and designated Local Road District, No. ---, in ----- County, North Carolina, and such report shall be kept on file in the office of the county road commission, or whatever commission or board that has charge of the road work of any county.

1917, c. 284, s. 53; 1919, c. 68.

3688. Work undertaken. After the making of such order and directing the making of such improvement and establishing such local road district, the county road commission, or other commission or board having charge of the road work of said county, shall proceed to do the work under the same provisions and conditions as they are authorized to carry on road work for townships and counties. 1917, c. 284, s. 54; 1919, c. 68.

3689. Apportionment of expense; assessment roll, etc. When the final order for said improvement in the local road district shall have been made, the county road commission, or whatever commission or board has charge of the road work of said county, through its engineer or other representative shall proceed to apportion the estimated cost and expenses of said improvement upon the land embraced in said local road district according to the benefits to be derived therefrom, and not more than thirty days after the beginning of work on said improvement report to and file with the board of county commissioners an assessment roll in duplicate, which shall contain a description of each lot or parcel of land or part thereof to be assessed; the amount to be charged, levied, or assessed against each lot or parcel of land or part thereof, in proportion to the special benefits to be derived by each such lot or parcel or part thereof from such improvement, and the name of the owner of each such lot or parcel of land or part thereof, if known; but in no case shall a mistake in the name of the owner be fatal when the description of the property is correct.

As soon as said assessment roll shall have been so reported and filed, the board of county commissioners shall cause notice to be published for three consecutive weeks, which notice shall be published in a newspaper of the county, or, in case there is no newspaper in the county in which the local road district is located, then in a newspaper of an adjoining county, notifying all persons interested that said assessment roll has been filed, and requiring them to appear at the office of the board of county commissioners, at the county courthouse, at a time not less than fifteen days from the date of the last issue of said publication of said notice, and make objections thereto, if any they have. At the time fixed the board of county commissioners shall meet, and, if no objections have been filed to said assessment roll, they shall make and enter an order confirming the same; but if objections in writing have been filed by any of the landowners affected thereby the board of county commissioners shall proceed to hear such objections, and for that purpose shall hear any testimony that shall be offered by any party interested, and either one of the board of county commissioners shall be authorized to administer oaths to witnesses. After such hearing they shall make such corrections and changes, if any, as to them shall appear just and requisite to apportion the assessment to the benefits to be received from such improvement, and shall then make and enter an order approving and certifying such assessment roll, and levying and assuming the amounts thereof against each and all of the lots and parcels of land, or parts thereof, respectively, included in said roll as approved, and the same shall become a first lien thereon: Provided, that any landowner may appeal to the superior court from the decision of said board, on giving an appeal bond in the sum of one hundred dollars, but such appeal shall not hinder or delay the carrying out of the provisions of this article.

The cost and expenses of survey and of all preliminary proceedings and all other expenses included in organization of the local road district, and for the

preparation, issuance, and disposal of the bonds or warrants for the payment of cost and expense of such improvements, and for the cost of the improvements for the construction and reconstruction of the roads in said local district shall be paid out of the road fund and the general fund of the county in a ratio one to two; that is, one-third of all cost and expenses mentioned above shall be paid out of the road fund of the county by the county road commission, or whatever commission or board that has charge of the road work of said county; and the other two-thirds out of the general fund of the county; this latter being repaid in the assessments collected from the owners of the land jointly, under this article, in the local road district.

1917, c. 284, s. 55; 1919, c. 68.

3690. Maintenance. All roads laid out, constructed, or reconstructed or improved under the provisions of this article shall, after their construction, be maintained by the county road commission, or other commission or board having charge of the public roads of said county.

1917, c. 284, s. 56; 1919, c. 68.

3691. Methods of payment and collection of assessments. There shall be two methods of making payment of the special assessment chargeable against the several tracts and parcels of land included in the local road district authorized under this article, namely, that of "immediate payment" and that of "payment by bonds or warrants"; the method to be adopted and the period not exceeding ten years over which such bonds or warrants shall be made payable shall be that petitioned for as authorized herein. In case the payment of such assessments in local road districts is to be by the method of "immediate payment" the board of county commissioners shall, as soon as such assessment roll has been approved and certified, deliver the same to the sheriff of the county for the collection of such assessments. The sheriff shall give notice by publication for two consecutive weeks in a newspaper in the county, or, in case there is no paper in the county in which the local road district is located, then in a newspaper of an adjoining county, and shall mail a copy of such notice to the owner of the property assessed when the name of such owner and his postoffice address is known; but the failure to mail such notice shall not be fatal when publication thereof is made; which said notice shall state that such assessment roll has been certified to him for collection, and that unless payment is made within thirty days from date of such notice such assessment will become delinquent and shall bear interest at the rate of six per cent per annum; and if not paid before such assessment shall have become delinquent, a penalty of five per cent shall be added, and the sums delinquent shall be added on the annual tax roll for the current year against each lot, tract, and parcel so delinquent, and, with the interest and penalty, collected as other taxes, separate account being kept thereof; and if not paid within the time fixed for the payment of general county taxes, shall be collected as such taxes are collected, together with such additional charges and penalties as are authorized to be charged and collected on other delinquent taxes; and each lot, tract, or parcel so delinquent shall be sold for the amount of such assessment, with interest, penalty, and costs, at the time and in the manner and by the same authority and process as lands and lots are sold for general county taxes.

1917, c. 284, s. 57; 1919, c. 68.

3692. Payment by bonds or warrants. In case the method of payment is to be "payment by bonds or warrants," the board of county commissioners, after the assessment roll has been approved and certified as hereinbefore provided, shall, at the time of levying said assessment and in their order making such levy, provide and declare that the sum charged thereby against each of such tracts or parcels of land in said local road district may be paid in equal annual installments, with interest upon the whole sum so charged at the rate fixed in said order, specifying the number of such installments, which shall be equal to the number of years which the bonds or warrants issued to pay for the improvement may run before payment of the same may be demanded by the holder thereof; and each year thereafter the sheriff shall collect one of said installments, together with the interest due thereon, and all installments thereafter to become due in the same manner and with the same added penalty and interest, in case of delinquents, and by means of the same proceedings to enforce such payments by the sale of the land, and as hereinbefore provided for the collection of said assessment by the method of "immediate payment."

1917, c. 284, s. 58; 1919, c. 68.

3693. Issuance of bonds of district; payable from general fund. The board of county commissioners shall make and enter an order authorizing and directing the issuance of such warrants or bonds of the local road district that has been authorized by the petition for the improved road work in said district, which by their terms shall be made payable on or before a date not to exceed ten years from and after the date of their issue, which latter date may be fixed by the order, and payment of which shall not be demanded by the holder thereof until the end of said period, and they shall bear such interest as shall insure their being disposed of at par and as may be provided for in said order, not exceeding six per cent per annum, which interest shall be payable annually, and each warrant or bond shall have attached thereto interest coupons for each interest payment. Such warrants or bonds shall bear the date of issue and be made payable to bearer. The warrants or bonds and each coupon shall be signed by the chairman of the board of county commissioners, and shall be attested by the clerk of said board, and the seal of such board shall be affixed to each warrant or bond, but not to the coupon: Provided, that each coupon may be signed by facsimile signature of said officers. Such warrant or bond shall be printed, engraved, or lithographed on good bond paper, and state on its face that it is issued in accordance and compliance with the act of 1917, chapter 284, designating the same by title and date of approval. Such warrants or bonds shall be in denominations of not less than one hundred or more than one thousand dollars, and they shall refer to the improvement to pay for which the same shall be issued, and to the order and record thereof authorizing the same, and shall bear upon its face the designation of the local road district, thus: Local Road District, Number --- in ----- County, North Carolina. The principal sum named in the warrant or bond, and the interest thereon, shall be payable out of the general fund of the county, the same to be reimbursed as the assessments are collected by the sheriff from the assessment on the lands in the local road district. Such warrants or bonds shall not be issued in excess of the amount named in the petition requesting organization of the local road district.

1917, c. 284, s. 59; 1919, c. 68.

3694. Notice of issuance of bonds; payment of assessments. In case the payment of the assessments provided for in the previous sections is by such special warrants or bonds, then the sheriff shall give notice by publication for two consecutive weeks in a newspaper of the county, or in case there is no newspaper published in said county, then in a newspaper of an adjoining county, and shall mail a copy of such notice to the owner of the property assessed, when the name of such owner and the postoffice address is given; but the failure to mail such notice shall not be fatal when publication thereof is made; which said notice shall state that such assessment roll has been certified to the sheriff for collection, and that unless payment of the whole amount of such assessment is made within thirty days from the date of such notice special warrants or bonds will be issued against said property for the payment of said assessments, and thereafter the same will be payable in annual installments, with interest thereon at the rate provided for in said warrants or bonds. At any time within such thirty days any owner of lands within such local improvement district may pay the said assessment chargeable against said owner's lands, and release and discharge the same therefrom and from the operation and effect of such warrants or bonds; and no warrants or bonds shall be issued until twenty days after the expiration of such thirty days, nor for any amounts of such assessment so paid in full within such thirty days. The owner of any such lands may redeem the same from all liability for such assessment at any time after said thirty days by paying the entire installments of said assessment remaining unpaid and charged against such lands at the time of such payment, with interest and all charges thereon to the date of the maturity of the installment next falling due. In all cases where any assessment or any installment thereof is paid as herein provided, the same shall be paid to the sheriff, and such funds shall be paid over by the sheriff into the general fund of the county.

1917, c. 284, s. 60; 1919, c. 68.

Part 5. Definition; Validating Clause

3695. Definition of terms; validation of bonds and elections. When provision is made by any section of this article for some other commission to have charge of the road work of any county, township, or road district, as provided for in this article, then such commission shall for the purposes of this article be considered as the county road commission of such county, township, or road district, and all the duties and authorities conferred upon the county road commission authorized by this article are herewith conferred upon such commission acting as the county road commission; and wherever the words "county road commission" are used in this article they shall be construed to mean such other commission as has been conferred with the authority and duties of the county road commission as authorized by this article. Whenever the word "owner" is used in this article, it shall be construed to mean owner or owners, guardian of infants, idiots, lunatics, or inebriates owning lands, or agents for nonresident owners of land in this state, or other persons whose property rights may be materially affected. All bonds issued and elections heretofore held under the provisions of this article are validated.

1917, c. 284, s. 61; 1919, c. 68.

ART. 5. TOWNSHIP ROAD BONDS AND ROAD COMMISSIONS

3696. Road bonds by townships authorized; bond limit. For the purpose of laying out, establishing, altering, repairing, grading, constructing and improving in any way the public roads in various townships of the state, and for purchasing machinery, tools, etc., necessary for such improvements, the boards of county commissioners of any county are authorized, empowered and directed to issue coupon bonds bearing interest at a rate not to exceed six per cent per annum, payable semiannually at the office of the treasurer of the county issuing such bonds, or at such other place as the board of county commissioners may determine, to an amount not to exceed fifty thousand dollars for any one township in any county, in the manner and under the restrictions hereinafter provided, and the bonds so issued by the commissioners of the county shall be paid by the township for which they are issued, and shall not be chargeable against any property or polls outside of such township. The board of county commissioners in performing the duties of issuing, selling and purchasing bonds or doing any other thing under this article shall be deemed the agent of any township acting under this article. If bonds hereunder have been voted at an election authorizing an issue of five per cent bonds, but not issued before March 8, 1919, the issuance of six per cent bonds in such case is authorized.

1913, c. 122, s. 1; 1915, c. 237, s. 1; 1919, c. 188, s. 1.

Legislature may create township road districts, regulate their management, and provide for issuing bonds: *Highway Com. v. Construction Co.*, 170-513; *Highway Com. v. Malone*, 166-1.

The county commissioners are acting as agents for the townships under this section, and the court will not interfere with their exercise of power, unless they are abusing their discretion: *Edwards v. Comrs.*, 170-448.

The county commissioners will not be restrained from building a township road under this section, at the suit of a taxpayer, because notice was not given to the landowners as required in sections 3762, 3763: *Edwards v. Comrs.*, 170-448.

3697. Election to determine issuance; return of election; issue and sale of bonds. Upon presentation of a petition in writing signed by not less than one-fourth of the qualified voters of any township, to the board of county commissioners of their county, requesting them to submit to the qualified voters of the township where such petitioners reside a proposition to issue bonds for the purposes named in the preceding section for a definite amount at a maximum rate of interest and to run for a period not to exceed fifty years, all to be named in said petition, the board of county commissioners shall within thirty days order an election to be held in such township and submit to the qualified voters therein the question of issuing bonds to the amount, at the rate of interest, and to run for a period specified in said petition, at which election all those qualified to vote who are in favor of said proposition shall vote a ballot on which shall be written or printed the words "For road bonds," and those opposed to the proposition shall vote a ballot on which shall be written or printed the words "Against road bonds," and the election for this purpose shall be conducted in the same manner and subject to the same rules and regulations as are or may be provided for the election of township officers by the general election laws of this state, unless in any manner otherwise provided for in this article.

The board of county commissioners shall at the time of ordering any election under this article appoint one registrar and two judges of election in each pre-

cinct in said township to hold said election. The books shall be kept open for the registration of voters for twenty days preceding the day of election. For the purpose of registration the books used in the general election shall be delivered to and revised by the registrar, and the commissioners may order a new registration by giving thirty days notice of such registration. Such election shall be held after thirty days notice thereof, specifying the amount of the proposed bond issue, rate of interest and period for which bonds shall run, shall have been posted at the courthouse and at every polling place in the township where said election shall take place, and published in four issues of some newspaper published in the county, if the board of county commissioners so order, and the returns thereof shall be made to the board of county commissioners, and returns recorded and result declared by said board as they may determine.

If a majority of the votes cast be "For road bonds," then the board of county commissioners shall issue coupon bonds to the amount, at the rate of interest, and to run for a period specified in the said petition and order of election, and the bonds shall upon their face indicate on account of what township they are issued. They may, at the option of the county commissioners, be issued so as to mature serially or in annual installments, the last payment of which shall be due within the maximum period authorized. They shall be in denominations of not less than one hundred dollars and not exceeding one thousand dollars each. They shall be signed by the chairman of the board of county commissioners and attested by the official seal and signature of the register of deeds of said county. The chairman of the board of county commissioners, under the direction of said board, shall sell the bonds so issued at not less than par value and for as much above par value as possible: Provided, that said bonds shall be issued and sold only as the funds are needed in the township for the purposes indicated herein: Provided further, elections may be ordered and held upon petitions under the provisions of this article not oftener than every twelve months, in any township, until the full amount of bonds authorized by this article shall have been issued for such township.

1913, c. 122, s. 2; 1919, cc. 188, 339.

3698. Tax for interest and sinking fund. The county commissioners or other county authorities who are legally authorized and empowered to levy taxes shall, in order to provide for payment of the bonds and interest thereon to be issued under the preceding section, compute and levy each year at the time of levying county taxes a sufficient tax upon the property and poll, observing the constitutional equation, in any township having issued bonds to pay the interest on the bonds issued on account of such township, and shall also levy a sufficient tax to create a sinking fund to provide for the payment of said bonds at maturity. Such taxes shall be levied and collected annually and under the same laws and regulations as shall be enforced for levying and collecting other county taxes.

1913, c. 122, s. 3.

3699. Record of bonds; proceedings and elections. The county commissioners of any county so issuing bonds shall provide a record which shall be kept by their clerk, in which shall be entered the name of every purchaser of a bond, the number of the bond purchased, the date of issue, when due, rate of interest, the township on account of which the bond is issued, and the amount received for

said bond. They shall also cause to be kept a record of all proceedings, and elections, as well as a record of the bonds redeemed annually, and the bonds when redeemed and recorded shall be destroyed by fire in the presence of the board of commissioners and that fact recorded: Provided, the record of bonds for each township shall be kept separate.

1913, c. 122, s. 4.

3700. Investment of excess fund from tax; provisions as to redemption; required statements in bonds; advertisement of sale. The funds raised by taxation in excess of the amount required to pay interest, if any, shall be safely invested by the board of county commissioners; and the county commissioners are authorized to purchase at par value any of such bonds from the excess fund, provided they are offered to them by the holder thereof; or the commissioners may stipulate in the bonds when same are to be redeemable, provided it is not less than five nor more than forty years from the date of the bonds. The bonds when so issued, after election is proved by the commissioners, shall bear on their face the statement that the tax shall be levied by the county commissioners in accordance with this article for payment of interest and principal, full payment of which interest and principal is guaranteed by the county, though no polls or property outside of the township in whose name the bonds are issued shall be liable for such bonds until the resources of the township shall be exhausted. All bonds issued under this article shall be sold at a public meeting of the board of county commissioners of the county in which the bonds are issued, after the bonds have been advertised for sale in at least one issue of a newspaper: Provided, that this provision as to advertising shall apply only to bonds sold after March tenth, one thousand nine hundred and seventeen.

1913, c. 122, s. 5; 1917, c. 207, ss. 1, 5.

3701. Separate accounts of funds; bond of treasurer. The funds derived from the sale of any bonds hereinbefore provided for and the taxes levied and collected under this article on account of any township shall be turned over to the county treasurer and a separate account of each fund for the benefit of each township shall be kept separate from all other funds. But before any such funds shall be placed in his hands the treasurer shall execute a good and sufficient bond in the penal sum of fifty per cent more than the amount of money in his hands at any time for road purposes and payment of bonds and interest thereon on account of the several townships in the county, and for the faithful performance of such other duties as may devolve upon him as treasurer of said fund. The said bond shall not be less than five thousand dollars and shall be approved by the board of county commissioners and shall be recorded and kept as bonds of county officers are required to be kept.

1913, c. 122, s. 6.

3702. Corporate powers of and judgments against commissioners. The board of county commissioners may sue and be sued, plead and be impleaded in any court of competent jurisdiction in this state touching the bonds issued on account of any township in any county issuing bonds under this article, or any matter connected therewith, or touching the road fund of any such township derived under this article, or on any contract made by or with the said board for carry-

ing out the purposes of this article, and any judgment in favor of the board shall specify for the benefit of what township such judgment is rendered, and any judgment against the board shall specify what township is liable for the payment thereof, and the judgment shall be paid only out of the funds of such township, or by taxes derived from property and polls in such township.

1913, c. 122, s. 7.

3703. Orders on funds; direction of expenditures. All orders for payment of any of said bonds and for interest on said bonds shall be made by the county commissioners, and shall specify thereon the purpose, and the amount for bonds and the amount for interest shall be on separate orders. The funds for other purposes shall be expended under the direction of the commissioners, or by the township supervisors with the consent of any of the commissioners, and paid upon the order of the commissioners, or in such manner and on such orders as the board of county commissioners may direct, and the board of commissioners shall make such rules and regulations and such directions in this respect as they may see proper.

1913, c. 122, s. 8.

3704. Use of proceeds of bonds; working convicts. The funds derived from sale of bonds on account of any township shall be used for the purpose of laying out, establishing, altering, repairing, grading, constructing and improving in any manner public roads in the township so issuing bonds and for purchasing such material, machinery and improvements as may be necessary. The money so expended shall be as far as possible used for permanent improvements only. The county commissioners may at any regular meeting organize a convict force, and elect necessary officers and guards as provided by law, and shall work such convicts on the public roads of the townships, and the expenses shall be paid by the said townships. Any damage that may be awarded to any person by reason of establishing, altering or repairing any public roads on which permanent improvements are to be made in any township issuing bonds shall be paid by such township. The county commissioners may use the funds aforesaid on any roads within the township, in their discretion, unless the petition has designated certain roads for the expenditure of a part or all of said funds, in which case the funds shall be expended as provided in the petition. The designation of certain roads in the petition shall not be held to invalidate any election heretofore or hereafter held.

1913, c. 122, s. 9; 1917, c. 125, s. 1.

Discretion of the county commissioners in the use of funds for township roads: *Edwards v. Comrs.*, 170-448.

3705. Appointment of township road commissioners. If at any election held in any township under this article the purposes of the article shall be ratified by a majority of the votes cast in the township, then it shall be the duty of the board of county commissioners at their next meeting to appoint a board of township road commissioners, to be known as the Township Road Commission of -----Township. This township road commission shall consist of three freeholders of the township. The appointment of this township road commission shall be agreed upon and approved by the state highway commission. The term of office of the members of the township road commission shall be for one,

two, and three years respectively for the first three years, and thereafter one member shall be appointed as above each year for a term or period of three years.

1917, c. 279, s. 1; 1919, c. 339, s. 2.

3706. Incorporation of commission; use of funds. The said township road commission and its successors in office is hereby constituted a body corporate under and by virtue of the laws of North Carolina under the name and style of Township Road Commission, and shall have all powers and authority granted to corporations of like nature by the laws of North Carolina, and by that name may sue and be sued, make contracts, acquire real and personal property by gift or devise, hold, exchange, and sell the same, and exercise such other rights and privileges as are incident to other municipal corporations of like nature, such as the condemnation of land for the construction, widening, or changing of any roads in the county, and such other powers as are necessary to carry out any and all the provisions of this article. The said township road commission shall use the funds derived from the sale of bonds or by levy of special tax, or whatever way derived, as authorized by this article, to locate, construct, reconstruct, surface, repair, improve, and maintain the public highways and bridges in the township under their jurisdiction; shall purchase such materials and purchase and hold or contract for the use of such tools, machinery, implements, and teams as they may deem necessary for carrying on the road work of the township, and perform such other duties as are hereinafter provided for by this article.

1917, c. 279, s. 1.

3707. Duties and powers of commission. It shall be the duty of the township road commission to take charge of laying out, opening, altering, maintaining, or discontinuing of any and all roads of the township that are now maintained or may be maintained by the township as public roads, and it is hereby vested with all powers and rights and authorities now vested in the board of county commissioners or other commission or board or other road officials of such township for the general supervision of its roads, and for the construction and repair thereof, by contract or otherwise as may be deemed best.

1917, c. 279, s. 1.

3708. Organization; drafts for money; pay of commissioners. The township road commission shall annually from the date of its organization elect a chairman and a secretary, who shall hold office for one year and until their successors shall be elected and qualified. All moneys expended by the commission shall be by draft upon the bank or banks which are depositaries for the road fund, and such drafts shall be signed by the secretary and countersigned by the chairman, and shall show upon their face the purpose for which the money is expended. The members of the township road commission shall receive pay only when acting jointly as a road commission, and such compensation at this time shall be the same as paid to the members of the board of county commissioners of said county.

1917, c. 279, s. 1.

3709. When governor to appoint commissioners; vacancies. In the event the state highway commission does not approve the appointment made by the board of county commissioners for members of the township road commission, and an

agreement cannot be reached by the above commissions, then the governor of the state shall appoint the necessary number of members to compose or complete the membership of the township road commission. In case of any vacancy caused by death, resignation, or otherwise, of any member of the township road commission, such vacancy shall be filled by the board of county commissioners for the unexpired term as provided above for regular appointments.

1917, c, 279, s. 1.

3710. Township road engineer; duties; compensation; assistance from state; books and accounts. The township road commission is authorized and directed to employ an expert road engineer, who shall be approved by the state highway commission, at such compensation as may be fixed by the township road commission; or, if in the opinion of the state highway commission a whole-time engineer is not required for the work to be done by the township, then, if practicable, arrangements may be made for the employment of an engineer for such portion of his time as may be deemed necessary by the state highway commission. In case an engineer is not employed continuously by the township, then in the absence of the engineer a superintendent shall be appointed by the engineer, with the approval of the township road commission and the state highway commission, who shall have charge of the road work and act for the engineer in his absence. His compensation may be paid in part by the state highway commission when arrangements for such payment is made by the township road commission with the state highway commission. When the state furnishes to the township engineering assistance and supervision of road work, the acceptance by the township road commission of the state road engineer shall be considered as fulfilling the requirements of this article. The road engineer, whether appointed by the township road commission or furnished by the state highway commission, shall have general supervision and direction of all the road work of the township, supervise the plans and specifications of all road work, and see to their execution. He shall appoint and discharge, by and with the approval of the township road commission, all superintendents, foremen, supervisors, overseers, and other assistants needed in conducting the road work of the township in a satisfactory and economical manner. The township road engineer, however appointed, may request, at any time, the advice of the state highway engineer in solving any problem that may arise, either technical, economical, or otherwise, that may be deemed by him to be of benefit to the township, and such advice shall be without any expense to the township.

It shall be the duty of the engineer of the township coming under the provisions of this article to keep or have kept the necessary books and accounts showing in detail the expenditures for all work done through money derived by bonds issued or special road tax levied for road work in such township. The engineer shall keep or have kept in suitable way a cost accounting system showing the unit cost of various items entering into the construction of the roads, showing when and where the various elements of cost entering into the said work were used, giving the name of the road and the nearest station number to culverts, bridges, etc. It shall be his duty to keep approximate yardage, costs, and approximate classification of the materials moved in all excavations made for the purpose of building such roads.

1917, c, 279, s. 1.

3711. Entry on lands; damages; excess of benefits a lien on lands; suits. In opening new highways, widening and straightening old roads and repairing same, the township road commission through its agents is hereby authorized to enter upon any land and locate and build such highways. If the township road commission and the owner or owners of said land cannot agree as to the damages, if any, the township road commission shall, after sixty days after said highway is completed, cause to be summoned three disinterested freeholders of said township who shall go upon the land and assess the damages and benefits under the general law as it now exists. Before entering upon lands as authorized by this section it shall be the duty of the township road commission to serve notice upon the owner or owners of said land, notifying them that the highway is to be located upon said land under authority of this article. In assessing the damages sustained by any landowner, the jury shall take into consideration the special benefits, if any, accruing to the landowner, and in determining such benefits consideration shall be given to the benefits the landowner has derived from the fact that any old road right of way has reverted back to said landowner by reason of the relocation and construction of the new road, and if such benefits shall exceed the damages, then the amount of such excess of benefits shall be assessed against the landowner and shall constitute a lien upon the land adjoining the road, and shall be collected by the sheriff in the same way as public taxes.

No suit shall be instituted by the landowner for damages on account of location of the road under this article until after sixty days after the completion of the road across the lands of such landowner, and no suit shall be brought by any landowner unless the same is commenced within six months after the completion of the road by or across the lands of the claimant. Either party may appeal to the superior court for the assessment of damages and benefits, where the matter shall be heard by the court and jury *de novo*. No cost shall be awarded against any township upon appeal when net damages awarded through such appeal are not greater than given by the referees.

1917, c. 279, s. 1.

See sections 3667, 3762, 3763.

3712. Entry on land for material; drains or ditches; obstruction. The township road commission through their officers and agents are hereby authorized to enter upon any land near or adjoining any public road of said township, to cut and carry away any timber except trees or groves on improved land planted or left for shade or ornament, dig or cause to be dug and carry away any gravel, sand, clay, dirt, or stone which may be necessary for the proper repair and construction of roads in said township, and make or cause to be made such drains or ditches upon any land adjoining or lying near any road in said township that the township road commission may deem necessary for the better condition of the road; and the drains and ditches so made shall not be obstructed by the occupants of such lands or any other person; and any person obstructing such drains or ditches shall be guilty of a misdemeanor. Before entering upon land as authorized by this section, it shall be the duty of the township road commission, through its representatives, to serve notice upon the owner or owners of the land, notifying them that certain material authorized to be taken by this section is required for the road work.

1917, c. 279, s. 1.

See sections 3668, 3817, 3818.

3713. Presentation of and hearing on claims. The owner of any land from which any timber or other material has been removed may present to the township road commission his claim therefor in writing, and upon such presentment it shall be the duty of the township road commission to set a day not earlier than sixty days after the removal of such timber or material for the purpose of hearing his claim. Upon the hearing thereof the claimant may appeal to the superior court of the county in which said township is located, to have his cause tried as in other civil cases.

1917, c. 279, s. 1.

3714. Deposits of proceeds of bonds. All moneys derived from the sale of bonds authorized and sold under the provisions of this article shall be deposited by the board of county commissioners in such solvent bank or banks, if any, of said township, or if there is no bank in said township, then in any solvent bank in a neighboring township or county as will pay the highest rate of interest on daily balances as may be determined by the board of county commissioners; said moneys to be deposited in such bank or banks to the credit of the township road commission, and to be drawn upon by the commission as hereinbefore directed.

1917, c. 279, s. 1.

3715. Deposits of other road funds. Any other moneys, in whatever way collected or appropriated, which are designed to be used for the construction or maintenance of roads in any township in which bonds for road work within such township have been issued and sold shall be deposited in the same bank or banks in which the moneys obtained from the bond issue or special road tax are deposited, and these moneys shall be deposited to the credit of the township road commission, and shall be drawn upon by said commission.

1917, c. 279, s. 1.

3716. Monthly statements. The bank or banks in which the road moneys designated in this article are deposited shall prepare monthly statements showing the amounts paid, to whom paid, and for what purposes, and submit same to the township road commission, and the road commission shall have such monthly statement posted at the courthouse door of the county in which the township is located.

1917, c. 279, s. 1.

3717. Local acts not affected. Nothing in this article shall be construed to repeal any local road laws of any county and shall not in any way affect them.

1917, c. 279, s. 1.

ART. 6. COUNTY ROAD MAINTENANCE TAX

3718. Special tax for road maintenance authorized. Where the board of county commissioners of any county in the state has heretofore issued and sold, or may hereafter issue and sell, bonds for the construction or reconstruction of the roads in the county or in any township or road district therein, such board of commissioners is directed to levy annually during the life of the bonds a special tax on all taxable property, both real and personal, sufficient to raise an amount equal to at least three per cent, and not more than five per cent, of the total

amount of bonds issued by the county, except as hereinafter specified, for the construction or reconstruction of the public roads, as may be necessary to maintain said roads in a satisfactory manner.

1919, c. 190, s. 1.

3719. Proceeds used for maintenance only. The money raised by the special tax authorized by the preceding section shall be used for the maintenance of the roads in said county, township, or road district in which the tax is collected, and which were or will be built by the revenue derived from the sale of bonds; and shall not be used for any other purpose except as herein provided.

1919, c. 190, s. 2.

3720. Scale of taxes to be levied. Taxes for the maintenance of the roads built from the revenue derived from said bonds shall be levied upon the following scale: Where the roads have cost one thousand dollars per mile or less, a tax sufficient to raise not less than fifty dollars per mile per year shall be levied. Where the roads have cost more than one thousand and not more than two thousand dollars per mile, a tax of five per cent shall be levied. When the roads have cost more than two thousand dollars per mile and not more than three thousand dollars per mile, a tax of four per cent shall be levied. When the roads have cost more than three thousand dollars per mile, a tax of three per cent shall be levied.

1919, c. 190, s. 3.

3721. Deduction of levies provided for. When in any county, township or road district the fund raised under this article is thought to be more than sufficient to maintain the roads in proper condition the board of county commissioners are authorized to apply to the state highway commission for an investigation to determine the amount needed for the proper maintenance of the roads to be maintained by the county, and upon certification by said state highway commission, showing that funds are more than sufficient, a reduction may be made in the levies as above provided, so that only such levies as will provide the amount needed may be made.

1919, c. 190, s. 4.

3722. Maintenance work carried out by road authorities. The work of maintaining the roads provided for in this article shall be under the board of county commissioners, county road commission, township road commission, district road commission, or any other officials having charge of the road work for the county or subdivisions thereof.

1919, c. 190, s. 5.

3723. County commissioners to report bonds issued and miles of roads built. The board of county commissioners of any county where bonds have been issued for the construction or reconstruction of roads shall, as soon as practicable after the ratification of the provisions of this article, ascertain the amount of bonds that have been issued or that may be hereafter issued in the county, or in the townships and road districts thereof, and shall ascertain the number of miles of road constructed under such bond issues, and make a report of same in detail to the state auditor and the state highway commission.

1919, c. 190, s. 6.

3724. Roads maintained by state not included. This article is not intended to include any roads that are maintained by the state.

1919, c. 190, s. 7.

ART. 7. COUNTY ROAD LAW, EFFECTIVE ON ADOPTION BY COUNTY
COMMISSIONERS

3725. County road electorate created. Subject to the provisions hereinafter made for the ratification of this article, there is hereby created for each county in this state a road electorate, to be composed of one member from each township in such county, who shall be a resident of the township, and one member at large for such county.

1919, c. 232, ss. 1, 10.

3726. County road commission created. Subject to the provisions hereinafter made for the ratification of this article, there is hereby created for each county in this state a road commission, to be composed of three members of the road electorate of such county, which said road commission shall be appointed or elected as hereinafter provided.

1919, c. 232, s. 2.

3727. Provisions to be ratified by county commissioners. Before the provisions of this article shall become applicable to any county in the state, it shall first be ratified by a resolution adopted by a majority of the board of county commissioners for such county, which resolution shall be spread upon the minutes of said board.

1919, c. 232, s. 3.

3728. When general assembly appoints electorate. The general assembly may appoint the members of the road electorate at the session of 1919 for any county, which persons so appointed shall compose the road electorate for such county, provided the county commissioners of such county shall hereafter ratify this article and make it applicable to such county.

1919, c. 232, s. 4.

3729. When county commissioners appoint electorate. If the general assembly shall not make such appointments for any county and the board of county commissioners of such county shall ratify this article and make it applicable thereto, as hereinbefore provided, such board of county commissioners shall appoint a road electorate as is hereinbefore provided for such county.

1919, c. 232, s. 5.

3730. Term of members of electorate. The members of such road electorate, whether appointed by the general assembly or by the board of county commissioners as herein provided, shall hold their respective offices until the next general election and until their successors are elected and qualified.

1919, c. 232, s. 6.

3731. Organization and oath of electorate. The members of a road electorate of any county shall, within thirty days after their appointment, meet at the courthouse of such county upon notice given by the chairman of the board of

county commissioners, giving the hour and place of meeting, and before entering upon their respective duties each member shall take and subscribe an oath that he will faithfully, fearlessly, and impartially, at all times discharge the duties of his office to the best of his ability. Such board shall then organize by electing one member chairman and another secretary.

1919, c. 232, s. 7.

3732. County commissioners fill vacancies. If any member shall refuse to qualify, or if there shall be a vacancy in the road electorate, the board of county commissioners of such county is authorized to fill such vacancy.

1919, c. 232, s. 8.

3733. Electorate elects county road commission. At such first meeting such road electorate shall elect three of its members as members of a road commission for such county, which said members so elected shall within ten days take the oath prescribed to be taken by the members of the road electorate and shall immediately enter upon the discharge of the duties of their respective offices, and shall hold the same until the first Monday of December after the next general election for such county.

1919, c. 232, s. 9.

3734. Election of successors to appointed road electorate. At the next general election after a road electorate has been appointed for any county as above provided, the successors of such electorate shall be elected at such election, and their term of office shall begin as other county officers, and they shall qualify as herein provided and proceed to organize and elect a board of road commissioners as hereinbefore provided.

1919, c. 232, s. 10.

3735. Quarterly meetings of road electorate. The members of a road electorate shall meet regularly at the courthouse in such county on the first Mondays in January, April, July, and October of each year.

1919, c. 232, s. 11.

3736. Duties of county road electorate. It shall be the duty of such road electorate to keep themselves advised as to the condition of all the roads of such county, and they may look over them, either in a body or by committee, at any time they may deem best, and it shall be the duty of said road electorate to make such recommendations as it may deem advisable to the road commission of such county.

1919, c. 232, s. 12.

3737. Pay of electorate and road commission. The members of the road electorate of any county other than the members composing the road commission shall each receive three dollars per day for each day they may be engaged wholly and exclusively as a member of such electorate in the performance of the duties herein provided, including the attendance at the first meeting and all regular meetings. The members of the road commission shall receive for their services the same pay as provided for the county commissioners of such county for each day they may be engaged wholly and exclusively in the performance of their

duties. But no member of the road electorate, unless he is also a member of the road commission, shall receive more than fifty dollars in one year as compensation for his services; and no member of the road commission shall receive in excess of one hundred dollars as compensation for his services. This limitation on compensation shall not apply to the chairman and secretary of the road commission. All compensation to any member of the road electorate or county road commission shall be passed on and allowed by board of county commissioners for such county.

1919, c. 232, ss. 13, 17, 38, 39.

3738. Vacancies in commission filled by electorate. In case of vacancy caused by the death, resignation, or otherwise, of any member of the county road commission, such vacancy shall be filled by the county road electorate for the unexpired term.

1919, c. 232, s. 18.

3739. Commission attends and calls meetings; examines roads; assigns duties of chairman. The road commissioners for any county, in addition to attending the regular meeting of the road electorate, may hold call meetings not exceeding three days in each month, and they may examine the roads at any time they may deem advisable, either in a body or by committee, and the chairman may be required by said commission to do any other work which in its opinion may be to the best interests of the road service in its county.

1919, c. 232, s. 14.

3740. Commission succeeds other county road authorities in road powers. It shall be the duty of the county road commission to take charge of laying out, opening, altering, maintaining, or discontinuing of the roads of said county that are now maintained or may be maintained by the county as public roads; and it is hereby vested with all powers, rights, and authority now vested in the board of county commissioners and other commissions or boards or other road officials of said county for the general supervision of the roads of the county, and for the construction and repair thereof, by contract or otherwise, as may be deemed best. All bridges shall be well constructed, iron being recommended when the stream is of any appreciable size, and all approaches shall be well constructed.

1919, c. 232, ss. 16, 25.

3741. Counties may retain present road authorities. If those counties coming under the provisions of this article already have lawful road authorities charged with the road work therein, either in the form of a county road commission or other commission or board, or a board of county commissioners charged with road work, and shall desire to retain such road authorities, then such desire shall be respected and no road electorate shall be appointed for such county.

1919, c. 232, s. 19.

3742. Local funds, etc., pass to county subject to prior contracts. Any moneys in hand in any county treasury, or in the hands of any county treasurer, or in any township or road district treasury, or in the hands of any township treasurer to the credit of the road funds of such county or township or road district of any

county ratifying the provisions of this article, shall be turned over to the banks designated as depositories for the road fund of such county or other authority having charge of such funds, and shall become part of such county road fund and shall be expended for the construction of the roads in such township or road district having turned the same over; but such county, through its road commission, shall carry out any contract previously made by such township or road district, and shall, out of any funds or proceeds of any property received from such township or road district, pay off any liabilities existing against such township or road district. In any county which shall ratify the provisions of this article, any township owning equipment and property used in the construction or maintenance of public roads shall turn the same over to the road commission of such county upon demand made by it.

1919, c. 232, s. 26.

3743. Expenditure of funds; highway systems; federal aid. All funds, whether collected by direct tax, sale of bonds, or otherwise, in such county shall be expended under the authority of the road commission for such county, and the road commission is authorized to appropriate such sums as it may deem expedient to be used by the state highway commission in securing federal aid to be used in the construction of any state or national highway leading through such county, and such road commission is further authorized to enter into any contract providing for the construction of a state highway: Provided, however, that federal funds shall be secured to aid in its construction.

1919, c. 232, s. 27.

3744. Apportionment of county road funds among townships. The road funds for such county shall be expended in each township in such county, as nearly as may be, in proportion to the taxes paid by such township in said fund so as to make an equitable apportionment in the course of one year.

1919, c. 232, s. 37.

3745. Sections of general highway law (Art. 4) applicable under this article. The following sections of the general highway law, forming article 4 of this chapter, dealing with the powers and duties of county road commissions under the said article, are declared applicable to county road commissions under this article:

- Section 3661. (Corporate powers; use of road funds.)
- Section 3663. (Organization of road commissions; compensation of commissioners.)
- Section 3667. (Assessments of damages and benefits.)
- Section 3668. (Entry on land for material; obstruction of drains or ditches.)
- Section 3670. (Claims for timber or material.)
- Section 3671. (Width, alignment, and grade of highways.)
- Section 3673. (County-line roads.)
- Section 3674. (Construction by one county of county-line road.)
- Section 3675. (Extension of work to adjoining counties.)
- Section 3676. (Work by county commissions in municipalities.)
- Section 3679. (Road statistics.)
- Section 3680. (Guard railings.)
- Section 3681. (Road institutes.)
- Section 3690. (Maintenance.)

1919, c. 232, ss. 15, 17, 21, 22, 24, 25, 28, 29, 30, 31, 33, 34, 35, 36.

3746. Cutting trees along road. The county road commission shall have the power as to cutting trees on land adjoining the road conferred on county road

commissioners under section 3669 of this chapter under the limitations contained in said section, but commissioners created under this chapter shall not cut trees in any grove or yard left around or near any house left or used for a grove or shade trees.

1919, c. 232, s. 23.

3747. Prisoners on road. The provisions of section 3678 as to the duties of county road commissioners in reference to persons sentenced to work on the public roads shall be applicable to county road commissioners created by this article, except that the clause of said section is inapplicable which provides that the expense of maintaining and guarding said convicts while employed on the public roads may be paid by the county commissioners out of the general fund of the county.

Where any county or township is working convicts on its public roads under any local, special or private act, such township, upon the demand of the county road commission, shall turn over such convicts to the county road commission, which may proceed to work them on the public roads of the county, or the road commission, if it shall find that working convicts is unprofitable, shall turn such convicts over to counties from which they were received and discontinue convict labor on the public roads.

1919, c. 232, ss. 26, 32.

3748. Counties excepted from article. This article shall not apply to Alamance, Alexander, Anson, Ashe, Beaufort, Bertie, Buncombe, Cabarrus, Caswell, Catawba, Chatham, Cherokee, Chowan, Clay, Cleveland, Columbus, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Gates, Graham, Granville, Halifax, Harnett, Hertford, Hoke, Hyde, Iredell, Johnston, Lee, Lenoir, Lincoln, Macon, Mecklenburg, Moore, Montgomery, Nash, Northampton, Orange, Pasquotank, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Surry, Tyrrell, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin, and Yancey counties.

1919, c. 232, s. 39a.

3749. Repealing clause. All laws and clauses of laws in conflict with this article are hereby repealed in those counties which may ratify this article.

1919, c. 232, s. 40.

ART. 8. ROAD OFFICIALS

3750. Public roads designated; authority of supervisors and county commissioners. All roads and ferries that have been laid out or appointed by virtue of any act of assembly, or any order of court, are hereby declared to be public roads and ferries; and the justices of the peace in each township shall have the supervision and control of the public roads in their respective townships. They shall, with respect to this work, constitute and be styled the board of supervisors of public roads of such township, and under that name, for the purposes aforesaid, they are hereby incorporated the board of supervisors of public roads, and the board of county commissioners, as hereafter in this chapter set forth, shall have full power and authority within their respective counties to appoint and

settle ferries, to order the laying out of public roads where necessary, to appoint where bridges shall be made, to discontinue such roads and ferries as shall be found useless, and to alter roads so as to make them more useful. But upon the adoption of road commissions by counties or townships, as provided in this chapter, the powers and authority conferred or exercised under this section are transferred to such road commissions within such counties or townships.

Rev., s. 2681; Code, s. 2014; 1887, c. 73; 1889, c. 543; 1893, c. 141; R. C., c. 101, s. 1; 1784, c. 227, s. 1; 1868, c. 20, ss. 11, 16, 17, 18; 1868-9, c. 185, s. 14; 1879, c. 82, s. 1.

For road commissioners, see sections 3643, 3658, 3705, 3726. For annotations as to establishing public roads, see section 3761.

LEGISLATIVE CONTROL OVER ROADS, BRIDGES, ETC. Article 8, section 2, of the constitution, giving to commissioners a general supervision and control over roads, bridges, ferries, etc., does not deprive legislature of power over these subjects: *Barrington v. Ferry Co.*, 69-165; *In re Spease Ferry*, 138-219.

Legislature may prescribe by what method roads shall be worked and kept in repair, either by labor, by taxation of property, or by license taxes, or by a mixture of two or more of these methods, and this may vary in different counties and localities: *State v. Holloman*, 139-642.

The question, what is a public use? is always one of law. Deference will be paid to the legislative judgment as expressed in enactments providing for appropriation of property, but it will not be conclusive: *Cozard v. Hardwood Co.*, 139-283.

Legislature can provide special road law and method of working public roads for a county, or several counties, or a township or other locality, and make the adoption of such systems depend upon acceptance or rejection thereof by people or landholders, or by official board of such county, township, or locality: *State v. Holloman*, 139-642. Legislature has complete power to regulate highways in state and may prescribe what vehicles may be used on them, with a view to the safety of passengers over them and preservation of roads, and this power may be conferred upon local governing agencies, and its being put into effect can be made dependent upon action of board of supervisors: *Ibid.*

WHAT IS A PUBLIC HIGHWAY. A public highway is one established and kept in order by public authority, or one used and controlled by the public for twenty years, so that a dedication is presumed: *State v. Norris*, 174-808; *Tise v. Whitaker*, 146-374; *Stewart v. Frink*, 94-487; *State v. Purifoy*, 86-682; *State v. McDaniel*, 53-284; *Boyden v. Achenbach*, 79-539; *Kennedy v. Williams*, 87-6; *State v. Johnson*, 61-140—or one arising from a dedication by owner and acceptance by public, or persons in a position to act for them: *Tise v. Whitaker*, 146-374; *Collins v. Patterson*, 119-602—but a neighborhood road not dedicated to public, but used by public under permission or license of owner of land, is not a public road within meaning of this section: *Ibid.*

An overseer is not essential to the existence of a highway. A public square in a city or town, within which is situated the courthouse, is a public highway: *State v. Eastman*, 109-785.

There may be a public road *de facto*, and the only person who can question right to such road is owner of land, but owner can only be bound by proceeding against him according to law of land, or by user of twenty years, from which such proceedings will ordinarily be presumed: *State v. Marble*, 26-318.

WHAT AMOUNTS TO HIGHWAY BY DEDICATION OR BY PRESCRIPTION. Dedication of a public way may be in express terms, or implied from owner's conduct, and, while intent to dedicate is usually required, conduct of owner may, under certain conditions, work a dedication on his part, even in the absence of an intent to dedicate: *Tise v. Whitaker*, 146-374.

Where road has been used by public as public highway for twenty years, and there is no evidence how this user commenced, a presumption of law arises that this road has been laid off and established as a public road by due course of law; but a possession or user by public for a less time will not raise this presumption: *State v. Marble*, 26-318; *Woolard v. McCullough*, 23-432; *State v. Hunter*, 27-369; *Stewart v. Frink*, 94-487; *Tise v. Whitaker*, 146-374. It is more the intention of owner than the length of time of user which must determine fact of dedication: *State v. Marble*, 26-318.

FERRIES; ESTABLISHMENT; EXCLUSIVE PRIVILEGES. The power to establish ferries is one of the attributes of sovereignty which is to be exercised by legislature itself, or by any agent whom that body may authorize to act for it: *In re Spease Ferry*, 138-219.

The essential element of a ferry franchise is exclusive right to transport persons, with horses and vehicles and such personal goods as accompany them, from one shore to other: *Broadnax v. Baker*, 94-675. The essential idea in a ferry is the crossing of a stream or other body of water from shore to shore: *Ibid.*

Franchise of keeping a public ferry is so incident to riparian ownership that it can be granted to none but those who own the land at one of the termini, unless such proprietors refuse to exercise it, when it may be granted to another, upon his making compensation to owner, and this is so even when termini are public roads: *Broadnax v. Baker*, 94-675; *Pipkin v. Wynns*, 13-402. Legislature has power to grant franchise of ferry to any one, and to authorize condemnation of land of riparian owner as a landing place: *Barrington v. Ferry Co.*, 69-165.

An order of the commissioners to lay out a ferry amounts to the establishment thereof: *Robinson v. Lamb*, 129-16. Article 7, section 2, of the constitution, giving supervision and control of roads, bridges, etc., to county commissioners, does not deprive general assembly of power to authorize establishment of public ferry at certain point for term of 30 years and providing that it shall be unlawful for any person to establish any other ferry within 1½ miles of said ferry: *In re Spease Ferry*, 138-219—and it must be construed as a restriction upon the general powers of the commissioners “to appoint and settle ferries,” *In re Spease Ferry*, 138-219. An order of the county court granting to one tenant in common exclusive right of keeping a ferry and receiving tolls, without default in the others, and without notice to them, is void: *Pipkin v. Wynns*, 13-402.

While county commissioners control public bridges and ferries, it is by virtue of their duties, imposed by law, in regard to public roads; and they are not to be established or assumed or maintained as county charges unless as parts thereof, in actual existence or in contemplation: *Greenleaf v. Comrs.*, 123-30. The discretionary power of the county commissioners to establish ferries and public roads is subject to review by superior court on appeal: *Robinson v. Lamb*, 126-498. An order of the commissioners establishing a ferry gives a vested right, and is not vacated by an appeal to the superior court: *Robinson v. Lamb*, 129-16.

Where a river lies wholly within a county, commissioners of an adjoining county have no jurisdiction to establish ferry across such river: *Robinson v. Lamb*, 131-229.

General assembly granting to a company privilege of establishing ferry within two miles of another which has been used for over forty years did not divest any vested right belonging to owner of such old ferry: *Barrington v. Neuse River Ferry Co.*, 69-165. Public ferries are not monopolies, but franchises granted in consideration of public services. They may be exclusive, but are simply licenses, revocable at will: *In re Spease Ferry*, 138-219.

Public ferry is protected by statute from all interference with proper enjoyment and use of franchise by erection of another ferry: *Broadnax v. Baker*, 94-675. Where statute prohibits establishment of ferry within certain limits, it does not affect license for ferry already granted: *Robinson v. Lamb*, 129-16.

Where plaintiff granted a ferry franchise from two points, opposite each other, on a large stream, it was held that he could not enjoin and recover damages from a party who used stream as a highway in conveying freight from points up the river, although one of these points was within statutory distance of five miles: *Broadnax v. Baker*, 94-675.

Every subtraction from the profits of a ferry, by conveying its customers over the stream, with or without charge, is an injury for which an action will lie: *Broadnax v. Baker*, 94-675—and in such case it is the diminution in number of customers who would use ferry, and consequent reduction of tolls, which is measure of damages recoverable, *Ibid.*

The distance of five miles prescribed in reference to ferries is five miles in a direct straight line from ferry first established: *Toll-Bridge Co. v. Flowers*, 110-381.

No one, in absence of special authority from legislature or board of county commissioners, has the right to erect and maintain a bridge or ferry within such a distance of a duly authorized toll-bridge as will divert from latter custom which, in ordinary course of travel, would pass over it, whether that distance be greater or less than five miles: *Toll-Bridge Co. v. Flowers*, 110-381. For discontinuance of ferries, see under section 3762.

EXERCISE OF AUTHORITY. The power of the county commissioners over roads and bridges will not be interfered with by the courts unless such power is abused: *Cobb v. R. R.*, 172-58; *Edwards v. Comrs.*, 170-448; *Scott v. Comrs.*, 170-327; *Supervisors v. Comrs.*, 169-548; *Brodnax v. Groom*, 64-244.

This section constitutes the justices of the peace a board of supervisors, and refers only to those who are qualified and acting: *Ford v. Manning*, 152-151.

Section referred to in *Tate v. R. R.*, 168-523.

3751. Local: County commissioners to regulate roads and bridges. The board of county commissioners shall have power, and it shall be their duty, to make rules and ordinances, not inconsistent with the acts of the general assembly, to regulate the use of the public roads, highways and bridges of their respective counties. They shall have power to make rules and ordinances to regulate the weight of loads permitted to be hauled on the public roads and highways, and as to the width of tires permitted to be used; and may prohibit the carrying thereon of such loads and the use of such tires or vehicles as they may deem needlessly injurious or destructive to such roads or bridges. In making such ordinances, they may have regard to the conditions of the various roads or parts thereof, and the conditions of traffic thereon, and make different rules and ordinances applicable thereto. Any person who shall needlessly violate an ordinance made in pursuance of the authority herein given, or who shall aid, abet or assist in such violation, shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

This section shall apply only to the counties of Alamance, Anson, Beaufort, Bertie, Brunswick, Camden, Cabarrus, Cherokee, Columbus, Cumberland, Davidson, Duplin, Durham, Franklin, Gaston, Granville, Guilford, Hertford, Hoke, Iredell, Johnston, Lee, Madison, McDowell, Macon, Montgomery, Nash, New Hanover, Northampton, Pitt, Pasquotank, Randolph, Richmond, Sampson, Tyrrell, Union, Washington, Yancey.

1915, c. 264, ss. 1, 2, 3; 1919, cc. 154, 209.

The legislature may regulate the highways and prescribe what vehicles may be used upon them, with a view to the safety of passengers and the preservation of the roads; and this power may be conferred upon local governing agencies: *Dalton v. Brown*, 159-175 (hauling lumber); *State v. Holloman*, 139-642 (hauling lumber); *State v. Yopp*, 97-477 (bicycles).

3752. Meetings of supervisors prescribed. The board of supervisors shall meet at some place in their respective townships to be agreed upon by themselves, or, in the absence of such agreement, to be named by their chairman, on the first Saturday of February and August, for the purpose of consulting on the subject of the condition of the roads in their township, and may hold special meetings at other times, upon ten days written notice by the chairman to each member of the board, stating the time and place of such meeting. They shall once in each year, during the week of their meeting in August, go over and personally examine all the roads in their township. They shall annually at their meeting in February elect some one of their number chairman. Where the board is composed of more than three members it shall take three members to constitute a quorum of said board for the transaction of business.

Rev., s. 2712; 1909, c. 364, ss. 2, 3; Code, s. 2015; 1879, c. 82, s. 2; 1880, c. 30, s. 1.

The supervisors are not confined to these public meetings for the purpose of considering cartways: *Ford v. Manning*, 152-151.

Supervisors are not liable for injury caused by defective highway unless negligence is corrupt or malicious: *Ruffin v. Garrett*, 174-134.

3753. Supervisors appoint overseers, designate workers and allot hands. The board of supervisors shall, annually at the meeting in August, divide the roads of their townships into sections and appoint overseers for such sections at said meeting. They shall at the same time allot the hands to the overseers, and shall also designate the boundaries or points to which each resident shall be liable to work on each section, and shall within five days after such meeting certify to each overseer written notice of his appointment, with a list of the hands assigned to his section. The board of supervisors may at any time alter the sections or allotment, but shall give notice thereof to the overseer. Such overseer shall serve, and be liable as such for neglect of duty, until he shall be relieved by the board, which shall be done only upon his showing that his road is in good condition as prescribed by law. The overseer may resign after the expiration of twelve months, provided his road shall be in good repair and the board of supervisors shall so find; and any overseer so resigning, and whose resignation has been accepted by the board, shall not without his consent be again appointed overseer until after the expiration of two years from the date of his resignation. When a public road shall be a dividing line between townships, the board of commissioners of the county shall determine as to how said road shall be divided, with notice as to the working of said road. The hands may be allotted to a road by allotting all who live or shall live within certain boundaries to be fixed by the board of supervisors, in which event a list of the hands by name need not be given, but the list shall specify the hands living in the prescribed territory.

Rev., s. 2715; Code, s. 2016; 1879, c. 82, ss. 3, 7; 1880, c. 30, s. 1; 1887, c. 93, s. 1.

Assignment of one liable to road duty to any particular road rests with board of supervisors of township: *State v. Gillikin*, 114-832. An order issued by township board appointing a person overseer of road is proper evidence of such appointment and admissible: *State v. Cauble*, 70-62.

An overseer cannot free himself from the duty imposed by law by surrendering his order of appointment to clerk of the board of township trustees: *State v. Long*, 81-563.

An overseer of a public road can require no hands to work on his road unless they live within a district which has been designated for him by county court, or unless they have been specially assigned by court to work on his road: *Woolard v. McCullough*, 23-432.

3754. To have orders appointing overseers served within thirty days; penalties. The board of supervisors of the township, within ten days after the rise of the board, shall furnish the constable with two copies of each order appointing overseers of roads that may have been made during the sitting of the board. And the constable shall apply at the office of the board, within ten days after the rise of every meeting of the board, for such orders, and, on receiving them, shall, within twenty days, serve each overseer of roads with a copy of the order, or leave the same at his usual habitation; and the other copy shall be returned to the next meeting of the board of supervisors, with the date of its reception by him and the date of the service indorsed thereon, or the date when it was left at the residence of the said overseer. And if either the board or constable shall fail to perform any duty enjoined by this section, he shall forfeit ten dollars to the county, to be recovered at any time, by notice to show cause at the instance of the solicitor, who shall prosecute the same in the name of the state: Provided, the delivery to the overseer of the order appointing him made by the board of supervisors of the township, or any one of them, shall be deemed and held to be a legal service of the same.

Rev., s. 2714; Code, s. 2043; 1891, c. 519; R. C., c. 101, s. 8; 1812, c. 845, ss. 1, 2; 1813, c. 859, ss. 1, 2.

3755. Supervisors annually report to superior court. The board of supervisors shall annually make report to the first term of the superior court of their county after the first Monday in August of the condition of the roads of their township, and if the meetings provided for in this chapter have been held by said board, the judge holding such term of the superior court shall, after his charge to the grand jury and before they shall retire to their room, call upon the clerk of the court for such reports, and they shall then and there be delivered to the foreman of the grand jury.

Rev., s. 2713; Code, s. 2024; 1879, c. 82, s. 10.

3756. Supervisors neglecting duties punished. If any board of supervisors shall fail to make any report required by law, or to discharge any duty imposed by law, the members thereof shall be guilty of a misdemeanor. The indictment may be against the board jointly, or against the justices composing said board, or any one or more of them severally.

Rev., s. 3770; Code, s. 2024; 1879, c. 82, s. 10.

To put and keep public roads in order is not one of the duties of the supervisors, but a duty of the overseer, and an indictment hereunder for such failure should be quashed: *State v. Britt*, 118-1255.

Section cited in *State v. Godwin*, 123-699.

3757. Overseers to report on state of road and work done; result when delinquency appears. Every overseer shall at each and every meeting of the board of supervisors of his township make report to them of the present condition of his road, of the number of days worked on his section since last meeting, of the number of hands who attended and worked each day, of the number and names of hands who failed to attend and work; whether or not they were legally summoned, and whether or not they have paid the one dollar as provided. In all cases the report provided for in this section must state either that the overseer has worked the hands allotted to his section of road the full limit of time allowed by law, or that his section of road of which he is overseer is not in need of any further work at the time such oath is made and subscribed to by the overseer. The said overseer shall, before some person authorized to administer an oath, make written affidavit that the report is true and correct. Upon this report sworn to as aforesaid, if it shall appear that any of the hands, after being legally summoned, have failed to attend and work on said road, and that they did not pay the one dollar, then it shall be the duty of the said supervisors, or any one of them, to issue a warrant for the arrest of any such hand, and shall put him upon trial for the offense: Provided, that nothing herein contained shall prevent the overseer of the road from prosecuting, at any time after the offense has been committed, any hand for failure to work on the road, and such cases of prosecution shall be stated in his report to the board of supervisors, that they may not prefer another prosecution for the same offense.

Rev., s. 2716; Code, s. 2021; 1879, c. 82, s. 7; 1880, c. 30, s. 4; 1909, c. 110, s. 1.

3758. Overseers to report on collections and expenditures of money. The said overseers shall, at the meeting of the supervisors in August, make a report of all moneys collected by them from parties excused from work on the road for the preceding year, with a statement as to how the same was expended. In case of failure of any overseer to make any report to the board of supervisors of public

roads of his township, as provided in this chapter, it shall be the duty of the chairman of such board immediately upon such failure to make a sworn statement of the fact before some justice of the peace of an adjoining township, who shall immediately issue his warrant for the arrest of the said overseer, and proceed to try him for the offense.

Rev., s. 2717; Code, s. 2022; 1879, c. 82, s. 8.

3759. Officials of road district to report financial condition annually. The board of road commissioners or other officials in charge of the roads of any county, township, or road district are and they are hereby required and directed to make out an annual itemized statement of the receipts and disbursements and of the financial condition of such road district for the calendar year, and shall, on or before the first day of February of each year, post a copy of the statement for the previous year at the courthouse door of the county, and shall file a copy of the same with the register of deeds, who shall produce such copy, on request, for the inspection of any taxpayer of such road district. And if any person or persons shall fail to perform the duties required of him by this section, he shall be guilty of a misdemeanor.

1917, c. 189, s. 1.

3760. Overseer neglecting duties punished. If any overseer of a road shall willfully neglect any of the duties imposed on him by law, he shall be guilty of a misdemeanor, and fined not to exceed fifty dollars or imprisoned not to exceed thirty days.

Rev., s. 3785; Code, s. 1054; 1889, c. 504; R. C., c. 34, s. 39; 1786, c. 256, s. 4.

Overseer of road cannot relieve himself from liability voluntarily; his road must be in the condition required by law: *State v. Long*, 81-563.

Should be excused when the weather makes work impossible or unavailing: *State v. Small*, 33-571.

Indictment must charge that defendant "wilfully neglected," etc.: *State v. Miller*, 100-543—not necessary to charge that "it became and was the duty" of the overseer to repair the road, *Ibid*.

The order appointing a person overseer is proper evidence of such appointment: *State v. Cauble*, 70-62. Not necessary to show appointment when party indicted acted as and performed the duties of overseer, he is estopped to deny his appointment: *State v. Long*, 76-254, 81-563.

ART. 9. CONSTRUCTION AND MAINTENANCE OF ROADS AND BRIDGES

Part 1. Procedure

3761. County commissioners to establish or discontinue; no more than five jurors required. The board of commissioners of the county only shall have the right to lay out and establish and discontinue public roads. In laying out and establishing roads, and for the purpose of assessing damage to property by reason of the same, no greater number of jurors than five shall be summoned or be required.

Rev., s. 2683.

As to laying out and discontinuing cartways, see sections 3836, 3837.

County commissioners are vested by statute with power to lay out or discontinue public roads, and from their action an appeal lies to superior courts in term, where issues of fact are to be tried by jury, and from that court an appeal lies to supreme court, as in other cases: *King v. Blackwell*, 96-322; *Blair v. Coakley*, 136-405; *Lambe v. Love*, 109-305; *McDowell v. Insane Asylum*, 101-656; see section 3764.

Order in which work upon public highways is to be performed is within sound discretion of commissioners, and a finding by court that they have exercised this discretion honestly and in a manner which they conceived to be for the best interests of people of county excludes any interference by the courts: *Glenn v. Comrs.*, 139-413.

A board of county commissioners denied and dismissed a petition for public road, and at subsequent meeting dismissed a similar petition for same road without going into merits of cause, and then, at a later meeting, upon petition by and against the same party as the first, allowed public highway to be constructed: *Held*, former judgments and proceedings of commissioners were not *res judicata* so as to prevent establishment of such highway: *Warlick v. Lowman*, 111-532.

The main question to be determined as to propriety of laying out public road is whether it is necessary for public good and convenience: *King v. Blackwell*, 96-322. Land cannot be taken for road by public authorities in promotion of private enterprise: *Cobb v. R. R.*, 172-58.

Order of county commissioners laying out road is competent evidence to show establishment of such road, and such judgment cannot be collaterally attacked: *State v. Yoder*, 132-1111.

A petition for laying off a public road presented to county commissioners, and definitely describing terminal points of road prayed for, is sufficient to support action of board establishing road, although such petition is addressed to "Board of Supervisors of Public Roads": *State v. Smith*, 100-550.

A county court cannot dedicate or appoint a public road in any other manner than as authorized by law: *State v. Marble*, 26-318. County court has full power to order laying out of public roads; but none to lay them out: *Welch v. Piercy*, 29-365. Court has the power to decide whether public convenience requires laying out of road and to order a jury for purpose of laying it out: *Ibid*.

Where road is opened by order of county court, according to law in every respect, except that no damages were assessed by jury to owners of land, none but those owners can impeach order for that cause: *Woolard v. McCullough*, 23-432.

Where charter has been granted for turnpike road and road opened, county court has no right to convert it into public road unless charter has been duly surrendered, or from a nonuser for twenty years a dedication to public may be presumed: *State v. Johnson*, 33-647—and even in such case road can only be made public road in manner prescribed; the mere appointment of an overseer will not be sufficient for that purpose: *Ibid*.

When a road has been laid off by order of county court upon report of a jury, confirmed by court, and an appeal is taken to superior court, it is too late to take exceptions to jury. Objection should have been made in court below, upon return of jury, by a motion to quash proceedings of jury: *Piercy v. Morris*, 24-168.

Mere appointment of overseer and assignment of hands to a supposed road are not per se a judicial determination that a public road be laid out where none before existed: *Baker v. Wilson*, 25-168.

3762. Petition for public road or ferry; contents; notice required. The board of county commissioners shall not establish any ferry, or order the laying out of any public road, or discontinue or alter such road or ferry, unless upon petition in writing. Unless it appear to the board that every person over whose lands the said road may pass, or whose ferry shall be within two miles of the place at which another ferry is prayed to be established, shall have had twenty days notice of the intention to file such petition, the same shall be filed in the office of the clerk of the board until the succeeding meeting of the board, and notice thereof be posted during the same period at the courthouse door; at which meeting the board shall hear the allegations set forth in the petition, and if sufficient reason be shown, the board shall appoint and settle or discontinue the ferry, or order the laying out, or discontinue or alter the road, as the case may be.

Rev., s. 2684; Code, s. 2038; R. C., c. 101, s. 2; 1813. c. 862. s. 1.

By adoption of road commissions the powers of county commissioners under this section are superseded, see this chapter, s. 3750.

For annotations as to roads and ferries, see section 3750.

This section and section 3763 are intended to protect the property owner and not to restrict the power of the commissioners in determining the necessity for the road: *Edwards v. Comrs.*, 170-448.

The law does not intend that establishment of necessary road should be impeded for want of twenty days notice if, before an order is made for laying off road, ample notice is given to owner: *Little v. May*, 10-599.

DISCONTINUANCE OF ROADS AND FERRIES. County court has no authority to discontinue public road but upon petition of one or more persons, filed in court, and other necessary proceedings prescribed by law, and any order for discontinuing a public road made otherwise is void: *State v. Shuford*, 28-162.

Where proceedings to change a road show no road as having been prepared nor describe where altered road is to run, except that it is to be brought nearer a particular house, and the prayer is only that an order may be "made for turning the road," and then an entry appears that "said report was confirmed and duly entered of record," there is no sufficient judgment for establishing the road as altered: *State v. Spainhour*, 19-547.

In determining upon propriety of discontinuing public road, evidence as to original object in opening road is not pertinent to inquiry, as its utility is not dependent upon intentions of those at whose instance it was first laid out, but upon wants of community and its tendency to promote public interest: *Ashcraft v. Lee*, 81-135. Evidence as to number of families to be benefited by continuing road is pertinent and important: *Ibid.* Evidence that road hands in a certain township are in number insufficient to keep up all roads in that township has no tendency, unless connected with other facts, to show that any particular road should be discontinued: *Ibid.*

Merely referring to section: *Russell v. Leatherwood*, 114-683.

3763. Public road laid out by three freeholders under oath; damages assessed a county charge. All public roads shall be laid out by a jury of three freeholders, who shall be summoned by the sheriff to meet at one of the termini of the proposed road, and, being duly sworn by the sheriff or other person authorized to administer oaths, shall lay out the road to the greatest advantage of the inhabitants, and with as little prejudice as may be to lands and enclosures. The jury shall also on oath assess such damage as private persons may sustain, and all damages assessed by them shall be deemed a county charge.

Rev., s. 2685; Code, s. 2040; 1885, c. 65; R. C., c. 101, s. 4; 1872-3, c. 189, s. 3; 1879, c. 82, s. 9.

Court has no power, except as to termini, to direct jury or any one else how road shall run, that being exclusive province of jury, their verdict being, of course, subject to judgment of court, whether it shall be received or not: *Welch v. Piercy*, 29-365.

Owner of property must seek compensation for land taken for a highway in manner pointed out by statute: *Hitch v. Comrs.*, 132-573.

Under acts 1899, chapter 581, providing for assessment of damages for taking land for road purposes, a petition to county commissioners is proper procedure, and not an action in superior court: *Jones v. Comrs.*, 130-451.

If commissioners take land for a highway without authority of law they are liable therefor individually: *Hitch v. Comrs.*, 132-573.

An appeal lies from action of board of county commissioners confirming report of a jury laying out road, notwithstanding there was no appeal from original order allowing road and appointing jury to locate it: *Lambe v. Love*, 109-305.

Special benefits to the owner may be set off against damages sustained: *Phifer v. Comrs.*, 157-150.

Damages for laying out road are not a county charge under a special township road law: *Wells v. Comrs.*, 152-663.

3764. Appeal from commissioners to court; bond; trial de novo. Any person may appeal to the superior court at term time from the determination of the board of county commissioners, and if any person shall appeal from the board on a petition, he shall give bond to the opposing party as provided in other cases

of appeal, and the superior court at term shall hear the whole matter anew; and where any proceeding is instituted to lay out, establish, alter or discontinue public roads or to appoint and settle ferries, and the said proceeding is carried to the superior court in term time by appeal or otherwise, the parties to said proceeding shall be entitled to have every issue of fact joined in said proceeding tried in the superior court in term time by jury, and from the judgment of the superior court either party may appeal to the supreme court as is provided by law for other appeals.

Rev., s. 2690; Code, s. 2039; R. C., c. 101, s. 3; 1813, c. 862, s. 1; 1879, c. 258.

The superior court has jurisdiction to review the action of commissioners in establishing public roads: *Dickson v. Perkins*, 172-359; *Robinson v. Lamb*, 126-492. Appeal lies from order laying out or discontinuing public roads: *King v. Blackwell*, 96-322; *McDowell v. Insane Asylum*, 101-656—from order altering public road, *Blair v. Coakley*, 136-405—from order establishing ferries, *Robinson v. Lamb*, 126-492—from confirmation of report of jury laying out a road, notwithstanding there was no appeal from original order, *Lambe v. Love*, 109-305. In construction of special act it was held that an appeal lies only upon the question of compensation: *Luther v. Comrs.*, 164-241. Appeal must be taken to and docketed at the next term of superior court: *Blair v. Coakley*, 136-405; *Brown v. Plott*, 129-272—bond is required, *Sutphin v. Sparger*, 150-517—a trial *de novo* is had, *State v. Davis*, 159-455; *Keaton v. Godfrey*, 152-16—a petitioner is disqualified as a juror, *Ibid.*

The appeal vacates the former order pending the appeal: *State v. Davis*, 159-455. The jurisdiction on appeal is only derivative, and the court cannot change a petition for a cartway to one for a public road: *Holmes v. Bullock*, 178-376. From the superior court an appeal lies to supreme court: *King v. Blackwell*, 96-322; *Ashcraft v. Lee*, 81-135.

When a party appeals from decision of county court laying off a road over his lands, and superior court lays it off as appellant wishes, appellant shall not pay costs: *Harris v. Coltraine*, 10-312. Superior court can only determine on the merits: *Piercy v. Morris*, 24-168.

3765. Petition for discontinuance; condition for maintenance of new road; duties of commissioners; when old road closed. Whenever, upon petition of any person, a road shall be changed and, as a condition thereof, it shall be required by the board that he put the proposed road in good condition, he may, at any time thereafter, tender the same to the overseer, who shall receive it, if it be in such condition as is required for highways; and if not, he shall reject it; and in either case he shall report and certify the fact to said board, where the same may be considered; and said board shall hear all persons interested in the matter of receiving or rejecting the road; and the decision of the board shall be conclusive as to the condition of the road; but the old road shall not be closed until it be discontinued by order of the board.

Rev., s. 2692; Code, s. 2041; R. C., c. 101, s. 5; 1784, c. 227, s. 13; 1813, c. 862, s. 1.

Discontinuance of roads and ferries, see annotations under section 3762. Cartways, see section 3837. Appeals, see section 3764.

In a petition to turn or change a public road it must be alleged that new road is necessary or would be more useful to public; otherwise petition will be dismissed: *Leath v. Summers*, 25-108.

Public roads are laid out for public convenience, and therefore should not be altered but when interest of public requires it: *Kenedy v. Erwin*, 44-387.

3766. How landowner may change location on his own land. In addition to the mode prescribed in the preceding section for turning roads, the following method may be observed by any one who desires to change a road from one part of his land to another part, namely: Such person shall lay out the same, and after putting it in such good condition as highways are directed to be, shall apply to a justice of the peace, who thereupon shall notify the overseer of the

road, and summon two freeholders to meet on the premises at a given day; and the said freeholders, being duly sworn, shall, with the justice, view and examine carefully the road which is proposed in place of the other, and all matters and facts tending to show whether the change should be allowed. They shall report, in writing subscribed by them, the result of their consideration to the next meeting of the board of supervisors, which may confirm or reject their report: Provided, that such justice and freeholders shall be disinterested in the land, and not of kin or affinity to the applicant.

Rev.. s. 2693; Code, s. 2042; R. C., c. 101, s. 6; 1834, c. 22.

Part 2. Bonds and Taxes for Roads and Bridges in the State

3767. Erection and maintenance of roads and bridges; county-line bridges.

Whenever in the opinion of the board of county or road commissioners or other road governing body of any county in the state it shall become necessary to build, rebuild, or repair any of the public roads or bridges in such county, and the same cannot be done with the labor and funds at their command or in their hands, then such board or body are hereby fully authorized and empowered in their discretion to build, rebuild, repair, alter or construct any of the roads and bridges in the county in such manner as to them may seem practicable.

Whenever it shall become necessary to build, rebuild, or repair any highway bridge over any stream which divides one county from another the road governing boards or authorities of the two counties may join in an agreement for building, rebuilding, or repairing the same, and the cost thereof shall be defrayed by the two counties in proportion to the number of taxable polls in each, unless otherwise agreed upon between the said boards or authorities of such counties: Provided, however, that the cost of any bridge erected across a stream dividing one county from another shall not exceed two per cent of the assessed valuation of the taxable property in each of the said counties.

Rev., s. 2696; 1917, c. 103, ss. 1, 2; 1919, c. 185, s. 1.

COUNTY BRIDGES. County commissioners (or other governing body) alone have power to determine upon necessity for construction or repair of bridges and to contract for same, and such power cannot be delegated: *McPhail v. Comrs.*, 119-330. Public bridges and ferries are incidentals of public roads and are not to be established or assumed or maintained as county charges unless as parts thereof in actual existence or in contemplation: *Greenleaf v. Comrs.*, 123-30. The power conferred to build and keep up bridges refers exclusively to public bridges: *Glenn v. Comrs.*, 139-421.

A citizen cannot restrain commissioners from erecting bridge across a river at certain point, though there is no public highway leading to such point, where court finds that board has in contemplation the opening of public road to such point, and that arrangements have been made for that purpose: *Glenn v. Comrs.*, 139-412.

County commissioners ordinarily contract on the part of the county for the construction and repair of bridges: *Cotton Mills v. Comrs.*, 108-694—but board cannot contract with citizen to perpetually maintain bridge, *Glenn v. Comrs.*, 139-412.

It is not the duty of the commissioners to take initial steps for repairing bridges; it is only when their coöperation becomes necessary in a movement started by township board of supervisors of public roads for such repairs: *State v. Selby*, 83-617.

Where repairs have been made on a bridge, and work has been accepted by county, contractor may recover therefor on a quantum meruit for reasonable and just value of work and labor done and material furnished, though action was brought on special contract for repairs made with supervisors, who had no authority to make contract: *McPhail v. Comrs.*, 119-330.

Where citizen, at his own expense, constructed bridge and opened up public roads over his lands leading to bridge on both sides of river, and commissioners accepted said bridge as public

bridge and have kept it in repair ever since, fact that commissioners paid him only part of cost of its construction did not change its character as part of public highway, subject to control of commissioners, as all other bridges in county: *Glenn v. Comrs.*, 139-412. Plaintiff in this case is not entitled to a mandamus commanding commissioners to repair bridge: *Ibid.*

No one, in the absence of special authority from the legislature or the board of county commissioners, has the right to erect and maintain a bridge or ferry within such a distance of a duly authorized toll-bridge as will divert from latter the custom which, in the ordinary course of travel, would pass over it, whether that distance be greater or less than five miles: *Toll-Bridge Co. v. Flowers*, 110-381.

County commissioners under their general powers may bring an action to restrain the use of a nonfloatable stream for floatage of logs, causing damage to a county bridge over such stream: *Comrs. v. Lumber Co.*, 115-590—or to restrain interference with a draw in a bridge, *Lenoir v. Crabtree*, 158-357.

Where the county commissioners built two bridges within the corporate limits of a town they cannot recover from the town the cost of construction: *Comrs. v. Raeford*, 178-337.

Where contract to build bridge had been entered into by defendants without concurrence of majority of justices of the peace as required in this county: Held, there is no liability imposed on county: *Bridge Co. v. Comrs.*, 111-317.

County is not liable for an injury to plaintiff occasioned by a defective bridge forming a part of the highway across a stream, in absence of any statutory provision: *White v. Comrs.*, 90-437—nor are the individual commissioners liable, *Hipp v. Farrell*, 173-167; s. c., 169-552.

COUNTY-LINE BRIDGES. Application of section in estimating expense of bridge over a stream between two counties: *Bridge Co. v. Comrs.*, 151-215.

The legislature may authorize two counties to issue bonds and build a bridge and necessary approaches over a dividing stream, although the bridge and principal part of the work may be in only one county: *Martin County v. Trust Co.*, 178-26. What is meant by a dividing stream: *Ibid.*; *Bridge Co. v. Comrs.*, 151-215; *McPeeters v. Blankenship*, 123-651. See section 1297 (22).

3768. Bonds for bridges; terms and denomination; no sale below par. For the purpose of raising funds with which to defray the cost of building or rebuilding any roads or bridges as provided in the last section the boards of commissioners of the respective counties shall each have full power and authority, subject to the foregoing limitations, to issue bonds of said respective counties or borrow money and issue notes therefor to an amount not to exceed the actual cost of such roads or bridges. Such bonds shall be in denominations of one thousand dollars, or less, with interest coupons attached, payable semiannually, at such time and place as may be directed by such boards, and to be in such form and tenor, and transferable in such way, and the principal thereof payable at such time or times, not exceeding forty years from the date thereof, and at such place or places as such board may determine: Provided, that none of such bonds shall be disposed of either by sale, exchange, hypothecation, or otherwise, for a less price than their face value; and the same may be disposed of at public or private sale, as the board of commissioners may determine.

1917, c. 103, s. 1 (c); 1919, c. 185, s. 3.

See *Martin County v. Trust Co.*, 178-26.

3769. Special tax to provide for bonds. The county commissioners or other county authorities who are legally authorized and empowered to levy taxes shall, in order to provide for payment of the bonds or notes to be issued hereunder, and interest thereon, compute and levy each year at the time of levying other county taxes a sufficient tax upon all real and personal property in said county to pay the interest on the said bonds and notes, and shall also levy a sufficient tax to create a sinking fund to provide for the payment of such bonds and notes at

maturity. Such taxes shall be levied and collected annually and under the same laws and regulations as shall be in force for levying and collecting other county taxes.

1917, c. 103, s. 1 (d) ; 1919, c. 185, s. 4.

See *Martin County v. Trust Co.*, 178-26.

3770. Record of bonds. The county commissioners of any county so issuing bonds shall provide a record which shall be kept by their clerk, in which shall be entered the name of every purchaser of a bond, the number of the bond purchased, the date of issue, when due, rate of interest, and the amount received for said bond. They shall also cause to be kept a record of all proceedings, as well as a record of the bonds redeemed annually, and the bonds when redeemed and recorded shall be destroyed by fire in the presence of the board of commissioners, and that fact recorded.

1917, c. 103, s. 1 (e).

3771. Investment of excess funds from tax; provisions as to redemption; conditions expressed on bond. The fund raised by taxation in excess of the amount required to pay interest, if any, shall be safely invested by the board of county commissioners, and the county commissioners are authorized to purchase any of said bonds to amount of such excess annually, and after ten years they may purchase at not exceeding their par value one twenty-fifth of the bonds issued for any county; and if no holder of said bonds shall offer to sell such amount, then the said county commissioners are authorized to designate such bonds as they may desire to purchase, and after the designation of such bonds and the notice thereof given to a newspaper published in the county, if the holder of the bonds neglects or refuses to surrender the same and receive their par value, with interest accrued thereon at the time of such notice, then the holders shall not receive any interest subsequently accruing: Provided, the said bonds designated shall express such conditions on their face.

1917, c. 103, s. 1 (f).

3772. Statutes under which such bonds may issue. County boards of commissioners or other bridge-governing body in any county may operate under the foregoing provisions or under the provisions of any special act in force in said county, or under provisions of any general act relating to bridges hereafter passed by the general assembly.

1917, c. 103, s. 3.

Part 3. Bonds and Taxes for State-line Bridges

3773. Construction and maintenance of interstate bridges. The board of commissioners of any county in the state of North Carolina bordering on any county in the state of South Carolina, Virginia, or Tennessee, is hereby authorized and empowered to cooperate with the authorities of any adjoining county in either of the above mentioned states in the construction and maintenance of any public road- or highway-bridge over any stream which divides any county in North Carolina from any other county in any of the above mentioned states, the cost of the construction and maintenance of which public road- or highway-bridge shall be defrayed and borne by the two adjoining counties in proportion to the number

of inhabitants of each according to the last federal census, unless otherwise agreed upon between the board of commissioners or other proper authorities of the respective counties which such bridge shall connect.

1919, c. 103, s. 1.

3774. When interstate bridge deemed necessary. The construction and maintenance of any bridge authorized by the preceding section shall be deemed necessary in all cases where public roads or highways shall have been regularly laid off, according to law, in each of said counties to be so connected by such bridge to the banks of any stream dividing one county from another, if there is no passable ford across said stream at said point. The total cost of any bridge constructed pursuant to the provisions of this part of this article shall not exceed one-fourth of one per cent of the total assessed value of all taxable real and personal property in the two counties engaged in the construction of such bridge.

1919, c. 103, s. 2.

3775. Bonds for state-line bridges. For the purpose of raising the funds with which to defray its share of the cost of building or rebuilding any bridge authorized by this part of this article, the board of commissioners of any county in this state in which such bridge is to be built shall have full power and authority, subject to the foregoing limitations, to issue bonds of said county to an amount not to exceed said county's share of the actual cost of said bridge. Said bonds to be in denominations of one thousand dollars, or less, with interest coupons attached, payable semiannually at such time or times and place as may be directed by said board, and to be in such form and tenor and transferable in such way, and the principal thereof payable at such time or times, not exceeding twenty years from the date thereof, and at such place or places as such board may determine: Provided, that none of such bonds shall be disposed of either by sale, exchange, hypothecation, or otherwise, for a less price than their face value.

1919, c. 103, s. 3.

3776. Tax to provide for bonds; records of bonds. The said commissioners or other county authorities empowered to levy taxes shall levy taxes to provide a fund for the payment of the interest of such bonds and a sinking fund for the payment of the bonds in the same manner and subject to the limitations and conditions specified in section 3769, and they shall keep, or cause to be kept, records of such bonds as provided in section 3770.

1919, c. 103, ss. 4, 5.

3777. Use of excess funds from tax. The fund raised by taxation in excess of the amount required to pay interest, if any, on said bonds shall be safely invested by the board of commissioners of such county, and such board is authorized to purchase any of said bonds to an amount of such excess annually at not exceeding their par value and accrued interest.

1919, c. 103, s. 6.

3778. Exercise of powers, where county commissioners superseded. The powers conferred and the duties imposed on the board of commissioners by this article shall be exercised and performed by the board of road commissioners or the board of highway commissioners or other bridge-governing board, by whatever name known, in counties where the powers and duties of boards of county

commissioners in respect to roads and bridges have been transferred or given by law to such board of road commissioners or highway commissioners or other bridge-governing board.

1917, c. 103, s. 2; 1919, c. 103, s. 7.

ART. 10. REGULATIONS FOR ROADS AND BRIDGES

Part 1. Roads

3779. Width of roads. All roads, except such as are causewayed or through cuts, shall be not less than eighteen feet wide, clear of trees, logs and other obstructions to the passage of ordinary vehicles, and there shall be ten feet in width in the center of the roadway clear of stumps and runners. Where, by the overseers, it may be deemed expedient to make or repair causeways on the same, they shall be at least fourteen feet wide; and earth, necessary to raise or cover them, shall be taken from either hand, so as to form a drain on each side of the causeway; and they shall make, of the same width, necessary bridges through swamps and over small streams of water: Provided, this section shall not apply to the roads in those counties where there is by law a classification of the widths of the roads.

Rev., s. 2682; Code, s. 2025; R. C., c. 101, s. 14; 1784, c. 227, s. 2; 1880, c. 30, s. 6.

3780. Guide-posts at forks and crossings. The board of county commissioners shall cause to be erected and maintained at the various crossings and forks of the public highways of each county guide-posts with proper inscriptions and devices thereon indicating the direction to and distance from the most important town or vicinity within ten miles of such guide-posts. Such post shall be of substantial timber and the lettering thereon shall be not less than two inches in height and of legible character. The cost of the erection of such guide-posts shall be paid from the county road fund. In those counties in which road commissions have been established the duty of the erection of such guide-posts shall devolve upon the road commissions instead of the board of county commissioners. Any person who shall willfully deface or destroy any such guide-post shall, upon conviction therefor, be fined not less than five dollars nor more than twenty-five dollars.

1917, c. 24, ss. 1, 2, 3, 4.

3781. Overseers' duty as to signs at crossings. Overseers shall cause to be set up, at the forks of their respective roads, a post or posts, with arms pointing the way of each road, with plain and durable directions to the most public places to which they lead, and with the number of miles from that place as near as can be computed; and every overseer who shall, for ten days after notice of his appointment, neglect to do so and to keep the same in repair, shall forfeit and pay for every such neglect ten dollars.

Rev., s. 2722; Code, s. 2030; R. C., c. 101, s. 18; 1784, c. 227, s. 11; 1812, c. 846.

Overseer of a road is subject to indictment if he neglects to keep signboards: *State v. Nicholson*, 6-135.

3782. High-water marks at fords; overseers liable. If any overseer of roads shall fail to establish high-water marks or signals on both sides of any river, creek

or stream which is used as a ford for a public highway, and to permanently fix the same, he shall be guilty of a misdemeanor.

Rev., s. 3782; 1889, c. 517.

3783. Mile-posts to be maintained; overseers liable. Every overseer of a road shall cause the same to be exactly measured, where it has not already been done, and at the end of each mile shall mark in a plain, legible, and durable manner the number of miles, beginning, continuing, and marking the numbers in such manner and form as the board of supervisors shall direct; and every overseer shall keep up and repair such marks and number of his road. If an overseer shall neglect any of the duties prescribed in this section, for the space of thirty days after his appointment to office, he shall forfeit and pay four dollars, and the like sum for every thirty days thereafter the said marking may be neglected.

Rev., s. 2723; Code, s. 2032; R. C., c. 101, s. 20; 1784, c. 227, s. 11.

3784. Injuring signs and mile-posts misdemeanor. If any person shall needlessly remove, knock down or deface any public sign-post, arms, or any mile-mark, he shall be guilty of a misdemeanor.

Rev., s. 3783; Code, s. 2031; R. C., c. 101, s. 19; 1784, c. 227, s. 11; 1812, c. 846.

3785. Footways at streams, etc.; ten years maintenance establishes right. Every overseer of the road, when the township board of supervisors may so direct, shall cause to be made and kept in repair, for the convenience of travelers on foot, good and sufficient footways over all swamps and streams of water that may cross that part of the road allotted to him; and, when the board shall so direct, shall also erect and keep hand-rails on each side of all hollow bridges situate on such part of the road: Provided, that at all places where footways and hand-rails, at hollow bridges or over swamps and streams of water, shall have been commonly used, for the space of ten years next preceding any period within three years before presentment made or indictment found for want of such footways or hand-rails, the same shall be conclusive evidence of an order theretofore made by the board, that they shall be erected and kept up, subject to be rebutted only by producing an order dispensing with them made within three years next before such presentment.

Rev., s. 2695; Code, s. 2029; R. C., c. 101, s. 17; 1817, c. 940, ss. 1, 2.

3786. Gates across highways may be allowed on petition. Any person desiring to erect a gate across a public road may file his petition before the board of supervisors of the township where the road lies; whereupon publication shall be made at the courthouse and on the land of the person so applying and at three public places in said township until the next succeeding meeting, of such application, specifying the road, the place for the gate and name of the petitioner; and all persons interested in the convenient traveling or transportation on said road shall have leave to appear and defend, demur, or plead to said petition; and if, at that meeting, it shall appear that such publication has been made, the supervisors may, at their discretion, authorize the petitioner, at his cost, to erect a gate as prayed for.

Rev., s. 2711; Code, s. 2058; R. C., c. 101, s. 39; 1834, c. 16, ss. 2, 3, 4; 1905, c. 88.

In exercise of their powers over public roads commissioners may grant to a party over whose land any new road ordered by them to be laid out may pass, right to erect gates across such road: *Andrews v. Beam*, 97-315.

No presumption of a legal authority to erect a gate across a public road can arise in less time than twenty years from actual erection of gate: *State v. Marble*, 26-318.

Jurisdiction to license erection of gate across public road is conferred on board of supervisors; this applies to roads already established: *Andrews v. Beam*, 97-315.

That a cartway was not established according to law is a matter of defense to an indictment for breaking down a gate across it: *State v. Combs*, 120-607.

By chapter 77, acts of 1885, this section does not apply to stock-law territory: *Edwards v. Supervisors*, 127-63.

3787. Leaving gates open; penalty. If any person shall leave open, break down or otherwise injure any gate lawfully across any public road, he shall forfeit and pay for every such offense ten dollars to the person erecting the same or his assigns of the land; and if the offense shall be maliciously or wantonly done, he shall be guilty of a misdemeanor.

Rev., s. 3781; Code, s. 2058; 1885, c. 45.

As to sufficiency of indictment for breaking down gate across cartway, see *State v. Combs*, 120-607. Section cited in *Andrews v. Beam*, 97-318; *Edwards v. Supervisors*, 127-63.

3788. Fords across boundaries to be kept in order. Where a river or stream across which there is a ford is the dividing line between any counties, townships, road districts or road sections, it shall be the duty of the board of county commissioners, road and highway commissioners, or supervisors, superintendents, and overseers having in charge the construction, maintenance, or working of a road or highway leading to such river or stream, to work and keep in good condition the part of such ford from such road or highway to the middle of the ford. Any person or persons failing to comply with the provisions of this section shall be guilty of a misdemeanor and punished by a fine not exceeding fifty dollars, or imprisoned not exceeding thirty days.

1917, c. 251, s. 1.

3789. Obstructing highways and roads misdemeanor. If any person shall willfully alter, change or obstruct any highway, cartway, mill road or road leading to and from any church or other place of public worship, whether the right of way thereto be secured in the manner provided for by law or by purchase, donation or otherwise, such person shall be guilty of a misdemeanor, and fined or imprisoned, or both. If any person shall hinder or in any manner interfere with the making of any road or cartway laid off according to law, he shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, in the discretion of the court.

Rev., s. 3784; Code, s. 2065; 1872-3, c. 139, s. 6; 1883, c. 383.

See, also, *Crimes*, s. 4354.

As to what is a public highway, etc., see under section 3750.

Jurisdiction in superior court: *State v. Eastman*, 109-788. No presumption of legal authority to erect a gateway across a public road will arise in less time than 20 years: *State v. Marble*, 26-318.

As to such obstruction being an indictable nuisance, see *State v. Godwin*, 145-464, and cases cited.

Whether indictment will lie for obstructing a private cartway: *State v. Purifoy*, 86-682; *State v. Lance*, 175-773; *State v. Norris*, 174-808. This section does not apply to a private right of way: *State v. Haynie*, 169-277.

Punishment for contempt in disobeying an order of court in obstructing the construction of road: *In re Parker*, 177-463.

INDICTMENT. Sufficient to give terminal of road and description substantially as in the order of county commissioners establishing it: *State v. Smith*, 100-550. Describing a public square as "a certain public square and common public highway" and giving boundaries is sufficient: *State v. Eastman*, 109-785. Following the statute is sufficient: *State v. Lucas*, 124-804. Indictment defective which charges obstruction by use of a plank and not the manner of using the plank: *State v. Lumber Co.*, 109-860.

EVIDENCE. Sufficiency of, of obstructing a public highway: *State v. McIver*, 88-686. It is essential in the absence of proof of an actual dedication or laying out of the road by public authority to show a user of 20 years, and it must have been worked and kept in order by public authority: *State v. Lucas*, 124-804.

3790. Obstructing highways by dirt or water; liability. Any person throwing a bank of dirt in the main road shall be compelled to spread the same. When any ditch or drain is cut in such a way as to turn water into any public road the person cutting the ditch or drain shall be compelled to cut another ditch or drain as may be necessary to take the water from said road.

Rev., s. 2697; Code, s. 2036.

3791. Obstructing highway drains, misdemeanor. Any person who shall obstruct any drains along or leading from any public road in the state shall be guilty of a misdemeanor, and punished by a fine of not less than ten nor more than one hundred dollars.

1917, c. 253.

See this chapter, ss. 3668, 3712.

3792. Use of roads by certain vehicles. It shall be lawful for any person to run and use traction engines and road steamers upon the public roads.

Rev., s. 2727; Code, s. 2061; 1870-1, c. 162.

The use of narrow-tired vehicles made unlawful on public roads of Camden, Chowan, Currituck, Durham, Pasquotank, Perquimans, and Vance. 1919, c. 272.

See section 3751.

License tax provided for in laws 1905, chapter 259, is simply a mode of regulating use of public roads and requiring that those desirous of using them for extraordinary purposes, as hauling heavy lumber and logs over roads in unusually heavy vehicles, shall not do so without taking out a license for such unusual and extraordinary and injurious use of the public highway, and paying a license tax for the privilege: *State v. Holloman*, 139-642.

3793. Injuring roads by hauling logs; damage and penalty. If any person, company or corporation shall damage any public road, bridge or causeway by hauling logs or sawmill timber thereon, and shall not repair the damage done thereto within five days after being notified of said damage by the overseer of said road, or by any member of the board of supervisors of the township in which said damaged road is situated, he shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than fifty dollars, or be imprisoned not exceeding thirty days: Provided, if any person shall pay the damage as assessed by the board of supervisors for injury to such road, the payment of such damages shall be a complete bar to any criminal prosecution under this section, and if any criminal prosecution shall have been commenced prior to the payment of said damages, all further proceedings in said criminal prosecution may be ended by the defendant paying the cost necessarily incurred in said criminal prosecution and satisfying the court that said damages and all proper costs have been paid.

Rev., s. 3778; 1893, c. 416, s. 2; 1889, c. 503, s. 2.

See section 3751; *State v. Holloman*, 139-642.

3794. Local: Settlement of damages from hauling logs in certain counties. If any of the public roads in Anson, Beaufort, Bertie, Clay, Columbus, Currituck, Dare, Gates, Halifax, Lenoir, Macon, Pasquotank, Pitt, Rutherford, Stokes, Swain, Tyrrell and Yancey counties shall be used by any person engaged in hauling logs or wood, whether such hauling be by the employees or agents of any other person, company or corporation, or by contractors for any other person, company or corporation, and the public roads shall become damaged by such use, upon complaint made to the chairman of the board of supervisors of the public roads of the township in which such damaged road is situated, he shall summon the person, company or corporation, or the manager of such person, company or corporation, alleged by such complainant to have damaged such road, before a called or regular meeting of the board of road supervisors of such township in which such alleged damaged road is situated, within ten days after complaint is made to him, and said board of road supervisors shall investigate by visiting and inspecting such damaged road, and they shall hear evidence on oath as to the condition of such damaged road and the cause of its bad condition, and the damage done to such road by the hauling of logs over such road by such person, company or corporation; and if the board of supervisors shall find such road or any part thereof damaged by the hauling of logs over the same, the person, company or corporation, or their agents, employees or contractors, alleged in the complaint to have damaged such road or any part thereof, they shall assess against such person, company, or corporation an amount of money sufficient to repair such road. And the board of road supervisors shall return to the clerk of the superior court the amount of such assessment as a judgment of the board of township road supervisors, and the clerk shall docket this transcript and it shall thereupon become a judgment of the superior court, and the clerk shall issue execution against such delinquent person or corporation for the assessed damages as other executions and the sheriff shall pay the proceeds of said judgment to the clerk of the superior court, to be applied by the board of township supervisors to the repair of such damaged road.

Rev., s. 3777; 1889, c. 503, ss. 1-3; 1893, c. 416; 1899, c. 712; 1901, c. 189.

See section 3751; *State v. Holloman*, 139-642.

Part 2. Bridges

3795. Duty as to bridges of millowners on, or persons ditching or enlarging ditches across, highways. It shall be the duty of every owner of a water-mill which is situate on any public road, and also of every person who, for the purpose of draining his lands, or for any other purpose, shall construct any ditch, drain or canal across a public road, respectively, to keep at his own expense in good and sufficient repair all bridges that are or may be erected or attached to his milldam, immediately over which a public road may run; and also to erect and keep in repair all necessary bridges over such ditch, drain or canal on the highway, so long as they may be needed by reason of the continuance of said mill, or milldam, ditch, drain or canal. Nothing herein shall be construed to extend to any mill which was erected before the laying off of such road, unless the road was laid off by the request of the owner of the mill. The duty hereby imposed on the owner of the mill, and on the person cutting the drain or canal, shall continue on all subsequent owners of the mill, or other property, for

the benefit of which the said ditch, drain or canal was cut. When any ditch or drain originally constructed across any public road, and bridged for the convenience and safety of the traveling public, has been or may hereafter be enlarged by the owner of adjacent lands to drain his lands, it shall be the duty of such owner to keep up and in repair all bridges crossing such ditch, drain or canal, and such charge shall be imposed upon all subsequent owners of the lands so drained.

Rev., s. 2697; Code, s. 2036; 1887, c. 261; R. C., c. 101, s. 24; 1817, c. 941, s. 1; 1846, c. 95, s. 1; 1881, c. 290.

In an action for failing to keep a sufficient bridge over a canal cut across a public road, plaintiff need not allege that road was laid off before mill was erected in order to negative proviso in statute: *Wadsworth v. Stewart*, 97-116.

When public road is made after landowner has cut his ditches for draining, he is not required to keep bridges in repair that are subsequently placed over them: *State v. Davis*, 143-611.

When proprietor of lands who, for purpose of draining, constructs a ditch, drain or canal across public road, he shall build a bridge over ditch, canal or drain and keep same in repair: *Nobles v. Langly*, 66-287—and overseer not liable if some one injured by reason of it being out of repair, *Ibid*.

A hand regularly assigned to work a certain road, and who has been properly summoned, cannot excuse himself from aiding to repair bridge over a ditch across road upon ground that it is duty of person who cut ditch to make bridge over it and keep same in repair: *State v. James*, 74-393.

3796. Liability for failure to maintain bridges; penalty and damages. If any owner of a water-mill situated on any public road, or any other person whose duty it is under this chapter to keep up and repair bridges built across any public road or across any ditch, drain, or canal, shall refuse or neglect to keep up and repair, or shall suffer to remain out of repair for the space of ten days, unless repair was prevented by unavoidable circumstances, any bridges which by law he may be required to keep up and repair, he shall be guilty of a misdemeanor and shall be liable for such damages as may be sustained.

Rev., ss. 2703, 3772, 3773; Code, ss. 1086, 2037; R. C., c. 34, s. 40, c. 101, s. 25; 1817, c. 941, ss. 2, 3; 1876-7, cc. 90, 211.

Where the public road is made after the landowner has cut ditches for draining he is not required to keep in repair bridges subsequently put over such ditches: *State v. Davis*, 143-611.

Liability of proprietor and lessee: *State v. Yarrell*, 34-130. Liability for damages by present proprietor and former proprietor: *Mulholland v. Brownrigg*, 9-349.

Indictment must state how the defendant became subject to the duty of making repairs: *State v. King*, 25-411.

3797. Railroad and turnpike companies to maintain bridges which they make necessary. All railroad, plankroad and turnpike companies shall keep up, at their own expense, any bridge on or over county or incorporated roads, when the building of such bridge was made necessary in establishing their respective roads; and on failure to do so, shall forfeit and pay twenty-five dollars to any person who may sue for the same, and in addition shall be guilty of a misdemeanor.

Rev., ss. 2700, 3775; Code, s. 2054; R. C., c. 101, s. 35; 1838, c. 5, ss. 1-4.

Compare *State v. R. R.*, 74-143. See, also, section 3448 et seq. A road used as a mill road may, because of its location, be also such a "plantation road" as will impose upon a railroad company the burden of keeping it in repair: *Hinkle v. R. R.*, 109-472.

3798. Counties to provide draws for vessels. The county or counties which may erect bridges shall, by their boards of commissioners, provide and keep up

draws in all such bridges, where the same may be necessary to allow the convenient passage of vessels. When any such draw shall be necessary to be erected for the passage of timber-rafts, said draw may not exceed twenty feet in width.

Rev., s. 2698; Code, s. 2053; 1891, c. 168; R. C., c. 101, s. 34.

It is within the discretion of the commissioners as to whether the draws in the bridges should turn both ways: *Lenoir v. Crabtree*, 158-358.

3799. Owner of bridge to provide draws on notice. Owners of steamboats or other craft, who may intend to navigate any river or creek over which any person may have a bridge, may give three months notice of such intention in one of the public journals of the state, published nearest the river or creek intended to be navigated, and to the owner of the bridge, to construct a draw of sufficient width to allow the passage of the boat which is to be used; and if the owner of the bridge shall not, within three months from the date of the notice, construct the required draw, he shall forfeit and pay the person so notifying, if he be thereby prevented from navigating the watercourse, fifty dollars; and shall be further subject to the like penalty, under like circumstances, for every three months default thereafter.

Rev., s. 2699; Code, s. 2052; R. C., c. 101, s. 32; 1846, c. 51, ss. 1, 2; 1838-9, c. 5.

Power to control management of drawbridge over navigable river after its construction, by requiring draw to be kept open at all proper times, the removal of rafts or debris, and in all other respects in which public welfare, interest and safety is involved, is ample in both federal and state governments: *Pedrick v. R. R.*, 143-485. Control of its navigable waters is with the state, authority of general government being only cumulative protection from interference with commerce: *Ibid.*

The public have right to use of navigable streams, which are used as highways, in passing up and down it, from one point to another: *Broadnax v. Baker*, 94-675. The obstruction or interference with navigation being a public nuisance, no private citizen may sue therefor, unless he suffers some damage which is not common to public: *Pedrick v. R. R.*, 143-485; *Mfg. Co. v. R. R.*, 117-579.

3800. Railroad and turnpike companies to provide draws. Railroad, plank-road and turnpike companies, erecting bridges across watercourses, shall attach and keep up good and sufficient draws, by which vessels may be allowed conveniently to pass.

Rev., s. 2701; Code, s. 2051; R. C., c. 101, s. 32; 1846, c. 51, ss. 1, 2.

A citizen who owns and operates a sawmill on the banks of a navigable river and procures logs for mill in rafts, coming down the river both above and below a proposed bridge, is, in that sense, an abutting owner, and is entitled to maintain an action to enjoin construction and maintenance of a railroad drawbridge across river below his mill as an alleged public nuisance; but a citizen who owns and runs sailboats on river has no right to sue: *Pedrick v. R. R.*, 143-485.

3801. Solicitor to prosecute for injury to bridges. The solicitors of the superior court are authorized and directed to institute suits in the name of the state, in the counties wherein the injuries may be done, for the recovery of damages, against all persons who shall willfully or negligently injure any public bridge belonging to or situate in any county or counties, by forcibly running any decked vessel, boat or raft against the same; by cutting trees or timber in the rivers or creeks above such bridges, or by any other manner or means whatsoever. In case the injury is done to two counties, the action may be brought in

either for the entire damage; and the damages which may be recovered shall be for the use of the county or counties injured; and if the plaintiff fail, the costs shall be paid by the county or counties for whose use the suit is brought, and in the same proportion in which the recovery would be divided.

Rev., s. 2705; Code, s. 2055; R. C., c. 101, s. 36; 1846, c. 11, ss. 1, 2.

For the recovery of damages for injury to county bridges, a remedy is given by this section: Comrs. v. Lumber Co., 115-590.

3802. County liable on commissioners' contracts as to bridge. Every contract and order by the board of county commissioners entered into or made as authorized by this chapter for or concerning the building, keeping up or repairing bridges, in such manner as to them may seem most proper, shall be valid against the county.

Rev., s. 2702; Code, s. 2035; 1887, c. 370, s. 2; R. C., c. 101, s. 23; 1784, c. 227, s. 6.

3803. Expenses of bridges borne by counties. The expense of building and keeping up public bridges in the several counties shall be borne by the whole people of each, and not by the people of the township separately, in which such bridges may be situated; and it shall be the duty of the commissioners to adjust this burden equally among the people of their respective counties, and they shall exercise a due supervision over the action of the respective boards of supervisors of the townships, so as to prevent the board of any township from establishing any unnecessary number of bridges in its respective township.

Rev., s. 2704; Code, s. 2060; 1869-70, c. 219.

3804. Fastening vessels to bridges misdemeanor. If any person shall fasten any decked vessel or steamer to any bridge that crosses a navigable stream, he shall be guilty of a misdemeanor, and in the case of a bridge that crosses a county line, may be prosecuted in either county.

Rev., s. 3774; Code, s. 2050; 1887, c. 93, s. 3; R. C., c. 101, s. 31; R. S., c. 104; 1858-9, c. 58, s. 1.

3805. Fast driving over bridges misdemeanor. If any person shall ride or drive over any public bridge at a rate of speed faster than a walk, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that this section shall not apply to any bridge unless the county commissioners shall keep posted at each end of such bridge a notice forbidding the riding or driving over such bridge at a rate of speed faster than a walk.

Rev., s. 3780.

ART. 11. ROAD LABOR AND MATERIAL

Part 1. In General

3806. All able-bodied males to work on roads. All able-bodied male persons between the ages of eighteen years and forty-five years (between twenty-one years and forty-five years in Columbus and Tyrrell counties) shall be required under the provisions of this chapter to work on the public roads, except the members of the board of supervisors of public roads; but no person shall be compelled to work more than six days in any one year, except in case of damage

resulting from a storm: Provided, that ten days instead of six days shall be the limit as to the counties west of the Blue Ridge.

Rev., s. 2725; Code, s. 2017; 1879, c. 82, s. 4; 1880, c. 30, s. 2; 1826, c. 26; 1905, c. 136.

For system of working and maintaining roads under the road commission plan, see this chapter, art. 4, part 2.

Legislature can prescribe method of working roads, whether by labor or taxation or by a mixture of two or more methods: *State v. Holloman*, 139-642.

This section is constitutional: *State v. Taylor*, 170-693; *State v. Wheeler*, 141-773.

Statutory requirement to work public roads is not a tax, but a duty, and inability to perform it, through sickness, is a full defense: *State v. Covington*, 125-641; *State v. Craig*, 81-590; *State v. Sharp*, 125-628; *State v. Wheeler*, 141-773; *State v. Taylor*, 170-693.

This section exempts only supervisors: *State v. Craig*, 81-590. For other exemptions, see section 3807.

That a person was summoned to work a public road three consecutive days, the law providing that hands shall not be required to work continuously for longer than two days at any one time, is no defense for failing to work the first two days: *State v. Yoder*, 132-1111.

Any inhabitant assigned, when sued for penalty incurred for refusing to work on road, and the overseer indicted for not having the road in order, may show that in fact there is no such public road: *Baker v. Wilson*, 25-168.

A hand regularly assigned to work a certain road, and who has been properly summoned, cannot excuse himself from aiding to repair bridge over a ditch across road, upon ground that it is duty of person who cut ditch to make bridge over it, and keep same in repair: *State v. James*, 74-393.

Where township trustees had failed under a special county road law to lay off new road districts according to strict intention of the act, but had adopted those laid off under general law: Held, that as there was sufficient certainty in location of such districts to fix liability of defendant subject to road duty, he could not, after conviction on an indictment for not working road, take advantage of such failure and irregularity by a motion in arrest of judgment: *State v. Baker*, 108-799.

3807. Exemptions from duty to work. No person between the ages prescribed shall be exempted from working upon the public roads, except such as shall be exempted by the general assembly, or by the board of supervisors of the township, on account of personal infirmity, of which the said board shall be the sole judge. No male student attending any school, college, academy or other institution of learning shall be compelled to perform any road duty or to work on any street or road, or to furnish a person to work in his place, or to pay any sum of money in lieu of such work, on the roads or streets in the county, city, town or township in which such institution of learning is located; but this exemption shall not extend to any male person subject to road duty who before becoming a student within the exemption was a bona fide and legally qualified resident of the district: Provided, that all boys in this state under twenty-one years of age are exempt from working the public roads during the time they may be attending school.

Rev., s. 2726; Code, s. 2018; R. C., c. 101, s. 12; 1784, c. 227, ss. 8, 9; 1826, c. 26, ss. 1, 2; 1907, c. 945; 1919, c. 263.

As to whether general statute as to who liable to road duty repeals special statute exempting certain persons, see *State v. Womble*, 112-862.

Where an able-bodied male person between 18 and 45 years of age resides in this state, and pursues a vocation for his income for an indefinite period, he is liable to road duty, although he is a citizen of another state to which he intends to return when he finishes his present employment: *State v. Johnston*, 118-1188.

Section hands employed on railroads at regular wages are not thereby excused from working on public highways of county: *State v. Cauble*, 70-62—nor are bar pilots unless employed on same day: *State v. Craig*, 81-588.

Where a person resides in another state during greater part of year, but has domicile in this state in which he also resides three or four months of year, during which he keeps slaves here, he is liable during time he resides in this state to requisition of overseer for services of those hands: *Cantrell v. Pinkney*, 30-436—but persons passing through state, or visiting it for purposes of profit or pleasure, and remaining for days, weeks, or even months without having any fixed home, are not persons whom overseer of roads are authorized to summon as being within their districts: *Ibid.*

3808. Overseers summon to work; notice; amount and conduct of work; substitutions allowed. The overseer of the road shall, as often as the road shall require, not more than six days in any one year, summon the hands of his section to work on the road, but the said hands shall not be required to work continuously for a longer time at any one time than two days, and at least fifteen days shall intervene between workings, except in case of special damage to the road, resulting from a storm. The notice shall be at least three days before the day named for the work, and shall state the hour and the place for the meeting of the hands, and what implement the hand shall bring with him. Every person liable to work on the road who has been so summoned shall appear at the time and place named, and with the implement directed, and shall work on the road under the direction of the overseer until discharged by him: Provided, that no hand shall be required to work for a less time than seven hours nor a longer time than ten hours in any one day.

Any person summoned as aforesaid who shall, by twelve o'clock of the day preceding the one appointed for work on the road, pay to the overseer the sum of one dollar shall be relieved from working on the road for one day. The money thus collected by the overseer shall be by him applied on the working and repairing of the road.

Any person who shall furnish one able-bodied hand as a substitute, with the implement directed, shall be held to have complied with this chapter.

Rev., s. 2721; Code, s. 2019; 1879, c. 82, s. 5; 1880, c. 30, s. 3.

A summons to a person liable to road duty need not be in writing: *State v. Telfair*, 130-645. A notice by the supervisor to a person subject to road duty directing him to meet supervisor at time and place designated "to work the road," the place of meeting being a branch crossing road to be worked, is sufficient; especially where it further appeared that such person had under previous notice worked same road: *State v. Baker*, 108-799.

An overseer of a public road has no right, at his discretion, to widen road: *Small v. Eason*, 33-94.

3809. Overseers allot tasks to workers. The overseer, if requested by a majority of the hands on the road assigned him, may, in his discretion, lay off the road in equal portions for the convenience of the laborers, who shall finish his or their part in a time agreed on between him and each person, and on default of any agreeing party, the overseer shall cause such part to be finished by the labor of other persons, and by warrant may recover the value thereof to his own use: Provided, that the time agreed on shall not exceed six days, and that nothing in this section shall be a defense to the overseer, when prosecuted for default concerning the condition of the road.

Rev., s. 2718; Code, s. 2026; R. C., c. 101, s. 13; 1784, c. 227, s. 10.

3810. Notice to work on road, how served. When an overseer shall not be able to personally notify the hands three days before the day appointed for working the road, he shall leave at the house of each hand a written summons, specifying

the day on which they are required to attend, the place of the road to be worked, and the kind of tools to be brought or used; and the said written summons, left as aforesaid, shall be deemed sufficient notice to the hands required to be notified; and all penalties recovered by an overseer for default of working on the road shall be applied by him to the repair of the road of which he is or may have been overseer.

Rev., s. 2720; Code, s. 2044; R. C., c. 101, s. 10; 1842, c. 65.

Personal service of summons to work hands means service on him personally, and not service by overseer personally: State v. Covington, 125-641.

3811. Penalty for failing to work roads. If any person liable to work on the road shall fail to attend and work, as provided by law, when summoned so to do, unless he shall have paid the one dollar as provided, he shall be guilty of a misdemeanor, and fined not less than two dollars nor more than five dollars, or imprisoned not exceeding five days, and if any defendant shall be unable to discharge the judgment and costs that may be recovered against him, the costs shall be paid by the county.

Rev., s. 3779; Code, s. 2020; 1885, c. 392; R. C., c. 101, s. 11; 1817, c. 935, s. 2; 1825, c. 1287; 1879, c. 82, s. 6.

As to who is liable to road duty, see sections 3806, 3807. See generally: State v. Pool, 106-698; State v. Yoder, 132-1111. **Statutes requiring working of public road by labor constitutional:** State v. Wheeler, 141-773; State v. Taylor, 170-693.

Work hereunder is a duty, not a tax, and sickness is an excuse for one failing to work: State v. Wheeler, 141-773; State v. Sharp, 125-628; State v. Covington, 125-641.

Where county commissioners order the construction of a public road, hands assigned for work upon it are liable hereunder for default: State v. Joyce, 121-610; State v. Yoder, 132-1111—but not while an appeal is pending in the proceeding to establish the road, State v. Davis, 159-455.

No defense that hand has been assigned to work another road: State v. Yoder, 132-1111—or that defendant had no occasion to use the road, State v. Gillikin, 114-832. **A hand properly summoned to work the road cannot excuse himself from repairing a bridge because it is the duty of some one else to keep said bridge in repair:** State v. James, 74-393.

A "bar pilot" is not excused from working roads, but if he was acting as pilot on the day summoned it would be a good defense: State v. Craig, 81-588. **Section hands employed by railroad not excused from working roads:** State v. Cauble, 70-62. **A citizen of another state who is pursuing his vocation here for an indefinite term is liable to road duty:** State v. Johnston, 118-1188.

Justices of the peace have exclusive original jurisdiction hereunder: State v. Clayton, 146-599; State v. Craig, 82-668—and superior court on appeal, State v. Clayton, 146-599.

INDICTMENT AND WARRANT. Sufficiency and insufficiency of generally: State v. Thomas, 168-146; State v. Pool, 106-698; State v. Yoder, 132-1111. **Must negative payment of \$1:** State v. Yoder, 132-1111; State v. Neal, 109-859; State v. Pool, 106-698. **Unnecessary to charge the failure as "unlawful and wilful":** State v. Covington, 125-641. **Defective when it fails to allege that defendant has been duly assigned and is liable to work on that particular road, and has been properly summoned:** State v. Smith, 98-747; State v. Pool, 106-698. **Superior court can amend warrant of justice making state plaintiff instead of the road overseer:** State v. Cauble, 70-62—and can amend warrant in form or substance, but not so as to change the nature of the offense, State v. Vaughan, 91-532; State v. Smith, 98-747.

Part 2. Convict Labor

3812. Application for convicts. Any county or township or good roads district that desires to use convict labor in the construction or improvement of its highways shall apply first to the geological and economic survey to lay out and

make plans for said work or to approve plans already made. The said county, township or "good roads district shall then apply to the board or state prison directors for the number of convicts desired for the work, this number in no case to be less than forty.

Ex. Sess. 1913, c. 37, ss. 1, 2.

3813. Duty of directors of state prison. The board of directors, as soon as possible after the receipt of the application and the approval of the council of state, shall furnish the labor requested and proceed to construct or improve the highway under the direction of the state geological and economic survey. All applications from counties, townships or good roads districts for convict labor shall be honored in turn, according to the date of their receipt, except that no county, township or good roads district may use at any time more than one hundred convicts if an application from another county is pending and no labor is available for it.

Ex. Sess. 1913, c. 37, ss. 3, 4.

3814. Compensation paid to state; how expense divided. Counties, townships, or good roads districts using convict labor shall pay to the state therefor the sum of not less than one dollar per day for each laborer; shall furnish quarters, to be approved by the board of prison directors, for prisoners and employees; it shall also provide pure drinking water and necessary firewood for camp use, and shall furnish overseers to direct the work. All other expenses of every kind whatever shall be borne by the board of prison directors.

Ex. Sess. 1913, c. 37, s. 5.

3815. Certain existing contracts not affected. This article shall not interfere with or apply to the agreements now existing and in force between the authorized authorities of the state and the Elkin and Alleghany railroad company, the Statesville Air Line railroad company, the public road in Madison county, under chapter four hundred and sixty-four, public-local laws of one thousand nine hundred and thirteen; the Watauga and Yadkin Valley railroad company and the Hickorynut Gap dirt road now being constructed by the state and leading across the Blue Ridge mountains through the county of Henderson. Should the said railroad companies at any time fail to carry out the provisions of the agreement existing between them and the authorities of the state, then the state shall be under no further obligation to furnish convict labor, and may at once withdraw such labor from the railroad company failing to carry out its agreement.

Ex. Sess. 1913, c. 37, s. 6.

3816. Convicts on state farm to be reserved. The state farm or penitentiary authorities or council of state shall at all times reserve a sufficient number of convicts to properly cultivate and conduct the state farm.

Ex. Sess. 1913, c. 37, s. 7.

Part 3. Material

3817. Appropriation of earth and timber for roads. Overseers may lawfully cut poles and other necessary timber, for repairing and making bridges and

causeways. And whenever earth shall be needed on a public road, and it cannot be conveniently procured on either side of the causeway, the overseer may lawfully take the earth from any adjoining land.

Rev., s. 2719; Code, s. 2027; R. C., c. 101, s. 18; 1785, c. 256, s. 1; 1818, c. 976, s. 1.

Soil not to be taken from cultivated field, under act of 1899, c. 581, and injunction will issue to restrain this: *Combs v. Comrs.*, 170-87. The right to cut poles, etc., is not confined to land immediately adjoining spot where work is to be done: *Collins v. Creecy*, 53-333.

3818. Compensation for earth and timber taken for roads. The owner of any land or timber used for building or repairing public roads may file his petition before the board of commissioners of the county wherein the injury is done; and, for damages sustained thereby, the board shall make the petitioner adequate compensation: Provided, that this and the preceding section shall not apply to the lands adjoining or contiguous to the causeway, or great road leading across Eagle's island to Wilmington.

Rev., s. 2728; Code, s. 2028; R. C., c. 101, s. 16; 1818, c. 976, s. 2.

The county is not liable for the wrongful act of the officers in taking stone from a quarry: *Keenan v. Comrs.*, 167-356.

ART. 12. FERRIES AND TOLL-BRIDGES

Part 1. General Provisions

3819. Commissioners may establish toll-bridges. Whenever, from the rapidity or width of any stream, it may be too burdensome to build and keep up a bridge across the same, at the expense of those who are taxable for that purpose, the board of commissioners of the county, or counties, chargeable therewith may jointly and severally (as the case may be) contract for the building thereof, by allowing the builder to take tolls, at such rate and for such time, on all persons, horses, carriages and other things passing over the bridge, as may be agreed on between the board of commissioners and the builder; which tolls shall be common to all persons. And such bridges shall be built in the manner the board or boards may direct, and shall be kept in good repair by the builder, his heirs and assigns, during the time the tolls are to be enjoyed.

Rev., s. 2706; Code, s. 2045; R. C., c. 101, s. 26; 1784, c. 227, s. 7; 1817, c. 939, s. 2; 1817, c. 940, s. 3.

Quere: Whether owner of a toll-bridge who claims a penalty for "setting over" persons and property does not have to aver that he was able and ready to carry all persons, etc., offering themselves, with reasonable promptness and safety: *McRee v. R. R.*, 47-186.

3820. Condemnation of ferry sites. Wherever a public ferry has been or may hereafter be established, the board of county commissioners of the county in which any such ferry is or may be located shall have power to condemn land, not exceeding one acre for each public ferry, adjacent or convenient to said ferry, upon which to erect necessary buildings for the use and convenience of ferrymen and the traveling public, under the same rules and regulations as are provided by law for condemning land for public roads; and upon the payment or offer of payment, to the owner of said land, of the amount awarded to him therefor, title to the same shall vest in the county in which said land is situate. Nothing in this section shall be construed to deprive the owner of land so condemned of the right of appeal to the superior court.

Rev., s. 2691; 1889, c. 447.

3821. Commissioners to regulate ferriage. The board of commissioners of each county shall, once a year, or oftener if necessary, at the meeting to be held next after the first day of January, rate the prices of such ferries as shall be kept within their respective counties; and ferries lying between two counties shall be rated at a joint meeting of the commissioners of the two counties, to be held at such time and place as may be agreed upon by the commissioners of the two counties, and any ferry keeper who shall ask, demand, or receive a greater price for ferriage than shall be rated by the board or boards of commissioners shall forfeit and pay five dollars for every offense to the party aggrieved. Every person who owns a public ferry, and refuses to keep it up at the rates allowed by the board, shall for every such offense forfeit five dollars.

Rev., s. 2707; 1907, c. 221, s. 1; Code, s. 2046; R. C., c. 101, s. 27; 1779, c. 160, s. 2.

Tolls are not regulated by joint boards of commissioners in the counties of Camden, Catawba, Gaston, Halifax, Iredell, Lincoln, Mecklenburg, Northampton, Onslow, Pasquotank and Surry. See 1907, c. 221, s. 1.

A franchise for a toll-bridge is not violated by a railroad company who carried passengers along their road and, as a part of the road, over their bridge: *McRee v. R. R.*, 47-186.

3822. Owner of ferry may substitute toll-bridge. In all cases where the proprietor of a ferry shall prefer building a good and substantial bridge over any water-course instead of keeping a ferry, he may do so; and may claim and hold such bridge under the same rights, and in the same manner, by which the ferry is claimed and held, and under the same rules, regulations, restrictions and penalties as other toll-bridges: Provided, that no more toll shall be demanded for passing any such bridge than is granted by law for the ferriage, unless by agreement with the board of commissioners: Provided further, that in all such bridges the proprietor shall erect a draw where the free navigation of the stream may require it.

Rev., s. 2708; Code, s. 2047; R. C., c. 101, s. 28; 1806, c. 706.

This section requires of owner of toll-bridge not only to erect and keep in good repair a draw sufficient for the purposes of a free navigation of the stream, but also to provide means of raising it, and to have it raised whenever steamboats and other vessels are passing it: *Davis v. Jenkins*, 50-291.

3823. Owners of toll-bridges and ferries to give bond; actions on bond. The board of commissioners of each county shall compel every person that may own a toll-bridge, or keep a public ferry, within the county, to give bond with good surety in the sum of one thousand dollars, payable to the state of North Carolina, conditioned that he will constantly keep such bridge in good repair, or, as the case may be, provide and keep good and sufficient boats, or other proper craft, always to be well attended, for the passing of travelers or other persons, their horses, carriages and effects, and will indemnify and save harmless every person who may be endamaged by reason of any default in his undertaking. And if any person shall receive damage, because such ferryman or keeper of a toll-bridge shall not have complied with the conditions of his bond, he may bring suit thereon in the name of the state, and recover his damages.

Rev., s. 2709; Code, s. 2048; R. C., c. 101, s. 29; 1784, c. 227, s. 15.

3824. Right of action of person detained at ferry. If any person shall be detained at any public ferry by reason of the ferryman not having sufficient

boats or other proper crafts at hand, or by his neglecting to do his duty in any other respect, he may recover before a justice of the peace, against such ferryman, the sum of ten dollars, as a penalty for every such default or neglect.

Rev., s. 2709; Code, s. 2448; R. C., c. 101, s. 29; R. S., c. 101, s. 29.

3825. Penalty on unauthorized ferry. If any unauthorized person shall pretend to keep a ferry or to transport for pay any person or his effects, within five miles of any ferry on the same river or water which theretofore may have been appointed, he shall forfeit and pay two dollars for every such offense, to the nearest ferryman: Provided, that any person who may contract for carrying the mail may keep a boat for the sole purpose of transporting the same, and such passengers as may travel in the coach therewith, across any ferry; but such contractor shall not transport across such ferry any other passengers than such as travel by the coach.

Rev., s. 2710; Code, s. 2049; R. C., c. 101, s. 30; 1764, c. 72, s. 1; 1787, c. 273; 1883, c. 381.

See annotations under section 3750.

Part 2. County-line Ferries

3826. Counties may purchase ferries on county-line streams; division of cost. Wherever in this state there are now operated ferries with causeways, roads, and bridges leading to the same, which lie partly within one county and partly within another county, the boards of commissioners of the respective counties are authorized to purchase all real and personal property, rights, and franchises incident and necessary to the said ferries, including any causeways, roads, and bridges leading thereto. The proportion of the purchase price to be paid by the said counties shall be determined and agreed upon at a joint meeting of the board of commissioners of said counties, and the amount of said purchase price so agreed upon and determined shall be paid by the respective counties to the owners of the same by proper warrant of the respective counties.

1919, c. 138, s. 1.

3827. Right of eminent domain conferred. If the said counties and the owners of the property the purchase of which is authorized in the preceding section cannot agree upon the purchase price, then the boards of commissioners of said counties are authorized, should they deem it necessary and for the best interests of the counties, to condemn the same, and for that purpose they are empowered to institute condemnation proceedings in either county in which said property, ferry, causeway, road, or bridges, or any part of the same, lie, and conduct the same in accordance with the chapter entitled Eminent Domain in the Consolidated Statutes.

1919, c. 138, s. 2.

3828. Joint operation and maintenance; joint committee. After the purchase or condemnation aforesaid, the said ferry, with the causeways, roads, and bridges leading to the same, shall become a part of the public highway and roads of the said counties, and it shall be the duty of the said commissioners to operate and maintain the same jointly as a part of such public highways and roads, and the expense of maintenance, improvement, and operation of the said property jointly acquired shall be borne by the said counties upon such terms and in such propor-

tions as shall be agreed upon by the board of commissioners of the same in joint meeting. The said boards of commissioners may vest the control and management of the said ferry and roads, causeways, and bridges, and equipment used in connection therewith, in a committee or committees from said boards, to be selected and determined by said boards in meeting assembled, and said commissioners are authorized to employ agents and servants, provide for the operation and to prescribe reasonable rules and regulations in reference to use and operation of said ferry, roads, causeways, bridges, and the property and equipment used in connection therewith.

1919, c. 138, s. 3.

3829. Expenses of equipment and maintenance; bond issue. The said boards of commissioners, after the purchase or condemnation of the ferries and roads, causeways, and bridges as aforesaid, shall provide all necessary equipment for the ferry and to improve and repair the causeways, roads, and bridges leading to the same, and thereafter shall keep the same in good condition to the end that the best possible service may be rendered to the public. In order to raise funds for the purchase or condemnation of said ferries, roads, causeways, bridges, rights, and property, and for the improvement and repair of the causeways, roads, and bridges, and the purchase of the necessary equipment for said ferry or ferries, the said boards of commissioners of the respective counties are hereby authorized and empowered to have prepared and issued at such time or times and in such amounts as they deem best, bonds of their respective counties to an amount not exceeding the cost of the ferries and other property so acquired, the repair and improvement of same, and the purchase of necessary equipment, said bonds to draw interest at such rate as may be determined by said respective counties, to be evidenced by coupons attached, payable semiannually, and to be in such form and tenor and transferable in such way, and the principal thereof payable at such time or times, not exceeding forty years from the date thereof, and at such places as such respective boards may determine: Provided, that none of such bonds shall be disposed of either by sale, exchange, hypothecation, or otherwise, for a less price than their face value.

1919, c. 138, s. 4.

3830. Tax for interest and sinking fund. The commissioners of the respective counties, in order to provide for the payment of the bonds to be issued hereunder and interest thereon, shall compute and levy each year at the time of levying other county taxes a sufficient tax upon all real and personal property in their respective counties to pay the interest on the said bonds, and shall also levy a sufficient tax to create a sinking fund to provide for the payment of said bonds at maturity. Such taxes shall be levied and collected annually and under the same laws and regulations as shall be in force for levying and collecting other county taxes.

1919, c. 138, s. 5.

3831. Toll rates; basis of adjustment. In order to defray the expense of operating, improving and maintaining said ferry or ferries, causeways, roads, and bridges and all property used in connection therewith, the boards of commissioners of the said respective counties shall prescribe passage rates from time to

time and authorize such tolls for the use of said ferry or ferries, roads, causeways, and bridges, and other equipment used in connection therewith, in their discretion, as may be reasonable, just, and proper to provide the operating expenses and reasonable upkeep of the said property, but said boards shall not consider the cost of the same or the amount expended in the first instance in improving, repairing and purchasing the necessary equipment as aforesaid in fixing the amount of toll to be charged and paid by the public for the use thereof: Provided, such rates, charges, or tolls shall be uniform on all citizens alike.

1919, c. 138, s. 6.

3832. Tax to supplement tolls. If the tolls collected under the last section shall not be sufficient to pay the expenses of operating, repairing, and maintaining such property, the said boards of commissioners of such respective counties are authorized to levy a tax upon the real and personal property of their respective counties sufficient to pay the proportionate loss occasioned by the operation as aforesaid. Said tax shall be levied at the same time as other taxes are levied and shall be collected at the same time and in the same manner as other county taxes; and if it shall become necessary to pay said loss for any one year or part thereof from the general fund of the counties, or in the event it becomes necessary to borrow money to provide for said loss, the said boards of commissioners may, from taxes so collected in any succeeding year, reimburse the general fund of their counties to the extent of the amount so advanced or the amount so borrowed to provide for said deficit; and may provide a contingent fund to meet such event.

1919, c. 138, s. 7.

3833. Compensation of committee for ferry control. If the boards of commissioners should elect to place the control, operation, and management of said ferries and property used in connection therewith, and the road, causeway, and bridges, in a committee or committees from the joint bodies, as is provided above, said committee or committees shall receive the same pay and mileage for holding meetings in connection with all necessary business of said operation and management as is allowed by law to the members of the boards of commissioners of said respective counties for attending meetings of the board in said respective counties.

1919, c. 138, s. 8.

3834. When counties may sell or lease ferries. If the operation and management of the ferries and property provided for hereunder, and the roads, causeways, and bridges connected therewith, as provided in this article, shall prove too costly to said counties or shall fail to give adequate and satisfactory service to the general public, or if the public interests would be better subserved by a sale, the boards of commissioners of the respective counties are authorized to sell said ferries and property upon such terms as they see fit, or the said boards of commissioners may rent and lease the same to such person, firm, or corporation as they may see fit, and subject to such rules and regulations as they may prescribe: Provided, however, that in the event of a sale or lease as aforesaid, the purchase price or lease price, as the case may be, shall be divided between the respective counties in proportion to the price paid in the first instance by the respective counties for such ferries and property.

1919, c. 138, s. 9.

ART. 13. CARTWAYS, CHURCH ROADS, AND THE LIKE

3835. Road supervisors establish or discontinue cartways; number of jurors; appeal. The board of supervisors shall have the right to lay out and discontinue cartways. In laying out and establishing roads and cartways, and for the purpose of assessing damage to property by reason of the same, no greater number of jurors than five shall be summoned or be required. Either party may appeal from the decision of the board of supervisors to the board of commissioners of the county.

Rev., s. 2683; Code, s. 2023; 1879, c. 82, s. 9.

3836. Cartways and tramways laid out; procedure; cartways to be open to public; appeal. If any person be settled upon or cultivating any land, or shall own any standing timber, or be working any mines or minerals to which there is leading no public road, or which is not convenient to water, and it shall appear necessary, reasonable and just that such person shall have a private way to a public road or water-course or railroad over the lands of other persons, he may file his petition before the board of supervisors of the township at a regular or special meeting praying for a cartway, tram or railway to be kept open across such other persons' lands, leading to some public road, ferry, bridge, public landing or water-course or railroad; and upon his making it appear to the board that the adverse party has had ten days notice of his intention, the board shall hear the allegations of the petitioner and the objections of the adverse party or parties, and if sufficient reason be shown, shall order the constable to summon a jury of five freeholders to view the premises and lay off a cartway, tram or railway, not less than fourteen feet wide, and assess the damages the owner of such land may sustain thereby; which, with the expense of making the way, shall be paid by the petitioner. The cartways established under this section shall be kept open for the free passage of all persons on foot or horseback, and all carts and wagons, and the petitioner and others who use said road may from time to time grade or repair said road as they may desire without doing any injury to the adjoining lands. If the notice aforesaid shall not have been given, the board shall cause such petition to be filed with their chairman until their next meeting, when they shall proceed to hear and determine the same, and the petitioner or the adverse party may appeal from the order of the supervisors to the board of commissioners of the county, and from the order of the board of commissioners to the superior court at term, when the issues of fact shall be tried by a jury, and from the judgment of the superior court to the supreme court, as in other cases of appeal.

Rev., s. 2686; Code, s. 2056; 1917, c. 282, s. 1; 1917, c. 187, s. 1; 1909, c. 364, s. 1; 1903, c. 102; 1887, c. 46; R. C., c. 101, s. 37; 1798, c. 508, s. 1; 1822, c. 1139, s. 1; 1879, c. 258.

As to cartways by prescription and dedication, see annotations under section 3750.

This section is in derogation of the rights of landowners, and must be strictly construed: *Warlick v. Lowman*, 103-122. Form of the petition, and proper methods of procedure under this section, pointed out in *Warlick v. Lowman*, 103-122; see, also, *Barber v. Griffin*, 158-348. The proceeding may be heard by the supervisors at a called meeting, after notice to the parties: *Ford v. Manning*, 152-151.

A cartway is a way established by law for a person who has not the benefit of a public highway, and for that reason alone: *State v. Purifoy*, 86-682. If plaintiff can have a practicable cartway on his own land it should not be constructed on land of another: *Mayo v. Thigpen*, 107-63.

To be entitled to cartway petitioner must show that it is a necessity; that his demand is reasonable and just: *Gorham v. R. R.*, 158-504; *Warlick v. Lowman*, 103-122, 104-403—or that he has no other means of egress and ingress, *Burwell v. Sneed*, 104-118; *State v. Purifoy*, 86-682—or that his lands are connected with public road but by an impassable tract, *Mayo v. Thigpen*, 107-63. "Sufficient reason" for its establishment under a private act, discussed in *Cook v. Vickers*, 144-312.

Petitioner not entitled to cartway simply because one would be more convenient to him: *Burwell v. Sneed*, 104-118; *Warlick v. Lowman*, 103-122; *Lea v. Johnson*, 31-15—or because it would give him a shorter and better outlet to public road, *Warlick v. Lowman*, 103-122.

When jury find cartway applied for is a necessity, because there is no other, then evidence of length and nature of route proposed, as compared with other, is competent to show that demand is reasonable and just: *Warlick v. Lowman*, 104-403; see *Cook v. Vickers*, 144-312.

Owner of a tract who does not reside on same, nor has cultivated, fenced, or in any wise improved any part of it, but has only used it as range for cattle, is not entitled to private way over adjoining land: *Caroon v. Doxey*, 48-23.

Courts have no authority to have lands of citizens taken for a cartway without consent of owner except in instance provided for by statute: *Lea v. Johnson*, 31-15.

Amendment made to law regarding cartways, etc., in so far as it authorizes owners of timber lands to condemn a right of way for tramways or railways over the lands of other owners for the exclusive use of the owners of the timber, is unconstitutional, in that private property can only be taken for a public use: *Cozard v. Hardwood Co.*, 139-283; *Leigh v. Garysburg Mfg. Co.*, 132-171—but a way *ex necessitate* may be acquired, *Ibid*.

Action of township supervisors in ordering establishment of cartway is such a final determination of matter as will support an appeal to board of commissioners, and hence through superior to supreme court, although order may not have been executed: *Warlick v. Lowman*, 101-548.

Upon trial of an issue whether proposed cartway was necessary and reasonable, opinions of witnesses are not competent, question not being one of science, peculiar skill, or professional knowledge: *Burwell v. Sneed*, 104-118.

When a cartway has not been laid out under this section or acquired by adverse user, it is not indictable to obstruct it: *State v. Norris*, 174-808.

Section referred to in *Lumber Co. v. Cedar Works*, 158-161.

3837. Discontinuance of cartways, etc.; gates and stockguards; duration of right. Cartways, tramways or railways laid off according to the provisions of this chapter may be changed or discontinued upon application by any person concerned, under the same rules of proceeding as they may be first laid off, and upon such terms as to the board of supervisors shall seem equitable and just. Cartways, tramways or railways for the removal of timber shall continue for a period not longer than five years, and in entering cultivated land shall protect the same by sufficient stockguards. And any person through whose land a cartway may pass may erect gates across the same, which shall be kept in good repair.

Rev., s. 2694; Code, s. 2057; 1887, c. 46, s. 2; R. C., c. 101, s. 38; 1798, c. 508, ss. 1, 2, 3; 1834, c. 16, s. 1; 1887, c. 266.

A petitioner who has acquired a right by order of court to have cartway over land of another, and who has afterwards obtained title to servient tenement, has right to obstruct and discontinue such cartway: *Jacoeks v. Newby*, 49-266.

3838. Church roads laid out on petition; procedure. The board of supervisors in each township is authorized to order the laying out of necessary roads to any church or other place of public worship in the township, to discontinue such roads when they may be found useless, and to alter the same so as to make them more useful. The right of way herein provided for shall terminate whenever the church or place of worship shall cease to be used as such. The board of

supervisors shall not order the laying out of any such road or discontinue or alter the same except upon petition, in writing, nor shall they hear such petition, unless it is made to appear that every person over whose lands the road may pass shall have had ten days notice of the intention to file such petition, by personal service of notice in writing, or if the owner is unknown or there is no owner, agent or attorney of such owner resident in this state, then by notice thereof posted up at the courthouse door of the county in which the township is situated and at two public places in the township for the space of ten days. Upon the hearing of the petition, if sufficient reason is shown, the board of supervisors shall order the laying out, or shall discontinue or alter the road, as the case may be, and from their determination any party dissatisfied may appeal as is provided with reference to the laying off of cartways. Such road shall be laid out to the greatest advantage of the inhabitants and with as little prejudice as may be to lands and enclosures, within twenty days from the notification of their appointment by three disinterested freeholders, to be appointed by the board of supervisors; and such damage as any individuals may sustain shall be ascertained by such freeholders, and a report thereof with the proceedings had by them shall be made to the board of supervisors. All damages so assessed by the freeholders shall be paid by the petitioners, and until paid there shall be no confirmation of the report of the freeholders, and the laying out shall be of no effect.

Rev., ss. 2687, 2689; Code, ss. 2062, 2064; 1872-3, c. 189, ss. 1-3, 5.

As to obstructing cartways, church roads, etc., see this chapter, s. 3789; Crimes, s. 4354.

ART. 14. CENTRAL HIGHWAY

3839. Central highway established; termini and route. There shall be established in the manner hereinafter provided a public central highway, extending from some point on Beaufort harbor, in the county of Carteret, through the counties of Carteret, Craven, Jones, Lenoir, Wayne, Johnston, Wake, Durham, Orange, Alamance, Guilford, Forsyth, Davie, Davidson, Rowan, Iredell, Catawba, Burke, McDowell, Buncombe, and Madison, or Haywood, Jackson and Macon, to some point on the Tennessee state line. The said central highway shall be composed as nearly as practicable of roads already existing; and the highway division of the North Carolina geological and economic survey is hereby charged with the duty of selecting and designating the route of the said highway and to report the route so selected and the roads so designated to the board of trustees hereinafter provided for; and shall also report to the boards of commissioners of each county through which the said highway shall pass the route or line of road designated through such county. The duties imposed by this article upon the highway division of the North Carolina geological and economic survey shall be considered as a part of its official duties, without additional compensation.

1911, c. 58, s. 1; 1913, c. 37; 1915, c. 132; 1919, c. 67.

3840. Appropriations by counties and cities. For the purpose of putting said central highway in order the boards of county commissioners of each county through which the said highway shall pass are hereby authorized and empowered to appropriate out of the general county funds a sum not exceeding fifty dollars for each mile of said highway in such county, and each city or town through which said highway may pass is likewise empowered to appropriate out of its

general funds a sum not exceeding one hundred dollars; but if such town shall have a population in excess of one thousand persons, as ascertained by the United States census of one thousand nine hundred and ten, such town may, for such additional one thousand inhabitants as shown by said census, appropriate an additional sum of twenty-five dollars for each thousand of population in excess of one thousand. All funds appropriated by any county shall be spent within said county and under the authority of the board of commissioners of said county; and any funds appropriated by any city or town shall be expended within the county in which said city or town shall be located, and under the authority of the board of aldermen or other governing body of such city or town.

1911, c. 58, s. 2.

3841. Use of county road forces. In addition to the appropriations hereinbefore authorized the boards of commissioners of the counties through which the said central highway shall pass are hereby authorized and empowered to use the road force of such county, whether it be hired or convict, upon the said highway to such an extent as, in the opinion of the board, may be practicable. And where there be no road force in a county the supervisor of roads shall, as far as possible, use the means available in constructing and maintaining this said central highway, cooperating as far as practicable with the board of trustees hereinafter provided for.

1911, c. 58, s. 3.

3842. Board of trustees; executive committee; local committees. There is hereby created a board of trustees of the central highway, to be composed of one member from each county through which the said highway shall pass, who shall serve for a term of four years from and after the first Monday in April, one thousand nine hundred and eleven, and until their successors have been appointed and have qualified. The following named persons are hereby appointed members of the board of trustees of the central highway for a period of four years from and after the first Monday in April, one thousand nine hundred and eleven, and until their successors shall have been appointed and have qualified, to wit: G. D. Canfield, of Carteret; William Dunn, of Craven; J. H. Bell, of Jones; J. F. Hooker, of Lenoir; G. C. Royall, of Wayne; James A. Wellons, of Johnston; Dr. J. M. Templeton, of Wake; Dr. A. Cheatham, of Durham; H. M. McIver, of Orange; Capt. S. H. Webb, of Alamance; Clem G. Wright, of Guilford; A. T. Grant, Jr., of Davie; P. H. Haynes, of Forsyth; H. B. Varner, of Davidson; P. B. Beard, of Rowan; R. R. Clark, of Iredell; R. L. Shuford, of Catawba; W. E. Walton, of Burke; W. T. Morgan, of McDowell; E. C. Chambers, of Buncombe; Thomas J. Murray, of Madison; Hugh A. Love, of Haywood; Walter E. Moore, of Jackson, and James A. Porter, of Macon. The said trustees of the central highway shall be notified of their appointment and shall meet in the city of Raleigh, in the rooms of the department of agriculture, on the twentieth day of April, one thousand nine hundred and eleven, for the purpose of organization; and the commissioner of agriculture shall notify each member of the said board of trustees of the time and place of said meeting, and shall himself act as temporary chairman in calling together the board of trustees, and shall serve as such until a permanent chairman shall have been elected. And the said board of trustees at this meeting, or at any subse-

quent meeting, may appoint such local committees or boards of directors for all or any of said counties as it may think proper, and impose upon such local committees or directorates the duty of conferring with the boards of county commissioners and other road authorities in constructing and maintaining said highway in their respective counties. Said board of trustees is hereby authorized to appoint an executive committee of not less than three members; and this executive committee shall have all such powers as the said board of trustees may confer upon it; and the board of trustees is authorized to repose in said executive committee all or any part of the powers vested in said board of trustees by this article. The boards of commissioners of each of the counties through which the said highway shall pass is authorized and empowered to elect a successor to the member of the board of trustees from such county in case a vacancy shall occur; and in case a vacancy shall occur before the expiration of the term of office of the member from such county, the board of commissioners shall elect a successor, who shall hold office for the unexpired term of such retiring member. On the first Monday in March, one thousand nine hundred and fifteen, and quadrennially thereafter, the board of commissioners of each county through which said central highway shall pass shall elect its member of the board of trustees of the central highway.

1911, c. 58, s. 4; 1913, c. 37; 1915, c. 132; 1919, c. 67.

3843. Board a body corporate; donations and gifts; stimulus of public interest; road day. The board of trustees of the central highway and their successors in office shall constitute a body corporate and shall have power to solicit and accept gifts of money, machinery, road materials, labor, or other things of value to be used and expended by the said board of trustees, under the direction of the proper road authorities of the counties or townships, in establishing, maintaining and improving said central highway as a public thoroughfare for the free and perpetual use of the public; and it shall have power to use all gifts and donations in improving the said central highway without regard to the county or locality. It shall also encourage and stimulate public interest in the maintenance of said highway and send representatives before any board of commissioners or other governing body of any county, city, or town to ask for appropriations of money to be used in each county, and also to advise and recommend the holding of elections to vote special taxes to be used in the construction and maintenance of said central highway. It shall also have power to arrange with and authorize the donation and testing upon the said highway of any improved systems of road building or dressing. It shall also have power to designate one day in each year to be known as "Road Day," on which day voluntary contributions in labor or other things of value shall be accepted to the end that the funds regularly appropriated may be supplemented by the volunteer offerings of the people and by the volunteer work of those who prefer to contribute labor rather than money. The said "Road Day" need not be uniform throughout the state, but shall be uniform throughout each county.

1911, c. 58, s. 5.

3844. Appropriations made annually. The counties and municipalities authorized to appropriate funds for the construction and maintenance of said central highway under this article are hereby authorized to make appropriations not

exceeding the sums prescribed in this article each year hereafter, which sums shall be used in the improvement and maintenance of said central highway.

1911, c. 58, s. 6.

3845. Status of trustees; allowance for expenses by counties. The members of the board of trustees shall not be considered to be public officers, and shall not be required to take an oath of office, and shall receive no compensation for their services out of any funds arising under this article; but any county, city, or town may provide for the payment of the necessary expenses of its own members of said board of trustees.

1911, c. 58, s. 8.

3846. Secretary and treasurer; reports to governor. The said board of trustees shall elect a secretary and a treasurer, or it may combine those duties and impose them on one person. Accurate accounts of all proceedings and of all receipts and expenditures shall be kept, and a report made to the governor at the end of each calendar year.

1911, c. 58, s. 9.

NOTE. *Charlotte-Wilmington Highway.* A public highway from Charlotte to Wilmington, through the counties of Mecklenburg, Union, Anson, Richmond, Scotland, Robeson, Bladen, Columbus, Brunswick, and New Hanover, was incorporated by an act of 1911, c. 60. The act of incorporation is identical section by section with the Central Highway Act, except that section one describes the highway as above and section four names as the board of trustees of the highway: W. D. McMillan, Jr., of New Hanover, A. M. Chinnis of Brunswick, Clyde Council of Columbus, G. H. Currie of Bladen, A. J. McKinnon of Robeson, Tom L. John of Scotland, H. C. Parsons of Richmond, T. C. Coxe of Anson, F. G. Henderson of Union, and F. M. Shannonhouse of Mecklenburg, who meet in Maxton April 4, 1911, for organization. 1911, c. 60.

CHAPTER 71

SALARIES AND FEES

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ART. 6. COMMISSIONERS IN VARIOUS COURT PROCEEDINGS.

- 3894. Condemnation commissioners.
- 3895. Commissioners to make partition.

- 3896. Commissioners to make sale in partition.
- 3897. Commissioners to divide land lying in this and another state.
- 3898. Commissioners to assess damages for mills.
- 3899. Commissioners in drainage proceedings.
- 3900. Person allotting widow's year's allowance.
- 3901. Person allotting dower.
- 3902. Receivers; selling as commissioners.

ART. 7. COUNTY OFFICERS.

- 3903. Clerk of superior court.
- 3904. Local modifications as to clerks' fees.
- 3905. Coroners.
- 3906. Register of deeds.
- 3907. Local modifications as to fees of register of deeds.
- 3908. Sheriffs.
- 3909. Local modifications as to fees of sheriffs.
- 3910. County treasurer.
- 3911. County superintendent of public instruction.
- 3912. County board of education.
- 3913. County board of pensions.
- 3914. County standard-keeper.
- 3915. Finance committee.
- 3916. Committee to examine treasurer's books.
- 3917. Election officers.
- 3918. County commissioners.
- 3919. Fees of jailers.
- 3920. Fees of entry-taker.
- 3921. Fees of surveyors and chain-carriers.

ART. 8. TOWNSHIP OFFICERS.

- 3922. Constable.
- 3923. Justices of the peace.

ART. 9. COMMISSIONERS OF AFFIDAVITS.

- 3924. Commissioners of affidavits.

ART. 1. PAYMENT OF SALARIES AND FEES

3847. **Salaries payable monthly.** All annual salaries shall be paid monthly out of any money in the treasury not otherwise appropriated.

Rev., s. 2772; Code, s. 3731; 1893, c. 54.

3848. **Legislative employees paid on certificate of presiding officers.** The auditor is authorized to audit the account of any employee of the senate or of the house of representatives, upon the certificate of the president of the senate and of the speaker of the house of representatives that such services have been rendered for which the account is presented, and that the amount as stated in said account is reasonable, just and proper.

Rev., s. 2735; Code, s. 2873; 1870-1, res., p. 508.

3849. **Payment of fees; when to be paid in advance.** The several officers named in this chapter shall receive the fees herein prescribed for them respectively, from the persons for whom, or at whose instance, the service shall be performed, except persons suing as paupers, and no officer shall be compelled to perform any service, unless his fee be paid or tendered, except in criminal actions. The said officers shall receive no extra allowance or other compensation whatever, unless the same shall be expressly authorized by statute. In case the service shall be ordered by any proper officer of the state, or of a county, for the benefit of the state or county, the fees need not be paid in advance; but if

for the state, shall be paid by the state, as other claims against it are; if for a county, by the board of commissioners, out of the county funds. The fees in criminal cases are not demandable in advance.

Rev., s. 2804; Code, ss. 3758, 1173.

As to taxing the costs, see section 1270 et seq. As to summary judgment for fees, see section 1226.

Fees due officers of court are vested rights by law, and are not discharged when defendant receives an unconditional pardon, after conviction and sentence, from governor of state: *State v. Mooney*, 74-98.

Whenever a person is compelled to pay a public officer, in order to induce him to do his duty, fees which he had no right to claim, they can be recovered back: *Robinson v. Ezzell*, 72-231.

Legislature may reduce or increase salaries of officers as are not protected by constitution during their term of office, but cannot deprive them of the whole: *Cotten v. Ellis*, 52-545; see "officeholding cases" cited under section 870.

Clerk had right even under common law, as he has under statute, to demand his fees in advance: *Ballard v. Gay*, 108-545. Clerk need not issue execution on judgment in civil action until his fee is advanced: *Bank v. Bobbitt*, 111-194. Clerk can demand his fee for making out transcript on appeal in civil actions when he performs the service: *Sanders v. Thompson*, 114-282; *Andrews v. Whisnant*, 83-447—but in criminal actions clerk cannot demand his fee for transcript in advance, *State v. Nash*, 109-822.

Clerk of supreme court may require payment of fees for docketing in advance or refuse to docket; such fees are not covered by appellant's undertaking: *Dunn v. Clerk's Office*, 176-50.

Sheriff not bound to execute process unless his fees are paid or tendered: *Johnson v. Kenney*, 70-435; *Jones v. Gupton*, 65-48; *Lute v. Reilly*, 65-20; *Taylor v. Rhyne*, 65-530.

Fees in criminal cases to which officers are entitled are not demandable in advance, see section 1230.

Register of deeds may demand his fees in advance: *Cunninggim v. Patterson*, 109-33.

3850. Fees of state officers; disposition and accounting. All fees from whatever source which may hereafter be collected by any of the officers or employees of the state, except officers and clerk of the supreme court, shall be paid by the heads of the departments into the state treasury within thirty days from their collection, and the money paid shall be converted into the general fund. An itemized statement thereof shall be rendered each month to the state treasurer. No officer or employee of the state shall receive any compensation other than the salaries fixed in this chapter, except as provided by way of fees or by special appropriation or from any departmental fund.

1907, cc. 830, s. 1; 994, s. 1.

3851. Copy-sheet defined. A copy-sheet shall consist of one hundred words, and in reckoning the number of words in a copy-sheet, every date, or amount of money, expressed in figures, as "1855," "\$250.90," shall be estimated and charged as one word.

Rev., s. 2805; Code, s. 3757; R. C., c. 102, s. 42; 1868-9, c. 279, s. 556.

ART. 2. LEGISLATIVE DEPARTMENT

3852. Members of general assembly and presiding officers. The members of the general assembly for the term for which they have been elected shall receive as a compensation for their services the sum of four dollars per day for each day of their session, for a period not exceeding sixty days; and should they remain longer in session, they shall serve without compensation. They shall also be entitled to receive ten cents per mile, both while coming to the seat of government and while returning home, the said distance to be computed by the nearest

line or route of public travel. The compensation of the presiding officers of the two houses shall be six dollars per day and mileage. Should an extra session of the general assembly be called, the members and presiding officers shall receive a like rate of compensation for a period not exceeding twenty days.

Rev., s. 2729; Const., Art. II, s. 28.

As to compensation and allowances to special committees of investigation appointed by general assembly, see *Bank v. Worth*, 117-146.

3853. Clerks and doorkeepers. The principal and his assistant clerks, the engrossing clerks and doorkeepers and assistant doorkeepers of the general assembly, and the chief clerk and assistants, appointed by the secretary of state to supervise the enrollment of bills and resolutions, shall each receive four dollars per day, during the session of the general assembly, and the same mileage as members of the general assembly.

Rev., s. 2730; Code, ss. 2871, 2872; 1903, c. 5, s. 2; 1901, c. 631; 1899, cc. 6, 7; 1897, c. 52.

3854. Copyists. Copyists employed in copying engrossed or enrolled bills and resolutions of the general assembly shall receive ten cents per sheet, which shall include the making of one carbon copy.

Rev., s. 2731; 1903, c. 5.

3855. Principal clerks; extra compensation. The principal clerks of the general assembly shall be allowed three hundred dollars as a compensation for indexing the journals of their respective houses, and three hundred dollars each for extra work and for services required to be performed by them after the adjournment of each session of the general assembly, including the transcribing of a copy of their respective journals, which shall be filed in the office of the secretary of state.

Rev., s. 2732; Code, s. 2868; 1866-7, c. 71; 1881, c. 292; 1911, c. 116; 1919, c. 170.

3856. Temporary doorkeepers. The persons appointed to place the two halls of the general assembly in order, and to wait upon the members until doorkeepers can be regularly appointed, shall be allowed, as a compensation, the sum of four dollars each for their daily attendance and services.

Rev., s. 2734; Code, s. 2871; R. C., c. 52, s. 38; 1846, c. 63, s. 2.

3857. Committee to examine treasurer's and auditor's books. The committee appointed by the general assembly to examine the books of the treasurer and auditor and insurance commissioner shall receive the same per diem for the number of days engaged at the offices in Raleigh, and mileage to and from the city of Raleigh, as is received by members of the general assembly.

Rev., s. 2740; Code, s. 3360; 1885, c. 334.

Legislature has power to appoint special commission and fix its compensation: *Bank v. Worth*, 117-152.

ART. 3. EXECUTIVE DEPARTMENT

3858. Governor. The salary of the governor shall be six thousand five hundred dollars per annum. He shall be allowed annually the sum of six hundred dollars as traveling expenses in attending to the business for the state and for expenses out of the state and in the state in representing the interest of the state and

people, incident to the duties of his office, the said allowance to be paid monthly. In addition to the foregoing allowance, the actual expenses of the governor while traveling outside the state on business incident to his office shall be paid by the state treasurer on a warrant issued by the auditor.

Rev., s. 2736; Code, s. 3720; 1879, c. 240; 1901, c. 8; 1907, c. 1009; 1911, c. 89; 1917, cc. 11, 235; 1919, c. 320.

Public officers, who have not taken the required oaths of office, are not entitled to the salaries attached to such offices: *Wiley v. Worth*, 61-171.

3859. Private secretary to governor; salary and fees. The private secretary to the governor shall be allowed an annual salary of twenty-five hundred dollars, and he shall charge and collect the following fees, to be paid by the persons for whom the services are rendered, namely: For the commission of a judge, solicitor, senator in congress, representative in congress, notary public, or a place of profit, two dollars and fifty cents each; for a testimonial, one dollar; for affixing the seal to a grant, twenty-five cents; and for affixing the great seal of the state to state bonds, ten cents. All fees, except fifty cents on each commission issued, which shall be retained by the private secretary for his services, received by the private secretary shall be paid into the treasury quarterly. He shall be ex officio secretary of the board of internal improvements, and shall be allowed five dollars per day for each day the board is in session.

Rev., s. 2737; Code, ss. 1689, 3721; R. C., c. 102, s. 12; 1856-7, p. 71, res.; 1881, c. 346; Pr. 1901, c. 405; 1903, c. 729; 1907, c. 830; 1911, c. 95; 1913, c. 1; 1915, c. 50; 1917, c. 214.

3860. Executive secretary. There shall be an executive secretary to the governor. The executive secretary shall receive a salary of twelve hundred dollars annually, and shall not be required to do clerical work for or allowed to receive pay from the adjutant-general's office, for which three hundred dollars has heretofore been allowed; and for additional clerical assistance the executive department shall be allowed a sum not exceeding twelve hundred dollars per annum.

Rev., s. 2738; Code, s. 3722; 1876-7, p. 589, res.; 1881, c. 218; 1917, c. 830, s. 2; 1911, c. 95; 1913, c. 1; 1915, c. 50; 1917, c. 214.

3861. Governor and council to fix certain salaries. The governor and council of state shall fix such salaries in the several departments of state as are hereinafter indicated to be fixed by them, not to exceed certain amounts hereinafter prescribed. In no case shall the clerks and others whose salaries are so fixed receive any additional compensation from the state or any department thereof. The governor and council of state are authorized and empowered to increase the salary of any chief clerk or chief deputy, whose salary they are authorized to fix, not exceeding twenty per cent of the amount prescribed, whenever it shall satisfactorily appear to the governor and council of state that such chief clerk or chief deputy has served for a period of ten years or more and has rendered faithful and efficient service.

1919, c. 247, ss. 1, 9.

3862. Lieutenant-governor. Whenever the lieutenant-governor shall attend any meeting of state officials or otherwise, which he is required by law to attend, he shall be entitled to receive as compensation the per diem allowed him under the constitution as president of the senate for the time required in attending said meeting, together with his necessary traveling expenses in going to and from

said meeting. The amount to which he shall be entitled shall be certified to by him, and shall be paid to him by the state treasurer upon the proper warrant.

1911, c. 103.

3863. Department of secretary of state. The salary of the secretary of state shall be three thousand five hundred dollars per annum. All fees received by him shall be paid into the treasury unless otherwise directed by law. The salaries of the following employees in the department of the secretary of state shall be fixed by the governor and council of state not to exceed the amounts herein indicated:

Corporation clerk -----	\$2,500 per annum
Grant clerk -----	2,250 per annum
Special clerk and stenographer-----	1,200 per annum

The secretary of state shall be allowed a contingent sum not exceeding fifteen hundred dollars per annum for extra clerical assistance in the discharge of the duties of his office, and the treasurer shall pay the same upon the warrant of the auditor out of the fees collected by the secretary of state and paid into the state treasury.

Rev., s. 2741; Code, s. 3724; 1879, c. 240, s. 6; 1881, p. 632, res.; 1907, c. 994; 1919, c. 247, s. 1.

3864. Secretary of state; fees to be collected. The secretary of state shall collect the following fees, namely: copying and certifying a will, grant or patent not exceeding two copy-sheets, fifty cents, and for every additional copy-sheet, ten cents; correcting an error not made by himself in a patent, fifty cents; copying and certifying a plot and survey, fifty cents for each warrant or for each six hundred and forty acres contained in the plot or survey, not to exceed five dollars for one copy; receiving surveyor's return, making out, recording and endorsing grants, sixty cents; each certificate, ten cents; filing and recording a copy of a judgment vacating a grant and all other services thereon, fifty cents; copying an entry from the journals of the assembly, forty cents; copying and certifying the laws of other states, twenty cents for each copy-sheet; and in all cases not otherwise provided for, the secretary of state shall receive for copies of records from his office, one dollar for the first three copy-sheets and ten cents a copy-sheet thereafter.

Rev., s. 2742; Code, s. 3725; R. C., c. 102, s. 13; 1870-1, c. 81, s. 3; 1881, c. 79.

3865. Fees on returns to secretary of state. All officers required to make returns to the secretary of state shall receive for such returns five cents per copy-sheet, to be audited on the certificate of the secretary of state, and paid as other claims against the state.

Rev., s. 2743; Code, s. 3759; 1868-9, c. 279, s. 557.

3866. Assistant to secretary of state; for indexing laws, etc. The assistant to the secretary of state who shall index the laws and prepare the laws and captions for publication shall receive a compensation of five hundred dollars.

Rev., s. 2733; 1903, c. 3.

3867. Department of state auditor. The auditor shall receive a salary of three thousand dollars per annum and shall be allowed no fee or other compensation whatever. The salaries of the following employees in the department of the

state auditor shall be fixed by the governor and council of state not to exceed the amounts herein indicated:

Chief clerk	\$2,500 per annum
Tax clerk	2,250 per annum

The salaries of the employees in the department of the state auditor, fixed by law, shall be as follows:

Stenographer, who is also pension clerk and bookkeeper.....	\$1,200 per annum
An additional clerk.....	1,800 per annum

Rev., s. 2744; Code, s. 3726; 1879, c. 240, s. 7; 1881, c. 213; 1885, c. 352; 1889, c. 433; 1891, c. 334, s. 5; 1907, c. 830, s. 5; 1907, c. 994, s. 2; 1911, c. 108, s. 1; 1911, c. 136, s. 1; 1913, c. 172; 1919, c. 149; 1919, c. 247, s. 7.

3868. Department of state treasurer. The salary of the state treasurer shall be three thousand five hundred dollars per annum. The salaries of the following employees in the department of the state treasurer shall be fixed by the governor and council of state not to exceed the amounts herein indicated:

Chief clerk	\$2,500 per annum
Teller	2,500 per annum
Institutional clerk	1,800 per annum
Bond clerk	1,700 per annum
Corporation tax clerk.....	1,200 per annum
Stenographer	1,200 per annum

Rev., s. 2739; Code, s. 3723; 1891, c. 505; 1907, c. 830, s. 3; 1907, c. 994, s. 2; 1917, c. 161; 1919, c. 233; 1919, c. 247, s. 3.

A bond executed by one of his clerks to the state treasurer is not an official bond and does not extend beyond the term during which the clerk was appointed: *Jackson v. Martin*, 136-196. An action against sureties on bond of clerk for defalcation in office of state treasurer is barred after three years: *Ibid.*

3869. Department of education. The state superintendent of public instruction shall receive an annual salary of three thousand dollars and actual traveling expenses, and after the expiration of the term of office of the state superintendent in office on the eleventh day of March, one thousand nine hundred and nineteen, such annual salary shall be four thousand dollars. The salaries of the following employees in the department of education shall be fixed by the governor and council of state not to exceed the amounts herein indicated:

Chief clerk	\$2,500 per annum
Statistical clerk	2,500 per annum

The statistical clerk, who is also the loan fund clerk, shall be paid out of the loan fund. The stenographer shall receive a salary of twelve hundred dollars per annum.

Rev., s. 2745; Code, s. 2737; 1879, c. 240, s. 8; 1901, c. 4, ss. 9, 11; 1903, c. 435, s. 2; 1903, c. 567, s. 6; 1903, c. 603; 1905, c. 533, ss. 2, 15, 16; 1907, c. 830, ss. 6, 11; 1907, c. 994; 1915, c. 247; 1917, cc. 167, 285; 1919, c. 293; 1919, c. 247, s. 5.

There are certain employees in the department of education whose salaries are fixed by the board of education and the superintendent under powers conferred upon them by law, see the chapter Education.

Supervisor of teacher training. 1907, c. 856.

Director of schools for adult illiterates. 1917, c. 224.

Members of the state board of examiners and institute conductors, six members at not to exceed \$3,000 per year each, exclusive of traveling expenses. 1917, c. 146; 1919, c. 247, s. 5.

3870. Department of justice. The attorney-general shall receive an annual salary of three thousand dollars and, also, one hundred dollars for each term

of the supreme court which he shall attend and the fees allowed by law. The assistant attorney-general shall receive a salary of twenty-two hundred and fifty dollars per year, payable monthly. The attorney-general shall also be allowed a stenographer, whose salary shall be fixed by the governor and council of state not to exceed twelve hundred dollars per year.

Rev., s. 2746; Code, ss. 3728, 3729; 1889, c. 274; 1893, c. 379; 1907, c. 830, s. 7; 1907, c. 994, s. 2; 1909, c. 804; 1911, c. 94; 1919, c. 247, s. 6.

3871. Fees of attorney-general. In all appeals to the supreme court of persons convicted of criminal offenses, a fee of ten dollars against each person who shall not reverse the judgment shall be allowed the attorney-general, to be taxed among the costs of that court.

Rev., s. 2747; Code, s. 3737; 1873-4, c. 170.

See section 3850.

3872. Department of agriculture. The salary of the commissioner of agriculture shall be three thousand five hundred dollars per annum, to be paid monthly out of the receipts of the agricultural department.

Rev., s. 2749; 1901, c. 479, s. 4; 1905, c. 529; 1907, c. 887, s. 1; 1913, c. 58.

3873. Department of labor and printing. The salary of the commissioner of labor and printing shall be three thousand dollars per annum. The salaries of the assistant commissioner of labor and printing and of the following employees in the department of labor and printing shall be fixed by the governor and council of state not to exceed the amounts herein indicated:

Assistant commissioner	\$2,500 per annum
Bookkeeper and stock man.....	1,800 per annum
Stenographer	1,200 per annum

The commissioner and assistant commissioner of labor and printing shall also receive their traveling expenses while traveling for the purpose of collecting the information and statistics as provided by law.

Rev., s. 2753; 1899, c. 373, s. 3; 1907, cc. 930, 989; 1915, cc. 157, 177; 1919, c. 247, s. 8.

3874. Department of insurance. The salary of the insurance commissioner shall be three thousand five hundred dollars per annum. The salaries of the following assistants and employees in the department of insurance shall be fixed by the governor and council of state not to exceed the amounts herein indicated:

Chief deputy	\$2,500 per annum
Chief clerk	2,500 per annum
Actuary	2,500 per annum
Cashier	1,500 per annum
License clerk	1,250 per annum

Rev., s. 2756; 1899, c. 54, ss. 3, 8; 1901, c. 710; 1903, c. 42; 1903, c. 771, s. 3; 1907, c. 830, s. 10; 1907, c. 994; 1909, c. 839; 1913, c. 194; 1915, cc. 158, 171; 1917, c. 70; 1919, c. 247, s. 4.

3875. Corporation commission. The salary of the corporation commissioners shall be three thousand dollars per annum each, and in addition thereto five hundred dollars per annum each as state tax commissioners; and also actual traveling expenses while on official business. The salaries of the employees of the corporation commission shall be as follows:

Clerk of corporation commission.....	\$2,400 per annum
First assistant clerk.....	1,500 per annum
Second assistant clerk.....	1,200 per annum

The clerk of the corporation commission as clerk to the board of state tax commissioners shall receive three hundred dollars per annum in addition to his other salary.

Rev., s. 2754; 1899, c. 164, s. 31, c. 688; 1901, c. 7, s. 2; 1903, c. 251, ss. 2, 3; 1905, c. 590, s. 3; 1907, cc. 830, 989, 994, 999; 1911, c. 147; 1919, c. 92, s. 13.

See, for clerks and assistants to the commission, the chapter Corporation Commission, s. 1032.

For fees for bank examinations, see the chapter Banks, s. 252.

3876. State librarian. The salary of the state librarian shall be fifteen hundred dollars per annum, and he shall be allowed two hundred and fifty dollars per annum for services as custodian of the document library, and one dollar per day during the sessions of the general assembly for keeping the document library open. He shall be allowed to charge a fee of fifty cents for each seal and certificate, and ten cents per copy-sheet for all documents, papers, copies of instruments of every description whatsoever pertaining to his office which he shall be called upon to furnish to any person interested in same, to be paid by the party securing such copy of record. He shall be allowed two assistants, whose salaries shall be as follows:

First assistant -----	\$900 per annum
Second assistant -----	500 per annum

Rev., s. 2748; Code, s. 3604; 1901, c. 503, s. 1; 1887, c. 258, s. 3; 1889, res., p. 519; 1905, c. 537; 1907, c. 647; 1909, cc. 246, 887; Ex. Sess. 1913, c. 33; 1915, c. 74.

3877. Adjutant-general. The salary of the adjutant-general shall be three thousand dollars per annum. The adjutant-general shall reside at the state capital during his term of office.

Rev., s. 2750; Code, ss. 3275, 3730; 1899, c. 390, ss. 2, 3; 1879, c. 240, s. 10; 1883, c. 283, s. 2; 1907, c. 803, s. 1; 1911, c. 110, s. 1; 1915, c. 118.

3878. Presidential electors. Presidential electors shall be allowed for their traveling expenses to and from the city of Raleigh and their attendance, the same compensation as may be allowed members of the general assembly, and shall be entitled to the same privileges.

Rev., s. 2761; 1901, c. 89, s. 84.

3879. State standard-keeper. The state standard-keeper shall be allowed such compensation for his services as the governor shall deem adequate, not exceeding one hundred dollars a year.

Rev., s. 2759; Code, s. 3845; 1866-7, p. 228; 1881, c. 199, s. 4.

3880. Keeper of capitol. The salary of the keeper of the capitol, or superintendent of public buildings and grounds, shall be twelve hundred dollars per annum, which shall include his compensation as keeper of the arsenal.

Rev., s. 2806; Code, ss. 2302, 2303; 1907, c. 989; 1915, c. 150.

3881. Servants and employees:

1. *Servants of the state departments and the supreme court.* The governor and the council of state are hereby authorized and empowered to fix the wages of the employees of the state hereinafter named, but in no case shall the wages exceed the amount herein specified.

The janitors or servants of the various state departments, including three servants for the supreme court, and the butler at the executive mansion, now authorized and provided by law, fifteen dollars per week.

The gardeners for the capitol grounds and executive mansion grounds, seventeen and a half dollars per week.

The custodian of the capitol building and of the supreme court building, twenty-five dollars per week; and the custodian of the state departments building, twenty-five dollars per week.

Night watchmen for the several state buildings as now authorized by law, seventeen dollars and fifty cents per week; but the night watchman and police for capitol building and grounds shall receive not exceeding twenty-two dollars and fifty cents per week.

The governor and the council of state are authorized to employ one night watchman for two or more buildings, when in their judgment the same is desirable, and, in that event, pay a salary not exceeding twenty-five dollars per week.

The justices of the supreme court may employ one additional servant for service in the supreme court.

The night watchman at the department of agriculture shall be paid out of funds belonging to the department.

2. *Janitor for state library.* The state librarian may employ a janitor and assistant at seventy-five dollars per month.

3. *Engineer and fireman of central heating plant.* An engineer, and fireman if necessary, for the central heating plant may be employed, whose duties and salary shall be fixed by the board of public buildings and grounds.

The servants and employees mentioned in this section shall be paid by the state treasurer unless otherwise specified herein.

1913, c. 108; Ex. Sess. 1913, c. 59, s. 1; 1919, cc. 313, 323.

3882. **Laborers' leave of absence.** Every laborer, waiter, and messenger permanently employed under authority of law in and about the public buildings and grounds at a salary, who shall have served faithfully therein for the space of one continuous year, shall be entitled to fifteen days leave of absence per annum, with full pay, at the end of every year of such service.

Rev., s. 2763; 1897, c. 274; 1907, c. 117.

ART. 4. JUDICIAL DEPARTMENT

3883. **Supreme court justices.** Each justice of the supreme court shall be paid an annual salary of five thousand dollars, and two hundred and fifty dollars annually in lieu of and in commutation for traveling expenses. They shall each be allowed nine hundred dollars annually for stenographer or clerk.

Rev., s. 2764; Code, s. 3733; 1891, c. 193; 1903, c. 805; 1905, c. 208; 1907, cc. 841, 988; 1909, c. 486; 1911, c. 82; 1915, c. 44; 1919, c. 51.

As to whether the salaries of judges are subject to taxation, see *In re Taxation of Judges' Salaries*, 131-692; *Purnell v. Page*, 133-125.

3884. **Superior court judges.** The salary of each of the judges of the superior court shall be four thousand dollars per annum, and each judge is allowed his necessary expenses incident to rotation, payable monthly by the state treasurer

upon warrant drawn by the state auditor, which warrant shall be issued by the state auditor upon receipt from the judge of a certified statement showing the total amount of such expenses, but such expenses shall not exceed fifteen hundred dollars per annum. They shall also receive one hundred dollars per week and their actual expenses incurred in attending and holding special terms of court by assignment of the governor, which expenses shall be paid by the county in which such special term is held.

Rev., s. 2765; Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51.

See chapter Courts, s. 1451.

As to whether salaries of judges are subject to taxation, see *In re Taxation of Judges' Salaries*, 131-692; *Purnell v. Page*, 133-125.

3885. Certificates of courts held by judges. Every judge of the superior court shall produce a certificate from the clerk of each county of his having held the court of the county according to law; and for every such certificate omitted to be produced there shall be a deduction from his salary of one hundred dollars, unless he shall be prevented by sickness or other unavoidable cause.

Rev., s. 2766; Code, s. 3735; R. C., c. 102, s. 4; 1868-9, c. 46, s. 7; 1879, c. 240, s. 5.

3886. Clerk of supreme court. The clerk of the supreme court shall receive an annual salary of three hundred dollars, to be paid semiannually, on a certificate of the justices; and, in addition thereto, the following fees, namely: For recording the papers and proceedings in the causes decided in the supreme court, which are required by law to be recorded, such compensation as may be estimated by the justices of the court at each term, not to exceed thirty cents for each page recorded, to be paid by the treasurer on the certificate of the justices; for entering an appeal, one dollar; a continuance, thirty cents; a scire facias, eighty cents; a certiorari, eighty cents; a determination, two dollars; a certificate, sixty cents; a fieri facias, or other execution, fifty cents; a seal, twenty-five cents; a transcript, or copy of a record, twenty cents for each copy-sheet; a rule given for service, twenty-five cents; a rule not for service, fifteen cents; a subpoena, writ, or other process, one dollar; a commission, fifty cents; drawing a decree or judgment, by the copy-sheet, forty cents; a search, ten cents; affixing the seal to any writing requiring it, twenty-five cents; and an affidavit, twenty-five cents.

Rev., s. 2769; Code, s. 3738; R. C., c. 102, ss. 25, 26; 1870-1, c. 139, s. 7.

Clerk of supreme court may require fees for docketing to be paid in advance or refuse to docket the case: *Dunn v. Clerk's Office*, 176-50. Clerk of supreme court is not bound to render his services gratuitously to a party whom judge of the court below has allowed to appeal without giving bond required by law: *Martin v. Chasteen*, 75-96.

3887. Janitor and fireman of supreme court building. The janitor of the supreme court shall be appointed by said court. He shall act also as assistant librarian of the supreme court. As janitor he shall receive fifteen dollars per week, and for acting as assistant librarian he shall receive thirty dollars per month. The fireman of the supreme court building shall be appointed by the chief justice and associate justices of the supreme court. When not engaged in his duties as fireman he shall act as assistant janitor of the supreme court building, and shall assist in the cleaning and care of such building and perform such other duties as may be designated by the said justices of the supreme court.

1907, c. 732; 1909, cc. 687, 721; 1911, c. 156.

3888. Marshal of supreme court. The salary of the marshal of the supreme court shall be two thousand dollars per annum; and he shall perform the duties of librarian without additional compensation.

Rev., s. 2770; Code, ss. 950, 3606; 1889, c. 482; 1873-4, c. 34; 1881, c. 306; 1907, c. 732; 1909, c. 687; 1919, c. 260.

See section 1427.

3889. Supreme court reporter. The compensation of the supreme court reporter shall not exceed fifteen hundred dollars per annum, to be fixed by the court. The council of state shall furnish him with suitable offices at a cost not to exceed five hundred dollars a year, which shall be paid direct to the lessor upon the warrant of the state auditor drawn upon the state treasurer. He is authorized and empowered to employ a stenographer and clerk at a yearly salary of not exceeding six hundred dollars, payable monthly directly to the person so employed by the reporter, by voucher drawn by the state auditor on the state treasurer, out of the general funds of the state.

Rev., s. 2771; Code, ss. 3363, 3728; 1893, c. 379; 1897, c. 429; 1911, c. 107; 1913, c. 59; 1917, c. 272; 1919, c. 276.

ART. 5. SOLICITORS, JURORS, AND WITNESSES

3890. Solicitors; general compensation. The solicitors of the several judicial districts shall receive twenty dollars for each term of the superior court they shall attend, warrant by the auditor to issue therefor upon a certificate of such attendance from the clerk of the court; and the fees as prescribed in the following section.

Rev., s. 2767; Code, s. 3736; 1879, c. 240, s. 12.

3891. Fees of solicitors. The solicitors shall, in addition to the general compensation allowed them by the state, receive the following fees, and no other, namely:

For every conviction under an indictment charging a capital crime, whether by plea or verdict, twenty-five dollars.

For perjury, forgery, counterfeiting, passing or attempting to pass or sell any forged or counterfeited paper or evidence of debt; maliciously injuring or attempting to injure any railroad or railroad car, or any person traveling on such railroad car; stealing or obliterating records; stealing, concealing, destroying or obliterating any will; maliciously burning or attempting to burn houses or bridges, seduction, slander of an innocent woman, and embezzlement; breaking into houses otherwise than burglariously; misdemeanors of accessories after the fact to felonies; in each of the above cases, fifteen dollars.

For larceny, receiving stolen goods, frauds, maims, deceits and escapes, eight dollars.

For all other offenses, five dollars.

The fees in all the above cases are to be taxed in the costs against the party convicted; but where the party convicted is insolvent, the solicitor's fees shall be one-half, to be paid by the county in which the indictment was found, except that for convictions under an indictment charging a capital crime, whether by plea or verdict, forgery, perjury, conspiracy, seduction, slander of an innocent

woman, embezzlement, breaking into houses otherwise than burglariously, and when defendants are convicted and assigned to work on the public roads of any county in this state, they shall receive full fees: Provided, that no larger fee than ten dollars shall be taxed for the solicitor in an indictment against the justices of the peace of any county, as justices, when there are more than three justices who are found guilty.

The solicitors of the several judicial districts and criminal courts shall prosecute all penalties and forfeited recognizances entered in their courts respectively, and as compensation for their services shall receive a sum to be fixed by the court, not more than five per centum of the amount collected upon such penalty or forfeited recognizance.

For performing his duty for the appointment of a receiver of an estate of a minor, he shall receive not to exceed ten dollars, to be fixed by the judge; and in passing on the returns of the receivers in such cases where the estate of the infant does not exceed five hundred dollars, the fee of the solicitor shall not exceed five dollars, and where the estate exceeds five hundred dollars, his fee shall not exceed ten dollars, to be fixed by the judge, and in each case to be paid out of the fund.

Rev., s. 2768; Code, s. 3737; 1873-4, c. 170; 1885, c. 130; 1895, c. 14; 1901, c. 4, s. 5; 1915, c. 86.

For suits by corporation commission, see section 1111. For fees for investigating lynchings, see section 1266. As to taxation of costs generally, see chapter on Costs, section 1225 et seq.

Under this section, solicitor is not entitled to fee upon a judgment nisi of four dollars, or any other amount, when at a subsequent term defendant is produced by his surety, court suspends judgment upon payment of cost of sci. fa., and remits penalty upon appearance bond: *State v. King*, 143-677—distinguishing *State v. Whisenhunt*, 5-287.

Under section 4588, solicitor has no vested right to his fee under an absolute judgment upon a forfeited recognizance which was subsequently set aside by court in exercise of its discretionary power: *Ibid*.

Upon indictment for murder in first degree and a prosecution and conviction for second degree, the solicitor is entitled to half fees: *State v. Mayhew*, 155-477.

An act allowing solicitor \$600 in lieu of fees in Pitt county is construed to mean all fees, and not merely those for which the county is liable: *Abernethy v. Comrs.*, 169-631.

Where, upon application of defendant to retax, solicitor's fee is reduced from \$10 to \$4, solicitor has no right to appeal, state having no interest in result: *State v. Tyler*, 85-569.

As to solicitor's fees where insolvent defendant sentenced to chain-gang, see *State v. Saunders*, 146-597.

3892. Fees of jurors. All jurors in the superior court other than special veniremen and tales jurors shall receive such an amount per day as the boards of commissioners of their respective counties may fix, not less than two dollars per day and not more than three dollars per day, and mileage at the rate of five cents per mile while coming to the county-seat and returning home. The said distance to be computed by the usual route of public travel.

Special veniremen and tales jurors shall receive such an amount per day for their attendance upon court as may be fixed by the boards of commissioners of their respective counties, not exceeding three dollars per day. Special veniremen who have been accepted on the panel in the trial of any cause shall receive the pay and mileage of regular jurors.

Rev., s. 2798; 1919, c. 85, ss. 1, 2.

For jurors at inquests, see section 1022; for jurors in ascertaining value of dividing fence, see section 1836.

3893. Fees and mileage of witnesses. The fees of witnesses, whether attending at a term of court or before the clerk, or a referee, or commissioner, or arbitrator, shall be one dollar per day. They shall also receive mileage, to be fixed by the county commissioners of their respective counties, at a rate not to exceed five cents per mile for every mile necessarily traveled from their respective homes in going to and returning from the place of examination by the ordinary route, and ferriage and toll paid in going and returning. If attending out of their counties, they shall receive one dollar per day and five cents per mile going and returning by the ordinary route, and toll and ferriage expenses: Provided, that witnesses before courts of justices of the peace shall receive fifty cents per day in civil cases, and in criminal actions of which justices of the peace have final jurisdiction, witnesses attending the courts of justices of the peace, under subpoena, shall receive fifty cents per day, and in hearings before coroners witnesses shall receive fifty cents per day and no mileage; but the party cast shall not pay for more than two witnesses subpoenaed to prove any one material fact, and no prosecutor or complainant shall pay any costs, unless the justice shall find that the prosecution was malicious and frivolous: Provided further, that experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may in its discretion order. Witnesses attending before the corporation commission shall receive two dollars per day and five cents per mile traveled by the nearest practicable route. All witnesses subpoenaed to attend courts of justices of the peace in Franklin county in the trial of civil or criminal cases in any township other than their resident townships shall be paid the same per diem and mileage that is now paid witnesses attending the superior courts.

Rev., s. 2803; Code, ss. 2860, 3756; 1891, c. 147; 1905, cc. 279, 522; P. L. 1911, c. 402.

For mileage of witnesses before legislative committee, see General Assembly.

For where county pays half fees, see Costs.

For collection of witnesses' fees, see Costs.

For special statute for Cherokee county, see 1907, c. 156.

A witness not subpoenaed cannot charge the losing party: *Stern v. Herren*, 101-516; *Thompson v. Hodges*, 10-318—nor can witness who is a nonresident, though subpoenaed, charge mileage even if he attends, *Ibid.*—and witnesses subpoenaed cannot be charged against losing party unless examined or sworn and tendered, *Chadwick v. Ins. Co.*, 158-380; *Moore v. Guano Co.*, 136-248; *Sutton v. Lumber Co.*, 135-540; *Cureton v. Garrison*, 111-271; but see *Herring v. R. R.*, 144-208; *Loftis v. Baxter*, 66-340—except when nonsuit taken, *Henderson v. Williams*, 120-339. Only two witnesses to a material point can be charged losing party: *State v. Wheeler*, 141-777; *Ex parte Beckwith*, 124-115; *State v. Massey*, 104-881—except in action of slander, where more can prove in court's discretion, *Holmes v. Johnson*, 33-55—also except where "value" is to be proven, *Ex parte Beckwith*, 124-111. The court may fix the compensation of experts: *Chadwick v. Ins. Co.*, 158-380; see, also, *State v. Parker*, 66-624.

All witnesses may recover from the party who subpoenaed them: *Sutton v. Lumber Co.*, 135-540; *Cureton v. Garrison*, 111-271; *Office v. Lockman*, 12-146—but they must prove their attendance before the clerk and get a ticket each term, *Thompson v. Hodges*, 10-318; see *Moore v. Islar*, 1-81—which ticket is sufficient evidence in court upon which to recover judgment against party cast or against party who subpoenaed witness, if party cast is insolvent, the statute making it presumptive evidence of the attendance, for whom, how long, for how much, and miles traveled, *Deaver v. Comrs.*, 80-116; *Belden v. Snead*, 84-243.

Witness is not at liberty after final judgment to withdraw his witness ticket and sue upon it. His fees for attendance should be taxed and collected with other costs against party adjudged to pay, if solvent, and if not, then the party who summoned and required his testimony is responsible: *Belden v. Snead*, 84-243; *Carter v. Wood*, 33-22.

One cannot recover for attendance of an incompetent witness: *Keith v. Goodwin*, 51-398. Witnesses for the losing party receive no pay unless he is solvent, and witnesses for state in

criminal actions where convicted party is insolvent receive only half pay: *State v. Wheeler*, 141-777. Where a nolle prosequi is entered on an indictment for homicide as to murder in the first degree, witnesses for state subsequently attending trial are entitled to only half fees: *Coward v. Comrs.*, 137-299.

There is no provision of law for payment of witnesses summoned to appear and testify generally before grand jury "in certain matters then and there to be inquired of"; and there is no authority of law to issue such summons: *Lewis v. Comrs.*, 74-194. Witnesses are entitled to compensation where a bill is prepared and sent to grand jury with names of those summoned endorsed as sworn and sent: *Lewis v. Comrs.*, 74-194. A witness in a criminal action has no claim upon county until liability of county for costs is passed upon by court: *Young v. Comrs.*, 76-316.

Witness for state being entitled to only half fees may recover in full amount paid for proving ticket: *Coward v. Comrs.*, 137-299. When witnesses in civil cases are refused payment of their fees they need not attend court but one day: *State v. Massey*, 104-881; see, also, *Carter v. Wood*, 33-22.

ART. 6. COMMISSIONERS IN VARIOUS COURT PROCEEDINGS

3894. Condemnation commissioners. The commissioners appointed, under any order of court, to condemn any land, for any railroad or other company or corporation in proceedings to condemn land under and by virtue of any right of eminent domain, shall each receive three dollars per day for each day they are engaged in the performance of their duties.

Rev., s. 2790; Code, s. 1946.

3895. Commissioners to make partition. The commissioners appointed by any court to make partition of any land, timber or real estate of any kind, or any personal property, shall each receive per diem for his services the sum of not exceeding three dollars, in the discretion of the court.

Rev., s. 2791; Code, ss. 1901, 1922; 1913, c. 18; 1919, c. 10.

3896. Commissioners to make sale in partition. In sales of real estate or personalty for partition the allowance to the commissioner for making such sale, and for all services therewith, and for making title, shall be as follows: For sales of five hundred dollars or less, not more than ten dollars; for sales of over five hundred dollars, two per centum, up to a compensation of forty dollars, and when the allowance shall amount to forty dollars, any additional compensation shall not exceed the rate of one per centum on the excess over two thousand dollars.

Rev., s. 2792; Code, s. 1910.

Compensation to commissioner for making partition sale being fixed by this section, no additional allowance can be made on account of extra trouble or expense: *Ray v. Banks*, 120-389; *Williamson v. Bitting*, 159-321.

3897. Commissioners to divide land lying in this and another state. The commissioners appointed to divide lands lying in this and another state shall be entitled to three dollars per day for their services; which, with all fees, expenses and costs, shall be paid as the court may direct.

Rev., s. 2793; Code, s. 1916; 1868-9, c. 122, s. 26.

3898. Commissioners to assess damages for mills. Every commissioner appointed in any proceeding to assess the damages arising from the location of any mill, as provided for in the chapter on Mills, shall be entitled to receive two dollars per day.

Rev., s. 2794; Code, s. 1863.

3899. Commissioners in drainage proceedings. Each commissioner appointed in proceedings under the chapter on drainage shall be entitled to receive one dollar and fifty cents per day.

Rev., s. 2795.

3900. Person allotting widow's year's allowance. Any person appointed by any court or justice of the peace or summoned by any sheriff to allot or set apart to any widow a year's allowance under the statute, and who shall serve, shall be paid the sum of one dollar per day or fraction of the day engaged, and the same shall be taxed as a part of the bill of costs of the proceeding.

1907, c. 223; 1913, c. 18.

3901. Person allotting dower. Any person designated to allot or assign to any widow dower in her husband's land, and who shall serve, shall be paid not exceeding three dollars per day in the discretion of the court, and the same shall be taxed as a part of the bill of costs of the proceeding.

1913, c. 18; 1919, c. 10.

3902. Receivers; selling as commissioners. Receivers of property appointed by any order of court, in any proceedings or action, shall be allowed such commissions as may be fixed by the court appointing them, not exceeding five per cent on the amount received and disbursed by them.

Rev., s. 2797; 1901, c. 2, s. 88; Code, s. 379, subsec. 4.

For compensation of surviving partner settling partnership estate, see chapter Partnership.

Allowance of commissions and counsel fees to receiver by superior court prima facie correct, and supreme court will alter same only when clearly inadequate or excessive: *Graham v. Carr*, 133-449. An order allowing commissions is a final judgment in respect to the matter decided, and is properly appealable: *Bank v. Bank*, 126-531. Caution to judges not to appoint more receivers than are necessary, and to avoid making excessive allowances: *Bank v. Bank*, 126-531. Allowances to receivers as well as to administrators and executors are reviewable when made on a wrong principle, or when clearly inadequate or excessive: *Bank v. Bank*, 126-531.

Not exceeding 5 per cent on receipts and disbursements seems to be statutory limit for receivers: *Bank v. Bank*, 126-531. Stipulation in a deed of trust, among other charges, "including an attorney's fee of 5 per cent," will not be sustained: *Turner v. Boger*, 126-300. Trustees and commissioners to sell land under judicial order (other than in partition proceedings) are not allowed commissions, either by statute or common law, but only such just compensation for time, labor, services and expenses as the circumstances of each case warrant: *Smith v. Frazier*, 119-157; *Williamson v. Bitting*, 159-321. See, also, *Hannah v. Hyatt*, 170-634.

It was error in this case to allow five per cent commissions to commissioners to sell land in foreclosure, and decree making such allowance will be modified so as to provide for reasonable compensation for time, services and expenses of commissioners: *Smith v. Frazier*, 119-157. Where deed of trust provided that, in case of sale thereunder, trustee should receive 5 per cent commission on the sale as a compensation for making the sale, and also that, if grantor should discharge debt before sale, land should be reconveyed to him, and trustee advertised sale, but before sale day trustor, with knowledge and consent of trustee, paid off debt and interest, and the expense of advertisement, and demanded his bond and trust deed: Held, that debt having been paid, trustee was not entitled to commissions: *Pass v. Brooks*, 118-397.

Where deed of trust provides for payment of "expenses" of trust, including "5 per cent commissions" to trustee, latter, after default in payment of debt and advertisement of sale, is entitled to his commissions: *Cannon v. McCape*, 114-580.

Debtor is only liable for debt, interest, actual expenses of sale, as advertising, and the like, and a reasonable compensation to trustee for his time and trouble in making sale, say not to exceed 2 per cent. Trustee pays his own attorney: *Turner v. Boger*, 126-300.

ART. 7. COUNTY OFFICERS

3903. Clerk of superior court. The fees of the clerk of the superior court shall be the following, and no other, namely:

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

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

Appeal from justice of the peace, fifty cents.

Appeal from the clerk to the judge, fifty cents.

Appeal to the supreme court, including certificate and seal, two dollars.

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

Apprenticing infant, including indenture, one dollar.

Attachment, order in, fifty cents.

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

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

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

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

Bond or undertaking, including justification, sixty cents.

Canceling notice of lis pendens, twenty-five cents.

Capias, each defendant, one dollar.

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

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

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

Commission, issuing, seventy-five cents.

Continuance, thirty cents.

Docketing ex parte proceedings, fifty cents.

Docketing indictment, twenty-five cents.

Docketing liens, twenty-five cents.

Docketing judgment, twenty-five cents.

Docketing summons, twenty-five cents.

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

Filing all papers, ten cents for each case.

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

Impaneling jury, ten cents.

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

Indexing liens on lien book, ten cents.

Indictment, each defendant in the bill, sixty cents.

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

Judgment, final, in term-time, civil action, one dollar.

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

Judgment, final, before the clerk, fifty cents.

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

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

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

Juror ticket, including jurat, ten cents.

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

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

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

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

Notifying solicitors of removal of guardian, one dollar.

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

Order of arrest, one dollar.

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

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

Postage, actual amount necessarily expended.

Presentment, each person presented, ten cents.

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

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

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

Probate of limited partnership, fifty cents.

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

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

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

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

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

Recording appointment of process agent for nonresident, fifty cents.

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

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

Recording certificates of incorporation of corporations, three dollars.

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

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

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

Subpœna, each name, fifteen cents.

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

Transcript of judgment, twenty-five cents.

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

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

Witness ticket, including jurat, ten cents.

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

Rev., s. 2773; Code, ss. 229, 1789, 3109, 3739; 1885, c. 199; 1893, c. 52, s. 4; 1897, c. 68; 1899, c. 17, s. 2; 1899, c. 247, s. 3; 1899, cc. 578, 261; 1901, cc. 121, 614, s. 3; 1903, c. 359, s. 6; 1905, c. 360, s. 3; 1917, c. 198, s. 6; 1919, c. 329.

For compensation of clerk on settlement of decedent's estate, see Administration, s. 158.

For fees in organization of corporations, see Corporations, s. 1219.

In many counties the clerk has been put upon a salary basis.

Judge fixes in certain settlements, see section 158.

For compensation for keeping money paid into court, see sections 153, 154.

Where clerk is appointed to sell land and to receive and invest proceeds he is entitled to commissions, and this section does not apply: *Hannah v. Hyatt*, 170-634.

Judge has no power to order county commissioners to pay extra allowance to clerk: *Brandon v. Comrs.*, 71-62. Judge of probate has no power to make to himself an allowance "for his services in stating an account," nor has he power to make an allowance to attorneys of intestate's creditors for services in their behalf: *Patterson v. Miller*, 72-516.

Costs are not allowed for docketing, filing, and indexing a judgment against state or county, since no lien can be acquired by such docketing: *Blount v. Simmons*, 120-19. Fee of twenty-five cents for motion for judgment can only be taxed when motion is a motion in the cause, in writing, and required to be recorded: *Blount v. Simmons*, 120-19. In an action by state to vacate an oyster bed entry, a fee of one dollar for entry of judgment in term time is taxable against state as losing party: *Blount v. Simmons*, 120-19.

Fee of ten cents allowed clerk for "filing papers" is for filing all papers in an action after final judgment, as prescribed by section 949, and not for filing each paper in a case: *Guilford v. Comrs.*, 120-23. The fee for continuance is allowed for such order made upon motion, and not for one caused by failing to reach the case: *Luther v. R. R.*, 154-103. When defendant is bound over to superior court by justice of the peace, clerk of superior court is not entitled to fee of 50 cents allowed for "appeal from justice of the peace": *Guilford v. Comrs.*, 120-23. Clerk of court is not entitled to any fee for entering a judgment of nolle prosequi in a criminal action: *State v. Johnson*, 101-711.

Clerks of superior court will not incur penalty prescribed for failure to issue execution within sixty days, unless plaintiff pays or tenders him his fees for that service: *Bank v. Bobbitt*, 111-194, distinguishing *Williamson v. Kerr*, 88-10.

Clerk has right to demand his fees for making out transcript in civil actions at the time he performs the service: *Sanders v. Thompson*, 114-282; *Andrews v. Whisnant*, 83-447—but in criminal actions, clerk cannot require costs of transcript upon appeal to be paid in advance, although defendant did not appeal in forma pauperis: *State v. Nash*, 109-822.

Clerk not entitled to fees for transcript negligently prepared: *State v. Cameron*, 122-1074.

3904. Local modifications as to clerk's fees. For the probate of a short-form lien bond, or lien bond and chattel mortgage combined, the clerk shall receive ten cents in the following counties: Alamance, Alleghany, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Carteret, Caswell, Catawba, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Davie, Duplin, Durham, Edgecombe, Forsyth, Gaston, Gates, Granville, Greene, Harnett, Iredell, Johnston, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Onslow, Pamlico, Pender, Perquimans, Person, Pitt, Polk, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Union, Vance, Warren, Washington, Watauga, Wayne, Wilson.

Rev., s. 2773; 1907, c. 717; 1909, c. 502; P. L. 1917, c. 182.

In Anson, this fee is twenty cents.

P. L. 1913, c. 49.

In Bertie county the clerk of the superior court shall collect the sum of fifteen cents for each crop lien or lien bond probated by him for registration in Bertie county, including all services connected therewith.

P. L. 1915, c. 163.

In Forsyth county the clerk shall receive fifteen cents for the probate of a deed or other writing, acknowledged by the signers or makers, including all except married women who acknowledge at the same time, with the certificate thereof. He shall also receive fifteen cents for the probate of a deed or other writing, proved by a witness, including the certificate.

P. L. 1913, c. 626.

In Jackson county, in addition to the fees now allowed by law, the clerk shall receive the sum of five dollars for writing up the minutes of each day's session of the superior court of the county, to be paid by the county.

P. L. 1913, c. 182.

In Robeson county the board of county commissioners may make an allowance to the clerk of the superior court for keeping the records of the court and transcribing the minutes, to be paid out of the general county fund.

Rev., s. 2773.

For fees in Guilford and Montgomery counties, see P. L. 1919, cc. 219, 334, s. 1.

3905. Coroners. Fees of coroners shall be the same as are or may be allowed sheriffs in similar cases:

For holding an inquest over a dead body, five dollars; if necessarily engaged more than one day, for each additional day, five dollars.

For burying a pauper over whom an inquest has been held, all necessary and actual expenses, to be approved by the board of county commissioners, and paid by the county.

It is the duty of every coroner, where he or any juryman deems it necessary to the better investigation of the cause or manner of death, to summon a physician or surgeon, who shall be paid for his attendance and services ten dollars, and such further sum as the commissioners of the county may deem reasonable.

Rev., s. 2775; Code, s. 3743; 1903, c. 781.

For coroners' fees in counties noted, see acts cited:

Buncombe, Rev., 2775; P. L. 1911, c. 556.

Brunswick and New Hanover, P. L. 1917, c. 680.

3906. Register of deeds. The register of deeds shall be allowed, while and when acting as clerk to the board of commissioners, such per diem as such board may respectively allow, not exceeding two dollars; and shall be allowed the following fees for his services as register of deeds:

For registering any deed or other writing authorized to be registered by them, with certificate of probate or acknowledgment and private examination of a married woman, containing not more than three copy-sheets, eighty cents; and for every additional copy-sheet, ten cents.

Registering chattel mortgage, statutory form, twenty cents.

For comparing and certifying a copy of any instrument filed for registration, when the copy is furnished by the party filing the instrument for registration and at the time of filing, one dollar.

For a copy of any record or any paper in their offices, like fees as for registering the same.

For issuing each notice required by the county commissioners, including subpoenas for witnesses, fifteen cents. This shall not include county orders on the treasury.

Recording and issuing each order of commissioners, ten cents. Where a standing order is made for the payment of money, monthly or otherwise, there shall be charged but one fee therefor.

Making out original tax list, two cents for each name thereon; for each name on each copy required to be made, two cents.

Issuing marriage license, one dollar.

For transcript and certificate of limited partnership, fifty cents.

For recording the election returns from the various voting precincts, ten cents per copy-sheet, to be paid by the county.

For attaching and indexing subdivisions or plats now allowed by law to be registered, fifty cents; for transcribing and indexing subdivisions and plats, seventy-five cents. If such subdivision or plat contains more than three lots or tracts of land, the register of deeds shall be entitled to charge twenty-five cents for transcribing each and every lot or tract of land in excess of three that is contained in such plat or subdivision, but in no case shall the fees exceed five dollars for transcribing and indexing such plat or subdivision.

Rev., s. 2776; Code, ss. 710, 3109, 3751; 1887, c. 283; 1891, c. 324; 1897, cc. 27, 68; 1899, c. 17, s. 2; 1899, c. 247, s. 3; 1899, cc. 261, 302, 578, 723; 1901, c. 294; 1903, c. 792; 1905, cc. 226, 292, 319; 1911, c. 55, s. 3.

In many counties the register of deeds has been put upon a salary basis.

For fees in relation to strays, see **Strays**.

For registering affidavits of sales for taxes, see **section 8029**.

For short form of lien bond, see **section 2490**.

Register of deeds can demand his fees in advance: *Cunninggim v. Peterson*, 109-33.

3907. Local modifications as to fees of registers of deeds. The register of deeds shall receive for registering short form of lien bond, or lien bond and chattel mortgage combined, fifty cents in the counties of Davidson, Halifax, Northampton, Scotland, Union, Vance, Warren and Wayne; thirty cents in the counties of Alamance, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Carteret, Caswell, Catawba, Chowan, Craven, Cumberland, Davie, Duplin, Durham, Edgecombe, Forsyth, Gaston, Gates, Granville, Harnett, Hertford, Jones, Lenoir, Lincoln, Martin, McDowell, Moore, New Hanover, Onslow, Pamlico, Pender, Perquimans, Person, Pitt, Polk, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Washington, Watauga and Wilson; twenty cents in the counties of Chatham, Columbus, Cleveland, Iredell, Johnston and Mecklenburg.

Rev., s. 2776; 1907, cc. 421, 636, 717; 1909, cc. 23, 532; P. L. 1913, c. 49; P. L. 1917, c. 182.

In Alexander county the board of county commissioners are authorized and empowered to pay the register of deeds the sum of one cent each per name for indexing births and deaths in said county. Likewise in Cleveland county.

P. L. 1915, c. 513; P. L. 1917, c. 423.

In Catawba county the register of deeds shall be allowed as a fee for his services for registering any deed of trust, in which real property is conveyed to a trustee to secure a loan from a building and loan association, the sum of eighty cents.

1909, c. 43.

In Forsyth county the register shall receive for registering any deed or other writing authorized to be registered, with certificate of probate or acknowledgment and private examination of a married woman, containing not more than three copy-sheets, sixty-five cents; and for every additional copy-sheet, ten cents: Provided, that the registration of any deed of trust shall not cost more than one dollar and ten cents, where the same does not contain more than four copy-sheets, and for every additional copy-sheet, ten cents each.

Rev., s. 2776; P. L. 1913, c. 626; P. L. Ex. Sess. 1913, c. 177.

In Jackson county the register shall, for his service in acting as clerk of the board of commissioners, for recording minutes, and doing other clerical work for or under the direction of the board of commissioners, receive three dollars per day, to be paid by the county.

P. L. 1913, c. 182.

In Tyrrell county the register shall receive for canceling mortgages, deeds of trust or instruments intended to secure the payment of money, fifteen cents.

1909, c. 780.

In Union county the county commissioners may revise the fees and commissions which may be charged by the register of deeds, and may fix all such fees and commissions at such amounts and rates as in their judgment will give the register of deeds and his deputies and assistants reasonable compensation. The fees and commissions so fixed shall be the legal fees chargeable by and payable to the register of deeds.

P. L. 1917, c. 366.

In Gates county the register of deeds shall receive for canceling of a mortgage or deed of trust, ten cents.

P. L. 1919, c. 4.

In Wake county the register of deeds shall charge and receive the following fees for registration of the papers herein mentioned, to wit: For registering lien bond, fifty cents; for registering short form of chattel mortgage provided for securing a sum not exceeding three hundred dollars, thirty cents; for registering short form of agricultural lien and chattel mortgage for advances, thirty cents; for registering short form of crop lien to secure advances and chattel mortgage to secure preëxisting debt, and to give additional security to the lien, thirty cents; for registering short-form notes given for the purchase price of personal property or combining also a conveyance of the property or other additional property as security, and retaining title to the property sold, twenty cents.

P. L. 1915, c. 138.

In Yadkin county the fees for recording chattel mortgages, crop liens, conditional sales, etc., shall be twenty cents for the first two copy-sheets or fraction thereof and ten cents for each additional copy-sheet or fraction thereof.

P. L. 1911, c. 414.

3908. Sheriffs. Sheriffs shall be allowed the following fees and expenses, and no other, namely:

Executing summons or any other writ or notice, sixty cents; but the board of county commissioners may fix a less sum than sixty cents, but not less than thirty cents, for the service of each road order.

Arrest of a defendant in a civil action and taking bail, including attendance to justify, and all services connected therewith, one dollar.

Arrest of a person indicted, including all services connected with the taking and justification of bail, one dollar.

Imprisonment of any person in a civil or criminal action, thirty cents; and release from prison, thirty cents.

Executing subpoena on a witness, thirty cents.

Conveying a prisoner to jail to another county, ten cents per mile.

For prisoner's guard, if any necessary, and approved by the county commissioners, going and returning, per mile for each, five cents.

Expense of guard and all other expenses of conveying prisoner to jail, or from one jail to another for any purpose, or to any place of punishment, or to appear before a court or justice of the peace in another county, or in going to another county for a prisoner, to be taxed in the bill of costs and allowed by the board of commissioners of the county in which the criminal proceedings were instituted.

For allotment of widow's year's allowance, one dollar.

In claim and delivery for serving the original papers in each case, sixty cents, and for taking the property claimed, one dollar, with the actual cost of keeping the same until discharged by law, to be paid on the affidavit of the returning officer.

For conveying prisoners to the penitentiary, two dollars per day and actual necessary expenses; also one dollar a day and actual necessary expenses for each

guard, not to exceed one guard for every three prisoners, as the sheriff upon affidavit before the clerk of the superior court of his county shall swear to be necessary for the safe conveyance of the convicts, to be paid by the state treasurer upon the warrant of the auditor, out of any money in the treasury not otherwise appropriated. The sheriff shall file with the auditor the affidavit above mentioned, together with a fully itemized account, to be sworn to before the auditor, showing the number of days requisite for coming and returning and the actual expense of conveying said convicts and the guard necessary for their safe-keeping, and if the auditor approves said account, he shall issue his warrant on the treasurer for the amount thereof.

Providing prisoners in county jail with suitable beds, bed-clothing, other clothing and fuel, and keeping the prison and grounds cleanly, whatever sum shall be allowed by the commissioners of the county.

Collecting fine and costs from convict, two and a half per cent on the amount collected.

Collecting executions for money in civil actions, two and a half per cent on the amount collected; and the like commissions for all moneys which may be paid to the plaintiff by the defendant while the execution is in the hands of the sheriff.

Advertising a sale of property under execution at each public place required, fifteen cents.

Seizing specific property under order of a court, or executing any other order of a court or judge, not specially provided for, to be allowed by the judge or court.

Taking any bond or undertaking, including furnishing the blanks, fifty cents.

The actual expense of keeping all property seized under process or order of court, to be allowed by the court on the affidavit of the officer in charge.

A capital execution, ten dollars, and actual expense of burying the body.

Summoning a grand or petit jury, for each man summoned, thirty cents, and ten cents for each person summoned on the special venire.

For serving any writ or other process with the aid of the county, the usual fee of one dollar, and the expense necessarily incurred thereby, to be adjudged by the county commissioners, and taxed as other costs.

All just fees paid to any printer for any advertisement required by law to be printed.

Bringing up a prisoner upon habeas corpus, to testify or answer to any court or before any judge, one dollar, and all actual and necessary expenses for such services, and ten cents per mile by the route most usually traveled, and all expenses for any guard actually employed and necessary.

For summoning and qualifying appraisers, and for performing all duties in laying off homesteads and personal property exemptions, or either, two dollars, to be included in the bill of costs.

For levying an attachment, one dollar.

For attendance to qualify jurors to lay off dower, or commissioners to lay off year's allowance, one dollar; and for attendance, to qualify commissioners for any other purpose, seventy-five cents.

Executing a deed for land or any interest in land sold under execution, one dollar, to be paid by the purchaser.

Service of writ of ejection, one dollar.

For every execution, either in civil or criminal cases, fifty cents.

Whenever any precept or process shall be directed to the sheriff of any adjoining county, to be served out of his county, such sheriff shall have for such service not only the fees allowed by law, but a further compensation of five cents for every mile of travel going to and returning from service of such precept or process: Provided, that whenever any execution of five hundred dollars or upwards shall be directed to the sheriff of an adjoining county, under this chapter, such sheriff shall not be allowed mileage, but only the commissions to which he shall be entitled.

Rev., s. 2777; Code, ss. 931, 2135, 2089, 2090, 3752; 1885, c. 262; 1891, cc. 112, 143; 1903, c. 541; 1901, c. 64; R. C., c. 102, s. 21; R. C., c. 31, s. 56; 1822, c. 1132.

For serving process from corporation commission, see Corporation Commission, art. 6.

For sheriff's compensation for duties connected with collection of taxes, see Taxation, art. 13.

In many counties the sheriff has been put upon a salary basis.

For serving notice of garnishment for taxes, twenty-five cents, see section 8004.

For sales for taxes, see section 8009.

For making memorandum of redemption of land sold for taxes, see section 8038.

As to costs in laying off homestead and exemption, see section 1251.

The action against a creditor for jail fees of an insolvent debtor due the jailer cannot be maintained by the sheriff as the jailer's principal: *Bunting v. McIlhenny*, 61-579.

An order by a judge for the county commissioners to pay sheriff for attendance upon court is void: *Griffith v. Comrs.*, 71-340.

Lien exists in favor of sheriff for his fees, he having right to retain costs out of amount collected in execution, and no compromise between debtor and creditor can affect his remedy: *Long v. Walker*, 105-90.

Unless his fees are paid or tendered, sheriff is not bound to execute process: *Lute v. Reilly*, 65-20; *Taylor v. Rhyne*, 65-530; *Johnson v. Kenneday*, 70-435; *Jones v. Gupton*, 65-48—but he must, nevertheless, make a return of the process: *Ibid.* Sheriff is not compelled to lay off homestead or personal property exemption before fees for such service are tendered or paid: *Whitmore v. Hyatt*, 175-117; *Vanoy v. Haymore*, 71-128; *McCanless v. Flinchum*, 98-358—nor to sell excess unless fees are advanced, *Taylor v. Rhyne*, 65-530.

A sheriff is not entitled to any extra compensation beyond his fee for executing a "writ of ejection" or a "writ of possession": *Allen v. Spoon*, 72-369. Law makes no provision for paying sheriffs for services in summoning tales jurors: *Bryan v. Comrs.*, 84-105.

Under this section sheriff holding execution is entitled to commissions on amount paid to plaintiff by defendant, as held in *Maxwell v. Maxwell*, 70-263, and changing the ruling in *Dawson v. Grafflin*, 84-100.

While office of sheriff is constitutional one, yet regulation of his fees is within control of legislature, and same may be reduced during term of the incumbent: *Comrs. v. Stedman*, 141-448—or place the office on a salary basis, *Mills v. Deaton*, 170-386.

3909. Local modifications as to fees of sheriffs. The sheriff of Hyde county shall be allowed the sum of two dollars for serving all warrants or capiases or other criminal processes on the waters of Pamlico sound or on the waters of any bay in Hyde county. Whenever such sheriff is compelled to go by boat or vessel a distance of more than two miles from any shore or landing in Hyde and of Dare county to serve any civil process upon the waters of Pamlico sound and waters of Dare county or any bay in Hyde county, such sheriff, in addition to the fee prescribed by law for serving such process, may add the expense of hiring such boat or vessel, which cost or expense shall be taxed by the clerk of the superior court of the county from which such process issued in the bill of

costs in the action in which such process issued. Sheriffs and constables of Hyde and Carteret counties shall receive three dollars for every process executed on board of any boat or vessel lying in the waters between Ocracoke island, Hyde county, and Portsmouth in Carteret county.

Rev., s. 2777; 1907, c. 206.

The sheriff of Dare county shall be allowed his actual traveling expenses incurred by him in serving warrants, capiasés or other criminal processes on the waters of Dare county or at any point in Dare county across the water.

1909, c. 527.

For every illicit distillery seized as required by law the sheriffs of Haywood, Lincoln, Pitt and Transylvania counties shall receive the sum of twenty dollars, and in Madison county thirty dollars, which shall be allowed by the commissioners of the county in which the seizure was made.

Ex. Sess. 1908, s. 97; P. L. 1919, c. 30.

For each person summoned on a special venire the sheriff of Robeson county shall receive thirty cents; but not for a special venire ordered to be summoned from the bystanders, in which case he shall receive ten cents for each person so summoned.

1909, c. 317.

For sheriff's fees in Greene county, see P. L. 1919, c. 313.

3910. County treasurer. The county treasurer shall receive as compensation in full for all services required of him such a sum, not exceeding one-half of one per cent on moneys received and not exceeding two and a half per cent on moneys disbursed by him, as the board of commissioners of the county may allow. As treasurer of the county school fund he shall receive such sum as the board of education may allow him, not exceeding two per cent on disbursements; and the said commissions shall be paid only upon the order of the county board of education, signed by the chairman and secretary, and the county board of education is hereby forbidden to sign any such order until the treasurer shall have made all reports and kept all such accounts required by law in the form and manner prescribed: Provided, that said treasurer shall be allowed no commission or compensation for receipts and disbursements of any loan or loans made to the county by the state board of education out of the state literary fund for the building of schoolhouses: Provided, that in counties where the treasurer's total compensation cannot exceed two hundred and fifty dollars per annum the treasurer may be allowed, in the discretion of the board of county commissioners and of the board of education, as to the school fund, a sum not exceeding two and one-half per cent on his receipts and not exceeding two and one-half per cent on his disbursements of all funds handled by him; but the compensation allowed by virtue of the provisions of this last proviso shall not be operative to give a total compensation in excess of two hundred and fifty dollars per annum to such treasurers.

Rev., s. 2778; Code, s. 770; 1899, c. 233; 1909, c. 577; 1913, c. 144; 1919, c. 254, s. 9.

For special commission allowed treasurer in Martin county, see 1905, c. 352.

In many counties the treasurer has been put upon a salary basis.

Every county treasurer is entitled to compensation for his labor and responsibility, in no case less than two and one-half per cent per annum on the amount collected, where it cannot exceed \$250: *Koonce v. Comrs.*, 106-192—and if commissioners refuse to consider his claim, the proper remedy is by mandamus to compel action on the subject, *Ibid.*

3911. County superintendent of public instruction. The salary of the county superintendent of schools shall be fixed by the county board of education. It shall not be less than three dollars per day while engaged in the service of the public schools. The county board of education may fix an annual salary not to exceed four per cent of the disbursements for schools under his supervision. The county board of education of any county whose total school fund exceeds fifteen thousand dollars may employ a county superintendent for all of his time at such salary as may be fixed by said board.

Rev., s. 2782; 1901, c. 4, s. 44; 1903, c. 435, s. 19; 1909, c. 525.

3912. County board of education. The members of the county board of education shall receive three dollars per diem and five cents a mile to and from their respective places of meeting.

Rev., s. 2786; 1901, c. 4, s. 27; 1915, c. 236, s. 2.

For local variations in counties noted, see acts cited:

Buncombe, P. L. 1919, c. 232.

Chatham, P. L. 1919, c. 152.

Durham, 1909, c. 545.

Guilford, 1909, c. 341; P. L. 1913, c. 810.

Robeson, P. L. 1913, c. 526.

3913. County board of pensions. Each member of the county board of pensions shall be entitled to two dollars a day, not exceeding three days in any year, when attending the annual meeting of said board, the said compensation to be paid by the county treasurer on the order of the board of county commissioners.

Rev., s. 2783; 1903, c. 273, s. 19.

3914. County standard-keeper. Standard-keepers shall be entitled to receive the following fees, and no other, namely: for examining and adjusting a pair of steelyards, twenty-five cents; every weight of half a pound and upwards, five cents; every set of weights below half a pound, including one piece of each denomination, five cents; for a yardstick, or other measure of cloth, five cents; every bushel, half-bushel, peck or other measure used in measuring grain, meal or salt, ten cents; each measure for liquors or wines, three cents, and for extra work on bushel and half-bushel measures a sum not exceeding twenty-five cents in any one case; and for every surveyor's chain, fifty cents.

Rev., s. 2780; Code, s. 3753; 1889, c. 406; R. C., c. 102, s. 37; 1870-1, c. 139, s. 3; 1874-5, c. 110.

For compensation of state standard-keeper, see chapter Weights and Measures.

3915. Finance committee. The members of the finance committee shall each receive such compensation for the performance of his duties as the board of commissioners may allow, not exceeding three dollars per day; but they shall not be paid for more than ten days in any one year.

Rev., s. 2781; Code, s. 763; 1871-2, c. 71, s. 5; 1873-4, c. 107.

County commissioners may employ an expert to examine the books of the county officers: *Wilson v. Holding*, 170-352.

3916. Committee to examine treasurer's books. The board of commissioners shall allow to the committee who examine the books and moneys of the treasurer the same pay per diem that is received by a member of the board, not to exceed pay for one day's service for each examination.

Rev., s. 2779; Code, s. 774; 1879, c. 33.

County commissioners may employ expert to examine treasurer's books, and pay him reasonable compensation: *Wilson v. Holding*, 170-352.

3917. Election officers. The registrar shall receive three cents for each name registered in the new registration when ordered, and thereafter in the revision of the registration book he shall receive one cent for each name copied from the original registration book. Each chairman of the county board of elections shall be allowed three dollars per day for the time actually employed, and five cents per mile for distance traveled, for making the returns for senators, and each sheriff shall receive thirty cents for each notice he is required to serve under the law providing for holding elections. The compensation allowed officers shall be paid by the county treasurer after being audited by the board of county commissioners. Clerks and registers of deeds shall also be allowed the usual registration fees for recording the election returns, to be paid by the county. The board of state canvassers may employ two clerks at a compensation of four dollars each per day, during the session of the board of state canvassers. The members of the county board of elections shall each be allowed three dollars per day for each day they may be actually employed in the performance of their duties. The registrars and judges of election shall be entitled to such compensation as may be fixed by the board of commissioners of their county, not to exceed three dollars each for holding the election. The election constables or bailiffs shall be entitled to three dollars per day each; and the registrar or judge of election, who shall act as returning officer, shall be allowed three dollars, payable out of the county treasury: Provided, that the registrars shall receive, in addition to the compensation herein allowed for each name registered, the sum of three dollars per day for each Saturday during the period of registration, and on which they attend at the several polling places for the purpose of registering voters or receiving and hearing challenges: Provided further, that in addition to the compensation herein allowed the several election officers it shall be lawful for the county commissioners to pay to the several members of the county board of elections and also to the several registrars such additional compensation as may be by them considered just and fair.

Rev., s. 2784; 1901, c. 89, s. 62; 1905, c. 434; 1907, c. 760; 1919, c. 61.

3918. County commissioners. Except where otherwise provided by law, each county commissioner shall receive for his services and expenses in attending the meetings of the board not exceeding two dollars per day, as a majority of the board may fix upon, and they may be allowed mileage to and from their respective places of meeting, not to exceed five cents per mile.

Rev., s. 2785; Code, s. 709; 1907, c. 500.

A member of the board of county commissioners cannot recover for extra services rendered: *Davidson v. Guilford*, 152-436.

County commissioners are only entitled to mileage for distance by usual route traveled to attend such meetings of board as statute has prescribed, and returning from such meeting;

they cannot charge mileage for each day, although they may actually return to their homes at close of each day of meeting: *State v. Norris*, 111-652.

Where county commissioners audited accounts in favor of its members for mileage, to which they were not entitled, and under advice and without any corrupt or fraudulent motive: Held, that they were not indictable: *Ibid.*

For local laws as to pay of county commissioners in the counties listed below, see the acts referred to.

- Alamance, P. L. 1919, c. 109.
 Ashe, P. L. 1911, c. 251; P. L. 1915, c. 121.
 Avery, P. L. 1915, c. 231.
 Beaufort, 1907, c. 351.
 Bertie, P. L. 1913, c. 358.
 Bladen, P. L. 1913, c. 756.
 Brunswick, Rev., s. 2785; 1907, c. 974.
 Buncombe, 1907, c. 942; P. L. 1911, c. 308; P. L. 1915, c. 794.
 Burke, P. L. 1911, c. 349.
 Cabarrus, P. L. 1919, c. 71.
 Camden, P. L. 1919, c. 156.
 Caswell, 1909, c. 370; P. L. 1911, c. 191.
 Catawba, P. L. 1911, c. 331; P. L. 1913, c. 632.
 Chatham, P. L. 1919, c. 152.
 Cherokee, P. L. 1911, c. 306.
 Clay, P. L. 1919, c. 8.
 Cleveland, 1907, c. 907.
 Columbus, P. L. 1911, c. 307; P. L. 1913, c. 529.
 Craven, Rev., s. 2785; P. L. 1919, c. 470.
 Cumberland, P. L. 1911, c. 118.
 Currituck, Rev., s. 2785.
 Dare, P. L. 1919, c. 110.
 Davidson, P. L. 1911, c. 511; P. L. 1913, c. 485.
 Davie, P. L. 1919, c. 528.
 Duplin, P. L. 1917, c. 472; P. L. 1919, c. 430.
 Durham, P. L. 1919, c. 116.
 Edgecombe, 1907, c. 561.
 Forsyth, P. L. 1911, c. 690.
 Franklin, P. L. 1911, c. 338.
 Gaston, 1907, c. 904; P. L. 1911, c. 152.
 Gates, P. L. 1919, c. 29.
 Graham, P. L. 1919, c. 77.
 Granville, Rev., s. 2785; 1909, c. 646; P. L. 1911, c. 350; P. L. 1919, c. 102.
 Greene, P. L. 1915, c. 539.
 Guilford, 1907, c. 13; P. L. 1911, c. 190; P. L. 1913, c. 810; P. L. 1919, c. 101.
 Halifax, P. L. 1911, c. 649; P. L. 1913, c. 485.
 Harnett, P. L. 1919, c. 223.
 Haywood, 1909, c. 228; P. L. 1913, c. 755; P. L. Ex. Sess. 1913, c. 227.
 Henderson, P. L. 1919, c. 269.
 Hertford, P. L. 1911, c. 712; P. L. 1913, cc. 47, 118.
 Hoke, P. L. 1911, c. 741.
 Hyde, 1907, c. 394; P. L. 1917, c. 159.
 Iredell, P. L. 1913, c. 401.
 Jackson, P. L. 1911, c. 419.
 Johnston, Rev., s. 2785; P. L. 1919, c. 153.
 Jones, P. L. 1919, c. 249.
 Lincoln, P. L. 1919, c. 78.
 McDowell, 1907, c. 132; P. L. 1917, c. 242; P. L. 1919, c. 180.
 Macon, P. L. 1919, c. 15.
 Madison, 1907, c. 651.
 Martin, P. L. 1919, c. 120.
 Mecklenburg, Rev., s. 2785; P. L. 1919, c. 544.
 Mitchell, 1909, c. 254.
 Montgomery, P. L. 1911, c. 63.
 Moore, P. L. 1915, c. 282.
 Nash, P. L. 1911, c. 665.
 New Hanover, P. L. 1913, c. 293.
 Northampton, Rev., s. 2785.

Onslow, Rev., s. 2785; 1909, c. 476; 1909, c. 606.
 Orange, 1907, c. 536.
 Pamlico, P. L. 1913, c. 635.
 Pasquotank, P. L. 1911, c. 352; P. L. 1913, c. 485; P. L. 1915, c. 25.
 Pender, 1909, c. 685.
 Perquimans, P. L. 1919, c. 461.
 Person, P. L. 1915, c. 4.
 Pitt, P. L. 1911, c. 98.
 Polk, P. L. 1919, c. 96.
 Richmond, 1909, c. 101.
 Robeson, P. L. 1919, c. 133.
 Rockingham, 1907, c. 448; P. L. Ex. Sess. 1913, c. 231.
 Rowan, P. L. 1915, c. 612.
 Rutherford, 1907, c. 737.
 Sampson, P. L. 1913, c. 279.
 Scotland, P. L. 1917, c. 190.
 Stanly, P. L. 1917, c. 271.
 Stokes, P. L. 1911, c. 45.
 Swain, P. L. 1917, c. 210.
 Transylvania, P. L. 1911, c. 252; P. L. 1919, c. 5.
 Union, P. L. 1919, c. 224.
 Vance, P. L. 1911, c. 474.
 Wake, 1909, c. 573.
 Warren, P. L. 1913, c. 485.
 Watauga, P. L. 1913, c. 485.
 Wayne, P. L. 1915, c. 522; P. L. 1919, c. 428.
 Wilkes, P. L. 1913, c. 414; P. L. 1913, c. 485.
 Wilson, P. L. 1919, c. 115.
 Yadkin, P. L. 1913, c. 321.
 Yancey, Rev., s. 2785; 1909, c. 384.

3919. Fees of jailers. Jailers shall receive, for furnishing prisoner with fuel, one pound of wholesome bread, one pound of good roasted or boiled flesh, and a sufficient quantity of water, with every necessary attendance, a sum not exceeding fifty cents per day, unless the board of commissioners of the county shall deem it expedient to increase the fees, which it may do provided such increase shall not exceed fifty per cent on the above sum.

Rev., s. 2799; Code, s. 3746; R. C., c. 102, s. 38; 1878, c. 87; 1919, c. 118.

3920. Fees of entry-taker. Entry-takers shall receive the following fees, and no other, namely: For an entry, including all services, forty cents; issuing each duplicate warrant, when thereto required, twenty-five cents; for posting and advertising, the applicant shall pay the entry-taker one dollar, and the costs of the newspaper advertisement.

Rev., s. 2801; Code, ss. 2765, 3744; R. C., c. 102, s. 32; 1870-1, c. 139, s. 3; 1903, c. 272, s. 3.

3921. Fees of surveyors and chain-carriers. Surveyors appointed by courts to survey any lands the boundaries of which may come in question in any suit or proceeding pending therein, or called upon by the commissioners to assist in surveying and dividing the lands of intestates or others, held in common, shall receive the following fees, and no other, namely: For every survey on an entry containing three hundred acres or less, one dollar and sixty cents, and for every hundred more than that quantity, forty cents; for surveying lands in dispute, by order of court, traveling to and from the place, and performing the duty, two dollars per day, or such greater sum as the court may allow; for assisting in surveying and dividing the lands of intestates, or others, held in common, when called upon by the commissioners appointed to make partition, or in laying

off dower, traveling to and from the place, and performing the duty, two dollars per day. For assisting in surveying and allotting the homestead exemption of any person when summoned to do so by the sheriff or other lawful officer, for traveling to and from the place and performing the duty, two dollars per day, which shall be taxed in the bill of costs. In all surveys made by order of the court, the chain-carriers shall be allowed such compensation as the court may determine, not exceeding one dollar each per day; and in matters of disputed boundary, which may come in question, in any suit, the court may make to the surveyor such allowance for plots as it may deem reasonable, which, with the allowance to chain-carriers, shall be taxed as costs.

Rev., s. 2802; Code, s. 3754; 1893, c. 58, s. 2; 1905, cc. 182, 263.

For fees for registering surveys, see State Lands, section 7573.

For local laws regulating surveyors' fees in counties noted, see acts cited.

Anson, 1907, c. 715.

Edgecombe, Montgomery and Nash, 1909, c. 738; P. L. 1911, c. 423.

Lee, P. L. 1917, c. 198.

Randolph, P. L. 1919, c. 347.

Richmond, P. L. 1913, c. 516.

Robeson, P. L. 1917, c. 79.

Wayne, P. L. 1919, c. 311.

Wilson, P. L. 1913, c. 136.

Brunswick, Catawba, Cleveland, McDowell, Mitchell, Rowan, Stokes and Wayne, Rev., s. 2802; P. L. 1911, cc. 264, 551; P. L. 1913, cc. 517, 792; P. L. 1915, c. 607; P. L. 1917, c. 558.

ART. 8. TOWNSHIP OFFICERS

3922. Constable. Constables shall be allowed the same fees as sheriffs.

Rev., s. 2787; Code, s. 3742; 1883, c. 108.

For fees in Pitt and Halifax, see P. L. 1917, c. 652.

3923. Justices of the peace. That justices of the peace shall receive the following fees, and none other: For attachment with one defendant, twenty-five cents, and if more than one defendant, ten cents for each additional defendant; transcript of judgment, ten cents; summons, twenty cents, if more than one defendant in the same case, for each additional defendant, ten cents; subpoena for each witness, ten cents; trial when issues are joined, seventy-five cents, and if no issues are joined, then a fee of forty cents for trial and judgment; taking an affidavit, bond or undertaking, or for an order of publication, or an order to seize property, twenty-five cents; for jury trial and entering verdict, seventy-five cents; execution, twenty-five cents; renewal of execution, ten cents; return to an appeal, thirty cents; order of arrest in civil actions, twenty-five cents; warrant of arrest in criminal and bastardy cases, including affidavit or complaint, fifty cents; warrant of commitment, twenty-five cents; taking depositions on order or commission, per one hundred words, ten cents; garnishment for taxes, and making necessary return and certificate of same, twenty-five cents; for hearing petition for widow's year's allowance, issuing notice to commissioners and allotting the same, one dollar; for filing and docketing laborers' liens, fifty cents; probate of a deed or other writing proved by a witness, including the certificate, twenty-five cents; probate of a deed or other writing executed by a married woman, proper acknowledgment and private examination, with the certificate thereof, twenty-five cents; probate of a deed or other writing acknowledged by the signers or makers, including all except married women who acknowl-

edge at the same time, with the certificate thereof, twenty-five cents; probating chattel mortgage, including the certificate, ten cents; for issuing all papers and copies thereof in an action for claim and delivery, and the trial of the same, if issues are joined, when there is one defendant, one dollar and fifty cents, and if more than one defendant in action, fifty cents for each additional defendant, and ten cents for each subpoena issued in said cause, and twenty-five cents for taking the replevy bond, when one is given: Provided, that when the trial of such a cause shall have been removed from before the justice of the peace issuing the said papers, the justice of the peace sitting in trial of such cause shall receive fifty cents of the above costs for such trial and judgment.

Rev., s. 2788; Code, ss. 2135, 3748; 1870-1, c. 130, s. 9; 1883, c. 368; 1885, c. 86; 1903, c. 225; 1907, c. 967; 1917, c. 260.

For justices' fees in Caswell, Forsyth, Gaston, Guilford, and Rockingham, see P. L. 1919, c. 129. As for Rowan, see P. L. 1919, c. 154; for Guilford, see P. L. 1919, c. 129.

One who is both recorder of a city recorder's court and a justice of the peace is presumed, in hearing a warrant made returnable before him by another justice and in binding over the accused, to have acted as a justice, and so to be entitled to his fees: *State v. Lord*, 145-479.

ART. 9. COMMISSIONERS OF AFFIDAVITS

3924. Commissioners of affidavits. Commissioners of affidavits, and those who are authorized by law to act as such, shall receive the following fees, and no other, namely: for an affidavit taken and certified, forty cents; affixing his official seal, twenty-five cents.

Rev., s. 2796; Code, s. 3741.

For notaries' fees, see *Notaries*, c. 59, s. 3177.

For fees of harbor masters, see section 6962.

For fees of pilots, see sections 6974, 6977, 6979, 6991-6993.

For publishing notice sale of land for taxes, see section 8014.

CHAPTER 72

SHERIFF

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ART. 1. THE OFFICE

3925. Election and term of office. In each county a sheriff shall be elected by the qualified voters thereof, as is prescribed for members of the general assembly, and shall hold his office for two years.

Rev., s. 2808; Const., Art. IV, s. 24.

There is a contract between sheriff and the state that he will discharge duties of the office, and it cannot be abrogated or impaired except by the consent of both parties: *King v. Hunter*, 65-603; see office-holding cases under section 870.

3926. Disqualifications for the office. No person shall be eligible to the office of sheriff who is not of the age of twenty-one years, and has not resided in the county in which he is chosen for one year immediately preceding his election, or who is a member of the general assembly, or practicing attorney, or who theretofore has been sheriff of such county and has failed to settle with and fully pay up to every officer the taxes which were due from him.

Rev., s. 2809; Code, ss. 2067, 2068, 2069; R. C., c. 105, ss. 5, 6, 7; 1777, c. 118, ss. 2, 4; 1806, c. 699, s. 2; 1829, c. 5, s. 6; 1830, c. 25, ss. 2, 3.

As to presenting receipts for taxes collected by him as former sheriff, see under section 3931.

3927. Sheriff may resign. Every sheriff may vacate his office by resigning the same to the board of county commissioners of his county; and thereupon the board may proceed to elect another sheriff.

Rev., s. 2810; Code, s. 2077; R. C., c. 105, s. 15; 1777, c. 118, s. 1; 1808, c. 752.

3928. Removal for misdemeanor in office. If any sheriff shall be convicted of a misdemeanor in office, the court may at its discretion, as a part of his punishment, remove him from office.

Rev., s. 2811; Code, s. 2071; R. C., c. 105, s. 11; R. S., c. 109, s. 11; 1829, c. 5, s. 8.

Removal of sheriff for other causes, see Art. 2, under Offices and Public Officers.

3929. Vacancy filled; duties performed by coroner. If any vacancy occurs in the office of sheriff, the coroner of the county shall execute all process directed to the sheriff until the first meeting of the county commissioners next succeeding such vacancy, when the board shall elect a sheriff to supply the vacancy for the residue of the term, who shall possess the same qualifications, enter into the same bonds, and be subject to removal, as the sheriff regularly elected. If the board should fail to fill such vacancy, the coroner shall continue to discharge the duties of sheriff until it shall be filled.

Rev., s. 2811; Code, s. 2071; R. C., c. 105, s. 11; R. S., c. 109, s. 11; 1829, c. 5, s. 8.

Vacancy filled in Polk county by governor, see 1909, c. 594. See section 1297 and annotations thereunder; also see section 1021.

When sheriff's office is vacant, commissioners may appoint for residue of term only: *Worley v. Smith*, 81-304.

County commissioners may declare office vacant, upon insanity of sheriff, but their failure to do so merely authorizes coroner to perform duties of sheriff proper, but does not cast upon him right to collect taxes: *Somers v. Comrs.*, 123-582.

An act authorizing board of commissioners to appoint tax collector for county where there is a sheriff is unconstitutional: *King v. Hunter*, 65-603—but an official ascertainment of the insanity of a sheriff suspends him from office, and terminates agency of his deputies: *Somers v. Comrs.*, 123-582—his sureties, in that event, have merely same right which they would have in event of sheriff's death, that is, to collect current tax list then in his hands; and county commissioners on first Monday in September following are vested with power of electing tax collector for ensuing year, unless and until sheriff should be restored to reason, *Ibid.*

Vacancy in office declared, when elected sheriff fails, upon applying to be again inducted into office, to show receipts for money collected by him formerly: *People v. Green*, 75-329—or fails to appear and justify or renew bonds, *Ibid.*

ART. 2. SHERIFF'S BONDS

3930. Sheriff to execute three bonds. The sheriff shall execute three several bonds, payable to the state of North Carolina, as follows:

One conditioned for the collection and settlement of state taxes according to law, a sum not exceeding the amount of the taxes assessed upon the county for state purposes in the previous year.

One conditioned for the collection and settlement of county and other local taxes according to law, a sum not exceeding the amount of such county and other local taxes for the previous year.

The third bond, for the due execution and return of process, payment of fees and moneys collected, and the faithful execution of his office as sheriff, shall be not more than five thousand dollars, in the discretion of the board of county commissioners, and shall be conditioned as follows:

The condition of the above obligation is such that, whereas the above bounden _____ is elected and appointed sheriff of _____ County; if, therefore, he shall well and truly execute and due return make of all process and precepts to him directed, and pay and satisfy all fees and sums of money by him received or levied by virtue of any process into the proper office into which the same, by the tenor thereof, ought to be paid, or to the person to whom the same shall be due, his executors, adminis-

trators, attorneys, or agents; and in all other things well and truly and faithfully execute the said office of sheriff during his continuance therein, then the above obligation to be void; otherwise to remain in full force and effect.

Rev., s. 298; Code, s. 2073; R. C., c. 105, s. 13; 1777, c. 118, s. 1; 1823, c. 1223; 1879, c. 109; 1895, c. 270, ss. 1, 2; 1899, c. 207, s. 2; 1903, c. 12; 1899, c. 54, s. 52.

BOND REQUIRED. Local provision for sheriff's bond in Craven county, see Rev., s. 298; 1899, c. 207. Must be given before inducted into office: Colvard v. Comrs., 95-515; but see Worley v. Smith, 81-304. The legislature's power to extend time for settlement of taxes enters into the terms of every bond, and sureties must take notice: Worth v. Cox, 89-44. County bond covers school taxes: Comrs. v. Sutton, 120-298; Tillery v. Candler, 118-888; Lindsay v. Dozier, 44-275. County commissioners no power to release sureties: Fidelity Co. v. Fleming, 132-332. Bond for collection of taxes of one year cannot be construed to mean another year: Prince v. McNeill, 77-398. Ceremony of acknowledgment in open court and registration not essential: McLean v. Buchanan, 53-444. All bonds taken during term are cumulative: Fidelity Co. v. Fleming, 132-332; Dixon v. Comrs., 80-118; Pickens v. Miller, 83-543; Moore v. Boudinot, 64-190; Bell v. Jasper, 37-597; Poole v. Cox, 31-69; Oats v. Bryan, 14-451. Sureties on bond have no right to tax books, when: Somers v. Comrs., 123-584.

LIABILITY ON BOND. See generally under sections 354, 356, 359. Liable for seizing property not subject to process: Martin v. Buffalo, 128-305; Leavering v. Smith, 115-385; Draper v. Buxton, 90-182—for taxes, Williamson v. Jones, 127-178; Comrs. v. White, 123-534; McGuire v. Williams, 123-349; Comrs. v. Wall, 117-377; Liles v. Rogers, 113-197; Worth v. Cox, 89-44; Vann v. Pipkin, 77-408; Comrs. v. Clarke, 73-255—for failing to lay off personal property exemptions, Scott v. Kenan, 94-296—only for some breach of duty specifically described in bond, Eaton v. Kelly, 72-110; but see State v. Bradshaw, 32-229; also, under section 354—for costs collected and not paid to clerk, Jackson v. Maultsby, 78-174—for failure to pay over money collected on execution, Walters v. Moore, 90-41; Fagan v. Williamson, 53-433; Brooks v. Gibbs, 47-326; Ellis v. Long, 30-513—for sale of exempt property, Hobbs v. Barefoot, 104-224—for failure to collect money on execution, Erwin v. Lowrance, 64-483—for failure to arrest defendant in arrest and bail, Jenkins v. Troutman, 52-169; Houser and Wilson v. Hampton, 29-333—for amercements, Hobbs v. Barefoot, 104-224; see, also, sections 3934, 3936—for allowing debtor to escape, Mabry v. Turrentine, 30-201; Willey v. Eure, 53-320—for failure to apply money to proper execution, Titman v. Rhyne, 89-64—for failure to take proper bail bond, Evans v. Blalock, 47-377. Bond not liable for money paid sheriff on judgment when he had no execution, Mills v. Allen, 52-564—nor unless duty alleged to be unperformed is set out as a condition therein, Eaton v. Kelly, 72-110.

PROCEDURE IN ACTION ON. For summary remedy on bond, see section 356. For action on official bonds generally, see section 354. Sheriff's audited account is prima facie correct and burden is on plaintiff to show otherwise: Williamson v. Jones, 127-178; Comrs. v. White, 123-534; Davenport v. McKee, 98-500. County commissioners proper relator in action for school taxes: Comrs. v. Sutton, 120-298; see, also, section 354. Demand on sheriff before suit for taxes not necessary: McGuire v. Williams, 123-349; State v. McIntosh, 31-307. Copy of bond certified by clerk competent evidence: Erwin v. Lowrance, 64-483. Where sheriff pleads in action to recover taxes that he has not received proper credits: Williamson v. Jones, 127-178—that tax was invalid, McGuire v. Williams, 123-349—that he is entitled to credit for insolvents, Comrs. v. Wall, 117-377—that his creditors have attached books, *Ibid.* Who relator in action on bond, see section 354. Where plaintiff in execution can sue on official or indemnity bond: Martin v. Buffalo, 128-305. What amounts to plea in bar necessary to be decided before reference: Comrs. v. White, 123-534. Where sureties plead that amercement was fraudulently obtained: State v. Woodside, 29-296—that taxes covered by their bond were used to pay tax covered by other bond, Liles v. Rogers, 113-197—that time for sheriff to settle was extended without their consent, Worth v. Cox, 89-44—that office was really vacant, sheriff having failed to make settlement and renew bond, Vann v. Pipkin, 77-408—that bond was never accepted and registered, Jenkins v. Howell, 65-61—that they are not liable for trespass of sheriff under color of office, State v. Brown, 33-141; State v. Long, 30-415.

3931. County commissioners to take and approve bonds. The board of county commissioners in every county shall take and approve the official bonds of the sheriffs, which they shall cause to be registered and the originals deposited with

the clerk of the superior court for safe-keeping. The bonds shall be taken on the first Monday of December next after the election of sheriffs, but no board shall permit any former sheriff to give bonds for, or reënter upon the duties of the office, until he has produced before the board the receipt in full of every such officer for taxes which he has or should have collected.

Rev., s. 2812; Code, ss. 2066, 2068; 1868, c. 20, s. 32; 1876-7, c. 276, s. 5; R. C., c. 105, s. 6; 1806, c. 699, s. 2; 1830, c. 2830, c. 25, s. 2.

The purpose of this section is to protect the public revenue and to insure its honest collection: *Hudson v. McArthur*, 152-445. Commissioners cannot wantonly refuse tax bond and appoint tax collector: *King v. Hunter*, 65-603.

While it was irregular to induct defendant into office without his giving all three required bonds, yet defect was cured when they were subsequently tendered and accepted: *Worley v. Smith*, 81-304.

Board of county commissioners being required to take and approve official bonds of sheriffs, and being liable in damages if they knowingly accept insufficient bonds, the approval of such bonds is within their discretion, and courts cannot compel them to approve and receive bonds which they find to be insolvent or insufficient: *Harrington v. King*, 117-117; *Burke v. Comrs.*, 148-46.

When sheriff presented to commissioners his proper certificate of election, and showed to them that he had accounted as former sheriff for public moneys, wherewith he was charged, as required by law, it at once became their duty to induct him into office according to law: *Hampton v. Waldrop*, 104-457; *Roberts v. Calvert*, 98-580; *Hannon v. Grizzard*, 96-293.

This section imposes no additional qualification upon eligibility to office of such sheriff-elect other than those required by constitution, article 6, section 1, but only prescribes an assurance for faithful discharge of duties of office. General assembly has authority to prescribe such assurances as general welfare demands, and therefore act is not unconstitutional: *Lee v. Dunn*, 73-595.

Former sheriff must exhibit to commissioners receipt of proper officers for all public funds which he received, or ought to have received, during his preceding official term, before he will be permitted to reënter upon a new term: *Colvard v. Comrs.*, 95-515—and the fact that he was able, ready and willing at time of tendering his bond to make settlement and payment of any liability on account of funds so received does not dispense with requirement, *Ibid.*

Sheriff-elect is not entitled to be inducted into office until he tenders three bonds required, notwithstanding fact that at beginning of his term there is a tax collector in that county: *Colvard v. Comrs.*, 95-515.

Mandamus lies on refusal to induct sheriff into office when bonds are sufficient and other requirements fulfilled: *Comrs. v. Sikes*, 72-34.

Ceremony of acknowledgment in open court and registration are not essential: *McLean v. Buchanan*, 53-444; *Jenkins v. Howell*, 65-61.

Clerk is proper depository of sheriff's bonds, and copy certified by him is competent evidence: *Erwin v. Lowrance*, 64-483.

3932. Duty of commissioners when bonds insufficient. It shall be the duty of the board of county commissioners whenever they shall be of opinion that the bonds of the sheriff of their county are insufficient, to notify the sheriff in writing to appear within ten days and give other and better sureties, or justify the sureties on his bonds; and in case such sheriff shall fail to appear on notice, or fail to give sufficient bonds, or to justify his bonds, it shall be the duty of the board to elect forthwith some suitable person in the county as sheriff for the unexpired term, who shall give proper and lawful bonds and be subject to like obligations and penalties.

Rev., s. 2813; Code, s. 2074; 1879, c. 109, s. 2.

See sections 326-328.

Under article 7, section 2, of constitution, county commissioners have power to summon sheriff to justify or renew official bond, whenever in fact, or in their opinion, sureties have

become or are liable to become insolvent. And it is not only the right, but duty, of commissioners to declare office of sheriff vacant, and appoint some one for unexpired term, whenever incumbent thereof is found to be, on a reelection, in arrears in his settlement of public taxes, or when he takes no notice whatever of summons by commissioners to appear before them on day certain and justify or renew official bond: *People v. Green*, 75-329.

Where statute requires bond from an officer for faithful discharge of duty, and new duty is attached to office by statute, such bond, given subsequently to latter statute, embraces new duty, and is a security for its performance, unless where, when new duty is attached, bond is required to be given specifically for its performance: *State v. Bradshaw*, 32-229.

3933. Liability of commissioners. If any board of county commissioners shall fail to comply in good faith with the provisions of this article, they shall be liable for all loss sustained in the collection of taxes, on motion to be made by the solicitor of the district.

Rev., s. 2814; Code, s. 2075; 1868-9, c. 245, s. 3.

Statute requiring sheriff to renew annually his official bonds and, in addition, to produce receipts for public moneys collected by him, and in default thereof it to be the duty of county commissioners to declare office vacant, are intended to effectuate same purpose, and, therefore, a member of the board of county commissioners is liable for only one penalty for failure to perform his duty in that connection: *Bray v. Barnard*, 109-44.

Commissioners being liable in damages if they knowingly accept insufficient bonds, approval of such bonds is within their discretion, and courts cannot compel them to approve and receive bonds which they find to be insolvent and insufficient: *Harrington v. King*, 117-117; *Burke v. Comrs.*, 148-46.

The failure of the commissioners to require the sheriff to produce receipts for taxes does not render them liable to the sureties on his bond: *Hudson v. McArthur*, 152-445.

3934. Liability of sureties. The sureties to a sheriff's bond shall be liable for all fines and amercements imposed on him, in the same manner as they are liable for other defaults in his official duty.

Rev., s. 2815; Code, s. 2076; R. C., c. 105, s. 14; 1829, c. 33.

See annotations under section 3930.

Records of proceedings against sheriff for an amercement imposed upon him are not evidence against sureties to prove his default; but they are admissible against them to prove fact of existence of amercement itself: *Governor v. Montford*, 23-155.

A judgment of an amercement against a sheriff is not conclusive against sureties on his bond. They may show that judgment was either fraudulently or improperly obtained against their principal: *State v. Woodside*, 29-296.

Officer cannot be heard to deny or contradict his return; as to him, it is conclusive, and he and the sureties on his bond are liable to plaintiff in execution for sums so endorsed: *Walters v. Moore*, 90-41.

Sureties to a sheriff's bond, with a condition in ordinary form, are liable for an amercement of sheriff for a default committed during his official term, though final judgment for amercement may not have been rendered until after expiration of it: *Governor v. Montford*, 23-155.

ART. 3. DUTIES OF SHERIFF

3935. To receipt for process. Every sheriff, coroner or constable shall, when requested, give his receipt for all original and mesne process placed in his hands for execution, to the party suing out the same, his agent or attorney; and such receipt shall be admissible as evidence of the facts therein stated, against such officer and his sureties, in any suit between the party taking the receipt and such officer and his sureties.

Rev., s. 2816; Code, s. 2081; R. C., c. 105, s. 18; 1848, c. 97.

For duty to indorse date of receiving process, see section 951.

3936. Execute process; penalty for false return. Every sheriff, by himself or his lawful deputies, shall execute and make due return of all writs and other process to him legally issued and directed, within his county or upon any river, bay or creek adjoining thereto, or in any other place where he may lawfully execute the same. He shall be subject to the penalty of forfeiting one hundred dollars for each neglect, where such process shall be delivered to him twenty days before the sitting of the court to which the same is returnable, to be paid to the party aggrieved by order of court, upon motion and proof of such delivery, unless the sheriff can show sufficient cause to the court at the next succeeding term after the order.

For every false return, the sheriff shall forfeit and pay five hundred dollars, one moiety thereof to the party aggrieved and the other to him that will sue for the same, and moreover be further liable to the action of the party aggrieved, for damages.

Every sheriff and his deputies, and every constable, shall execute all writs and other process to him legally issued and directed from a justice's court and make due return thereof, under penalty of forfeiting one hundred dollars for each neglect or refusal, where such process shall be delivered to him ten days before the return day thereof, to be paid to the party aggrieved by order of such court, upon motion and proof of such delivery, unless the sheriff or constable can show sufficient cause to the court at a day within three months from the date of the entry of the judgment nisi, of which the officer shall be duly notified.

Rev., s. 2817; Code, s. 2079; 1899, c. 25; R. C., c. 105, s. 17; 1777, c. 218, s. 5; 1821, c. 1110; 1874, c. 33.

See annotations under section 3930. For penalty for failure to enter date of receipt of process, see section 951.

For procedure in motion for judgment nisi hereunder, see annotations under section 3937.

SHERIFF'S AND CONSTABLE'S DUTY TO EXECUTE AND RETURN PROCESS. What constitutes service of process and whether upon a given state of facts service has been duly made, is a question for court; return of sheriff is *prima facie* service, subject to be overcome by proof of facts: *Williamson v. Cocks*, 124-585; see, also, section 921.

Where writ from court of competent jurisdiction is delivered to sheriff he is bound to execute it, according to exigency of writ, without inquiring into regularity of proceedings on which writ is grounded: *Cody v. Quinn*, 28-191—but he must determine, at his peril, whether he who issued it had jurisdiction of matter, *State v. McDonald*, 14-468.

Sheriff is not obliged to summon power of county upon mesne process: *Houser v. Hampton*, 29-333.

Constable cannot serve process addressed to sheriff, nor can sheriff serve process addressed to constable: *McGloughan v. Mitchell*, 126-681. Execution from justice's court must be directed to "any constable or other lawful officer of the county," and if it comes into hands of sheriff he must obey it: *Ibid.* Constable is bound to same degree of diligence in execution of process, where he takes it out himself, as where it is taken out by creditor or his agent and put into his hands: *Hearn v. Parker*, 52-150.

An officer, notified of necessity of prompt measures for execution of process placed in his hands for arrest of a party, owes the duty, quitting everything else, to make an effort to make the arrest: *Wasson v. Linster*, 83-575.

Officer cannot break open door of house and enter therein, without consent of owner, for purpose of executing civil process, except when acting under a requisition in claim and delivery where property has been concealed: *State v. Whitaker*, 107-802; *State v. Armfield*, 9-246.

Amercement of a sheriff is a penalty imposed by law for neglect to serve process, when no sufficient cause is shown for his failure to discharge an official duty: *Swain v. Phelps*, 125-43.

Sheriff, who fails to make a due return, is liable to fine for not making due return of process placed in his hands: *Buckley v. Hampton*, 23-322; see paragraph under this section headed "Due return," etc.

Sheriff must execute writs issued and directed to him from a superior or justice's court under penalty of \$100 for neglecting to make return: *McGloughan v. Mitchell*, 126-681; *Lindsay's Exrs. v. Armfield*, 10-548.

A sheriff is bound to return every process which comes to his hand, not void, with a statement of his action under it, and if he has not completely obeyed it, with a lawful reason for his omission: *Bryan v. Hubbs*, 69-423. Law requires that a writ shall be returned to court and not to clerk: *Hamlin v. March*, 31-35—yet clerk is officer of court to receive writ, and whatever may be raised upon it, as his office is place where records of court are kept and preserved, *Ibid.* If clerk will not receive return when rendered, officer to discharge his duty must return precept and money, if he has made it, to court. Court will, upon proper presentation, make such order as case may require, and, in a proper case, direct officer to receive process: *Hamlin v. March*, 31-35.

Until sheriff receives notice that execution has been superseded he is to obey it according to its tenor. On receiving such notice, it is his duty to stop proceeding and to return writ with a statement of his action under it and reason for his ceasing to act: *Bryan v. Hubbs*, 69-423. A sheriff is not bound to collect execution, and pay amount to plaintiff, before return day of writ: *Patten v. Mann*, 35-444.

Where sheriff returns that he has applied the proceeds of one execution in his hands in satisfaction of another he is liable to amercement: *Smith v. McMillan*, 84-593.

Sheriff may be amerced for not returning process at a term subsequent to that to which return should have been made: *Halcombe v. Rowland*, 30-240.

THE RETURN ITSELF; USED AS EVIDENCE. The term "return" means that process must be brought back and produced in court whence it issued, with such endorsements as law requires: *Watson v. Mitchell*, 108-364.

Recitals in a sheriff's return of process are prima facie evidence of truth of the statements therein: *Miller v. Powers*, 117-218; *Simpson v. Hiatt*, 35-470; *Patterson v. Britt*, 33-383; see section 921. But it cannot be impeached collaterally: *Comrs. v. Spencer*, 174-36; *Edwards v. Tipton*, 77-222—nor contradicted by a single witness, *Burlingham v. Canady*, 156-177. Return of a levy endorsed upon an execution is neither conclusive nor prima facie evidence that there was an actual seizure of the property: *Bland v. Whitfield*, 46-122. Officer cannot be heard to deny or contradict his return; as to him it is conclusive: *Walters v. Moore*, 90-41. If an interlineation appears on face of officer's return, and there is no evidence to show when it was done, court will presume that it was done before return was made, when officer had authority to alter his return: *Sloan v. Stanley*, 33-627. A certified copy of execution, when returned, is evidence: *Pigot v. Davis*, 10-25.

DUE RETURN. "Due return" of process means a proper return, made in proper time. What is a proper return, in form and substance, is a question of law, to be decided by the court; but whether it was made in proper time is a question of fact to be decided by jury: *Waugh v. Brittain*, 49-470. What constitutes service of process and whether upon a given state of facts service has been duly made, is a question for court; return of sheriff is prima facie service, subject to be overcome by proof of facts: *Williamson v. Cocke*, 124-585; see, also, section 921.

Sheriff to whom writ has been delivered, but who goes out of office before return day of writ, has no power to make return on it, and therefore is not liable to amercement for not doing so: *State v. Woodside*, 29-296; *McLin v. Hardie*, 25-407. A return of sheriff to a fi. fa., that "he had made a levy on personal property and taken a forthcoming bond, but had not sold it; that obligors did not deliver property on day, and that, after day, it was too late to make a sale," is not such a "due return" of process as will exempt sheriff from amercement: *Frost v. Rowland*, 27-385.

A sheriff is not bound, like a constable, to any particularity in his return of a levy on a fi. fa.: *Judge v. Houston*, 34-108. Upon a fi. fa. issuing with a venditioni exponas upon the return of a former fi. fa. levied on property which was not sold, it is sufficient to return "No property except what heretofore has been levied on and sent to your office": *McDowell v. Robison*, 48-535. Proof that a writ was directed by clerk to sheriff of another county, and mailed in due time to reach him in regular course of mail, was held to be sufficient evidence to authorize entering of judgment for an amercement, nisi, if there be no return of process: *State v. Latham*, 51-233. Where a sheriff returned an execution endorsed "Enjoined": Held, sufficient: *Patton v. Marr*, 44-377. Where levy upon land was made in December, 1867, and

upon a ven. ex. issued in 1869 sheriff returned "No goods, chattels, lands or tenements to be found in my county over the homestead": Held, that he was liable to be amerced for insufficient return: *McKeithan v. Terry*, 64-25. Return to execution, "Wholly unsatisfied," is not a sufficient return, as it does not conclusively appear thereby that no goods of testator were to be found. After an absolute judgment against executors, the proper return to an execution issuing thereon is "No goods or chattels of testator to be found": *McDowell v. Clark*, 68-117. Return by sheriff on a fieri facias that "he has levied on goods subject to older executions," without saying whether he had sold property seized or still had it in his hands, or if latter, why he had not sold, whether for want of bidders or of time, or other sufficient excuse, is not a "due return" because it does not answer the writ: *Buckley v. Hampton*, 23-322.

Sheriff is not liable to amercement for failure to have in court amount of execution issued upon a judgment for debt contracted prior to 1868, when judgment debtor has no property, real or personal, in excess of his exemptions under article 10 of the constitution: *Richardson v. Wicker*, 80-172.

Sheriff is allowed all the days of term to return an execution, unless he be ruled, upon motion and cause shown, to return it on some intermediate day: *Person v. Newsom*, 87-142; *Ledbetter v. Arledge*, 53-475. Where summons sent by mail did not reach officer until six days before sitting of court to which it was returnable, and he served it in two days thereafter: Held, not liable to amercement: *Yeargin v. Wood*, 84-326. Sheriff who fails to make return of process before adjournment of court to which returnable is liable to penalty prescribed by statute: *Boyd v. Teague*, 111-246; *Turner v. Page*, 111-291. Sheriff cannot be amerced if he return an execution within time prescribed by law, though he fail to return the money collected thereon into court or pay it to party or his attorney: *Cockerham v. Baker*, 52-288; *Davis v. Lancaster*, 5-255. Former sheriff has no authority to act under a writ directed to his successor, and therefore a writing purporting to be a return by former sheriff, made upon such writ, is not in law a return, and of course not a part of record in that suit: *Spruill v. Bateman*, 20-627.

EXECUTION FOR FAILURE TO MAKE "DUE RETURN." An execution to which a sheriff of a county is a party, either plaintiff or defendant, directed to such sheriff, is null and void; and sheriff is not bound to make any return thereon, and cannot be amerced for neglecting or refusing to do so: *Bowen v. Jones*, 35-25.

Where scire facias has been sued out upon judgment, and while it is in sheriff's hands parties agreed that collection of money should be suspended so as to enable them to make full settlement, yet sheriff is not thereby excused from returning process, but is liable to amercement if he fails to do so: *Morrow v. Allison*, 33-217. Death of clerk during term time is no excuse for not making return: *Hamlin v. March*, 31-35.

Where a sheriff mailed an execution in time, by ordinary course of mails, to have come to hands of clerk, to whom it was directed, before sitting of court to which it was returnable, it was held he was not guilty of a breach of duty: *Cockerham v. Baker*, 52-288. A sheriff indorsed upon execution "Debt and interest due to sheriff, costs paid into office," and upon another "Satisfied," without stating what disposition he had made of fund; returns are sufficient in law to relieve sheriff from amercement for not making "due return": *Person v. Newsom*, 87-142. What is excuse to sheriff for not making arrest is matter of law, after facts are ascertained: *Houser v. Hampton*, 29-333. Rescue is a good return in excuse, and sheriff may return that he did not take body because he was kept off by force of arms: *Ibid.*

For facts not sufficient to excuse, see *Bell v. Wycoff*, 131-245; *Turner v. Page*, 111-291.

FALSE RETURN. To render sheriff liable to amercement for false return it must appear that return is false in point of fact and not false merely as importing, from facts truly stated, a wrong legal conclusion: *Lemit v. Mooring*, 30-312; see *Albright v. Tapscott*, 53-473; *Harrell v. Warren*, 100-259.

When sheriff returns that a writ came to his hands "too late to execute," writ having been delivered to him more than ten but less than twenty days before term of court, he is liable to penalty for making a false return: *Lemit v. Freeman*, 29-317—but not liable when only five days intervened, *Hassell v. Latham*, 52-465.

Where defendant in writ is openly at large in county, "non est inventus" is a false return; and if he cannot be taken elsewhere, statute requires that sheriff shall go to his place of residence before he makes that return: *Houser v. Hampton*, 29-333. Return of "not to be found" on a capias is not true, because of defendant's being out of state at time return is made, if officer had an opportunity of making arrest previously while process was in his hands:

Martin v. Martin, 50-349. A sheriff, having in hand an order of arrest against B, told B that he "had better come and go with him to Jackson and fix the matter there"; B refused to go with him, and sheriff left without taking any further action; what passed did not constitute an arrest of B, and sheriff was not liable for a false return, in that he returned on the order of arrest "Not served": *Lawrence v. Buxton*, 102-129.

A sheriff who returns on an execution that he has collected and paid over amount thereof, when in fact money was not collected until some ten days thereafter, is liable for penalty of \$500 for making false return: *Peebles v. Newsom*, 74-473. Where sheriff returns upon a *fi. fa.* two credits for money received thereon at different times, and suppressing a third credit, returns "Not satisfied," it was held that such return was false, and subjected him to penalty of \$500: *Martin v. Martin*, 50-346.

Failure to mention payment of \$2.50 made on execution in his return made return defective, but such an omission does not render sheriff liable to penalty imposed for false return: *Harrell v. Warren*, 100-259. Mere general report that debtor has no property will not justify a return of *nulla bona* if debtor in fact has property subject to be levied on: *Parks v. Alexander*, 29-412.

EXCUSE FOR FALSE RETURN. Ignorance of sheriff's deputy, who makes a false return, does not excuse sheriff from penalty: *Houser v. Hampton*, 29-333.

A sheriff who endorses upon execution an application of proceeds of sale different from actual application is not excused from penalty for false return, although actual application was proper and false entry made by mistake or inadvertence: *Finley v. Hayes*, 81-368. Mistake of fact as to date of sale endorsed upon execution by sheriff will not excuse or free him from liability for penalty for false return: *Finley v. Hayes*, 81-368.

If a sheriff, who has *mesne process*, finds defendant and really endeavors to arrest him, and is prevented by any sufficient cause, or if, after arrest, defendant is rescued, he should return facts in excuse for not taking body, and not return generally *non est inventus*, contrary to fact: *Houser v. Hampton*, 29-333.

DEPUTY SHERIFF'S FAILURE TO EXECUTE AND RETURN PROPERLY. Ignorance of sheriff's deputy, who makes a false return, does not excuse sheriff from penalty: *Houser v. Hampton*, 29-333.

Sheriff cannot be made responsible for acts of constable, who sometimes acted as his deputy, but never without a special deputation, unless it can be shown that he was expressly authorized: *Patterson v. Britt*, 33-383—nor when constable returns the attachment levied by him as constable, although by an order of court the return is permitted to be amended by stating the levy to have been made by sheriff by constable as deputy, sheriff's office having then expired and order of amendment having been appealed from, *Ibid.*

Sheriff may recover on deputy's bond for loss suffered by reason of false return made by deputy; but not if the sheriff ratified the act or was himself the cause of the wrongful act: *Wasson v. Linster*, 83-575.

AMENDMENT OF RETURN. Court has no power to allow sheriff's return of a levy on land to be amended by inserting a particular description of the premises required by statute, the original return being defective, and so of the like cases: *Phillippe v. Higdon*, 44-380.

Power of judge to allow amendments in process, etc., is broad, and is to be exercised, in meritorious cases, in his sound discretion: *Swain v. Burden*, 124-16. Sheriff may, on motion, be allowed to amend his return of process so as to make it speak the truth: *Swain v. Burden*, 124-16; *Swain v. Phelps*, 125-43; *Stealman v. Greenwood*, 113-355; *Williams v. Weaver*, 101-1—and this is so even after suit brought for penalty imposed for false return, and such amendment defeats plaintiff's right to recover such penalty: *Stealman v. Greenwood*, 113-355. An officer has not, "as a matter of law," right to amend return in order to correct error, but it is within discretion of presiding judge to permit such amendment in meritorious cases: *Campbell v. Smith*, 115-498; *Williams v. Weaver*, 101-1.

If return be erroneous, officer may have same corrected upon direct application to court for that purpose: *Walters v. Moore*, 90-41. When, in action against sheriff for false return, court permits return to be amended, plaintiff should note his exception, and, unless amended return is admitted to be true, proceed to try the issue. An appeal before final judgment on such admission, or a verdict, is premature and will be dismissed: *Mfg. Co. v. Buxton*, 105-74.

Where summons has been properly served, return may be amended to show that deputy officer making service had been duly appointed by sheriff; and defendant cannot be prejudiced by

such amendment: *Manning v. R. R.*, 122-824. Sheriff should not be permitted to amend return to the injury of strangers to record, and this especially after lapse of sixteen years: *Davidson v. Cowan*, 12-304; see *Williams v. Sharpe*, 70-582; *Bank v. Williamson*, 24-147.

Where summons was properly served and sheriff's return was unsigned, though indorsed in proper form, judge at trial did not exceed his powers in permitting sheriff to sign return nunc pro tunc: *Luttrell v. Martin*, 112-593; *Grady v. R. R.*, 116-952.

LIABILITY OF SHERIFF. The sheriff is liable for failure to return process or for a false return: *Comrs. v. Spencer*, 174-36.

Formerly the penalty of \$100 imposed for false return to criminal process was restricted to constables. Under section 4396 it is extended to sheriffs and other officers, state or municipal, and was held to apply only to criminal process: *Harrell v. Warren*, 100-259—but it was extended to apply to civil cases in *State v. Berry*, 169-371.

Penalty of \$500 imposed for false return under this section is restricted to sheriffs, and false returns by them made to civil process: *Harrell v. Warren*, 100-259; *Martin v. Martin*, 50-349. Action for penalty brought in name of person suing, without alleging that any one else is interested: *Ibid.*

Where sheriff acts under execution regular in form and issued by court of competent jurisdiction he incurs no liability to judgment debtor for seizure and sale of his property, although judgment on which execution issued may have been invalid: *O'Briant v. Wilkerson*, 122-304; *Farley v. Lea*, 20-310; but at his peril, he must see that court had jurisdiction of the matter: *State v. McDonald*, 14-468.

A delay to execute a *fi. fa.* for eight days, where officer lived within ten miles of debtor, was such a want of diligence as would subject him in damages to creditor: *Hearn v. Parker*, 52-150. If sheriff forbears, at request of plaintiff, to collect money on an execution, he is not responsible therefor; but if he forbears of his own accord, he will be liable for the damages plaintiff may sustain thereby: *McRae v. Evans*, 18-243.

Sheriff having an execution in his hands is not indictable for levying upon property in the possession of and belonging to a son of the defendant in the execution, when he acts bona fide under a bond of indemnity. He is liable civilly, but not criminally: *State v. Tatom*, 69-35; see *Stein v. Cozart*, 122-280.

Reputation of insolvency of defendant in execution will not excuse officer from liability for neglect in not endeavoring to ascertain whether there is property subject to execution: *State v. Edwards*, 32-342. A sheriff has no right to return "nulla bona" on an execution without making an effort to find property at residence of defendant in execution, or making demand of payment or inquiry for property: *Parks v. Alexander*, 29-412.

It is no answer for sheriff to say, when sued for negligence in not executing process against debtor, that debtor, even after being imprisoned under a *ca. sa.*, might pay, or secure to be paid by assignment, other bona fide debts to disappointment of judgment creditor: *Sherrill v. Shuford*, 32-200—true inquiry being, Has the sheriff, by his negligence, deprived plaintiff of any legal means of securing payment of his debt? If he has, and debtor had property, which might by due process have been subject to it, sheriff shall be liable to amount of debt which might have been thus secured, *Ibid.*

Where execution is about to be levied, debtor, if he has personal property, must show it, and if he does not, officer commits no wrong by levying on land in first instance: *Sloan v. Stanley*, 33-627—if it does not appear that the officer knew of the existence of the personal property he is justifiable in levying on real estate: *Ibid.*

When owner of land does not petition for homestead, it is duty of sheriff or other officer who has execution to have it laid off at expense of creditor, and if he refuse to pay or tender fees of officer, he will be justified in refusing to execute process: *Lute v. Reilly*, 65-20; *Taylor v. Rhyne*, 65-530.

Where sheriff had levied on personal property alleged to belong to judgment debtor and, upon its being claimed by third person, released levy and took bond to indemnify him in case he should be amerced, such bond of indemnity is void: *Griffin v. Hasty*, 94-438.

It is not necessary, in action against sheriff for misconduct of one who acted as his deputy, to show written deputation; it being sufficient to show that he acted generally as deputy, without going back to his appointment: *State v. Allen*, 27-36. Admissions or declarations of sheriff's deputy are evidence against sheriff when they accompany official acts of deputy or tend to charge him, he being real party in interest, for he is agent of sheriff: *State v. Allen*, 27-36.

Measure of damages against a collecting agent is amount which he collected or which he might have collected and did not, and same is lost by his negligence. For simply failing to return an insolvent debt the damage is nominal: *Brumble v. Brown*, 73-476.

The law charges deputy with no duty to creditor, and if he makes default in serving an execution he cannot be sued for it, but his principal only. In such a case deputy is not a bailee as to possession, but is merely a servant of his superior, and holds for him, and therefore has no action himself: *Hampton v. Brown*, 35-18.

When sureties of sheriff have had to pay money for default of deputy in not taking bail bond from defendant in writ, they have right to be substituted to rights of sheriff against deputy: *Blalock v. Peake*, 56-323.

Where money collected by deputy sheriff by virtue of office and not turned over, sheriff liable in damages: *Lyle v. Wilson*, 26-226.

Sheriff is liable where he or his deputy seized the property of A under execution against B: *Satterwhite v. Carson*, 25-549; *Burgin v. Burgin*, 23-453—or where he seized and sold property of a third person in attachment proceedings: *Stein v. Cozart*, 122-280.

3937. Sufficient notice in case of amercement. In all cases where any sheriff or other officer shall be amerced for failure to make due return of any execution or other process placed in his hands, or for any default whatsoever in office, and judgment nisi or otherwise for the penalty or forfeiture in such case made and provided shall be entered, it shall be sufficient to give such sheriff notice, according to law, under the hand of the clerk and seal of the court where such judgment may be entered, of a motion for a judgment absolute, or for execution, as the case may be; and no other notice, summons or suit shall be necessary to enforce the same; and such proceedings shall be deemed and held in aid of a suit or other proceedings already instituted in court.

Rev., s. 2818; Code, s. 446; 1871-2, c. 74, s. 4.

See section 3936. Where a prima facie case is made, either upon affidavit or other sufficient proof, a rule nisi is granted as of course: *Ex parte Schenck*, 63-601. Where judgment nisi for \$100 is rendered against sheriff for failure to make due return of process, and no sufficient reason is shown for failure, judgment should be made absolute: *Graham v. Sturgill*, 123-384.

On trial of an action for penalty for false return on execution when defendant sheriff offered to introduce in evidence true return of proceeds of sale endorsed upon certain other executions, evidence was immaterial and properly excluded: *Finley v. Hayes*, 81-368.

Sheriff may be amerced at a subsequent term to that at which the process was returnable, for not having made his return at a previous term: *Hyatt v. Allison*, 48-533.

Amercement, and not a civil action, is remedy given against a sheriff for not making "due and proper" return of process: *Mfg. Co. v. Buxton*, 105-74.

Courts have no dispensing power to relieve from penalty prescribed by law: *Swain v. Phelps*, 125-43.

A justice of the peace has no power to amerce sheriff of county other than that in which he holds his court for failure to make due return to process issued by such justice; he can only amerce sheriff of his county when he fails to perform duties: *Boggs v. Davis*, 82-27.

The return or certificate of a ministerial officer, as to what he has done out of court, is only to be taken as prima facie true, and is not conclusive: *Smith v. Low*, 27-197.

Action against sheriff of county other than that from which process issued, for making false return, is properly brought in courts of county to which that process returnable: *Watson v. Mitchell*, 108-364.

Any person may sue for penalty imposed upon sheriff for a false return, and he need not mention in his complaint the other party to whom the statute gives one-half of the recovery: *Harrell v. Warren*, 100-259.

In a proceeding to enforce statutory penalty against sheriff for failure to make due return of process, it is not error to set aside judgment absolute where it appeared that he had no notice of rule upon him to show cause: *Yeargin v. Wood*, 84-326.

On motion to set aside judgment against defendant sheriff for alleged failure to make due return of process, facts of this case entitle him to relief under section 600: *Francks v. Sutton*, 86-78.

Duties and liabilities of sheriff in relation to execution of process are nearly same under C. C. P. as under old system, but procedure for enforcing judgment nisi against him is changed from a scire facias to a civil action, and summons must be in same court as judgment, and must be returned to regular term thereof: *Jones v. Gupton*, 65-48.

3938. Execute summons, order or judgment. Whenever the sheriff may be required to serve or execute any summons, order or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty; and if the sheriff be a party, the coroner shall be bound to perform the service, as he is now bound to execute process where the sheriff is a party; and this chapter relating to sheriffs shall apply to coroners when the sheriff is a party. Sheriffs and coroners may return process by mail. Their liabilities in respect to the execution of process shall be as prescribed by law.

Rev., s. 2819; Code, s. 598; C. C. P., s. 354.

For duties with reference to service of process, and penalties for failure to make due return, etc., see section 3936.

In action wherein sheriff is party defendant, it is proper that summons issued against a co-defendant should be addressed to and served by coroner: *Battle v. Baird*, 118-854.

County commissioners may declare the office vacant, upon insanity of sheriff, but their failure to do so merely authorizes coroner to perform duties of sheriff proper, but does not cast upon him right to collect taxes: *Somers v. Comrs.*, 123-582.

A city or town constable has no authority to serve beyond limits of his own town process directed to "constable or other lawful officer of county"; to authorize him to make such service, process must be directed to him, not necessarily in his individual name as such officer, but in name of office he holds: *Davis v. Sanderlin*, 119-84; *Carson v. Woodrow*, 160-144.

If court issuing process has a general jurisdiction to issue such process, and the want of jurisdiction does not appear upon the face of the paper, a sheriff and his assistants may justify under it: *State v. Ferguson*, 67-219.

Constable cannot serve process addressed to sheriff, nor can sheriff serve process addressed to constable: *McGloughan v. Mitchell*, 126-681.

As to coroner's acting as sheriff, see section 1021.

3939. Liability of outgoing sheriff for unexecuted process. Any sheriff who shall have received a precept, and shall go out of office before the return day thereof, without having executed the same, shall forfeit and pay to the party at whose instance it was issued the sum of one hundred dollars, if such precept shall have remained in his hands for such length of time wherein it might have been well executed by him; unless the same shall have been thereafter executed by the successor of such sheriff and returned at the day and place commanded therein; or unless it shall have been delivered over to the succeeding sheriff time enough to have allowed of its being executed by him; and the penalty aforesaid shall be recoverable by notice against such outgoing sheriff and his sureties.

Rev., s. 2820; Code, s. 2088; R. C., c. 105, s. 25.

It is duty of sheriff going out of office to deliver all process remaining in his hands to his successor: *State v. Woodside*, 29-296.

3940. Payment of money collected on execution. In all cases where a sheriff has collected money upon an execution placed in his hands, if there be no bona fide contest over the application thereof, he shall immediately pay the same to the plaintiff, or into the office of the clerk of the court from which the execution issued, and upon his failure to make such payment upon demand, he shall be liable to a penalty of one hundred dollars, to be collected as other penalties.

Rev., s. 2821; Code, s. 2080.

3941. Deposit county tax money with treasurer. Every sheriff shall deposit the county and other local taxes, by him collected, with the county treasurer, if there be a county treasurer, as often as he shall collect or have in his possession at any one time of such county or local taxes a sum equal to five hundred dollars. Rev., s. 298; Code, s. 2073.

3942. Publish list of delinquent taxpayers. Whenever any sheriff or tax collector shall be credited on settlement with any tax or taxes by him returned as insolvent, dead or removed, he shall forthwith make publication at the courthouse door, and at least one public place in each and every township in his county, of a complete list of the names of such insolvent, dead or removed delinquents, with the amount of the tax due from each, and the sum total so credited. Such list, by order of the board of commissioners, may also be published in any newspaper printed in the county; in which case, the expense of the advertisement, for such time as may be directed, shall be paid by the county. Any sheriff or tax collector failing to comply with the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars.

Rev., ss. 2826, 3587; Code, s. 2092; 1876-7. c. 78, ss. 1, 2, 3.
Section cited in *Williamson v. Jones*, 127-180.

3943. Liability for escape under civil process. When any sheriff shall take or receive and have in keeping the body of any debtor in execution, or upon attachment, for not performing a judgment for the payment of any sum of money, and shall willfully or negligently suffer such debtor to escape, the person suing out such execution or attachment, his executors or administrators, shall have and maintain an action for the debt against such sheriff and the sureties on his official bond, and in case of his death, against his executors or administrators, for the recovery of all such sums of money as are mentioned in the execution or attachment, and damages for detaining the same.

Rev., s. 2823; Code, s. 2083; R. C., c. 105, s. 20; 13 Edw. I, c. 11; 1777, c. 118, ss. 10, 11.

AS TO WHAT IS AN ESCAPE. There are only two kinds of escape known to our law of a prisoner confined for debt, one voluntary and the other negligent, except where prisoner has escaped by act of God or of public enemy: *Adams v. Turrentine*, 30-147.

It is not an escape in a sheriff to permit a debtor committed under a ca. sa. to remain in prison with the door of the prison open, unless such debtor passes out of prison: *Currie v. Worthy*, 47-104. Sheriff, having permitted one arrested under mesne process in a civil action to get into an adjoining room, from which he escaped, is guilty of an escape: *Winborne v. Mitchell*, 111-13.

A paper-writing, upon which a constable arrests a debtor and imprisons him, not running in name of state, nor being directed to any ministerial officer, nor purporting to be signed by a justice of the peace, cannot be deemed a judicial process; and sheriff is not guilty of an escape in permitting debtor thus imprisoned to go at large: *Ellis v. Gee*, 5-445.

WHEN SHERIFF LIABLE AND WHEN NOT LIABLE. Where defendant has been arrested upon mesne process and gives bail, and, after judgment, bail surrenders him to sheriff out of term time, no execution having been issued on judgment nor any committitur prayed by plaintiff, if sheriff releases him upon bond to appear at court and take benefit of insolvent law, sheriff is liable for an escape: *State v. Ellison*, 31-261.

Only difference as to liability of officer, between the two kinds of escape, is that in case of voluntary escape he is liable absolutely; in the case of negligent escape, he has a right to retake prisoner, and if he does retake him upon fresh pursuit, he is not liable to an action of debt brought after such recapture, and when he has prisoner in custody: *Adams v. Turrentine*, 30-147.

Nothing can excuse sheriff for escape of a debtor committed to his custody but the act of God or the public enemy: *Rainey v. Dunning*, 6-386; *Mabry v. Turrentine*, 30-201; *Adams v. Turrentine*, 30-147.

A sheriff is not liable as special bail, after he has committed a defendant on mesne process, though such defendant be permitted by him to go at large: *Buffalow v. Hussey*, 44-237.

Where scire facias issued against sheriff to charge him as special bail for person sued at the instance of plaintiff, and who had been, for want of bail, committed to jail in the sheriff's county, and afterwards discharged as an insolvent by two magistrates, sheriff was not liable as special bail: *Buffalow v. Hussey*, 44-237.

The words "executed P. R. T., D. Sheriff" endorsed on a capias which, duly issued, came to hands of sheriff, are such legal return as to make sheriff liable as special bail, on failure of him or his deputy to take bail bond: *Washington v. Vinson*, 49-380.

To render sheriff liable for escape of insolvent surrendered in court, it is necessary to show that such insolvent was committed to sheriff's custody by order of court. A mere prayer to that effect will not be sufficient: *Siler v. McKee*, 47-379.

Where one has been arrested under a capias ad respondendum, escaped from sheriff, and latter by his return negatived any idea that he intended to become special bail for the party escaped, sheriff and his sureties were liable upon his official bond for such escape, and measure of damages was not the debt and interest, but such actual damages as plaintiff had sustained: *Lusk v. Falls*, 63-188.

If sheriff fails to take bail, plaintiff need not file exceptions nor give notice to fix him as bail: *Adams v. Jones*, 60-198—and sheriff is said to fail to take bail when bond is so defective and imperfect as to be adjudged not to be such, *Ibid*.

After surrender, if creditor, upon reasonable notice, will not charge party in execution, either a habeas corpus or a supersedeas would be issued by court: *State v. Ellison*, 31-261.

In action of debt on sheriff's bond for escape of debtor imprisoned under a ca. sa., jury are not bound to give whole sum due from such debtor, but should give damages really sustained by escape: *Willey v. Eure*, 53-320; *Robertson v. Matlock*, 8-425.

Where sheriff arrested a man on a ca. sa. and committed him to jail, in custody of jailer, and prisoner escaped: Held that, without bond of indemnity, jailer was only bound to sheriff for want of fidelity or due care in discharge of duty: *Turrentine v. Faucett*, 33-652.

In an action for escape, if defendant wishes to except as to venue upon ground of its being a penal action, he must make objection by plea in abatement: *Whicker v. Roberts*, 32-485.

Meaning of term "negligent escape" in our statute is same that was given to that term at common law: *Adams v. Turrentine*, 30-147. Insolvency of principal is no defense to action against bail; nor can sheriff, when sued as bail, show in mitigation of damages such insolvency: *Winborne v. Mitchell*, 111-13. Sheriff must be proceeded against by sci. fa., as bail for not taking bail upon a capias in equity; and an action on the case will not lie against him for such failure or neglect: *Troy v. Williamson*, 18-252.

Plaintiff is entitled to interest on a recovery in debt for an escape against the sheriff in the same way he would be entitled against the debtor: *Currie v. Worthy*, 48-315.

Where sheriff executes a writ and permits defendant to go at large under promise to give bail to deputy, latter is not liable to sheriff for escape: *Dowell v. Vannoy*, 14-23.

When judgment is obtained against two or more, and no bail bond has been taken from either, and sheriff, who has thus become bail for all, after rendition of judgment and issuing of ca. sa., is directed by plaintiff not to serve ca. sa. on one of defendants, he is still liable as bail for not surrendering other defendant: *Jackson v. Hampton*, 32-579.

A writ commanding to "take the body and safely keep, etc., until the sheriff makes a sum of money, and to have that money in court at return day," is not a ca. sa. and not sufficient to charge bail: *Finley v. Smith*, 15-95. Without a proper ca. sa. a precept will not authorize detention of defendant nor make sheriff liable for his escape: *Walker v. Vick*, 19-99.

In all cases of escape, after debtor is committed to jail, sheriff is liable, however innocent he may be, unless escape has been occasioned by act of God or public enemy: *Rainey v. Dunning*, 6-386.

PURSUIT AND RECAPTURE AS A DEFENSE. Where prisoner, confined for debt, escapes, officer, in an action against him for escape, can only excuse himself by showing that he has not only made fresh pursuit, but also that he has actually recaptured prisoner before suit brought. Without this, fresh pursuit will not excuse officer, even though prisoner die

before officer has it in his power by due diligence to recapture him: *Whicker v. Roberts*, 32-485. In this state, defense of fresh pursuit and recapture need not be by plea, but may be made on the general issue: *Ibid*.

3944. Custody of jail. The sheriff shall have the care and custody of the jail in his county; and shall be, or appoint, the keeper thereof.

Rev., s. 2824; Code, s. 2085; R. C., c. 105, s. 22.

A sheriff has a right to take bond from jailer to indemnify him for all losses to which he may be subjected by escape of prisoner while in custody of jailer: *Turrentine v. Faucett*, 33-652.

3945. Prevent entering jail for lynching; county liable. When the sheriff of any county has good reason to believe that the jail of his county is in danger of being broken or entered for the purpose of killing or injuring a prisoner placed by the law in his custody, it shall be his duty at once to call on the commissioners of the county, or some one of them, for a sufficient guard for the jail, and in such case, if the commissioner or commissioners fail to authorize the employment of necessary guards to protect the jail, and by reason of such failure the jail is entered and a prisoner killed, the county wherein whose jail the prisoner is confined shall be responsible in damages, to be recovered by the personal representatives of the prisoner thus killed, by action begun and prosecuted before the superior court of any county in this state.

Rev., s. 2825; 1893, c. 461, s. 7.

3946. Not to farm office. No sheriff shall let to farm in any manner, his county, or any part of it, under pain of forfeiting five hundred dollars, one-half to the use of the county and the other half to the person suing for the same.

Rev., s. 2828; Code, s. 2084; R. C., c. 105, s. 21; 23 Hen. VI, c. 10.

This section prohibits sheriff from letting to farm, in any manner, his county, or any part of it: *Cansler v. Penland*, 125-578. Plaintiff, appointed tax collector for county, turned over to defendant entire lists, absolutely, to collect and account for, and reserving no control of tax lists; this constituted a clear case of farming out public office prohibited by statute: *Ibid*.

An agreement to compensate or to pay expenses for attempting to secure appointment to office is void: *Basket v. Moss*, 115-448. Traffic in public offices is against good morals and contrary to public policy: *Ibid*.

3947. Obligation taken by sheriff, payable to himself. The sheriff or his deputy shall take no obligation of or from any person in his custody for or concerning any matter or thing relating to his office otherwise payable than to himself as sheriff and dischargeable upon the prisoner's appearance and rendering himself at the day and place required in the writ (whereupon he was or shall be taken or arrested), and his sureties discharging themselves therefrom as special bail of such prisoner or such person keeping within the limits and rules of any prison; and every other obligation taken by any sheriff in any other manner or form, by color of his office, shall be void, except in any special case and other obligation shall be, by law, particularly and expressly directed; and no sheriff shall demand, exact, take or receive any greater fee or reward whatsoever, nor shall have any allowance, reward or satisfaction from the public, for any service by him done, other than such sum as the court shall allow for ex officio services and the allowance given and provided by law.

Rev., s. 2829; Code, s. 2082; R. C., c. 105, s. 19; 1777, c. 118, s. 8.

Powers and duties of deputy sheriff: Lanier v. Greenville, 174-311.
Action against, barred by statute of limitations, see s. 439.
When judge absent, adjourn court from day to day, see s. 1448.
Laying off homestead, see s. 730.
Bail liable to, when, see Civil Procedure.
Bond when acting as county treasurer, see s. 1392.
Duty in claim and delivery, see s. 835 et seq.
Duty in attachment, see s. 805 et seq.
Day of receipt of process endorsed thereon, see ss. 951, 4514.
Deeds made by whom after expiration of office or death of sheriff, see ss. 995, 8030.
To execute writs for board of internal improvements, see s. 6551.
Failure to return process a misdemeanor, s. 4396.
Penalty for failure to return writ of habeas corpus, see ss. 2218, 3582, 2220, 2229.
Releasing prisoner without bail, s. 4579.
Sales under execution, s. 687 et seq.
Tax collector for county, ss. 1322, 7974.

CHAPTER 73

STATUTORY CONSTRUCTION

- 3948. Repeal of statute not to affect actions.
- 3949. Rules for construction of statutes.
- 3950. Construction of amended statute.

3948. Repeal of statute not to affect actions. The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute.

Rev., s. 2830; Code, s. 3764; R. C., c. 108, s. 1; 1830, c. 4; 1879, c. 163; 1881, c. 48.

When a statute creates a cause of action and is repealed before action is brought, the cause of action is destroyed: *Grocery Co. v. R. R.*, 136-396. When the action is pending at the time of such repeal, the right of action continues: *Smith v. Ice Co.*, 159-151; *Grocery Co. v. R. R.*, 136-396; *Wilmington v. Stolter*, 122-395; *Wilmington v. Cronly*, 122-388; *Epps v. Smith*, 121-157; *State v. Williams*, 97-455. By express enactment the cause of action may be taken away: *R. R. v. Oates*, 164-167; *Bray v. Williams*, 137-387; *Grocery Co. v. R. R.*, 136-396; *Dyer v. Ellington*, 126-941. When a judgment has been obtained before the repeal, it is a vested right and will not be affected: *Grocery Co. v. R. R.*, 136-396; *Dunham v. Anders*, 128-207.

When the cause of action is founded upon the common law, the repeal of a statute affecting it will not destroy the right: *Williams v. R. R.*, 153-360.

When county officers had been ordered by the court to build a certain fence, and while appeal was pending the act authorizing the building was repealed, the action abated: *Brinson v. Duplin*, 173-137.

When a part of two counties had been included in a graded school district and the act including a part of one county was repealed, it would not prevent the collection of taxes due at the time: *Mann v. Allen*, 171-219; *Marsh v. Early*, 169-465.

When a penal statute upon which an indictment is founded is repealed pending the indictment, defendant is entitled to an acquittal: *State v. Williams*, 97-455; *State v. Long*, 78-571; *State v. Wise*, 66-120, 67-281; *State v. Nutt*, 61-20; *State v. Cress*, 49-421—and judgment may even be arrested after conviction: *State v. Perkins*, 141-797; *State v. Cress*, 49-421; *State v. Williams*, 97-455; *State v. Long*, 78-571.

When a criminal statute, or any part of it essential to sustain an indictment, is repealed or stricken out, offense committed under older statute cannot be punished unless contrary intent appear from express saving clause or by necessary implication: *State v. Massey*, 103-356.

Statutes which change mode of procedure may apply to suits pending: *Sumner v. Miller*, 64-688.

AS TO CONSTRUING RETROACTIVELY. A statute is to be construed prospectively, unless the contrary intention be clearly expressed therein: *Waddill v. Masten*, 172-582; *State v. Haynie*, 169-277; *Elizabeth City v. Comrs.*, 146-539; *Woodley v. Bond*, 66-396; *State v. Littlefield*, 93-614; *Greer v. Asheville*, 114-678. Presumption is against retroactive operation: *Lowe v. Harris*, 112-472; *Morrison v. McDonald*, 113-327.

A statute which repeals a statute containing penalty against usury does not have the retroactive effect to make the contract for usury lawful: *Hughes v. Boone*, 102-137. Act changing law of evidence will not be construed retroactive so as to injure existing rights: *Lowe v. Harris*, 112-472. Time of statute of limitations cannot be changed as to existing suits: *Nichols v. R. R.*, 120-495. Increase of punishment cannot be retroactive: *State v. Ramsour*, 113-642.

Where, pending an appeal, subject-matter of the action is destroyed or a statute giving the cause of action is repealed, this court will not go into consideration of the abstract question as to which party ought to have prevailed, in order to adjudicate costs, but judgment below as to costs will be allowed to stand: *Wikel v. Comrs.*, 120-451; *Reid v. R. R.*, 162-355.

A retrospective law taxing business of citizens during whole of current year in which such law is passed is not constitutional: *State v. Bell*, 61-76.

3949. Rules for construction of statutes. In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the same statute, that is to say:

Rev. s. 2831; R. C., c. 108, s. 2.

LEGISLATIVE INTENT. The general purpose of construction is to arrive at the legislative intent, and when that is clear the court can only enforce it: *State v. Carpenter*, 173-767; *Abernethy v. Comrs.*, 169-631; *Roberts v. Mfg. Co.*, 169-27; *Comrs. v. Henderson*, 163-114; *School Comrs. v. Aldermen*, 158-191; *Kearney v. Vann*, 154-311; *Spencer v. R. R.*, 137-107; *Comrs. v. Packing Co.*, 135-62; *Randall v. R. R.*, 107-748; *State v. Eaves*, 106-752. To ascertain the intent, effect must be given to all clauses and provisions: *Nance v. R. R.*, 149-366; *McLeod v. Comrs.*, 148-77; *Grocery Co. v. Bag Co.*, 142-174; *Comrs. v. Stedman*, 141-448; *Fortune v. Comrs.*, 140-322; *Bd. of Ed. v. Comrs.*, 137-310.

Words are to be taken in their ordinary meaning, and technical words in their usual technical sense: *Abernethy v. Comrs.*, 169-631; *Asbury v. Albemarle*, 162-247; *Rives v. Guthrie*, 46-84; *Adams v. Turrentine*, 30-147; *State v. Gupton*, 30-271; *Kitchen v. Tyson*, 7-314; *State v. Jernigan*, 7-12—and words which have been construed in a particular sense will receive the same construction, *Kirby v. Boyette*, 118-244; *Bridgers v. Taylor*, 102-86.

The court cannot supply words to make the statute operative, but clerical omissions may be supplied: *Fortune v. Comrs.*, 140-322; *State v. Monds*, 130-697; *Russell v. Leatherwood*, 114-683. A mistake in a name or description will not defeat the statute if there is enough left to show the meaning: *Toomey v. Lumber Co.*, 171-178; *Fortune v. Comrs.*, 140-322. In the use of specific words and general terms the former will restrict the meaning of the latter: *State v. Craig*, 176-740.

In ascertaining the meaning, consideration should be given to the law as it existed before, to general public policy of the state, the purpose of the act, and the effect of a particular construction: *Kendall v. Stafford*, 178-461; *Bank v. Loven*, 172-666; *Seward v. R. R.*, 159-241.

In determining whether a statute is mandatory or directory, no definite rule can be applied, but the legislative intent must govern, to be ascertained from the wording, the nature, purpose and consequences: *Spruill v. Davenport*, 178-364.

A change of construction by the court will not affect vested rights: *Fowle v. Ham*, 176-12; *Ely v. Norman*, 175-299. The court will not attribute to the legislature the intention of requiring the doing of an impossible thing: *Garrison v. R. R.*, 150-575.

If a statute is too vague to convey any definite meaning it is void: *State v. Partlow*, 91-550—and no extrinsic evidence is admissible to show the legislative intent, *Goins v. Training School*, 169-736; *Abernethy v. Comrs.*, 169-631; *State v. R. R.*, 122-1052; *State v. Partlow*, 91-550.

Rule, in the construction of statutes, that a proviso is to be considered as a limitation upon the general words preceding, or an exception therefrom, is not absolute, and the meaning of proviso must generally be ascertained from its language: *Bank v. Mfg. Co.*, 96-298. If the proviso is in conflict with the purview of the statute, the proviso will control: *Supply Co. v. Eastern Star Home*, 163-514.

The maxim, "the reason ceasing, the law ceases also," has no application to the construction of statutes: *State v. Eaves*, 106-752.

When act declaratory of intent of previous act will not control court in construction: *Rodwell v. Harrison*, 132-45.

RELATED STATUTES. All statutes about the same subject-matter are in *pari materia* and should be construed together: *Allen v. Reidsville*, 178-513; *Latham v. Latham*, 178-12; *Bank v. Loven*, 172-666; *Mfg. Co. v. Andrews*, 165-285; *Abbott v. Beddingfield*, 125-256; *State v. Melton*, 46-49; *State v. Grove*, 1-63—and this applies whether the statutes were enacted at the same session or not, *Wilson v. Jordan*, 124-683.

Two statutes apparently in conflict must be reconciled, if possible, and if not, that meaning should be adopted which appears to have been the legislative intention: *Bd. of Agriculture v. Drainage Dist.*, 177-222; *Bramham v. Durham*, 171-196; *Power Co. v. Power Co.*, 171-248; *State v. Johnson*, 170-685; *Board v. Comrs.*, 137-63; *Arendell v. Worth*, 125-111; *Winslow v. Morton*, 118-486; *State v. Custer*, 65-339; *State v. Jones*, 67-210; *McAden v. Jenkins*, 64-796.

Original statute and amendment should be construed together: *Road Com. v. Comrs.*, 178-61; *Hamlin v. Carlson*, 178-431; *Keith v. Lockhart*, 171-451. When laws have been codified the original statutes may be referred to as an aid to construction: *Mfg. Co. v. Andrews*, 165-285; *Rodgers v. Bell*, 156-378.

STRICT CONSTRUCTION. Statutes in derogation of common law or common right will be strictly construed: *Swift v. Tempelos*, 178-487; *Price v. Edwards*, 178-493; *Jennette v. Coppersmith*, 176-82; *Nance v. R. R.*, 149-366; *Arendell v. Worth*, 125-111; *Board v. Comrs.*, 137-64; *Winslow v. Morton*, 118-486. Statutes limiting the power to contract: *Marriner v. Roper*, 112-164. Attachment laws: *Leak v. Moorman*, 61-168; *Bank v. Hinton*, 12-397. Statutes conferring powers upon municipal corporations: *Plymouth v. Cooper*, 135-1. Statute depriving court of acquired jurisdiction: *State v. Sullivan*, 110-513.

Penalty statutes are strictly construed: *Grocery Co. v. R. R.*, 170-241; *State v. R. R.*, 168-103; *Alexander v. R. R.*, 144-93; *State v. Hicks*, 143-689; *Sears v. Whitaker*, 136-37; *Freight Discrimination Cases*, 95-434; *Coble v. Shoffner*, 75-42; *Smithwick v. Williams*, 30-268. Statute construed strictly against a forfeiture: *Skinner v. Thomas*, 171-98. Criminal statutes strictly construed: *State v. R. R.*, 122-1052; *State v. Godfrey*, 97-507.

Remedial statutes are liberally construed: *Cape Lookout Co. v. Gold*, 167-63; insolvent debtor's law liberally construed, *Dean v. King*, 35-20.

CONSTRUING WITH REFERENCE TO CONSTITUTION. Every presumption is in favor of the validity of an act of the legislature and all doubts are resolved in support of the act: *Lowery v. School Trustees*, 140-33; *White v. Murray*, 126-158; *Brooks v. Tripp*, 135-160; *Sutton v. Phillips*, 116-502; *State v. Lewis*, 107-967; *State v. Moore*, 104-714; *Holton v. Comrs.*, 93-430; *Freight Discrimination Cases*, 95-428; *Malloy v. Fayetteville*, 122-483; *State v. Pool*, 74-402; *Sedberry v. Comrs.*, 66-486.

Part of a statute may be constitutional and other parts unconstitutional, and the valid parts sustained: *Archer v. Joyner*, 173-75; *Lowery v. School Trustees*, 140-33; *Garsed v. Greensboro*, 126-162; *Rodman v. Washington*, 122-41; *McCless v. Meekins*, 117-34; *Gamble v. McCrady*, 75-509; *Johnson v. Winslow*, 63-552—but not when invalid part would enlarge the operation of the law, *Keith v. Lockhart*, 171-451—or the parts are interdependent, *State v. Godwin*, 123-697; *Tate v. Comrs.*, 122-661.

An act is unconstitutional from its effect, and not from legislative intention: *Jacobs v. Smallwood*, 63-112.

REPEAL OF STATUTE. The repeal of a statute repealing a former statute leaves the latter in force: *Brinkley v. Swicegood*, 65-626; *State v. Goulding*, 131-716; *State v. Edwards*, 134-638.

The repeal of an act of the assembly giving a forfeiture for an offense is a repeal of all forfeitures incurred under the act repealed, unless there be a special exception to the contrary: *Governor v. Howard*, 5-465.

Private act may not be repealed by section in general law: *State v. Womble*, 112-862.

Adoption of stock law does not abrogate a general statute or rule of law: *Shepard v. R. R.*, 140-391.

These rules of law for construction of statutes are well established: (1) The law does not favor repeal of an older statute by a later one by mere implication. (2) The implication which will work repeal of a statute must be necessary, and if it arises out of repugnancy between the two acts, later act abrogates older only to the extent that it is inconsistent and irreconcilable with it. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute. (3) Where a later or revising statute clearly covers whole subject-matter of antecedent acts, and it plainly appears to have been purpose of the legislature to merge into it the whole law on the subject, a repeal by necessary implication is effected: *Winslow v. Morton*, 118-486. For various applications of these rules, see *Sanatorium v. State Treas.*, 173-810; *Bunch v. Comrs.*, 159-335; *State v. Broadway*, 157-598; *State v. Perkins*, 141-797; *College v. Lacy*, 130-364; *McNeill v. McDuffie*, 119-336; *Davis v. Whitaker*, 114-279; *Greensboro v. McAdoo*, 112-359; *State v. Massey*, 103-356; *State v. Monger*, 111-675; *State v. Sutton*, 100-474; *Jones v. Ins. Co.*, 88-499; *State v. Cunningham*, 72-469.

General election law repeals provision in city charter: *Rodwell v. Harrison*, 132-45.

Where a statute makes that which was a felony merely a misdemeanor it will be construed as repealing, by implication, the old law: *State v. Upchurch*, 31-454.

CERTAIN WORDS CONSTRUED. "Authorize and empower," in act conferring power upon county to issue bonds, construed to be mandatory: *Jones v. Comrs.*, 137-579.

"Deed" in a statute means instrument under seal: *Patterson v. Galliher*, 122-512.

When a statute directs the performance of an act for the promotion of justice or the public good, if it is necessary to secure these objects, the word "may" will be construed to mean "shall": *Johnston v. Pate*, 95-68. Local and special laws defined: *State v. Johnson*, 170-685. "Merchandise" in bulk sales law: *Swift v. Tempelos*, 178-487. "Assumed name" under statute: *Jennette v. Coppersmith*, 176-82. "Levy" means assessment as applied to taxes: *Mann v. Allen*, 171-219.

TITLE AS AID TO CONSTRUCTION. Where the meaning of statute is doubtful, title may be resorted to to aid in its construction: *Freight Discrimination Cases*, 95-434—but it cannot control when the meaning is clear, *In re Chisholm's Will*, 176-211; *Blue v. McDuffie*, 44-131. Title of act competent to show that date of act amended is erroneously stated: *State v. Woolard*, 119-779. Headings to sections of the Code cannot be considered in construing: *Cram v. Cram*, 116-288. Title to statute is no part thereof: *State v. Welsh*, 10-404.

1. *Singular and plural number, masculine gender, etc.* Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only shall extend and be applied to one person or thing, as well as to several persons or things; and every word importing the masculine gender only shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary.

2. *Authority to three or more exercised by majority.* All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority.

Referred to in *Ryder v. Oates*, 173-569.

3. *"Month" and "year."* The word "month" shall be construed to mean a calendar month, unless otherwise expressed; and the word "year," a calendar year, unless otherwise expressed; and the word "year" alone shall be equivalent to the expression "year of our Lord."

The words of limitation to an action of slander are to be taken as lunar and not calendar months: *Rives v. Guthrie*, 46-84.

"Thirty days" as used in article 4 of the constitution is not synonymous with "one month"; it may be more or less: *State v. Upchurch*, 72-146.

The words "twelve months," in the absence of any legislative definition of the word month and the word "year," will be interpreted to mean twelve calendar months: *Muse v. Assurance Co.*, 108-240.

4. *Leap-year, how counted.* In every leap-year, the increasing day and the day before, in all legal proceedings, shall be counted as one day.

R. C., c. 31, s. 108; R. S., c. 31, s. 113; 21 Hen. III.

5. *"Oath" and "sworn."* The word "oath" shall be construed to include "affirmation," in all cases where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall be construed to include the word "affirmed."

6. *"Person" and "property."* The word "person" shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary. The words "real property" shall be coextensive with lands, tenements and hereditaments. The words "personal property"

shall include moneys, goods, chattels, choses in action and evidences of debt, including all things capable of ownership, not descendible to the heirs at law. The word "property" shall include all property, both real and personal.

While the word "property" in its legal sense ordinarily includes money, yet where it can be seen from other parts of a will in which it is used that it was not so intended, that interpretation will be given it by the courts with which the testator had evidently employed it: *Patterson v. Wilson*, 101-584.

A chose in action is property: *Winfree v. Bagley*, 102-515; *Worth v. Trust Co.*, 151-191.

Word "estate" has a broader meaning than the word "property." The latter word would not include choses in action, unless there be something in the context which would require it to receive this interpretation, except by force of the definition contained in this section: *Vaughn v. Murfreesboro*, 96-317.

This provision could not affect the meaning of terms employed in the constitution; indeed, it purports to apply only to statutes, and to them when the meaning is manifestly otherwise than as therein provided and defined: *Redmond v. Comrs.*, 106-144.

7. "*Preceding*" and "*following*." The words "preceding" and "following," when used by way of reference to any section of a statute, shall be construed to mean the section next preceding or next following that in which such reference is made; unless when some other section is expressly designated in such reference.

8. "*Seal*." In all cases in which the seal of any court or public office shall be required by law to be affixed to any paper issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal, made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto.

9. "*Will*." The term "will" shall be construed to include codicils as well as wills.

10. "*Written*" and "*in writing*." The words "written" and "in writing" may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters: Provided, that in all cases where a written signature is required by law, the same shall be in a proper handwriting, or in a proper mark.

11. "*State*" and "*United States*." The word "state," when applied to the different parts of the United States, shall be construed to extend to and include the District of Columbia and the several territories, so called; and the words "United States" shall be construed to include the said district and territories and all dependencies.

12. "*Imprisonment for one month*," *how construed*. The words "imprisonment for one month," wherever used in any of the statutes, shall be construed to mean "imprisonment for thirty days."

Rev., s. 2831; Code, s. 3765; R. C., c. 108.

3950. Construction of amended statute. Where a part of a statute is amended it is not to be considered as having been repealed and reenacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment.

Rev., s. 2832; Code, s. 3766; 1868-9, c. 270, s. 22; 1870-1, c. 111.

An amendment to a statute is construed as incorporated into the original statute with the same effect as if it had been a part of the original statute: *State v. Moon*, 178-715; *Burwell v. Lillington*, 171-94.

Amendment to a statute operates from its enactment, leaving in force the portions which are not altered: *Nichols v. Edenton*, 125-13.

An amending statute does not repeal the former statute, but merely applies to subsequent offenses: *State v. Broadway*, 157-598; *State v. Perkins*, 141-797; *State v. Massey*, 97-465.

Reënactment by legislature of a law in the terms of a former law at the same time it repeals the former law is not, in contemplation of law, a repeal, but is a reaffirmance of the former law, whose provisions are thus continued without any intermission: *Wood v. Bellamy*, 120-212; *Lusk v. Sawyer*, 120-225; *Person v. Southerland*, 120-225; *State v. Williams*, 117-753; *Robinson v. Goldsboro*, 122-211; *Kesler v. Smith*, 66-154; *State v. Sutton*, 100-474—but not where the corporation is substantially different, *Ward v. Elizabeth City*, 121-1.

CHAPTER 74

STRAYS

3951. Notice to owner of stray, or to register of deeds.

3952. Owner may reclaim.

3953. When and how strays sold.

3954. Failure to comply with stray law misdemeanor.

3951. Notice to owner of stray, or to register of deeds. Any person who shall take up any stray horse, mare, colt, mule, ass or jennet, neat cattle, hog or sheep, shall within ten days after taking up such stray inform the owner, if to him known, if not, he shall inform the register of deeds of the supposed age, marks, brands and color of the stray, and that the same was taken up at his plantation or place of abode; whereupon the register of deeds shall record such information in a book kept by him for that purpose, for which service the taker-up of the stray shall pay a fee of twenty-five cents, except for hogs and sheep, for which the fee shall be ten cents. The register of deeds shall at once publish a notice of the taking up of such stray, by posting the same at the courthouse door, and if the cost does not exceed two dollars, then in some newspaper published in the county. Such notices shall be published for thirty days, and shall contain a full and complete description of the stray and of all marks or brands on the same, and when and where the same was taken up. The fees for publishing such notices shall be paid by the party taking up the stray.

Rev., s. 2833; Code, s. 3768; 1874-5, c. 258, s. 2.

3952. Owner may reclaim. When any stray has been taken up, the owner may at any time before a sale reclaim such stray by proving his ownership and paying to the party capturing the same the actual costs paid the register of deeds as provided in the preceding section, together with the actual costs of keeping such stray, as fixed by the county commissioners. The board of commissioners of the several counties shall fix a scale of costs for keeping strays.

Rev., s. 2834.

3953. When and how strays sold. If the owner of any stray shall fail to claim the same within thirty days after the publication of the notice required by law, the person taking up the stray shall cause the stray to be appraised by the nearest magistrate and two freeholders, none of whom shall receive any fees for such services. Such appraisement shall give a full and accurate description of such stray and shall by the magistrate be returned to the register of deeds, and by him recorded in his book for strays; and the register of deeds shall issue an order to the sheriff directing him to sell such stray, and the sheriff shall sell such stray at public auction after ten days public advertisement as for sales of personal property under execution; and out of the proceeds he shall pay the cost of publishing the notices as to strays, the costs of keeping and the costs of sale, and shall pay the surplus to the county treasurer for the benefit of the public school fund of the county. The county board of education shall, at any time within twelve months after such funds have been paid to the county treasurer,

upon due proof of ownership, issue an order commanding the county treasurer to pay to the owner of the stray the net amount paid the county treasurer as the proceeds of the sale of the stray.

Rev., s. 2835.

For stock running at large, see **Fences and Stock Law**.

3954. Failure to comply with stray law misdemeanor. If any person shall fail to comply with any of the requirements of law as to strays, he shall be guilty of a misdemeanor and upon conviction be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., s. 3306.

CHAPTER 75

SUNDAYS AND HOLIDAYS

- 3955. Work in ordinary calling on Sunday forbidden.
- 3956. Hunting or going armed on Sunday.
- 3957. Local: Sale of articles on Sunday in Forsyth.
- 3958. What process executed on Sunday.
- 3959. Dates of public holidays.
- 3960. Acts to be done on Sunday or holidays.

3955. Work in ordinary calling on Sunday forbidden. On the Lord's day, commonly called Sunday, no tradesman, artificer, planter, laborer, or other person shall, upon land or water, do or exercise any labor, business or work, of his ordinary calling, works of necessity and charity alone excepted, nor employ himself in hunting, fishing or fowling, nor use any game, sport or play, upon pain that every person so offending, being of the age of fourteen years and upwards, shall forfeit and pay one dollar.

Rev., s. 2836; Code, s. 3782; R. C., c. 115; 1741, c. 30, s. 2.

For history of Sunday laws, see *Rodman v. Robinson*, 134-503. Every act may lawfully be done on Sunday which may lawfully be done on any other day, unless there is some statute forbidding it: *Ibid.*; *State v. Ricketts*, 74-192.

This section does not prevent a town ordinance regulating Sunday trade: *State v. Burbage*, 172-876; *State v. Davis*, 171-809; *State v. Medlin*, 170-682.

The legislature has power to prohibit labor on Sunday on the ground of public decency, but such regulation is confined to such acts as have a tendency to disturb the public; but when it prohibits labor which is done in private, the power is exceeded: *Melvin v. Easley*, 52-356.

Selling a horse on Sunday is not forbidden, where dealing in horses is not the ordinary calling: *Melvin v. Easley*, 52-356. A contract for conveyance of land entered into on Sunday is valid: *Rodman v. Robinson*, 134-503. Giving a check for automobile repairs on Sunday is not a violation of this section: *Auto Co. v. Rudd*, 176-497.

Keeping open shop and selling goods on Sunday is not indictable: *State v. Williams*, 26-400; *State v. Brooksbank*, 28-73; *Melvin v. Easley*, 52-356; *State v. Ricketts*, 74-187.

Section referred to in *Davis v. R. R.*, 145-207.

3956. Hunting or going armed on Sunday. If any person shall, except in defense of his own property, hunt on Sunday with a dog, or shall be found off his premises on Sunday, having with him a shotgun, rifle or pistol, he shall be guilty of a misdemeanor, and pay a fine not exceeding fifty dollars, or be imprisoned not exceeding thirty days.

Rev., s. 3842; Code, s. 3783; 1868-9, c. 18, ss. 1, 2.

Section creates two offenses: (1) hunting on the Sabbath with a dog; (2) being found off one's premises on Sunday having a shotgun, rifle, or pistol: *State v. Howard*, 67-24.

INDICTMENT. Must charge the act was done on Sunday, and after such a charge no exception can be taken to a reference to the Sunday by an erroneous day of the month: *State v. Drake*, 64-589. It is immaterial that the word "Sabbath" is used instead of the word "Sunday": *State v. Drake*, 64-589. Charging that a person was "found off his premises on the Sabbath day, having with him a shotgun," is sufficient: *State v. Howard*, 67-24. Charging a man with being a common Sabbath-breaker is too vague: *State v. Brown*, 7-224.

Section cited in *State v. Moore*, 104-748.

3957. Local: Sale of articles on Sunday in Forsyth. No person, firm or corporation in Forsyth county shall expose for sale, sell or offer for sale on Sunday any goods, wares or merchandise within one mile of the corporate limits of any incorporated town or city; and no store, shop, or other place of business in which

goods, wares or merchandise of any kind are kept for sale shall keep open doors from twelve o'clock Saturday night until twelve o'clock Sunday night: Provided, that this section shall not be construed to apply to hotels or boarding-houses, or to restaurants or cafés furnishing meals to actual guests, where the same are not otherwise prohibited by law from keeping open on Sunday: Provided further, that drug stores, with licensed pharmacists, may be kept open for the sale of goods to be used for medical or surgical purposes, and for the sale of cigars and tobacco; and cigar stands and news stands may sell cigars, tobacco and newspapers: Provided further, that ice dealers and dairies may remain open for the sale and delivery of ice and dairy products. Nothing in this section shall be construed to prohibit livery stables or garages from operating on Sunday or to prohibit publication and sale of newspapers. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court.

P. L. 1917, c. 597.

3958. What process executed on Sunday. It shall not be lawful for any sheriff, constable, or other officer to execute any summons, *capias*, or other process on Sunday, unless the same be issued for treason, felony or misdemeanor.

Rev., s. 2837; Code, s. 928; R. C., c. 31, s. 54; 1777, c. 118, s. 6.

It is unlawful for an officer to execute any writ or other process on Sunday: *Devries v. Summit*, 86-126. A levy of an execution on Sunday is void: *Bland v. Whitfield*, 46-122.

Notice to take a deposition on Sunday is not good, and a deposition taken on such notice must be rejected: *Sloan v. Williford*, 25-307.

Sheriff may proceed on Sunday by distress to enforce penalty authorized by revenue act of legislature for peddling without license: *Cowles v. Brittain*, 9-204.

COURTS MAY SIT ON SUNDAY, WHEN. In special cases, *ex necessitate*, a court may sit on Sunday: *Rodman v. Robinson*, 134-507; *Taylor v. Erwin*, 119-274; *State v. Howard*, 82-626; *State v. McGimsey*, 80-377; *State v. Ricketts*, 74-187.

Holding a court on the Sabbath is not forbidden by the common law or any statute in this state, but it has been the long-settled practice of our courts, when a term continues so long that a Sunday intervenes, to adjourn over until Monday: *State v. Howard*, 82-623. Sunday is not a juridical day, hence an adjournment of the court from Saturday night to Monday morning during progress of a trial for murder is not in violation of the act requiring adjournment to be "from day to day": *Ibid*.

A verdict rendered in open court on Sunday during a term is valid: *Tuttle v. Tuttle*, 146-484; *Taylor v. Erwin*, 119-274; *State v. Penley*, 107-808.

When a term is set by statute to begin on a certain Monday, and to last for one, two or three weeks, as the case may be, it embraces the Sunday of each week: *Taylor v. Erwin*, 119-274. There being no inhibition of a verdict rendered on Sunday, either at common law or by statute, a judgment entered on that day (by virtue of the statute that it shall be entered up at once on the verdict) is valid: *Ibid*.

3959. Dates of public holidays. The first day of January, the nineteenth day of January, the twenty-second day of February, the twelfth day of April, the tenth day of May, the twentieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, Tuesday after the first Monday in November when a general election is held, the day appointed by the governor as a thanksgiving day, and the twenty-fifth day of December of each and every year, are declared to be public holidays; and whenever any such holiday shall fall upon Sunday, the Monday following shall be a public holiday.

Rev., s. 2838; Code, s. 3784; 1891, c. 58; 1899, c. 410; 1901, c. 25; 1881, c. 294; 1907, c. 996; 1909, c. 888; 1919, c. 287.

Statute declaring certain days public holidays does not prohibit the pursuit of the usual avocations of citizens, nor public officers, or the courts from exercising their respective functions on those days. While it might be the attendance of jurors, witnesses and suitors will not be enforced, and the courts will not sue out or enforce process on such days, yet courts may lawfully proceed with the business before them: *State v. Moore*, 104-743.

Notice of opening depositions is not void because time set for opening them is on a legal holiday: *Latta v. Electric Co.*, 146-285. Whatever the statute does not prohibit from being done on a legal holiday may be done, and the legality of such acts cannot be measured by the legal status of Sunday: *Ibid.*

3960. Acts to be done on Sunday or holidays. Where the day or the last day for doing an act required or permitted by law to be done falls on Sunday or on a holiday the act may be done on the next succeeding secular or business day.

Rev., s. 2839; Code, ss. 3784, 3785, 3786; 1899, c. 733, s. 194.

Arrest on Sunday in civil action, section 768. Computing time, Sunday not counted, section 922. Fishing on Sunday, section 1970. Hunting on Sunday, section 2122. Negotiable instrument maturing on Sunday or holiday, section 3066. Trains running on Sunday, section 3480.

CHAPTER 76

SURETYSHIP

- 3961. Surety and principal distinguished in judgment and execution.
- 3962. Principal liable on execution before surety.
- 3963. Summary remedy of surety against principal.
- 3964. Subrogation of surety paying debt of deceased principal.
- 3965. Contribution among sureties.
- 3966. Dissenting surety not liable to surety on stay of execution.
- 3967. Surety may notify creditor to sue.
- 3968. How notice served.
- 3969. Failure of creditor to sue discharges surety; exceptions.
- 3970. Cancellation of contract of suretyship in case of common carrier and employee.

3961. Surety and principal distinguished in judgment and execution. In the trial of actions upon contracts either of the defendants may show in evidence that he is surety, and if it be satisfactorily shown, the jury in their verdict, or the justice of the peace in his judgment, shall distinguish the principal and surety, which shall be indorsed on the execution by the clerk or justice of the peace issuing it.

Rev., s. 2840; Code, s. 2100; R. C., c. 31, s. 124; 1826, c. 31, s. 1.

As to sureties on official and fiduciary bonds, see chapter Bonds.

Parol evidence is admissible to show that one apparently a principal on a note is, in fact, a surety: *Smith v. Carr*, 128-152; *Lockhart v. Ballard*, 113-292; *Cole v. Fox*, 83-463; *Williams v. Lewis*, 158-571, and cases cited—but to obtain protection, surety must show that his relation was known to creditor: *Coffey v. Reinhardt*, 114-509; *Torrence v. Alexander*, 85-143; *Goodman v. Litaker*, 84-8; *Forbes v. Sheppard*, 93-111; *Williams v. Glenn*, 92-253; *Welfare v. Thompson*, 83-276; *Capell v. Long*, 84-17; *Lewis v. Long*, 102-206.

Where negotiable instrument was signed by three persons other than principal obligor, and it appeared, from a writing executed some time thereafter by one to indemnify other two, that they (other two) "signed as cosureties" of third, character of suretyship in which all three signed was sufficiently established: *Southerland v. Fremont*, 107-565.

Order in which parties to a security are liable at law is the order in which, independently of contract, they will be held bound in equity: *Smith v. Smith*, 16-173. Where suit is brought against two persons, a finding of jury that one defendant is principal and other surety, if binding at all between parties, does not in equity establish relation of suretyship: *Lowder v. Noding*, 43-208. Case where question arose as to whether endorsers were cosureties or whether one was a supplementary surety to the other: *Parrish v. Graham*, 129-230.

Liability of guarantor or surety is not to be enlarged by construction: *Shoe Co. v. Peacock*, 150-545.

A surety signing a note with the understanding, known to the payee, that another was to sign as cosurety, is not bound without such signature: *Bank v. Jones*, 147-419.

All defendants in judgments for payment of money are, as to judgment creditor, principal debtors, and creditor may proceed to enforce judgment by execution against one or all, unless verdict or judgment shows that relation of surety existed, and this is indorsed upon execution. In that event officer must first proceed against principal: *Gatewood v. Burns*, 99-357; *Fleming v. Halcomb*, 26-269. The magistrate is not bound to make discrimination between principal and surety, except upon the application of and due proof by surety: *Ibid.*

Where execution against two does not distinguish which is principal and which surety, sheriff has right to collect from either; and one from whom it is collected has no cause of action against sheriff, though he claimed to be only a surety and though plaintiff in execution directed sheriff to collect it from the other: *Shuford v. Cline*, 35-463.

3962. Principal liable on execution before surety. When an execution, indorsed as aforesaid, shall come to the hands of any officer for collection, he shall levy

on all the property of the principal, or so much thereof as shall be necessary to satisfy the execution, and, for want of sufficient property of the principal, also on the property of the surety, and make sale of all the property of the principal levied on before that of the surety.

Rev., s. 2841; Code, s. 2101; R. C., c. 31, s. 125; 1826, c. 31, s. 2.

Creditor having obtained judgment against principal and sureties to debt, and there being some real property of principal in excess of homestead, after same was allotted, neglect of creditor to proceed to sell such excess, though orally requested so to do by sureties, does not exonerate sureties to amount land would have brought if sold: *Bank v. Homesley*, 99-531.

3963. Summary remedy of surety against principal. Any person who may have paid money for and on account of those for whom he became surety, upon producing to the superior court, or any justice of the peace having jurisdiction of the same, a receipt, and showing that an execution has issued, and he has satisfied the same, and making it appear by sufficient testimony that he has laid out and expended any sum of money as the surety of such person, may move the court or justice of the peace, as the case may be, for judgment against his principal for the amount which he has actually paid; a citation having previously issued against the principal to show cause why execution should not be awarded; and should the principal not show sufficient cause, the court or justice shall award execution against the estate of the principal.

Rev., s. 2842; Code, s. 2093; R. C., c. 110, s. 1; 1797, c. 487, s. 1.

This section is constitutional: *Bank v. Hotel Co.*, 147-594. Notice that surety has paid debt of principal is not required to be given before bringing suit for money paid: *Sikes v. Quick*, 52-19. Reasonable notice to show cause should be given: *Bank v. Hotel Co.*, 147-594. "Court" in this section means clerk of superior court: *Ibid.*

To enable a surety to recover for money paid to the use of his principal he must prove an actual payment in satisfaction of the debt: *Hodges v. Armstrong*, 14-253; *Ponder v. Carter*, 34-242.

Surety who has paid money for his principal cannot sue him in an action of tort: *Ledbetter v. Torney*, 33-294.

Where a surety pays a judgment against his principal he may recover any funds wrongfully converted or misapplied by the principal: *Fidelity Co. v. Jerdan*, 134-236.

Where one endorsed a note at request of member of firm for purpose of obtaining money for use of firm, and proceeds were so used, the indorser, upon payment of note, can recover therefor against firm, though no member of such firm signed note: *Springs v. McCoy*, 122-628.

Where principal debtor borrowed a sum of money, which he deposited in a bank which soon afterwards became insolvent, and surety had to pay debt, surety has no equity to enjoin principal debtor from collecting dividends from insolvent bank until he can recover a judgment: *Carlton v. Simonton*, 94-401.

Where writ is issued against two copartners for partnership debt, and one is arrested and gives bail, such bail, upon being afterwards compelled by due course of law to pay debt, has no remedy except against individual for whom he became bail. He has no claim upon other partner: *Foley v. Robards*, 25-177.

Obligation of a bond for the forthcoming of property is only that property shall be delivered to officer at time designated, and not that execution shall be satisfied; and, therefore, if a surety to forthcoming bond before it is forfeited discharges execution without request of principal, such surety cannot maintain an action against his principal for money expended for latter's use, although by payment of money in satisfaction of execution the bond was discharged: *Gray v. Bowls*, 18-437.

A surety who has to pay debt has no equity to follow specific property which principal debtor purchased with borrowed money: *Carlton v. Simonton*, 94-401.

SUBROGATION. Doctrine of subrogation explained: *Publishing Co. v. Barber*, 165-478. It may be legal subrogation, which is based upon payment, and exists where one who has an

interest to protect or is secondarily liable makes payment; or conventional subrogation, which is based upon agreement of the parties: *Ibid.*; *Joyner v. Reflector Co.*, 176-274; *Bank v. Bank*, 158-238. Subrogation is substitution of another person in place of creditor so that former can succeed to rights of latter in relation to debt, and to entitle one to such equitable relief he must have paid money upon request or as surety or under some compulsion made necessary by inadequate protection of his own rights: *Liles v. Rogers*, 113-197; *Caviness v. Fidelity Co.*, 140-58; *Grainger v. Lindsay*, 123-216; *Moring v. Privott*, 146-558.

An endorser or surety who pays the indebtedness is subrogated to the rights of the creditor as against the property of the debtor: *Pittinger, ex parte*, 142-85—and as against all specific liens and securities which creditor has against principal debtor, *Carlton v. Simonton*, 94-401—and to all the rights of the creditor, against a cosurety as well as against principal, and this includes the right to have a judgment, which he has paid, assigned to a trustee for his benefit, so as to compel his cosurety to pay his pro rata part: *Peebles v. Gay*, 115-38.

Surety called upon to pay a devastavit committed by principal, an administrator, is entitled to be subrogated to rights of creditor against party who received the money with knowledge of its wrongful appropriation, and his rights are exactly those of the creditor: *Caviness v. Fidelity Co.*, 140-58. Surety to an administration bond who paid one-half of a debt recovered against insolvent administrator is not subrogated to rights of creditor whose debt he paid, but to rights of administrator for whom he paid it: *Clark v. Williams*, 70-679. Right of subrogation of creditors of estate out of bond to indemnify sureties on administration bond: *Hooker v. Yellowley*, 128-297.

Where land is held in trust for the payment of a debt, a third person, who is compelled by law to pay it, is subrogated to the rights of the creditor and may collect the amount so paid from the land: *Holden v. Strickland*, 116-185. It was correctly held that surety, omitted in the deed of trust, was entitled to be subrogated to the rights of his cosureties pro tanto, if he had paid the debts, and the payees in the notes had a superior equitable right of subrogation to the benefit of any security given by principal debtor to his sureties: *Blanton v. Bostic*, 126-421; *I James v. Gaither*, 93-362; *Sherrod v. Dixon*, 120-63; *Harrison v. Styres*, 74-290; *Wiswall v. Potts*, 58-189—and this is so whether they knew of it or not, *Matthews v. Joyce*, 85-266.

The equity of a surety for subrogation is superior to that of a subsequent mortgagee of the equity of redemption: *Williams v. Lewis*, 158-571.

For application of doctrine in favor of mortgagee against purchaser from mortgagor, see *Baber v. Hanie*, 163-588—in insurance contract, *Powell v. Water Co.*, 171-290.

Sureties on different bonds of sheriff are not entitled to subrogation: *Liles v. Rogers*, 113-197.

SURETY, UPON PAYING DEBT, MUST HAVE ASSIGNMENT TO TRUSTEES. If surety desires to preserve for his benefit an existing security for the debt which he is called upon to discharge, the debt and security (which follows debt) must be assigned to trustee, otherwise payment will be in satisfaction and cancellation of debt and a release of security, leaving surety a simple contract creditor: *Fowle v. McLean*, 168-537; *Tripp v. Harris*, 154-296; *Bank v. Hotel Co.*, 147-594; *Burnett v. Sledge*, 129-120; *Browning v. Porter*, 116-62; *Peebles v. Gay*, 115-38; *Tiddy v. Harris*, 101-589; *Briley v. Sugg*, 21-366; *Sherwood v. Collier*, 14-380; *Hodges v. Armstrong*, 14-253.

A surety who pays amount recovered against him and his principal or cosureties may have judgment assigned to another in trust for his use, and it will continue in force for his benefit; and he may, upon motion in cause, have satisfaction of judgment entered, even against consent of assignee: *Rice v. Hearn*, 109-150.

A transfer to the surety himself upon payment is a satisfaction: *Liverman v. Cahoon*, 156-187; *Sherwood v. Collier*, 14-380. But a surety is subrogated to the rights of the creditor in a mortgage held as collateral, without an assignment to a trustee: *Tripp v. Harris*, 154-296; *Burnett v. Sledge*, 129-114.

Where judgment against principal and sureties on a note is paid by sureties, and an assignment thereof is made to a trustee for benefit of sureties, but by mistake payment is entered on judgment record, which is afterwards corrected by entry thereon of assignment, a person taking mortgage on property of judgment debtor, after assignment entered on record, takes with notice of assignment: *Patton v. Cooper*, 132-791.

If an assignment of the security is taken, surety may have his redress upon it immediately in name of creditor: *Hodges v. Armstrong*, 14-253.

Where surety paid and satisfaction was entered as to one-half of a judgment against himself, his principal and a cosurety, and procured judgment as to other half to be assigned to a trustee for his benefit, it was, in effect, same as if he had procured the whole judgment to be so assigned: *Peebles v. Gay*, 115-38.

3964. Subrogation of surety paying debt of deceased principal. Whenever a surety, or his representative, shall pay the debt of his deceased principal, the claim thus accruing shall have such priority in the administration of the assets of the principal as had the debt before its payment.

Rev., s. 2843; Code, s. 2096; R. C., c. 110, s. 4; 1829, c. 23.

This section applies to any claim, whether surety pays it before or after death of principal: *Drake v. Coltrane*, 44-300.

When a plaintiff, a cosurety, discharged the bond debt, for payment of which defendant's intestate was equally bound, he becomes a bond creditor as to assets of intestate; and when, pending action for contribution, administrator paid off bonds voluntarily, of equal dignity with surety debt, having previously paid an open account, he committed a devastavit to extent of plaintiff's claim for contribution, such claim being for smaller sum than bonds so preferred and open account: *Howell v. Reams*, 73-391.

3965. Contribution among sureties. Where there are two or more sureties for the performance of a contract, and one or more of them may have been compelled to perform and satisfy the same, or any part thereof, and the principal shall be insolvent, or out of the state, such surety may have and maintain an action against every other surety for a just and ratable proportion of the sum which may have been paid as aforesaid, whether of principal, interest or cost.

Rev., s. 2844; Code, s. 2094; R. C., c. 110, s. 2; 1807, c. 722.

RIGHT OF CONTRIBUTION. The right of contribution exists between cosureties when principal is insolvent, and that, whether they are so by separate instruments or by same instruments: *Bell v. Jasper*, 37-597; *Moore v. Isley*, 22-372. Right of a surety to have contribution from cosurety is not founded upon any principle of contract, but is result of natural justice: *Allen v. Wood*, 38-386.

The cosurety, who is in this state, will have to make contribution, without regard to share of contribution which absent cosurety would have had to pay had he been within reach of process of our courts: *Jones v. Blanton*, 41-115.

A surety has no right to call upon his cosurety in equity for contribution without showing that he could not obtain satisfaction for the amount he has paid from their common principal: *Rainey v. Yarborough*, 37-249.

The right of contribution exists for one surety against other sureties who are solvent: *Fowle v. McLean*, 168-537—but not against indorsers, since they are not in the same class, *Edwards v. Ins. Co.*, 173-614.

Surety upon a bond who voluntarily pays a balance due upon the same after he has obtained his discharge in bankruptcy is entitled to contribution from a cosurety: *Craven v. Freeman*, 82-361.

Whether surety who pays a debt (not due by specialty) after action of creditor is barred by act of 1715, can maintain an action against a cosurety for contribution, *quere*: *Reeves v. Bell*, 47-254.

Act of 1807, giving right to one surety to recover at law his ratable proportion of debt of principal, does not enlarge rights of surety, who pays debt, nor deprive cosurety of any just grounds of defense which would before have been available to him in equity: *Hall v. Robinson*, 30-56.

Surety who seeks to recover from a cosurety a ratable part of money paid must take care to do no act which will prevent cosurety from having recourse against principal. If, therefore, he release principal, it is a discharge of the cosurety: *Draughan v. Bunting*, 31-10.

If note, discounted at bank for benefit of principal, with three sureties, be discharged at maturity by proceeds of another note, discounted with only two of the sureties, third having

died before first note fell due, estate of latter will not be liable to contribute, upon insolvency of principal, and payment of renewal note by sureties thereto, although when they executed it they supposed estate of deceased would be liable upon it: *Hutchins v. McCauley*, 22-399.

Where A, as surety, signed the note of B, payable to C, and it was indorsed by C, at the request and for the accommodation of B, there being no contract between A and C whereby they agreed to become cosureties of B, it was held that A had no right to contribution from C: *Smith v. Smith*, 16-173.

Where two sureties on a note to a bank agreed, after insolvency of their principal, to employ a broker to buy notes of bank to an amount sufficient to pay debt, and one of them paid broker for notes purchased by him, and discharged debt, he could maintain an action against his cosurety for contribution: *DeRossett v. Bradley*, 63-17.

Where a surety upon a bond pays a balance due upon same with knowledge of existence of a covenant upon part of obligee to a cosurety not to sue him, he is not entitled to contribution from such cosurety: *Craven v. Freeman*, 82-361.

It is not necessary, to entitle a surety to maintain an action for contribution, that amount of his liability which was paid by him should be fixed by a judgment: *Bright v. Lennon*, 83-183. Waiver or withdrawal of plea of statute of limitations by a surety in an action against him does not affect his right afterwards to maintain an action for contribution: *Ibid.*

Where one signed as surety a note signed by two persons, without knowledge of the fact that one of the signers was a surety, he could not be held a cosurety with such signer: *Bank v. Burch*, 145-316. It is competent for one to become surety for other sureties, or to limit the extent of his liability with respect to other sureties: *Ibid.*

Coprincipals and cosureties are presumed to assume equal liability, but this presumption may be rebutted by parol evidence: *Smith v. Carr*, 128-150.

Where A indorsed a note for the maker and subsequently, but before it was discounted, F indorsed it, and A paid the note, F was a cosurety, and the doctrine of contribution applies for A's benefit: *Atwater v. Farthing*, 118-388.

Where a guardian gives several successive bonds for faithful discharge of trust, sureties on each bond stand in relation of cosureties to sureties on every other bond; the only qualification to rule being that sureties are bound to contribution only according to amount of penalty of bond, in which each class is bound: *Jones v. Hays*, 38-502. The fact that the sureties on an official bond justify to different amounts does not affect the right of contribution: *Comrs. v. Dorsett*, 151-307.

There was a judgment against principal and two sureties, and execution levied on property of one of sureties. A bought this property from his surety, pending levy, and afterwards obtained an assignment of judgment, to enable him to have whole amount satisfied out of property of cosurety, and issued an execution for that purpose; court will restrain him from collecting out of cosurety more than fair proportion which latter owed, whether A had actual notice of lien of execution or not: *Dobson v. Prather*, 41-31.

No right of contribution between sureties on different tax collector's bonds: *McGuire v. Williams*, 123-357.

RIGHT OF COSURETIES WHEN ONE SURETY SECURES PROPERTY OF PRINCIPAL OR GAINS AN ADVANTAGE. Among cosureties "equality is equity"; it is a well-settled principle that if one surety by any means gets a fund belonging to the principal he is not at liberty to take the entire benefit, but must share with his cosureties: *Parham v. Green*, 64-436; *Leary v. Cheshire*, 56-172; *Barnes v. Pearson*, 41-482; *Allison v. Davidson*, 17-79; *Moore v. Isley*, 22-372; *Mast v. Raper*, 81-335.

Where principal placed property in hands of surety sufficient to satisfy debt, and then left state, third person, also bound for debt as surety, having been compelled to pay it, may recover its amount from person who has received property, without making a previous demand: *Parham v. Green*, 64-436.

A having a judgment against B as principal and C as surety, C, without the consent of A, has an execution issued and levied upon B's property. A has right to withdraw execution and discharge levy, without making herself liable to C: *Forbes v. Smith*, 40-369.

One, when he is about becoming a surety with others, may stipulate for separate indemnity from principal to himself, and cosureties would only be entitled to a surplus after his reimbursement: *Comrs. v. Nichols*, 131-505; *Long v. Barnett*, 38-631. Where two persons engage in a common risk as sureties for a third, and one of them subsequently takes an indemnity from the principal debtor, it inures to the benefit of both: *Gregory v. Murrell*, 37-233; *Hall v.*

Robinson, 30-56; Pool v. Williams, 30-286. The indemnity taken by one surety can be reached by the other only in two cases, either when it was taken in fraud or for the benefit of the other: Moore v. Moore, 11-358.

Where money is advanced by principal to one of sureties to discharge debt before debt is actually discharged, cosurety may file his bill in equity for an account and for relief: Allen v. Wood, 38-386—but if money is paid by principal, after debt has been discharged by sureties, to one of two sureties, to reimburse both, then cosurety has his remedy against surety receiving the money by an action at law for money had and received, and therefore cannot support a suit in equity, *Ibid.*

Where surety merely had a deed of trust for certain property, as an indemnity, executed by principal, and neglected to have it registered, so that property was sold by other creditors, cosurety is not entitled, on account of his laches, to make him responsible for the value of the property: Pool v. Williams, 30-286.

Where A and B were cosureties on an administration bond, and B, who had administered on estate of principal, had, by mistake of law and in good faith, erroneously given up assets of principal to another claim which would have saved them both from loss by this suretyship, A could not sustain a bill to throw whole loss on B, there being no evidence that B had concealed from A the fact of having thus parted with assets and not making any allegation of fraud or imposition on part of B: Brandon v. Medley, 54-313.

CONTRIBUTION FROM COSURETIES ENFORCED. To a bill brought by one surety against his cosurety for contribution, their common principal, or if he be dead, his executor or administrator, should be made a party defendant: Rainey v. Yarborough, 37-249.

Surety, who has been compelled to pay a debt of his principal, must make all his cosureties parties to a bill for contribution, if they are in this state and solvent. But where one is out of the jurisdiction of the court and others are within it, plaintiff, by stating the fact in his bill, is at liberty to proceed against the latter alone: Jones v. Blanton, 41-115.

When a surety files his bill against a cosurety for contribution, and latter sets up an agreement, which is a bar to the former's claim, that agreement must be proved at the hearing, it cannot be the subject of reference to the master: Long v. Barnett, 38-631.

When one surety brings a bill for contribution against a cosurety he should at least allege that principal is insolvent, so that he can have no redress against him: Allen v. Wood, 38-386.

In an action against an alleged cosurety to recover money paid in settlement of their joint liability, the amount received by plaintiff as interest on collaterals deposited should be deducted from the amount paid by plaintiff: Carr v. Smith, 129-232. Where one of two sureties claims to be a supplemental surety by agreement, the burden is upon him to show the agreement: *Ibid.*

A surety seeking contribution from a cosurety can offer evidence of general reputation for insolvency of their principal, even after direct evidence of such insolvency, such as unsatisfied executions against him, etc.: Leak v. Covington, 99-559. Statute giving an action to a surety who has paid debt against a cosurety, when the principal shall be insolvent or out of state, has reference to time when action is brought, and not to time of payment by surety: *Ibid.*; Shufford v. Cook, 164-46.

In action by surety of insolvent guardian for contribution against other sureties it is proper to include in sum adjudged to be raised by contribution costs which were paid by plaintiff in an action against him as condition for leave to plead statute of limitations: Bright v. Lennon, 83-183.

Where it appeared on the face of a note that certain parties thereto were sureties, in an action for contribution parol evidence is admissible to show that they were really principals: Williams v. Glenn, 92-253.

In action for contribution by surety against four different guardian bonds, with different penalties and different sureties, some solvent and some otherwise, it is not necessary that notice should be given before action is brought: Bright v. Lennon, 83-183.

Surety who pays money for his principal may maintain an action against his cosurety for his ratable part, without first making a demand, and statute of limitations begins to run from the time of payment of the money: Sherrod v. Woodard, 15-360; Leak v. Covington, 99-559.

Record in a suit upon an administration bond against a surety and personal representatives of another surety in which a nol. pros. was entered as to them, and judgment rendered against their intestate's cosurety, is evidence and prima facie proof, in a suit by him for contribution against personal representatives, as to damages: Leak v. Covington, 99-559.

Adjustment of all rights between sureties where some have counterclaims and others not, permitted in one action: *Davis v. Mfg. Co.*, 114-321.

Where surety brings an action of assumpsit for money paid for the use and at request of defendant, against his cosurety, to obtain contribution, it is not sufficient for him to show that he has given his note for debt due by principal, and that same has been accepted by creditor as a payment and discharge of the debt, but he must show payment of the debt: *Brisendine v. Martin*, 23-286.

Where complaint in an action by surety for contribution joined principals as parties, and alleged by contract of suretyship payment by plaintiff and demand of cosureties "for their contributive shares," and asked judgment against all, but did not allege insolvency of the principals except by the averment that plaintiff was compelled to pay debt: Held, that though proper relief was not asked, and insolvency of principals was imperfectly alleged, cause of action will be construed, on demurrer, as equitable rather than legal in order to confer jurisdiction below: *Adams v. Hayes*, 120-383; *Hudson v. Aman*, 158-429.

One of three joint solvent sureties cannot sustain a bill against either of his cosureties for contribution out of fund alleged to have been received by that surety for his indemnity from the estate of an insolvent cosurety, without making the other a party: *Moore v. Isley*, 22-372.

AGREEMENT BY COSURETIES TO WAIVE CONTRIBUTION. After two persons have become sureties for a common principal they may, by agreement between themselves, renounce their right to take benefit from any securities they may respectively obtain, and each undertake to look out for himself, exclusively, for an indemnity from the principal or for contribution from another cosurety: *Long v. Barnett*, 38-631.

After relation of joint sureties has been severed by an agreement among sureties, each of them has his distinct and several claim to prosecute, because of what he has paid for his principal, or for an insolvent joint surety; and others have no right to demand participation in what his diligence may enable him to procure, while thus prosecuting his several claims: *Moore v. Isley*, 22-372. If, by any agreement between sureties, one of them is released by creditor, upon his securing payment of a certain part of the debt, he shall not afterwards be called upon to contribute to one or more of the remaining sureties for a loss arising from the deficiency of another of them: *Ibid.*

3966. Dissenting surety not liable to surety on stay of execution. Whenever any judgment shall be obtained before a justice against a principal and his surety, and the principal debtor shall desire to stay the execution thereon, but the surety is unwilling that such stay shall be had, the surety may cause his dissent thereto to be entered by the justice, which shall absolve him from all liability to the surety who may stay the same. And the constable or other officer, who may have the collection of the debt, shall make the money out of the property of the principal debtor, and that of the surety for the stay of execution, if he can, before he shall sell the property of the surety before judgment.

Rev., s. 2845; Code, s. 2095; R. C., c. 110, s. 3; 1829, c. 6, ss. 1, 2.

3967. Surety may notify creditor to sue. In all cases where any surety or indorser on any note, bill, bond, or other written obligation shall consider himself in danger of loss in consequence of his contingent liability, either from the insolvency or misconduct of the principal, in the note, bill, bond, or other written obligation, or from the negligence of the payee or holder of any such instrument, it shall be lawful for such surety or indorser, at any time after such note, bill, bond, or other written obligation becomes due and payable, to cause written notice to be given to the payee or holder of any such paper or obligation, requiring him to bring suit on such obligation, and to use all reasonable diligence to save harmless such surety or indorser: Provided, nothing herein contained shall apply to official bonds, or bonds given by any person acting in a fiduciary capacity.

Rev., s. 2846; Code, s. 2097; 1868-9, c. 232, s. 1.

To get benefit provided for sureties by this section they must give creditor notice in writing to bring suit, etc., and only he who gives notice can claim benefit when there are more than one: *Bank v. Homesley*, 99-531.

While creditor is not bound to exercise diligence to enforce collection of a demand upon which he has surety, he has no right to release any other security which he has acquired and which might be available in satisfaction of debt, and if he does so it will discharge surety: *Bell v. Howerton*, 111-69.

Section applied to indorser of a nonnegotiable note: *Johnson v. Lassiter*, 155-47.

Section referred to in *Moore v. Goodwin*, 109-219; *Roberson v. Spain*, 173-23.

3968. How notice served. Such notice shall be served by the sheriff or his deputy, who shall return it to the party for whose benefit the notice was issued, which shall be evidence of the fact in all courts.

Rev., s. 2848; Code, s. 2099; 1868-9, c. 232, s. 3.

3969. Failure of creditor to sue discharges surety; exceptions. Should the payee or holder of any such note, bond, bill, or other written obligation refuse or fail, within thirty days from the service of such notice, to bring suit in the appropriate court in an effort to save harmless such surety or indorser, such refusal or failure to sue shall operate as a discharge of such surety or indorser, from all liability whatever, on any such note, bond, bill, or other written obligation: Provided, that this notice shall not have the effect to discharge from liability any cosurety who does not join in such notice, or who has not given a separate notice: Provided further, that this and the preceding section shall not apply to holders of such note, bond, bill, or obligation, who hold the same as collateral security or in trust.

Rev., s. 2847; Code, s. 2098; 1868-9, c. 232, s. 2.

If a creditor agree with his principal debtor in such manner that he is bound by the agreement to postpone day of payment, surety is thereby discharged from all liability: *Smith v. Parker*, 131-471; *Revell v. Thrash*, 132-803; *Scott v. Harris*, 76-205; see *Jenkins v. Daniels*, 125-161; *Fleming v. Barden*, 126-450, 127-214; *Bank v. Swink*, 129-255; *Benedict v. Jones*, 129-475; *Hedrick v. Byerly*, 119-420; *Bank v. Sumner*, 119-591; *Smith v. Loan Assn.*, 119-257; *Sutton v. Waters*, 118-496; *Lumber Co. v. Christenbury*, 155-257; *Poster v. Davis*, 175-541.

Plaintiff creditor made parol contract with principal to extend time of payment of bond beyond date of commencement of suit thereon, without knowledge or consent of surety; such contract suspends plaintiff's right of action and exonerates surety from liability: *Carter v. Duncan*, 84-676.

Exoneration grows out of agreement to forbear, and is not affected by creditor's breach of it: *Forbes v. Sheppard*, 98-111. An agreement with a principal, on a sufficient consideration, to forbear to sue for a fixed period, without reserving right to proceed against surety, and made without his assent, will exonerate him from liability: *Ibid.*

3970. Cancellation of contract of suretyship in case of common carrier and employee. Whenever an employee of a common carrier authorized to do business in this state is required to give a bond or undertaking of any nature whatever with a bonding company or companies, as surety thereon, any such employee who shall have given such bond or undertaking shall, upon the breach of any of the conditions thereof by the other party or parties thereto, have the power to cancel the same by giving the surety or sureties thereon, for the benefit of whom same shall have been made, at least ten days notice in writing, setting out in full the reason for canceling the same. Any such notice to a company, corporation or association may be served by leaving the same with any person upon whom service of legal process upon such company, corporation or association may be had. Any surety on any such bond or undertaking shall, upon the breach of

any of the conditions thereof by the common carrier employee for whom same shall have been made, have power to cancel the same by giving such employee at least ten days notice in writing, and, upon demand, set out in full the reasons for canceling same, the notice to be signed by an agent or manager of such surety. Nothing herein shall affect any right of action accruing to any person upon the breach of a contract; nor shall any bonding company furnishing the information which causes it to withdraw from the bond be liable in any action at the instance of the party aggrieved for damages, nor be required to disclose to the party aggrieved the sources of information that caused it to withdraw from the bond. But any bonding company may be required to give evidence in any action brought by the party aggrieved against the party or person furnishing the information causing the company to withdraw as surety.

Any person, officer or manager, company, corporation, association or firm who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor and punished by a fine of not less than five hundred dollars nor more than one thousand dollars.

1913, c. 17.

For sureties on administration bonds, see sections 33-44. For evidence against principal as against surety, see section 358.

CHAPTER 77

TRADEMARKS, BRANDS AND MARKS

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ART. 1. TRADEMARKS

3971. Adoption and filing for registry. It shall be lawful for any person to adopt for his protection and file for registry, as in this chapter provided, any label, trademark, term or design that has been used or is intended to be used for the purpose of designating, making known or distinguishing any goods, wares, merchandise or products of labor that have been or may be wholly or partly made, manufactured, produced, prepared, packed or put on sale by any such person, or to or upon which any work or labor has been applied or expended by any such person, or by any member of any corporation that has adopted and filed for registry any such label, trademark, term or design as aforesaid, or announcing or indicating that the same have been made in whole or in part by any such person or corporation, or by any member thereof.

Rev., s. 3012; 1903, c. 271.

It seems that the name of a town or locality cannot be exclusively appropriated as a trademark: *Blackwell v. McElwee*, 94-425.

As a rule a trademark cannot be taken in a surname: *Bingham School v. Gray*, 122-699.

Legislature cannot establish a monopoly in a family name or confer a patent right in its use: *Bingham School v. Gray*, 122-699.

But a person may, by contract, bind himself not to use his own name in business, in the sale of an established business: *Zagier v. Zagier*, 167-616.

3972. Property rights protected by filing for registry. Whenever any person shall adopt and file for registry any label, trademark, term or design pursuant to the provisions of this chapter, the property, privileges, rights, remedies and interests in and to any such label, trademark, term or design, and in and to the use of same, provided or given by this chapter to, or otherwise conferred upon or enjoyed by, the person filing the same for the registry, shall be fully and completely secured, preserved and protected as the property of those entitled to the same before any such label, trademark, term or design has been actually applied to any goods, wares, merchandise, or product of labor, and put upon the market for sale or otherwise, and before any use or appropriation of any such label, trademark, term or design has been made in connection with any such goods, wares, merchandise or product of labor, as well as after the same has been used or applied to designate, make known or distinguish any such goods, wares, merchandise, or product of labor and they have been put upon the market.

Rev., s. 3013; 1903, c. 271, s. 2.

See cases prior to enactment: *Blackwell v. McElwee*, 94-425; *Tobacco Co. v. McElwee*, 100-150; *McElwee v. Blackwell*, 94-261.

3973. Filing to be with secretary of state; contents of affidavits; fees. Any person who has heretofore adopted and used, or shall hereafter adopt and use any label, trademark, term or design, as in this chapter provided, may file the same for registry in the office of the secretary of state, by leaving two copies, facsimiles or counterparts thereof, with the said secretary, and filing therewith a statement in the form of an affidavit, subscribed and sworn to by any such person, or by any officer, agent or attorney, if a corporation, specifying the person by whom any such label, trademark, term or design is filed, and the class or character of the goods, wares, merchandise or products of labor to which the same has been or is intended to be appropriated or applied, and that the person so filing the same has the right to the use of the said label, trademark, term or design, and

that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as may be calculated to deceive, without the permission or authority of the person filing the same, and that the copies, facsimiles or counterparts filed therewith are true and correct copies, facsimiles or counterparts of the genuine label, trademark, term or design of the person filing the same; and there shall be paid for such registry a fee of one dollar to the secretary of state for the use of the state, and the same recording fees required by law for recording certificate of organization of corporations.

Rev., s. 3014; 1903, c. 271, s. 3.

3974. Registration; certified copies evidence; fees. The secretary of state, upon the filing of any such label, trademark, term or design that is not in conflict with section 3976, shall register the same, and shall deliver to the person filing the same as many certified copies thereof, with his certificate of such registry, as any such person may request, and for every such copy and certificate there shall be paid to the secretary of state, for the use of the state, a fee of one dollar; and any such certified copy and certificate shall be admissible in evidence and competent and sufficient proof of the adoption, filing and registry of any such label, trademark, term or design, by any such person in any action or judicial proceeding in any of the courts of this state, and of due compliance with the provisions of this chapter.

Rev., s. 3015; 1903, c. 271, s. 4.

For decision prior to enactment, see *Tobacco Co. v. McElwee*, 100-150.

3975. Transfer of trademarks. The right to use any registered label, trademark, term or design shall be granted only by an instrument in writing, duly filed in the office of the secretary of state. The fees for recording or filing such transfer and issuing copies thereof shall be the same as for filing such label, trademark, term or design.

Rev., s. 3016.

3976. Similar trademarks refused registration. It shall not be lawful for the secretary of state to register for any person any label, trademark, term or design that is in the identical form of any other label, trademark, term or design theretofore filed by any other person, or that bears any such near resemblance thereto as may be calculated to deceive, or that would be liable to be mistaken therefor.

Rev., s. 3017; 1903, c. 271, s. 5.

3977. Fraudulent registration; penalty. Any person who shall file or procure the filing and registry of any label, trademark, term or design in the office of the secretary of state under the provisions of this chapter, by making any false or fraudulent representations or declarations, with fraudulent intent, shall be liable to pay any damages sustained in consequence of any such registry, to be recovered by or in behalf of the party injured thereby.

Rev., s. 3018; 1903, c. 271, s. 5.

3978. Use of counterfeit trademarks unlawful. Whenever any person has adopted and filed for registry any label, trademark, term or design, as provided by law, and the same shall have been registered pursuant to law, it shall be

unlawful for any other person to manufacture, use, sell, offer for sale, or in any way utter or circulate any counterfeit or imitation of any such label, trademark, term or design, or have in possession, with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or product of labor to which or on which any counterfeit or imitation of any such label, trademark, term or design is attached, affixed, printed, stamped, impressed or displayed, or to sell or dispose of, or offer to sell or dispose of, or have in possession with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or product of labor contained in any box, case, can or package to which or on which any such counterfeit or imitation is attached, affixed, printed, stamped, impressed or displayed.

Rev., s. 3019; 1903, c. 271, s. 6.

An imitation of a trademark which would not deceive the ordinary purchaser is not an infringement: *Blackwell v. Wright*, 73-310.

3979. Unauthorized use unlawful; use under license. Whenever any person has adopted and registered any label, trademark, term or design, as provided by law, it shall be unlawful for any other person to make any use, sale, offer for sale or display of the genuine label, trademark, term or design of any such person filing the same, or to have any such genuine label, trademark, term or design in possession with intent that the same shall be used, sold, offered for sale, or displayed, or that the same shall be applied, attached or displayed in any manner whatever to or on any goods, wares or merchandise, or to sell, offer to sell, or dispose of, or have in possession with intent that the same shall be sold or disposed of, any goods, wares or merchandise in any box, case, can or package to or on which any such genuine label, trademark, term or design of any such person is attached, affixed, or displayed, or to make any use whatever of any such genuine label, trademark, term or design, without first obtaining in every such case the license of the person adopting, filing and registering the same; and any such license may be revoked and terminated at any time upon notice, and thereafter any use thereof shall be unlawful.

Rev., s. 3020; 1903, c. 271, s. 7.

See cases of interest decided prior to this enactment: *Blackwell v. McElwee*, 94-425; *Tobacco Co. v. McElwee*, 100-150.

3980. Remedies; damages; profits; destruction of counterfeits. Any person who has registered any label, trademark, term or design under the provisions of this chapter shall have a right of action against any person for the unauthorized use of such label, trademark, term or design, and the courts shall by appropriate remedies prevent the unauthorized or unlawful use, manufacture or display of any label, trademark, term or design, or the imitation or counterfeit thereof, or the sale, disposal or display of any articles of property on which any counterfeit or imitation of any registered label, trademark, term or design, or on which any genuine label, trademark, term or design may be used or displayed without proper authority; and shall further secure and protect all persons in all rights of property and interest which they may have in any label, trademark, term or design registered under this chapter; and the court shall award to the plaintiff any and all damages resulting from any such wrongful use of any such label, trademark, term or design; and any counterfeit or imitation of any labels, trademarks, terms or designs, and any die, engraving, mould or mechanical device or

the manufacture of the same in the possession or under the control of the defendant, shall be delivered up to an officer of the court, to be destroyed, and any such genuine labels, trademarks, terms or designs in the possession or under the control of any such defendant shall be delivered to the plaintiff.

Rev., s. 3021; 1903, c. 271, s. 8.

3981. Concurrent action for penalty. In addition to any other rights, remedies or penalties provided by this chapter, and as concurrent therewith, any person who shall violate any of the provisions of this chapter shall be liable to a penalty of two hundred dollars, to be recovered by any person who has filed any such label, trademark, term or design.

Rev., s. 3022; 1903, c. 271, s. 9.

3982. Use of private marks or labels to defraud, misdemeanor. If any person shall knowingly and willfully forge or counterfeit, or cause or procure to be forged or counterfeited, the private marks, tokens, stamps or labels of any mechanic, manufacturer or other person, being a resident of the United States, with intent to deceive and defraud the purchasers, mechanics, or manufacturers of any goods, wares or merchandise whatsoever, upon conviction thereof he shall be punished by a fine of not less than fifty dollars and not exceeding one thousand dollars, or by imprisonment of not less than thirty days or more than five years, or both fine and imprisonment, at the discretion of the court.

Rev., s. 3852; Code, s. 1038; 1870-1, c. 253, s. 1.

3983. Selling goods with forged marks or labels, misdemeanor. If any person shall vend any goods, wares or merchandise having thereon any forged or counterfeited marks, tokens, stamps or labels purporting to be the marks, tokens, stamps or labels of any person being a resident of the United States, knowing the same at the time of the purchase thereof by him to be forged or counterfeited, he shall be guilty of a misdemeanor, and punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or by both fine and imprisonment, at the discretion of the court.

Rev., s. 3850; Code, s. 1039; 1870-1, c. 253, s. 2.

3984. Misbranding sacks to defraud, misdemeanor. If any person shall knowingly use the mark or brand of any other person on any sack, or shall knowingly impress on any sack the mark or brand of another person, with intent to defraud or for the purpose of enhancing the value of his own property, the person so offending shall be guilty of a misdemeanor, and punished as if convicted of larceny.

Rev., s. 3851; Code, s. 1040; 1874-5, c. 225.

ART. 2. TIMBER MARKS

3985. Timber dealers may adopt. Any person dealing in timber in any form shall be known as a timber dealer and as such may adopt a trademark, in the manner and with the effect in this article provided.

Rev., s. 3023; 1903, c. 261, s. 1.

3986. How adopted, registered and published. Every such dealer desiring to adopt a trademark may do so by the execution of a writing in form and effect as follows:

TRADEMARK

Notice is hereby given that I (or we, etc., as the case may be) have adopted the following trademark, to be used in my (or our, etc.) business as timber dealer (or dealers), to wit: (Here insert the words, letters, figures, etc., constituting the trademark, or if it be any device other than words, letters or figures, insert a facsimile thereof).

Dated this _____ day of _____, 19____ A_____ B_____

Such writing shall be acknowledged or proved for record in the same manner as deeds are acknowledged or proved, and shall be registered in the office of the register of deeds of the county in which the principal office or place of business of such timber dealer may be, in a book to be kept for that purpose marked Registry of Timber Marks, also in office of secretary of state, and a copy thereof shall be published at least once in each week for four successive weeks in some newspaper printed in such county, or if there be no such newspaper printed therein, then in some newspaper of general circulation in such county.

Rev., s. 3024; 1889, c. 142; 1903, c. 261, s. 2.

3987. Property in and use of trademarks. Every trademark so adopted shall, from the date thereof, be the exclusive property of the person adopting the same. The proprietor of such trademark shall, in using the same, cause it to be plainly stamped, branded or otherwise impressed upon each piece of timber upon which the same is placed.

Rev., s. 3025; 1889, c. 142; 1903, c. 261, ss. 3, 4.

3988. Effect of branding timber purchased. When timber is purchased by the proprietor of any such trademark, and the said trademark is placed thereon as hereinbefore provided, such timber shall thenceforth be deemed the property of such purchaser, without any other or further delivery thereof, and such timber shall thereafter be at the risk of the purchaser, unless otherwise provided by contract in writing between the parties.

Rev., s. 3026; 1889, c. 142; 1903, c. 261, s. 6.

3989. Trademark on timber evidence of ownership. In any action, suit or contest in which the title to any timber, upon which any trademark has been placed as aforesaid, shall come in question, it shall be presumed that such timber was the property of the proprietor of such trademark, in the absence of satisfactory proof to the contrary.

Rev., s. 3027; 1903, c. 261, s. 7.

3990. Fraudulent use of timber trademark, misdemeanor. If any person shall use or attempt to use any timber trademark without the written consent of the proprietor thereof, or falsely and fraudulently place any trademark on timber not the property of the owner of such trademark without his written consent, or intentionally and without lawful authority remove, deface or destroy any timber trademark or the imprint thereof on any timber or intentionally put any such timber in such a position or place so remote from the stream from which it was taken or on which it was afloat as to render it inconvenient or unnecessarily expensive to replace the same in such stream, he shall be guilty of a misdemeanor.

Rev., s. 3854; 1903, c. 261, ss. 3-5.

3991. Larceny of branded timber. If any person shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark is stamped, branded or otherwise impressed, or shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark has been intentionally and without lawful authority removed, defaced or destroyed, he shall be deemed guilty of larceny thereof and punished as in other cases of larceny.

Rev., s. 3853; 1903, c. 261, s. 5.

3992. Altering timber trademark larceny. If any person shall willfully change, alter, erase or destroy any registered timber mark or brand put or cut upon any logs, timber, lumber or boards, except by the consent of the owner thereof, with intent to steal the said logs or timber, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both; if the same shall have been done with a felonious intent, such person shall be guilty of larceny and punished as for that offense.

Rev., s. 3855; 1889, c. 142, s. 3; 1903, c. 41.

3993. Possession of branded logs without consent, misdemeanor. If any person shall knowingly and willfully take up or have in his possession any log, timber, lumber or board upon which a registered timber mark or brand has been put or cut, except by the consent of the owner thereof, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both.

Rev., s. 3856; 1889, c. 142, s. 4; 1903, c. 42.

ART. 3. MINERAL WATERS AND BEVERAGES

3994. Description of name, labels, or marks filed and published. Any person, partnership or corporation engaged in manufacturing, bottling, selling or dealing in mineral, soda or aerated waters, beers, lager-beer, milk or other beverages, in kegs, boxes, trays, crates, bottles, syphons, barrels, casks, or other vessels, with his name or other marks or devices printed, impressed, or otherwise produced thereon, or upon labels pasted thereon, shall file with the clerk of the superior court of the county in which his principal office or place of business (or in the case of a foreign corporation, its principal office or place of business or agency) is located, a description of the names, marks, or devices so used by him, and cause such description to be printed twice a week for two successive weeks in some daily newspaper published in said county, if there be a daily newspaper published therein, and if not, then in some newspaper published in said county once a week for two successive weeks. The description of the names, marks or devices, before being filed as aforesaid, shall be signed by the person filing the same, or in case of a partnership, by a partner, or in case of a corporation, by one of its officers or managers, and shall be acknowledged by the person signing the same as his act, or as the act of said partnership or corporation, before an officer competent to take acknowledgments of deeds. The publication hereby required need only be a brief description, sufficient for identification, of such names or marks, and need not contain a certified copy of the acknowledgment. The pro-

visions of this article shall apply to all vessels enumerated above upon which said names or marks shall appear as aforesaid, whether or not any of the same shall be in existence at the time of said filing and publication.

1907, c. 901, s. 1.

3995. Clerk to record description. The several clerks of the superior courts mentioned in the preceding section shall record in some book of record in their custody all such descriptions filed with them, and also copies of the said advertisement in the newspaper, certified to by the publishers thereof, and shall furnish copies thereof, duly certified by them in the usual manner, to any person who may apply therefor, and shall receive for the recording of such copies a fee of fifty cents. Such certified copies shall be evidence that the provisions of the preceding section have been complied with, and shall be prima facie evidence of the title of the person, named therein, to the vessels upon which his name, marks, labels or devices appear as described in said description.

1907, c. 901, s. 2.

3996. Refilling vessels and defacing marks forbidden; punishment. After any person has filed and published his description of such names, marks or devices, in accordance with the preceding provisions of this article, it shall be unlawful for any persons to fill in any way the vessels upon which such names or other marks are printed, impressed or otherwise produced, with any water or beverage enumerated in this article, or to deface, remove or conceal such names or other marks, thereon, with intent to convert the same to his use, or to have on sale, offer for sale, traffic in, handle in the course of business, transport, or to take or collect from ash or garbage receptacles or from public or private premises, or to keep in stock, store or dispose of or deal or traffic in same, or any parts thereof, without the written consent of the person whose name or other marks are upon such vessels, or to willfully break, destroy or otherwise injure any of the articles mentioned in this section. Any person who shall do any of the acts declared to be unlawful by this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished for the first offense by imprisonment of not less than ten days or more than one year, or by a fine of three dollars for each of such kegs, casks or barrels, and one dollar for each of such boxes, trays, crates, bottles, syphons, or any other vessels so unlawfully used; and for the second and subsequent offense by imprisonment for not less than twenty days or more than one year, or by a fine of not less than two dollars or more than five dollars for each vessel unlawfully used, or by both such fine and imprisonment, at the discretion of the court before whom such offense is tried: Provided, this section shall not apply to such vessels as the bottler charges his customers for at the time of sale of the goods.

1907, c. 901, s. 3.

3997. Disposal of fine. In the event of a fine being imposed by any court for any offenses under this article, one-half thereof shall go to the state and one-half to the informer, to be collected as other fines are collected.

1907, c. 901, s. 3.

3998. Possession of vessels as evidence of offense. If any person shall be found to be in possession of any of the vessels mentioned above in this article, or any

parts thereof, and the persons whose names, marks or devices have been placed thereon, as above provided, have complied with the provisions of this article, and the persons so found in possession thereof shall be charged with any of the offenses mentioned in the preceding section, then such possession shall be prima facie evidence that such person is guilty of the offenses so charged: Provided, this section shall not apply to bottlers who receive such vessels in the course of business and mixed and exchanged in shipment, when such bottler within a reasonable time notifies the owners thereof of the location thereof.

1907, c. 901, s. 4.

3999. Search warrants. If the owner of any vessel mentioned in section 3994 of this article who has complied with the provisions thereof, or the officer, agent or employee of such owner, shall make an affidavit before a justice of the peace asserting that he has reason to believe and does believe that any person is in actual or constructive possession of, or is making use of, any article above mentioned or any part thereof, or in any way declared to be unlawful by section 3996 of this article, the justice may issue his search warrant to any sheriff, constable or other officer of the law to whom such warrant may be directed, and cause the premises designated in the warrant to be searched; and if article above mentioned or any part thereof shall be found upon the premises so designated, the officer executing such search warrant shall thereupon report the same, under his oath, to the justice, who shall thereupon, upon said report and upon the oath of any person or persons charging any violations of section 3996 of this article, issue his warrant for the arrest of the person against whom the charge is made, and cause him, together with such articles, to be brought before him for trial.

1907, c. 901, s. 5.

4000. Concurrent jurisdiction of justices. The justices of the peace in the counties of this state shall have concurrent jurisdiction with the superior courts of their respective counties in the case of persons arrested for violation of the above provisions of this article, and such justices of the peace shall proceed to hear and determine such cases when the parties arrested are brought before them, in all cases where the punishment fixed in this article is such as to give the justices jurisdiction under the constitution and laws of this state. And if such person shall be found to be guilty of the violation of any of the provisions of this article, the court trying such person and imposing the punishment herein prescribed shall also award possession to the owner of all the property involved in such violation.

1907, c. 901, s. 6.

4001. Accepting deposit not deemed sale. The requiring, taking or accepting of any deposit for any purpose upon any vessel above enumerated shall not be deemed to constitute a sale of such property, either optional, conditional or otherwise, in any proceedings under this article.

1907, c. 901, s. 7.

4002. When refileing description not required. Any person, partnership, or corporation that has heretofore filed and published a description of his name, marks or devices for the purposes mentioned in section one of this article, in accordance with the law existing at the time of such filing and publication, shall

not be required to again file such description, but shall be entitled to all the benefits of this article as fully as if he had complied with all the provisions thereof.

1907, c. 901, s. 8.

4003. Application of the article. The provisions of this article do not apply to any person using the vessels enumerated above for the beverages placed therein by the owners, or who after consumption of the contents is in possession of the same, while awaiting the return to the owners, nor shall the provisions of this article apply to any garbage man collecting the same in the regular course of his business: Provided, this article shall not apply to beer and mineral water bottles shipped into this state from other states.

1907, c. 901, s. 9.

ART. 4. FARM NAMES

4004. Registration of farm names authorized. Any owner of a farm in the state of North Carolina may have the name of his farm, together with a description of his lands to which said name applies, recorded in a register kept for that purpose in the office of the register of deeds of the county in which the farm is located, and the register of deeds shall furnish to such landowner a proper certificate setting forth the name and description of the lands.

1915, c. 108, s. 1.

4005. After registry, similar name not registered. When any name has been recorded as the name of any farm in such county, the name, or one so nearly like it as to produce confusion, shall not be recorded as the name of any other farm in the same county.

1915, c. 108, s. 1.

4006. Distinctive name required. No name shall be registered as the name of a farm where such proposed name or one so nearly like it as to produce confusion has been so used in connection with another farm in the same county as to become generally known prior to March 5, 1915, unless the name used has also prior to March 5, 1915, become well known as the name of the farm proposed to be registered; and in this event two or more farms in the same county may be registered with the same name with some prefix or suffix added to distinguish them.

1915, c. 108, s. 2.

4007. Application for registry; publication and hearing. Before a name shall be registered the clerk shall have publication made at least once a week for four weeks in some secular newspaper published in the county, if one is so published, and if one is not so published, then one having a general circulation in the county, giving the name of the applicant, the proposed name of registration and a sufficient description to identify the farm and the time of the return; and if the owner or clerk knows of another farm in the county of the same or very similar name, a summons shall be served on the owner thereof at least ten days before the return day. On the return day any person, firm or corporation may file claim to the name, and the clerk may pass upon the claim and award the

name to any party, with the right to appeal by the aggrieved party to the superior court within ten days, as in other cases, and on such appeal the judge shall decide the matters unless a jury be demanded by some party.

1915, c. 108, s. 2.

4008. Fees for registration. Any person having the name of his farm recorded as provided in this article shall first pay to the register of deeds a fee of one dollar, which fee shall be paid to the county treasurer as other fees are to be paid to the county treasurer by such register of deeds: Provided, that in counties where the fee system obtains, the fees herein mentioned shall go to the register of deeds of such counties.

1915, c. 108, s. 3.

4009. When transfer of farm carries name. When any owner of a farm, the name of which has been recorded as provided in this article, transfers by deed or otherwise the whole of such farm, such transfer may include the registered name thereof; but if the owner shall transfer only a portion of such farm, then, in that event, the registered name thereof shall not be transferred to the purchaser unless so stated in the deed or conveyance.

1915, c. 108, s. 4.

4010. Cancellation of registry; fee. When any owner of a registered farm desires to cancel the registered name thereof, he shall state on the margin of the record of the register of such name the following: "This name is canceled and I hereby release all rights thereunder," which shall be signed by the person canceling such name, and attested by the register of deeds. For such latter service the register of deeds shall charge a fee of twenty-five cents, which shall be paid to the county treasurer as other fees are paid to the county treasurer by him.

1915, c. 108, s. 5.

4011. Article not applicable to certain counties. This article shall not apply to the counties of Surry, Stokes, and Sampson.

1915, c. 108, s. 6.

ART. 5. STAMPING OF GOLD AND SILVER ARTICLES

4012. Marking gold articles regulated. It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of gold or any alloy of gold, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark indicating or designed to indicate that the gold, or alloy or gold, therein is of a greater degree of fineness than its actual fineness, unless the actual fineness, in the case of flat-ware and watch-cases, is not less by more than three one-thousandths parts, and in the case of all other articles is not less by more than one-half karat than the fineness indicated, according to the standards and subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of gold or alloy in the articles, according to the required standards, the part of the gold or alloy taken for the test, analysis or assay shall be a part not containing or having attached thereto any solder or alloy of inferior fineness used for brazing or uniting the parts of the articles. In addition to the foregoing tests and standards, the actual fineness of the entire quantity of gold and of its alloys contained in any article mentioned in this section (except watch-cases), including all solder or alloy of inferior metal used for brazing or uniting the parts (all such gold, alloys, and solder being assayed as one piece), shall not be less by more than one karat than the fineness indicated by the mark used as above indicated. Violation of this section is a misdemeanor, punishable as provided in this article.

1907, c. 331, s. 1.

4013. Marking silver articles regulated. It shall be unlawful to make for sale or sell or offer to sell or dispose of or have in possession with intent to sell or dispose of—

1. Any article of merchandise made in whole or in part of silver or any alloy of silver, and having marked, stamped, branded or engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words "sterling silver" or "sterling" or any colorable imitation thereof, unless nine hundred and twenty-five one-thousandths of the component parts of the metal appearing or purporting to be silver, of which the article is manufactured, are pure silver, subject to the qualifications hereinafter set forth: Provided, that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standard.

2. Any article of merchandise made in whole or in part of silver or of any alloy of silver, and having marked, stamped, branded, engraved or imprinted thereon, or upon any card, tag or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words "coin" or "coin silver," or any colorable imitation thereof, unless nine hundred one-thousandths of the component parts of the metal appearing or purporting to be silver, of which the article is manufactured, are pure silver, subject to the qualifications hereinafter set forth: Provided, that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standards.

3. Any article of merchandise made in whole or in part of silver or of any alloy of silver, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark or word (other than the word "sterling" or the word "coin") indicating, or designed to indicate, that the silver or alloy of silver in the article is of a greater degree of fineness than its actual fineness, unless the actual fineness is not less by more than four one-thousandths parts than the actual fineness indicated by the use of such mark or word, subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of the articles mentioned in this section, according to the foregoing standards, the part taken for test, analysis or assay shall be a part not containing or having attached thereto any solder or alloy of inferior metal used for brazing or uniting the parts of such article. In

addition to the foregoing test and standards, the actual fineness of the entire quantity of metal purporting to be silver contained in any article mentioned in this section, including all solder or alloy of inferior fineness used for brazing or uniting the parts (all such silver, alloy or solder being assayed as one piece), shall not be less by more than ten one-thousandths parts than the fineness indicated according to the foregoing standards, by the mark employed as above indicated. Violation of this section is a misdemeanor, punishable as provided in this article.

1907, c. 331, s. 2.

4014. Marking articles of gold plate regulated. It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto a plate, plating, covering or sheet of gold, or of any alloy of gold, which article is known in the market as "rolled gold plate," "gold plate," "gold-filled," or "gold electroplate," or by any similar designation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any word or mark usually employed to indicate the fineness of gold, unless such word be accompanied by other words plainly indicating that such article or some part thereof is made of rolled gold plate, or gold plate, or gold electroplate, or is gold-filled, as the case may be. Violation of this section is a misdemeanor, punishable as provided in this article.

1907, c. 331, s. 3.

4015. Marking articles of silver plate regulated. It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto, a plate, plating, covering or sheet of silver or of any alloy of silver, which article is known in the market as "silver plate" or "silver electroplate," or by any similar designation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the word "sterling" or the word "coin," either alone or in conjunction with any other words or marks. Violation of this section is a misdemeanor, punishable as provided in this article.

1907, c. 331, s. 4.

4016. Violation of article misdemeanor. Every person, firm, corporation or association guilty of a violation of any one of the preceding sections of this article, and every officer, manager, director or managing agent of any such person, firm, corporation or association directly participating in such violation or consenting thereto, shall be guilty of a misdemeanor and punished by fine or imprisonment, or both, at the discretion of the court: Provided, that if the person charged with violation of this article shall prove that the article concerning which the charge was made was manufactured prior to the thirteenth day of June, one thousand nine hundred and seven, then the charge shall be dismissed.

1907, c. 331, s. 5.

ART. 6. CATTLE BRANDS

4017. **Owners of stock to register brand or marks.** Every person who has any horses, cattle, hogs or sheep may have an earmark or brand different from the earmark or brand of all other persons, which he shall record with the clerk of the board of commissioners of the county where his horses, cattle, hogs or sheep are; and he may brand all horses eighteen months old and upwards with the said brand, and earmark all his hogs and sheep six months old and upwards with the said earmark; and earmark or brand all his cattle twelve months old and upwards; and if any dispute shall arise about any earmark or brand, the same shall be decided by the record thereof.

Rev., s. 3028; Code, s. 2317; R. C., c. 17, s. 1.

CHAPTER 78

TRUSTEES

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ART. 1. INVESTMENT AND DEPOSIT OF TRUST FUNDS

4018. **Certain investments deemed cash.** Guardians, executors, administrators, and others acting in a fiduciary capacity, having surplus funds of their wards, estates and cestuis que trustent to loan, may invest in United States bonds, or any securities for which the United States are responsible, farm loan bonds issued by Federal land banks, or in bonds of the state of North Carolina issued since the year one thousand eight hundred and seventy-two; or in drainage bonds duly issued under the provisions of article 8 of chapter entitled Drainage; and in settlements by guardians, executors, administrators, trustees, and others acting in a fiduciary capacity, such bonds or other securities of the United States, and such bonds of the state of North Carolina, and such drainage bonds, and state road bonds, issued under sections 3600 to 3607 of chapter Roads and Highways, shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds or other securities, and may be paid as such by the transfer thereof to the persons entitled.

Rev., s. 1792; Code, s. 1594; 1870-1, c. 197; 1885, c. 389; 1917, c. 6, s. 9; 1917, c. 67, s. 1; 1917, c. 152, s. 7; 1917, c. 191, s. 1; 1917, c. 269, s. 5.

For authority of fiduciaries to invest in farm loan bonds of joint-stock land banks, see section 225.

Guardian's primary duty is to invest funds, and he will be charged with interest in the absence of proof that funds remained in his hands unemployed without his fault: *Wilson v. Lineberger*, 88-416. Guardian may authorize trustee of insolvent bank to borrow money to run bank, the ward being a shareholder: *Bank v. Cocks*, 127-467. Guardian may use his own discretion in investment of ward's money: *Gary v. Cannon*, 38-64.

For additional annotations, see section 2308.

4019. Trust funds deposited at trustee's risk. No provision in any charter or certificate of organization of any corporation permitting deposits therein by any guardian, executor or other trustee or fiduciary, or by any county, bonded or other officer, shall operate or be construed to relieve or discharge them, or either of them, from official responsibility, or to relieve them, or either of them, or their sureties, from liability on their official bonds.

Rev., s. 1793; 1889, c. 470.

Section referred to in *Smith v. Patton*, 131-396.

ART. 2. REMOVAL OF TRUST FUNDS FROM STATE

4020. Proceeding to remove trust funds of nonresidents. When any personal estate in this state is vested in a trustee resident therein, and those having the beneficial interest in the said estate are nonresidents of this state, the clerk of the superior court of the county in which the said trustee resides may, on a petition filed for that purpose, order him or his personal representative to pay, transfer, and deliver the said estate, or any part of it, to a nonresident trustee appointed by some court of record in the state in which the said beneficiary or beneficiaries reside. No such order of any clerk shall be valid and in force until approved by the resident judge of said judicial district, or the judge holding court in such district.

1911, c. 161, s. 1.

4021. Removal ordered on notice; bond of nonresident trustee. No such order shall be made, in the case of a petition, until notice of the application shall have been given to all persons interested in such trust estate, as now required by law in other special proceedings, nor until the court shall be satisfied by authentic documentary evidence that the nonresident trustee, appointed as aforesaid, has given bond, with sufficient surety, for the faithful execution of the trust, nor until it is satisfied that the payment and removal of such estate out of the state will not prejudice the right of any person interested or to become interested therein.

1911, c. 161, s. 2.

4022. Order of removal discharges resident trustee. When any guardian or committee, trustee or other person in this state, shall pay over, transfer, or deliver any estate in his hands or vested in him, under any order or decree made in pursuance of this article, he shall be discharged from all responsibility therefor.

1911, c. 161, s. 3.

ART. 3. RESIGNATION OF TRUSTEE

4023. Clerk's power to accept resignations. The clerks of the superior courts of this state have power and jurisdiction to accept the resignation of executors, administrators, guardians, trustees, and other fiduciaries and to appoint their successors in the manner provided by this article.

1911, c. 39, s. 1.

4024. Petition; contents and verification. When any executor, administrator, guardian, trustee, or other fiduciary desires to resign his trust, he shall file his petition in the office of the clerk of the superior court of the county in which he

qualified or in which the instrument under which he claims is registered. The petition shall set forth all the facts in connection with the appointment and qualification of the applicant as such fiduciary, with a copy of the instrument under which he acts; shall state the names, ages, and residences of all the cestuis que trustent and other parties interested in the trust estate; shall contain a full and complete statement of all debts or liabilities due by the estate, and a full and complete statement of all assets belonging to said estate, and a full and complete statement of all moneys, securities, or assets in the hands of the fiduciary and due the estate, together with a full statement of the reasons why the applicant should be permitted to resign his trust. The petition shall be verified by the oath of the applicant.

1911, c. 39, s. 2.

4025. Parties; hearing; successor appointed. Upon the filing of the petition, the clerk shall docket the cause as a special proceeding, with the fiduciary as plaintiff and the cestuis que trustent as defendants, and shall issue summons for the defendants, and the procedure shall be the same as in other special proceedings. If any of the defendants be nonresidents, summons may be served by publication; and if any be infants, a guardian ad litem must be appointed by the court to represent their interests in the manner now provided by law. The cestuis que trustent, creditors, or any other person interested in the trust estate, have the right to answer said petition or traverse the same and to offer evidence why the prayer of the petition should not be granted. The clerk shall then proceed to hear and determine the matter, and if it appears to the court that the best interests of the creditors and the cestuis que trustent demand that the resignation of the fiduciary be accepted, or if it appears to the court that sufficient reasons exist for allowing the resignation, and that the resignation can be allowed without prejudice to the rights of creditors or the cestuis que trustent, the clerk may, in the exercise of his discretion, allow the applicant to resign; and in such case the clerk shall proceed to appoint the successor of the petitioner in the manner provided in this article.

1911, c. 39, s. 3.

4026. Resignation allowed; costs; judge's approval. In making an order allowing the fiduciary to resign the clerk shall make such order concerning the costs of the proceedings and commissions to the fiduciary as may be just. If there is no appeal from the decision and order of the clerk within the time prescribed by law, the proceedings shall be submitted to the judge of the superior court and approved by him before the same become effective.

1911, c. 39, s. 3.

4027. Appeal; stay effected by appeal. Any party in interest may appeal from the decision of the clerk to the judge at chambers, and in such event the procedure shall be the same as in other special proceedings as now provided by law. If the clerk allows the resignation, and an appeal is taken from his decision, such appeal shall have the effect to stay the judgment and order of the clerk until the cause is heard and determined by the judge upon the appeal taken.

1911, c. 39, s. 4.

4028. On appeal judge determines facts. Upon an appeal taken from the clerk to the judge, the judge shall have the power to review the findings of fact made

by the clerk and to find the facts or to take other evidence, but the facts found by the judge shall be final and conclusive upon any appeal to the supreme court.

1911, c. 39, s. 5.

4029. Final accounting before resignation. No executor, administrator, guardian, trustee, or other fiduciary shall be allowed or permitted to resign his trust until he shall first file with the court his final account of the trust estate, and until the court shall be satisfied that the said account is true and correct.

1911, c. 39, s. 6.

4030. Resignation effective on settlement with successor. In case the resignation of the fiduciary is accepted by the court, the same shall not go into effect, or release or discharge the fiduciary from liability, until he shall have accounted to his successor in full for all moneys, securities, property or other assets or things of value in his possession or under his control or which should be in his possession or under his control belonging to the trust estate.

1911, c. 39, s. 6.

4031. Court to appoint successor; bond required. If the court shall allow any executor, administrator, guardian, trustee, or other fiduciary to resign his trust upon compliance with the provisions of this article, it shall be the duty of the court to proceed to appoint some fit and suitable person as the successor of such executor, administrator, guardian, trustee or other fiduciary; and the court shall require the person so appointed to give bond with sufficient surety, approved by the court, in a sum double the value of the property to come into his hands, conditioned upon the faithful performance of his duties as such fiduciary and for the payment to the persons entitled to receive the same of all moneys, assets, or other things of value which may come into his hands. All bonds executed under the provisions of this article shall be filed with the clerk, and shall be recorded in his office in a book kept for that purpose.

1911, c. 39, s. 7.

4032. Rights and duties devolve on successor. Upon the acceptance by the court of the resignation of any executor, administrator, guardian, trustee, or other fiduciary, and upon the appointment by the court of his successor in the manner provided by this article, the substituted trustee shall succeed to all the rights, powers, and privileges, and shall be subject to all the duties, liabilities, and responsibilities that were imposed upon the original trustee.

1911, c. 39, s. 8.

ART. 4. CHARITABLE TRUSTS

4033. Trustees to file accounts. When real or personal property has been granted by deed, will, or otherwise, for such charitable purposes as are allowed by law, it shall be the duty of those to whom are confided the management of the property and the execution of the trust, to deliver in writing a full and particular account thereof to the clerk of the superior court of the county where the charity is to take effect, on the first Monday in February in each year, to be filed among the records of the court, and spread upon the record of accounts.

Rev., s. 3922; Code, s. 2342; R. C., c. 18, s. 1; 1832, c. 14, s. 1; 43 Eliz., c. 4.

The courts take special care to enforce regulations concerning private charities: *Keith v. Scales*, 124-497; see *Newton Academy v. Bank*, 101-488; *Deaf and Dumb Institute v. Norwood*, 45-65; *Kirkpatrick v. Rogers*, 41-130; *White v. University*, 39-19; *Bridges v. Pleasants*, 39-26; *Holland v. Peck*, 37-255; *State ex rel. v. Gerard*, 37-210; *Stanly v. McGowen*, 37-9; *Cameron v. Comrs.*, 36-436; *Griffin v. Graham*, 8-96.

Gifts to charity are liberally construed: *Paine v. Forney*, 128-237.

As to what is necessary to create a charitable trust, see *St. James v. Bagley*, 138-384; *McLeod v. Jones*, 159-74.

Where funds bequeathed are not sufficient to build a church of the size named, a church of smaller size should be built: *Paine v. Forney*, 128-237.

As to liability of property held by church for charitable purposes, see *United Brethren v. Comrs.*, 115-489.

Bequest for charitable purposes must be definite or it cannot be enforced: *Bridges v. Pleasants*, 39-26; *Barnes v. Simms*, 40-392.

Doctrine of *cy pres* does not obtain in this state: *Bridges v. Pleasants*, 39-26; *Faribault v. Taylor*, 58-219; *Trustees v. Chambers*, 56-253; *Institution v. Norwood*, 45-65; *Taylor v. Bible Society*, 42-201; *Lemmond v. Peoples*, 41-137; *White v. University*, 39-19; *Hester v. Hester*, 37-330.

To sustain a gift in trust by a testator, the trust itself must be valid: *Bridges v. Pleasants*, 39-26—and it must be granted for a definite purpose to some body or association of persons having capacity to take, or to be chartered by the legislature for that purpose, *Ibid.*

A devise in perpetuity for charitable purposes will be sustained: *Stanly v. McGowen*, 37-9; *State ex rel. v. Gerard*, 37-210.

For further annotations, see chapter Religious Societies.

4034. Action for account; court to enforce trust. If the preceding section be not complied with, or there is reason to believe that the property has been mismanaged through negligence or fraud, it shall be the duty of the clerk of the superior court to give notice thereof to the attorney-general or solicitor who represents the state in the superior court for that county; and it shall be his duty to bring an action in the name of the state against the grantees, executors, or trustees of the charitable fund, calling on them to render a full and minute account of their proceedings in relation to the administration of the fund and the execution of the trust. The attorney-general or solicitor may also, at the suggestion of two reputable citizens, commence an action as aforesaid; and, in either case, the court may make such order and decree as shall seem best calculated to enforce the performance of the trust.

Rev., s. 3923; Code, ss. 2343, 2344; R. C., c. 18, ss. 2, 3; 1832, c. 14, ss. 2, 3.

See *Keith v. Scales*, 124-497; *Newton Academy v. Bank*, 101-488; see annotations under section 4033. Action to determine what trustees are entitled to administer the trust: *Kerr v. Hicks*, 154-266—or who is entitled to benefit of the trust, *Church v. Trustees*, 158-119.

4035. Fees allowed solicitor. The court may allow fees to the attorney-general or solicitor for his services, to be paid by the trustees, the estate, or the county, as shall be ordered by the court.

Rev., s. 3924; Code, s. 2345; R. C., c. 18, s. 4; 1832, c. 14, s. 4.

See *Keith v. Scales*, 124-497; *Kerr v. Hicks*, 154-266.

CHAPTER 79

WAREHOUSE RECEIPTS

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ART. 1. GENERAL PROVISIONS

4036. Name of act. This act may be cited as the Uniform Warehouse Receipts act.

1917, c. 37, s. 62.

For cotton warehouse system, see sections 4907-4925. For public warehouses, see sections 5118-5123. For leaf tobacco warehouses, see sections 5124-5126.

4037. Terms defined. In this act, unless the context or subject-matter otherwise requires—

“Action” includes counterclaim, set-off, and suit in equity.

“Delivery” means voluntary transfer of possession from one person to another.

“Fungible goods” means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

“Goods” means chattels or merchandise in storage, or which has been or is about to be stored.

“Holder” of a receipt means a person who has both actual possession of such receipt and a right of property therein.

“Order” means an order by indorsement on the receipt.

“Owner” does not include mortgagee or pledgee.

“Person” includes a corporation or partnership of two or more persons having a joint or common interest.

To “purchase” includes to take as mortgagee or as pledgee.

“Purchaser” includes mortgagee and pledgee.

“Receipt” means a warehouse receipt.

“Value” is any consideration sufficient to support a simple contract. An antecedent or preëxisting obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

“Warehouseman” means a person lawfully engaged in the business of storing goods for profit.

A thing is done “in good faith” within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not.

1917, c. 37, s. 58.

4038. Uniform construction. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

1917, c. 37, s. 57.

4039. General law applied. In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern.

1917, c. 37, s. 56.

4040. Prior receipts not affected. The provisions of this act do not apply to receipts made and delivered prior to the taking effect of this act, March 1, 1917. 1917, c. 37, s. 59.

ART. 2. ISSUE OF WAREHOUSE RECEIPTS

4041. Who may issue receipts. Warehouse receipts may be issued by any warehouseman. 1917, c. 37, s. 1.

4042. What receipt must contain. Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms—

1. The location of the warehouse where the goods are stored.
2. The date of issue of the receipt.
3. The consecutive number of the receipt.
4. A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order.
5. The rate of storage charges.
6. A description of the goods or of the packages containing them.
7. The signature of the warehouseman, which may be made by his authorized agent.

8. If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and

9. A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is at the time of the issue of the receipt unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred, and the purpose thereof, is sufficient. A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms herein required.

Rev., s. 3032; 1917, c. 37, s. 2.

4043. Other terms inserted; exceptions. A warehouseman may insert in a receipt issued by him any other terms and conditions, provided that such terms and conditions shall not—

1. Be contrary to the provisions of this act.
2. In any wise impair his obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

1917, c. 37, s. 3.

4044. Nonnegotiable receipts. A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a nonnegotiable receipt.

1917, c. 37, s. 4.

4045. Nonnegotiable receipts marked. A nonnegotiable receipt shall have plainly placed upon its face by the warehouseman issuing it “nonnegotiable,” or “not negotiable.” In case of the warehouseman’s failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable may, at his

option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character.

Rev., s. 3032; 1917, c. 37, s. 7.

4046. Negotiable receipts. A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt, is a negotiable receipt. No provisions shall be inserted in a negotiable receipt that it is nonnegotiable. Such provision, if inserted, shall be void.

Rev., s. 3032; 1917, c. 37, s. 5.

4047. Duplicate negotiable receipts. When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to any one who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt.

1917, c. 37, s. 6.

ART. 3. OBLIGATIONS AND RIGHTS OF WAREHOUSEMEN ON RECEIPTS

4048. Delivery of goods on proper demand. A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—

1. An offer to satisfy the warehouseman's lien;
2. An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt; and
3. A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman. In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal.

1917, c. 37, s. 8.

4049. To whom goods may be delivered. A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is—

1. The person lawfully entitled to the possession of the goods, or his agent;
2. A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods or who has written authority from the person so entitled, either indorsed upon the receipt or written upon another paper; or
3. A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee.

1917, c. 37, s. 9.

4050. Liability for wrong delivery. Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (2) and (3) of the preceding section, and though he delivered the goods as authorized by said subdivisions, he shall be so liable if prior to such delivery he had either—

1. Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

2. Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.

1917, c. 37, s. 10.

4051. Liability on receipt not taken up on delivery. Except as hereafter provided in this article, when the goods may have been sold to satisfy warehouseman's charges or because of their perishable or hazardous nature, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable, to any one who purchases for value and in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman.

1917, c. 37, s. 11.

4052. Liability on receipt for partial delivery. Except when goods may have been sold to satisfy warehouseman's lien or because of their perishable or hazardous nature, as hereafter provided in this article, where a warehouseman delivers a part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel the receipt or to place plainly upon it a statement of what goods or packages have been delivered, he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman.

1917, c. 37, s. 12.

4053. Effect of alteration of receipt. The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was—

1. Immaterial,

2. Authorized, or

3. Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the altera-

tion shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase.

1917, c. 37, s. 13.

4054. Delivery in case of lost receipt. Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties, to be approved by the court, to protect the warehouseman from any liability or expense which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also, in its discretion, order the payment of the warehouseman's reasonable costs. The delivery of the goods under an order of the court as provided in this section shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

1917, c. 37, s. 14.

4055. Effect of issuing duplicate receipt. A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability.

1917, c. 37, s. 15.

4056. Claim of title no defense for nondelivery; exceptions. No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt.

1917, c. 37, s. 16.

4057. Interpleader in conflicting claims. If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate, require all known claimants to interplead.

1917, c. 37, s. 17.

See Code of Civil Procedure, section 460.

4058. Reasonable time to investigate conflicting claims. If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

1917, c. 37, s. 18.

4059. Title in third person no defense; exceptions. Except as provided in the two preceding sections and except when the goods may have been delivered to the

person authorized to have such delivery, as heretofore provided in this article, or when the goods may have been sold to satisfy the warehouseman's lien or because of their perishable or hazardous nature, as hereafter provided in this article, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt.

1917, c. 37, s. 19.

4060. Failure to deliver goods as described. A warehouseman shall be liable to the holder of a receipt for damages caused by the nonexistence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor.

1917, c. 37, s. 20.

4061. Liability for negligence. A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise; but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.

1917, c. 37, s. 21.

For liability of warehouseman, see *Motley v. Finishing Co.*, 124-232.

4062. Goods kept separate. Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited.

1917, c. 37, s. 22.

4063. Effect of confusion of goods. If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole.

Rev., s. 3034; 1917, c. 37, s. 23.

4064. Liability of warehouseman for confusion of goods. The warehouseman shall be severally liable to each depositor for the care and redelivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate.

1917, c. 37, s. 24.

4065. Goods not subject to attachment or execution. If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to

them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court.

1917, c. 37, s. 25.

4066. Creditor's remedy against receipt. A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

1917, c. 37, s. 26.

4067. Warehouseman's lien. Subject to the subsequent provisions of this article specifying what liens may be enforced against a negotiable receipt, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooperating, and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien.

1917, c. 37, s. 27.

See chapter on Liens.

4068. Against what goods lien enforced. Subject to the subsequent provisions of this article specifying what liens may be enforced against a negotiable receipt, a warehouseman's lien may be enforced—

1. Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted; and

2. Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person has been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid.

1917, c. 37, s. 28.

4069. Loss of lien. A warehouseman loses his lien upon goods—

1. By surrendering possession thereof, or

2. By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this act.

1917, c. 37, s. 29.

4070. What liens enforced against negotiable receipts. If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the

receipt expressly enumerate other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms for a warehouseman's lien as heretofore provided in this article, although the amount of the charges so enumerated is not stated in the receipt.

1917, c. 37, s. 30.

4071. Right to retain until liens satisfied. A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied.

1917, c. 37, s. 31.

4072. Other legal remedies for warehouseman. Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay.

1917, c. 37, s. 32.

4073. Enforcement of liens. A warehouseman's lien for a claim which has become due may be satisfied as follows:

1. Notice given. The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain—

a. An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due;

b. A brief description of the goods against which the lien exists;

c. A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered or from the time when the notice should reach its destination according to the due course of post if the notice is sent by mail; and

d. A statement that unless the claims are paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

2. Sale of goods. In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable

charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

3. Right of claimant to pay charges. At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this act, to the possession of the goods on payment of charges thereon. Otherwise, the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit.

Rev., ss. 3036, 3037, 3038; 1917, c. 37, s. 33.

4074. Sale of perishable goods. If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods and to remove them from the warehouse; and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section.

Rev., ss. 3039, 3040; 1917, c. 37, s. 34.

4075. Other remedies not excluded. The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property.

Rev., s. 3041; 117, c. 37, s. 35.

4076. Liability discharged by sale for liens. After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable.

1917, c. 37, s. 36.

ART. 4. NEGOTIATION AND TRANSFER OF RECEIPTS

4077. Negotiation by delivery. A negotiable receipt may be negotiated by delivery—

1. Where by the terms of the receipt the warehouseman undertakes to deliver the goods to the bearer; or

2. Where by the terms of the receipt the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where by the terms of a negotiable receipt the goods are deliverable to bearer, or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee.

1917, c. 37, s. 37.

4078. Negotiation by indorsement. A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are by the terms of the receipt deliverable. Such indorsement may be in blank, to bearer, or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer, or to another specified person. Subsequent negotiation may be made in like manner.

1917, c. 37, s. 38.

4079. Transfer of nonnegotiable receipts. A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

A nonnegotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right.

1917, c. 37, s. 39.

4080. By whom receipt negotiated. A negotiable receipt may be negotiated—

1. By the owner thereof, or

2. By any person to whom the possession or custody of the receipt has been entrusted by the owner, if by the terms of the receipt the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been entrusted, or if at the time of such entrusting the receipt is in such form that it may be negotiated by delivery.

1917, c. 37, s. 40.

4081. Rights acquired by negotiation. A person to whom a negotiable receipt has been duly negotiated acquires thereby—

1. Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and

2. The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him.

1917, c. 37, s. 41.

4082. Rights acquired by transfer. A person to whom a receipt has been transferred but not negotiated acquires thereby, as against the transferrer, the title of the goods, subject to the terms of any agreement with the transferrer. If the receipt is nonnegotiable, such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the

direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Prior to the notification of the warehouseman by the transferrer or transferee of a nonnegotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferrer, or by a notification to the warehouseman by the transferrer or a subsequent purchaser from the transferrer of a subsequent sale of the goods by the transferrer.

1917, c. 37, s. 42.

4083. Right to compel indorsement. Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferrer is essential for negotiation, the transferee acquires a right against the transferrer to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

1917, c. 37, s. 43.

4084. Warranties in negotiation and transfer. A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants—

1. That the receipt is genuine;
2. That he has a legal right to negotiate or transfer it;
3. That he has knowledge of no fact which would impair the validity or worth of the receipt; and
4. That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a receipt the goods represented thereby.

1917, c. 37, s. 44.

4085. Indorser not liable for failure of prior parties. The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations.

1917, c. 37, s. 45.

4086. No warranty by collection of debt secured by receipt. A mortgagee, pledgee, or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described.

1917, c. 37, s. 46.

See *Mason v. Cotton Co.*, 148-492.

4087. Rights of bona fide holder not affected by fraud. The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake, or duress to entrust the possession or custody of the receipt to such person, if the person to whom the

receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress.

1917, c. 37, s. 47.

4088. Subsequent purchasers protected. Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage, or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation.

1917, c. 37, s. 48.

4089. Right of purchaser superior to seller's lien. Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation.

1917, c. 37, s. 49.

ART. 5. CRIMINAL OFFENSES

4090. Issuing receipt for goods not stored. A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both.

1917, c. 37, s. 50.

4091. Issuing receipt with false statement. A warehouseman, or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both.

1917, c. 37, s. 51.

4092. Issuing fraudulent duplicates. A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt after proceedings for delivery as heretofore pro-

vided in this chapter, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both.

1917, c. 37, s. 52.

4093. Failure to state in receipt the interest of warehouseman. Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents, or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both.

1917, c. 37, s. 53.

4094. Delivering goods without obtaining receipt. A warehouseman, or any officer, agent, or servant of a warehouseman, who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, except in the cases heretofore provided for in this chapter for the delivery of goods upon a lost receipt and for the sale of goods to satisfy the warehouseman's lien or because of their perishable or hazardous nature, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both.

1917, c. 37, s. 54.

4095. Fraudulent deposit and negotiation. Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars, or by both.

1917, c. 37, s. 55.

CHAPTER 80

WIDOWS

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ART. 1. DISSENT FROM WILL

4096. **Time and manner of dissent.** Every widow may dissent from her husband's will before the clerk of the superior court of the county in which such will is proved, at any time within six months after the probate. The dissent may be in person, or by attorney authorized in writing, executed by the widow and attested by at least one witness and duly proved. The dissent, whether in person or by attorney, shall be filed as a record of court. If the widow be an infant or insane, she may dissent by her guardian.

Rev., s. 3080; Code, s. 2108; 1868-9, c. 93, s. 37.

Dissent of widow may be made in person or by attorney: *Hollomon v. Hollomon*, 125-29—formerly made in person only, *Hinton v. Hinton*, 28-274.

Widow may dissent, notwithstanding executor induced her to agree otherwise under seal, if she was ignorant at the time of the condition of the estate: *Richardson v. Justice*, 125-409. Where widow agrees to adhere to provisions of will and, in consequence thereof, executor proceeds to pay legacies and assume obligations which would cause loss to him if widow were to dissent, she will be estopped by her agreement; but where in such case she offers to put the estate in statu quo, and executor has not acted under her agreement so as to cause him any loss, she is not estopped: *Yorkly v. Stinson*, 97-236.

Where widow is appointed executrix, proves the will and qualifies, she cannot afterwards renounce and dissent, but must carry out will in all of its provisions: *Yorkly v. Stinson*, 97-236; see *Mendenhall v. Mendenhall*, 53-287; *Syme v. Badger*, 92-706; *Allen v. Allen*, 121-331; *Jones v. Gerock*, 59-195. But she may still dissent within the six months where qualification was had under an agreement with those interested to increase her allowance, and this was not carried out: *In re Shuford's Will*, 164-132.

Where widow fails to dissent, and brings action after six months from probate for a year's allowance, such action is not maintainable: *Perkins v. Brinkley*, 133-86. Dissent not necessary to maintain claim to year's allowance, when will provided for the allowance: *Flippin v. Flippin*, 117-376. Widow is entitled to provision from both personal and real estate of husband, and where she is provided for with one in the will she may obtain the other by dissenting from the will: *Craven v. Craven*, 17-338. Widow is entitled to dower without dissenting when no provision is made for her in the will: *Miller v. Chambers* (not reported), cited in *Craven v. Craven*, 17-338—but where provision made, she must dissent in six months, *Redmond v. Coffin*, 17-437.

If widow, donee of a power in a will, dissents from will, she renounces all powers and estates given, at least of such powers as imply personal trust and confidence: *Hinton v. Hinton*, 68-104; *Mendenhall v. Mendenhall*, 53-287.

Where widow dissents to will in one state, it seems she cannot come here and claim under the will: *Jones v. Gerock*, 59-195; *Mendenhall v. Mendenhall*, 53-287.

Fact that widow enters a caveat to will and contests its validity does not prevent her from accepting any benefit given her by will if its validity is established, or from entering her dissent thereto in the proper time: *Yorkly v. Stinson*, 97-236.

An election to take under the will once made, though by matter in pais, is binding: *Horton v. Lee*, 99-227. Widow who takes under a will is barred of dower in the lands included in such will because of her election, and not under an idea that she has received consideration therefor: *Mitchener v. Atkinson*, 62-23; but see same case, 63-585.

This section is a statute of limitation and only affects the remedy: *Hinton v. Hinton*, 61-410.

Where widow, being under age and without guardian, dissented from husband's will in open court and dower was assigned, it was held that, though dissent erroneously made, assignment of dower cannot be impeached in an action of ejectment brought by her for its recovery: *Cheshire v. McCoy*, 52-376.

4097. Effect of dissent. Upon such dissent, the widow shall have the same rights and estates in the real and personal property of her husband as if he had died intestate.

Rev., s. 3081; Code, s. 2109; R. C., c. 118, s. 12; 1868-9, c. 93, s. 38.

The "estate" is her dower, and her "rights" are the year's support and share as distributee: *Drewry v. Bank*, 173-664. Upon dissent the widow takes such interest as she would have taken if husband had died intestate; and her interest is subject to inheritance tax: *Corporation Com. v. Dunn*, 174-679.

How distributive share in personalty arrived at when widow dissents from will: *Arrington v. Dortch*, 77-367, and cases cited.

Where property is devised to widow for life and then to another, and she dissents to will, such property descends at once to the remainderman unless assigned to widow in her dower: *Baptist University v. Borden*, 132-476; *Adams v. Gillespie*, 55-244; *Wilson v. Stafford*, 60-647. Upon a dissent of widow, will should be so construed as to affect devisees and legatees to as small a degree as possible: *Ibid.*

For further annotations, see under section 4096.

4098. Widow's interest not liable for husband's debts. The dower or right of dower of a widow, and such lands as may be devised to her by his will, if such lands do not exceed the quantity she would be entitled to by right of dower, although she has not dissented from such will, shall not be subject to the payment of debts due from the estate of her husband, during the term of her life.

Rev., s. 3082; Code, ss. 2104, 2105; R. C., c. 118, s. 8; 1868-9, c. 93, s. 34; 1791, c. 351, s. 4.

Failure of the widow to dissent does not deprive her of her dower in the land as against the rights of creditors: Trust Co. v. Stone, 176-270; Lee v. Giles, 161-541; Shackelford v. Miller, 91-181; Simonton v. Houston, 78-408; Avery, ex parte, 64-113—and she is entitled to the same remedies as in an application for dower, Simonton v. Houston, 78-408.

Where will gave certain legacies and devises to widow in lieu of dower, which amounted to less in value than her dower, such legacies and devises were not assets liable to pay debts of testator: Smith v. Smith, 79-455. **A decree of sale in a petition to sell land for assets does not estop the widow to claim dower in the proceeds unless her right was adjudicated:** Trust Co. v. Stone, 176-270.

Where the widow is entitled to a homestead in right of her husband she is not put to her election to hold under the will or against it by dissent: Fulp v. Brown, 153-531.

ART. 2. DOWER

4099. Who entitled to dower. Widows shall be endowed as at common law as in this chapter defined: Provided, if any married woman shall commit adultery, and shall not be living with her husband at his death, or shall be convicted of the felonious slaying of her husband, or being accessory before the fact to the felonious slaying of her husband, she shall thereby lose all right to dower in the lands and tenements of her husband; and any such adultery or conviction may be pleaded in bar of any action or proceeding for the recovery of dower.

Rev., s. 3083; Code, s. 2102; 1889, c. 499; 1868-9, c. 93, s. 32; 1871-2, c. 193, s. 44.

Nature and history of dower discussed: Corporation Com. v. Dunn, 174-679. **Widow's claim is in nature of a "writ of right" and is favored by law, and cannot be lost or forfeited, except for causes prescribed by statute or common law:** Brown v. Morisey, 126-772.

Where decree in an action for divorce a mensa et thoro directed that husband pay a sum in gross and be discharged from all further liability for the support of his wife, after his death wife was entitled to dower in his lands: Taylor v. Taylor, 93-418.

Wife who commits adultery and is not living with her husband at time of his death is thereby deprived of her dower: Lee v. Thornton, 176-208; Phillips v. Wiseman, 131-402. **Bigamy of wife forfeits all right of dower in first husband's estate:** Irby v. Wilson, 21-568.

4100. In what property widow entitled to dower. Subject to the provision in the preceding section, every married woman, upon the death of her husband intestate, or in case she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, tenements and hereditaments whereof her husband was seized and possessed at any time during the coverture, in which third part shall be included the dwelling-house in which her husband usually resided, together with offices, outhouses, buildings and improvements thereunto belonging or appertaining; she shall in like manner be entitled to such an estate in all legal rights of redemption and equities of redemption or other equitable estates in lands, tenements and hereditaments whereof her husband was seized in fee at any time during the coverture, subject to all valid encumbrances existing before the coverture or made during it with her free consent lawfully appearing thereto. The jury summoned for the purpose of assigning dower to a widow shall not be restricted to assign the same in every separate and

distinct tract of land, but may allot her dower in one or more tracts, having a due regard to the interest of the heirs as well as to the right of the widow. This section shall not be construed so as to compel the jury selected to allot dower to allot the dwelling-house in which the husband usually resided, when the widow shall request that the same be allotted in other property.

Rev., s. 3084; Code, s. 2103; R. C., c. 118, s. 3; R. S., c. 121, s. 3; 1827, c. 46; 1869-70, c. 176; 1883, c. 175; 1908, c. 132.

For partition and dower, see section 3226.

NATURE OF DOWER RIGHT. Widow claims her dower under statute, not under her husband, often against him: *Brown v. Morisey*, 126-772. Right of wife to dower is paramount to and does not arise from the estate of the heir, but is a continuation of that of husband: *Love v. McClure*, 99-290; *Everett v. Newton*, 118-922; see *Campbell v. Murphy*, 55-357; *Reitzel v. Eckard*, 65-673.

Right of wife to have lands exonerated from mortgage debts, as against heirs, legatees, etc.: *Creedy v. Pearce*, 69-67; *Caroon v. Cooper*, 63-386; *Gore v. Townsend*, 105-228; *Gwathney v. Pearce*, 74-398; *Klutts v. Klutts*, 58-80.

Action for waste lies against tenant in dower, when: *Carr v. Carr*, 20-317—but not against husband of such tenant, *Davis v. Gilliam*, 40-308—unless such husband attempts to remove a house therefrom, even though he built it himself, *Dozier v. Gregory*, 46-100. Action for permissive waste can be brought against life tenant: *Sherrill v. Connor*, 107-630. Creditor cannot bring action: *Jones v. Britton*, 102-174. The right to sue for waste includes the right to restrain its commission: *Morrison v. Morrison*, 122-598. Assignee of dower entitled to cut how much timber from dower land, see *Joyner v. Speed*, 68-236.

Where the wife joined the husband in conveyance of timber, payment for extension of time, made after husband's death, should be to the heir and not to the widow: *Morton v. Lumber Co.*, 178-163.

The widow's right of dower is an inchoate right, and she has no present right to property, nor to its possession; she has only a right contingent upon surviving her husband: *Rodman v. Robinson*, 134-504. Until allotment of dower has been made the widow has no right to retain possession of land against the heir or those claiming under him: *Morton v. Lumber Co.*, 178-163; *Fishel v. Browning*, 145-71, and cases cited.

Where widow by ante-nuptial agreement agreed to take same interest in husband's lands as an heir in lieu of dower, etc., such agreement is enforceable on her: *Brooks v. Austin*, 95-474—as is also agreement to take nothing, *Cauley v. Lawson*, 58-132.

Dower interest is not shown by widow proving only a deed to her husband, without proving title in grantor or possession for seven years under deed: *Brown v. Morisey*, 128-138.

Open, notorious, and exclusive possession for twelve years, accompanied by claim of ownership, is constructive notice of an equity, even though it be in possession of one entitled to dower which had not been allotted. It would have been otherwise if dower had been allotted, as to the part embraced in the allotment: *Ross v. Hendrix*, 110-403.

Debt being one prior to 1868, defendant, widow of execution debtor, is not entitled to a homestead in the land so sold, but purchaser at sheriff's sale became owner and is entitled to recover land subject only to widow's right of dower: *Buie v. Scott*, 112-375.

In suit by widow against heirs to recover payments allotted to her as dower and made a charge on land, heirs cannot set up by way of counterclaim damages for waste committed by widow, but must proceed under statute: *Hybart v. Jones*, 130-227.

In a decree for specific performance of a contract to convey land, in which the wife did not join, compensation may be made for wife's dower right as an encumbrance: *Bethell v. McKinney*, 164-71.

LANDS IN WHICH WIDOW ENDOWED OR NOT ENDOWED. Wife is entitled to dower, under statute, in equitable as well as legal estates: *Fortune v. Watkins*, 94-304; see *Rhea v. Rawls*, 131-454; *Efland v. Efland*, 96-488—in all estates which any child she might bear could by any possibility have taken by descent: *Pollard v. Slaughter*, 92-72—only in an estate of inheritance, of which husband has a seizin in law or a seizin in deed, at any time during coverture; and therefore she is not dowable of a reversion or remainder expectant upon an estate of freehold: *Houston v. Smith*, 88-312; *Redding v. Voght*, 140-562; *Thomas v. Bunch*, 158-175; *Phifer v. Phifer*, 157-221; *Royster v. Royster*, 61-226.

Seizin of husband in order to support dower must be seizin in law; not only actual or constructive possession, but legal right to possession: *Haire v. Haire*, 141-88; *Efland v. Efland*, 96-488; *Barnes v. Raper*, 90-189. Widow is not entitled to dower where husband had only a life estate: *Sprinkle v. Spainhour*, 149-223; *Gilmore v. Sellars*, 145-283; *Thompson v. Crump*, 138-32.

Where land acquired and marriage took place prior to dower act of 1867, and husband conveyed in 1872 without concurrence of wife, land was not subject to dower: *Jenkins v. Jenkins*, 82-208. Where vendee, who was married before dower and homestead acts, makes a contract to buy land, bearing date before passage of those acts, but deed is not made until after their passage, his wife is not entitled to dower or homestead in such land unless he be seized of them at his death, and deed for them without her joinder conveys good title: *Fortune v. Watkins*, 94-304. Widow who married since the common-law dower act is not entitled to dower in lands sold during coverture under execution for debts contracted prior to dower act. And this is not changed because some of debts under which lands were sold were contracted subsequently. In this view, dower act does not impair obligations of the contract between debtor and creditor: *Patton v. Asheville*, 109-685. Not entitled as against purchaser at bankrupt sale, where marriage and acquisition of land were prior to 1860: *Baird v. Winstead*, 123-181.

Where husband and wife joined in a bond to convey a tract of land to defendant, but wife was not privily examined, and after death of husband she received payment for land and invested money in other land, she was estopped from taking advantage of want of privy examination, and therefore was not entitled to dower in land sold by her husband: *Hodge v. Powell*, 96-64.

Where a man executed and delivered deed to tract of land prior to his marriage and remained on land up to his death, and deed was not recorded until after his death, his widow is not entitled to dower: *Haire v. Haire*, 141-88.

Where widow fails for fourteen years to have dower allotted she cannot take dower in lands bought by third persons from heirs, where there is enough realty left out of which to secure her dower: *Howell v. Parker*, 136-373.

Where there is a devise in fee simple, with an executory devise over, wife's right to dower attaches on first estate, and is not defeated on its determination: *Pollard v. Slaughter*, 92-72.

Where land was purchased and paid for by husband, but deed was made to a third party in order to defraud creditors of husband, he has no such seizin as will support a claim for dower on part of his widow, although he was in possession of land: *Efland v. Efland*, 96-488; *Barnes v. Raper*, 90-189—but where land of which husband was seized during coverture was sold at execution sale and purchased by a third party with money of husband, and title was made to purchaser, with a like intent to defraud, wife is entitled to dower, *Ibid*.

A conveyance before marriage to defeat intended wife of dower right is void: *Barnes v. Raper*, 90-191; *Littleton v. Littleton*, 18-327; see, also, *Tate v. Tate*, 21-22; *Pinner v. Pinner*, 44-475.

If husband made a void deed, seizin remained in him and right of dower attached thereto: *Norwood v. Morrow*, 20-578.

Widow has right of dower in land covenanted to be conveyed to husband, but not fully paid for at death: *Overton v. Hinton*, 123-1; *Smith v. Gilmer*, 64-546; *Thompson v. Thompson*, 46-430—or paid for and no deed executed, *Howell v. Parker*, 136-373.

Widow entitled to dower in land voluntarily conveyed to husband, even though deed not registered: *Tyson v. Tyson*, 37-137; *Tyson v. Harrington*, 41-329.

Where husband conveys land in trust to satisfy creditors, but continues in possession till his death, his widow is not entitled to dower therein: *Taylor v. Parsley*, 10-125 (decision under a prior statute).

Widow's right of dower in partnership realty, see *Sparger v. Moore*, 117-449; *Stroud v. Stroud*, 61-525; *Patton v. Patton*, 60-572; *Summey v. Patton*, 60-601—in land held by husband as tenant in common, *Dudley v. Tyson*, 167-67—in land in which there has been an equitable conversion and reconversion, *Phifer v. Giles*, 159-142; s. e., 157-221.

When first wife paid for land and deed was made to husband by mistake, second wife is not entitled to dower: *Hendren v. Hendren*, 153-505.

Where deed not registered, and is lost at husband's death, he did not die seized, and widow therefore not entitled in law: *Thomas v. Thomas*, 32-123—but whether in equity, see *Tyson v. Harrington*, 41-329.

Where, on death of intestate, his widow and son live together on his land, and son marries and dies and his mother has her dower allotted in the same homestead tract, the son's wife can have no dower therein: *Reitzel v. Eckard*, 65-674.

Widow not entitled, in land of second husband, when first husband still alive, and no divorce, though he was absent from state and not heard from in seven years when second marriage took place: *Ward v. Bailey*, 118-55.

Where testator made several specific bequests to widow and children and provided that residue should be disposed of according to law, widow is entitled to dower as in case of intestacy: *Bost v. Bost*, 56-484.

A reservation of dower to wife of trustor in deed of trust to pay debts is void, but does not render deed void: *Carter v. Cocks*, 64-239.

Contract before marriage that neither, in case of death of one of them, should claim anything that belonged to other before marriage is sufficient to exclude widow from dower, from year's allowance and distributive share: *Cauley v. Lawson*, 58-132.

Where it becomes necessary to resort to lands of testator to pay his debts, widow is entitled to her dower: *Gully v. Holloway*, 63-84; *Avery*, ex parte, 64-113.

Acceptance by widow of a homestead laid off in lifetime of husband does not bar her right of dower in the other lands of husband: *McAfee v. Bettis*, 72-28.

Where widow was general devisee under husband's will and conveyed a large part of the land in trust for her creditors, and, after passage of ordinance of March, 1868, dissented and sought to have dower therein: Held, that she was entitled: *Ramsour v. Ramsour*, 63-231.

Widow, who has taken dower in another state, has no interest in rents from estate of deceased husband: *Carroll v. Montgomery*, 128-278.

Widow not entitled to dower in land deeded to her husband under parol agreement of a reconveyance by way of mortgage, and she refuses to sign mortgage: *Bunting v. Jones*, 78-242.

Widow entitled in lands sold after husband's death under a fi. fa. tested before: *Frost v. Etheridge*, 12-30, overruling *Winstead v. Winstead*, 2-243.

Dower of widow shall embrace residence last usually occupied by deceased husband, and if value thereof is as much as one-third of the realty of which husband died seized, widow has no interest in balance of estate: *Howell v. Parker*, 136-373; *Harrington v. Harrington*, 142-517. But when the husband dies seized only of a house and lot, the widow is not entitled to have the whole as dower: *Caudle v. Caudle*, 176-537.

4101. Dower not affected by conveyance of husband; exception. No alienation of the husband alone, with or without covenant of warranty, shall have any other or further effect than to pass his interest in such estate, subject to the dower right of his wife: Provided, that a mortgage or trust deed by the husband to secure the purchase money, or any part thereof, of land bought by him, shall, without the wife executing the deed, be effectual to pass the whole interest according to the provisions of the said deed.

Rev., s. 3085; Code, s. 2106; 1868-9, c. 93, s. 35.

For annotations as to necessity of signature and private examination of wife in order to bar her dower, see section 997.

Husband may convey land acquired before the constitution of 1868 without joinder of wife, and thereby bar wife of dower or homestead: *Cawfield v. Owen*, 129-286.

Where wife is not a party to an action for specific performance of contract to convey land executed by her husband he cannot avoid decree for conveyance by asserting that his wife was entitled to dower in land: *Rodman v. Robinson*, 134-503—compensation allowed for dower right as an encumbrance, *Bethell v. McKinney*, 164-71.

While land sold without joinder of wife is subject to dower, the purchaser has the right to have the dower allotted out of other lands descended: *Harrington v. Harrington*, 142-517.

The restriction placed upon alienation in fee by dower must be so construed as to carry out kindly purpose for which it was created with no more restraint on power of alienation than is necessary to make it effectual: *Hughes v. Hodges*, 102-236.

4102. Dower conveyed by wife's joinder in deed. The right to dower under this chapter shall pass and be effectual against any widow or person claiming

under her upon the wife joining with her husband in the deed of conveyance and being privately examined as to her consent thereto in the manner prescribed by law.

Rev., s. 3086; Code, s. 2107; 1868-9, c. 93, s. 36.

For necessity of married woman's signing deed and being privately examined to bar her dower right, see under section 997. See chapter Married Women.

Where only interest that feme defendant in an action by grantee of her husband and herself to recover land is her contingent right of dower, her failure to sign deed or to be privily examined will not affect right of plaintiff to recover: *Deans v. Pate*, 114-194.

4103. Conveyance of home site without wife's signature. No deed or other conveyance, except to secure purchase money, made by the owner of a home site, which shall include the residence and other buildings together with the particular lot or tract of land upon which the residence is situate, whether actually occupied by said owner or not, shall be valid to pass possession or title during the lifetime of the wife without the voluntary signature and assent of his wife, signified on her private examination according to law: Provided, the wife does not commit adultery, or has not and does not abandon the husband and live separate and apart from him.

1919, c. 123.

ART. 3. ALLOTMENT OF DOWER

4104. By agreement between widow and heir. If the personal property of a decedent be sufficient to pay his debts and charges of administration, the heir or devisee with the widow may, by deed, agree to an assignment of her dower.

Rev., s. 3087; Code, s. 2110; 1868-9, c. 93, s. 39.

Agreements to assignment, see *Jones v. Slaughter*, 96-541; *Waters v. Waters*, 125-590.

4105. Petition filed in superior court. If no such agreement be made, the widow may apply for assignment of dower by petition in the superior court, and, if she fail to make such application within three months after the death of her husband, any heir or devisee may file a petition reciting the facts that the widow is entitled to dower on certain lands and has not applied for it, and demand that her dower be assigned to her. In all cases the widow and all heirs and devisees and persons in possession of, or claiming estates in, the lands shall be made parties, and the court shall hear and pass upon the petition in like manner as in other cases of special proceedings.

Rev., s. 3088; Code, ss. 2111, 2112; 1891, c. 133; 1868-9, c. 93, ss. 40, 41.

Allotment of dower at law and in equity explained: *In re Gorham*, 177-271.

Dower must be allotted in a single action brought in county in which deceased last usually resided: *Howell v. Parker*, 136-373; see *Askew v. Bynum*, 81-350.

Summons must be returnable before clerk only: *Gatewood v. Tomlinson*, 113-312. Equitable jurisdiction of superior court over dower has not been taken away by giving cognizance of such matters to clerk; but in order for jurisdiction to attach as a general rule, some equitable element should appear in application: *Pollard v. Slaughter*, 92-72; *Efland v. Efland*, 96-488.

Right to apply for allotment of dower by special proceeding under this section is a legal right, personal to the widow, and cannot be transferred by assignment: *Parton v. Allison*, 109-674—and assignee of dower right is left to his remedy by civil action in superior court: *Ibid.*; s. c., 111-429. Action of assignee of dower right is primarily against widow, but in absence of an averment that lands described were all of which she was entitled to be endowed, heirs and devisees are properly made parties, so that whole matter may be determined in one action: *Parton v. Allison*, 111-429—widow is a necessary party, and conveyance will be treated in equity as a contract to have it allotted to her and then to convey it to purchasers: *Ibid.*

Court may permit creditor of person who dies seized and possessed of lands to be made party to a proceeding for dower, and contest claim of widow: *Welfare v. Welfare*, 108-272—but creditors are not necessary parties, *Ramsour v. Ramsour*, 63-231. A tenant for years in possession is a proper party to a proceeding for dower: *Ingram v. Corbit*, 177-318.

In petition for dower it is incumbent on widow, by proper evidence, to show seizin in husband during coverture and summons served on heirs: *Waters v. Waters*, 125-590—and simply showing deed to husband will not do, *Brown v. Morisey*, 128-138.

Declarations of heir of husband are not competent against widow upon trial of an action wherein it is sought to defeat her right to dower: *Love v. McClure*, 99-290.

Equitable defense that heir's money was used in purchase of land will not avail against widow in absence of fraud, mistake, etc.: *Vance v. Vance*, 118-864.

Widow's right not being yet denied, no need to allege when marriage took place: *Parton v. Allison*, 111-429.

There is no statute of limitations barring the application of a widow for her dower: *Brown v. Morisey*, 126-772; *Simonton v. Houston*, 78-418.

Right of widow to an account for rents: *In re Gorham*, 177-271.

4106. Dower assigned by jurors summoned by sheriff. If dower be adjudged, it shall be assigned by a jury of three persons qualified to act as jurors, unless one of the parties demand a greater number, not exceeding twelve, who shall be summoned by the sheriff to meet on the premises or some part thereof, and being duly sworn by the sheriff or other person authorized to administer oaths, shall proceed to allot and set apart to the widow her dower in said premises according to law and make report of their proceedings under their hands within five days to the clerk of the superior court.

When the husband dies seized and possessed of lands in any other county than that in which dower is to be assigned, the clerk of the superior court of the county in which dower is to be assigned shall, upon application of the widow entitled to dower, issue a commission to the sheriff of such other county requiring him to summons three or more persons, as may be asked in said application, qualified to act as jurors, to go upon the lands of said husband in the county of said sheriff and assess the value of the same after being duly sworn by the sheriff for that purpose, and report their assessment under their hands and seals through the sheriff, who shall countersign the same as their report to the clerk issuing said commission; and said report in the hands of the jury summoned to assign the dower shall be considered by them a true valuation of the lands mentioned in the report, and said last-mentioned jury shall be deemed to have met on the lands thus assessed and shall assign the dower accordingly.

Rev., s. 3089; Code, s. 2113; 1893, c. 314; 1868-9, c. 93, s. 42.

A widow's dower must be assigned; she cannot take what part of her husband's lands she pleases: *Williamson v. Cox*, 3-5.

In petition for dower, where lands consisted principally of different parcels mortgaged in several deeds by husband and wife, allotment should not be in part of lands as if unencumbered or subject to same encumbrance, but in each parcel separately, and then widow can work out her relief by asserting her equity against each creditor, as he seeks to enforce his security: *Askew v. Askew*, 103-285—nor should widow be allowed the use for life in a specific sum of money in lieu of dower in a parcel of the mortgaged lands, not deemed susceptible of allotment by metes and bounds, but allotment should be of one-third of the premises in value, for life, her share being fixed by law, and not depending on estimates: *Ibid.*

Dower should embrace the residence last usually occupied by deceased husband, and if value thereof is as much as one-third of realty of which husband died seized, widow has no interest in balance of estate: *Howell v. Parker*, 136-373; see *Askew v. Eynum*, 81-350; *Harrington v. Harrington*, 142-517—but where the husband owned only a house and lot, the wife is not entitled to the whole as dower: *Caudle v. Caudle*, 176-537.

Value of real estate of an insolvent partnership cannot be taken into consideration in estimating the dower of the widow of a deceased partner so as to increase such dower allotment: *Sparger v. Moore*, 117-449.

Where husband conveyed portions of his land for valuable consideration without joinder of wife, but retained lands, which descend to his heirs, of a kind and quantity which permit that dower be assigned out of lands descended, purchasers may require that dower be allotted out of lands descended, and lands which they have purchased be relieved of widow's claim: *Harrington v. Harrington*, 142-517.

Judgment in a special proceeding for allotment of dower to widow was intended by statutes to be and is conclusive upon heirs, devisees or other claimants who may be made parties, as to title of husband and rights of widow: *Boyd v. Redd*, 118-680; *Sigmon v. Hawn*, 86-310, 87-450; *Mood v. Sugg*, 91-93; *Askew v. Bynum*, 81-350.

Sheriff is not required to attest the report of jury to allot dower: *Brickhouse v. Sutton*, 99-103. When secondary evidence of contents of report may be used: *Wells v. Harrell*, 152-218.

EXCEPTIONS; REALLOTMENT; APPEAL. Practice in filing exceptions to report, moving for new allotment and appeal: *Welfare v. Welfare*, 108-275; *Moore, ex parte*, 64-91; *Avery, ex parte*, 64-113; *Lowery v. Lowery*, 64-112; *Stiner v. Cawthorn*, 20-640; *Eagles v. Eagles*, 3-181.

Trial judge, in exercise of sound discretion, is judge of how often, for just cause, court will order a reallocation of dower, and such discretion is not reviewable where it appears that court below, after proper hearing, confirmed order of clerk directing a reallocation: *Wilson v. Featherstone*, 118-840.

A supposed heir, not a party to proceeding, cannot intervene and move to set aside final judgment: *Lowery v. Lowery*, 64-110.

4107. Notice to parties of meeting of jury. The parties to such proceeding, or their attorneys, if within the county, shall be notified of the time and place of meeting of the jury appointed to assign dower, at least five days before the meeting.

Rev., s. 3090; Code, s. 2114; 1868-9, c. 93, s. 43.

For allotment in proceeds of sale for partition, see section 3226.

ART. 4. YEAR'S ALLOWANCE

Part 1. Nature of Allowance

4108. Who entitled to allowance. Every widow of an intestate, or of a testator from whose will she has dissented, shall be entitled, besides her distributive share in her husband's personal estate, to an allowance therefrom, for the support of herself and her family for one year after his decease, and such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of her husband: Provided, if any married woman shall commit adultery, and shall not be living with her husband at his death, or shall be convicted of the murder of her husband, or of being accessory before the fact to the murder of her husband, she shall thereby lose all right to a year's provision, and to a distributive share from the personal property of her husband, and such adultery or conviction may be pleaded in bar of any action or proceeding for the recovery of such rights and estates.

Rev., s. 3091; Code, s. 2116; 1889, c. 499, s. 2; 1868-9, c. 93, s. 81; 1871-2, c. 193, s. 44; 1880, c. 42.

As to distributive share in husband's estate, see section 137 et seq.

Purpose of the year's support is to provide for the dependent family of deceased residing with the widow at death of her husband, and not at the date of her application: *In re Hayes*, 112-76.

Widow's claim to her year's allowance has priority over all other claims against decedent's estate except such as are secured by specific liens on property, even over funeral expenses and costs of administration: *Denton v. Tyson*, 118-542; *Hinkle v. Greene*, 125-489; *Williams v. Jones*, 95-405. She takes subject to a mortgage or conditional sale, though not registered until after husband's death: *Williams v. Jones*, 95-405; *Hinkle v. Greene*, 125-489.

Where testator provided in his will that his wife should have a year's allowance for her support for one year not exceeding the amount allowed by law, and widow and executor selected three men to lay off her year's support under will, and both parties assented to the report in writing endorsed thereon; in the absence of fraud and undue influence, widow is estopped by award and cannot maintain a proceeding under statute for a year's allowance: *Flippin v. Flippin*, 117-376.

Distributive share of widow consists of one-half of personalty after debts, expenses of administration, her year's allowance, and specific legacies are deducted from total value of personal estate: *University v. Borden*, 132-476.

When wife commits adultery, and is not living with husband at time of his death, she is barred of right to "year's provision": *Leonard v. Leonard*, 107-171; see section 2522—but adultery committed prior to enactment does not bar, *Cook v. Sexton*, 79-304. Bigamy bars: *Irby v. Wilson*, 21-568.

Widow is barred from recovering a year's support by an ante-nuptial contract, relinquishing all claim to any property of her husband: *Perkins v. Brinkley*, 133-86; *Cauley v. Lawson*, 58-132; *Brooks v. Austin*, 95-474.

Clerk of superior court has no jurisdiction to render judgment on report of arbitrators appointed by court, in term, against heirs to whom decedent conveyed land prior to his death, for amount of their respective shares of widow's year's allowance and make payment of such sums a lien on the land, and judgment so rendered is void: *McCauley v. McCauley*, 122-288.

If a widow dies before allotment of her year's support is made or before report is confirmed, her right ceases, and it does not survive either to the children or to her administrator: *Simpson v. Cureton*, 97-112.

Widow of tenant cultivating land on shares, after the crop is allotted to her in her year's support, may maintain an action for conversion against landlord: *Parker v. Brown*, 136-280. Where landlord agrees with widow of tenant, to whom crop has been allotted as part of her year's support, that he will harvest same, and after deducting expenses pay her part, he thereby recognizes the allotment: *Ibid.*

WHERE HUSBAND DIED A NONRESIDENT. A widow's relations to her deceased husband's estate is governed by his domicile at death: *Simpson v. Cureton*, 97-112; *Cade v. Davis*, 96-139; but see *Jones v. Layne*, 144-600—and if the state of his domicile makes provision for widows, and there are not enough chattels in that state to satisfy that provision, it may be that such laws would be given effect in this state, but this would be in subordination to the rights of residents, and perhaps of all creditors: *Ibid.*—for a widow of a deceased citizen of another state, as a rule, cannot have her allowance set apart here, though she became a citizen of this state since the death of her husband, *Ibid.*; *Medley v. Dunlap*, 90-527—however, this seems to be changed by *Jones v. Layne*, 144-600, as to widows resident here. An allotment to nonresident widow is void: *Simpson v. Cureton*, 97-112.

4109. Amount allowed. Except in cases in which a larger allowance is hereinafter provided for, the value of a year's allowance shall be three hundred dollars, and one hundred dollars in addition thereto for every member of the family besides the widow.

Rev., s. 3092; Code, s. 2118; 1868-9, c. 93, s. 10.

4110. Family defined. The family of the deceased, for the purposes of this chapter, shall be deemed to be, besides the widow, any child with which she may be pregnant at the death of her husband, every child, either of the deceased or of the widow, and every other person to whom the deceased or widow stood in place of a parent, who was residing with the deceased at his death, and whose age did not then exceed fifteen years.

Rev., s. 3093; Code, s. 2119; 1868-9, c. 93, s. 11; 1909, c. 93.

The death of a child, after death of husband, does not diminish the allowance to the widow, as she gets allowance for every child "residing with deceased at his death": *In re Hayes*, 112-76—but where widow declined to take two children by former marriage, under 15 years of age, and keep them for one year and apply a portion of the money received as her allowance to their support, she is entitled to only \$300, and not an additional \$100 for each of the children: *In re Stewart*, 140-28.

Where testator provides for his infant children by former marriage—appointing guardian of their persons and property, directing him to take them to live with him (which he does), and educate them out of the profits of the estate, they do not constitute part of family of his widow after his death, and such widow is not entitled to extra allowance for their support: *Hollomon v. Hollomon*, 125-29.

4111. When children entitled to allowance. If a man die intestate leaving no widow surviving him, or if his widow die before her year's allowance is assigned her, then there shall be assigned to every other member of the family, as in this chapter defined, the sum of one hundred dollars each, which shall be turned over immediately to the guardian and used by him in the care and education of the members of the family, respectively; and if there be no guardian, it shall be received and disbursed by the clerk of the superior court for their benefit.

Rev., s. 3094; 1889, c. 496.

4112. From what property assigned. Such allowance shall be assigned from the crop, stock and provisions of the deceased in his possession at the time of his death, if there be a sufficiency thereof in value; and if there be a deficiency, it shall be made up by the personal representative from the personal estate of the deceased.

Rev., s. 3095; Code, s. 2117; 1868-9, c. 93, s. 9.

Allotment of a year's support from growing crops at a specified value is sufficiently definite to admit record thereof in evidence by widow in action for conversion: *Parker v. Brown*, 136-280.

Administrator is personally liable if he have assets applicable to the deficiency and he fails to pay it: *Irvin v. Hughes*, 82-210.

Court may enter judgment nunc pro tunc in favor of widow against personal representative for deficiency in allotment of widow's year's allowance; widow also entitled to interest on such judgment: *Long v. Long*, 85-415.

Surplus of assets from sale of land to pay debts of a decedent remains real estate and cannot be applied to payment of a judgment against administrator in favor of widow for balance of her year's allowance: *Denton v. Tyson*, 118-542.

No part assigned out of amount recovered for wrongful death of husband: *Broadnax v. Broadnax*, 160-432.

When crops of husband exceed landlord's lien, wife is entitled to have her year's allowance in the crops: *Sessoms v. Tayloe*, 148-369.

Part 2. Assigned by Justice of the Peace

4113. Duty of personal representative. It shall be the duty of every administrator, collector, or executor of a will, from which the widow of a testator has dissented, on application in writing, signed by the widow of such intestate or testator, at any time within one year after the decease of the husband, to assign to her a year's allowance in the manner prescribed in this chapter, to the value herein prescribed, deducting therefrom the value of any articles consumed by the widow and her family since the death of her husband to the time of the assignment. If there be no widow, or if she should die before the year's provision is assigned, the personal representative shall assign one hundred dollars

to every other member of the family as defined in this chapter; but if there be no personal representative it shall be assigned by a justice of the peace, upon the application of the guardian or next friend of the children entitled.

Rev., s. 3096; Code, s. 2120; 1889, c. 496; 1868-9, c. 93, s. 12.

As to who are members of the family, see section 4110.

4114. Value of property ascertained. The value of stock, crop and provisions assigned to the widow, as well as that of the articles consumed, shall be ascertained by a justice of the peace and two persons qualified to act as jurors of the county in which administration was granted or the will proved.

Rev., s. 3097; Code, s. 2121; 1868-9, c. 93, s. 13.

4115. Procedure for assignment. Upon the application of the widow, the personal representative of the deceased shall apply to a justice of the peace of the township in which the deceased resided, or some adjoining township, to summon two persons qualified to act as jurors, who, having been sworn by the justice to act impartially, shall, with him, ascertain the number of the family of the deceased according to the definition given in this chapter, and examine his stock, crop and provisions on hand, and assign to the widow so much thereof as will not exceed the value limited in this chapter, subject to the deduction prescribed in this chapter: Provided, that in case there shall be no administration upon such estate, or in the event that the personal representative shall fail or refuse to apply to a justice of the peace as aforesaid for the space of ten days after the widow shall have filed with him the application as aforesaid, or if the widow shall be the personal representative, she may make the application, and it shall be the duty of the justice to proceed in the same manner as though the application had been made by the personal representative: Provided further, that in all cases, if there be no crop, stock or provisions on hand, or not a sufficient amount, the commissioners may allot to the widow any articles of personal property of the deceased, and also any debt or debts known to be due him, and such allotment shall vest in the widow such property, and the right to collect the debts thus allotted: Provided further, that where the widow and personal effects of the deceased husband shall have been removed from the township or county where deceased husband resided before his death, the widow may apply to any justice of the peace of any township or county where such personal property is located, and it shall be the duty of such justice to allot and assign the year's allowance as if the husband had resided and died in that township.

Rev., s. 3098; Code, s. 2122; 1891, c. 13; 1899, c. 531; 1870-1, c. 263.

If widow is a minor and without guardian she may be represented by her next friend in applying for year's allowance: *Hollomon v. Hollomon*, 125-29.

Where widow fails to dissent to will and brings action after six months from probate thereof for a year's allowance, such action is not maintainable: *Perkins v. Brinkley*, 133-86—unless she has been deceived by executor and induced not to dissent, *Bolin v. Barker*, 75-47.

Where year's allowance provided in the will and three persons selected by widow and executor to allot it, to whose report widow assents in writing, she is estopped from bringing proceeding hereunder, in the absence of fraud or undue influence: *Flippin v. Flippin*, 117-376.

Application barred after one year from death of husband: *Cook v. Sexton*, 79-305.

An assignment under this section does not prevent a further allowance under section 4121: *Mann v. Mann*, 173-20.

4116. Report of commissioners. The commissioners shall make and sign three lists of the articles assigned to the widow, stating the quantity and value of each,

the number in the family, and the deficiency to be paid by the personal representative. One of these lists shall be delivered to the widow, one to the personal representative, and one returned by the justice, within twenty days after the assignment, to the superior court of the county, and the clerk shall file and record the same and enter judgment against the personal representative, to be paid when assets shall come into his hands, for any residue found in favor of the widow.

Rev., s. 3099; Code, s. 2123; 1868-9, c. 93, s. 15.

Filing and recording the list of articles allotted to widow as her year's support, as required by statute, is essential to its validity and to the vesting of the property or debt allotted in her: *Kiff v. Kiff*, 95-71. Allotment must be made with such reasonable certainty as to indicate what property was intended by the commissioner, otherwise allotment will be void: *Ibid.* It is intimated that in case of uncertainty widow could have list corrected by a proper proceeding: *Ibid.*

As to recovery of residue from personal representative, see section 4112.

4117. Right of appeal. The personal representative, or the widow, or infant by his guardian or next friend, or any creditor, legatee or distributee of the deceased, may appeal from the finding of the commissioners to the superior court of the county, and, within ten days after the assignment, cite the adverse party to appear before such court on a certain day, not less than five nor exceeding ten days after the service of the citation.

Rev., s. 3100; Code, s. 2124; 1897, c. 442; 1868-9, c. 93, s. 16.

4118. Hearing on appeal. At or before the day named, the appellant shall file with the clerk a copy of the assignment and a statement of his exceptions thereto, and the issues thereby raised shall be decided as other issues are directed to be. When the issues shall have been decided, judgment shall be entered accordingly, if it may be without injustice, without remitting the proceedings to the commissioners.

Rev., s. 3101; Code, s. 2125; 1868-9, c. 93, s. 17.

4119. Personal representative entitled to credit. Upon the settlement of the accounts of the personal representative, he shall be credited with the articles assigned, and the value of the deficiency assessed as aforesaid, if the same shall have been paid, unless the allowance be impeached for fraud or gross negligence in him.

Rev., s. 3102; Code, s. 2126; 1868-9, c. 93, s. 18.

4120. When above allowance is in full. If the estate of a deceased be insolvent, or if his personal estate does not exceed two thousand dollars, the allowance for the year's support of his widow and her family shall not, in any case, exceed the value prescribed above; and the allowance made to her as above prescribed shall preclude her from any further allowance.

Rev., s. 3103; Code, s. 2127; 1868-9, c. 93, s. 19.

When an additional allowance may be made: *Mann v. Mann*, 173-20.

Part 3. Assigned in Superior Court

4121. Widow may apply to superior court. It shall not, however, be obligatory on a widow to have her support assigned as above prescribed. Without

applying to the personal representative of her deceased husband, she may, at any time within one year after the death of her husband, apply to the superior court of the county in which the will was proved, or administration granted, to have a year's support for herself and her family assigned to her.

Rev., s. 3104; Code, s. 2128; 1868-9, c. 93, s. 20.

The proceedings hereunder are statutory and not equitable in nature: *Drewry v. Bank*, 173-664.

4122. Nature of proceeding; parties. The application shall be by summons, as is prescribed for special proceedings, in which the personal representative of the deceased, if there be one other than the plaintiff, the largest known creditor, or legatee, or some distributee of the deceased, living in the county, shall be made defendant, and the proceedings shall be as prescribed for special proceedings between parties.

Rev., s. 3105; Code, s. 2129; 1868-9, c. 93, s. 21.

See *Drewry v. Bank*, 173-664; *Flippin v. Flippin*, 117-377.

4123. What complaint must show. In her complaint the widow shall set forth, besides the facts entitling her to a year's support and the value thereof, as claimed by her, the further facts that the estate of the deceased is not insolvent, and that the personal estate of which he died possessed exceeded two thousand dollars, and also whether or not she had an allowance made her, and the nature and value thereof; and if no allowance has been made, the quantities and values of the articles consumed by her and her family since the death of her husband.

Rev., s. 3106; Code, s. 2130; 1868-9, c. 93, s. 22.

4124. Judgment, and order for commissioners. If the material allegations of the complaint be found true, the judgment shall be that she is entitled to the relief sought; and the court shall thereupon issue an order to the sheriff or other proper officer of the county, commanding him to summon a justice of the peace and two indifferent persons qualified to act as jurors of the county, to assign to the plaintiff from the crop, stock and provisions of the deceased a sufficiency for the support of herself and her family for one year from the death of her husband; and if there be a deficiency thereof, to assess such deficiency, to be paid by the personal representative from the personal assets of the deceased, deducting, nevertheless, in all cases from such allowance the articles, or the value thereof, consumed by the widow and her family before such assignment, and also any sum previously assigned her.

Rev., s. 3107; Code, s. 2131; 1868-9, c. 93, s. 23.

4125. Duty of commissioners; amount of allowance. The said commissioners shall be sworn by the justice and shall proceed as prescribed in this chapter, except that they may assign to the widow a value sufficient for the support of herself and her family according to the estate and condition of her husband and without regard to the limitation aforesaid in this chapter; but the value allowed shall not in any case exceed the one-half of the annual net income of the deceased for three years next preceding his death. This report shall be returned by the justice to the court.

Rev., s. 3108; Code, s. 2132; 1868-9, c. 93, s. 24.

4126. Exceptions to the report. The personal representative, or any creditor, distributee or legatee of the deceased, within twenty days after the return of the report, may file exceptions thereto. The plaintiff shall be notified thereof and cited to appear before the court on a certain day, within twenty and not less than ten days after service of the notice, and answer the same; the case shall thereafter be proceeded in, heard and decided as provided in special proceedings between parties.

Rev., s. 3109; Code, s. 2133; 1868-9, c. 93, s. 25.

The findings of fact by the lower court will not be reviewed on appeal: *Drewry v. Bank*, 173-664.

4127. Confirmation of report; execution. If the report shall be confirmed, the court shall so declare, and execution shall issue to enforce the judgment as in like cases.

Rev., s. 3110; Code, s. 2134; 1868-9, c. 93, s. 26.

CHAPTER 81

WILLS

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ART. 1. EXECUTION OF WILL

4128. **Infants incapable.** No person shall be capable of disposing of real or personal estate by will until he shall have attained the age of twenty-one years.

Rev., s. 3111; Code, s. 2137; R. C., c. 119, s. 2; 1811, c. 280.

4129. Married woman capable. A married woman owning real or personal property may dispose of the same by will.

Rev., s. 3112; Code, s. 2138; R. C., c. 119, s. 3; 1844, c. 88, s. 8.

The wife can dispose of her property, acquired since 1868, by will and thereby bar the husband's right as tenant by the curtesy: *Watts v. Griffin*, 137-572; *Hallyburton v. Slagle*, 132-947; *Watts, ex parte*, 130-237; *Tiddy v. Graves*, 126-620; s. c., 127-502.

4130. Local: Wills of married women in Gaston. All devises and bequests heretofore or hereafter made by any married woman to her husband shall be void, if such married woman has thereafter or shall hereafter become insane, and if a decree of divorce a vinculo matrimonii or a mensa et thoro has been obtained or shall hereafter be obtained by either party to such marriage: Provided, that this section shall apply only to Gaston county.

1908, c. 138.

4131. Formal execution. No last will or testament shall be good or sufficient, in law, to convey or give any estate, real or personal, unless such last will shall have been written in the testator's lifetime, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest of the estate, except as hereinafter provided; or, unless such last will and testament be found among the valuable papers and effects of any deceased person, or shall have been lodged in the hands of any person for safe-keeping, and the same shall be in the handwriting of such deceased person, with his name subscribed thereto or inserted in some part of such will; and if such handwriting shall be proved by three credible witnesses, who verily believe such will and every part thereof is in the handwriting of the person whose will it appears to be, then such will shall be sufficient to give and convey real and personal estate.

Rev., s. 3113; Code, s. 2136; R. C., c. 119, s. 1; 1784, c. 204, s. 11; 1784, c. 225, s. 5; 1840, c. 62; 1846, c. 54.

For annotations as to holograph wills, see section 4144 (2)—as to nuncupative wills, see section 4144 (3).

The right to dispose of property by will is regulated by statute: *Peace v. Edwards*, 170-64; *In re Allred's Will*, 170-153; *In re Garland's Will*, 160-555; *Pullen v. Comrs.*, 66-363.

Whether an instrument is a deed or a will, how determined: *Phifer v. Mullis*, 167-405. No particular form required: *In re Edwards' Will*, 172-369. Letter may be a will: *In re Will of Ledford*, 176-610; but see *Spencer v. Spencer*, 163-83; *Alston v. Davis*, 118-202.

EXECUTION OF WILL BY TESTATOR. A paper prepared by an attorney from stenographer's notes, taken at dictation of deceased, as to the disposition of her property, is not a will if unsigned and unwitnessed: *Kennedy v. Douglas*, 151-337. A will may be written on separate sheets of paper which are attached to each other or where there is internal evidence of their relation: *In re Swaim's Will*, 162-213. Where there were four wills found folded together, all in the handwriting of testator, and making a different disposition of the property, in the absence of evidence as to which was the last will, neither will be valid: *Peace v. Edwards*, 170-64.

It is not necessary that a will should be read over to an illiterate person before he signs it: *King v. Kinsey*, 74-261.

Signing by the testator need not be by his signature at the bottom of the will; it may be in the body of the will or even below the signatures of the witnesses: *Devereux v. McMahon*, 108-134; *Peace v. Edwards*, 170-64—nor does the will require a date, *Ibid.* A holograph will is sufficiently signed when the writing is in a sealed envelope and the signature is on the outside: *Alexander v. Johnston*, 171-468.

It is not necessary that the testator should sign the will in the presence of the witnesses; an acknowledgment is sufficient: In re Will of Margaret Deyton, 177-494; In re Broach's Will, 172-520; Watson v. Hinson, 162-72; Ripley v. Armstrong, 159-158; In re Herring's Will, 152-258.

SUBSCRIBING WITNESSES. It is not necessary that the testator request the witnesses to sign; the request may be by attorney: Burney v. Allen, 125-314; In re Herring's Will, 152-258—or the request may appear from the circumstances, In re Will of Margaret Deyton, 177-494.

The witnesses must sign in the presence of the testator: In re Will of Margaret Deyton, 177-494; In re Herring's Will, 152-258. The testator must actually see, or be in a position to see, not only the witnesses but the will itself at the time of signing: *Ibid.*; Burney v. Allen, 125-314; In re Snow's Will, 128-100; Jones v. Tuck, 48-202; Bynum v. Bynum, 33-632—and where he could see the backs of the witnesses, but not the paper, it was not a good attestation, Graham v. Graham, 32-219. It may be shown from the location of the parties, the furniture in the room, etc., that testator could have seen the witnesses sign the will: Burney v. Allen, 127-476.

The witnesses need not sign in the presence of each other: In re Margaret Deyton's Will, 177-494; Watson v. Hinson, 162-72; In re Herring's Will, 152-258; Eelbeck v. Granberry, 3-232.

The attestation must be on the same sheet as that which contains the signature of the testator, or on a paper physically connected with it: In re Baldwin's Will, 146-25—and when witness signed a paper before testator signed, and did not see testator after paper was left at his house to be executed, it was not a proper execution, *Ibid.*

The witness may sign by making his mark: Pridgen v. Pridgen, 35-259; Devereux v. McMahon, 102-284, and cases cited—and it is immaterial that he was at the time able to write his name, In re Will of Elijah Pope, 139-484.

It is sufficient if witnesses sign before the testator, if signed in his presence: Cutler v. Cutler, 130-1; In re Baldwin's Will, 146-25.

To be held as a witness to a will it is essential that subscriber consent to be such and that he sign in the presence of the testator: Boone v. Lewis, 103-40; Jones v. Tuck, 48-202; Gaskill v. King, 34-211; Bynum v. Bynum, 33-632; Graham v. Graham, 32-219; Ragland v. Huntington, 23-561. Where one signs a will where subscribing witnesses usually sign, there is a presumption that he signed as a subscribing witness, but the contrary may be shown: Boone v. Lewis, 103-40—and he is not deprived of his benefits under the will, if in fact he did not sign as a subscribing witness, *Ibid.*

Statement that will was proven by the oath of two subscribing witnesses would imply legal proof of its execution: Lumber Co. v. Branch, 158-251.

A blind man may execute a will, and the signing of the witnesses in his presence is sufficient: In re Allred's Will, 170-153.

The contents of a lost will may be proved by the testimony of one witness: In re Hedgepeth, 150-245.

4132. Execution of power of appointment by will. No appointment, made by will in exercise of any power, shall be valid unless the same be executed in the manner by law required for the execution of wills; and every will, executed in such manner, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

Rev., s. 3114; Code, s. 2139; R. C., c. 119, s. 4; 1844, c. 88, s. 9.

ART. 2. REVOCATION OF WILL

4133. Revocation by writing or by cancellation or destruction. No will or testament in writing, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burn-

ing, canceling, tearing, or obliterating the same, by the testator himself, or in his presence and by his direction and consent; but all wills or testaments shall remain and continue in force until the same be burnt, canceled, torn, or obliterated by the testator, or in his presence and by his consent and direction; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the testator, and his name subscribed thereto or inserted therein, and lodged by him with some person for safe-keeping, or left by him in some secure place, or among his valuable papers and effects, every part of which will or codicil or other writing shall be proved to be in the handwriting of the testator, by three witnesses at least.

Rev., s. 3115; Code, s. 2176; R. C., c. 119, s. 22; 1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2; 1840, c. 62.

There may be a partial revocation of a will: *Baker v. Edge*, 174-100; *Barfield v. Carr*, 169-574.

A joint will by husband and wife conveying property held by entirety may be revoked by the survivor: *Ginn v. Edmundson*, 173-85.

Where one erases the name of the executor at the request of the testator and inserts the name of another it amounts to a revocation as to the first executor if he is living; if he is dead, the change does not affect the will; and if the change is not properly made and witnessed, it would be inoperative as to second executor: *Watson v. Hinson*, 162-72.

To constitute a valid revocation it is essential, among other requirements, that entire writing, including signature, should be in testator's writing, where it is not attested by witnesses: *In re Shelton's Will*, 143-218.

Where will was found in mutilated condition among deceased's papers immediately after his death there is a presumption that mutilation was done by him for the purpose of revocation, although the repository was accessible to a stranger and to deceased: *Bennett v. Sherrod*, 25-303—but presumption is otherwise when will is found mutilated two days after and it has been in custody of party adversely interested, *Ibid.*

A cancellation, obliteration or erasure made after execution of a will, which does not in fact destroy some material part of it, is not a revocation: *In re Shelton's Will*, 143-218.

A clause of attestation being annexed to a paper not attested is not conclusive evidence of abandonment by testator of his intention that it should operate as his will: *Robeson v. Key*, 15-301.

A direction to one to burn will, given by testator, when not complied with, is no revocation: *Hise v. Fincher*, 32-139—otherwise when testator throws it upon the fire and only partially burns, but does not interfere with the writing: *White v. Casten*, 46-197.

No will can be revoked by parol: *In re Shelton's Will*, 143-218—nor can parol evidence be introduced to show revocation, *In re Venable's Will*, 127-344.

Testator's declaration cannot be received to change or add to the will already duly executed: *In re Shelton's Will*, 143-218—but declarations of testator made after the date of an alleged revocation, written on margin of a will, tending to prove that he did not write or execute alleged revocation, were competent, *Ibid.*

Where will, having been in possession of testator, has signature of testator erased, it is prima facie evidence of its revocation: *Cutler v. Cutler*, 132-190. A cancellation is prima facie a revocation; but jury may decide from all the evidence whether testator so intended: *Bethell v. Moore*, 19-311.

Second will, afterwards destroyed, does not affect, in any way, validity of first: *Marsh v. Marsh*, 48-77.

Later will does not revoke a former one unless the two are so inconsistent as to be incapable of standing together: *In re Venable's Will*, 127-344—and parol evidence is not admissible to show revocation, *Ibid.* Question for jury, as between two paper-writings, as to which is the will: *Fleming v. Fleming*, 63-209.

Where copy of lost will is presented for probate as against an original of earlier date, and it is shown that testatrix had one which was lost in her possession when it was last seen, the presumption is that she destroyed it: *Scoggins v. Turner*, 98-135.

Where testator knows of defacement and mutilation of his will by vermin, whether he intended it to be revoked thereby is a question for jury: *Cutler v. Cutler*, 130-1, 132-190.

Revocation of a will is an act of the mind, demonstrated by some outward and visible sign: *White v. Casten*, 46-197.

There cannot be republication by oral declaration merely of what purports to be an attested will; and it is doubtful whether there can be of a holograph. As to a paper purporting to be an attested will, there cannot be a republication unless by a reëxecution of a codicil with ceremonies required by the statute: *Love v. Johnston*, 34-355.

Other cases of interest: *Battle v. Speight*, 31-288; *In re Zollicoffer*, 50-309; *Sawyer v. Sawyer*, 52-133; *McCormick v. Jernigan*, 110-406; *Croom v. Sugg*, 110-259.

BURDEN OF PROOF. In proceeding for probate of will, on the margin of which was written an alleged revocation, after propounder offered the will and proved its due execution, burden of proving that will had been legally revoked was upon contestant: *In re Shelton's Will*, 143-218.

Where a will has been in testator's possession and is offered for probate with name of testator torn off or eaten by vermin, burden of showing that it had not been revoked is on propounder: *Cutler v. Cutler*, 130-1; s. c., 132-190.

Where the will is found among the papers of the testator and is mutilated by having the name torn and the word "canceled" written on two important sections, the burden is on the propounder to show the will is not revoked: *In re Wellborn's Will*, 165-636.

Where court erroneously put upon the propounder of a will the burden of proving that an alleged revocation of will was not genuine, contestant, at whose request it was done, cannot complain: *In re Shelton's Will*, 143-218.

Presumption that lost will, which was last seen in hands of testator, was destroyed by him, is not conclusive; burden is upon person asserting will to show it was not so destroyed: *Scoggins v. Turner*, 98-135.

4134. Revocation by marriage; exception. All wills shall be revoked by subsequent marriage of the maker except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his heirs, executor or administrator, or the person entitled as his next of kin, under the statute of distributions.

Rev., s. 3116; Code, s. 2177; R. C., c. 119, s. 23; 1844, c. 88, s. 10.

Directly sustaining section: *Byrd v. Surles*, 77-435.

How holograph will, revoked by subsequent marriage, revived and republished: *Sawyer v. Sawyer*, 52-133.

The will of a married woman is revoked by another marriage contracted after will was made and her verbal declaration, during the last coverture, that said paper-writing was her last will and testament, without any further execution thereof in accordance with statute, does not constitute a reëxecution and republication: *Means v. Ury*, 141-248. See, also, *Winslow v. Copeland*, 44-17.

4135. No revocation by altered circumstances. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

Rev., s. 3117; Code, s. 2178; R. C., c. 119, s. 24; 1844, c. 88, s. 11.

4136. No revocation by subsequent conveyance. No conveyance or other act made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, except an act by which such will shall be duly revoked, shall prevent the operation of the will with respect to any estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

Rev., s. 3118; Code, s. 2179; R. C., c. 119, s. 25; 1844, c. 88, s. 2.

No conveyance or other act done after execution of a will, unless it amounts to a revocation, will affect its provisions: *Wood v. Cherry*, 73-110.

Since 1844 parol evidence is not admissible to attach a trust to a devise of land: *Chappell v. White*, 146-571, and cases cited, discussing *Wood v. Cherry*, 73-199.

ART. 3. WITNESSES TO WILL

4137. Executor competent witness. No person, on account of being an executor of a will, shall be incompetent to be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Rev., s. 3119; Code, s. 2146; R. C., c. 119, s. 9.

An executor is competent to prove a will, when it has been burned, though he is a devisee: *Cox v. Lumber Co.*, 124-78; *Pannell v. Scoggins*, 53-408.

4138. Beneficiary competent; interest rendered void. If any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, estate, interest, legacy, or appointment of or affecting any real or personal estate shall be thereby given or made, such devise, estate, interest, legacy, or appointment shall, so far only as concerns such person attesting the execution of such will or the wife or husband of such person, or any person claiming under such person, or wife or husband, be void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof.

Rev., s. 3120; Code, s. 2147; R. C., c. 119, s. 10.

Being a legatee or devisee does not disqualify a witness from attesting the execution of a will, but his legacy becomes void: *McLean v. Elliott*, 72-70; *Cornelius v. Brawley*, 109-548; *Vester v. Collins*, 101-114; *McEwan v. Brown*, 176-249.

Where question raised as to whether signature of devisee was as a subscribing witness or as attesting the signature of a subscribing witness who signed by making his mark, see *Boone v. Lewis*, 103-40.

A decedent executed a deed of trust and on the same day a will, which referred to former. The trustee was one of the attesting witnesses to the will and was authorized by the trust to retain his compensation. He was an incompetent witness: *Allison v. Allison*, 11-141.

Devisee competent to prove holograph will: *Hampton v. Hardin*, 88-592.

Witness disinterested at time of attestation of will, but interested before probate, not competent: *Hampton v. Garland*, 3-147.

Widow and devisee of testator is a competent witness to prove fact that script was found among valuable papers of deceased: *Cornelius v. Brawley*, 109-542; *McEwan v. Brown*, 176-249.

A witness who is a devisee under script executed in January is not competent upon trial of issue *devisavit vel non* to speak of conversations with testator tending to impeach a script executed in May thereafter: *Hathaway v. Hathaway*, 91-139.

ART. 4. PROBATE OF WILL

4139. Executor may apply for probate. Any executor named in a will may, at any time after the death of the testator, apply to the clerk of the superior court, having jurisdiction, to have the same admitted to probate. Such will shall not be valid or effective to pass real estate or personal property as against innocent purchasers for value and without notice, unless it is probated or offered for probate within two years after the death of the testator or devisor. If such will is fraudulently suppressed, stolen or destroyed, or been lost, and an action or proceeding shall be commenced within two years from the death of the testa-

tor or deviser to obtain said will or establish the same as provided by law, then the limitation herein set out shall only begin to run from the termination of said action or proceeding, but not otherwise.

Rev., s. 3122; Code, s. 2151; C. C. P., s. 439; 1919, c. 15.

In the absence of some statute to the contrary there is no limit of time after testator's death within which a will may be proved, and when duly proved it relates back to death of testator so as to vest title from that date as between parties who claim under it: *Steadman v. Steadman*, 143-345; *In re Dupree's Will*, 163-256. No statute of limitations applies to probate of lost will: *McCormick v. Jernigan*, 110-406. Cases decided before amendment of section, see section 4163.

4140. Executor failing, beneficiary may apply. If no executor apply to have the will proved within sixty days after the death of the testator, any devisee or legatee named in the will, or any other person interested in the estate, may make such application, upon ten days notice thereof to the executor.

Rev., s. 3123; Code, s. 2152; C. C. P., s. 440.

This section applies to a codicil as well as to the will: *Spencer v. Spencer*, 163-83.

4141. Clerk may compel production of will. Every clerk of the superior court having jurisdiction, on application by affidavit setting forth the facts, shall, by summons, compel any person in the state, having in possession the last will of any decedent, to exhibit the same in his court for probate; and whoever being duly summoned refuses, in contempt of the court, to produce such will, or (the same having been parted with by him) refuses to inform the court on oath where such will is, or in what manner he has disposed of it, shall, by order of the clerk of the superior court, be committed to the jail of the county, there to remain without bail till such will be produced or accounted for, and due submission made for the contempt.

Rev., s. 3124; Code, s. 2154; C. C. P., s. 442.

Duty of respondent to produce will, even though in wrong jurisdiction: *In re Scarborough*, 139-423. As to attachment for contempt: *Ibid*.

This is neither an action nor a special proceeding, and issues of fact do not arise; upon an answer denying the allegations as to possession, the respondent should be discharged unless applicant offers evidence: *Williams v. Bailey*, 177-37.

4142. What shown on application. On application to the clerk of the superior court, he must ascertain by affidavit of the applicant—

1. That such applicant is the executor, devisee or legatee named in the will, or is some other person interested in the estate, and how so interested.

2. The value and nature of the testator's property, as near as can be ascertained.

3. The names and residences of all parties entitled to the testator's property, if known, or that the same on diligent inquiry cannot be discovered; which of the parties in interest are minors, and whether with or without guardians, and the names and residences of such guardians, if known. Such affidavit shall be recorded with the will and the certificate of probate thereof, if the same is admitted to probate.

Rev., s. 3125; Code, s. 2153; C. C. P., s. 441.

4143. Proof and examination in writing. Every clerk of the superior court shall take in writing the proofs and examinations of the witnesses touching the execution of a will, and he shall embody the substance of such proofs and exami-

nations, in case the will is admitted to probate, in his certificate of the probate thereof, which certificate must be recorded with the will. The proofs and examinations as taken must be filed in the office.

Rev., s. 3126; Code, s. 2149; C. C. P., s. 437.

The old law did not require this; and when the will appeared upon the record where it should be if properly probated, it is presumed to have been placed there in the regular way: *Poplin v. Hatley*, 170-163.

Section referred to in *Roscoe v. Lumber Co.*, 124-42; *McClure v. Spivey*, 123-680; *Haygood Will Case*, 101-577.

4144. Manner of probate. Wills and testaments must be admitted to probate only in the following manner:

1. In case of a written will, with witnesses, on the oath of at least two of the subscribing witnesses, if living; but when any one or more of the subscribing witnesses to such will are dead, or reside out of the state, or cannot after due diligence be found within the state, or are insane or otherwise incompetent to testify, then such proof may be taken of the handwriting, both of the testator and of the witness or witnesses so dead, absent, insane or incompetent, and also of such other circumstances as will satisfy the clerk of the superior court of the genuineness and the due execution of such will. In all cases where the testator executed the will by making his mark, and where any one or more of the subscribing witnesses are dead or reside out of the state, or are insane or otherwise incompetent to testify, it shall not be necessary to prove the handwriting of the testator, but proof of the handwriting of the subscribing witness or witnesses so dead, absent, insane or incompetent shall be sufficient. The probate of all wills heretofore taken in compliance with the requirements of this section are hereby declared to be valid.

GENERALLY. Objectors to the probate of a will who attend before clerk and contest will, with counsel and evidence, are virtually caveators, and may be so termed: *Collins v. Collins*, 125-98.

There is no particular form required for a will; one in the form of a contract is sufficient if it shows clearly the intention of the testator to make a will: *In re Edwards' Will*, 172-369; *In re Will of Margaret Deyton*, 177-494. See, also, *In re Belcher*, 66-51.

Joint will may be probated as to each on his death, but not as a joint will until death of both: *In re Davis' Will*, 120-9.

In proceedings to probate a will, parol proof that paper offered for probate is a copy of the will of testator which had been destroyed is inadmissible, in the absence of any physical connection between the paper and the will: *In re Baldwin's Will*, 146-25.

Probate is a proceeding in rem, of which statute confers jurisdiction on clerk and court; upon issue of *devisavit vel non* all persons interested should be brought in; and, strictly speaking, there are no parties who can withdraw or nonsuit case: *Powell v. Watkins*, 172-244; *Collins v. Collins*, 125-98; *Young's Will*, 123-358; *Hutson v. Sawyer*, 104-1; *St. John's Lodge v. Callender*, 26-335; *Love v. Johnston*, 34-355.

Probate of a lost will must be made before clerk: *McCormick v. Jernigan*, 110-406; *Ricks v. Wilson*, 154-282; *In re Hedgepeth*, 150-245. What is sufficient proof of lost will and its contents: *Ibid.*

The probate of a lost will relates back to the death of testator, but an intervening judgment determining the title to the property as between the claimants will be an estoppel and will protect an innocent purchaser: *Stelges v. Simmons*, 170-42.

Manner of probate where one of subscribing witnesses is dead: *Watson v. Hinson*, 162-72.

In a proceeding for probate of a will, where the usual issue was submitted, "Is the paper-writing propounded for probate, and every part thereof, the last will and testament of deceased?" to which jury answered "Yes," verdict was not ambiguous because the will had on its margin an alleged revocation, as the marginal words were no part of the will: *In re Shelton's Will*, 143-218.

That an executor is appointed is sufficient to entitle the will to be admitted to probate, if properly executed, and an exception that propounder had offered no evidence that there was a beneficiary under the will capable of taking, cannot be sustained, as the probate court has no jurisdiction except to inquire into the execution of the will: *In re Murray's Will*, 141-488—and the only question presented is whether the will was duly executed, *Redmond v. Collins*, 15-430.

A letter may be construed as a will and admitted to probate: *Alston v. Davis*, 118-202; overruled in *Spencer v. Spencer*, 163-83; but see this explained in *In re Will of Ledford*, 176-610.

Case of *R. R. v. Mining Co.*, 113-24, clerk's jurisdiction of probate of wills, distinguished from case bearing on probate of will under old county court system: *Davis v. Blevins*, 123-379.

Incorporating an agreement into the probate of a will that certain ones would not resist probate if paid certain legacies is irregular: *Gardner v. Anderson*, 79-24.

As to presumption of acquiescence in probate, see *Gray v. Maer*, 20-41; *Etheridge v. Corprew*, 48-14; see section 4145. Acquiescence in probate in common form will work forfeiture of right to probate in solemn form: *Etheridge v. Corprew*, 48-14.

Probate of will in common form cannot be set aside on petition for reprobate without showing some reason why former probate was wrong. That there was no notice to those interested is not sufficient: *Armstrong v. Baker*, 31-109; *McNorton v. Robeson*, 31-256.

Length of time which must elapse to set aside a will and an application for a reprobate must depend upon circumstances of each case: *Dickenson v. Stewart*, 5-99.

For setting aside probate and reprobate, see *McNorton v. Robeson*, 31-256; *Gray v. Maer*, 20-41.

A WILL WITH SUBSCRIBING WITNESSES. Where there were three subscribing witnesses to will, only two need be examined for probate in common form: *Boone v. Lewis*, 103-44—and, if nonresidents, handwriting of only two need be proven: *Bethell v. Moore*, 19-311.

Where paper offered for probate was written by third person, who signed as witness before testator signed, and not in his presence, and who never saw testator after paper was left at his residence to be executed, will was not proved within meaning of section requiring will to be subscribed in the presence of testator by witnesses, though, where signing of testator and of witnesses takes place at same time, it may be immaterial who signed first: *In re Baldwin's Will*, 146-25.

Mere recitation in attestation clause of will that it was signed in presence of two witnesses, etc., is not affirmative evidence: *R. R. v. Mining Co.*, 113-241.

In case of wills admitted to probate prior to January 1, 1856, when a will appears upon its face to have been attested by two witnesses, testimony of the one subscribing witness authorized by Rev. Stat., chap. 122, sec. 6, to prove it is presumed to have shown that both subscribed in the presence of the testatrix: *Jenkins v. Jenkins*, 96-254.

Prior to January 1, 1856, when the Revised Code went into effect, a will attested by two witnesses could be proved in common form by oath and examination of one of them only. Since that time it must be proved by at least two of the subscribing witnesses, if living: *Jenkins v. Jenkins*, 96-254; *Cowles v. Reavis*, 109-417.

When a will, executed with proper formalities, etc., is offered for probate, it must be established without consideration of trusts therein declared: *Wood v. Sawyer*, 61-251.

The signing may be proved from the witnesses having seen it written by testator, or from having heard him acknowledge it. It is not necessary, if he acknowledged the signing, that name or signature or handwriting should be before him at the time. If paper lie at a distance on the table, and he acknowledge the signature without seeing it, it is sufficient: *Eelbeck v. Granberry*, 3-232.

Where, after two witnesses had signed, an insertion of the name of one of the witnesses as executor was made, and a third witness was called in who signed after the testator acknowledged the execution, this did not impair its validity: *Grigg v. Williams*, 51-518; *Bateman v. Mariner*, 5-176; *Malloy v. McNair*, 49-297.

Under statutes now regulating attestation and probate of wills the document must be subscribed in the presence of the testator by at least two witnesses, and the evidence upon which the will is admitted to probate must show that fact: *In re Thomas*, 111-409. Where the certificate of probate, after reciting the testimony, failed to show that the witness attested the execution of the will in the presence of the testator, the probate was defective: *Leatherwood v. Boyd*, 60-123; see *Howell v. Ray*, 92-510.

While the subscribing witnesses to a will are necessary and are the law's witnesses, their statement is not conclusive: *In re Will of Margaret Deyton*, 177-494.

Under the doctrine of "incorporation by reference" a will properly executed may refer to another defective will or to another document in such a manner as to make it a part of the valid will: *Watson v. Hinson*, 162-72.

There is no statute of limitations as to the probate of a will: *In re Dupree's Will*, 163-256; *Steadman v. Steadman*, 143-345; but see section 4139.

2. In case of a holograph will, on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof. It must further appear on the oath of some one of the witnesses, or of some other credible person, that such will was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe-keeping.

A writing in the form of a letter may operate as a will: *In re Will of Ledford*, 176-610—but it must appear to have been the intention of the writer to dispose of his property after his death, *Ibid.*; *Spencer v. Spencer*, 163-83, overruling *Alston v. Davis*, 118-202.

A holograph will is not invalidated by having an attestation clause: *Hill v. Bell*, 61-122—nor by having a subscribing witness, *Brown v. Beaver*, 48-516; *Harrison v. Burgess*, 8-384.

A script written in a book containing accounts, found eight months after death, may be proved as a holograph will: *Brown v. Eaton*, 91-26; *Hampton v. Hardin*, 88-592.

In probate of a holograph will there must be affirmative and direct proof that it was deposited with some one as a will, or was found among the valuable papers of testator after his death: *St. John's Lodge v. Callender*, 26-335; *McEwan v. Brown*, 176-249.

The wife of testator may be the person to whose safe-keeping his will, in his own handwriting, is intrusted: *Harrison v. Burgess*, 8-384.

Holograph will found among valuable papers, bearing particular date, presumed to have been deposited by testator on date named: *Sawyer v. Sawyer*, 52-133.

'As to what constitutes finding "among the valuable papers" of decedent, see *In re Shepard's Will*, 128-54; *Collins v. Collins*, 125-98; *Cornelius v. Brawley*, 109-542; *Adams v. Clark*, 53-56; *Sawyer v. Sawyer*, 52-133; *Brown v. Eaton*, 91-26; *Hill v. Bell*, 61-122; *Hughes v. Smith*, 64-493; *Winstead v. Bowman*, 68-170; *Little v. Lockman*, 49-494; *St. John's Lodge v. Callender*, 26-335.

"Valuable papers and effects," "and" may be construed "or"; "effects" is a broad term and will include life insurance policies; "valuable papers" does not mean most valuable: *In re Jenkins*, 157-429.

Where the holograph will is found among the valuable papers and is signed by testator, but it is also marked "canceled" and the signature is torn, the burden is on the propounder to establish it as a valid will: *In re Wellborn's Will*, 165-636.

A second probate of holograph will may correct defect in first probate: *Boggan v. Somers*, 152-390.

A will written on the back of envelope containing insurance policies and found in a safe with valuable papers may be valid: *Harper v. Harper*, 148-453. The fact that a holographic will is found among valuable papers and effects implies that it was placed there to take effect as a will: *In re Jenkins*, 157-429.

Joint will, in the handwriting of the husband and signed by the husband and wife, may be the holographic will of the husband: *In re Cole's Will*, 171-74.

Where four papers are presented as holograph wills, all making different dispositions of property, neither will be valid, in the absence of evidence as to which was the last will: *Peace v. Edwards*, 170-64.

3. In case of a nuncupative will, on the oath of at least two credible witnesses present at the making thereof, who state that they were specially required to bear witness thereto by the testator himself. It must also be proved that such nuncupative will was made in the testator's last sickness, in his own habitation, or

where he had been previously resident for at least ten days, unless he died on a journey or from home. No nuncupative will shall be proved by the witnesses after six months from the making thereof, unless it was put in writing within ten days from such making; nor shall it be proved till a citation has been first issued or publication been made for six weeks in some newspaper published in the state, to call in the widow and next of kin to contest such will if they think proper.

Rev., s. 3127; Code, s. 2148; 1893, c. 269; 1901, c. 276; C. C. P., s. 435.

Nuncupative will must be proved on oath of at least two credible witnesses present at making thereof, who state that they were specially required to bear witness by testator himself. It must have been made in his last sickness, in his own habitation, or in one where he had been resident for at least ten days previous, unless he died on a journey or from home: *Bundrick v. Haygood*, 106-468; *In re Garland's Will*, 160-555.

Nuncupative will which has been reduced to writing within ten days after it was made may be proved for probate either before or after the lapse of six months after making thereof; but if not put in writing within ten days it cannot be proved after the expiration of six months: *Haygood Will Case*, 101-574.

To establish a nuncupative will it is not necessary that the persons called by testator to witness his testamentary declarations should have been designated by him by name: *Long v. Foust*, 109-114.

Statute must be strictly observed in the probate of a nuncupative will: *Bundrick v. Haygood*, 106-468; *Brown v. Brown*, 6-350; *Rankin v. Rankin*, 31-156. Notice to heirs is necessary: *Ibid.* Due execution of nuncupative will not proven: *Bundrick v. Haygood*, 106-468; *Kennedy v. Douglas*, 151-337. A nuncupative will must be proven by two witnesses present at the same time: *Wester v. Wester*, 50-95; *Smith v. Smith*, 63-637; *Haden v. Bradshaw*, 60-259.

Land cannot pass by nuncupative will: *Smithdeal v. Smith*, 64-52—it only applying to personal property, *Newman v. Bost*, 122-533.

After contents of nuncupative will are established within time and in manner prescribed by statute it cannot be admitted to probate until citation or publication has been made according to statute, but it is essential that this citation or publication and the probate based thereon shall be completed within six months from making of alleged will: *Haygood Will Case*, 101-574.

Probate will not be valid if next of kin are not cited: *Rankin v. Rankin*, 31-156.

4145. Probate conclusive until vacated. Such record and probate is conclusive in evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal.

Rev., s. 3128; Code, s. 2150; C. C. P., s. 438.

Probate of wills is a judicial proceeding in rem, and judgment is a judgment in rem and is good against the world, and cannot be attacked collaterally: *Davis v. Blevins*, 123-379; *Granbery v. Mhoon*, 12-456.

Probate of a will by clerk is a judicial act, and his certificate is conclusive evidence of validity of will, until vacated on appeal or declared void by a competent tribunal in a proceeding instituted for that purpose: *Starnes v. Thompson*, 173-466; *Powell v. Watkins*, 172-244; *McClure v. Spivey*, 123-678; *In re Beauchamp's Will*, 146-254; *Mayo v. Jones*, 78-402; *Hampton v. Hardin*, 88-592; *London v. Railroad*, 88-584; *Morgan v. Bass*, 25-243.

It is sufficient evidence of a probate of a will that it is certified by the clerk that it was proved in open court by H., a subscribing witness, and recorded, where it appears from the will that there were two subscribing witnesses: *Harven v. Springs*, 32-180—also sufficient where stated "was produced in open court for probate and duly proved according to law," *Davis v. Blevins*, 123-382—also "the will of R., proved by H., executor T. qualified," *Marshall v. Fisher*, 46-111.

Under the law at date of this decision where will attested by two witnesses, and probate is by one, it is presumed that it was legally proven: *University v. Blount*, 4-455.

In an action of ejectment, party who claims under deed from devisee in a will cannot question validity of probate of will: *Steadman v. Steadman*, 143-345.

Where will has been admitted to probate, party claiming property disposed of by it to another cannot, in an action to recover same, attack will on ground of lack of testamentary capacity of testatrix, and evidence offered for that purpose is properly excluded: *Varner v. Johnston*, 112-570.

Section referred to: *Holt v. Ziglar*, 163-390.

4146. Wills filed in clerk's office. All original wills shall remain in the clerk's office, among the records of the court where the same shall be proved, and to such wills any person may have access, as to the other records.

Rev., s. 3129; Code, s. 2173; R. C., c. 119, s. 19; 1777, c. 115, s. 59.

4147. Certified copy of will proved in another state. When a will, made by a citizen of this state, is proved and allowed in some other state or country, and the original will cannot be removed from its place of legal deposit in such other state or country, for probate in this state, the clerk of the superior court of the county where the testator had his last usual residence or has any property, upon a duly certified copy or exemplification of such will being exhibited to him for probate, shall take every order and proceeding for proving, allowing and recording such copy as by law might be taken upon the production of the original.

Rev., s. 3130; Code, s. 2157; C. C. P., s. 445; R. C., c. 44, s. 9; 1802, c. 623.

See section 1777.

Certificate of probate of will executed in another state, disposing of real estate in this state, is defective which does not show affirmatively that will was executed according to the laws of this state: *R. R. v. Mining Co.*, 113-241.

A will proved in another state, bearing certificate of clerk of court wherein probate was had to the oath of attesting witnesses, but having no other authentication, is inadmissible in evidence: *Hunter v. Kelly*, 92-285.

4148. Probate of will made out of the state. Whenever it is suggested to the clerk of the superior court, by affidavit or otherwise, that a will has been made without the state, or that a will has been made in the state and the witnesses thereto have moved out of the state, disposing of or charging land or other property within the state, the clerk of the superior court of the county where the property is situated may issue a commission to such person as he may select, authorizing the commissioner to take the examination of such witnesses as may be produced, touching the execution thereof, and upon return of such commission, with the examination, he may adjudge the will to be duly proved or otherwise, as in cases on the oral examination of witnesses before him, and if duly proved, such will shall be recorded.

Rev., s. 3131; Code, s. 2155; 1899, c. 55; C. C. P., s. 443.

4149. Probate when witnesses are nonresident. Where one or more of the subscribing witnesses to the will of a testator, resident in this state, reside in another state, the examination of such witnesses may be had, taken and subscribed in the form of an affidavit, before a notary public residing in the county and state in which the witnesses reside; and the affidavits, so taken and subscribed, shall be transmitted by the notary public, under his hand and official seal, to the clerk of the court before whom the will has been filed for probate. If such affidavits are, upon examination by the clerk, found to establish the facts necessary to be established before the clerk to authorize the probate of the will if the witnesses had appeared before him personally, then it shall be the duty of the clerk

to order the will to probate, and record the will with the same effect as if the subscribing witnesses had appeared before him in person and been examined under oath.

1917, c. 183.

4150. Probate when witnesses in another county. When a will is offered for probate in one county of this state and the witnesses reside in another county, the clerk of the court before whom such will is offered shall have power and authority to issue a subpoena for the witnesses requiring them to appear before him and prove the will; and the clerk shall likewise have power and authority to issue a commission to take the deposition of such witnesses when they reside more than seventy-five miles from the place where the will is to be probated, such deposition and commission to be returned and the clerk to adjudge the will to be duly proven. Also, when it shall be found as a fact upon affidavit or other proof, by the clerk of any county where a will is to be probated, that any witness to the will resides outside of the county, and seventy-five miles or less from the place where the will is to be probated, and that the witness is so infirm of body as to be unable to appear in person before the clerk to prove the will, then the clerk shall have the power and authority to issue a commission to take the deposition of the witness, the commission and deposition of the witness to be returned, and the clerk to adjudge the will to be duly proved thereon as if the witness had appeared in person before him.

Rev., s. 3132; 1899, c. 55; 1911, c. 13.

Where deposition is taken and the alleged will is shown to the witness, it may be shown by parol evidence what paper was exhibited to the witness: *In re Clodfelter's Will*, 171-528.

4151. Probate of wills of soldiers and sailors. In addition to the methods already provided in existing statutes therefor, the will of a soldier or sailor, executed while in the actual service of the United States, shall be admitted to probate (whether there were subscribing witnesses thereto or not, if they, or either of them, is out of the state at the time said will is offered for probate) upon the oath of at least three credible witnesses that the signature to said will is in the handwriting of the person whose will it purports to be. Such will so proven shall be effective to devise real property as well as to bequeath personal estate of all kinds. This section shall not apply to cases pending in courts and at issue on the tenth day of March, one thousand nine hundred and nineteen.

The provisions of this section shall expire by limitation on April sixth, one thousand nine hundred and twenty.

1919, c. 216.

4152. Certified copy of will of nonresident recorded. Whenever any will made by a citizen or subject of any other state or country is duly proved and allowed in such state or country according to the laws thereof, a copy or exemplification of such will, duly certified and authenticated by the clerk of the court in which such will has been proved and allowed, if within the United States, or by any ambassador, minister, consul or commercial agent of the United States under his official seal when produced or exhibited before the clerk of the superior court of any county wherein any property of the testator may be, shall be allowed, filed and recorded in the same manner as if the original and not the copy had been produced, proved and allowed before such clerk. But when any will contains any

devise or disposition of real estate in this state, such devise or disposition shall not have any validity or operation unless the will is executed according to the laws of this state; and that fact must appear affirmatively in the certified probate or exemplification of the will; and if it does not so appear, the clerk before whom the copy is exhibited shall have power to issue a commission for taking proofs, touching the execution of the will, as prescribed in the preceding section; and the same may be adjudged duly proved, and shall be recorded as herein provided.

Rev., s. 3133; Code, s. 2156; 1885, c. 393; C. C. P., s. 444; 1883, c. 144.

A will executed in Tennessee and proved by only one witness cannot be read in evidence here: *Blount v. Patton*, 9-237.

Where nonresident testator devises land in this state, and record of foreign court of probate, duly certified, contains certificate of probate, which refers to certified examination of witnesses, the whole forming one transaction, exemplification of which and of will being duly recorded in county where land lies, will is sufficiently proved and passes property: *Roscoe v. Lumber Co.*, 124-42; see *Drake v. Merrill*, 47-368.

A devise by citizen of another state of land in this state can have no operation until proved before proper court in this state to have been executed according to our laws: *Drake v. Merrill*, 47-368.

Will of nonresident devising realty must conform to statutes of this state, while as to personality the law of the testator's domicile controls: *McEwan v. Brown*, 176-249; *R. R. v. Mining Co.*, 113-241; *Drake v. Merrill*, 47-368.

Record and certification of exemplified copy is sufficient though pages may not be in regular order: *Lumber Co. v. Hudson*, 153-96.

The requirement that a will duly executed and probated in another state may be allowed and recorded on certificate is a valid exercise of power: *Vaught v. Williams*, 177-77. Insufficient certificate under this section: *Riley v. Carter*, 158-484.

4153. Probates validated where proof taken by commission or another clerk. In all cases of the probate of any will heretofore made in common form before any clerk of the superior courts of this state, where the testimony of the subscribing witnesses has been taken in the state or out of it by any commissioner appointed by said clerk or taken by any other clerk of the superior court in any other county of this state, and the will admitted to probate upon such testimony, the proceedings are validated.

Rev., s. 3134; 1899, c. 680.

4154. Probates by deputy clerk validated in certain counties. All probates of wills heretofore made before a deputy clerk of the superior court, wherein no contest or suit is pending for the purpose of annulling the probate, shall be deemed to have been probated before the clerk of the superior court, and the acts of the deputy clerk in probating the same shall be deemed as effectual and valid in law as if done by the clerk in person. This section shall apply only to Burke and Scotland counties.

1907, c. 669.

4155. Probates in another state before 1860 validated. In all cases where any will devises land in this state, and the original will was duly admitted to probate in some other state prior to the year one thousand eight hundred and sixty, and a certified copy of such will and the probate thereof has been admitted to probate and record in any county in this state, and it in any way appears from such recorded copy that there were two subscribing witnesses to such will, and its execution was proved by the examination of such witnesses when the original was admitted to probate, such will shall be held and considered, and is hereby

declared to be, good and valid for the purpose of passing title to the lands devised thereby, situated in this state, as fully and completely as if the original will had been duly executed and admitted to probate and recorded in this state in accordance with the laws of this state: Provided, that this section shall in no way affect actions or suits pending on March 8, 1913, or any vested rights.

1913. c. 93, s. 1.

4156. Local: Validating probate of certain old wills. In all cases where wills and testaments were executed prior to the first day of January, one thousand eight hundred and ninety-nine, and which appears to have two or more subscribing witnesses thereto, and such wills and testaments were admitted to probate in jurisdictions outside of North Carolina upon the proof of one witness, and such wills, or exemplified copies thereof, were presented to the clerk of the superior court in any county in this state where the makers thereof owned property, and by such clerk recorded in the records of wills for his county, said wills and testaments, or exemplified copies thereof, so recorded, if otherwise sufficient, shall have the effect to pass the title to the real and personal property therein devised and bequeathed, to the same extent and as completely as if the execution of such wills had been proven by two subscribing witnesses thereto in the manner provided by the laws of this state. And where such wills and testaments were duly admitted to probate in jurisdictions outside of North Carolina, upon proof of one witness, and in cases where parties interested desire to have them recorded in this state, where they have not already been so recorded, the clerk of the superior court of any county in North Carolina, when such wills or exemplified copies thereof are duly authenticated and presented to him by parties interested, shall receive and record the same; and if same are otherwise sufficient such wills shall have the effect to pass the title to all real and personal property therein devised and bequeathed, to the same extent and as completely as if the execution of such wills had been proven by two subscribing witnesses thereto in the manner provided by the laws of this state. This section shall not have the effect to invalidate the title of any person owning any land embraced in the provisions of any such will which was valid prior to the tenth day of March, one thousand nine hundred and nineteen. This section shall not apply to suits pending on the tenth day of March, one thousand nine hundred and nineteen, and nothing herein shall be construed to prevent such wills from being impeached for fraud. This section shall only apply to Henderson and Transylvania and Wake counties.

1919, c. 250.

4157. Wills in Haywood. All wills recorded by the clerk of the superior court of Haywood county, under and by virtue of chapter eight of the laws of one thousand eight hundred and eighty-five, shall be deemed and held to have been duly probated and recorded, subject to the right of any person interested to show by competent proof that said will has never been proved and recorded.

Rev., s. 1614; 1885. c. 8.

ART. 5. CAVEAT TO WILL

4158. When and by whom caveat filed. At the time of application for probate of any will, and the probate thereof in common form, or at any time within seven

years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will: Provided, that if any person entitled to file a caveat be within the age of twenty-one years, or a married woman, or insane, or imprisoned, then such person may file a caveat within three years after the removal of such disability.

Rev., s. 3135; Code, s. 2158; C. C. P., s. 446; 1907, c. 862.

Coverture not a disability affecting statute of limitations, see sections 407, 408.

A person interested may file a caveat to probate of will in common form and require proponent to prove it in solemn form, if there has been no unreasonable delay: *In re Hedgepeth*, 150-245.

A will devising realty executed by a resident of another state may be contested where the land is situated; as to personalty, the caveat is at the testator's domicile: *McEwan v. Brown*, 176-249.

Where an action is brought for the construction of a will and judgment rendered, the parties are estopped and cannot afterwards file a caveat: *In re Will of Lloyd*, 161-557.

A caveat is a proceeding in rem, and upon an issue devisavit vel non the only question determined is the validity of the will: *Phifer v. Mullis*, 167-405.

While there was no statute of limitation as to caveat before this section, there was a presumption which might bar the caveators by acquiescence or unreasonable delay: *In re Dupree's Will*, 163-256; *In re Bateman's Will*, 168-234.

Upon an issue devisavit vel non the will must be proved per testes, and the examination taken before the clerk may be used only as corroborative evidence: *In re Will of Chisman*, 175-420. Upon a caveat filed, the will cannot be set aside by consent: *Holt v. Ziglar*, 159-272; s. c., 163-390. Practice in filing caveat reviewed in *Randolph v. Hughes*, 89-428.

Amendment to section fixing seven years after probate of a will in common form as the time within which a caveat for probate in solemn form may be filed, and permitting seven years after ratification of act as to wills theretofore proven, did not revive a right to file a caveat which had been lost by forty years acquiescence: *In re Beauchamp's Will*, 146-264.

Failure from 1863 for over forty years to file a caveat for probate of will in solemn form may not be excused by married woman on ground that until laws of 1899, statute of limitations did not run against her, since there was no statute of limitations as to time in which caveat should be filed until 1907: *Ibid.*

Right of next of kin and heirs at law to require probate in solemn form may be forfeited by acquiescence or unreasonable delay, after notice of probate; and such right was forfeited where petitioner knew for more than forty years of the probate in common form and of the qualification of executors, of their removal from state, of the appointment of an administrator with the will annexed, and of his proceeding for final account and settlement, to which she was a party: *Ibid.*

Wife may sue for probate of her father's will in solemn form without joining her husband, if he is opposed: *Ibid.*

Issues as to execution of a will and testator's capacity may only be determined after probate in solemn form is allowed, and will not be considered on a preliminary question whether right to caveat has been forfeited by unreasonable delay: *Ibid.*

As to undue influence or fraud in procuring execution of will, see *McDonald v. McLendon*, 173-172; *In re Mueller's Will*, 170-28; *In re Allred's Will*, 170-153; *In re Abee's Will*, 146-273; *Linebarger v. Linebarger*, 143-229; *In re Peterson*, 136-13; *Westbrook v. Wilson*, 135-400; *In re Worth*, 129-223; *Evans Will Case*, 123-113; *Vester v. Collins*, 101-114; *Lee v. Williams*, 111-200; *Ray v. Ray*, 98-566; *Mullen v. Helderman*, 87-471; *Barnhardt v. Smith*, 86-473; *Gilmore v. Gilmore*, 86-301; *King v. Kinsey*, 74-261; *Lee v. Lee*, 71-139; *Lawrence v. Steel*, 66-584; *Paine v. Roberts*, 82-451; *Amis v. Satterfield*, 40-173; *Wright v. Howe*, 52-412; *Marshall v. Flinn*, 49-199; *Downey v. Murphey*, 18-82; *Eelbeck v. Granberry*, 3-232; *Howell v. Borden*, 14-442.

As to testamentary capacity of testator at time will executed, see *In re Staub's Will*, 172-138; *Bond v. Mfg. Co.*, 140-381; *In re Peterson*, 136-13; *In re Snow's Will*, 128-102; *Mitchell v. Corpening*, 124-473; *In re Burns' Will*, 121-336; *Crenshaw v. Johnson*, 120-270; *Williams*

v. Haid, 118-481; Ray v. Ray, 98-566; Wood v. Sawyer, 61-251; Varner v. Johnson, 112-570; Mayo v. Jones, 78-402; Horah v. Knox, 87-483; Earnhardt v. Smith, 86-473; Syme v. Broughton, 85-367; Bost v. Bost, 87-477; Cornelius v. Cornelius, 52-593; Amis v. Satterfield, 40-173; Horne v. Horne, 31-99; Keerans v. Brown, 68-43; Lawrence v. Steel, 66-584; Love v. Johnston, 34-355; Bell v. Clark, 31-239.

4159. Bond given and cause transferred to trial docket. Upon any caveator giving bond, with sufficient surety to be approved by the clerk, in the sum of two hundred dollars, payable to the propounder of the will, conditioned to pay all costs which may be adjudged against such caveator in the superior court by reason of his failure to prosecute his suit with effect, or deposit the money or give a mortgage in lieu of such bond, or shall file affidavits and satisfy the clerk of his inability to give such bonds or secure such costs, the clerk shall transfer the cause to the superior court for trial; and he shall also forthwith issue a citation to all devisees, legatees or other parties in interest within the state, and cause publication to be made, for four weeks, in some newspaper printed in the state, for nonresidents to appear at the term of the superior court, to which the proceeding is transferred and to make themselves proper parties to the proceeding, if they choose. At the term of court to which such proceeding is transferred, or as soon thereafter as motion to that effect shall be made by the propounder, and before trial, the judge shall require any of the persons so cited, either those who make themselves parties with the caveators or whose interests appear to him antagonistic to that of the propounders of the will, and who shall appear to him to be able so to do, to file such bond within such time as he shall direct and before trial; and on failure to file such bond the judge shall dismiss the proceeding.

Rev., s. 3136; Code, s. 2159; 1899, c. 13; 1901, c. 748; C. C. P., s. 447; 1909, c. 74.

The general issue devisavit vel non may be submitted, or a special issue as to any part of the will: McDonald v. McLendon, 173-172.

Upon an issue devisavit vel non the proof of the formal execution of the will must be made de novo: Watson v. Hinson, 162-72; In re Hedgepeth, 150-245; In re Thomas, 111-409.

Proper charge of court upon an issue devisavit vel non: In re Thorp, 150-487.

Upon caveat filed, the burden is upon the propounder to establish the will by showing formal execution, or, if lost or destroyed, that it was not intentionally done so as to make a revocation: In re Hedgepeth, 150-245.

Issue as to whether paper-writing is the will of decedent being raised by the caveat filed thereto, no answer to such caveat is necessary: Crenshaw v. Johnson, 120-270.

4160. Affidavit of deceased witness as evidence. Whenever the subscribing witness to any will shall die, or be absent beyond the state, it shall be competent upon any issue of devisavit vel non to give in evidence the affidavits and proofs taken by the clerk upon admitting the will to probate in common form, and such affidavit and proceedings before the clerk shall be prima facie evidence of the due and legal execution of said will.

Rev., s. 3121; 1899, c. 680, s. 2.

4161. Caveat suspends proceedings under will. Where a caveat is entered and bond given, the clerk of the superior court shall forthwith issue an order to any personal representative, having the estate in charge, to suspend all further proceedings in relation to the estate, except the preservation of the property and the collection of debts, until a decision of the issue is had.

Rev., s. 3137; Code, s. 2160; C. C. P., s. 448.

Does not affect right of husband to administer on wife's estate, will naming no executor: *In re Meyers*, 113-545.

Executor cannot be removed and collector appointed simply upon filing of caveat: *In re Palmer's Will*, 117-133.

In absence of an order to suspend further proceedings upon filing of caveat, acts of executor in filing a petition or proceeding for sale of land were not void nor were rights of purchasers affected: *Carraway v. Lassiter*, 139-145; *Syme v. Broughton*, 86-153.

Filing of caveat to probate of will does not prevent executor, upon giving bonds prescribed by statute, from proceeding in collection of debts due testator: *Hughes v. Hodges*, 94-56.

Section referred to: *Holt v. Ziglar*, 163-390.

ART. 6. CONSTRUCTION OF WILL

4162. Devise presumed to be in fee. When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity.

Rev. s. 3138; Code, s. 2180; R. C., c. 119, s. 26; 1784, c. 204, s. 12.

The purpose of construction is to arrive at the intention of testator, and the whole will must be considered: *Taylor v. Brown*, 165-157; *Fellowes v. Durfey*, 163-305; *Herring v. Williams*, 158-1, reversing s. c., 153-231.

A codicil is a part of the will, and the two must be construed together: *Darden v. Matthews*, 173-186.

No technical words of conveyance are required in wills: *Keith v. Scales*, 124-514; *Alston v. Davis*, 118-202.

A devise will be construed in fee unless it appears otherwise by clear and express words: *Fellowes v. Durfey*, 163-305. A devise to L for life with remainder to "her bodily issue" is construed to convey an estate to L for life, with remainder to her children: *Ford v. McBrayer*, 171-420. An estate to one generally, with the power of disposition, carries the fee: *Griffin v. Commander*, 163-230; see *Mabry v. Brown*, 162-217—but a devise to one for life, with power of disposition, gives only a life estate, with power to convey the fee, *Makely v. Land Co.*, 175-101; *Darden v. Matthews*, 173-186; *Fellowes v. Durfey*, 163-305, and cases cited. The intention to create the power of disposition in the devisee must clearly appear from the language of the will: *Herring v. Williams*, 158-1, reversing s. c., 153-232. The word "lend" may be construed to convey a fee: *Cohoon v. Upton*, 174-88. Will construed as conveying a defeasible fee: *Kornegay v. Cunningham*, 174-209; *Satterwaite v. Wilkinson*, 173-38.

An action by one devisee against other devisees to obtain a construction of a will to determine their interests under the will cannot be maintained as a proceeding in equity, their interests being purely legal: *Heptinstall v. Newsom*, 146-503.

While laying down a rule of construction, this section leaves open the question of intention of testator, and where there is a particular interest and a general interest in conflict in the will, the general interest must prevail: *Leeper v. Neagle*, 94-338.

Purpose of section is to establish a rule between heir and devisee in respect to the beneficial interest of the latter: *Alexander v. Cunningham*, 27-430.

Section referred to: *Kirkman v. Smith*, 174-603; *Jones v. Richmond*, 161-553; *Cox v. Jernigan*, 154-584; *Whitfield v. Garris*, 134-27; s. c., 131-148; *Gates v. Max*, 125-139; *Baird v. Winstead*, 123-182; *Vickers v. Leigh*, 104-257; *McKrow v. Painter*, 89-439.

4163. Probate necessary to pass title; rights of innocent purchasers. No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court of the proper county, and a duly certified copy thereof shall be recorded in the office of the superior court clerk of the county wherein the land is situate, and the probate of a will devising real estate shall be conclusive as to the execution thereof, against the heirs and devisees of

the testator, whenever the probate thereof, under the like circumstances, would be conclusive against the next of kin and legatees of the testator: Provided, that the probate and registration of any will shall not affect the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator, unless the will has been fraudulently withheld from probate.

Rev., s. 3139; Code, s. 2174; R. C., c. 119, s. 20; 1784, c. 225, s. 6; 1915, c. 219.

See annotations under section 4145, and section 4139.

When the formalities of probate have been complied with, it relates back to the death of deviser, but not to affect the rights of innocent purchasers from the heirs when the purchase is more than two years after the death of the deviser (1915, c. 219): *Cooley v. Lee*, 170-18.

Probate of will in the proper court is an indispensable prerequisite to its validity as a conveyance of real or personal estate: *Osborne v. Leak*, 89-433.

Probate of will ought regularly to appear upon minutes of county court, and the will itself ought to be recorded: *Sumner v. Roberts*, 13-527.

Section referred to in *Curlee v. Smith*, 91-172; *Floyd v. Herring*, 64-411.

4164. What property passes by will. Any testator, by his will duly executed, may devise, bequeath, or dispose of all real and personal estate which he shall be entitled to at the time of his death, and which, if not so devised, bequeathed, or disposed of, would descend or devolve upon his heirs at law, or upon his executor or administrator; and the power hereby given shall extend to all contingent, executory, or other future interest in any real or personal estate, whether the testator may or may not be the person or one of the persons in whom the same may become vested, or whether he may be entitled thereto under the instrument by which the same was created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

Rev., s. 3140; Code, s. 2140; R. C., c. 119, s. 5; 1844, c. 88, s. 1.

An interest in remainder in land passes by the will: *Jones v. Huntley*, 156-410.

Prior to statute no land acquired after date of will could pass thereby: *Hines v. Mercer*, 125-71.

Lands acquired after publication of holograph will do not pass thereby: *Jiggitts v. Maney*, 5-258.

Land cannot pass by a nuncupative will: *Smithdeal v. Smith*, 64-52.

Where interest in money is bequeathed, the principal to be paid to personal representative of beneficiary at her death, beneficiary may dispose of same by will: *Lyon v. Bank*, 128-75.

Section referred to in *Freeman v. Lide*, 176-434; *Kornegay v. Miller*, 137-663; *Church v. Young*, 130-11; *Champion, ex parte*, 45-246.

4165. Will relates to death of testator. Every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

Rev., s. 3141; Code, s. 2141; R. C., c. 119, s. 16; 1844, c. 88, s. 3.

Will speaks as of the death of the testator: *Perry v. Perry*, 175-141.

Prior to statute, title of no land after date of the will could pass thereby; but since statute, all lands owned by testator at his death will pass, unless a contrary intention shall appear by the will: *Hines v. Mercer*, 125-71; *Aydlett v. Small*, 115-1.

This section does not apply to wills executed prior to its enactment: *Battle v. Speight*, 31-288.

Section referred to in *Church v. Young*, 130-11; *Starbuck v. Starbuck*, 93-186; *Twitty v. Martin*, 90-646; *Edwards v. Warren*, 90-606; *Robbins v. Windy*, 56-285; *Champion*, ex parte, 45-246; *Williams v. Davis*, 34-21.

4166. Lapsed and void devises pass under residuary clause. Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will: Provided, there shall be no lapse of the devise or legacy by reason of the death of the devisee or legatee during the life of the testator, if such devisee or legatee would have been an heir at law or distributee of such testator had he died intestate, and if such devisee or legatee shall leave issue surviving him; and if there is issue surviving, then the said issue shall have the devise or bequest named in the will.

Rev., s. 3142; Code, s. 2142; R. C., c. 119, s. 7; 1844, c. 88, s. 4; 1919, c. 28.

Where a codicil revokes part of a devise and no further disposition is made of the property, it passes under the residuary clause: *Baker v. Edge*, 174-100. Where the construction of the will shows a contrary intention, the property will not pass under the residuary clause: *Howell v. Mehegan*, 174-64. This will apply where the will attempts to devise land, but no devisee is named: *Faison v. Middleton*, 171-170.

Unless contrary intent appears, residuary clause will pass both personalty and realty: *Powell v. Woodecock*, 149-235.

A devise which lapsed by death of devisee before testator passes under residuary clause, where there is nothing in the will which shows a contrary intention: *Duckworth v. Jordan*, 138-520; *Barfield v. Carr*, 169-574.

Heirs of testator, and not residuary legatees, take property included in a lapsed specific devise, unless it appears that testator intended it otherwise: *Holton v. Jones*, 133-399.

Words "balance and residue of my estate of every kind" include reversionary interest in real estate in which a life estate had been carved out: *Foil v. Newsome*, 138-115.

Under a devise in a residuary clause that "surplus of testator's estate should be equally divided between P. M. and the children of S., share and share alike, to each and every of them, their executors, etc., forever," devisees took per capita, and a child of S., born after death of testator, was entitled to share with other children: *Culp v. Lee*, 109-675.

Person made residuary legatee as to all personal property does not take land which testator fails to devise: *Sain v. Baker*, 128-256.

Unless there is something to show contrary intention on part of testator, a general residuary devise will operate as an execution of a power to dispose of property by will: *Johnston v. Knight*, 117-122.

Section referred to in *Saunders v. Saunders*, 108-330.

4167. General gift by will an execution of power of appointment. A general devise of the real estate of the testator, or of his real estate in any place or in the occupation of any person mentioned in the will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper; and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property, described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description

shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

Rev., s. 3143; Code, s. 2143; R. C., c. 119, s. 8; 1844, c. 88, s. 5.

Where donee of a power to dispose of property by will to certain persons devises property to such persons by a residuary clause without referring to the power, the devise will be considered an intentional and not an accidental exercise of the power: *Johnston v. Knight*, 117-122.

It is a presumption of fact that every man that makes a will intends to dispose of all of his estate: *McCallum v. McCallum*, 167-310; *Austin v. Austin*, 160-367; *Powell v. Woodcock*, 149-235; *Peebles v. Graham*, 128-225; *Blue v. Ritter*, 118-580; *Jones v. Perry*, 38-200.

A bequest of "all my property of every description to J." passes stocks, bonds, and all interests of the testator: *Hurdle v. Outlaw*, 55-75.

4168. Gifts to children dying before testator pass to their issue. When any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect and vest a title to such estate in the issue surviving, if there be any, in the same manner, proportions and estates as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Rev., s. 3144; Code, s. 2144; 1868-9, c. 113, s. 61.

This applies only to devises or legacies to child or other issue of the testator: *Howell v. Mehegan*, 174-64.

Devise to a child who died before testator does not lapse, but by force of statute goes to issue of such deceased child: *Cox v. Ward*, 107-507—but this does not have reference to devises to children not in esse, *Lindsay v. Pleasants*, 39-320.

This statute is not intended for the benefit of creditors of such deceased parent: *Smith v. Smith*, 58-305.

Legacy to grandchild, who died before will was made, is void: *Scales v. Scales*, 59-163.

Section referred to in *Buchanan v. Buchanan*, 99-317; *Gordon v. Pendleton*, 84-100; *Whitehead v. Thompson*, 79-453; *Lefler v. Rowland*, 62-143; *Williamson v. Williamson*, 57-282; *Hester v. Hester*, 37-320.

4169. After-born children share in testator's estate. Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in this chapter.

Rev., s. 3145; Code, s. 2145; 1868-9, c. 113, s. 62.

Applies only when after-born child has not been provided for through inadvertence or mistake. Does not control provision parent should make: *Flanner v. Flanner*, 160-126. Does not apply if omission was intentional or provision made ultra: *Ibid*.

A will expressly excluding the children of testator born after the execution thereof makes a "provision" for them under section, and such children do not share in estate as though testator had died intestate: *Thomason v. Julian*, 133-309.

Where, by will of their father, two children in esse were to take upon a contingency which failed to occur, a posthumous child, who was to share equally with them, will be precluded also: *Clark v. Benton*, 124-200.

Where it can be gathered from the will that it was intention of testator that a posthumous child should share equally with his two children, in esse, court will effectuate his intention: *Ibid.*

Devise to children of S., share and share alike, to each and every of them; devisees take per capita with child of S. born after testator's death: *Culp v. Lee*, 109-675; see *Coggins v. Flythe*, 113-102.

Section merely referred to in *Johnson v. Chapman*, 45-213; *Windley v. Gaylord*, 52-55.

4170. Administrator c. t. a. must observe will. In all cases where letters of administration with the will annexed are granted, the will of the testator must be observed and performed by the administrator with the will annexed, both in respect to real and personal property, and an administrator with the will annexed has all the rights and powers, and is subject to the same duties, as if he had been named executor in the will.

Rev., s. 3146; Code, s. 2168; C. C. P., s. 455.

See chapter Administration, section 22.

An administrator cum testamento annexo can execute any power conferred by will on executor therein named: *Council v. Averett*, 95-131.

An administrator d. b. n., c. t. a., although required to execute will, does not stand on same footing in all respects as an executor, as his authority is derived from the law and not from the will, and he cannot sue in another jurisdiction to recover assets of estate: *Grant v. Reese*, 94-720.

Administrator c. t. a.'s duties as trustee: *Clark v. Peebles*, 120-31; *Smathers v. Moody*, 112-791; *Saunders v. Saunders*, 108-327; *Creech v. Grainger*, 106-213; *Gay v. Grant*, 101-206; *Vaughan v. Farmer*, 90-612; *Hester v. Hester*, 37-330; *Jones v. Jones*, 17-387.

Administration c. t. a. was granted upon a will proven in common form; a subsequent contest in regard to the will does not necessarily annul the letters of administration: *Floyd v. Herring*, 64-409—but it suspends the action of such administrator pending contest: *Syme v. Broughton*, 86-153.

Injunction lies to prevent administrator from selling land for assets where validity of will in controversy: *Galbreath v. Everett*, 84-546.

Section referred to in *Grant v. Reese*, 94-731.

CHAPTER 82

CRIMES AND PUNISHMENTS

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- 4276. Embezzlement by tax officers.

ART. 19. FALSE PRETENSES AND CHEATS.

- 4277. Obtaining property by false tokens and other false pretenses.
- 4278. Obtaining signatures or property by false pretenses.
- 4279. Obtaining property by false representation of pedigree of animals.
- 4280. Obtaining certificate of registration of animals by false representations.
- 4281. Obtaining advances under promise to work and pay for same.
- 4282. Obtaining advances under written promise to pay therefor out of designated property.
- 4283. Obtaining property in return for worthless check, draft or order.
- 4284. Obtaining entertainment at hotels and boarding-houses without paying therefor.
- 4285. Obtaining wearing apparel on approval.
- 4286. Obtaining money on false representation of physical defect.

ART. 20. FRAUDS.

- 4287. Fraudulent disposal of mortgaged property.
- 4288. Secreting property to hinder enforcement of lien.
- 4289. Fraudulent entry of horses at fairs.
- 4290. Fraudulent and deceptive advertising.
- 4291. Blackmailing.
- 4292. Fraudulent removal of manufacturer's serial number from automobiles.

ART. 21. FORGERY.

- 4293. Forgery of bank-notes, checks and other securities.
- 4294. Uttering forged paper.
- 4295. Selling of certain forged securities.
- 4296. Forgery of deeds, wills and certain other instruments.
- 4297. Forging names to petitions and uttering forged petitions.
- 4298. Forging certificates of corporate stock and uttering forged certificates.
- 4299. Forgery of bank-notes and other instruments by connecting genuine parts.

SUBCHAPTER 7. CRIMINAL TRESPASS

ART. 22. TRESPASSES TO LAND AND FIXTURES.

- 4300. Forcible entry and detainer.
- 4301. Malicious injury to real property.
- 4302. Trespass on public lands.
- 4303. Disorderly conduct in and injuries to public buildings.
- 4304. Local: Erecting artificial islands and lumps in public waters.
- 4305. Trespass on land after being forbidden; license to look for estrays.
- 4306. Cutting, injuring or removing another's timber.
- 4307. Local: Cutting, felling or removing another's timber.
- 4308. Local: Purchasing timber unlawfully removed from another's land.
- 4309. Setting fire to grass and brush lands and woodlands.
- 4310. Local: Willfully or negligently setting fire to woods and fields.
- 4311. Setting fire to woodlands and grass lands with camp fires.
- 4312. Certain fires to be guarded by watchman.
- 4313. Burning or otherwise destroying crops in the field.
- 4314. Local: Removing dog-tongue and certain other products from another's land.
- 4315. Injuries to dams and water channels of mills and factories.
- 4316. Taking unlawful possession of another's house.
- 4317. Injuring houses, churches, fences and walls.
- 4318. Injuring bridges.
- 4319. Removing, altering or defacing landmarks.
- 4320. Removing or defacing monuments and tombstones.
- 4321. Removing enclosures of graveyards.
- 4322. Disturbing graves.
- 4323. Interfering with gas, electric and steam appliances.
- 4324. Injuring fixtures and other property of gas companies; civil liability.
- 4325. Tampering with engines and boilers.
- 4326. Injuring wires and other fixtures of telephone, telegraph and electric-power companies.
- 4327. Making unauthorized connections with telephone and telegraph wires.
- 4328. Injuring fixtures and other property of electric-power companies.
- 4329. Felling trees on telephone and electric-power wires.
- 4330. Interfering with telephone lines.

ART. 23. TRESPASSES TO PERSONAL PROPERTY.

- 4331. Malicious injury to personal property.
- 4332. Malicious removal of packing from railway coaches and other rolling stock.
- 4333. Removing boats or their fixtures and appliances.
- 4334. Injuring livestock not inclosed by lawful fence.
- 4335. Taking away or injuring exhibits at fairs.

SUBCHAPTER 8. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY

ART. 24. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

- 4336. Crime against nature.
- 4337. Incest between certain near relatives.
- 4338. Incest between uncle and niece and nephew and aunt.
- 4339. Seduction.
- 4340. Miscegenation.
- 4341. Issuing license for marriage between white person and negro; performing marriage ceremony.
- 4342. Bigamy.
- 4343. Fornication and adultery.
- 4344. Inducing female persons to enter hotels or boarding-houses for immoral purposes.
- 4345. Opposite sexes occupying same bedroom at hotels for immoral purposes; falsely registering as husband and wife.
- 4346. Permitting unmarried female under eighteen in houses of prostitution.
- 4347. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined.
- 4348. Obscene literature, indecent exposures and lewd dances.
- 4349. Cutting or painting obscene words or pictures near public places.
- 4350. Using profane or indecent language on passenger trains.
- 4351. Using profane or indecent language to female telephone operators.

- 4352. Local: Using profane or indecent language on public highways.
- 4353. Lewd women within three miles of colleges and boarding-schools.
- 4354. Obstructing way to places of public worship.
- 4355. Disturbing religious assembly by certain exhibitions.
- 4356. Permitting stone-horses and stone-mules to run at large.

ART. 25. PROSTITUTION.

- 4357. Definition of terms.
- 4358. Unlawful acts.
- 4359. Prosecution; in what courts.
- 4360. Reputation and prior conviction admissible as evidence.
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SUBCHAPTER 9. OFFENSES AGAINST PUBLIC JUSTICE

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- 4364. Punishment for perjury.
- 4365. Subornation of perjury.
- 4366. Perjury before legislative committees.
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- 4368. False oath to insurance statement.
- 4369. False oath to procure benefit of insurance policy or certificate.
- 4370. False oath to statement required of fraternal benefit societies.
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- 4372. Bribery of officials.
- 4373. Offering bribes.
- 4374. Bribery of legislators.
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ART. 28. OBSTRUCTING JUSTICE.

- 4376. Breaking or entering jails with intent to injure prisoners.
- 4377. Refusal of witness to appear or to testify in investigations of lynchings.
- 4378. Resisting officers.
- 4379. Failing to aid police officers.
- 4380. Intimidating or interfering with jurors and witnesses.
- 4381. Failing to attend as witness before legislative committees.

ART. 29. MISCONDUCT IN PUBLIC OFFICE.

- 4382. Buying and selling offices.
- 4383. Acting as officer before qualifying as such.
- 4384. Willfully failing to discharge duties.
- 4385. Failing to make reports and discharge other duties.
- 4386. Swearing falsely to official reports.
- 4387. Making of false report by bank examiners; accepting bribes.
- 4388. Director of public trust contracting for his own benefit.
- 4389. Speculating in claims against towns, cities and the state.
- 4390. Acting as agent for those furnishing supplies for schools and other state institutions.
- 4391. Buying school supplies from interested officer.
- 4392. Selling bonds without giving proper notice.
- 4393. Allowing prisoners to escape; burden of proof.
- 4394. Solicitor to prosecute officer for escape.
- 4395. Disposing of public documents or refusing to deliver them over to successor.
- 4396. Failing to return process or making false return.
- 4397. Failing to surrender tax list for inspection and correction.
- 4398. Failing to file report of fines.
- 4399. Failure of ex-justice of the peace to turn over books and papers.

ART. 30. MISCONDUCT IN PRIVATE OFFICE.

- 4400. Failure of certain railroad officers to account with successors.
- 4401. Malfesance of bank officers and agents.
- 4402. Making false entries in banking accounts; misrepresenting assets and liabilities of banks.

ART. 31. PRISON BREACH AND PRISONERS.

- 4403. Escape of hired prisoners from custody.
- 4404. Prison breach and escape.
- 4405. Permitting escape of or maltreating hired convicts.
- 4406. Conveying messages and weapons to convicts and other prisoners.
- 4407. Injury to prisoner by jailer.
- 4408. Confining prisoners in improper apartments.
- 4409. Requiring female prisoners to work in chain-gang.

SUBCHAPTER 10. OFFENSES AGAINST THE PUBLIC PEACE

ART. 32. OFFENSES AGAINST THE PUBLIC PEACE.

- 4410. Carrying concealed weapons.
- 4411. Sending, accepting or bearing challenges to fight duels.
- 4412. Engaging in and betting on prize fights.
- 4413. Disturbing picnics, entertainments and other meetings.
- 4414. Disturbing schools and scientific and temperance meetings; injuring property of schools and temperance societies.
- 4415. Disturbing religious congregations.
- 4416. Detectives going armed in a body.

SUBCHAPTER 11. OFFENSES AGAINST THE PUBLIC SAFETY

ART. 33. OFFENSES AGAINST THE PUBLIC SAFETY.

- 4417. Maliciously injuring property of railroads and other carriers; causing death or other physical injury thereby.
- 4418. Injuring without malice property of railroads and other carriers; causing death or other physical injury thereby.
- 4419. Shooting or throwing at trains or passengers.
- 4420. Operating trains and street cars while intoxicated.
- 4421. Displaying false lights on seashore.
- 4422. Local: Building unguarded barbed-wire fences along public highways.
- 4423. Exploding dynamite cartridges and bombs.
- 4424. Storing explosives near causeway on Eagle's island.
- 4425. Keeping for sale or selling explosives without a license.
- 4426. Failing to enclose marl beds.

SUBCHAPTER 12. GENERAL POLICE REGULATIONS

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- 4427. Advertising lotteries.
- 4428. Dealing in lotteries.
- 4429. Selling lottery tickets and acting as agent for lotteries.
- 4430. Gambling.
- 4431. Allowing gambling in houses of public entertainment; duty of police officers; penalty.
- 4432. Gambling with faro-banks and tables.
- 4433. Keeping gaming tables or betting thereat.
- 4434. Allowing gaming tables on premises.
- 4435. Gaming tables to be destroyed by justices and police officers.
- 4436. Property exhibited by gamblers to be seized; disposition of same.
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- 4440. Selling or giving weapons to minors.
- 4441. Permitting young children to use dangerous firearms.
- 4442. Permitting minors to enter barrooms, billiard rooms and bowling alleys.
- 4443. Exposing children to fire.
- 4444. Marrying female under fourteen years old.
- 4445. Separating child under six months old from mother.
- 4446. Failing to pay minors for doing certain work.

ART. 36. PROTECTION OF THE FAMILY.

- 4447. Abandonment of family by husband.
- 4448. Evidence that abandonment was willful.
- 4449. Order of support from husband's property or earnings.
- 4450. Failure of husband to provide adequate support for family.

ART. 37. INTOXICATING LIQUORS.

- 4451. Adulteration of liquors.
- 4452. Selling recipe for adulterating liquors.
- 4453. Manufacturing or selling poisonous liquors.
- 4454. Selling or giving away liquor near political speaking.
- 4455. Giving intoxicants to unmarried minors under seventeen years old.
- 4456. Selling or giving intoxicants to unmarried minors by dealers; liability for exemplary damages.

ART. 38. PUBLIC DRUNKENNESS.

- 4457. Public drinking on railway passenger cars; copy of section to be posted.
- 4458. Local: Public drunkenness.

ART. 39. VAGRANTS AND TRAMPS.

- 4459. Persons classed as vagrants.
- 4460. Police officers to furnish list of disorderly houses; inmates competent and compellable to testify.
- 4461. Tramp defined and punishment provided; certain persons excepted.
- 4462. Trespassing and the carrying of dangerous weapons by tramps.
- 4463. Malicious injuries by tramps to persons and property.
- 4464. Arrest of tramps by persons who are not officers.

ART. 40. REGULATION OF SALES.

- 4465. Selling or offering for sale meat of diseased animals.
- 4466. Unauthorized dealing in railroad tickets.
- 4467. Sale of cotton at night under certain conditions.
- 4468. Local: Sale of corn at night in less than five-bushel lots.

ART. 41. REGULATION OF EMPLOYER AND EMPLOYEE.

- 4469. Enticing servant to leave master.
- 4470. Local: Hiring servant who has unlawfully left employer.
- 4471. Enticing seamen from vessel.
- 4472. Secreting or harboring of deserting seamen.
- 4473. Search warrants for deserting seamen.
- 4474. Appeals in cases of deserting seamen regulated.
- 4475. Influencing agents and servants in violating duties owed employers.
- 4476. Witness required to give self-criminating evidence; no suit or prosecution to be founded thereon.
- 4477. Blacklisting employees.
- 4478. Conspiring to blacklist employees.
- 4479. Issuing nontransferable script to laborers.

ART. 42. REGULATION OF LANDLORD AND TENANT.

- 4480. Local: Violation of certain contracts between landlord and tenant.
- 4481. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.
- 4482. Local: Tenant violating contract not to rent land from others.

ART. 43. CRUELTY TO ANIMALS.

- 4483. Cruelty to animals; construction of section.
- 4484. Instigating or promoting cruelty to animals.
- 4485. Bear-baiting, cock-fighting and similar amusements.
- 4486. Conveying animals in a cruel manner.

ART. 44. ANIMAL DISEASES.

- 4487. Selling, using, or exposing diseased animals.
- 4488. Disposal of carcasses of animals.
- 4489. Animals affected with glanders to be killed.
- 4490. Hogs affected with cholera to be segregated and confined.
- 4491. Shipping hogs from cholera-infected territory.
- 4492. Distributing, selling, or using hog-cholera virus without permission.

ART. 45. PROTECTION OF LIVESTOCK RUNNING AT LARGE.

- 4493. Failing to show hide and ears of livestock killed while running at large.
- 4494. Molesting or injuring livestock.
- 4495. Altering the brands of and misbranding another's livestock.
- 4496. Placing poisonous shrubs and vegetables in public places.

ART. 46. PROTECTION OF LETTERS, TELEGRAMS, AND TELEPHONE MESSAGES.

- 4497. Wrongfully obtaining or divulging knowledge of telephonic messages.
- 4498. Violating privacy of telegraphic messages; failure to transmit and deliver same promptly.
- 4499. Unauthorized opening, reading, or publishing of sealed letters and telegrams.

ART. 47. MISCELLANEOUS POLICE REGULATIONS.

- 4500. Desecration of state and national flags.
- 4501. Pollution of water or lands used for dairy purposes.
- 4502. Cutting timber on town watershed without disposing of boughs and débris; misdemeanor.
- 4503. Injuring notices and advertisements.
- 4504. Defacing or destroying public notices and advertisements.
- 4505. Erecting signals and notices in imitation of those of railroads.
- 4506. Operating automobile while intoxicated.
- 4507. Sale of jamaica ginger.
- 4508. Furnishing intoxicants, poisons, or firearms to inmates of charitable and penal institutions.
- 4509. Usurious loans on household and kitchen furniture.
- 4510. Digging ginseng on another's land during certain months.
- 4511. Shooting rifles across Currituck sound and waters of Dare county.

SUBCHAPTER 1. GENERAL PROVISIONS**ART. 1. FELONIES AND MISDEMEANORS**

4171. Felonies and misdemeanors defined. A felony is a crime which is or may be punishable by either death or imprisonment in the state's prison. Any other crime is a misdemeanor.

Rev., s. 3291; 1891, c. 205, s. 1.

Felonies and misdemeanors distinguished: *Jones v. Brinkley*, 174-23. The punishment which may be imposed fixes the nature of the crime, whether felony or misdemeanor: *State v. Hyman*, 164-411. Prior to this statute the line between felonies and misdemeanors was not clearly drawn: *State v. Holder*, 153-606.

Indictments for offenses made felonies by this section must state that offenses were committed "feloniously": *State v. Taylor*, 131-711; *State v. Shaw*, 117-764; *State v. Caldwell*, 112-854; *State v. Wilson*, 116-979; *State v. Bryan*, 112-848; *State v. Skidmore*, 109-795.

Section held constitutional: *State v. Lytle*, 138-738. **Section merely cited in** *State v. Shine*, 149-480; *State v. Lewis*, 142-630; *State v. Frisbee*, 142-674.

4172. Punishment of felonies. Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be imprisoned in the county jail or state prison not exceeding two years, or be fined, in the discretion of the court, or if the offense be infamous, the person offending shall be imprisoned in the county jail or state prison not less than four months nor more than ten years, or be fined.

Rev., s. 3292; Code, s. 1096; R. C., c. 34, s. 27.

See generally: *State v. Rippey*, 127-516. **Section merely cited in** *In re Holley*, 154-163; *State v. Mathis*, 109-816; *State v. Powell*, 94-920; *State v. Driver*, 78-426.

4173. Punishment of misdemeanors. All misdemeanors, where a specific punishment is not prescribed shall be punished as misdemeanors at common law;

but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail for not less than four months nor more than ten years, or shall be fined.

Rev., s. 3293; Code, s. 1097; R. C., c. 34, s. 120.

See generally: State v. Mallett, 125-718; State v. Powell, 94-920; State v. McNeill, 75-15; In re Schenck, 74-607.

Punishment by imprisonment in the penitentiary cannot be imposed at common law: State v. Smith, 174-804; State v. McNeill, 75-15. For punishment for misdemeanors at common law, see State v. Manly, 95-661; State v. Powell, 94-920; State v. Jackson, 82-565; State v. McNeill, 75-15. As to excessive punishment of misdemeanors at common law, see State v. Miller, 94-904; State v. Perkins, 82-682; State v. Pettie, 80-367; State v. Driver, 78-423; State v. Miller, 75-73.

Where statute makes commission of an act "unlawful" and specifies no mode of proceeding, violation of its provisions is a misdemeanor punishable by indictment at common law: State v. Bloodworth, 94-918; State v. Parker, 91-650; see, also, State v. Snuggs, 85-541.

The word "or," in criminal statutes, cannot be interpreted to mean "and" when the effect is to aggravate the offense or increase punishment: State v. Walters, 97-489.

As to punishment for simple assault, see State v. Nash, 109-824—for tenant's removing crops unlawfully, State v. Powell, 94-920—for fornication and adultery, State v. Manly, 95-661—for conspiracy to charge another with infanticide, State v. Jackson, 82-565—for assault and battery, State v. Driver, 78-423—for receiving stolen goods, State v. Brite, 73-26.

Where punishment within court's discretion it is not reviewable: State v. Woodlief, 172-885; State v. Miller, 94-904.

Power of legislature to declare certain offenses misdemeanors: State v. Dunlop, 159-491; Jones v. Brinkley, 174-23.

Where statute which person had violated was repealed before he was sentenced, no punishment can be imposed: State v. Perkins, 141-797; State v. Williams, 97-455; State v. Long, 78-571; State v. Wise, 67-281, 66-120; State v. Nutt, 61-20; State v. Cress, 49-421; State v. Kent, 65-311—and where penalty increased by statute it cannot be imposed where indictment concludes as at common law, State v. Lawrence, 81-522.

Where no time of imprisonment is fixed by statute, two years is not excessive: State v. Farlington, 141-844.

Other cases of interest hereunder: State v. Hamby, 126-1066; State v. Wilson, 121-650; In re Griffin, 98-225; State v. Manly, 95-661; State v. Perkins, 82-681; State v. Bennett, 20-170; State v. Pugh, 3-55.

Section cited in In re Holly, 154-163; State v. Rippey, 127-516; State v. Hall, 108-776; State v. Crumpler, 90-701; State v. Lawrence, 81-522; State v. Driver, 78-423; In re Schenck, 74-607; see, also, State v. Kent, 65-311.

4174. Violation of town ordinance misdemeanor; punishment. If any person shall violate an ordinance of a city or town, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

Rev., s. 3702; Code, s. 3820; 1871-2, c. 195, s. 2.

Mayor or other chief officer has jurisdiction of violations of ordinances: State v. Wilson, 106-718; State v. Smith, 103-403. See section 2635. Justice of peace has concurrent jurisdiction with mayor or other chief officer to try misdemeanors arising from violations of ordinances: State v. Wood, 94-855; State v. Cainan, 94-880. Superior court has no original jurisdiction: State v. Threadgill, 76-17.

Town ordinances are in subordination to public laws, and must give way to a general statute on the same subject: State v. Langston, 88-692; State v. Keith, 94-933; State v. McCoy, 116-1059. A town ordinance cannot make criminal or prescribe a punishment for acts which are indictable at common law or by statute: State v. Austin, 114-855; State v. Stevens, 114-873; State v. Taylor, 133-755.

For this section to operate, the ordinance must be valid; and one which leaves the penalty in the discretion of the court is uncertain and void: State v. Irwin, 126-989; State v. Webber,

107-962; *State v. Rice*, 97-422; *State v. Worth*, 95-615; *State v. Cainan*, 94-883; *State v. Crenshaw*, 94-877. The state must show a valid ordinance and its violation: *State v. Prevo*, 178-740.

Prior to this section there was no way of enforcing a town ordinance: *School Directors v. Asheville*, 137-509.

A conviction under a town ordinance for disturbing the good order and quiet of the town by fighting is no bar to a prosecution by state for an assault: *State v. Taylor*, 133-755.

This section gives the right to arrest for the violation of a city ordinance, but a clause in such ordinance authorizing the arrest for a violation thereof is void: *State v. Earnhardt*, 107-789.

WARRANT. Sufficiency of: *State v. Merritt*, 83-677. Insufficiency of: *State v. Deaton*, 92-788. An averment which takes the case out of the jurisdiction of the mayor may be amended, where it appears from the allegations in the warrant and affidavit that such mayor has jurisdiction: *State v. Wilson*, 106-718. In an indictment for loud and boisterous swearing it is not necessary to set out the words used by the defendant: *State v. Cainan*, 94-880. Not necessary to set out ordinance in warrant, but a reference to it, so as to point it out with certainty, is sufficient: *Ibid.* Compare *Hendersonville v. McMinn*, 82-532; *State v. Edens*, 85-522. Since enactment of section 2673 it is not necessary to aver any authority to pass the ordinance alleged to have been violated: *State v. Merritt*, 83-677. See further annotations under section 2673, as to valid and invalid ordinances.

ART. 2. PRINCIPALS AND ACCESSORIES

4175. Accessories before the fact; trial and punishment. If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person so counseling, procuring or commanding shall be guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished. The offense of the person so counseling, procuring or commanding, howsoever indicted, may be inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offense had been committed at the same place as the principal felony or where the principal felony is triable, although such offense may have been committed at any place within or without the limits of the state. In case the principal felony shall have been committed within the body of any county, and the offense of counseling, procuring or commanding shall have been committed within the body of any other county, the last mentioned offense may be inquired of, tried, determined, and punished in either of such counties: Provided, that no person who shall be once duly tried for any such offense, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offense.

Rev., s. 3287; Code, s. 977; R. C., c. 34, s. 53; 1797, c. 485, s. 1; 1852, c. 58.

See generally: *State v. McLean*, 121-589; *State v. Davis*, 87-514; *State v. Ives*, 35-338; *State v. Duncan*, 28-236; *State v. Smith*, 24-402; *State v. Chittum*, 13-49. Difference between accessory before the fact and principal: *State v. Jarrell*, 141-722; *State v. Fox*, 94-928; *State v. Cheek*, 35-114; *State v. Hardin*, 19-407. Accessory before the fact defined: *State v. Jones*, 176-702; *State v. Barden*, 12-518. Accessory before the fact may be convicted on an indictment for murder found against him as principal: *State v. Bryson*, 173-803, seemingly changing

the rule in *State v. Dewer*, 65-572. One who is present at the commission of a felony, and does not try to prevent it, does not partake of the guilt by his mere inactivity: *State v. Hildreth*, 31-440.

Meaning of the word "command": *State v. Mann*, 2-4. Act of 1797 construed in *State v. Groff*, 5-270. Principal and accessory may be indicted and tried together: *State v. Register*, 133-746. Prior conviction of principal unnecessary, but where principal has been tried and acquitted it is left as at common law: *State v. Jones*, 101-719; *State v. Ludwick*, 61-404.

When principal is not amenable to process of law, indictment must contain an averment to that effect: *State v. Ives*, 35-339; *State v. Groff*, 5-270.

No accessories before the fact in larceny; all are principals: *State v. Fox*, 94-928; *State v. Stroud*, 95-626—and where indictment charges A with committing the theft and B with aiding and abetting, and the proof is the reverse, it is not a variance, *State v. Fox*, 94-928.

Confession of principal not substantive evidence against accessory, but corroborative only: *State v. McCall*, 131-798; see *State v. Duncan*, 28-98. Whatever makes a man an accessory before the fact in felony will make him a principal in a misdemeanor: *State v. Cheek*, 35-114; *State v. Barden*, 12-518. Where parties indicted with others for barn-burning, they cannot be convicted as principals if evidence shows they were not present at the burning: *State v. Dewer*, 65-572. Acquittal of principal as complete defense to indictment against accessory: *State v. Jones*, 101-719. One charged as principal in indictment for assault with intent to kill cannot be convicted as accessory: *State v. Green*, 119-899. Conviction as principal as evidence of accessory's guilt, see *State v. Duncan*, 28-98; *State v. McCall*, 131-798; *State v. Chittem*, 13-49. What indictment against accessory must show: *State v. Davis*, 87-514.

Where statute creates offense not existing at common law, and imposes a separate and distinct punishment upon principal and his agent for violating it, principal cannot be held further liable as an accessory before the fact to act of agent violating provision of statute: *State v. R. R.*, 145-495.

Other cases of interest hereunder: *State v. Reid*, 178-745; *State v. Stephens*, 170-745; *State v. Robertson*, 166-356; *State v. Turner*, 143-641; *State v. Jarrell*, 141-722. Section cited in *State v. Powell*, 168-134.

4176. Punishment of accessories before the fact. Any person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary or rape shall be imprisoned for life in the state's prison. An accessory before the fact to the stealing of any horse, mare, gelding or mule, on being duly convicted thereof, shall be imprisoned in the state's prison for not less than five nor more than twenty years, in the discretion of the court. Every accessory before the fact in any other felony shall be punished by imprisonment in the state prison or county jail for not more than ten years, or may be fined in the discretion of the court.

Rev., s. 3290; Code, s. 980; 1868-9, c. 31, s. 2; 1874-5, c. 212.

When defendant was convicted of murder in second degree and sentenced to imprisonment for twenty years, he is not entitled to resentence as an accessory: *State v. Bryson*, 173-803.

4177. Accessories after the fact; trial and punishment. If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a felony, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years, and may also be fined in the discretion of the court. The offense of such person may be inquired of, tried, determined and punished by any court which shall have jurisdiction of the principal felon, in the same manner as if the act, by reason whereof such person shall have become

an accessory, had been committed at the same place as the principal felony, although such act may have been committed without the limits of the state; and in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory shall have been committed within the body of any other county, the offense of such person guilty of a felony as aforesaid may be inquired of, tried, determined, and punished in either of said counties: Provided, that no person who shall be once duly tried for such felony shall be again indicted or tried for the same offense.

Rev., s. 3289; Code, s. 978; R. C., c. 34, s. 54; 1797, c. 485, s. 1; 1852, c. 58.

See generally: State v. Ives, 35-338; State v. Duncan, 28-98; State v. Smith, 24-402; State v. Chittam, 13-49. Section generally construed; form of indictment: State v. Winton, 61-196; State v. Beatty, 61-52; State v. Ives, 35-338; State v. Groff, 5-270. Evidence against accessory; record of conviction of principal: State v. Duncan, 28-98; State v. Chittam, 13-49. Husband of one charged as accessory is not competent witness in favor of one charged as principal: State v. Ludwick, 61-401. Petty larceny does not admit of an accessory, therefore receiver of stolen goods is no longer an accessory: State v. Tyler, 85-569.

Rule that principal must be first tried and convicted before accessory has no application between two principals in first and second degrees: State v. Jarrell, 141-722.

Misdemeanor in "first degree" and "second degree" in statute against prostitution, see section 4361.

SUBCHAPTER 2. OFFENSES AGAINST THE STATE

ART. 3. REBELLION

4178. Rebellion against the state. If any person shall incite, set on foot, assist or engage in a rebellion or insurrection against the authority of the state of North Carolina or the laws thereof, or shall give aid or comfort thereto, every person so offending in any of the ways aforesaid shall be guilty of a felony, and, shall be punished by imprisonment in the state's prison for not more than fifteen years and by a fine of not more than ten thousand dollars.

Rev., s. 3437; Code, s. 1106; 1868, c. 60, s. 2; 1861, c. 18; 1866, c. 64; Const., Art. IV, s. 5.

4179. Conspiring to rebel against the state. If two or more persons shall conspire together to overthrow or put down, or to destroy by force, the government of North Carolina, or to levy war against the government of the state, or to oppose by force the authority of such government, or by force or threats to intimidate, or to prevent, hinder or delay the execution of any law of the state, or by force or fraud to seize or take possession of any firearms or other property of the state, against the will or contrary to the authority of such state, every person so offending in any of the ways aforesaid shall be guilty of a felony and shall be imprisoned not more than ten years in the state's prison and be fined not exceeding five thousand dollars.

Rev., s. 3438; Code, s. 1107; 1868, c. 60, s. 1.

Conspiracy generally: State v. Jackson, 82-565.

4180. Secret political and military organizations forbidden. If any person, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or resisting the laws, shall join or in any way connect or unite himself with any oath-bound secret political or military organization, society or association of whatsoever name or character; or

shall form or organize or combine and agree with any other person or persons to form or organize any such organization; or as a member of any secret political or military party or organization shall use, or agree to use, any certain signs or grips or passwords, or any disguise of the person or voice, or any disguise whatsoever for the advancement of its object, and shall take or administer any extra-judicial oath or other secret, solemn pledge, or any like secret means; or if any two or more persons, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or circumventing the laws, shall secretly assemble, combine or agree together, and the more effectually to accomplish such purposes, or any of them, shall use any certain signs, or grips, or passwords, or any disguise of the person or voice, or other disguise whatsoever, or shall take or administer any extra-judicial oath or other secret, solemn pledge; or if any persons shall band together and assemble to muster, drill or practice any military evolutions except by virtue of the authority of an officer recognized by law, or of an instructor in institutions or schools in which such evolutions form a part of the course of instruction; or if any person shall knowingly permit any of the acts and things herein forbidden to be had, done or performed on his premises, or on any premises under his control; or if any person being a member of any such secret political or military organization shall not at once abandon the same and separate himself entirely therefrom, every person so offending shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than two hundred dollars, or be imprisoned, or both, at the discretion of the court.

Rev., s. 3439; Code, s. 1095; 1870-1, c. 133; 1868-9, c. 267; 1871-2, c. 143.

ART. 4. COUNTERFEITING AND ISSUING MONETARY SUBSTITUTES

4181. Counterfeiting coin and uttering coin that is counterfeit. If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting the resemblance or similitude or likeness of a Spanish milled dollar, or any coin of gold or silver which is in common use and received in the discharge of contracts by the citizens of the state; or shall pass, utter, publish or sell, or attempt to pass, utter, publish or sell, or bring into the state from any other place with intent to pass, utter, publish or sell as true, any such false, forged or counterfeited coin, knowing the same to be false, forged or counterfeited, with intent to defraud any person whatsoever, every person so offending shall be guilty of a felony, and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years.

Rev., s. 3422; Code, s. 1035; R. C., c. 34, s. 64; 1811, c. 814, s. 3.

4182. Possessing tools for counterfeiting. If any person shall have in his possession any instrument for the purpose of making any counterfeit similitude or likeness of a Spanish milled dollar, or other coin made of gold or silver which is in common use and received in discharge of contracts by the citizens of the state, and shall be duly convicted thereof, the person so offending shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years, or be fined not more than five hundred dollars.

Rev., s. 3423; Code, s. 1036; R. C., c. 34, s. 65; 1811, c. 814, s. 4.

Sufficiency of indictment: State v. Collins, 10-191. **For other annotations on forgery generally, see under section 4296.**

4183. Issuing substitutes for money without authority. If any person or corporation, unless the same be expressly allowed by law, shall issue any bill, due bill, order, ticket, certificate of deposit, promissory note or obligation, or any other kind of security, whatever may be its form or name, with the intent that the same shall circulate or pass as the representative of, or as a substitute for, money, he shall forfeit and pay for each offense the sum of fifty dollars; and if the offender be a corporation, it shall in addition forfeit its charter. Every person or corporation offending against this section, or aiding or assisting therein, shall be guilty of a misdemeanor.

Rev., s. 3711; Code, s. 2493; 1895, c. 127; R. C., c. 36, s. 5.

Compare under act of 1816, ch. 900: *State v. Humphreys*, 19-555.

4184. Receiving or passing unauthorized substitutes for money. If any person or corporation shall pass or receive, as the representative of, or as the substitute for, money, any bill, check, certificate, promissory note, or other security of the kind mentioned in the preceding section, whether the same be issued within or without the state, such person or corporation, and the officers and agents of such corporation aiding therein, who shall offend against this section shall for every such offense forfeit and pay five dollars, and shall be guilty of a misdemeanor.

Rev., s. 3712; Code, s. 2494; 1895, c. 127; R. C., c. 36, s. 6.

Section cited in *State v. Bank of Fayetteville*, 48-450.

SUBCHAPTER 3. OFFENSES AGAINST THE ELECTIVE FRANCHISE

ART. 5. CORRUPT PRACTICES AT ELECTIONS

4185. Certain acts declared misdemeanors. Any person who shall in connection with any primary, special, general or other election in this state do any of the acts and things declared in this section to be unlawful shall be guilty of a misdemeanor and, upon conviction, shall be fined or imprisoned, or both, in the discretion of the court. It shall be unlawful—

1. To fail as election officer to perform duties. For any person to fail as an officer or as a judge or registrar of election, or as a member of any election or canvassing board, to prepare the books, tickets and return blanks which it is his duty under the law to prepare, or to distribute the same as required by law, or to make the returns, or to perform any other duty within the time and in the manner required by law.

Rev., s. 3396; 1901, c. 89, s. 46; 1913, c. 164, s. 1.

2. To act as election officer after removal. For any person to continue, or attempt, to act as a judge or registrar of election, or as a member of any election board, after having been legally removed from such position, and after having been given notice of such removal.

Rev., s. 3399; 1901, c. 89, s. 10; 1913, c. 164, s. 1.

3. To interfere with elections and the duties of election officers. For any person to break up, or by force or violence to stay or interfere with, the holding of any election, to interfere with the possession of any ballot box, election

book, ticket or return sheet by those entitled to the possession of the same under the law, or to interfere in any manner with the performance of any duty imposed by law upon any election officer or member of any election or canvassing board.

Rev., s. 3385; 1901, c. 89, s. 51; 1913, c. 164, s. 1.

4. *To disturb election officers in the performance of their duties.* For any person to be guilty of boisterous conduct so as to disturb any member of any election or canvassing board, or any judge or registrar of elections, in the performance of his duties as imposed by law.

Rev., s. 3385; 1901, c. 89, s. 51; 1913, c. 164, s. 1.

5. *To bet on elections.* For any person to bet or wager any money or other thing of value on any election.

Rev., s. 3384; 1901, c. 89, s. 55; 1913, c. 164, s. 1.

Compare *Bettis v. Reynolds*, 34-344.

6. *To intimidate or oppress voters.* For any person to directly or indirectly discharge or threaten to discharge from employment or otherwise intimidate or oppress any legally qualified voter on account of any vote such voter may cast, or consider casting, or intend to cast or not to cast, or which he may have failed to cast.

Rev., s. 3387; 1901, c. 89, s. 53; 1913, c. 164, s. 1.

Turning one out of church because he voted a certain ticket is not within section: *State v. Rogers*, 128-576. Compare *State v. Williams*, 117-753.

7. *To make contributions toward campaigns without properly reporting same.* For any person to spend or contribute directly or indirectly any money or other thing of value to aid in the campaign or election of any candidate for any office in a primary or in a general election, unless the same be reported immediately to such candidate, to the end that it may be included by him in the reports required of him by law, or unless such contribution be reported to the campaign committee of such candidate within the meaning of "campaign committee" as herein defined. The term "campaign committee," as used in this subsection, shall embrace only such committees as are designated by candidates for office before primary elections and reported to the secretary of state at least thirty days before any such primary election by those who are candidates for any office embracing a greater territory than a county, and reported to the clerk of the superior court in the county of the candidate at least thirty days prior to the primary election by those who are candidates for any office to be voted for only by the electors in a particular county or subdivision thereof. It shall be the duty of each candidate to receive from such campaign committee, and of each campaign committee of each candidate to give to the candidate appointing such committee, all the information they may have, and for such campaign committee and candidate to embrace such information in the reports required of them by law, and it shall be unlawful for the candidate and the members of his campaign committee to fail to do so.

1913, c. 164, s. 1.

8. *To fail before primary elections to report campaign receipts and disbursements.* For any person who is a candidate or member of the campaign

committee to fail to report under oath, within the time required by law for the report from such candidate, the amount of money received in connection with or in aid of his campaign, the sources thereof, and for what purposes it has been applied. The report to be made by the campaign committee of any candidate before the primary shall be made in duplicate, one copy thereof to be filed with the candidate and one copy to be filed with the officer to whom such candidate is required to report, and shall be made within the time required for a report from such candidate.

1913, c. 164, s. 1.

9. To expend more than a certain sum for campaign purposes before primary elections. For any person who is a candidate for any political office before a primary to expend or knowingly assent to or permit the expenditure of more than fifty per cent of what the annual salary of such person will be if elected to the office for which he is a candidate, except that a candidate for governor and a candidate for the United States senate may spend or allow others to spend a total amount, which shall not be greater than the annual salary would be if the candidate were elected to such office, and such candidate may lawfully pay in addition his transportation expenses and board and lodging bills while campaigning for such office.

1913, c. 164, s. 1.

10. To fail before general elections to report campaign receipts and disbursements. For any person who is a member of any executive, managing or other committee of any political party for any county or subdivision of any county in the state, to fail to report to the clerk of the court of such county, not more than fifteen nor less than ten days before any general election, the amount of money received by such committee for campaign purposes, and within twenty days after the election to make a similar report of money received and from whom, and the purposes for which it was used, such report to be made under oath by the secretary or chairman of the committee who has full knowledge of all the details of the committee's affairs; or for any chairman or secretary of such committee of a political party having a territory embracing more than one county to fail to make, within the time required by law, similar reports to the secretary of state.

1913, c. 164, s. 1.

11. To publish unsigned derogatory charges concerning candidates. For any person to publish in any newspaper or pamphlet, or otherwise, any charge derogatory to any candidate, or calculated to affect the candidate's chances of election to office, unless such publication be signed by the party giving publicity to and being responsible for such charge.

1913, c. 164, s. 1.

12. To circulate false derogatory charges concerning candidates. For any person to publish or cause to be circulated derogatory reports with reference to any candidate, known by the person publishing or circulating such report to be false, when such report is calculated or intended to affect the chances of such candidate for such office.

1913, c. 164, s. 1.

13. To promise political appointments in securing political support. For any person to give or promise, in return for political support or influence, any political appointment or support for political office.

1913, c. 164, s. 1.

4186. Certain acts declared felonies. Any person who shall in connection with any primary, special, general or other election in this state do any of the acts and things declared in this section to be unlawful shall be guilty of a felony, and upon conviction shall be imprisoned in the state's prison not less than four months, or fined not less than one thousand dollars, or both, in the discretion of the court. It shall be unlawful—

1. To register in more than one precinct or impersonate other voters. For any person fraudulently to cause his name to be placed upon the registration books of more than one election precinct, or fraudulently to cause or procure his name, or that of any other person, to be placed upon the registration books in any precinct when such registration in that precinct does not qualify such person to vote legally therein, or to impersonate falsely another registered voter for the purpose of voting in the stead of such other voter.

Rev., s. 3395; 1901, c. 89, s. 70; 1913, c. 164, s. 2.

Compare *State v. Boyett*, 32-336; *State v. Pearson*, 97-434.

2. To buy and sell votes. For any person to give or promise or request or accept at any time before or after any such election any money, property or other thing of value whatever, in return for the vote of any elector.

Rev., s. 3386; 1901, c. 89, s. 54; 1913, c. 164, s. 2.

3. To make fraudulent entries and returns. For any person who is an election officer, a member of a canvassing or election board or other officer charged with any duty with respect to any election, knowingly to make any false or fraudulent entry on any election book, or any false or fraudulent return, or knowingly to make, or cause to be made, any false statement on any ticket, or to do any fraudulent act, or knowingly and fraudulently to omit to do any act or make any report legally required of such person.

1913, c. 164, s. 2.

4. To swear falsely in connection with elections. For any person knowingly to swear falsely with respect to any matter pertaining to any such election.

1913, c. 164, s. 2.

5. To qualify any one fraudulently as an elector. For any person falsely to make or present any exemption from poll tax, tax receipt, certificate or other paper to qualify any person fraudulently as an elector, or to attempt thereby to secure to any person the privilege of voting.

Rev., s. 3401; 1901, c. 89, s. 13; 1913, c. 164, s. 2.

4187. Persons pardoned compellable to testify. Any person subpoenaed by the state to testify relative to any offense arising under the provisions of the two preceding sections shall be required to testify, but such person shall be immune from prosecution and shall be pardoned for any violation of law about which such person is so required to testify.

1913, c. 164, s. 3.

ART. 6. OTHER OFFENSES AGAINST THE ELECTIVE FRANCHISE

4188. Disposing of liquor at or near polling places. If any person shall give away or shall sell any intoxicating liquor, except for medical purposes and upon the prescription of a practicing physician, at any place within five miles of the polling place, at any time within twelve hours next preceding or succeeding any public election, whether general, local or municipal, or during the holding thereof, he shall be guilty of a misdemeanor, and shall be fined not less than one hundred nor more than one thousand dollars.

Rev., s. 3389; 1901, c. 89, s. 76; 1905, c. 531.

General discussion of this and former statutes: *State v. Edwards*, 134-636. Indictment, sufficiency of: *State v. Stamey*, 71-202.

4189. Voting of felons at elections. If any person convicted of a crime which excludes him from the right of suffrage shall vote at an election, without having been restored to the right of citizenship, he shall be guilty of a felony and punished by a fine not exceeding one thousand dollars, or imprisoned in the state's prison not exceeding two years, or both.

Rev., s. 3388; 1901, c. 89, s. 71.

4190. Corrupt taking of oath by voter. If any person shall corruptly take the oath prescribed for voters, he shall be guilty of perjury, and shall be fined not less than five hundred dollars nor more than one thousand dollars, and shall be imprisoned in the state's prison not less than two nor more than five years.

Rev., s. 3390; 1901, c. 89, s. 49.

Cases under this section: *State v. Fenner*, 166-248; *State v. Griffin*, 175-767.

4191. False oath of voter in registering. If any person shall knowingly register under the permanent registration law who is not qualified within the meaning of that law and article six, section four, of the constitution, or if any person shall knowingly take any false oath in registering under the same, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than one thousand dollars or imprisoned not more than five years.

Rev., s. 3392; 1901, c. 550, s. 12.

4192. Voting illegally at elections; fraudulent entries by registrars and clerks. If any person shall, with intent to commit a fraud, register or vote at more than one box or more than one time, or shall induce another to do so, or if any person shall illegally vote at any election, he shall be guilty of a felony and shall be imprisoned in the state's prison not less than six nor more than twelve months, or fined not less than one hundred nor more than five hundred dollars, at the discretion of the court. If any registrar of voters, or any clerk or copyist, shall make any entry or copy with intent to commit a fraud, he shall be guilty of a like offense.

Rev., s. 3394; 1901, c. 89, s. 48.

Where an illegal vote is voluntarily given, the unlawful purpose attaches prima facie to the act: *State v. Hart*, 51-389.

A decision of the judges of election that a person is entitled to vote is no complete defense to an indictment for illegal voting, although such person, in fact, was not entitled to vote: *State v. Pearson*, 97-434.

That the election was irregularly held is no defense to illegal voting: *State v. Cohoon*, 34-178. Compare *State v. Boyett*, 32-336.

4193. Willful failure of returning officer to discharge duty. If any chairman of the county board of elections, or other returning officer whatever, shall willfully, or of malice, neglect to perform any duty, act, matter or thing required or directed in the time, manner and form in which such duty, act, matter or thing is required to be performed in relation to the election, and returns thereof, of the governor, representatives in congress, justices of the supreme court, judges of the superior court, solicitors, electors for president and vice president of the United States or other officers, the person so offending shall be guilty of a felony, and shall be fined not less than one thousand nor more than five thousand dollars, and be imprisoned not less than one nor more than three years.

Rev., s. 3391; 1901, c. 89, s. 47.

4194. Willful failure of registration officer to discharge duty. If any officer charged with any duty under the permanent registration law willfully fails and neglects to perform the same, he shall be guilty of a misdemeanor, and upon conviction shall forfeit his office and be fined not more than one thousand dollars or imprisoned not more than five years.

Rev., s. 3393; 1901, c. 550, s. 11.

4195. Making false returns or tampering with poll books. If any person shall make, certify, deliver or transmit a false return of an election held in this state, or make any erasure or alteration in the poll books, he shall be guilty of a felony and shall be imprisoned in the state's prison not less than one year, and shall, in addition, forfeit and pay five hundred dollars, one-half to the use of the person who shall sue for the same and the other half to the use of the state.

Rev., s. 3397; 1901, c. 89, s. 83.

4196. Refusing to furnish copy of election returns. If any register of deeds or clerk of the superior court shall refuse to make and give to any person a duly certified copy of the returns of any election, or of a tabulated statement of any election, the returns of which are by law deposited in his office, upon the tender of the fees therefor, he shall be guilty of a misdemeanor, and upon conviction shall be dismissed from office and imprisoned for one year.

Rev., s. 3398; 1901, c. 89, s. 83.

4197. Failing to furnish poll-tax list. If any sheriff or tax collector shall fail, between the first day of May and the tenth day of May of any year in which a general election occurs to certify to the clerk of the superior court of his county a list of all persons who have paid their poll tax for the previous year, he shall be guilty of a misdemeanor.

Rev., s. 3400; 1901, c. 89, s. 13.

4198. Failing to give or falsely dating poll-tax receipt. If any tax collector or sheriff shall willfully fail to give a tax receipt to any person paying his poll tax, or shall falsely date any tax receipt or duplicate thereof, he shall be guilty of a misdemeanor, and shall be punished in the discretion of the court.

Rev., s. 3402; 1901, c. 89, s. 13.

4199. Using funds of insurance companies for political purposes. No insurance company or association, including fraternal beneficiary associations, doing business in this state shall, directly or indirectly, pay or use, or offer, consent or

agree to pay or use, any money or property for or in aid of any political party, committee or organization, or for or in aid of any corporation, joint-stock company, or other association organized or maintained for political purposes, or for or in aid of any candidate for political office or for nomination for such office, or for any political purpose whatsoever, or for the reimbursement or indemnification of any person for money or property so used. Any officer, director, stockholder, attorney or agent of any corporation or association which violates any of the provisions of this section, who participates in, aids, abets, advises or consents to any such violation, and any person who solicits or knowingly receives any money or property in violation of this section, shall be guilty of a misdemeanor, and shall be punished by imprisonment for not more than one year and a fine of not more than one thousand dollars. Any officer aiding or abetting in any contribution made in violation of this section shall be liable to the company or association for the amount so contributed. The insurance commissioner may revoke the license of any company violating this section. No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial for a violation of any of the provisions of this section, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate or degrade him; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be used against him upon any criminal investigation or proceeding.

1907, c. 121.

SUBCHAPTER 4. OFFENSES AGAINST THE PERSON

ART. 7. HOMICIDE

4200. Murder in the first and second degree defined; punishment. A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the state prison.

Rev., s. 3631; 1893, c. 85; 1893, c. 281.

See generally: State v. Fuller, 114-885; State v. Covington, 117-834.

Difference between first and second degree: State v. Thomas, 118-1113. General effect of section discussed in State v. Rhyne, 124-847; State v. Ewing, 127-555; State v. Barrett, 142-565; State v. Matthews, 142-621. This section does not make a new definition of murder, but recognizes its different kinds as they existed at common law: State v. Dalton, 178-779; State v. Banks, 143-625.

Killing by lying in wait: State v. Walker, 170-716; State v. Wiseman, 178-784—motive may be considered as a circumstance in determining guilt: Ibid. Killing while attempting robbery: State v. Logan, 161-235. When one in attempting to kill another kills an innocent bystander, the degree of guilt depends upon his intent and conduct toward his adversary: State v. Dalton, 178-779.

INDICTMENT. Sufficiency of, under section 4614: State v. Gilchrist, 113-673; State v. Covington, 117-866; State v. Matthews, 142-621. Sufficiency of under acts 1893, chapter 85: State v. Covington, 118-834. Words "premeditation and deliberation" need not be used: State v. Cole, 132-1069. Charging murder, grand jury cannot return for murder in second degree: State v. Ewing, 127-555; State v. Hunt, 128-584.

MALICE. Presumed where killing is with deadly weapon: State v. Love, 166-333; State v. Simonds, 154-197; State v. Norwood, 115-789; State v. Booker, 123-713; State v. Worley, 141-764; State v. Kendall, 143-659; Overcash v. Electric Co., 144-581—or killing proved, nothing else appearing, the law presumes malice, but not premeditation and deliberation, and the killing is murder in the second degree, State v. Fuller, 114-885; State v. Wilcox, 118-1131; State v. Rhyne, 124-848; State v. Hicks, 125-636; State v. Capps, 134-628. Implied when an act dangerous to others is done so recklessly or wantonly as to evince depravity and a disregard for human life: State v. Lilliston, 141-857. Sufficiently shown to make out case in first degree, when there has been a wrongful and intentional killing of another, without lawful excuse or mitigating circumstances: State v. Banks, 143-652; State v. Kendall, 143-659; State v. McDowell, 145-566; State v. Adams, 136-617; State v. Wilcox, 132-1143; State v. Turner, 143-642. When the homicide is shown or admitted to have been intentionally committed by lying in wait, poisoning, starvation, imprisonment, or torture, the law raises a presumption of murder in the first degree, but the presumption may be rebutted: State v. Matthews, 142-621. When the intentional killing is done by other means than the above, the presumption is only of murder in the second degree: State v. Fuller, 114-885; State v. Norwood, 115-789; State v. Dowden, 118-1145; State v. Booker, 123-713; State v. Hicks, 125-636; State v. Capps, 134-628; State v. Worley, 141-764; State v. Matthews, 142-621.

Malice is necessary to constitute murder in the second degree: State v. Baldwin, 152-822; State v. Fowler, 151-731.

In the killing with a deadly weapon the defendant must not only rebut the presumption of malice, but also the presumption that it was unlawful: State v. Fowler, 151-731—and the burden is on the defendant to show justification or mitigation to the satisfaction of the jury: State v. Cox, 153-638; State v. Baldwin, 152-822; State v. Fowler, 151-731; State v. Quick, 150-820; State v. Roberson, 150-837; State v. Patterson, 149-533.

PREMEDITATION AND DELIBERATION. What constitutes: State v. Walker, 173-780; State v. Coffey, 174-814; State v. McClure, 166-321; State v. Cameron, 166-379; State v. Daniels, 164-464; State v. Thomas, 118-1113. No particular time necessary for premeditation and deliberation; and if purpose to kill has been deliberately formed, the time elapsing before the execution of such purpose is immaterial: State v. Norwood, 115-789; State v. McCarmoe, 116-1033; State v. Covington, 117-834; State v. Dowden, 118-1153; State v. Daniel, 139-549; State v. Banks, 143-652. Where prisoner weighs the purpose to kill long enough to form a fixed design, he is guilty of murder in the first degree; but where the intent to kill is formed simultaneously with the act, it is not murder in the first degree: State v. Dowden, 118-1145; State v. Barrett, 142-565; State v. Jones, 145-466. Whether certain evidence shows premeditation and deliberation is a question of fact for the jury: State v. Daniels, 134-671; State v. Daniel, 139-549.

DEFENSES. What is self-defense, excessive force, etc.: State v. Cox, 153-638. Son can justify fighting for father only when the circumstances amount to self-defense: *Ibid.* Self-defense is not to be proved beyond a reasonable doubt, but only to the satisfaction of the jury: State v. Little, 178-722. There is a presumption of sanity, and the burden is upon the defendant to prove insanity: State v. Cloninger, 149-567; State v. Banner, 149-519. The fact of drunkenness should be considered when the intent is necessary: State v. Murphy, 157-614.

EVIDENCE. Sufficiency of, for conviction of murder in first degree: State v. Bynum, 175-777; State v. Covington, 117-834; State v. Banks, 143-652—insufficiency of, for murder in first degree, State v. Thomas, 118-1113; State v. Rhyne, 124-847; State v. Bishop, 131-733; State v. Cole, 132-1069. Sufficiency of, for conviction of murder in second degree: State v. Hinson, 150-829; State v. Lilliston, 141-857; State v. Tillman, 146-611; State v. Kendall, 143-659. Sufficient evidence of premeditation and deliberation: State v. Cain, 178-724; State v. Lovelace, 178-762; State v. Johnson, 172-920; State v. McKay, 150-813; State v. Roberson, 150-837; State v. McDowell, 145-63; State v. Daniel, 139-549; State v. Hunt, 134-684; State v. Teachey, 138-587; State v. Jones, 145-466; State v. Barrett, 142-565. Where killing with deadly weapon

is admitted the burden is still upon the state to show premeditation and deliberation: *State v. Roberson*, 150-837.

Admissibility of dying declarations: *State v. Quick*, 150-820. Inadmissible declarations: *State v. Worley*, 141-764. Evidence of threats by deceased: *State v. Stratford*, 149-483. Testimony of nonexperts to prove insanity: *State v. Banner*, 149-519. Motive as a circumstance to be considered in evidence: *State v. Stratford*, 149-483. Words of defendant immediately after the killing: *State v. Baldwin*, 152-822. What was said to defendant as tending to produce insanity is admissible, but the truth of the statement is not in question: *State v. Green*, 152-835. Evidence as to the dangerous character of deceased is not admissible when there is no evidence of self-defense: *State v. Dunlap*, 149-550; *State v. Fisher*, 149-557—nor when the defense is insanity, *State v. Banner*, 149-519.

Where there is no evidence of manslaughter it is not error for the judge to instruct the jury to return a verdict of murder in the first or second degree, or not guilty: *State v. McKay*, 150-813. Upon conviction of murder in second degree it was not error for judge to charge that there was not sufficient evidence to convict of first degree: *State v. Fisher*, 149-557. Where solicitor elects not to prosecute for murder in first degree, and the evidence tends to show suicide or first degree, it is not error to instruct the jury to convict of murder in second degree or acquit: *State v. Stratford*, 149-483. Defendant is not prejudiced because solicitor asks only for a conviction of murder in second degree: *State v. Casey*, 159-472.

Jury rendering a verdict of guilty of murder in first degree "with mercy," and only one of the jurors said "with mercy," upon polling the jury, it is proper for the judge to send the jury back for a proper verdict: *State v. McKay*, 150-813.

The order of proof upon trials of homicide is usually left to sound discretion of judge, and is not reviewable on appeal unless made to appear that some substantial injustice has been done: *State v. Guthrie*, 145-492.

Where circumstances do not bring the killing within the cases made murder in the first degree per se by the statute, the state must prove premeditation and deliberation beyond a reasonable doubt: *State v. Fuller*, 114-885; *State v. Norwood*, 115-789; *State v. Thomas*, 118-1113; *State v. Booker*, 123-713; *State v. Daniels*, 134-675. Compare *State v. Matthews*, 142-621.

Defendant only required to show matters in mitigation or excuse to satisfaction of jury: *State v. Willis*, 63-26; *State v. Vann*, 82-632; *State v. Brittain*, 89-502; *State v. Mozon*, 90-676; *State v. Wilcox*, 118-1131; *State v. Barrett*, 132-1005; *State v. Worley*, 141-764.

Before a conviction for murder can be had, an unlawful and intentional taking of another's life must be shown or imputed, as is sometimes the case, by reason of a killing with a deadly weapon, or under circumstances which indicate a reckless indifference to human life: *State v. Stitt*, 146-643.

4201. Punishment for manslaughter. If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or state prison for not less than four months nor more than twenty years.

Rev., s. 3632; Code, s. 1055; 1879, c. 255; R. C., c. 34, s. 24; 4 Hen. VII, c. 13; 1816, c. 918.

What constitutes manslaughter: see *State v. Cobb*, 177-588; *State v. Kennedy*, 169-288; *State v. Rowe*, 155-436; *State v. Quick*, 150-820; *State v. Ramsey*, 50-195; *State v. Curry*, 46-280; *State v. Floyd*, 51-392; *State v. Messoge*, 65-480; *State v. Harmon*, 78-515; *State v. Brittain*, 89-481; *State v. Vines*, 93-493; *State v. Gaskins*, 93-547; *State v. Durham*, 141-741; *State v. Walker*, 145-567; see, also, annotations under section 4200. Where one points gun at another, thinking it unloaded, and it goes off and kills, defendant is guilty of manslaughter: *State v. Stitt*, 146-643; *State v. Trollinger*, 162-618; also see *State v. Limerick*, 146-649; *State v. Turnage*, 138-566. Criminal negligence to constitute manslaughter: *State v. Tankersley*, 172-955. Running over and killing a person by negligently driving an automobile: *State v. McIver*, 175-761; *State v. Gash*, 177-595. Selling intoxicating drink containing poison: *State v. Keever*, 177-114. Firing a pistol from a train and killing some one: *State v. Lance*, 149-551. Involuntary manslaughter: *State v. Oakley*, 176-755. Aiding and abetting in manslaughter: *State v. Cloninger*, 149-567.

Act of 1909, c. 80, s. 6, does not interfere with the power of the court to imprison a defendant in the state prison: *State v. Killian*, 173-792.

Where the indictment is for murder, it is error to fail to charge as to manslaughter if the circumstances of the case require it: *State v. Merrick*, 171-788.

4202. Punishment for second offense of manslaughter. If any person, having been convicted of the crime of manslaughter and sentenced thereon, shall be convicted of a second crime of the like nature, he shall be imprisoned in the state prison not less than five nor more than sixty years; and in every such case of conviction for such second offense, the prior conviction of the same person and sentence thereon may be shown to the court.

Rev., s. 3633; Code, s. 1056; R. C., c. 34, s. 25.

4203. Killing adversary in duel; aiders and abettors declared accessories. If any person fight a duel in consequence of a challenge sent or received, and either of the parties shall be killed, then the survivor, on conviction thereof, shall suffer death; and all their aiders or abettors shall be considered accessories before the fact.

Rev., s. 3629; Code, s. 1013; R. C., c. 34, s. 3; 1802, c. 608, s. 2.

See annotations under section 4411.

As to sending, accepting or bearing a challenge, see s. 4411.

For death as result of wilfully wrecking railroad train, see ss. 4417, 4418.

ART. 8. RAPE AND KINDRED OFFENSES

4204. Punishment for rape. Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death.

Rev., s. 3637; Code, s. 1101; R. C., c. 34, s. 5; 18 Eliz., c. 7; 1868-9, c. 167, s. 2; 1917, c. 29.

Infant under the age of 14 years cannot commit the crime of rape, nor be guilty of an assault with intent to commit rape: *State v. Sam*, 60-293; *State v. Pugh*, 52-61.

Carnal knowledge of married woman by personating her husband not rape: *State v. Brooks*, 76-1; see section 4207.

To carnally know and abuse a female child under the age of ten years is rape, irrespective of consent: *State v. Goldston*, 103-323; *State v. Johnson*, 76-209.

Crime not complete where genital organs only injured and abused, but the least penetration is sufficient: *State v. Monds*, 130-697; *State v. Hargrave*, 65-466.

If prosecutrix offered to have connection with prisoner upon certain terms, and he attempts to force connection without complying with the terms of the offer, he is guilty of rape if he succeeds, and assault with intent to commit rape if he does not succeed: *State v. Long*, 93-542.

One who, by threatening to kill, compels his wife to submit to, and another man to attempt, sexual connection, is guilty of an assault with intent to commit rape upon his wife: *State v. Dowell*, 106-722.

A female who aids and abets a male assailant in an attempt to commit rape upon a female child becomes a principal in the offense: *State v. Hairston*, 121-580; *State v. Jones*, 83-605.

Where evidence shows girl raped by defendant several times, state need not make election until its testimony closed: *State v. Parish*, 104-679.

INDICTMENT. The word "her" sufficiently indicates that person ravished was a female: *State v. Terry*, 20-289; *State v. Farmer*, 26-224. Necessary to charge that the act was done "feloniously": *State v. Johnson*, 67-55; *State v. Goldston*, 103-323; *State v. Scott*, 72-461. Must allege that the act was done "forcibly and against her will" or words equivalent: *State v. Marsh*, 132-1000; *State v. Peak*, 130-713; *State v. Powell*, 106-635; *State v. Johnson*, 67-55; *State v. Jim*, 12-142. Not necessary to state that the female ravished was above the age of ten years; but if the female is under age of ten years, such fact should appear: *State v. Farmer*, 26-224; *State v. Storkey*, 63-7. If child under ten years is forcibly ravished, her age need not be set out; but if she consents, her age must be set out: *State v. Johnson*, 100-494. Not necessary to charge that prisoner "ravished" the child if she is under ten years of age: *State v. Smith*, 61-302. Two persons may be jointly indicted for rape: *State v. Jordan*, 110-491.

EVIDENCE. Sufficiency of: *State v. Dancy*, 83-608; *State v. Johnson*, 76-209. Character of woman competent: *State v. Jefferson*, 28-305; *State v. Hairston*, 121-579; *State v. Freeman*, 100-429—incompetent evidence, when, *State v. Arnold*, 146-602; *State v. Jefferson*, 28-305; *State v. Hairston*, 121-579. Expert testimony as to age of child ravished admissible: *State v. Smith*, 61-302—and family Bible also admissible to prove age of child, *State v. Hairston*, 121-579. Long silence on part of female is not presumption, but is matter of fact to be passed upon by jury: *State v. Peter*, 53-19. Fact that prosecutrix did not tell her aunt, whom she met soon after the occurrence, does not entitle defendant to instruction that her testimony should be disregarded: *State v. Marshall*, 61-49. Competent for prosecutrix to testify that she told her husband immediately after assault: *State v. Stines*, 138-687. Proof of emission of seed not necessary; proof of penetration only necessary: *State v. Storkey*, 63-7; *State v. Hodges*, 61-231—as the least penetration only is necessary, *State v. Monds*, 130-697; *State v. Hargrave*, 65-466.

Failure to make outcry is evidence in favor of defendant: *State v. Smith*, 138-700; *State v. Stines*, 138-687.

Where prisoner sets up defense that he was under fourteen years when alleged offense committed, burden is on him to prove it, and jury may look on him and judge his age from his appearance: *State v. McNair*, 93-628.

Evidence that witness near by called to prosecutrix at time of alleged assault is competent as showing that she knew witness was near: *State v. Huff*, 136-679. Defendant had right to cross-examine prosecutrix as to contents of letter written by her to him after alleged rape for purpose of showing that sexual relations between them were voluntary on her part: *State v. Hayes*, 138-660—and this is so even though letter be offered in evidence, *Ibid.* Fact that prosecutrix followed prisoner into woods is not conclusive evidence of consent: *State v. Marshall*, 61-49.

4205. Punishment for assault with intent to commit rape. Every person convicted of an assault with intent to commit a rape upon the body of any female shall be imprisoned in the state's prison not less than one nor more than fifteen years.

Rev., s. 3638; Code, s. 1102; 1868-9, c. 167, s. 3; R. C., c. 107, s. 44; 1823, c. 1229; 1917, c. 162, s. 1.

Where prisoner made an assault with an intent to commit rape, and then desisted, he is guilty of the assault: *State v. Elick*, 52-68.

Infant under age of 14 years cannot commit rape, nor be guilty of an assault with intent to commit rape: *State v. Sam*, 60-293; *State v. Pugh*, 52-61.

Woman may be guilty of rape or assault with intent to commit rape by being present, aiding and abetting a man: *State v. Hairston*, 121-579; *State v. Jones*, 83-605.

One who, by threatening to kill, compels his wife to submit to, and another man to attempt, sexual connection, is guilty of an assault with intent to commit rape upon his wife: *State v. Dowell*, 106-722.

If prosecutrix offered to have sexual connection with prisoner upon certain terms, and he attempts to force the connection without complying with the terms of the offer, he is guilty of rape if he succeeds, and of an assault with intent to commit rape if he does not succeed: *State v. Long*, 93-542.

Superior court may convict a person, charged with an assault hereunder, of simple assault: *State v. Johnson*, 94-863; *State v. Reaves*, 85-553; *State v. Perkins*, 82-681.

Offense hereunder was a misdemeanor until section 4171 was enacted: *State v. Perkins*, 82-681.

INDICTMENT. In an indictment for an assault with intent to commit rape, the word "intent" is not necessary if other sufficient words are used, as "attempt": *State v. Hewett*, 158-627, overruling *State v. Martin*, 14-329, and *State v. Goldston*, 103-323. Necessary to charge that assault was "felonious": *State v. Jesse*, 19-297. A charge that assault was made with "intention" to commit rape, good: *State v. Tom*, 47-414. Necessary to charge that the assault was made with intent to "feloniously" ravish and carnally know: *State v. Johnson*, 67-55; *State v. Scott*, 72-461. Must allege that the assault was "forcible and against her will" or words equivalent: *State v. Powell*, 106-635; *State v. Marsh*, 132-1000; *State v. Peak*,

130-713; *State v. Johnson*, 67-55; *State v. Jim*, 12-142. Not necessary to state the age of the female in the bill: *State v. Staton*, 88-654—nor to state that accused is a male person: *State v. Tom*, 47-414.

EVIDENCE. Sufficient to be submitted to jury: *State v. Arnold*, 146-602; *State v. Garner*, 129-536; *State v. Page*, 127-512; *State v. Daniel*, 87-507; *State v. Boon*, 35-244. Sufficient to be left to jury as to intent: *State v. Mitchell*, 89-521. Not sufficient to be submitted to jury: *State v. Massey*, 86-658 (overruling *State v. Neely*, 74-425); *State v. DeBerry*, 123-703; *State v. Jeffreys*, 117-743. Proof of an assault with intent to abuse and carnally know a female under ten years of age sufficient: *State v. Staton*, 88-654; *State v. Dancy*, 83-608; *State v. Johnson*, 76-209. As to virtue of prosecutrix, competent: *State v. Daniel*, 87-507; *State v. Arnold*, 146-602. Long silence of female does not raise presumption in favor of defendant, but is matter for the jury: *State v. Peter*, 53-19. "Intent" must be established beyond a reasonable doubt: *State v. DeBerry*, 123-703—and the intent must be to gratify one's passion notwithstanding resistance of woman, *State v. Jeffreys*, 117-743.

4206. Emission not necessary to constitute rape and buggery. It shall not be necessary upon the trial of any indictment for the offenses of rape, carnally knowing and abusing any female child under twelve years old, and buggery, to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only.

Rev., s. 3639; Code, s. 1105; 1860-1, c. 30; 1917, c. 29.

Proof of emission of seed necessary before this section: *State v. Gray*, 53-170. The fact of penetration essential, but no particular form of words necessary to establish it: *State v. Hodges*, 61-231; *State v. Storkey*, 63-7—and the least penetration is sufficient, *State v. Hargrave*, 65-466; *State v. Monds*, 130-697; *State v. Hodges*, 61-231.

4207. Obtaining carnal knowledge of married woman by personating husband. If any person shall have carnal knowledge of any married woman by fraud in personating her husband, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison at hard labor for not less than ten nor more than twenty years.

Rev., s. 3624; Code, s. 1103; 1881, c. 89, s. 1.

"Fraud in personating husband" need not be in words, but "acts and conduct" are sufficient: *State v. Williams*, 128-573. Does not amount to rape: *State v. Brooks*, 76-1.

4208. Attempted carnal knowledge of married woman by personating husband. Every person convicted of an assault upon any married woman, with intent to have knowledge of her by fraud in personating her husband, shall be punished by imprisonment in the state's prison at hard labor for not less than five nor more than fifteen years.

Rev., s. 3625; Code, s. 1104; 1881, c. 89, s. 2.

Does not amount to attempt to commit rape: *State v. Brooks*, 76-1.

4209. Obtaining carnal knowledge of virtuous girls between twelve and fourteen years old. If any person shall unlawfully carnally know or abuse any female child over twelve and under fourteen years old, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined or imprisoned in the state's prison, in the discretion of the court.

Rev., s. 3348; 1895, c. 295; 1917, c. 29.

See generally: *State v. Monds*, 130-697. Punishment is in discretion of court: *State v. Rippey*, 127-516. Man and woman may be both guilty of abusing and carnally knowing a female child: *State v. Hairston*, 121-580. Family Bible competent evidence to prove age of child: *Ibid.*

ART. 9. ASSAULTS

4210. Malicious castration. If any person, of malice aforethought, shall unlawfully castrate any other person, or cut off, maim or disfigure any of the privy members of any person, with intent to murder, maim, disfigure, disable or render impotent such person, the person so offending shall suffer imprisonment in the state's prison for not less than five nor more than sixty years.

Rev., s. 3627; Code, s. 999; R. C., c. 34, s. 4; 1831, c. 40, s. 1; 1868-9, c. 167, s. 6.

See generally: State v. Girgin, 23-121; State v. Skidmore, 87-509. **Malice aforethought is express or to be implied from circumstances:** State v. Irwin, 2-112. **Previous threats inadmissible:** State v. Skidmore, 87-509; State v. Norton, 82-628.

4211. Castration or other maiming without malice aforethought. If any person shall, on purpose and unlawfully, but without malice aforethought, cut or slit the nose, bite or cut off the nose, or a lip or an ear, or disable any limb or member of any other person, or castrate any other person, or cut off, maim or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person, the person so offending shall be imprisoned in the county jail or state's prison not less than six months nor more than ten years, and fined, in the discretion of the court.

Rev., s. 3626; Code, s. 1000; R. C., c. 34, s. 47; 1754, c. 56; 1791, c. 339, ss. 2, 3; 1831, c. 40, s. 2.

See generally: State v. Girgin, 23-121; State v. Skidmore, 87-509. **What constitutes "maim" hereunder:** State v. Girgin, 23-121. **Not necessary to prove malice aforethought hereunder:** Ibid. **Malice aforethought is express or to be implied from circumstances, as also is intent to maim:** State v. Irwin, 2-112; State v. Evans, 2-325. **When during fight defendant bit off opponent's ear, burden is on defendant to show that it was done in self-defense:** State v. Skidmore, 87-509.

Indictment must state the offense to have been done "on purpose": State v. Ormond, 18-119. **Indictment for biting off ear, not necessary to state which ear:** State v. Green, 29-39.

Previous threats are not admissible: State v. Skidmore, 87-509; State v. Norton, 82-628. **Prima facie case made out when act is proved or admitted:** State v. Evans, 2-281; State v. Girgin, 23-121; State v. Skidmore, 87-509; State v. Crawford, 13-425. **Section cited in State v. Miller, 75-77.**

4212. Malicious maiming. If any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any other person, with intent to murder, maim or disfigure, the person so offending, his counselors, abettors and aiders, knowing of and privy to the offense, shall, for the first offense, be punished by imprisonment in the state's prison or county jail not less than four months nor more than ten years, and be fined, in the discretion of the court; and for the second offense shall be imprisoned in the state's prison not less than five nor more than sixty years.

Rev., s. 3636; Code, s. 1080; R. C., c. 34, s. 14; 1754, c. 56; 1791, c. 339, s. 1; 1831, c. 12; 22 and 23 Car. II, c. 1 (Coventry Act).

What constitutes maiming: State v. Girgin, 23-121.

"Malice aforethought," meaning of, under act 1791: State v. Crawford, 13-425; State v. Evans, 2-281. **Malice aforethought is express or to be implied from circumstances:** State v. Irwin, 2-112. **Intent presumed from act, unless rebutted:** State v. Crawford, 13-425; State v. Girgin, 23-121; State v. Skidmore, 87-509. **Intent may be implied from circumstances:** State v. Irwin, 2-112.

Count in indictment hereunder cannot be joined with count for assault and battery: State v. Bridges, 5-134. **Indictment need not state which ear injured:** State v. Green, 29-39.

4213. Maliciously assaulting in a secret manner. If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be guilty of a felony and shall be punished by imprisonment in jail or in the penitentiary for not less than twelve months nor more than twenty years, or by a fine not exceeding two thousand dollars, or both, in the discretion of the court.

Rev., s. 3621; 1887, c. 32; 1919, c. 25.

Section includes all assaults committed in a secret manner: *State v. Shade*, 115-757. Meaning of words "or otherwise in a secret manner": *State v. Jennings*, 104-774; *State v. Shade*, 115-759. "In secret manner" means that the person assaulted was unconscious of the presence as well as the purpose of his adversary: *State v. Gunter*, 116-1068; *State v. King*, 120-612; *State v. Harris*, 120-577; *State v. Patton*, 115-756; *State v. Jennings*, 104-774 (changed by act of 1919, c. 25). Although indictment omits the words "by waylaying or otherwise," it is sufficient: *State v. Shade*, 115-757; see, also, *State v. Gunter*, 116-1068.

Malice defined: *State v. Knotts*, 168-173. A secret assault upon two persons at the same time may be charged in the bill: *Ibid.* All who are present aiding and abetting are guilty: *Ibid.*

Sufficient evidence of secret assault: *State v. Bridges*, 178-733. Evidence sufficient as to aiding and abetting: *State v. Chastain*, 104-900—sufficient as to identity, *State v. Telfair*, 109-878. In a prosecution for secret assault it is not necessary to prove a motive for the crime, but it may be shown to ascertain the identity of the defendant: *State v. Carmon*, 145-481.

Indictment for assault in secret manner, verdict may be for simple assault: *State v. Jennings*, 104-774.

4214. Assault with deadly weapon with intent to kill resulting in injury. Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the state prison or be worked on the county roads for a period not less than four months nor more than ten years.

1919, c. 101.

4215. Punishment for assault. In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: Provided, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill or with intent to commit rape, or to cases of assault or assault and battery by any man or boy over eighteen years old on any female person.

Rev., s. 3620; Code, s. 987; 1870-1, c. 43, s. 2; 1873-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6; 1911, c. 193.

As to punishment of offense hereunder, see *State v. Battle*, 130-655; *State v. Hight*, 124-845; *State v. Holmes*, 118-1201; *State v. Haynie*, 118-1265; *State v. Roseman*, 108-765; *State v. Johnson*, 94-863; *State v. Norwood*, 93-578; *State v. Warren*, 92-825; *State v. Driver*, 78-423. No imprisonment in penitentiary for assault with deadly weapon: *State v. Smith*, 174-804. The last proviso in this section makes the punishment greater than in other cases of assault: *State v. Love*, 166-411. Compare, as to punishment, under act of 1870-71, ch. 43: *State v. Heideburg*, 70-496; *In re Schenck*, 74-607; *State v. McNeill*, 75-15; *State v. Miller*, 75-73.

ELEMENTS OF ASSAULT. An assault is a demonstration of hostility that puts the prosecutor in fear and causes him to leave a place at which he has a right to be sooner than he would otherwise have done, or to desist from doing what he has the right to do: *State v. Horne*,

92-805; *State v. Marsteller*, 84-726; *State v. Rawles*, 65-334; *State v. Shipman*, 81-513; *State v. Church*, 63-15; *State v. Hampton*, 63-13; *State v. Morgan*, 25-186—is where an unequivocal purpose of violence is accompanied by an act which, if not stopped or diverted, will be followed by personal injury, *State v. Daniel*, 136-574; *State v. Jeffreys*, 117-743; *State v. Reavis*, 113-677; *State v. Vannoy*, 65-532; *State v. Davis*, 23-125—is an offer or attempt by violence to do an injury to person of another, *State v. Scott*, 142-582; *State v. Leggett*, 104-784; *State v. Horne*, 92-805; *State v. Crow*, 23-375; *State v. Martin*, 85-508; *State v. Marsteller*, 84-726; *State v. Millsaps*, 82-549; *State v. Shipman*, 81-513; *State v. Vannoy*, 65-532; *State v. Rawles*, 65-334. The touching of the person of another in anger or against his will may constitute an assault, but the intent with which it is done is material: *State v. Hemphill*, 162-632. Discussion of the distinction between ‘attempts to strike’ and ‘offer to strike’ and between effect of words used where an ‘offer to strike’ is made with deadly weapon or without one: *State v. Myerfield*, 61-108.

It is not an assault where there is an apparent present purpose not to strike: *State v. Crow*, 23-375—and it is only a menace of violence where one engages in loud and angry talk without offering to use weapons, and causes no one to alter his course, see *State v. Daniel*, 136-576; *State v. Millsaps*, 82-549; *State v. Mooney*, 61-434.

An indiscriminate assault upon several persons is an assault upon each: *State v. Merritt*, 61-134. An assault by one, others being present and abetting, all may be found guilty: *Ibid*.

Jailer guilty of assault where he cruelly beat a female prisoner: *State v. Roseman*, 108-765. One who strikes another is guilty unless he justifies upon ground of self-defense: *State v. Gibson*, 32-214. One who threateningly places his open hand on another’s breast and pushes him down is guilty: *State v. Baker*, 65-332.

Where the facts of the fight are such that, had defendant killed prosecutor, he would have been guilty of manslaughter, defendant is guilty of assault and battery: *State v. Leary*, 88-615.

Members of a voluntary association who, during a ceremony expelling a member according to the rules, suspend him from the wall by means of a cord against his will, are guilty: *State v. Williams*, 75-134.

Druggist who sells to customer medicine for the purpose of being given another as a trick, which inconveniences or injures him, is guilty: *State v. Monroe*, 121-677—and it is not necessary that the medicine be poisonous or deadly, *Ibid*.

Police officer is judge of amount of force necessary to be applied to suppress fights, and he is not guilty unless he uses his power wantonly or maliciously or unnecessarily: *State v. Pugh*, 101-737.

Where two men go toward a man, cursing him and threatening him, and he runs to save himself from being beaten, the two men are guilty of assault: *State v. Jones*, 118-1237; *State v. Rawls*, 65-334.

As to right to resist officers without legal right to make arrest, see *State v. Queen*, 66-615; *State v. Briggs*, 25-357; *State v. Brittain*, 25-17; *State v. Worley*, 33-242. See *State v. Dula*, 100-423. Where defendant in attempting to get away intentionally tripped up one in whose custody he was lawfully placed, he is guilty of assault: *State v. Hedrick*, 95-624. If officer, in pursuit of one who has escaped who is charged with a misdemeanor, fires his pistol when within 30 feet of fugitive, he is guilty of assault, whether he intended to hit the fugitive or to cause him to stop: *State v. Sigman*, 106-728.

A person may lawfully use so much force as is reasonably necessary to protect his property or to retake it when it has been wrongfully taken by another, or is withheld without authority: *State v. Scott*, 142-582; *State v. Burke*, 82-551; *State v. Taylor*, 82-554—but if he use more force than is required for the purpose he will be guilty of an assault, *State v. Scott*, 142-582; *State v. Crook*, 133-675; *State v. Goode*, 130-651; see *State v. Taylor*, 82-554—for human life must not be endangered or great bodily harm threatened, except, perhaps, in urgent cases; moderate means must be first used, *State v. Scott*, 142-582. He has no right to take his stock in the pound by violence, even though town ordinance invalid: *State v. Black*, 109-856.

As to use of deadly weapon to repel a simple assault, see *State v. Hill*, 141-769. Wife can fight in defense of husband, but cannot use excessive force unless circumstances demand it for his defense: *State v. Bullock*, 91-614. Wife who assaults third person in presence of husband is presumed to act under his constraint, and this must be rebutted: *State v. Williams*, 65-398.

RIGHTS OF TEACHER OR PARENT TO PUNISH CHILD. There is a presumption that teacher exercised his authority correctly in whipping pupil: *State v. Thornton*, 136-610.

Teacher has a discretionary power in punishing pupils and is the judge when punishment is necessary and the degree of punishment: *State v. Stafford*, 113-635; *State v. Thornton*, 136-610—and they are not criminally responsible unless punishment is such as to occasion permanent injury, or inflicted merely to gratify malice or evil passion: *State v. Pendergrass*, 19-365; *State v. Thornton*, 136-610; *State v. Long*, 117-791; *State v. Stafford*, 113-635.

Warrant charging teacher with immoderate punishment, but setting out no facts showing serious damage, is for a simple assault: *State v. Thornton*, 136-610—and indictment alleging simply that “bruises” were inflicted does not take case out of justice’s jurisdiction, *State v. Stafford*, 113-635.

Indictment need not set forth the *quo animo* of the teacher: *Ibid.*

Parent not guilty of assault and battery in whipping child, however severe and unmerited, unless permanent injury results or unless whipping done through malice or dishonest motive: *State v. Jones*, 95-588.

As to the right of those standing in relation of parent to punish child, see *State v. Bost*, 125-707; *State v. Alford*, 68-322.

HUSBAND AND WIFE; ASSAULT BY ONE ON OTHER. In determining whether husband guilty of assault and battery on wife, the criterion is the effect produced and not the manner of producing it or the instrument used: *State v. Rhodes*, 61-453.

Husband cannot be convicted of a battery on his wife unless such excessive violence or cruelty as indicates malignity or vindictiveness, and it makes no difference that they are living separate by agreement: *State v. Black*, 60-262. Instances of excessive cruelty: *State v. Oliver*, 70-60—of serious damage done, *State v. Huntley*, 91-617.

Husband and wife competent witnesses against each other in cases where one assaulted received serious injury or where weapon used showed malice: *State v. Davidson*, 77-522; *State v. Hussey*, 44-123.

JURISDICTION. Justice of the peace has jurisdiction of simple assault where no deadly weapon used or serious damage inflicted: *State v. Johnson*, 94-863; see section 1481.

Superior court has exclusive original jurisdiction of assaults with deadly weapons: *State v. Roseman*, 108-766; *State v. Phillips*, 104-786; *State v. Murphy*, 101-701; *State v. Cunningham*, 94-824; *State v. Taylor*, 84-774; *State v. Moore*, 82-659—of assaults where serious damage done, *State v. Shelly*, 98-673; *State v. Huntley*, 91-617; *State v. Cunningham*, 94-824; *State v. Taylor*, 84-773; *State v. Moore*, 82-659—of assaults with intent to commit rape, *State v. Taylor*, 84-773; *State v. Moore*, 82-659—of assaults with intent to kill, *Ibid.* In a charge of assault with intent to commit rape under laws 1911, c. 193, it is not necessary to allege the age of defendant: *State v. Smith*, 157-578.

Superior court has jurisdiction concurrent with justice’s court of affrays committed within one mile of place of the sitting of court: *State v. Battle*, 130-656; *State v. Bowers*, 94-910—and has jurisdiction as to both offenders where in an affray a deadly weapon is used, *State v. Coppersmith*, 88-614.

Where indictment charges assault with deadly weapon, or other offense of which superior court has jurisdiction, and proof shows simple assault, or other lesser degree of offense, jurisdiction of superior court not ousted: *State v. Fritz*, 133-725; *State v. Price*, 111-705; *State v. Roseman*, 108-765; *State v. Fesperman*, 108-770; *State v. Porter*, 101-715; *State v. Earnest*, 98-740; *State v. Johnson*, 94-863; *State v. Cunningham*, 94-824; *State v. Russell*, 91-624; *State v. Speller*, 91-526; *State v. Ray*, 89-587; *State v. Reeves*, 85-553—though charge of simple assault in indictment would give superior court *prima facie* jurisdiction, and burden is on defendant to show twelve months had not elapsed since commission of offense and before superior court took jurisdiction, *State v. Shelly*, 98-673; *State v. Fesperman*, 108-771; *State v. Porter*, 101-714; *State v. Earnest*, 98-743; *State v. Moore*, 82-662.

Objection to jurisdiction is a matter of defense and may be taken advantage of under plea of not guilty: *State v. Reeves*, 85-553; *State v. Berry*, 83-604; *State v. Taylor*, 83-601; *State v. Moore*, 82-659; *State v. Hooper*, 82-663. If justice had no jurisdiction, the superior court will have none where the trial is on the warrant: *State v. Wiseman*, 131-795.

Justice has exclusive original jurisdiction of affrays where no deadly weapon used or serious damage done: *State v. Shields*, 78-417; *State v. Davis*, 65-298. Affray is cognizable in superior court as to both defendants where deadly weapon used by either: *State v. Coppersmith*, 88-614.

It is not necessary in this case that bill found by grand jury for assault and battery should aver that deadly weapon was used: *State v. Taylor*, 83-601—that any serious damage done,

Ibid.—that six (now twelve) months had elapsed before finding of bill, and no justice had taken jurisdiction, *Ibid.*; *State v. Moore*, 82-659; *State v. Hooper*, 82-663—or that offense was committed within one mile of court during session thereof, *State v. Taylor*, 83-601—but where jury by special verdict finds that assault was committed within six (now twelve) months next before finding of indictment, jurisdiction of superior court ousted, *State v. Berry*, 83-603.

“**DEADLY WEAPON.**” What is a deadly weapon: *State v. Beal*, 170-764. A deadly weapon is not one that must or may kill, but one which would likely produce death by manner of its use by defendant: *State v. Sinclair*, 120-603; *State v. Archbell*, 139-537; *State v. Norwood*, 115-789; *State v. Huntley*, 91-617—some being deadly per se, others owing to manner of their use become deadly, *State v. Archbell*, 139-537; *State v. Huntley*, 91-617—but a club is *ex vi termini* a deadly weapon, *State v. Phillips*, 104-786; *State v. Porter*, 101-713—as is also an axe, *State v. Shields*, 110-497—and court will take judicial notice that a pistol is also a deadly weapon, *State v. Swann*, 65-330.

Whether weapon used is a deadly weapon is a question of law for the court where there is no dispute about the facts concerning its character, size, etc.: *State v. Sinclair*, 120-603; *State v. Norwood*, 115-789; *State v. Phillips*, 104-786; *State v. Speaks*, 94-865; *State v. Huntley*, 91-617; *State v. West*, 51-505; *State v. Collins*, 30-407; *State v. Craton*, 28-164—and in determining the question, the size, nature and manner of use of weapon, and size and strength of assailant, and person upon whom it is used should be considered, *State v. Sinclair*, 120-603—as a gun or a penknife may, under certain circumstances, both be deadly weapons, *Ibid.*—for even a pin is a deadly weapon where it is pushed down the throat of an infant, producing death, *State v. Norwood*, 115-789. Where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used, it is proper and necessary to submit the matter to jury with proper instructions: *State v. Archbell*, 139-537.

“**SERIOUS DAMAGE DONE.**” It is necessary to describe the serious damage done, its character and extent, so that court can see from face of indictment that the damage was serious: *State v. Battle*, 130-657; *State v. Stafford*, 113-635; *State v. Phillips*, 104-786; *State v. Porter*, 101-713; *State v. Shelly*, 98-673; *State v. Earnest*, 98-740; *State v. Russell*, 91-624; *State v. Moore*, 82-659. “**Serious damage**” must be such physical injury as gives rise to great bodily pain: *State v. Nash*, 109-824—and also damage to the peace, good order, decencies and proprieties of society, *State v. Huntley*, 91-620.

INDICTMENT. Where six months (now twelve) had elapsed before indictment found, not necessary to aver that deadly weapon used, that serious damage was done, that six months (now twelve) had elapsed before the finding of the bill, and not necessary to aver that committed within one mile of courthouse during session in order to preserve the jurisdiction of superior court: *State v. Taylor*, 83-601; *State v. Moore*, 82-659; *State v. Hopper*, 82-663. The fact that indictment was found within six months of commission of offense is matter of defense under plea of not guilty: *State v. Moore*, 82-659; *State v. Hooper*, 82-663; *State v. Taylor*, 83-601.

A prosecution for simple assault may be tried in superior court on justice’s warrant without indictment: *State v. Thornton*, 136-610.

But if indictment was found within six months (now twelve) of commission of offense, it is necessary to state, to preserve jurisdiction of superior court, that assault was made with deadly weapon, or that serious damage was done: *State v. Shelly*, 98-673.

Where serious damage done it is necessary to describe its character and extent: *State v. Battle*, 130-657, and cases there cited: *State v. Russell*, 91-624. For assault with intent to kill, not necessary to describe instrument used by assailant: *State v. Gainus*, 86-632.

An indictment of a policeman need not state his official character: *State v. Belk*, 76-10.

Use of words “**an axe**” *ex vi termini* imports use of deadly weapon: *State v. Shields*, 110-497—as does also the use of the word “**club**,” *State v. Phillips*, 104-786. Where several counts are drawn to present different phases, court will not compel an election: *Ibid.* An indictment against a teacher for assaulting a pupil need not state the *quo animo*: *State v. Stafford*, 113-635.

JUSTIFICATION AND DEFENSE. One who by his conduct provokes an assault cannot defend on the ground of self-defense: *State v. Shields*, 110-497; *State v. Bryson*, 60-476; *State v. Lawhorn*, 88-634; *State v. Perry*, 50-9. An assault in retaliation for a blow previously received cannot be justified: *State v. Gibson*, 32-214.

It is not one's belief that he is about to be stricken that will justify striking first, but a belief founded on reasonable grounds: *State v. Bryson*, 60-476—and whether the grounds were reasonable should be submitted to the jury, *State v. Hill*, 141-769.

When one armed with a deadly weapon enters the house of another and stands his ground defiantly, the occupant may resort to force, and the doctrine of *molliter manus* does not apply: *State v. Taylor*, 82-554. Where tenant assaults landlord with a deadly weapon while landlord is collecting advancements out of crop, and landlord knocks him down with a stick, landlord is not guilty: *State v. Burwell*, 63-661. But the same act cannot be self-defense and excess of force: *State v. Jones*, 77-520.

The judge should not instruct the jury that defendant is guilty on his own evidence, when the jury might have found from the evidence that he acted in self-defense: *State v. Green*, 134-658; *State v. Nash*, 88-618.

One who accompanies an officer in discharge of his duty has the same protection as the officer: *State v. James*, 80-371.

EVIDENCE. Previous threats made by the prosecutor against defendant are not admissible: *State v. Skidmore*, 87-509; *State v. Kimbrell*, 151-702, and cases cited. Proving identity of person committing the offense: *State v. Burton*, 94-947; *State v. Griffis*, 25-504.

Where evidence that correction inflicted by master upon apprentice was excessive, evidence of bad character of apprentice is not admissible: *State v. Dickerson*, 98-708.

On an indictment for an affray, one defendant may be examined as a witness against the other: *State v. Weaver*, 93-595; *State v. Frizell*, 111-722. Husband and wife competent witnesses to prove an assault upon one by the other: *State v. Davidson*, 77-522; *State v. Hussey*, 44-123.

4216. Assaulting by pointing gun. If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault, and upon conviction of the same shall be fined, imprisoned, or both, at the discretion of the court.

Rev., s. 3622; 1889. c. 527.

Pointing pistol at another with the hand and pistol inside of coat pocket makes defendant guilty: *State v. Atkinson*, 141-734. When one points a gun at another under circumstances which would not excuse its discharge, and death ensues, defendant at least guilty of manslaughter: *State v. Stitt*, 146-643; *State v. Limerick*, 146-649.

Intimated that party in this case guilty under section 4216: *State v. Scott*, 142-585.

Section cited in *State v. Coble*, 177-588; *State v. Turnage*, 138-568. For assault generally, see under section 4215.

ART. 10. HAZING

4217. Hazing; definition and punishment. It shall be unlawful for any student in any college or school in this state to engage in what is known as hazing, or to aid or abet any other student in the commission of this offense. For the purposes of this section hazing is defined as follows: "to annoy any student by playing abusive or ridiculous tricks upon him, to frighten, scold, beat or harass him, or to subject him to personal indignity." Any violation of this section shall constitute a misdemeanor.

1913, c. 169, ss. 1, 2, 3, 4.

4218. Expulsion from school; duty of faculty to expel. Upon conviction of any student of the offense of hazing, or of aiding or abetting in the commission of this offense, he shall, in addition to any punishment imposed by the court, be expelled from the college or school he is attending. The faculty or governing board of any college or school charged with the duty of expulsion of students for proper cause shall, upon such conviction at once expel the offender, and a failure to do so shall be a misdemeanor.

1913, c. 169, ss. 5, 6.

4219. Certain persons and schools excepted; copy of article to be posted. This article shall not apply to females, nor to schools or colleges not keeping boarders, nor to schools keeping less than ten student boarders. A copy of this article shall be framed and hung or displayed in every college or school to which it applies.

1913, c. 169, s. 3.

4220. Witnesses in hazing trials; no indictment to be founded on self-criminating testimony. In all trials for the offense of hazing any student or other person subpoenaed as a witness in behalf of the state shall be required to testify if called upon to do so: Provided, however, that no student or other person so testifying shall be amenable or subject to indictment on account of, or by reason of, such testimony.

1913, c. 169, s. 8.

ART. 11. KIDNAPPING AND ABDUCTION

4221. Punishment for kidnapping. If any person shall forcibly or fraudulently kidnap any person, he shall be guilty of a felony, and upon conviction may be punished in the discretion of the court, not exceeding twenty years in the state's prison.

Rev., s. 3634; 1901, c. 699, s. 1.

State must establish fact that child had been actually carried away, as well as that defendant did it: *State v. Harrison*, 145-408—and that the carrying away was forcibly or fraudulently done, *Ibid.* Certain circumstantial evidence held competent in this case: *Ibid.* Evidence sufficient to convict of kidnapping weak-minded girl: *State v. Marks*, 178-730.

4222. Enticing minors out of the state for the purpose of employment. If any person shall employ and carry beyond the limits of this state any minor, or shall induce any minor to go beyond the limits of this state, for the purpose of employment without the consent in writing, duly authenticated, of the parent, guardian or other person having authority over such minor, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than five hundred and not more than one thousand dollars for each offense. The fact of the employment and going out of the state of the minor, or of the going out of the state by the minor, at the solicitation of the person for the purpose of employment, shall be prima facie evidence of knowledge that the person employed or solicited to go beyond the limits of the state is a minor.

Rev., s. 3630; 1891, c. 45.

Count hereunder may join with count under section 4223: *State v. Burnett*, 142-577.

4223. Abduction of children. If any one shall abduct or by any means induce any child under the age of fourteen years, who shall reside with its father, mother, uncle, aunt, brother or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, to leave such person or school, he shall be guilty of a felony, and on conviction shall be fined or imprisoned in the state's prison for a period not exceeding fifteen years.

Rev., s. 3358; Code, s. 973; 1879, c. 81.

See generally: *State v. Burnett*, 142-577; *State v. Chisenhall*, 106-676. Abduction defined: *State v. Burnett*, 142-577; *State v. Chisenhall*, 106-676; *State v. George*, 93-567.

Indictment, sufficiency of: *State v. George*, 93-567; *State v. Burnett*, 142-577. **Allegation and proof that the taking was "against father's will and without his consent"** necessary: *State v. Burnett*, 142-577; *State v. Chisenhall*, 106-676; *State v. George*, 93-567.

As to declarations of father of abducted child, see *State v. Chisenhall*, 106-676. **State need not show a want of father's consent, and if it is relied on as defense, burden of proof is upon defendant:** *State v. Burnett*, 142-577; *State v. Chisenhall*, 106-676. **Consent of child is no defense:** *Ibid.* **Inducement offered child may be simply persuasion:** *Ibid.*

The wife indicted for abduction, whether presumption that she is acting under coercion of her husband applies, see *State v. Nowell*, 156-648.

Section cited in *Howell v. Howell*, 162-282; *State v. Sullivan*, 85-506.

4224. Conspiring to abduct children. If any one shall conspire to abduct, or by any means to induce any child under the age of fourteen years, who shall reside with any of the persons designated in the preceding section, or shall reside at school, to leave such persons or the school, he shall be guilty of a felony, and on conviction shall be punished as prescribed in the preceding section: Provided, that no one who may be a nearer blood relation to the child than the persons named in the preceding section shall be indicted for either of said offenses.

Rev., s. 3359; Code, s. 974; 1879, c. 81, s. 2.

"Abduction" defined: *State v. Burnett*, 142-577; *State v. Chisenhall*, 106-676; *State v. George*, 93-567.

As to sufficiency of indictment, see *State v. George*, 93-567.

As to manner of abduction that makes one guilty hereunder, see *State v. Burnett*, 142-577; *State v. Chisenhall*, 106-676.

Effect of proviso: *State v. George*, 93-567. Section cited in *State v. Sullivan*, 85-560.

4225. Abduction of married women. If any male person shall abduct or elope with the wife of another, he shall be guilty of a felony, and upon conviction shall be imprisoned not less than one year nor more than ten years: Provided, that the woman, since her marriage, has been an innocent and virtuous woman: Provided further, that no conviction shall be had upon the unsupported testimony of any such married woman.

Rev., s. 3360; 1903, c. 362.

Elopement of the wife is her voluntary act in deserting her husband to go with and cohabit with another man: *State v. O'Higgins*, 178-708. **Testimony of husband as to innocence and virtue of wife:** *Ibid.* **Burden of proving the facts under first proviso is upon the State:** *State v. Connor*, 142-700. **Evidence as to general character of woman for her virtue is admissible hereunder:** *Ibid.*

ART. 12. ABORTION AND KINDRED OFFENSES

4226. Using drugs or instruments to destroy unborn child. If any person shall willfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of the mother, he shall be guilty of a felony, and shall be imprisoned in the state's prison for not less than one year nor more than ten years, and be fined at the discretion of the court.

Rev., s. 3618; Code, s. 975; 1881, c. 351, s. 1.

Criminal abortion: *State v. Summers*, 173-775. **It is indictable at common law to administer a noxious drug to produce abortion:** *State v. Slagle*, 82-653. **The crime is the advising**

and procuring the woman to take the drug with the intent: *State v. Crews*, 128-582. The intent is the material element and not so much the nature of the drug: *State v. Shaft*, 166-407. The woman is not an accomplice: *Ibid*.

Form of indictment: *State v. Brady*, 177-587. Indictment need not set out overt acts used: *State v. Crews*, 128-582. Indictment charging attempt to kill by administering poisonous drug, and also attempt to produce abortion, is not defective for misjoinder: *State v. Slagle*, 82-653.

4227. Using drugs or instruments to produce miscarriage or injure pregnant woman. If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be guilty of a felony, and shall be imprisoned in the jail or state's prison for not less than one year nor more than five years and shall be fined, at the discretion of the court.

Rev., s. 3619; Code, s. 976; 1881, c. 351, s. 2.

The offense is committed by administering any substance with intent to procure an abortion: *State v. Shaft*, 166-407. See annotations under section 4226.

4228. Concealing birth of child. If any person shall, by secretly burying or otherwise disposing of the dead body of a new-born child, endeavor to conceal the birth of such child, such person shall be guilty of a felony, and punished by fine or imprisonment, or both, such imprisonment to be in the county jail or state's prison, at the discretion of the court: Provided, that the imprisonment in the state's prison shall in no case exceed a term of ten years: Provided further, that nothing in this section shall be construed to prevent the mother, who may be guilty of the homicide of her child, from being prosecuted and punished for the same according to the principles of the common law. Any person aiding, counseling or abetting any woman in concealing the birth of her child shall be guilty of a misdemeanor.

Rev., s. 3623; Code, s. 1004; R. C., c. 34, s. 28; 1818, c. 985; 1883, c. 390; 21 Jac. I, c. 27. See 43 Geo. III, c. 58, s. 3; 9 Geo. IV, c. 31, s. 14.

If child be born dead, concealment is not an offense: *State v. Joiner*, 11-351—and burden is not on state to show it was born alive, but upon defendant to show it was born dead: *Ibid*. (note, this decision was rendered under statute of 1818, c. 985).

Plea of former conviction on charge of concealment is no defense to charge of murder: *State v. Morgan*, 95-641.

A sufficient indictment in *State v. Stewart*, 93-539. See decision rendered under 21 Jac. 1, ch. 27, now repealed: *State v. Jeffreys*, 7-480.

ART. 13. LIBEL AND SLANDER

4229. Communicating libelous matter to newspapers. If any person shall state, deliver or transmit by any means whatever, to the manager, editor, publisher or reporter of any newspaper or periodical for publication therein any false and libelous statement concerning any person or corporation, and thereby secure the publication of the same, he shall be guilty of a misdemeanor.

Rev., s. 3635; 1901, c. 557, ss. 2, 3.

For punishment of libel by newspaper, see section 2430.

4230. Slandering innocent women. If any person shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman by

words, written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor.

Rev., s. 3640; Code, s. 1113; 1879, c. 156.

For civil action, see section 2432.

See generally: State v. McIntosh, 92-794; State v. Davis, 92-764; State v. McDaniel, 84-803.

Slander of innocent woman is a malicious misdemeanor, and is not barred in two years by section 4512: State v. Claywell, 98-731.

This section has no effect on the awarding of punitive damages in a civil suit for slander of an innocent woman: Sowers v. Sowers, 87-303.

Husband is not indictable for slander of his wife: State v. Edens, 95-693; but see concurring and dissenting opinions in State v. Fulton, 149-485. Divorced husband can be guilty of slandering his divorced wife: State v. Misenheimer, 123-758. One cannot justify his charge by simply showing that he himself had intercourse with prosecutrix, having seduced her: *Ibid.*

Statements made before a church council are privileged: State v. Misenheimer, 123-758—but not so when made to one's wife, State v. Shoemaker, 101-690.

INCONTINENCY. Necessary to prove that the words amounted to a charge of actual, definitive, illicit sexual intercourse: State v. Moody, 98-671; State v. Brown, 100-519. A charge of intercourse with a male dog is sufficient: State v. Howlin, 128-571. To call a woman a bitch and say "I have a quarter for you" not criminal per se: State v. Harwell, 129-550. Calling an innocent woman "a damned whore" in the presence of a third person is a charge of incontinency: State v. Shoemaker, 101-690. Saying of a woman "she has promised to let me have criminal intercourse with her, and I intend to have that thing," does not amount to a charge of incontinency: State v. Moody, 98-671—nor does saying "if she didn't have a child by that man she missed a good chance," Sowers v. Sowers, 87-303; State v. Benton, 117-788. "That she is no lady, but a crook," is ambiguous and subject to explanation to constitute a charge of incontinence: State v. Howard, 169-312.

INNOCENT WOMAN. A pure woman, one whose character is unsullied: State v. McDaniel, 84-803—one who never had actual illicit intercourse with a man, State v. Davis, 92-764; State v. Malloy, 115-737; State v. Brown, 100-519—one who has never had intercourse with a man, although she was surprised in the embraces of a man and prevented from the act, State v. Hinson, 103-374—one who at the time of the slanderous charge and at the time of the trial is chaste and virtuous, although she may have made a slip in her conduct in the past, State v. Grigg, 104-882; State v. Misenheimer, 123-758; see, also, State v. Davis, 92-764; State v. Aldridge, 86-680; and see, reviewing this subject, although both cases are prosecutions under another statute, State v. Horton, 100-447; State v. Ferguson, 107-848.

INDICTMENT. Must aver that woman is innocent: State v. McDaniel, 84-805; State v. Aldridge, 86-680—must charge that there was an attempt in a "wanton and malicious" manner to destroy the reputation of an innocent woman, State v. Harwell, 129-550; State v. Mitchell, 132-1033.

Not necessary to set out the circumstances under which the words were spoken, but it is necessary, as well as sufficient, to use the words of the statute: State v. McIntosh, 92-794; State v. Haddock, 109-873. It seems that it is only necessary to allege that the words spoken in substance charged an innocent woman with incontinency: State v. Edens, 95-693.

EVIDENCE. Malice is implied where slanderous charge is made, except in cases of privileged communications: State v. Malloy, 115-737; State v. Hinson, 103-374; State v. Misenheimer, 123-758. Sufficient if it is made to appear that the words spoken amounted to a charge of incontinency and were spoken in the presence of a third person: State v. Shoemaker, 101-690.

Prevalent report of incontinency cannot be shown in defense, but may be shown, after verdict of guilty, to the court in extenuation: State v. Hinson, 103-374. As to expert testimony, see State v. Hinson, 103-374. Defendant bound by the answer of the question whether husband of prosecutrix had had sexual intercourse with prosecutrix before marriage: State v. Morris, 109-820. No presumption that the woman is innocent, and when defendant admits that he spoke the words charged, the burden does not shift to him to show that he has not slandered an innocent woman: State v. Smith, 155-473; State v. McDaniel, 84-803.

Words written or spoken before or after the alleged slander are admissible to show animus; also mode and extent of their repetition: State v. Mills, 116-1051.

Discretionary with judge to allow defendant's counsel to ask prosecutrix questions tending to show reason for her frequent separations from her husband: *State v. Morris*, 109-820. Error to refuse testimony as to character of woman at time of trial, witness having stated her character up to time of the alleged slander: *State v. Spurling*, 118-1250.

Where words are admitted to have been spoken and truth is the justification offered, the only question is the innocence of the woman: *State v. Malloy*, 115-737.

4231. **Derogatory statements about banks.** Any person who shall willfully and maliciously make, circulate or transmit to another any statement, rumor or suggestion, written, printed or by word of mouth, which is directly or by inference derogatory to the financial condition or affects the solvency or financial standing of any bank, savings bank, banking institution or trust company doing business in this state, or who shall counsel, aid, procure or induce another to start, transmit or circulate any such statement or rumor, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by fine or imprisonment in the discretion of the court.

1915, c. 273.

SUBCHAPTER 5. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS

ART. 14. BURGLARY AND OTHER HOUSE-BREAKINGS

4232. **First and second degree burglary.** There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling-house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling-house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling-house or sleeping apartment not actually occupied by any one at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling-house or in any building not a dwelling-house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree.

Rev., s. 3331; 1889, c. 434, s. 1.

Word "dwelling-house" construed in *State v. Foster*, 129-704; *State v. Williams*, 90-724; *State v. Pressley*, 90-730; *State v. Outlaw*, 72-598; *State v. Potts*, 75-129; *State v. Mordecai*, 68-207; *State v. Jake*, 60-471; *State v. Jenkins*, 50-430; *State v. Whit*, 49-349; *State v. Langford*, 12-253; *State v. Wilson*, 2-242.

This section does not authorize conviction for burglary in the second degree when the evidence shows that the house was actually occupied at the time: *State v. Johnston*, 119-883.

As to sufficiency of indictment, see *State v. Johnston*, 119-883; *State v. Cody*, 60-197; *State v. Halford*, 104-874; *State v. Outlaw*, 72-598—since crime divided into degrees, *State v. Johnston*, 119-883; *State v. Fleming*, 107-905. Insufficiency of indictment, *State v. McPherson*, 70-239. Compare *State v. Wise*, 67-281, 66-120.

Burglary at common law defined in *State v. Jake*, 60-471; *State v. McDaniel*, 60-245; *State v. Jenkins*, 50-430; *State v. Langford*, 12-253.

One charged with burglary in first degree may be convicted of burglary in second degree: *State v. Fleming*, 107-905.

One breaking into a bedroom in a storehouse, where person regularly sleeps and is sleeping, is guilty of first degree burglary: *State v. Foster*, 129-704—as is also person breaking into the storeroom, where bedroom, connected therewith by a door left open, is regularly occupied and is occupied at time by person, *Ibid*.

As to felonious intent, see *State v. Staton*, 133-643; *State v. Ellsworth*, 130-690; *State v. Haynes*, 71-79; *State v. McDaniel*, 60-245; *State v. Boon*, 35-244.

As to "breaking," see *State v. Ellsworth*, 130-692; *State v. Foster*, 129-710; *State v. Fleming*, 107-905; *State v. Rowe*, 98-629; *State v. Mordecai*, 68-207; *State v. Willis*, 52-190; *State v. Johnson*, 61-186; *State v. Boon*, 35-346; *State v. Henry*, 31-463.

As to houses "within the curtilage of a dwelling-house," etc., see *State v. Roper*, 88-656; *State v. Twitty*, 2-102.

As to breaking "in nighttime," see *State v. McKnight*, 111-690; *State v. Whit*, 49-349.

Other cases of interest hereunder: *State v. Bowden*, 175-794; *State v. Smarr*, 121-669; *State v. Alston*, 113-666; *State v. Drake*, 113-624; *State v. Ward*, 103-419; *State v. Queen*, 91-660; *State v. Powell*, 94-965; *State v. Drake*, 82-592; *State v. Davis*, 77-490; *State v. Wineroff*, 76-38; *State v. McDonald*, 73-346; *State v. Graves*, 72-482; *State v. McPherson*, 70-239; *State v. Grisham*, 2-13.

4233. Punishment for burglary. Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death, and any one so convicted of burglary in the second degree shall suffer imprisonment in the state's prison for life, or for a term of years, in the discretion of the court.

Rev., s. 3330; Code, s. 994; 1889, c. 434, s. 2; 1870-1, c. 222.

Under the amendment (act 1889, ch. 434) the power to commute punishment does not reside in the jury: *State v. Alston*, 113-666; *State v. Fleming*, 107-905. Section cited in *State v. Jones*, 69-364.

4234. Breaking out of dwelling-house burglary. If any person shall enter the dwelling-house of another with intent to commit any felony or other infamous crime therein, or being in such dwelling-house, shall commit any felony or other infamous crime therein, and shall, in either case, break out of such dwelling-house in the nighttime, such person shall be guilty of burglary.

Rev., s. 3332; Code, s. 995; R. C., c. 34, s. 8; 12 Anne, c. 7, s. 3.

What constitutes "breaking": *State v. Boon*, 35-244. Entering chimney: *State v. Fleming*, 107-905; *State v. Willis*, 52-190. There is no presumption of law that the breaking occurred in the nighttime rather than in the day: *State v. Whit*, 49-349.

Indictment must charge the "breaking out": *State v. McPherson*, 70-239.

Section cited in *State v. Peak*, 130-713. Compare, as to constructive breaking, *State v. Johnson*, 61-186; *State v. Henry*, 31-463.

4235. Breaking into or entering houses otherwise than burglariously. If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling-house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, banking-house, counting-house or other building where any merchandise, chattel, money, valuable security or other personal property shall be; or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years.

Rev., s. 3333; Code, s. 996; 1874-5, c. 166; 1879, c. 323.

See generally: *State v. Hughes*, 86-662. One charged with burglary may be convicted of the crime created by this section: *State v. Fleming*, 107-905.

To complete the offense, under this section, "intent" is all that is necessary to accompany breaking: *State v. Christmas*, 101-749; *State v. McBryde*, 97-393. The "intent to commit a felony" is held to apply to all the breakings in this section and not alone to the one with which it is closely connected: *State v. Spear*, 164-452.

Defendant not guilty where act done with consent of owner or his servant: *State v. Goffney*, 157-624.

Indictment: *State v. Peak*, 130-713; *State v. Ellsworth*, 130-690; *State v. Christmas*, 101-749; *State v. Tytus*, 98-705; *State v. Hooker*, 145-581.

Breaking and entering storehouse with intent to steal was no crime at common law: *State v. Dozier*, 73-117.

An acquittal on prosecution for larceny will not bar a subsequent prosecution for breaking and entering to commit larceny: *State v. Hooker*, 145-581.

Section cited in *State v. Gadberry*, 117-831; *State v. McKnight*, 111-690.

4236. Preparation to commit burglary or other house-breakings. If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit a felony or other infamous crime therein; or shall be found having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of house-breaking; or shall be found in any such building, with intent to commit a felony or other infamous crime therein, such person shall be guilty of a felony and punished by fine or imprisonment in the state's prison, or both, in the discretion of the court.

Rev., s. 3334; Code, s. 997; 1907, c. 822.

Indictment: *State v. Tytus*, 98-705. See, as to common law: *State v. Dozier*, 73-117.

4237. Breaking into or entering railroad cars. If any person shall, with intent to commit larceny or other felony, break any seal upon a railroad car containing any goods, wares, freight or other thing of value, or shall unlawfully and willfully break or enter into any railroad car containing any goods, wares, freight or other thing of value, such person shall upon conviction be punished by confinement in the penitentiary in the discretion of the court for a term not exceeding five years. Any person found unlawfully in such car shall be presumed to have entered in violation of this section.

1907, c. 468.

ART. 15. ARSON AND OTHER BURNINGS

4238. Punishment for arson. Any person convicted according to due course of law of the crime of arson shall suffer death.

Rev., s. 3335; Code, s. 985; R. C., c. 34, s. 2; 1870-1, c. 222.

See generally: *State v. Wise*, 66-120, 67-281; *State v. Jones*, 69-364; *State v. Bullock*, 63-570.

Constitution of 1868 repealed only the death penalty in R. C., ch. 34, sec. 2: *State v. Wright*, 89-507; *State v. King*, 69-419.

As to alleging ownership of property in indictment, see *State v. Gailor*, 71-88. Indictment for arson at common law: *State v. McCarter*, 98-637.

Burning necessary to constitute arson: *State v. Hall*, 93-571; *State v. Mitchell*, 27-350; *State v. Sandy*, 25-570. As to intent, see *State v. Mitchell*, 27-350; *State v. McCarter*, 98-637. "Dwelling-house" defined: *State v. Clark*, 52-167.

Indictment charging defendant with burning a dwelling-house occupied by him as "lessee" falls within section 2351 and not under this section: *State v. Graham*, 121-623.

4239. Burning of certain public and other corporate buildings. If any person shall willfully and maliciously burn the statehouse, or any of the public offices of the state, or any courthouse, jail, arsenal, clerk's office, register's office, or any house belonging to any county or incorporated town in the state or to any incorporated company whatever, in which are kept the archives, documents, or public papers of such county, town or corporation, he shall, on conviction, be imprisoned in the state's prison for not less than five nor more than ten years.

Rev., s. 3344; Code, s. 985, subsec. 3; R. C., c. 34, s. 7; 1830, c. 41, s. 1; 1868-9, c. 167, s. 5.

Burning must be both wilful and malicious: *State v. Mitchell*, 27-350. If a prisoner burn a part of the jail merely to make his escape, and not with the intent to destroy the building, he is not guilty under this section: *State v. Mitchell*, 27-350; *State v. Laughlin*, 53-455.

Section cited in *State v. Graham*, 121-623; *State v. Hall*, 93-571; *State v. Laughlin*, 53-455.

4240. Setting fire to schoolhouse. If any person shall willfully set fire to any schoolhouse, or procure the same to be done, he shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the state's prison or the county jail, and may also be fined, in the discretion of the court.

Rev., s. 3345; 1901, c. 4, s. 28; 1919, c. 70.

4241. Burning or attempting to burn certain bridges and buildings. If any person, with intent to destroy the same, shall willfully and maliciously set fire to and burn any public bridge, or private toll-bridge, or the bridge of any incorporated company, or any fire-engine house, or any house belonging to any county or incorporated town, used for public purposes other than the keeping of archives, documents and public papers, or any house belonging to an incorporated company and used in the business of such company; or if any person shall willfully and maliciously attempt to burn any of such houses or bridges, or any of the houses or buildings mentioned in this article, the person offending shall be guilty of a felony and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years.

Rev., s. 3337; Code, s. 985, subsec. 4; R. C., c. 34, s. 30; 1825, c. 1278.

Section cited in *State v. Graham*, 121-623.

4242. Setting fire to churches and certain other buildings. If any person shall wantonly and willfully set fire to any church, chapel or meeting-house, or to any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of a felony, and shall be imprisoned in the state's prison for not less than two nor more than forty years.

Rev., s. 3338; 1885, c. 66; 1903, c. 665, s. 2; 1874-5, c. 228; Code, s. 985, subsec. 6.

Effect of act 1885, chapter 66: *State v. Massey*, 103-356, 97-465; *State v. Rogers*, 94-860. As to intent under act of 1874-75, see *State v. England*, 78-552; *State v. Jaynes*, 78-504. State must show criminal intent: *State v. Morgan*, 136-628.

Evidence: *State v. Freeman*, 131-725; *State v. Battle*, 126-1036; *State v. Parker*, 109-813; *State v. Thompson*, 97-496. Evidence sufficient to sustain charge: *State v. Arthur*, 151-653; *State v. Allen*, 149-458. Evidence and charge as to "wantonly": *State v. Millican*, 158-617. Instructions by the judge under this section: *State v. Barrett*, 151-665.

INDICTMENT. Sufficient charge in bill of indictment under this section: *State v. Sprouse*, 150-860. Intent: *State v. Thompson*, 97-496; *State v. Rogers*, 94-860—"wantonly and willfully," *State v. Battle*, 126-1036; *State v. Pierce*, 123-745; *State v. Morgan*, 98-641; *State v. Massey*, 97-465—under act 1874-5, *State v. Phifer*, 90-721; *State v. Porter*, 90-719; *State v. England*, 78-552; *State v. Jaynes*, 78-504—must charge that the offense was done "feloniously," *State v. Roper*, 88-656. For offense under statute which has been amended since the commission of the offense, see *State v. Massey*, 97-465. Not necessary to allege that the burned building was in the possession of some person named: *State v. Daniel*, 121-574.

WORDS OF STATUTE DEFINED. "Shop": *State v. Morgan*, 98-641. "Barn": *State v. Laughlin*, 53-354; see, also, *State v. Cherry*, 63-493; *State v. Jim*, 53-459; *State v. Laughlin*, 53-455. "Outhouse": *State v. Roper*, 88-656.

Section cited in *State v. May*, 118-1204; *State v. Green*, 92-783. Compare *State v. King*, 69-419.

4243. Burning of boats and barges. If any person, with the intent to destroy the same, shall willfully and maliciously, or for a fraudulent purpose, set fire to and burn any boat, barge or float, whether he be the owner thereof or not, he shall be guilty of a felony and shall be punished by imprisonment in the state's prison for not less than four months nor more than ten years, or fined in the discretion of the court.

1909, c. 854.

4244. Burning of gin-houses, tobacco houses and stables. Every person convicted of the willful burning of any gin-house or tobacco house, or any part thereof, or, in the nighttime, of any stable containing a horse or a mule, or cattle, shall be imprisoned in the state's prison not less than two nor more than ten years.

Rev., s. 3341; 1863, c. 17; 1868-9, c. 167, s. 5; 1903, c. 665, s. 1; Code, s. 985, subsec. 2.

Indictment; sufficiency of: State v. Rogers, 168-112; State v. Pierce, 123-745; State v. Green, 92-779; State v. Thorn, 81-555—**must allege stable to have been burned in the "night-time,"** State v. England, 78-552. **"Burning,"** defined in State v. Hall, 93-571.

Evidence: State v. England, 78-552; State v. Green, 92-779. **Term of imprisonment:** State v. Dunn, 86-731.

Section cited in State v. Battle, 126-1036. Compare State v. Keen, 95-646—which has been modified by section 4171.

4245. Fraudulently setting fire to dwelling-houses. If any person, being the occupant of any building used as a dwelling-house, whether such person be the owner thereof or not, or, being the owner of any building designed or intended as a dwelling-house, shall willfully and wantonly or for a fraudulent purpose set fire to such building, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison or county jail, and may also be fined, in the discretion of the court.

Rev., s. 3340; Code, s. 985; 1903, c. 665, s. 3; 1909, c. 862.

See State v. Daniel, 121-574.

4246. Attempting to burn dwelling-houses and certain other buildings. If any person shall willfully attempt to burn any dwelling-house, uninhabited house, barn, stable or outhouse, or any mill, manufacturing house, cotton gin, tobacco barn, granary or turpentine distillery, the property of another, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison or county jail, and may also be fined, in the discretion of the court.

Rev., s. 3336; Code, s. 985, subsec. 7; 1876-7, c. 13.

At common law an attempt to commit a felony was a misdemeanor, but under this section an attempt to commit arson is a felony: State v. Stephens, 170-745; State v. Rogers, 168-112—while section 4244 punishes the offense of burning, *Ibid.* Defendant may be convicted of arson or of an attempt to commit arson: State v. Stephens, 170-745.

As to sufficiency of indictment, see State v. Lee, 114-844. As to what is a "dwelling-house" within the section, see State v. Clark, 52-167. As to what is an "outhouse," see State v. Roper, 88-656.

Section cited in State v. Hill, 91-561.

4247. Failure of owner of property to comply with orders of public authorities. If the owner or occupant of any building or premises shall fail to comply with

the orders of the chief of the fire department, or of the insurance commissioner, he shall be guilty of a misdemeanor, and shall be fined not less than ten nor more than fifty dollars for each day's neglect.

Rev., s. 3343; 1899, c. 58, s. 4.

4248. Failure of officers to investigate incendiary fires. If any town or city officer shall fail, neglect or refuse to comply with any of the requirements of the law in regard to the investigation of incendiary fires, he shall be guilty of a misdemeanor and may be fined not less than twenty-five nor more than two hundred dollars.

Rev., s. 3342; 1899, c. 58, s. 5.

For burning woodlands, grass and crops, see this chapter, art. 22.

SUBCHAPTER 6. OFFENSES AGAINST PROPERTY

ART. 16. LARCENY

4249. Distinction between grand and petit larceny abolished. All distinctions between petit and grand larceny, where the same has had the benefit of clergy, are abolished; and the offense of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny is: Provided, that in cases of much aggravation, or of hardened offenders, the court may, in its discretion, sentence the offender to the state's prison for a period not exceeding ten years.

Rev., s. 3500; Code, s. 1075; R. C., c. 34, s. 26.

Effect of this section on section 4250: State v. Brite, 73-26.

Larceny defined: State v. Kirkland, 178-810. **Larceny a felony at common law and in North Carolina:** State v. Haughton, 63-491. **In petty larceny all who participate are principals:** State v. Barton, 12-518; State v. Gaston, 73-93; State v. Tyler, 85-569; State v. Fox, 94-928; State v. Stroud, 95-626.

Jurisdiction in superior court: State v. Haughton, 63-491. **Section merely cited:** State v. Lawrence, 81-525.

Punishment may be imprisonment at common law: State v. Kearzey, 61-481. **Punishment under this section:** In re Holly, 154-163; State v. Shuford, 152-809.

INDICTMENT. Must allege that the theft was done "feloniously": State v. Haughton, 63-491. **Joinder of counts for larceny of a horse at common law and receiving under the statute, permissible:** State v. Lawrence, 81-523. **Person may be described by any particulars which furnish sufficient identification:** State v. Brite, 73-26. **Sufficiency of:** State v. Fox, 94-928.

EVIDENCE. Declarations of codefendant admissible, although they tend to convict both defendants: State v. Brite, 73-26. **Evidence of accomplice sufficient:** State v. Stroud, 95-626.

4250. Receiving stolen goods. If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing the same to have been feloniously stolen or taken, he shall be guilty of a misdemeanor, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession, or

in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny.

Rev., s. 3507; Code, s. 1074; R. C., c. 34, s. 56; 1797, c. 485, s. 2.

To constitute receiving stolen goods no personal possession of the goods is necessary, but their receipt by an agent is sufficient: *State v. Stroud*, 95-626. Crime complete even if defendant did not act from motives of gain, but only to aid the thief: *State v. Rushing*, 69-29.

Evidence: *State v. Bethel*, 97-459—guilty knowledge, *State v. Mincher*, 178-698. Intent must be felonious: *State v. Caveness*, 78-484. Punishment same as for larceny: *State v. Brite*, 73-26. Section cited: *State v. Kittelle*, 110-593. Compare as to indictment: *State v. Ives*, 35-338; *State v. Beatty*, 61-52.

INDICTMENT. Insufficiency of: *State v. Phelps*, 65-450. No averment of the person from whom the goods were stolen necessary: *State v. Minton*, 61-196; *State v. Martin*, 82-672. A count for larceny, concluding at common law, may be joined with a count for receiving under the statute: *State v. Lawrence*, 81-522. A count for larceny and one for receiving, to meet the different phases of proof, may be joined: *State v. Morrison*, 85-561.

VERDICT. Form of verdict: *State v. Gregory*, 153-646. Sufficiency of: *State v. Stroud*, 95-626—insufficiency of, *State v. Whitaker*, 89-472—erroneous where there is a general verdict on two counts of an indictment, one for horse-stealing under the statute and the other for receiving under the statute, as they are offenses of different grades, *State v. Johnson*, 75-123; *State v. Goings*, 98-766.

4251. Larceny of property, or the receiving of stolen goods, not exceeding twenty dollars in value. The larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than twenty dollars, is hereby declared a misdemeanor, and the punishment therefor shall be in the discretion of the court. If the larceny is from the person, or from the dwelling by breaking and entering, this section shall have no application: Provided, that this section shall not apply to horse stealing. In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen.

Rev., s. 3506; 1895, c. 285; 1913, c. 118, s. 1.

See generally: *In re Holly*, 154-163; *State v. Harris*, 119-811.

This is a felony, and there must be a conviction in the superior court upon a bill of indictment: *State v. Newell*, 172-933. As to jurisdiction, see section 4252. As to punishment, see *State v. Shuford*, 152-809.

Indictment need not aver that property stolen exceeded \$20 in value, nor that the taking was neither from the person nor the dwelling, as these are matters of defense: *State v. Harris*, 119-811; *State v. Bynum*, 117-749.

Burden is upon defendant to show value of property in diminution of punishment: *State v. Dixon*, 149-460.

Section cited in *State v. Hullen*, 133-661.

4252. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods. The superior courts shall have exclusive jurisdiction of the trial of all cases of the larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of more than twenty dollars.

1913, c. 118, s. 2.

Superior court has exclusive jurisdiction of larceny from the person, without regard to the value: *State v. Brown*, 150-867.

4253. Larceny by servants and other employees. If any servant or other employee, to whom any money, goods or other chattels, or any of the articles, securities or choses in action mentioned in the following section, by his master

shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by his said master; or if any servant, being in the service of his master, without the assent of his master, shall embezzle such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal them, or to defraud his master thereof, the servant so offending shall be fined or imprisoned in the state prison or county jail not less than four months nor more than ten years, at the discretion of the court: Provided, that nothing contained in this section shall extend to apprentices or servants within the age of sixteen years.

Rev., s. 3499; Code, s. 1065; R. C., c. 34, s. 18; 21 Hen. VIII, c. 7, ss. 1, 2.

See generally: *State v. Higgins*, 1-36; *State v. Jarvis*, 63-556.

Meaning of "servant": *State v. Higgins*, 1-36; *State v. Fann*, 65-317; *State v. Costin*, 89-511.

Jurisdiction of superior court: *State v. Jarvis*, 63-556.

INDICTMENT. Must aver that property was received and held by defendant in trust or for the use of the master: *State v. Wilson*, 101-730. Averment that defendant was not within the age of 18 years, sufficient: *State v. Wilson*, 101-730.

4254. Larceny of choses in action. If any person shall feloniously steal, take and carry away, or take by robbery, any bank-note, check or other order for the payment of money issued by or drawn on any bank or other society or corporation within this state or within any of the United States, or any treasury warrant, debenture, certificate of stock or other public security, or certificate of stock in any corporation, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, being the property of any other person, or of any corporation (notwithstanding any of the said particulars may be termed in law a chose in action), such felonious stealing, taking and carrying away, or taking by robbery, shall be a felony of the same nature and degree and in the same manner as it would have been if the offender had feloniously stolen, or taken by robbery, money, goods or property of any value, and the offender for every such offense shall suffer the same punishment and be subject to the same pains, penalties and disabilities as he should or might have suffered if he had feloniously stolen or taken by robbery money, goods or other property of value.

Rev., s. 3498; Code, s. 1064; R. C., c. 34, s. 20; 1811, c. 814, s. 1.

When possession is presumption of guilt: *State v. Jennett*, 88-665. Section cited in *State v. Wilson*, 101-732.

SECTION CONSTRUED. Check drawn by U. S. pension agent on the treasurer is within the act: *State v. Bishop*, 98-773. "Due bill" is within the act: *State v. Campbell*, 103-344—but if "due bill" has been paid indictment hereunder will not lie, *State v. Campbell*, 103-344.

INDICTMENT. Sufficiency of description: *State v. Rout*, 10-618; *State v. Brown*, 53-443; *State v. Fulford*, 61-563; *State v. Banks*, 61-577; *State v. Thompson*, 71-146; *State v. Bishop*, 98-773.

EVIDENCE. That party indicted was seen with bill of unknown denomination is inadmissible: *State v. Carter*, 72-99. Evidence that defendant stole either treasury note or national bank note not sufficient: *State v. Collins*, 72-144—but evidence that witness believed he stole the treasury note sufficient, *State v. Freeman*, 72-521.

4255. Larceny, mutilation, or destruction of public records and papers. If any person shall steal, or for any fraudulent purpose shall take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney or any original document whatsoever, of or belonging to any court of record, or relating to any matter, civil or criminal, begun, pending or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order or decree or any original document whatsoever, of or belonging to any court or relating to any cause or matter begun, pending or terminated in any such court, every such offender shall be guilty of a misdemeanor; and in any indictment for such offense it shall not be necessary to allege that the article, in respect to which the offense is committed, is the property of any person or that the same is of any value. If any person shall steal or for any fraudulent purpose shall take from the register's office, or from any person having the lawful custody thereof, or shall unlawfully and willfully obliterate, injure or destroy any book wherein deeds or other instruments of writing are registered, or any other book of registration or record required to be kept by the register of deeds, or shall unlawfully destroy, obliterate, deface or remove any records of proceedings of the board of county commissioners, or unlawfully and fraudulently abstract any record, receipt, order or voucher or other paper-writing required to be kept by the clerk of the board of commissioners of any county, he shall be guilty of a misdemeanor.

Rev., s. 3508; Code, s. 1071; R. C., c. 34, s. 31; 8 Hen. VI, c. 12, s. 3; 1881, c. 17.

Sufficiency of description in indictment: *State v. McLeod*, 50-318. **Sufficient evidence to convict:** *State v. Gouge*, 157-602.

4256. Larceny, concealment or destruction of wills. If any person, either during the life of the testator or after his death, shall steal or, for any fraudulent purpose, shall destroy or conceal any will, codicil or other testamentary instrument, he shall be guilty of a misdemeanor.

Rev., s. 3510; Code, s. 1072; R. C., c. 34, s. 32.

4257. Larceny of ungathered crops. If any person shall steal or feloniously take and carry away any maize, corn, wheat, rice or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, fruit, vegetable or other product cultivated for food or market, growing, standing or remaining ungathered in any field or ground, he shall be guilty of larceny, and shall be punished accordingly.

Rev., s. 3503; Code, s. 1069; 1811, c. 816; R. C., c. 34, s. 21; 1868-9, c. 251.

Indictment will lie against lessee or cropper for secretly appropriating crop where his actual possession has terminated by delivery to the landlord: *State v. Copeland*, 86-692; *State v. Webb*, 87-558.

Jurisdiction in superior court: *State v. Cherry*, 72-123; *State v. Graham*, 76-195. **Evidence, admissibility of:** *State v. Bragg*, 86-668.

Section cited in *Flynt v. Conrad*, 61-190; *State v. Vosburg*, 111-718; *State v. Buck*, 141-829. **Compare:** *State v. Foy*, 82-679 (before section 4625).

INDICTMENT. Must allege that product was "cultivated for food or market," unless the article stolen is one of those specifically named in the statute: *State v. Liles*, 78-496; *State v. Thompson*, 93-537; *State v. Bullard*, 97-443—must allege that product was "growing, standing, or ungathered," *State v. Bragg*, 86-688.

4258. Larceny of ginseng. If any person shall take and carry away, or shall aid in taking or carrying away, any ginseng growing upon the lands of another

person, with intent to steal the same, he shall be guilty of a felony, and shall be imprisoned not less than two years nor more than five years, in the discretion of the court: Provided, that such ginseng, at the time the same is taken, shall be in beds and the land upon which such beds are located shall be surrounded by a lawful fence.

Rev., s. 3502; 1905, c. 211.

For digging ginseng, see section 4510.

4259. Larceny of wood and other property from land. If any person, not being the present owner or bona fide claimant thereof, shall willfully and unlawfully enter upon the lands of another, carrying off or being engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense; and if not done with such intent, he shall be guilty of a misdemeanor.

Rev., s. 3511; Code, s. 1070; 1866, c. 60.

For act as to certain counties, see sections 4307, 4308.

Tenant not estopped to deny landlord's title to timber land not embraced in the portion which he rented: *State v. Boyce*, 109-739.

This statute embraces only such property as was not subject to larceny at common law: *State v. Vosburg*, 111-718—therefore does not embrace money, *Ibid.*—but does embrace brass fixtures on an engine which is attached to freehold, *State v. Beck*, 141-829.

Accused may show title to be in third person: *State v. Boyce*, 109-739.

As to sufficiency of indictment hereunder, see *State v. Holloway*, 117-730; *State v. Calloway*, 118-864. Sufficient description of property: *State v. Caylor*, 178-807.

Felonious intent necessary to convict hereunder: *State v. Crosset*, 81-579. Effect of recent possession: *State v. Jennett*, 88-665.

Compare, as to jurisdiction: *State v. Rice*, 83-660.

4260. Larceny of horses and mules. If any person shall steal any horse, mare, gelding or mule, he shall suffer imprisonment at hard labor for not less than one nor more than twenty years, at the discretion of the court. A count under this section may be joined in a bill of indictment with a count under the section that immediately follows.

Rev., s. 3505; Code, s. 1066; 1868, c. 37, s. 1; 1879, c. 234, s. 2; 1866-7, c. 62; 1917, c. 162, s. 2.

One borrowing horse with felonious intent to deprive owner of it, and to appropriate it to his own use, is guilty of larceny: *State v. Bryant*, 74-124.

Evidence, sufficiency of: *State v. Thompson*, 95-596. Effect of recent possession: *State v. Adams*, 2-463; *State v. Jennett*, 88-665; see *State v. Hullen*, 133-656.

Compare, as to punishment, *State v. Putney*, 61-543; *State v. Evans*, 69-40.

VERDICT. General verdict of guilty on two counts, one charging stealing a horse, under the statute, and the other charging receiving, is error: *State v. Johnson*, 75-123; *State v. Goings*, 98-766—but no error where the charge of horse-stealing is made at common law, *State v. Lawrence*, 81-552.

4261. Taking horses or mules for temporary purposes. If any person shall unlawfully take and carry away any horse, gelding, mare or mule, the property of another person, secretly and against the will of the owner of such property, with intent to deprive the owner of the special or temporary use of the same, or with the intent to use such property for a special or temporary purpose, the

person so offending shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both fined and imprisoned, in the discretion of the court.

Rev., s. 3509; Code, s. 1067; 1879, c. 234, s. 1; 1913, c. 11.

Indictment not defective because it charges the stealing of the temporary use of a buggy as well as a horse: *State v. Darden*, 117-697.

Section cited: *Clark v. Whitehurst*, 171-1; *State v. Thompson*, 95-596.

4262. Taking of automobiles and electric vehicles for temporary purpose. If any person shall unlawfully take and carry away any automobile or electrical vehicle of any nature, kind or description whatsoever, the property of another person, secretly and against the will of the owner of such property, with intent to deprive the owner of the special or temporary use of the same, or with the intent to use such property for a special or temporary purpose, the person so offending shall be guilty of larceny, and shall be punished by imprisonment in the state's prison or county jail not less than four months nor more than ten years, in the discretion of the court: Provided, that this section shall not be construed to repeal any other section of this article.

1907, c. 126.

See annotations under section 4261.

4263. Larceny of taxed dogs misdemeanor. The larceny of any dog upon which the license tax provided in article two of the chapter entitled Dogs has been paid shall be a misdemeanor.

1919, c. 116, s. 9.

See section 1683.

4264. Pursuing or injuring livestock with intent to steal. If any person shall pursue, kill or wound any horse, mule, ass, jennet, cattle, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a felony, and shall be punishable, in all respects, as if convicted of larceny, though such animal may not have come into the actual possession of the person so offending.

Rev., s. 3504; Code, s. 1068; 1866, c. 57.

See generally: *State v. Butler*, 65-309. Description as a "certain cattle beast" sufficient in indictment: *State v. Credle*, 91-640.

Compare, as to defense, *State v. Rivers*, 90-738.

4265. Local: Killing unmarked livestock with felonious intent. If any person, not being the owner of any unmarked neat cattle, sheep or hogs, shall kill any unmarked neat cattle, sheep or hogs in the range, such person shall, if the act be done with felonious intent, be guilty of larceny and punished as for that offense, and if not done with such intent shall be guilty of a misdemeanor: Provided, that this section shall apply only to the counties of Haywood, Hyde and Tyrrell.

Rev., s. 3316; 1891, c. 258; 1895, c. 8; 1909, c. 597.

ART. 17. TRAIN ROBBERY

4266. Train robbery. If any person shall enter upon any locomotive engine or car on any railroad in this state, and by threats, the exhibition of deadly weapons or the discharge of any pistol or gun, in or near any such engine or

car, shall induce or compel any person on such engine or car to submit and deliver up, or allow to be taken therefrom, or from him, anything of value, he shall be guilty of train robbery, and on conviction thereof shall be punished by imprisonment in the state's prison for not less than ten years nor more than twenty years.

Rev., s. 3765; 1895, c. 204, s. 2.

4267. **Attempted train robbery.** If any person shall stop, or cause to be stopped, or impede, or cause to be impeded, or conspire with others for that purpose, any locomotive engine or car on any railroad in this state, by intimidation of those in charge thereof or by force, threats or otherwise, for the purpose of taking therefrom or causing to be delivered up to such person so forcing, threatening or intimidating, anything of value, to be appropriated to his own use, he shall be guilty of attempting train robbery, and, on conviction thereof, shall be punished by confinement in the state's prison for not less than two years nor more than twenty years.

Rev., s. 3766; 1895, c. 204, s. 1.

ART. 18. EMBEZZLEMENT

4268. **Embezzlement of property received by virtue of office or employment.** If any person exercising a public trust or holding a public office, or any guardian, administrator or executor, or any officer or agent of a corporation, or any agent, consignee, clerk or servant, except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make way with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny.

Rev., s. 3406; Code, s. 1014; 21 Hen. VII, c. 7; 1871-2, c. 145, s. 2; 1889, c. 226; 1891, c. 188; 1897, c. 31; 1919, c. 97, s. 25.

As to jurisdiction, see *State v. Blackley*, 138-620. Demand not necessary to support a prosecution: *Ibid.* Review of amendments to the original section in *Durham v. Jones*, 119-270; *State v. Connelly*, 104-794. Under this section embezzlement is punishable as larceny, but the offense is not made larceny: *State v. Lanier*, 88-658, 89-517. Section merely cited in *State v. Hill*, 91-562; *State v. Harper*, 94-936.

THE CRIME OF EMBEZZLEMENT. Not a common-law offense: *State v. McDonald*, 133-682. Embezzlement means not only to appropriate to one's own use, but also to misappropriate fraudulently: *State v. Foust*, 114-842. The use of funds from one source to meet a default in another transaction is embezzlement: *State v. Klingman*, 172-947. Distinguished from larceny by fact that in larceny there is necessarily a trespass: *State v. McDonald*, 133-684. Constituent elements of the crime pointed out in *State v. Blackley*, 138-620. Intention to restore the property, and even a restoration itself, is not a defense: *State v. Summers*, 141-841.

One making locust pins out of prosecutor's timber under contract to go halves in profits is not guilty of embezzlement where he sells pins and keeps all the money: *State v. Barton*, 125-702.

Section does not embrace relation of landlord and tenant: *State v. Keith*, 126-1114—and landlord selling crop and not accounting to tenant does not make embezzlement, *Ibid.* The appropriation by defendant does not raise presumption of fraudulent intent: *State v. McDonald*, 133-680. Property must be that of prosecutor: *State v. Barton*, 125-702.

Word "servant" defined: *State v. Costin*, 89-511. Contractor with prosecutor is not an officer, clerk, employee or servant of prosecutor: *Ibid.*

INDICTMENT. What the indictment should charge: *State v. Gullede*, 173-746. Need not allege that goods were committed in custody of defendant nor any branch of trust except that growing out of relation of owner and servant or agent: *State v. Wilson*, 101-730. Must allege that defendant is not an apprentice nor within age of sixteen: *State v. Blackley*, 138-620; *State v. Lanier*, 88-658; *State v. Wilson*, 101-730; *State v. Connor*, 142-708. Where count for embezzlement contains charge of larceny, charge of larceny will be treated as surplusage: *State v. Harris*, 106-682. Need not incorporate the words "with force and arms": *State v. Harris*, 106-682. As to description of property, see *State v. Fain*, 106-760. Where two charged with embezzlement in one count and one of the two also charged with embezzlement in another count, no misjoinder: *State v. Harris*, 106-682. Sufficiency of indictment: *State v. Foust*, 114-842; *State v. Harris*, 106-682; *State v. Fain*, 106-760; *State v. Wilson*, 101-730.

BURDEN OF PROOF. Though appropriation admitted, burden is on state to show felonious intent beyond reasonable doubt: *State v. Summers*, 141-841; *State v. McDonald*, 133-680—being the essential element of the crime and peculiarly a question for the jury, *State v. Dunn*, 138-672; *State v. Dewey*, 139-556; *State v. Summers*, 141-841; *State v. Blackley*, 138-620; *State v. McDonald*, 133-680. Burden is not on state to prove defendant is not an apprentice nor under age of sixteen, but is on defendant: *State v. Blackley*, 138-620; *State v. Connor*, 142-708.

EVIDENCE. Not necessary to prove any breach of trust or confidence except that which grows out of the relation between owner and servant or agent: *State v. Wilson*, 101-730. Court properly excluded question asked defendant, if he were willing to deposit money alleged to have been embezzled in clerk's office to await result of civil action about the matter: *State v. Summers*, 141-841.

4269. Embezzlement of state property by public officers and employees. If any officer, agent or employee of the state, or other person having or holding in trust for the same any bonds issued by the state, or any security, or other property and effects of the same, shall embezzle or knowingly and willfully misapply or convert the same to his own use, or otherwise willfully or corruptly abuse such trust, such offender and all persons aiding and abetting, or otherwise assisting therein, shall be guilty of a felony, and shall be fined not less than ten thousand dollars, or imprisoned in the state's prison not less than twenty years, or both, at the discretion of the court.

Rev., s. 3407; Code, s. 1015; 1874-5, c. 52.

See annotations under section 4268. Section cited in *State v. Hill*, 91-562; *State v. Connelly*, 104-798.

4270. Embezzlement of funds by public officers and trustees. If any officer, agent, or employee of any city, county or incorporated town, or of any penal, charitable, religious or educational institution; or if any person having or holding any moneys or property in trust for any city, county, incorporated town, penal, charitable, religious or educational institution, shall embezzle or otherwise willfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held, such person shall be guilty of a felony, and shall be fined and imprisoned in the state's prison in the discretion of the court. If any clerk of the superior court or any sheriff, treasurer, register of deeds or other public officer of any county or town of the state shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any

purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony. The provisions of this section shall apply to all persons who shall go out of office and fail or neglect to account to or deliver over to their successors in office or other persons lawfully entitled to receive the same all such moneys, funds and securities or property aforesaid. The punishment shall be imprisonment in the state's prison or county jail, or fine in the discretion of the court.

Rev., s. 3408; Code, s. 1016; 1891, c. 241; 1876-7, c. 47.

See annotations under section 4268. Section cited in *State v. Hill*, 91-562. Compare *State v. Heaton*, 81-542; *State v. Connelly*, 104-794.

4271. Embezzlement by treasurers of charitable and religious organizations. If any treasurer or other financial officer of any benevolent or religious institution, society or congregation shall lend any of the moneys coming into his hands to any other person or association without the consent of the institution, association or congregation to whom such moneys belong; or, if he shall fail to account for such moneys when called on, he shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, in the discretion of the court.

Rev., s. 3409; Code, s. 1017; 1879, c. 105.

See annotations under section 4268. This section creates two offenses, lending money of society without consent, and failure to account for such money: *State v. Dunn*, 138-672.

Words "benevolent and religious association" and "account" interpreted in *State v. Dunn*, 134-663. Section cited in *State v. Hill*, 91-562.

4272. Embezzlement by officers of railroad companies. If any president, secretary, treasurer, director, engineer, agent or other officer of any railroad company shall embezzle any moneys, bonds or other valuable funds or securities, with which such president, secretary, treasurer, director, engineer, agent or other officer shall be charged by virtue of his office or agency, or shall in any way, directly or indirectly, apply or appropriate the same for the use or benefit of himself or any other person, state or corporation, other than the company of which he is president, secretary, treasurer, director, engineer, agent or other officer, for every such offense the person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of any county through which the railroad of such company shall pass, shall be imprisoned in the state's prison not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars.

Rev., s. 3403; Code, s. 1018; 1870-1, c. 103, s. 1.

For annotations on embezzlement, see under section 4268.

4273. Conspiring with officers of railroad companies to embezzle. If any person shall agree, combine, collude or conspire with the president, secretary, treasurer, director, engineer or agent of any railroad company to commit any offense specified in the preceding section, such person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of a county through which the railroad of any company against which such offense may be perpetrated passes, shall be imprisoned in the state's prison for not less than three nor

more than ten years, and fined not less than one thousand nor more than ten thousand dollars.

Rev., s. 3404; Code, s. 1019; 1870-1, c. 103, s. 2.

Conspiracy generally; order of proof: *State v. Jackson*, 82-565. As to jurisdiction, see *State v. Lewis*, 142-633. Section cited in *State v. Hill*, 91-562. For annotations as to embezzlement generally, see under section 4268.

4274. Embezzlement by insurance agents and brokers. If any insurance agent or broker who acts in negotiating a contract of insurance by an insurance company, association or fraternal order or society, lawfully doing business in this state, embezzles or fraudulently converts to his own use, or, with intent to use or embezzle, takes, secretes or otherwise disposes of, or fraudulently withholds, appropriates, lends, invests or otherwise uses or applies any money or substitute for money received by him as such agent or broker, contrary to the instructions or without the consent of the company for or on account of which the same was received by him, he shall be deemed guilty of larceny.

Rev., s. 3489; 1889, c. 54, s. 103; 1911, c. 196, s. 8.

4275. Embezzlement by surviving partner. If any surviving partner shall willfully and intentionally convert any of the property, money or effects belonging to the partnership to his own use, and refuse to account for the same on settlement, he shall be guilty of a felony, and upon conviction shall be punished by fine or imprisonment in the state's prison in the discretion of the court.

Rev., s. 3405; 1901, c. 640, s. 9.

For annotations as to embezzlement generally, see under section 4268.

4276. Embezzlement by tax officers. If any officer appropriates to his own use the state, county, school, city or town taxes, he shall be guilty of embezzlement, and may be punished by confinement in the state's prison not exceeding five years, at the discretion of the court.

Rev., s. 3410; Code, s. 3705; 1883, c. 136, s. 49.

See annotations under section 4268. Section cited in *State v. Hill*, 91-562; *State v. Connelly*, 104-794.

ART. 19. FALSE PRETENSES AND CHEATS

4277. Obtaining property by false tokens and other false pretenses. If any person shall knowingly and designedly, by means of any forged or counterfeited paper, in writing or in print, or by any false token, or other false pretense whatsoever, obtain from any person or corporation within the state any money, goods, property or other thing of value, or any bank-note, check or order for the payment of money, issued by, or drawn on, any bank or other society or corporation within this state or any of the United States, or any treasury warrant, debenture, certificate of stock or public security, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, with intent to cheat or defraud any person or corporation of the same, such person shall be guilty of a felony, and shall be imprisoned in the state's prison not less than four months nor more than ten years, or fined, in the discretion of the court: Provided, that if, on the trial of any one indicted for such crime, it shall be proved that he obtained the property in such manner as to amount to larceny, he shall not, by reason thereof, be entitled to be

acquitted of the felony; and no person tried for such felony shall be liable to be afterwards prosecuted for larceny upon the same facts: Provided further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.

Rev., s. 3432; Code, s. 1025; R. C., c. 34, s. 67; 1811, c. 814, s. 2; 33 Hen. VIII, c. 1, ss. 1, 2; 30 Geo. II, c. 24, s. 1.

CONSTITUENT ELEMENTS OF THE CRIME. False pretense is the false representation of a subsisting fact, calculated to deceive, intended to deceive, and which does deceive, whether it be in writing, words or acts, whereby one man obtains value from another without compensation: State v. Whedbee, 152-770; State v. Davis, 150-851; State v. Phifer, 65-321; State v. Hefner, 84-751; State v. Matthews, 121-604; State v. Mangum, 116-998; State v. Mikle, 94-843; State v. Matthews, 91-636; State v. Dickson, 88-643; State v. Eason, 86-274; State v. Young, 76-258; State v. Moore, 111-667.

Elements of the crime: State v. Carlson, 171-818. A mere lie is not sufficient to make out the crime; there must be a false token or contrivance calculated to deceive the ordinary man: State v. Matthews, 121-604; State v. Fitzgerald, 18-408; State v. Justice, 13-199; State v. Simpson, 10-620—and it must be a false pretense of an existing fact in contradistinction to mere promise or opinion, State v. Knott, 124-814; State v. Daniel, 114-823. Selling articles by short weight: State v. Ice Co., 166-366; s. c., 166-403. The false representation may be made to the agent of the owner of the goods: State v. Taylor, 131-711.

There is no crime where party to whom false pretense made knows it is false or ought to have known it: State v. Whidbee, 124-796; State v. Moore, 111-667. Section does not apply where property obtained under false pretense was land: State v. Burrows, 33-477—where payment is made for goods delivered and change is given in counterfeit coin, State v. Allred, 84-749—where caveat emptor applies, State v. Wilkerson, 103-337; State v. Young, 76-258. But it does apply where property obtained was money, although obtained in a transaction conveying land: State v. Munday, 78-460. Instances of false pretense, see State v. Burke, 108-750; State v. Jones, 70-75.

INDICTMENT. Must state that pretense made was in fact false, and in what respects false: State v. Lambeth, 80-393; State v. Pickett, 78-458; State v. Holmes, 82-607—that defendant knew it was false, State v. Mangum, 116-998; State v. Moore, 111-667—that it was made feloniously, State v. Wilson, 116-979; State v. Bryan, 112-848; State v. Caldwell, 112-854; State v. Howard, 129-584.

Must show connection between the false pretense and the thing of value secured: State v. Whedbee, 152-770—and this connection must be proved, State v. McCloud, 151-730.

Not necessary to allege an intent to defraud any particular person: State v. Ridge, 125-658; State v. Howard, 129-584; State v. Taylor, 131-714—nor the person deceived, State v. Ice Co., 166-366; s. c., 166-403—nor that order used to obtain goods was written or oral, State v. Mikle, 94-843—nor what kind of currency counterfeited and passed for something of value, State v. Boon, 49-463—nor the value of property obtained, State v. Gillespie, 80-396; State v. Boon, 49-463.

Goods obtained by false pretense must be described: State v. Reese, 83-637.

Indictment sufficient in State v. Carlsen, 171-818; State v. Claudius, 164-521; State v. Marsh, 162-603; State v. Ridge, 125-658; State v. Howard, 129-584; State v. Burke, 108-750; State v. Dixon, 101-741; State v. Wilkerson, 98-696; State v. Sherrill, 95-663; State v. Mikle, 94-843; State v. Dixon, 88-643; State v. Eason, 86-674; State v. Hefner, 84-751; State v. Pickett, 78-458; State v. Boon, 49-463—insufficient, State v. Holmes, 82-607; State v. Lambeth, 80-393; State v. Pickett, 78-458; State v. Burrows, 33-477; State v. Fitzgerald, 18-408; State v. Patillo, 11-348.

GENERALLY. See State v. Dixon, 101-741; State v. Phifer, 65-321; State v. Burrows, 33-477. A corporation may violate this section: State v. Ice Co., 166-366; s. c., 166-403.

Sufficiency of evidence: *State v. Marsh*, 162-603; *State v. Taylor*, 131-711; *State v. Matthews*, 121-604; *State v. Wilkerson*, 98-696; *State v. Johnson*, 75-123; *State v. Jones*, 70-75—insufficiency of, *State v. Knott*, 124-814; *State v. Corbett*, 46-246; *State v. Alphin*, 84-745. **Burden of proof is on prosecution to establish the truth of every averment necessary to constitute the offense:** *State v. Wilbourne*, 87-529.

As to judge's charge, see *State v. Taylor*, 131-711; *State v. Wilkerson*, 103-337; *State v. Alphin*, 84-745; *State v. Wilbourne*, 87-529.

A charge of obtaining money by false pretense is not sustained by proving the fraudulent obtaining of a promissory note: *State v. Gibson*, 169-318; s. c., 170-697. A new indictment for obtaining a note is not twice in jeopardy: *Ibid*.

Special verdict must set out all the facts necessary to constitute the crime: *State v. Oakley*, 103-408; *State v. Blue*, 84-807. As to variance between indictment and proof, see *State v. McWhirter*, 144-809; *State v. Ridge*, 125-658; *State v. Ashford*, 120-588; *State v. Mikle*, 94-843; *State v. Corbett*, 46-264.

Compare *State v. Crumpler*, 90-701.

4278. Obtaining signatures or property by false pretenses. If any person, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, the false making of which would be punishable as forgery, or obtain from any person any money, goods, wares, merchandise or other property or valuable thing whatsoever, he shall be punishable by fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the state's prison for a term of not less than one year nor more than five years, or both, at the discretion of the court.

Rev., s. 3433; Code. s. 1026; 1871-2, c. 92.

For annotations upon "false pretense" generally, see under section 4277.

Obtaining money by fraudulently obtaining prosecutor's signature to a note: *State v. Gibson*, 169-318; s. c., 170-697. Section not applicable where "caveat emptor" applies: *State v. Young*, 76-258; *State v. Wilkerson*, 103-337—where property obtained was land, *State v. Burrows*, 33-477—but it does apply where property obtained was money, although obtained in a transaction conveying land, *State v. Munday*, 78-460. Criminal intent is essential: *State v. Austin*, 79-624.

INDICTMENT. Since act of 1891, ch. 205, it must charge that the act was done "feloniously": *State v. Caldwell*, 112-554; *State v. Taylor*, 131-711. **Sufficiency of:** *State v. Eason*, 86-674. **Insufficiency of:** *State v. Lambeth*, 82-393; *State v. Pickett*, 78-458; *State v. Holmes*, 82-607. There must be an averment of false pretense: *State v. Holmes*, 82-607—but no averment as to value of property necessary, *State v. Gillespie*, 80-396. Description of goods obtained necessary: *State v. Reese*, 83-637.

Sufficiency of evidence hereunder: *State v. Jones*, 70-75. Compare *State v. Crumpler*, 90-701.

4279. Obtaining property by false representation of pedigree of animals. If any person shall, with intent to defraud or cheat, knowingly represent any animal for breeding purposes as being of greater degree of any particular strain of blood than such animal actually possesses, and by such representation obtain from any other person money or other thing of value, he shall be guilty of a misdemeanor, and upon conviction thereof shall for each offense be punished by a fine of not less than sixty dollars nor more than three hundred dollars, or by imprisonment for a term not exceeding six months.

Rev., s. 3307; 1891, c. 94, s. 2.

4280. Obtaining certificate of registration of animals by false representation. If any person shall, by any false representation or pretense, with intent to defraud or cheat, obtain from any club, association, society or company for the

improvement of the breed of cattle, horses, sheep, swine, fowls or other domestic animals or birds, a certificate of registration of any animal in the herd register of any such association, society or company, or a transfer of any such registration, upon conviction thereof he shall be punished by imprisonment for a term not exceeding three months or a fine not exceeding one hundred dollars, or by both such fine and imprisonment.

Rev., s. 3308; 1891, c. 94, s. 1.

4281. Obtaining advances under promise to work and pay for same. If any person, with intent to cheat or defraud another, shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation upon and by color of any promise or agreement that the person making the same will begin any work or labor of any description for such person or corporation from whom the advances are obtained, and the person making the promise or agreement shall willfully fail, without a lawful excuse, to commence or complete such work according to contract, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Evidence of such promise or agreement to work, the obtaining of such advances thereon and the failure to comply with such promise or agreement shall be presumptive evidence of the intent to cheat and defraud at the time of obtaining the advances and making the promise or agreement, subject to be rebutted by other testimony which may be introduced by the defendant.

Rev., s. 3431; 1889, c. 444; 1891, c. 106; 1905, c. 411.

Section constitutional: *State v. Norman*, 110-484. As to sufficiency of evidence hereunder, see *Ibid.* The last part of the section as to presumptive evidence is unconstitutional: *State v. Griffin*, 154-611; *State v. Isley*, 164-491.

4282. Obtaining advances under written promise to pay therefor out of designated property. If any person shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation, upon any written representation that the person making the same is the owner of any article of produce, or of any other specific chattel or personal property, which property, or the proceeds of which the owner in such representation thereby agrees to apply to the discharge of the debt so created, and the owner shall fail to apply such produce or other property, or the proceeds thereof, in accordance with such agreement, or shall dispose of the same in any other manner than is so agreed upon by the parties to the transaction, the person so offending shall be guilty of a misdemeanor, whether he shall or shall not have been the owner of any such property at the time such representation was made.

Rev., s. 3434; Code, s. 1027; 1879, cc. 185, 186; 1905, c. 104.

Section constitutional: *State v. Torrence*, 127-550. The representation hereunder must be a false representation of an existing fact: *State v. Torrence*, 127-550; *State v. Whidbee*, 124-796. As to sufficiency of indictment and evidence: *State v. Torrence*, 127-550. The indictment should follow the statute, using the essential words descriptive of the offense: *State v. Mooney*, 173-798. See annotations under section 4277.

4283. Obtaining property in return for worthless check, draft or order. Every person who, with intent to cheat and defraud another, shall obtain money, credit, goods, wares or any other thing of value by means of a check, draft or order of any kind upon any bank, person, firm or corporation, not indebted to the drawer,

or where he has not provided for the payment or acceptance of the same, and the same be not paid upon presentation, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. The giving of the aforesaid worthless check, draft, or order shall be prima facie evidence of an intent to cheat and defraud.

1907, c. 975; 1909, c. 647.

The offense is called a misdemeanor and may be punished on appeal from recorder's court to the superior court without a bill of indictment: *State v. Freeman*, 172-925. What is meant by obtaining a thing of value: *Ibid*.

4284. Obtaining entertainment at hotels and boarding-houses without paying therefor. Any person who obtains any lodging, food or accommodation at an inn, boarding-house or lodging-house without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an inn, boarding-house or lodging-house by the use of any false pretense, or who, after obtaining credit or accommodation at an inn, boarding-house or lodging-house, absconds and surreptitiously removes his baggage therefrom without paying for his food, accommodation or lodging, shall be guilty of a misdemeanor, and shall upon conviction be fined or imprisoned at the discretion of the court.

1907, c. 816.

What is meant by a boarding-house: *State v. McRae*, 170-712. Removing baggage from hotel without paying bill: *State v. Hill*, 166-298.

4285. Obtaining wearing apparel on approval. If any person, with intent to cheat and defraud, shall solicit and obtain from any merchant any article of wearing apparel on approval, and shall thereafter, upon demand, refuse or fail to return the same to such merchant in an unused and undamaged condition, or to pay for the same, such person so offending shall be guilty of a misdemeanor. Evidence that a person has solicited a merchant to deliver to him any article of wearing apparel for examination or approval and has obtained the same upon such solicitation, and thereafter, upon demand, has refused or failed to return the same to such merchant in an unused and undamaged condition, or to pay for the same, shall constitute prima facie evidence of the intent of such person to cheat and defraud, within the meaning of this section.

1911, c. 185.

4286. Obtaining money by false representation of physical defect. It shall be unlawful for any person to falsely represent himself or herself in any manner whatsoever as blind, deaf, dumb, or crippled or otherwise physically defective for the purpose of obtaining money or other thing of value or of making sales of any character of personal property. Any person so falsely representing himself or herself as blind, deaf, dumb, crippled or otherwise physically defective, and securing aid or assistance on account of such representation, shall be deemed guilty of a misdemeanor.

1919, c. 104.

ART. 20. FRAUDS

4287. Fraudulent disposal of mortgaged property. If any person, after executing a chattel mortgage, deed of trust or other lien for a lawful purpose, shall make any disposition of any personal property embraced in such mortgage, deed

of trust or lien, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit such deed was made, every person so offending and every person with a knowledge of the lien buying the property embraced in any such deed or lien, and every person assisting, aiding or abetting the unlawful disposition of such property, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit any such deed or lien was made, shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, in the discretion of the court. In all indictments for violations of the provisions of this section it shall not be necessary to allege or prove the person to whom any sale or disposition of the property was made, but proof of the possession of the property embraced in such chattel mortgage, deed of trust or lien, by the grantor thereof, after the execution of said chattel mortgage, deed of trust, or lien, and while it is in force, and further proof of the fact that the sheriff or other officer charged with the execution of process cannot after due diligence find such property under process directed to him for its seizure, for the satisfaction of such chattel mortgage, deed of trust or lien, or that the mortgagee demanded the possession thereof of the mortgagor for the purpose of sale to foreclose said mortgage, deed of trust or lien, after the right to such foreclosure had accrued, and that the mortgagor failed to produce, deliver or surrender the same to the mortgagee for that purpose, shall be prima facie proof of the fact of a disposition or sale of such property, by the grantor, with the intent to hinder, delay or defeat the rights of the person to whom said chattel mortgage, deed of trust or lien was made.

Rev., s. 3435; Code, s. 1089; 1887, c. 14; 1873-4, c. 31; 1874-5, c. 215; 1883, c. 61.

There are three classes of offenders against whom the statute is directed: *State v. Woods*, 104-898. Infant cannot be convicted hereunder: *State v. Howard*, 88-650.

Intent is essential: *State v. Ellington*, 98-749. It is presumed where disposition of property necessarily results in hindering, delaying, or defrauding the mortgagee; otherwise, question of fact for jury: *State v. Manning*, 107-910. Intent is presumed where sale is proved, and no evidence offered to explain such sale: *State v. Holmes*, 120-573.

Indictment should charge aiding and abetting where such is the offense: *State v. Wood*, 104-898. Sufficiency of indictment: *State v. Surles*, 117-720.

Evidence; sufficiency of: *State v. Logan*, 100-454—insufficiency of, *State v. Woods*, 104-898. Proving the intent: *State v. Jeffries*, 117-727. Burden of proof is upon defendant to disprove criminal intent where prosecution has made out prima facie case: *State v. Holmes*, 120-573; *State v. Surles*, 117-720.

Section cited in *State v. Barrett*, 138-635; *State v. Torrence*, 127-550; *State v. Jones*, 113-669.

Compare, as to jurisdiction, *State v. Jones*, 83-657—as to indictment, *State v. Pickens*, 79-652; *State v. Burns*, 80-376.

4288. Secreting property to hinder enforcement of lien. Any person removing, exchanging or secreting any personal property on which a lien exists, with intent to prevent or hinder the enforcement of the lien, shall be guilty of a misdemeanor.

Rev., s. 3436; 1887, c. 14.

4289. Fraudulent entry of horses at fairs. If any person shall knowingly enter or cause to be entered in competition for any purse, prize, premium, stake or sweepstake offered or given by any agricultural or other society, association or person in this state, any horse, mare, gelding, colt or filly under an assumed name or out of its proper class, he shall be punished by a fine of not less than

one hundred nor more than one thousand dollars, or by imprisonment in the state's prison for not less than one nor more than five years, or by both fine and imprisonment, at the discretion of the court.

Rev., s. 3429; 1893, c. 387.

See section 4335.

4290. Fraudulent and deceptive advertising. It shall be unlawful for any person, firm, corporation or association, with intent to sell or in anywise to dispose of merchandise, securities, service or any other thing offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, to make public, disseminate, circulate or place before the public or cause directly or indirectly to be made, published, disseminated, circulated or placed before the public in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service or any other thing so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading: Provided, that such advertising shall be done willfully and with intent to mislead. Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1915, c. 218.

4291. Blackmailing. If any person shall knowingly send or deliver any letter or writing demanding of any other person, with menaces and without any reasonable or probable cause, any chattel, money or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or by imprisonment in the state's prison, with the intent to extort or gain from such person any chattel, money or valuable security, every such offender shall be guilty of a misdemeanor.

Rev., s. 3428; Code, s. 989; R. C., c. 34, s. 110.

As to sufficiency of indictment, see *State v. Harper*, 94-936. Sufficient evidence: *State v. Frady*, 172-978.

4292. Fraudulent removal of manufacturer's serial number from automobile. Every person within this state is hereby prohibited from knowingly buying, selling, receiving, disposing of or concealing any automobile, motor car, or motor vehicle from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered, or destroyed, for the purpose of concealing or misrepresenting the identity of said automobile, motor car, or motor vehicle. Any person violating the provisions of this section, and any person who shall knowingly buy, sell, receive, dispose of, or conceal any automobile, motor car, or motor vehicle from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered, or destroyed, for the purpose of concealment or misrepresenting the identity of said automobile, motor car,

or motor vehicle, shall be guilty of a misdemeanor. This section shall not apply to automobiles in the possession of innocent purchasers who acquired title or possession prior to March fourth, one thousand nine hundred and nineteen.

1919, c. 110.

ART. 21. FORGERY

4293. Forgery of bank-notes, checks and other securities. If any person shall falsely make, forge or counterfeit, or cause or procure the same to be done, or willingly aid or assist therein, any bill or note in imitation of, or purporting to be, a bill or note of any incorporated bank in this state, or in any of the United States, or in any of the territories of the United States; or any order or check on any such bank or corporation, or on the cashier thereof; or any of the securities purporting to be issued by or on behalf of the state, or by or on behalf of any corporation, with intent to injure or defraud any person, bank or corporation, or the state, the person so offending shall be guilty of a felony and shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years, or by a fine in the discretion of the court.

Rev., s. 3419; Code, s. 1030; R. C., c. 34, s. 60; 1819, c. 994, s. 1.

See, also, annotations under section 4296. See generally, as to forgery: *State v. Hall*, 108-776; *Barnes v. Crawford*, 115-76; *State v. Cross*, 101-770; *State v. Covington*, 94-913; *State v. Thornburg*, 28-79; *State v. Gherkin*, 29-206; *State v. Lytle*, 64-255; *State v. Dourden*, 13-443.

Sufficiency of indictment: *State v. Hall*, 108-776; *State v. Monds*, 9-443; *State v. Twitty*, 9-248; but see *State v. Perry*, 4-130.

Former acts which tend to bring the scienter home to defendant, competent: *State v. Twitty*, 9-248.

Compare *State v. Tow*, 44-214.

4294. Uttering forged paper. If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeited bill, note, order, check or security as is mentioned in the preceding section; or shall pass or deliver, or attempt to pass or deliver, any of them to another person (knowing the same to be falsely forged or counterfeited), the person so offending shall be punished by imprisonment in the county jail or state's prison not less than four months nor more than ten years.

Rev., s. 3427; Code, s. 1031; R. C., c. 34, s. 61; 1819, c. 994, s. 2; 1909, c. 666.

For the presentation of a false certificate of exemption from the poll tax or a false tax receipt, see s. 4186, subsec. 5, of this chapter.

See annotations under section 4296. **Indictment held multifarious:** *State v. Jarvis*, 129-698. **Expert testimony:** *State v. Harris*, 27-287.

4295. Selling of certain forged securities. If any person shall sell, by delivery, indorsement or otherwise, to any other person, any judgment for the recovery of money purporting to have been rendered by a justice of the peace, or any bond, promissory note, bill of exchange, order, draft or liquidated account purporting to be signed by the debtor (knowing the same to be forged), the person so offending shall be punished by imprisonment in the state's prison or county jail for not less than four months nor more than ten years.

Rev., s. 3425; Code, s. 1033; R. C., c. 34, s. 63.

4296. Forgery of deeds, wills and certain other instruments. If any person, of his own head and imagination, or by false conspiracy or fraud with others,

shall wittingly and falsely forge and make, or shall cause or wittingly assent to the forging or making of, or shall show forth in evidence, knowing the same to be forged, any deed, lease or will, or any bond, writing obligatory, bill of exchange, promissory note, endorsement or assignment thereof; or any acquittance or receipt for money or goods; or any receipt or release for any bond, note, bill or any other security for the payment of money; or any order for the payment of money or delivery of goods, with intent, in any of said instances, to defraud any person or corporation, and thereof shall be duly convicted, the person so offending shall be punished by imprisonment in the state's prison or county jail not less than four months nor more than ten years, or fined in the discretion of the court.

Rev., s. 3424; Code, s. 1029; R. C., c. 34, s. 59; 1801, c. 572; 5 Eliz., c. 14, ss. 2, 3; 21 James I, c. 26.

See generally, as to forgery: *Barnes v. Crawford*, 115-76; *State v. Hall*, 108-776; *State v. Cross*, 101-770; *State v. Covington*, 94-913; *State v. Shaw*, 92-768; *State v. Dourden*, 13-443.

Falsely, wittingly and corruptly rubbing out and obliterating an acquittance, indorsed on a bond, is not forgery in North Carolina: *State v. Thornburg*, 28-79—nor falsely putting the name of a witness to a bond, which does not require a witness, *State v. Gherkin*, 29-206—nor is a writing binding on no one a subject of forgery, *State v. Lytle*, 64-255.

As to name, see *State v. Morgan*, 19-348. Punishment may be by imprisonment in penitentiary: *State v. Williams*, 86-671.

As to verdict, see *State v. Cross*, 101-770, 106-650. As to jurisdiction of state courts over forgery of notes to cover up national bank defalcations: *Ibid*.

SECTION CONSTRUED. "Receipt for money": *State v. Dalton*, 8-3—"shall show forth in evidence any deed," *State v. Britt*, 14-122—"order for payment of money or delivery of goods," *State v. Lamb*, 65-419; *State v. Thorn*, 66-644; *State v. Leak*, 80-403; *State v. Williams*, 86-671.

INDICTMENT. Where forged instrument lost, bill need not allege the fact: *State v. Peterson*, 129-556—and only the substance need be set out, *Ibid*. As to indictment for forging bond, *State v. Ballard*, 6-186—for forging order on store, *State v. Lane*, 80-407—for forging instrument, where extrinsic facts necessary to show its capacity to deceive, *State v. Covington*, 94-913—for forging receipt against a book account, *State v. Dalton*, 6-379, 8-3—for forging deed, *State v. Street*, 1-186—for changing date of note, *State v. Weaver*, 35-491—for forging railroad pass, *State v. Weaver*, 94-836—for forging bond by one of the obligors named therein against another of the obligors named, *State v. Gardiner*, 23-27—for forging order in name of overseer or agent against principal, *State v. Thorn*, 66-644.

Indictment for forging instruments where errors in names: *State v. Covington*, 94-913; *State v. Collins*, 115-716. Fraudulent intent is a necessary ingredient of the crime of forgery: *State v. Wolf*, 122-1079; *State v. Collins*, 115-716.

EVIDENCE. Possession of forged instrument, in favor of possessor, presumption of guilt: see *State v. Patterson*, 129-556; *State v. Lane*, 80-407; *State v. Britt*, 14-122. Competency of witness and of evidence: *State v. Bateman*, 25-474; *State v. Cross*, 101-770. Sufficiency of evidence: *State v. Matlock*, 119-806; *State v. Lane*, 80-407; *State v. Morgan*, 19-348. Insufficiency of evidence: *State v. Smith*, 78-462; *State v. Harrison*, 69-143.

4297. Forging names to petitions and uttering forged petitions. If any person shall willfully sign, or cause to be signed, or willfully assent to the signing of the name of any person without his consent, or of any deceased or fictitious person, to any petition or recommendation with the intent of procuring any commutation of sentence, pardon or reprieve of any person convicted of any crime or offense, or for the purpose of procuring such pardon, reprieve or commutation to be refused or delayed by any public officer, or with the intent of procuring from any person whatsoever, either for himself or another, any appointment to office, or to any position of honor or trust, or with the intent to influence the official

action of any public officer in the management, conduct or decision of any matter affecting the public, he shall be guilty of a felony, and shall be fined not exceeding one thousand dollars, or imprisoned in the county jail or state's prison not exceeding five years, or both, at the discretion of the court; and if any person shall willfully use any such paper for any of the purposes or intents above recited, knowing that any part of the signatures to such petition or recommendation has been signed thereto without the consent of the alleged signers, or that names of any dead or fictitious persons are signed thereto, he shall be guilty of a felony, and shall be punished in like manner.

Rev., s. 3426; Code, s. 1034; 1883, c. 275.

4298. Forging certificate of corporate stock and uttering forged certificates. If any officer or agent of a corporation shall, falsely and with a fraudulent purpose, make, with the intent that the same shall be issued and delivered to any other person by name or as holder or bearer thereof, any certificate or other writing, whereby it is certified or declared that such person, holder or bearer is entitled to or has an interest in the stock of such corporation, when in fact such person, holder or bearer is not so entitled, or is not entitled to the amount of stock in such certificate or writing specified; or if any officer or agent of such corporation, or other person, knowing such certificate or other writing to be false or untrue, shall transfer, assign or deliver the same to another person, for the sake of gain, or with the intent to defraud the corporation, or any member thereof, or such person to whom the same shall be transferred, assigned or delivered, the person so offending shall be imprisoned in the county jail or state's prison not less than four months nor more than ten years.

Rev., s. 3421; Code, s. 1032; R. C., c. 34, s. 62.

See annotations under section 4296.

4299. Forgery of bank-notes and other instruments by connecting genuine parts. If any person shall fraudulently connect together different parts of two or more bank-notes, or other genuine instruments, in such a manner as to produce another note or instrument, with intent to pass all of them as genuine, the same shall be deemed a forgery, and the instrument so produced a forged note, or forged instrument, in like manner as if each of them had been falsely made or forged.

Rev., s. 3420; Code, s. 1037; R. C., c. 34, s. 66.

SUBCHAPTER 7. CRIMINAL TRESPASS

ART. 22. TRESPASSES TO LAND AND FIXTURES

4300. Forcible entry and detainer. No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor.

Rev., s. 3670; Code, s. 1028; R. C., c. 49, s. 1; 5 Ric. II, c. 8.

To constitute the crime there must be some force or violence in excess of a mere trespass: *State v. Leary*, 136-578. Justice of the peace has no jurisdiction of forcible entry and detainer: *State v. Yarborough*, 70-250; *R. R. v. Johnston*, 70-348; *R. R. v. Sharp*, 70-509; *Perry v. Shepherd*, 78-83.

Difference between forcible trespass and forcible detainer: *State v. Laney*, 87-535. Strictly speaking, forcible trespass applies to personal property and forcible entry to real property: *State v. Jacobs*, 94-950. Forcible trespass (or entry and detainer) explained: *State v. Davenport*, 156-596.

Entry may be peaceable, without any objection, but may become forcible after party being forbidden: *State v. Robbins*, 123-730; see *State v. Condor*, 126-988.

Under this section the lands must be in the actual possession of the person whose possession is charged to have been interfered with: *State v. Bryant*, 103-436; see *State v. Leary*, 136-578. Overseer on plantation is not in possession as against the owner, and owner may evict him without being guilty hereunder: *State v. Curtis*, 20-363. Landlord can forbid trespassers, even though tenant in possession: *State v. Robbins*, 123-730. Widow living on land not yet assigned as dower cannot prosecute hereunder: *State v. Thompson*, 130-680.

For examples of forcible entry, see *State v. Jacobs*, 94-950; *State v. Smith*, 100-466; *State v. Shepard*, 82-614; *State v. Robbins*, 123-730; *State v. Davis*, 109-809; *State v. Caldwell*, 47-468.

INDICTMENT. Not necessary to charge or show that proprietor of the house where the alleged forcible entry and detainer was committed was in the house or present at time of offense: *State v. Fort*, 20-332; *State v. Shepard*, 82-614—but if trespasser warned off by child of owner, must be stated that he was member of owner's family residing there: *State v. Morgan*, 60-243. Not necessary to allege that defendant had no title to land: *State v. Whitfield*, 30-317. Sufficient when it charges "that defendant unlawfully and with a strong hand did break and enter into a certain house of J. D., he, the said J. D., being then and there in the peaceable and quiet possession of same": *State v. Whitfield*, 30-315. Must charge actual possession in person whose possession is alleged to have been disturbed: *State v. Bryant*, 103-436. As to sufficiency of indictment generally, see *State v. Eason*, 70-88. Indictment is to be considered as containing two counts, one for forcible entry and the other for a detainer: *State v. Ward*, 46-291.

EVIDENCE. Sufficiency of: *State v. Bordeaux*, 47-242; *State v. Davis*, 109-809; *Mos-seller v. Deaver*, 106-495; *State v. Smith*, 100-466; *State v. Caldwell*, 47-469—insufficiency of, *State v. Leary*, 136-578; *State v. Mills*, 104-905; *State v. Pridgen*, 30-84; *State v. Smith*, 24-127. For variance between allegations and proof, see *Jordan v. Rouse*, 46-119.

4301. Malicious injury to real property. If any person shall maliciously commit any damage, injury or spoil upon any real property whatsoever, either of a public or private nature, for which no punishment is provided by any existing law, every person so offending shall be guilty of a misdemeanor: Provided, that nothing herein shall extend to any case where the party trespassing or doing the injury acted under a fair and reasonable belief that he had a right to do the act complained of, nor to any trespass, not being willful and malicious, committed in hunting, fishing or the pursuit of game. When the owner, or one of the owners, of an estate in possession shall complain of the injury before a justice of the peace of the county in which the offense is charged to have been committed before the regular term of the superior court next after the commission of the offense, and shall fail to state in his complaint that the damage exceeds ten dollars, the punishment, upon conviction of the offense, shall not exceed a fine of fifty dollars or imprisonment for thirty days.

Rev., s. 3677; Code, s. 1081; R. C., c. 34, s. 111; 1873-4, c. 176, s. 5.

Acts of 1873-74, ch. 176, do not embrace offense of forcible trespass: *State v. Batchelor*, 72-468.

For injury to houses, churches, fences, walls, etc., see section 4317.

4302. Trespass on public lands. If any person shall erect a building on any public lands before the same shall have been sold or granted by the state, or on any lands belonging to the state board of education before the same shall have

been sold and conveyed by them, or cultivate or remove timber from any of such lands, he shall be guilty of a misdemeanor. Moreover, the state board of education can recover from any person cutting timber on its land three times the value of the timber which is cut. When any person shall be in possession of any part of such land, it shall be the duty of the sheriff of the county in which the land is situated, and he is hereby required, to give notice in writing to such person, commanding him to depart therefrom forthwith; and if the person in possession, upon being so notified, shall not, within two weeks after the time of notice, remove therefrom, the sheriff is required to remove him immediately, and if necessary, he shall summon the power of the county to assist him in so doing.

Rev., s. 3746; Code, s. 1121; R. C., c. 34, s. 42; 1823, c. 1190; 1842, c. 36, s. 4; 1909, c. 891. Section cited in *Worth v. Comrs.*, 118-125; *Land Co. v. Board of Education*, 101-35.

4303. Disorderly conduct in and injuries to public buildings. If any person shall make any rude or riotous noise or be guilty of any disorderly conduct in or near any of the public buildings of the state, or of any county or municipality, or shall write or scribble on, mark, deface, besmear, or injure the walls of any of the public buildings of the state or of any county or municipality, or any statue or monument, or shall do or commit any nuisance in or near any public building of the state or of any county or municipality, he shall be guilty of a misdemeanor. The keeper of the capitol or any person in charge of any of such public buildings shall have authority to arrest summarily and without warrant for a violation of this section. The words "public building," as used in this section, shall include the grounds around such buildings.

Rev., s. 3742; Code, s. 2308; R. C., c. 103, ss. 7, 8; 1829, c. 29, ss. 1, 2; 1842, c. 47; 1915, c. 269.

4304. Local: Erecting artificial islands and lumps in public waters. If any person shall erect artificial islands or lumps in any of the waters of the state east of the Wilmington and Weldon railroad and the Petersburg and Weldon railroad, he shall be guilty of a misdemeanor.

Rev., s. 3543; Code, s. 986; 1883, c. 109.

4305. Trespass on land after being forbidden; license to look for estrays. If any person, after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days: Provided, that if any person shall make a written affidavit before a justice of the peace of the county that any of his cattle or other livestock (which shall be specially described in such affidavit) have strayed away, and that he has good reason to believe that they are on the lands of a certain other person, then the justice may, in his discretion, allow the affiant to enter on the premises of such person with one or more servants, without firearms, in the daytime (Sunday excepted), between the hours of sunrise and sunset, and make search for his estrays for such limited time as to the justice shall appear reasonable. The only effect of such license shall be to protect the persons entering from indictment therefor, and the license shall have this effect only where it is made bona fide and the entry is effected without any damage except such as may be necessary to conduct the search.

Rev., s. 3688; Code, s. 1120; 1866, c. 60.

A person who enters land under a bona fide claim of title or right is not guilty hereunder: State v. Faggart, 170-737; State v. Wells, 142-590; State v. Winslow, 95-649; State v. Crossett, 81-579; State v. Hause, 71-518; State v. Ellen, 68-281; State v. Hanks, 66-612—so servant of bona fide claimant, entering at his command, is not guilty, State v. Winslow, 95-649—but a mere belief is not sufficient; there must be proof of a claim of title, or facts upon which defendant based a bona fide claim of right, State v. Fisher, 109-817; State v. Crawley, 103-353; State v. Bryson, 81-595; State v. Glenn, 118-1194; State v. Durham, 121-546; compare State v. Boyce, 109-739. Failure to charge as to bona fide claim of defendant no error, when no such instruction is prayed: State v. Yellowday, 152-793.

Although forbidden by the landlord, if a person entered the land on the invitation of the tenant he is not guilty: State v. Lawson, 101-717. Husband is not indictable for trespass on lands of his wife after being forbidden by her: State v. Jones, 132-1043. Indictment hereunder will lie against railroad employee for entry after being forbidden on lands which company is seeking to condemn: State v. Wells, 142-590; State v. Mallard, 143-666.

Defendant's guilt need not be established where the question of entry under bona fide claim of right has not been determined: State v. Wells, 142-590.

Justice has exclusive original jurisdiction of this offense: State v. Dudley, 83-660. Compare State v. Edney, 80-360; State v. Presley, 72-204.

Where indictment charges that "defendant did unlawfully enter upon the premises of the prosecutor, he, said defendant, having been forbidden to enter on said premises, and not having a license so to enter," etc., is sufficient: State v. Whitehurst, 70-85. Necessary in indictment to negative defendant's having license to enter: State v. Bullard, 72-445. The word "premises" equivalent to "land" in indictment: State v. Yellowday, 152-793. Possession of agent of owner is sufficient allegation of possession of owner: *Ibid.*

The omission of the words "unlawfully and wilfully" in a warrant of a justice of the peace is fatal: State v. Whitaker, 85-566—but superior court has power to amend the warrant in this respect after verdict: State v. Smith, 103-410; State v. Yellowday, 152-793.

Warrant which does not contain necessary descriptive words of the offense, but refers to an attached affidavit which does, will not be quashed: State v. Winslow, 95-649.

Evidence that defendant went on land under bona fide claim of title competent: State v. Crawley, 103-353. Insufficient evidence of reasonable belief of title or right of entry: State v. Fisher, 109-817; State v. Mallard, 143-666; State v. Durham, 121-546; State v. Glenn, 118-1194. State must prove entry after being forbidden, but it is upon defendant to show, by way of defense, to the satisfaction of jury, that he entered under license or bona fide claim of right: State v. Durham, 121-546; State v. Glenn, 118-1194. Where charge is that land was in possession of A and the proof that it was in possession of B, the variance is fatal: State v. Sherrill, 81-550.

Section cited in State v. Connor, 142-708; State v. Holmes, 120-576; State v. Yarborough, 70-254.

4306. Cutting, injuring, or removing another's timber. If any person, not being the bona fide owner thereof, shall knowingly and willfully cut down, injure or remove any standing, growing or fallen tree or log, the property of another, he shall be guilty of a misdemeanor, and shall be punished by a fine of not more than fifty dollars or by imprisonment for not more than thirty days.

Rev., s. 3687; 1889, c. 168.

4307. Local: Cutting, felling or removing another's timber. If any person, or his agent or employee, shall cut, fell or remove any timber tree, for the purpose of sale or gain, knowing the same to be upon the land of another, without the consent of the owner thereof, the person so cutting, felling or removing, or causing the same to be done, shall be guilty of a misdemeanor, and shall be fined or imprisoned in the discretion of the court, and shall also be liable to such owner for an amount equal to double the value of the timber so cut, felled or removed, to be recovered in a civil action to be brought therefor. The prosecution for any offense committed under this section shall be commenced within one

year after its commission. This section shall apply only to Caldwell, Wilkes, Watauga, Burke, McDowell, Yadkin, Cherokee and Mitchell counties.

1907, c. 320, ss. 1, 2, 5.

Section cited in *Lumber Co. v. Hayes*, 157-333.

4308. Local: Purchasing timber unlawfully removed from another's land. If any person or corporation shall purchase or receive any timber tree, knowing the same to have been cut or removed from the lands of another without the consent of the owner thereof, or shall purchase or receive any logs, planks, boards, staves, shingles or other lumber made from such timber tree, knowing the same to have been cut or removed as aforesaid, the person so offending shall be guilty of a misdemeanor, and shall be fined or imprisoned, in the discretion of the court, and shall be liable to double the amount of the actual damages to the owner of such timber, to be recovered in a civil action brought therefor. This section shall apply only to Caldwell, Wilkes, Watauga, Burke, McDowell, Yadkin, Cherokee and Mitchell counties.

1907, c. 320, ss. 3, 5.

Section cited in *Lumber Co. v. Hayes*, 157-333.

4309. Setting fire to grass and brush lands and woodlands. If any person shall intentionally set fire to any grass land, brush land or woodland, except it be his own property, or in that case without first giving notice to all persons owning or in charge of lands adjoining the land intended to be fired, and without also taking care to watch such fire while burning and to extinguish it before it shall reach any lands near to or adjoining the lands so fired, he shall for every such offense be guilty of a misdemeanor and shall be fined not less than ten dollars nor more than fifty dollars, or imprisoned not exceeding thirty days. This section shall not prevent an action for the damages sustained by the owner of any property from such fires. For the purposes of this section, the term "woodland" is to be taken to include all forest areas, both timber and cut-over land, and all second-growth stands on areas that have at one time been cultivated. Any person who shall furnish to the state evidence sufficient for the conviction of a violation of this statute shall receive the sum of twenty dollars, to be taxed as part of the court costs.

Rev. s. 3346; Code, ss. 52, 53; R. C., c. 16, ss. 1, 2; 1777, c. 123, ss. 1, 2; 1915, c. 243, ss. 8, 11; 1919, c. 318.

See generally: *Roberson v. Morgan*, 118-991; *Lamb v. Sloan*, 94-534.

The action for penalty here given may be brought before a justice of the peace in a county other than the one where the offense was committed, if such county is where defendant resides: *Fisher v. Bullard*, 109-574.

Only adjoining landowners can maintain an action under this section: *Roberson v. Morgan*, 118-991.

Penalty here provided is only incurred by voluntary firing of woods; not in cases of burning woods from necessity or accident: *Caton v. Toler*, 160-104; *Lamb v. Sloan*, 94-534; *Averitt v. Murrell*, 49-322; *Tyson v. Rasberry*, 8-60.

This applies only to woods: *Mizzell v. Mfg. Co.*, 158-265. "Woods" defined: *Achenbach v. Johnston*, 84-264; *Hall v. Cranford*, 50-3; *Averitt v. Murrell*, 49-322.

Liability for damages in burning without giving notice: *Stanland v. Rourk*, 168-568. An agreement by adjoining landowners to take less than two days notice will not bar a stranger from recovering the penalty: *Lamb v. Sloan*, 94-534; *Wright v. Yarborough*, 4-687. Proof of waiver of notice is a sufficient answer to an action for damages: *Lamb v. Sloan*, 94-534; *Roberson v. Kirby*, 52-477. See, also, *Garrett v. Freeman*, 50-78.

4310. Local: Willfully or negligently setting fire to woods and fields. If any person shall willfully or negligently set on fire, or cause to be set on fire, any woods, lands or fields whatsoever, every such offender, upon conviction, shall be fined in the discretion of the court, one-half of the fine to go to the informer, if there be one, and the residue to the school fund of the county wherein such offense was committed, or he shall be imprisoned, in the discretion of the court. This section shall apply only to Caldwell, Wilkes, Watauga, Burke, McDowell, Yadkin, Cherokee and Mitchell counties.

1907, c. 320, ss. 4, 5.

Section cited in *Lumber Co. v. Hayes*, 157-333.

4311. Setting fire to woodlands and grass lands with campfires. Any wagoner, hunter, camper or other person who shall kindle a campfire or shall authorize another to kindle such fire, unless all combustible material for the space of ten feet surrounding the place where such fire is kindled has been removed, or shall leave a campfire without fully extinguishing it, or who shall accidentally or negligently by the use of any torch, gun, match or other instrumentality, or in any manner whatever, start any fire upon any grass land, brush land or woodland without fully extinguishing the same, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment not exceeding thirty days. For the purposes of this section the term "woodland" is to be taken to include all forest areas, both timber and cut-over land, and all second-growth stands on areas that have at one time been cultivated.

Rev., s. 3347; Code, s. 54; 1885, c. 126; 1913, c. 8; 1915, c. 243, ss. 9, 11.

4312. Certain fires to be guarded by watchman. All persons, firms or corporations who shall burn any tar kiln or pit of charcoal, or set fire to or burn any brush, grass or other material, whereby any property may be endangered or destroyed, shall keep and maintain a careful and competent watchman in charge of such kiln, pit, brush or other material while burning. Any person, firm or corporation violating the provisions of this section shall be punishable by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment for not exceeding thirty days. Fire escaping from such kiln, pit, brush or other material while burning shall be prima facie evidence of neglect of these provisions.

1915, c. 243, s. 10.

4313. Burning or otherwise destroying crops in the field. If any person shall willfully burn or destroy any other person's corn, cotton, wheat, barley, rye, oats, buckwheat, rice, tobacco, hay, straw, fodder, shucks or other provender in a stack, hill, rick or pen, or secured in any other way out of doors, or grass or sedge standing on the land, he shall be guilty of a felony, and shall be punished by imprisonment in the county jail or state's prison for not less than four months nor more than five years.

Rev., s. 3339; 1885, c. 42; 1874-5, c. 133; Code, s. 985, subsec. 2.

See generally: *State v. Huskins*, 126-1070; *State v. Avery*, 109-798. **Insufficiency of indictment:** *State v. Hall*, 93-571. **Sufficiency of indictment:** *State v. Huskins*, 126-1070.

4314. Local: Removing dog-tongue and certain other products from another's land. If any person shall enter upon and remove from the lands of any other person, without first obtaining permission from the landowner, any dog-tongue (or vanilla), whortleberries or other fruits, or any other marketable product of the soil, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than fifty dollars for each offense, or imprisoned not more than thirty days: Provided, that this section shall apply to the counties of Sampson and Duplin only.

Rev., s. 3683; 1889, c. 77.

4315. Injuries to dams and water channels of mills and factories. If any person shall cut away, destroy or otherwise injure any dam, or part thereof, or shall obstruct or damage any race, canal or other water channel erected, opened, used or constructed for the purpose of furnishing water for the operation of any mill, factory or machine works, or for the escape of water therefrom, he shall, upon conviction, be fined or imprisoned, or both, at the discretion of the court.

Rev., s. 3678; Code, s. 1087; 1866, c. 48.

Placing obstructions in a mill-race below mill is not a violation of this section: *State v. Tomlinson*, 77-528. Section cited in *State v. Suttle*, 115-788.

4316. Taking unlawful possession of another's house. If any person shall enter upon the lands of another and take possession of any house or other building thereon, without permission of the owner or his agent and without a bona fide claim of right or title so to enter and take possession, and shall fail or refuse to vacate such premises within ten days after being notified personally in writing to do so, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court.

Rev., s. 3685; 1893, c. 347.

See annotations under section 4305.

4317. Injuring houses, churches, fences and walls. If any person shall, by any other means than burning or attempting to burn, unlawfully and willfully demolish, destroy, deface, injure or damage any of the houses or other buildings mentioned in this chapter in the article entitled Arson and Other Burnings; or shall unlawfully and willfully burn, demolish, pull down, destroy, deface, damage or injure any church, uninhabited house, outhouse or other house or building not mentioned in such article; or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure, or any part thereof, surrounding or about any yard, garden, cultivated field or pasture, or about any church or graveyard, or about any factory or other house in which machinery is used, every person so offending shall be guilty of a misdemeanor.

Rev., s. 3673; Code, s. 1062; R. C., c. 34, s. 103.

As to what constitutes a "cultivated field," see *State v. Campbell*, 133-640; *State v. McMinn*, 81-585. As to what constitutes a "fence," see *State v. Roberts*, 101-744. A jail is included in "houses or buildings" previously mentioned in this chapter: *State v. Bryan*, 89-531. Destruction of crib by use of dynamite: *State v. Martin*, 173-808.

Under an indictment for arson, where a special verdict is rendered making defendant guilty hereunder, court may proceed to judgment as for a misdemeanor: *State v. Clark*, 52-167.

To be guilty hereunder defendant must be guilty of a trespass, and to be guilty of a trespass he must act wilfully and unlawfully: *State v. McCracken*, 118-1240; *State v. Watson*, 86-626;

State v. Headrick, 48-375; State v. Williams, 44-197—and a mortgagor in possession after a sale under the mortgage is not a trespasser, and is not guilty hereunder, State v. Jones, 129-508. Act of removing fence justified under judgment to establish a cartway: State v. Hardy, 158-652.

Indictment hereunder cannot be supported by proof that the act was done by owner or his tenant: State v. Mace, 65-344; see, also, State v. Williams, 44-197; State v. Watson, 86-626—but the landlord is guilty if he removes a fence over the protest of his tenant, State v. Piper, 89-551. Lessee not indictable hereunder for injury to house during the continuance of his term: State v. Whitener, 92-798.

Where state shows actual possession in the prosecutor, defendant cannot exculpate himself by showing title to the land upon which the fence, etc., was situated: State v. Taylor, 172-892; State v. Campbell, 133-640; State v. Fender, 125-649; State v. Howell, 107-835; State v. Marsh, 91-632; State v. Piper, 89-551; State v. Hovis, 76-117; State v. Graham, 53-397.

INTENT. Party who by mistake builds houses on land of another, and pulls them down while still in possession, is not guilty hereunder: State v. Reynolds, 95-616. If the act is done by one under direction or by permission of another whom he honestly supposes the owner of the premises, he is not guilty: State v. Roseman, 70-235. As to removal by town marshal, see State v. Goodwin, 145-461.

INDICTMENT. Must allege possession in actual possessor: State v. Whitener, 92-798; State v. Mason, 35-341. Must aver that fence or wall surrounds or incloses the field: State v. Biggers, 108-760. Where trespass is upon a garden it should be so charged: State v. McMinn, 81-585.

Sufficient charge "that defendant did cut and destroy a wire fence inclosing a pasture": State v. Biggers, 108-760. Sufficiency of indictment: State v. Taylor, 172-892.

EVIDENCE. As to bona fide claim to the locus in quo admissible to explain possession of defendant, see State v. Reynolds, 95-616; State v. Roseman, 66-634—also evidence of a claim of a bona fide agreement to remove a fence admissible, State v. McCracken, 118-1240. Under indictment for removing fence, evidence that defendant was acting for another inadmissible: State v. Campbell, 133-640. The manner, occasion, circumstances attending the doing of the injury make evidence going to prove that the intent was wilful or otherwise: State v. Howell, 107-835; State v. Whitener, 93-590; State v. Marsh, 91-632; State v. Watson, 86-626; State v. Hovis, 76-117.

ACT OF 1846, CH. 70. This act reduces burning of a barn from a felony to a misdemeanor: State v. Upchurch, 31-454. Under it a person may be convicted for removing fence around a field in course of preparation for cultivation: State v. Allen, 35-36. Indictment must allege possession in actual possessor: State v. Mason, 35-341. To be guilty under this act one must be guilty of a trespass: State v. Headrick, 48-375. Does not extend to persons in rightful possession of premises, as quasi tenant: State v. Williams, 44-197.

Section cited in State v. Padgett, 82-544; Gudger v. Penland, 108-600; State v. Perry, 64-305. As to conflict between this section and section 1831, see State v. Biggers, 108-760.

4318. Injuring bridges. If any person shall unlawfully and willfully demolish, destroy, break, tear down, injure or damage any bridge across any of the creeks or rivers or other streams in the state, he shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discretion of the court.

Rev., s. 3771; Code, s. 993; 1883, c. 271.

4319. Removing, altering or defacing landmarks. If any person, firm or corporation shall knowingly remove, alter or deface any landmark in anywise whatsoever, or shall knowingly cause such removal, alteration or defacement to be done, such person, firm or corporation shall be guilty of a misdemeanor. This section shall not apply to landmarks, such as creeks and other small streams, which the interest of agriculture may require to be altered or turned from their channels, nor to such persons, firms or corporations as own the fee simple in the lands on both sides of the lines designated by the landmarks removed, altered or

defaced. Nor shall this section apply to those adjoining landowners who may by agreement remove, alter or deface landmarks in which they alone are interested.

Rev., s. 3674; Code, s. 1063; 1858-9, c. 17; 1915, c. 248.

A wooden stake set as a mark is within this section: *State v. Jenkins*, 164-527.

Indictment charging that "one A. B., with force and arms, wilfully and unlawfully did alter, deface and remove a certain corner tree, the property of C.," etc., is sufficient: *State v. Bryant*, 111-693—and it is not necessary to negative the matter contained in the proviso hereunder, *Ibid.*

4320. Removing or defacing monuments and tombstones. If any person shall, unlawfully and on purpose, remove from its place any monument of marble, stone, brass, wood or other material, erected for the purpose of designating the spot where any dead body is interred, or for the purpose of preserving and perpetuating the memory, name, fame, birth, age or death of any person, whether situated in or out of the common burying ground, or shall unlawfully and on purpose break or deface such monument, or alter the letters, marks or inscription thereof, he shall be guilty of a misdemeanor.

Rev., s. 3680; Code, s. 1088; R. C., c. 34, s. 102; 1840, c. 6.

Where owner of land consents, expressly or impliedly, to the burying of dead bodies upon his land, he has no right afterwards to remove the bodies or deface or remove monuments, etc., erected to their memory: *State v. Wilson*, 94-1015.

Sufficiency of indictment generally: *Ibid.* Not necessary to designate name of person whose tomb has been defaced: *Ibid.* Not necessary to charge in terms that dead body was that of a human being: *Ibid.*

Evidence sufficient to go to jury as to guilt, see *Ibid.*

4321. Interfering with graveyards. If any person shall unlawfully take away any stone, brick, iron or other material that encloses private graveyards, or shall cut or keep open any ditch or drainway, or put any permanent log or other obstruction not intended as a monument to a grave in such graveyards, or knowingly plow over and tear up any grave, or shall remove or change the location of any fence around such graveyard without the consent of such person or persons as may have parents, children or brothers or sisters buried therein, he shall be guilty of a misdemeanor, and on conviction shall be fined not more than ten dollars or imprisoned not more than thirty days.

Rev., s. 3681; 1889, c. 130; 1919, c. 218.

4322. Disturbing graves. If any person shall, without due process of law, or the consent of the surviving husband or wife or the next of kin of the deceased, and of the person having the control of such grave, open any grave for the purpose of taking therefrom any dead body, or any part thereof buried therein, or anything interred therewith, he shall be guilty of a felony, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court.

Rev., s. 3672; 1885, c. 90.

The opening of the grave for purpose of removing anything interred therein is conclusive as to the intent: *State v. McLean*, 121-589. Mayor of town counseling commissioners that they had right to remove bodies, etc., guilty in this case: *Ibid.*

4323. Interfering with gas, electric and steam appliances. If any person shall willfully, with intent to injure or defraud, commit any of the acts set forth in the following subsections, he shall be guilty of a misdemeanor:

1. Connect a tube, pipe, wire or other instrument or contrivance with a pipe or wire used for conducting or supplying illuminating gas, fuel, natural gas or electricity in such a manner as to supply such gas or electricity to any burner, orifice, lamp or motor where the same is or can be burned or used without passing through the meter or other instrument provided for registering the quantity consumed; or,

2. Obstruct, alter, injure or prevent the action of a meter or other instrument used to measure or register the quantity of illuminating fuel, natural gas or electricity consumed in a house or apartment, or at an orifice or burner, lamp or motor, or by a consumer or other person other than an employee of the company owning any gas or electric meter, who willfully shall detach or disconnect such meter, or make or report any test of, or examine for the purpose of testing any meter so detached or disconnected; or,

3. In any manner whatever change, extend or alter any service or other pipe, wire or attachment of any kind, connecting with or through which natural or artificial gas or electricity is furnished from the gas mains or pipes of any person, without first procuring from said person written permission to make such change, extension or alterations; or,

4. Make any connection or reconnection with the gas mains, service pipes or wires of any person, furnishing to consumers natural or artificial gas or electricity, or turn on or off or in any manner interfere with any valve or stop-cock or other appliance belonging to such person, and connected with his service or other pipes or wires, or enlarge the orifice of mixers, or use natural gas for heating purposes except through mixers, or electricity for any purpose without first procuring from such person a written permit to turn on or off such stop-cock or valve, or to make such connection or reconnections, or to enlarge the orifice of mixers, or to use for heating purposes without mixers, or to interfere with the valves, stop-cocks, wires or other appliances of such, as the case may be; or

5. Retain possession of or refuse to deliver any mixer, meter, lamp or other appliance which may be leased or rented by any person, for the purpose of furnishing gas, electricity or power through the same, or sell, lend or in any other manner dispose of the same to any person other than such person entitled to the possession of the same; or,

6. Set on fire any gas escaping from wells, broken or leaking mains, pipes, valves or other appliances used by any person in conveying gas to consumers, or interfere in any manner with the wells, pipes, mains, gate-boxes, valves, stop-cocks, wires, cables, conduits or any other appliances, machinery or property of any person engaged in furnishing gas to consumers unless employed by or acting under the authority and direction of such person; or,

7. Open or cause to be opened, or reconnect or cause to be reconnected any valve lawfully closed or disconnected by a district steam corporation; or,

8. Turn on steam or cause it to be turned on or to reënter any premises when the same has been lawfully stopped from entering such premises.

Rev., s. 3666; 1901, c. 735.

4324. Injuring fixtures and other property of gas companies; civil liability.
If any person shall willfully, wantonly or maliciously remove, obstruct, injure or destroy any part of the plant, machinery, fixtures, structures or buildings, or

anything appertaining to the works of any gas company, or shall use, tamper or interfere with the same, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days for such offense. Such person shall also forfeit and pay to the company so injured, to be sued for and recovered in a civil action, double the amount of the damages sustained by any such injury.

Rev., s. 3671; 1889 (Pr.), c. 35, s. 3.

4325. Tampering with engines and boilers. If any person shall willfully turn out water from any boiler or turn the bolts of any engine or boiler, or meddle or tamper with such boiler or engine, or any other machinery in connection with any boiler or engine, causing loss, damage, danger or delay to the owner in the prosecution of his work, he shall be guilty of a misdemeanor.

Rev., s. 3667; 1901, c. 733.

4326. Injuring wires and other fixtures of telephone, telegraph and electric-power companies. If any person shall willfully injure, destroy or pull down any telegraph, telephone or electric-power-transmission pole, wire, insulator or any other fixture or apparatus attached to a telegraph, telephone or electric-power-transmission line, he shall be guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court.

Rev., s. 3847; Code, s. 1118; 1881, c. 4; 1883, c. 103; 1907, c. 827, s. 1.

4327. Making unauthorized connections with telephone and telegraph wires. It shall be unlawful for any person to tap or make any connection with any wire or apparatus of any telephone or telegraph company operating in this state, except such connection as may be authorized by the person or corporation operating such wire or apparatus. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than ten dollars or imprisoned not more than ten days for each offense. Each day's continuance of such unlawful connection shall be a separate offense.

1911, c. 113.

4328. Injuring fixtures and other property of electric-power companies. It shall be unlawful for any person willfully and wantonly, and without the consent of the owner, to take down, remove, injure, obstruct, displace or destroy any line erected or constructed for the transmission of electrical current, or any poles, towers, wires, conduits, cables, insulators or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or to sever any wire or cable thereof, or in any manner to interrupt the transmission of electrical current over and along any such line, or to take down, remove, injure or destroy any house, shop, building or other structure or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electrical current, or to wantonly or willfully cause injury to any of the property mentioned in this section by means of fire. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned not longer than one year, or both fined and imprisoned, in the discretion of the court

1907, c. 919.

4329. Felling trees on telephone and electric-power wires. If any person shall negligently and carelessly cut or fell any tree, or any limb or branch therefrom, in such a manner as to cause the same to fall upon and across any telephone, electric light or electric-power-transmission wire, from which any injury to such wire shall be occasioned, he shall be guilty of a misdemeanor, and shall also be liable to a penalty of fifty dollars for each and every offense.

Rev., s. 3849; 1903, c. 616; 1907, c. 827, s. 2.

4330. Interfering with telephone lines. If any person shall unnecessarily disconnect the wire or in any other way render any telephone line, or any part of such line, unfit for use in transmitting messages, or shall unnecessarily cut, tear down, destroy or in any way render unfit for the transmission of messages any part of the wire of a telephone line, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned for a term not exceeding two years, in the discretion of the court.

Rev., s. 3845; 1901, c. 318.

ART. 23. TRESPASSES TO PERSONAL PROPERTY

4331. Malicious injury to personal property. If any person shall wantonly and willfully injure the personal property of another, he shall be guilty of a misdemeanor, whether the property be destroyed or not, and shall be punished by fine or imprisonment, or both, in the discretion of the court.

Rev., s. 3676; Code, s. 1082; 1885, c. 53; 1876-7, c. 18.

A promissory note or a due bill is "personal property" within meaning of this section: *State v. Sneed*, 121-614—so also an electric street car, *State v. Martin*, 141-832.

The offense here created may be committed jointly by two persons, one doing the act and the other, as principal, aiding and abetting him, or participating with him: *Ibid*.

Indictment which charges that the act was "wantonly and wilfully" done is sufficient: *State v. Martin*, 107-904. Indictment which charged the killing of a hog "unlawfully and on purpose" cannot be sustained hereunder: *State v. Tweedy*, 115-704. Since the act of 1885, ch. 53, it is unnecessary to allege or prove any malice toward owner of the personal property: *State v. Sneed*, 121-614. Proof of injury to an ox will not support an indictment charging injury to a cow: *State v. Hill*, 79-656. Wounding cattle maliciously was not an indictable offense at common law: *State v. Manuel*, 72-201. No defense to indictment hereunder for injury to livestock, that stock law prevailed in community, and prosecutor turned his stock out: *State v. Brigman*, 94-888. Owner of dog has such property in him as will sustain indictment for injury to property: *State v. Latham*, 35-33.

Section cited in *State v. Avery*, 109-798. Compare, as to meaning of words "wanton" and "wilful," *State v. Brigman*, 94-888. As to necessity to lay the property truly in indictment, a variance in that respect being fatal: *State v. Mason*, 35-341; *State v. Hill*, 79-656.

4332. Malicious removal of packing from railway coaches and other rolling stock. If any person shall willfully and maliciously take or remove the waste or packing from the journal box of any locomotive, engine, tender, carriage, coach, car, caboose or truck used or operated upon any railroad, whether the same be operated by steam or electricity, he shall upon conviction thereof be fined or imprisoned in the jail or state's prison, in the discretion of the court.

Rev., s. 3759; 1905, c. 335.

4333. Removing boats or their fixtures and appliances. If any person shall take away from any landing or other place where the same shall be, or shall loose, unmoor, or turn adrift from the same, any boat, canoe, pettiaugua, oars,

paddles, sails or tackle belonging to or in the lawful custody of any person; or if any person shall direct the same to be done without the consent of the owner, or the person having the custody or possession of such property, he shall forfeit and pay to such owner, or person having the custody and possession as aforesaid, the sum of two dollars, and shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, in the discretion of the court. The owner may also have his action for such injury. The penalties aforesaid shall not extend to any person who shall press any such property by public authority.

Rev., s. 3544; Code, s. 2288; 1889, c. 378; R. C., c. 14, ss. 1, 3.

4334. Injuring livestock not inclosed by lawful fence. If any person shall willfully and unlawfully kill or abuse any horse, mule, hog, sheep or other cattle, the property of another, in any inclosure not surrounded by a lawful fence, such person shall be guilty of a misdemeanor, and fined or imprisoned, at the discretion of the court.

Rev., s. 3313; Code, s. 1003; 1868-9, c. 253.

See generally: *State v. Deal*, 92-802; *State v. Godfrey*, 97-507. Construction of word "cattle": *State v. Groves*, 119-822—of word "inclosure," *State v. Staton*, 66-640.

As to warrant and indictment generally, see *State v. Deal*, 92-802; *State v. Howe*, 100-449—sufficiency of, *State v. Allen*, 69-23; *State v. Painter*, 70-70—insufficiency of, *State v. Staton*, 66-640; *State v. Simpson*, 73-269; *State v. Hill*, 79-656; *State v. Parker*, 81-548; *State v. Whitaker*, 85-566.

Wounding of cattle maliciously is not an offense at common law: *State v. Manuel*, 72-201; *State v. Hill*, 79-656. Shooting at cattle carelessly renders person criminally liable: *State v. Barnard*, 88-661.

Case of interest hereunder: *State v. Godfrey*, 97-507.

4335. Taking away or injuring exhibits at fairs. If any person, without the license of the owner, or any agricultural or other society, shall unlawfully carry away, remove, destroy, mar, deface or injure anything, animate or inanimate, while on exhibition on the grounds of any such society, or going to or returning from the same, he shall be guilty of a misdemeanor. It shall be sufficient in any indictment for any such offense, or for the larceny of any such thing, animate or inanimate as aforesaid, to charge that the thing so carried away, destroyed, marred, injured or feloniously stolen is the property of the society to which the said thing shall be forwarded for exhibition.

Rev., s. 3668; Code, s. 2796; 1870-1, c. 184, s. 4.

For fraudulent entries at fairs, see section 4289.

SUBCHAPTER 8. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY

ART. 24. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY

4336. Crime against nature. If any person shall commit the abominable and detestable crime against nature, with mankind or beast, he shall be imprisoned in the state's prison not less than five nor more than sixty years.

Rev., s. 3349; Code, s. 1010; R. C., c. 34, s. 6; 1868-9, c. 167, s. 6; 5 Eliz., c. 17; 25 Hen. VIII, c. 6.

What constitutes the crime under this section: *State v. Griffin*, 175-767; *State v. Fenner*, 166-247. Defendant may be convicted of an attempt to commit the crime: *State v. Savage*, 161-245.

4337. Incest between certain near relatives. In all cases of carnal intercourse between grandparent and grandchild, parent and child, and brother and sister of the half or whole blood, the parties shall be guilty of a felony, and shall be punished for every such offense by imprisonment in the state's prison for a term not exceeding fifteen years, in the discretion of the court.

Rev., s. 3351; Code, s. 1060; 1879, c. 16, s. 1; 1911, c. 16.

Incest not a criminal offense at common law: *State v. Cutshall*, 109-774; *State v. Brittain*, 117-783; *State v. Kresler*, 78-469. Carnal intercourse with one's illegitimate child is incest: *State v. Lawrence*, 95-659. Relation existing between the parties may make one guilty of incest without the guilt of the other: *Strider v. Lewey*, 176-448.

Amended by 1911, ch. 16, the law is not repealed, but offenses before amendment are punished under original section: *State v. Broadway*, 157-598.

As to indictment, see *State v. Lawrence*, 96-659.

Wife's confession to husband, under his threats, that she committed incest is not admissible: *State v. Brittain*, 117-783—nor like confessions to third party in husband's presence, *Ibid.*

4338. Incest between uncle and niece and nephew and aunt. In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, in the discretion of the court.

Rev., s. 3352; Code, s. 1061; 1879, c. 16, s. 2.

Incest not a criminal offense at common law: *State v. Brittain*, 117-783; *State v. Cutshall*, 109-774; *State v. Kresler*, 78-469. Carnal intercourse with daughter of half-sister is incest: *State v. Harris*, 149-513.

4339. Seduction. If any man shall seduce an innocent and virtuous woman under promise of marriage, he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the state prison not exceeding the term of five years: Provided, the unsupported testimony of the woman shall not be sufficient to convict: Provided further, that marriage between the parties shall be a bar to further prosecution hereunder. But when such marriage is relied upon by the defendant, it shall operate as to the costs of the case as a plea of *nolo contendere*, and the defendant shall be required to pay all the costs of the action or be liable to imprisonment for nonpayment of the same.

Rev., s. 3354; 1885, c. 248; 1917, c. 39.

Section contemplates a seduction under promise of marriage in the nature of deceit: *State v. Horton*, 100-443.

Essentials to convict: *State v. Cline*, 170-751. The defendant, if of marriageable age, may be convicted: *State v. Creed*, 171-837.

Deceit being of the essence of seduction under promise of marriage, section 4512 excepts it from the two-year statute of limitations: *State v. Crowell*, 116-1052.

Consent is no defense, if seduction proved: *State v. Horton*, 100-443.

The words "innocent and virtuous woman" interpreted: *State v. Whitley*, 141-823; *State v. Crowell*, 116-1052; *State v. Ferguson*, 107-841.

Punishment may be by fine or imprisonment, but not both: *State v. Crowell*, 116-1052.

Indictment need not aver a marriage contract: *State v. Whitley*, 141-823. As to definiteness and persuasiveness of the promise, see *State v. Ring*, 142-596; *State v. Raynor*, 145-472; *State v. Whitley*, 141-823. A bill of indictment which uses the words "innocent virtuous," omitting "and," is not defective: *State v. Ratliff*, 170-707.

Counsel allowed to comment upon fact that defendant admitted to prosecutrix that he had intercourse with another woman: *State v. Kincaid*, 142-657.

EVIDENCE. As to sufficiency: *State v. Fulcher*, 176-724; *State v. Cooke*, 176-731; *State v. Ferguson*, 107-841; *State v. Horton*, 100-443; *State v. Ring*, 142-596. Corroborating testi-

mony: State v. Pace, 159-462; State v. Malonee, 154-200; State v. Kincaid, 142-657; State v. Whitley, 141-823; State v. Ferguson, 107-841. **What is supporting testimony:** State v. Moody, 172-967. **Declarations:** State v. Kincaid, 142-657. **Child may be shown to jury for them to see if there is any resemblance between such child and defendant:** State v. Horton, 100-443. **Character:** State v. Kincaid, 142-657; State v. Whitley, 141-823; State v. Ferguson, 107-841.

Evidence of intoxication of prosecutrix prior to seduction is competent: State v. Garland, 95-671—as also is evidence of her inconsistent statements, *Ibid.* **Competent to ask defendant if he has not transferred his property to avoid result of indictment:** State v. Kincaid, 142-657. **Competent for prosecutrix to tell the inducements and circumstances under which she yielded:** State v. Raynor, 145-472; State v. Whitley, 141-823. **State can show intercourse of prisoner with prosecutrix after the first act:** State v. Robertson, 121-551.

Subsequent familiarities do not negative character as innocent and virtuous woman, but may be considered with reference to character as a witness: State v. Lang, 171-778. **As to competency of testimony that there were reports in the neighborhood derogatory to character of prosecutrix, see** State v. Whitley, 141-823.

4340. Miscegenation. All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are forever prohibited, and shall be void. Any person violating this section shall be guilty of an infamous crime, and shall be punished by imprisonment in the county jail or state's prison for not less than four months nor more than ten years, and may also be fined, in the discretion of the court.

Rev., s. 3369; Code, s. 1084; Const., Art. XIV, s. 8; R. C., c. 68, s. 7; 1834, c. 24; 1838-9, c. 24.

This section was not affected by changes in the federal and state constitutions, nor by the civil rights bill: State v. Hairston, 63-451; Puit v. Comrs., 94-709; State v. Reinhardt, 63-547.

Marriage solemnized in a state whose laws permit such marriage between a negro and white person, domiciled in such state, is valid in this state: State v. Ross, 76-242—but such marriage solemnized out of this state, with intent to evade our laws, is void, State v. Ross, 76-242; State v. Kenney, 76-251.

As to evidence, see Hopkins v. Bowers, 111-175.

Section cited in State v. Fore, 23-378; State v. Hooper, 27-201. **Compare** State v. Watters, 25-455; State v. Melton, 44-49.

4341. Issuing license for marriage between white person and negro; performing marriage ceremony. If any register of deeds shall knowingly issue any license for marriage between any person of color and a white person; or if any clergyman, minister of the gospel or justice of the peace shall knowingly marry any such person of color to a white person, the person so offending shall be guilty of a misdemeanor.

Rev., s. 3370; Code, s. 1085; R. C., c. 34, s. 80; 1830, c. 4, s. 2.

4342. Bigamy. If any person, being married, shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail for any term not less than four months nor more than ten years. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying

a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time; nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage; nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

Rev., s. 3361; Code, s. 988; R. C., c. 34, s. 15; 1790, c. 323; 1809, c. 783; 1829, c. 9; 1913, c. 26. See 9 Geo. IV, c. 31, s. 22.

JURISDICTION. Where offense committed outside of state there is no jurisdiction: *State v. Ray*, 151-710 (but see change in section as to living as man and wife in this state); *State v. Cutshall*, 110-538; *State v. Burnett*, 83-615. The punishment is not for bigamy in another state, but for living together here in bigamous cohabitation: *State v. Moon*, 178-715. Venue in county where defendant may be apprehended: *Ibid.*; *State v. Ray*, 151-710 (but see *State v. Bray*, 35-289, saying must be in county where second marriage took place)—and where wrong county, plea in abatement is proper remedy where permissible, *State v. Long*, 143-671.

INDICTMENT. As to sufficiency of indictment, see *State v. Long*, 143-670; *State v. Connor*, 142-707; *State v. Goulden*, 134-743; *State v. Melton*, 120-591; *State v. Davis*, 109-780; *State v. Bray*, 35-289; *State v. Norman*, 13-222. Not necessary to state date of marriage: *State v. Long*, 143-670—nor where second marriage took place, *Ibid.*—nor the name of first wife, *State v. Davis*, 109-780—nor that defendant had never been divorced from first wife, *State v. Melton*, 120-591; *State v. Davis*, 109-780. As to variance in name of first wife, see *State v. Davis*, 109-780. Defendant can ask for bill of particulars: *State v. Long*, 143-671; see, also, section 4613.

BURDEN OF PROOF. Where want of mental capacity is relied on as defense, burden is on defendant to satisfy jury that he had not sufficient capacity to know right from wrong: *State v. Davis*, 109-780. Burden on defendant to show valid divorce or seven years absence of the other party to the marriage: *State v. Herron*, 175-754; *State v. Long*, 143-671; *State v. Goulden*, 134-744—and that he did not know first wife was living, *Ibid.* Burden on defendant to show second marriage took place in another state: *State v. Long*, 143-671.

EVIDENCE. Second wife is a competent witness either for or against husband: *State v. Patterson*, 24-346. First wife competent to prove her marriage: *State v. Melton*, 130-591. Proof of first marriage may be made by admission of defendant or by circumstantial evidence: *State v. Goulden*, 134-743; *State v. Wylde*, 110-500. As to use of marriage license in proving fact of marriage, see *State v. Melton*, 120-591; *State v. Davis*, 109-780. Record of marriages for county is competent to prove marriage: *State v. Melton*, 120-591. Other cases as to proving marriage: *State v. Bray*, 35-289; *State v. Robbins*, 28-23.

After absence of wife for seven years, defendant not justified in remarrying without making inquiry as to whether first wife living, he having driven her from home: *State v. Goulden*, 134-744.

GENERALLY. The section constitutional: *State v. Long*, 143-670—except that part which attempts to constitute a second, or bigamous, marriage in another state a crime without parties subsequently living together in this state: *State v. Cutshall*, 110-538. Bigamy no crime at common law: *State v. Burns*, 90-707; *State v. Barnett*, 83-615.

Amended by 1913, c. 26, divorce in another state granted upon constructive service is not sufficient defense: *State v. Herron*, 175-754; s. c., 173-801.

As to marriage of former slaves, see *State v. Melton*, 120-591; *State v. Whitford*, 86-636.

Carnal knowledge not necessary to validity of marriage: *State v. Patterson*, 24-346. Ceremony by de facto justice is valid: *State v. Davis*, 109-780.

No defense that at first marriage defendant had no license: *State v. Robbins*, 28-23. Ignorance of law, and advice that defendant's first marriage was not valid, are no defenses: *Ibid.*

4343. Fornication and adultery. If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor: Provided, that the admissions or confessions of one shall not be received in evidence against the other.

Rev., s. 3350; Code, s. 1041; R. C., c. 34, s. 45; 1805, c. 684.

Upon trial for fornication and adultery, where one defendant is found guilty and the other not guilty, no judgment can be rendered against the former: *State v. Mainor*, 28-340; *State v. Reinhart*, 106-787—except when the intent is not the same, when one may be acquitted and the other convicted, *State v. Cutshall*, 109-764, overruling in part *State v. Mainor*, 28-340; *State v. Simpson*, 133-676—but in an indictment against two, one may be convicted and punished without, or before, any conviction of the other, *State v. Lyerly*, 52-158; *State v. Parham*, 50-416.

Marriage, divorce and remarriage in another state, and according to the laws of that state, are valid here: *State v. Schlachter*, 61-520.

Persons who were formerly slaves, and married as such, are not guilty of fornication and adultery by cohabitation after emancipation: *State v. Adams*, 65-537.

Marriage of a white person and a negro void: *State v. Kennedy*, 76-251; *State v. Ross*, 76-242; *State v. Reinhart*, 63-547; *State v. Hairston*, 63-451; *State v. Melton*, 44-49; *State v. Hooper*, 27-201; *State v. Fore*, 23-378; see annotations in chapter entitled *Marriage*.

One may be guilty of both rape and fornication and adultery: *State v. Summers*, 98-702. Where verdict returned as to fornication, but not as to adultery, see *State v. Cowell*, 26-231. New trial may be granted one defendant and judgment pronounced as to the other: *State v. Parham*, 50-416.

Punishment in discretion of court: *State v. Manly*, 95-661.

Compare cases under act 1805, holding that the man may be indicted separately: *State v. Parham*, 50-416; *State v. Mainor*, 28-340; *State v. Cox*, 4-597—that indictment must charge that the man and woman have not intermarried, *State v. Dickinson*, 18-349; *State v. Aldridge*, 14-331—that defendants may be convicted of either fornication or adultery, *State v. Cowell*, 26-231.

Section cited in *State v. Custer*, 65-339; *State v. Vermington*, 71-264; *State v. Perry*, 71-522. Referred to in *Prendergast v. Prendergast*, 146-226.

INDICTMENT. Sufficiency of: *State v. Jolly*, 20-108; *State v. Fore*, 23-378; *State v. Lyerly*, 52-158; *State v. Tally*, 74-322; *State v. Guest*, 100-410; *State v. Stubbs*, 108-774. Need not charge that parties were male and female and not married, if marriage is negatived and the offense charged according to the statute: *State v. Lashley*, 84-754; but see dicta in *State v. Connor*, 142-708; see, also, *State v. Aldridge*, 14-331; *State v. Dickerson*, 18-348. Indictment sufficient which alleges that defendants "did unlawfully bed and cohabit together": *State v. Britt*, 150-811.

EVIDENCE. Generally: *State v. Gay*, 94-814; *State v. Summers*, 98-702. Sufficiency of: *State v. Wade*, 169-306; *State v. Chaney*, 110-507; *State v. Poteet*, 30-23; *State v. Eliason*, 91-564; *State v. Dixon*, 104-704; *State v. McDuffie*, 107-885; *State v. Dukes*, 119-782; *State v. Rhinehart*, 106-787. Insufficiency: *State v. Pope*, 109-849; *State v. Jones*, 89-559; *State v. Waller*, 80-401; *State v. Ballard*, 79-627; *State v. Adams*, 65-537. Competency: *State v. Manly*, 95-661; *State v. Roby*, 121-682; *State v. Guest*, 100-410. Corroborating: *State v. Austin*, 108-780; *State v. Wheeler*, 104-893; *State v. Pippin*, 88-646; *State v. Kemp*, 87-538.

Witnesses competent: *State v. Guest*, 100-410; *State v. Phipps*, 76-203. Declarations of wife: *State v. Austin*, 108-780. Admissions: *State v. Simpson*, 133-676; *State v. Rinehart*, 106-787. Burden of proof: *State v. Connor*, 142-708; *State v. Cody*, 111-725; *State v. McDuffie*, 107-885.

4344. **Inducing female persons to enter hotels or boarding-houses for immoral purposes.** Any person who shall knowingly persuade, induce or entice, or cause to be persuaded, induced or enticed, any woman or girl to enter a hotel, public inn or boarding-house for the purpose of prostitution or debauchery or for any other immoral purpose, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished in the discretion of the court.

1917, c. 158, s. 1.

4345. **Opposite sexes occupying same bedroom at hotel for immoral purposes; falsely registering as husband and wife.** Any man and woman found occupying the same bedroom in any hotel, public inn or boarding-house for any immoral purpose, or any man and woman falsely registering as, or otherwise representing

themselves to be, husband and wife in any hotel, public inn or boarding-house, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished in the discretion of the court.

1917, c. 158, s. 2.

4346. Permitting unmarried female under eighteen in house of prostitution. Whoever, being the keeper of a house of prostitution, or assignation house, building or premises in this state where prostitution, fornication, or concubinage is allowed or practiced, shall suffer or permit any unmarried female under the age of eighteen years to live, board, stop, or room in such house, building or premises, shall be guilty of a misdemeanor.

1919, c. 288; P. L. 1913, c. 761, s. 18.

4347. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined. On a prosecution in any court for keeping a disorderly house or bawdy-house, or permitting a house to be used as a bawdy-house, or used in such a way as to make it disorderly, or a common nuisance, evidence of the general reputation or character of the house shall be admissible and competent; and evidence of the lewd, dissolute and boisterous conversation of the inmates and frequenters, while in and around such house, shall be prima facie evidence of the bad character of the inmates and frequenters, and of the disorderly character of the house. The manager or person having the care, superintendency or government of a disorderly house or bawdy-house is the "keeper" thereof, and one who employs another to manage and conduct a disorderly house or bawdy-house is also "keeper" thereof.

1907, c. 779.

For statute declaring prostitutes and keepers of bawdy-houses vagrants, see section 4459.

A disorderly house is a house kept in a way to disturb and scandalize the public generally or a particular neighborhood or the passers-by: *State v. Wilson*, 93-608; see, also, *State v. Wright*, 51-25; *State v. Thornton*, 44-252; *State v. Boyce*, 32-536; *State v. Matthews*, 19-424.

A bawdy-house is the common habitation of prostitutes, a brothel: *State v. Evans*, 27-603. A woman living alone who allows men to come in and have illicit intercourse with her does not keep a "bawdy-house": *State v. Evans*, 27-603; *State v. Calley*, 104-858.

Person renting a house to another with the knowledge that it is to be used, and it is used, as a bawdy-house, is guilty: *State v. Boyd*, 175-791.

For evidence sufficient and insufficient to establish guilt, see *State v. Calley*, 104-858; *State v. Wilson*, 93-608. Evidence as to character and reputation of house is admissible: *State v. Price*, 175-804.

As to powers of city authorities in the enactment of ordinances concerning bawdy-houses and houses of ill-fame, see *State v. Webber*, 107-962.

4348. Obscene literature, indecent exposure and lewd dances. If any person shall exhibit for the purpose of gain, lend for hire or otherwise publish or sell for the purpose of gain, or exhibit in any school, college or other institution of learning, or have in his possession for the purpose of sale or distribution, any obscene book, paper, writing, print, drawing or other representation; or if any person shall post any indecent placards, writings, pictures or drawings on walls, fences, bill-boards or other places; or if any person shall make any public exposure of the person or other indecent exhibition, or take part in any immoral show, exhibition or performance, where indecent, immoral or lewd dances or plays are conducted, in any booth, tent, room or other place to which the public is invited; or if any one shall permit such exhibitions or immoral performances to

be conducted in any tent, booth, or other place owned or controlled by him, he shall be guilty of a misdemeanor.

Rev., s. 3731; 1885, c. 125; 1907, c. 502.

Section referred to: *Brèwer v. Wynne*, 163-319.

4349. Cutting or painting obscene words or pictures near public places. It shall be unlawful for any person to write, cut or carve any indecent word, or to paint, cut or carve any obscene or lewd picture or representation, on any tree or other object near the public highways or other public places. Any person guilty of violating this section shall be fined not more than fifty dollars, or imprisoned not more than thirty days.

1907, c. 344.

4350. Using profane or indecent language on passenger trains. It shall be unlawful for any person to curse or use profane or indecent language on any passenger train. Any person so offending shall upon conviction be fined not more than fifty dollars or imprisoned not more than thirty days.

1907, c. 470, ss. 1, 2.

4351. Using profane or indecent language to female telephone operators. It shall be unlawful for any person to use any lewd or profane words, or any words of vulgarity, or to use indecent language to any female telephone operator operating any telephone, switchboard, circuit or line. Any person violating this section shall upon conviction be guilty of a misdemeanor.

1913, c. 35; 1915, c. 41.

4352. Local: Using profane or indecent language on public highways. If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. The following counties shall be exempted from the provisions of this section: Dare, Tyrrell, Washington, Beaufort, Martin, Pitt, Watauga, Cleveland, Brunswick, Stanly, Perquimans, Pasquotank, Camden, Swain, Gates, Davie, Orange, Jones, Transylvania, Macon and Craven.

1913, c. 40.

The provisions of act 1908, c. 125, as to disorderly conduct in public road in Robeson, does not change the common-law offense: *State v. Foulk*, 154-638.

Any person who shall use vulgar or obscene language on the premises of the Kannapolis Cotton Mills shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five dollars nor more than ten dollars, or be imprisoned not more than ten days. See 1909, c. 46, s. 3.

4353. Lewd women within three miles of colleges and boarding-schools. If any loose woman or woman of ill-fame shall commit any act of lewdness with or in the presence of any student, who is under twenty-one years old, of any boarding-school or college, within three miles of such school or college, she shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Upon the trial of any such case students may be competent but not compellable to give evidence. No prosecution shall be had under this section after the lapse of six months.

Rev., s. 3353; 1889, c. 523.

4354. Obstructing way to places of public worship. If any person shall maliciously stop up or obstruct the way leading to any place of public worship, or to any spring or well commonly used by the congregation, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 3776; Code, s. 3669; R. C., c. 97, s. 5; 1785, c. 241.

For injuries to gates across cartways, see section 3837.

In absence of a laying out by public authority or actual dedication, it is essential, in order to constitute a church road which it is indictable to obstruct, not only that there must be a user for 20 years, but the road must have been worked and kept in order by public authority: *State v. Lucas*, 124-804; see, also, *State v. Gross*, 119-868; *State v. McDaniel*, 53-284; *State v. Marble*, 26-318; *State v. Hunter*, 27-369.

See annotations under section 3789.

4355. Disturbing religious assembly by certain exhibitions. If any person shall bring within half a mile of any place where the people are assembled for divine worship, and stop for exhibition, any stallion or jack, or shall bring within that distance any natural or artificial curiosities and there exhibit them, he shall forfeit and pay to any one who will sue therefor the sum of twenty dollars and shall also be guilty of a misdemeanor: Provided, that nothing herein shall be construed to prohibit such exhibitions at any time if made within the limits of any incorporated town, or without such limits if made before the hour of ten o'clock in the forenoon or after three o'clock in the afternoon. This section shall not apply to Hatteras township in Dare county.

Rev., s. 3705; Code, s. 3670; R. C., c. 97, s. 6; 1809, c. 779, s. 1; 1907, c. 412.

Section cited in *State v. Stovall*, 103-418.

4356. Permitting stone-horses and stone-mules to run at large. If any person shall let any stone-horse or stone-mule of two years old or upwards run at large, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. This section shall not apply to Hatteras township in Dare county.

Rev., s. 3323; Code, s. 2325; R. C., c. 17, s. 6; 1907, c. 412.

ART. 25. PROSTITUTION

4357. Definition of terms. The term "prostitution" shall be construed to include the offering or receiving of the body for sexual intercourse for hire, and shall also be construed to include the offering or receiving of the body for indiscriminate sexual intercourse without hire. The term "assignation" shall be construed to include the making of any appointment or engagement for prostitution or any act in furtherance of such appointment or engagement.

1919, c. 215, s. 2.

4358. Prostitution and various acts abetting prostitution unlawful. It shall be unlawful:

1. To keep, set up, maintain, or operate any place, structure, building or conveyance for the purpose of prostitution or assignation.

2. To occupy any place, structure, building, or conveyance for the purpose of prostitution or assignation; or for any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the

purpose of prostitution or assignation, with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose.

3. To receive, or to offer or agree to receive any person into any place, structure, building, or conveyance for the purpose of prostitution or assignation, or to permit any person to remain there for such purpose.

4. To direct, take, or transport, or to offer or agree to take or transport, any person to any place, structure, or building or to any other person, with knowledge or reasonable cause to know that the purpose of such directing, taking, or transporting is prostitution or assignation.

5. To procure, or to solicit, or to offer to procure or solicit for the purpose of prostitution or assignation.

6. To reside in, enter, or remain in any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution or assignation.

7. To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever.

1919, c. 215, s. 1.

4359. Prosecution: in what courts. Prosecutions for the violation of any of the provisions of this article shall be tried in the courts of this state wherein misdemeanors are triable except those courts the jurisdiction of which is so limited by the constitution of this state that such jurisdiction cannot by statute be extended to include criminal actions of the character herein described.

1919, c. 215, s. 6.

4360. Reputation and prior conviction admissible as evidence. In the trial of any person charged with a violation of any of the provisions of this article, testimony of a prior conviction, or testimony concerning the reputation of any place, structure, or building, and of the person or persons who reside in or frequent the same, and of the defendant, shall be admissible in evidence in support of the charge.

1919, c. 215, s. 3.

4361. Degrees of guilt. Any person who shall be found to have committed two or more violations of any of the provisions of section 4358 of this article within a period of one year next preceding the date named in an indictment, information, or charge of violating any of the provisions of such section, shall be deemed guilty in the first degree. Any person who shall be found to have committed a single violation of any of the provisions of such section shall be deemed guilty in the second degree.

1919, c. 215, s. 4.

4362. Punishment; probation; parole. Any person who shall be deemed guilty in the first degree, as set forth in the preceding section, shall be subject to imprisonment in, or commitment to, any penal or reformatory institution in this state for not less than one nor more than three years. In case of a commitment to a reformatory institution the commitment shall be made for an indeterminate period of time of not less than one nor more than three years in duration, and the board of managers or directors of the reformatory institution shall have authority to discharge or to place on parole any person so committed after the service of the minimum term, or any part thereof, and to require the

return to the said institution for the balance of the maximum term of any person who shall violate the terms or conditions of the parole.

Any person who shall be deemed guilty in the second degree, as set forth in the preceding section, shall be subject to imprisonment for not more than one year. The sentence imposed, or any part thereof, may be suspended; or the defendant may be placed on probation in the care of a probation officer designated by law or theretofore appointed by the court, upon the recommendation of five responsible citizens.

Probation or parole shall be granted or ordered in the case of a person infected with venereal disease only on such terms and conditions as shall insure medical treatment therefor and prevent the spread thereof, and the court may order any convicted defendant to be examined for venereal disease.

No girl or woman who shall be convicted under this article shall be placed on probation or on parole in the care or charge of any person except a woman probation officer.

1919, c. 215, s. 5.

4363. Constitutionality. The declaration by the courts of any of the provisions of this article as being in violation of the constitution of this state shall not invalidate the remaining provisions.

1919, c. 215, s. 7.

SUBCHAPTER 9. OFFENSES AGAINST PUBLIC JUSTICE

ART. 26. PERJURY

4364. Punishment for perjury. If any person shall willfully and corruptly commit perjury, on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the state, or in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be guilty of a felony and shall be fined not exceeding one thousand dollars, and imprisoned in the county jail or state's prison not less than four months nor more than ten years.

Rev., s. 3615; Code, s. 1092; R. C., c. 34, s. 49; 1791, c. 338, s. 1.

While original section called perjury a misdemeanor, the punishment which might be imposed made it a felony: *State v. Hyman*, 164-411.

For indictment for perjury, see section 4615. Where witness, sworn with uplifted hand, deposes falsely, he is guilty of perjury: *State v. Whisenhurst*, 9-458. The administration of the oath is an essential element: *State v. Glisson*, 93-506.

Where indictment alleges that defendant was sworn "on the Holy Gospels of God," it must be strictly so found: *State v. Davis*, 69-383. It is presumed that oath was correctly administered: *State v. Mace*, 86-668.

In a trial for perjury, the burden is not upon defendant to show the truth of the matter: *State v. Cline*, 150-854.

Where defendant in bastardy indicted for perjury, being charged with falsely swearing that he never had sexual intercourse with prosecutrix, and she swears she never had intercourse with another man, defendant has right to show that she was criminally intimate with another man before birth of child: *State v. Jones*, 91-629.

Where perjury assigned is that defendant swore in civil case that he never had been member of certain firm, he may show that no such firm ever existed: *State v. Smith*, 119-856. He is not estopped to deny his former declaration to others who were witnesses that he was a member: *Ibid.*

Where evidence of prosecuting witness sufficiently corroborating to warrant jury in finding defendant guilty, see *State v. Peters*, 107-876; *State v. Hawkins*, 115-712; *State v. Glisson*, 93-506; *State v. Molier*, 12-263.

Although one believes the allegation to which he testifies, yet unless he has probable cause for such belief he may be convicted of perjury: *State v. Knox*, 61-312. See, also, as to intent: *State v. Houston*, 103-383; *State v. Curtis*, 34-270.

As to when incompetent witness may be convicted of perjury: *State v. Molier*, 12-263.

False testimony under oath must have been taken before court having jurisdiction: *State v. Alexander*, 11-182; *State v. Wyatt*, 3-56; *State v. Ridley*, 114-827; *State v. Gates*, 107-832; *State v. Knight*, 84-789.

As to whether there was a fatal variance between indictment and proof, see *State v. Hester*, 122-1047; *State v. Green*, 100-419; *State v. Collins*, 85-511; *State v. Hare*, 95-682; *State v. Lewis*, 93-581; *State v. Davis*, 69-383; *State v. Harvell*, 49-55; *State v. Caffey*, 6-320; *State v. Groves*, 44-402; *State v. Avera*, 4-669; *State v. Bradley*, 2-463.

As to whether matter testified to falsely was material, see *State v. Harris*, 145-456; *State v. Murphy*, 101-697; *State v. Hare*, 95-682.

As to plea of former acquittal hereunder, see *State v. Williams*, 1-591.

Section merely cited in *Gudger v. Penland*, 108-599. See, also, *State v. Swaim*, 97-462.

4365. Subornation of perjury. If any person shall, by any means, procure another person to commit such willful and corrupt perjury as is mentioned in the preceding section, the person so offending shall be punished in like manner as the person committing the perjury.

Rev., s. 3616; Code, s. 1093; R. C., c. 34, s. 50; 1791, c. 338, s. 2.

4366. Perjury before legislative committees. If any person shall willfully and corruptly swear falsely to any fact material to the investigation of any matter before any committee of either house of the general assembly, he shall be subject to all the pains and penalties of willful and corrupt perjury, and, on conviction in the superior court of Wake county, shall be confined in the state's prison for the time prescribed by law for perjury.

Rev., s. 3611; Code, s. 2857; 1869-70, c. 5, s. 4.

For annotations as to perjury generally, see under sections 4364, 4615.

4367. Perjury in court-martial proceedings. If any person shall willfully and corruptly swear falsely before any court-martial, touching and concerning any matter or thing cognizable before such court-martial, he shall be liable to the pains and penalties of perjury.

Rev., s. 3612; Code, s. 3235; R. C., c. 70, s. 73; 1812, c. 828, s. 3.

See annotations under section 4364. See *State v. Gregory*, 6-69.

4368. False oath to insurance statement. Any person who shall make oath to a willfully false statement in the annual report or other statement required by law from an insurance company shall be guilty of perjury.

Rev., s. 3493; 1899, c. 54, s. 97.

4369. False oath to procure benefit of insurance policy or certificate. Any person who shall willfully make a false statement of any material fact or thing in a sworn statement as to the death or disability of a policy or certificate holder in any insurance corporation or fraternal benefit society, for the purpose of procuring payment of a benefit named in the certificate of such holder, shall be guilty of perjury.

Rev., s. 3487; 1899, c. 54, s. 60; 1913, c. 89, s. 28.

4370. False oath to statement required of fraternal benefit societies. Any person who shall willfully make any false statement in any verified report or declaration under oath, required or authorized by law from fraternal benefit societies, shall be guilty of perjury.

1913, c. 89, s. 28.

See section 6529.

4371. False oath to certificate of mutual fire insurance company. Any person taking a false oath in respect to the certificate required by law before issuing policies in a mutual fire insurance company, that every subscription for insurance is genuine and made with an agreement that every subscriber will take the policies subscribed for by him within thirty days after granting a license to such company, shall be guilty of perjury.

Rev., ss. 4738, 4834; 1899, c. 54, s. 32; 1901, c. 391, ss. 3, 4; 1903, c. 438, s. 4.

See section 6346.

ART. 27. BRIBERY

4372. Bribery of officials. If any person holding office under the laws of this state who, except in payment of his legal salary, fees or perquisites, shall receive, or consent to receive, directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action, or omission to act, is to be in any degree influenced thereby, he shall be guilty of a felony, and shall be punished by imprisonment in the state's prison for a term not exceeding five years, or fined not exceeding five thousand dollars, or both, in the discretion of the court.

Rev., s. 3568; Code, s. 991; 1868-9, c. 176, s. 2.

Indictment is not defective when it charges that defendant "did receive and consent to receive" instead of "did receive or consent to receive": *State v. Wynne*, 118-1206. Indictment must allege that act charged was done with wilful and corrupt intent: *State v. Pritchard*, 107-921.

4373. Offering bribes. If any person shall offer a bribe, whether it be accepted or not, he shall be guilty of felony, and shall be punished by imprisonment for a term not less than one year nor more than five years in the state's prison or county jail, in the discretion of the court.

Rev., s. 3569; Code, s. 992; 1870-1, c. 232.

4374. Bribery of legislators. If any person shall directly or indirectly promise, offer or give, or cause or procure to be promised, offered or given, any money, bribe, present or reward, or any promise, contract, undertaking, obligation or security for the payment or delivery of any money, goods, right of action, bribe, present or reward, or any other valuable thing whatever, to any member of the senate or house of representatives of this state after his election as such member, and either before or after he shall have qualified and taken his seat, with intent to influence his vote or decision on any question, matter, cause or proceeding which may then be pending before the general assembly, or which may come before him for action in his capacity as a member of the general assembly, such person so offering, promising or giving, or causing or procuring to be promised,

offered or given any such money, goods, bribe, present or reward, or any bond, contract, undertaking, obligation or security for the payment or delivery of any money, goods, bribe, present or reward, or other valuable thing whatever, and the member-elect who shall in anywise accept or receive the same or any part thereof, shall be guilty of a felony, and shall be fined not exceeding double the amount so offered, promised or given, and imprisoned in the state's prison not exceeding five years, and the person convicted of so accepting or receiving the same, or any part thereof, shall forfeit his seat in the general assembly and shall be forever disqualified to hold any office of honor, trust or profit under this state.

Rev., s. 3570; Code, s. 2852; 1868-9, c. 176, s. 5.

4375. Bribery of jurors. If any juror, either directly or indirectly, shall take anything from the plaintiff or defendant in a civil suit, or from any defendant in a state prosecution, or from any other person, to give his verdict, every such juror, and the person who shall give such juror any fee or reward to influence his verdict, or induce or procure him to make any gain or profit by his verdict, shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail not less than four months nor more than ten years.

Rev., s. 3697; Code, s. 990; R. C., c. 34, s. 34; 5 Edw. III, c. 10; 34 Edw. III, c. 8; 38 Edw. III, c. 12.

See *State v. Pritchard*, 107-921.

ART. 28. OBSTRUCTING JUSTICE

4376. Breaking or entering jails with intent to injure prisoners. If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoner, he shall be guilty of a felony, and upon conviction, or upon a plea of guilty, shall be fined not less than five hundred dollars, and imprisoned in the state's prison or the county jail not less than two nor more than fifteen years.

Rev., s. 3698; 1893, c. 461, s. 1.

See generally: *State v. Lewis*, 142-626. The force and effect of acts 1893, ch. 461, is not impaired by the fact that it has been split up and its different sections placed under appropriate headings: *Ibid*.

As to indictment, see concurring opinion of Walker, J., in *State v. Lewis*, 142-647. Upon an indictment under this section defendant may be convicted of an attempt: *State v. Rumble*, 178-717.

4377. Refusal of witness to appear or to testify in investigations of lynchings. If any person summoned as a witness in the investigation of a charge of lynching shall willfully fail to attend as a witness in obedience to the process served on him, or if, after being sworn, he shall refuse to answer questions pertinent to the matter being investigated before any tribunal, he shall be guilty of a misdemeanor, and, on conviction, shall be fined or imprisoned, or both, at the discretion of the court.

Rev., s. 3699; 1893, c. 461, s. 3.

The force and effect of act 1893, ch. 461, is not impaired by the fact that it has been split up and its different sections placed under appropriate headings: *State v. Lewis*, 142-626.

4378. Resisting officers. If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor.

Rev., s. 3700; 1889, c. 51, s. 1.

A deputy sheriff collecting back taxes after his term of office has expired is a public officer within this section: *State v. Alston*, 127-518.

Sufficiency of indictment: *State v. Dunn*, 109-839. Not necessary to set out the process under which officer acted when he was resisted: *State v. Dunn*, 109-839.

It is too late after verdict to move in arrest of judgment for misjoinder in the counts where different defendants are indicted, in same bill, though under different counts, for offense here created and that under section 4379: *State v. Perdue*, 107-853.

As to extent of force to which officer can go in making arrest, see *State v. McClure*, 166-321; *State v. Pugh*, 101-737; see annotations under sections 976, 2642, 2639, 4542-4547. What is resisting an officer: *State v. McClure*, 166-321.

Section cited in *State v. Durham*, 141-745; *State v. Conoly*, 28-244.

4379. Failing to aid police officers. If any person, after having been lawfully commanded to aid an officer in arresting any person, or in retaking any person who has escaped from legal custody, or in executing any legal process, willfully neglects or refuses to aid such officer, he shall be guilty of a misdemeanor.

Rev., s. 3701; 1889, c. 51, s. 2.

Liability for failure to assist in an arrest: *State v. Ditmore*, 177-592. It is too late after verdict to move in arrest of judgment for misjoinder in courts where different defendants are indicted in same bill, though under different counts, for offense here created and that under section 4378: *State v. Perdue*, 107-853. See, also, *State v. Dunn*, 109-839.

4380. Intimidating or interfering with jurors and witnesses. If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a juror or witness in any of the courts of this state, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such juror or witness from attendance upon such court, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court.

Rev., s. 3696; 1891, c. 87.

This section is additional to, and not a repeal of, the inherent right of the court to protect itself by proceedings as for contempt: *In re Young*, 137-552. Section cited in *State v. Hodge*, 142-670.

4381. Failing to attend as witness before legislative committees. If any person shall willfully fail or refuse to attend or produce papers, on summons of any committee of investigation of either house of the general assembly, either select or committee of the whole, he shall be guilty of a misdemeanor, and on conviction in the superior court of the county in which such witness may reside or be found, he shall be fined not less than five hundred dollars nor more than one thousand dollars, and shall be subject to imprisonment at the discretion of the court.

Rev., s. 3692; Code, s. 2854; 1869-70, c. 5, s. 2.

ART. 29. MISCONDUCT IN PUBLIC OFFICE

4382. Buying and selling offices. If any person shall bargain away or sell an office or deputation of an office, or any part or parcel thereof, or shall take money, reward or other profit, directly or indirectly, or shall take any promise,

covenant, bond or assurance for money, reward or other profit, for an office or the deputation of an office, or any part thereof, which office or any part thereof shall touch or concern the administration or execution of justice, or the receipt, collection, control or disbursement of the public revenue, or shall concern or touch any clerkship in any court of record wherein justice is administered; or if any person shall give or pay money, reward or other profit, or shall make any promise, agreement, bond or assurance for any of such offices, or for the deputation of any of them, or for any part of them, the person so offending in any of the cases aforesaid shall be guilty of a misdemeanor, and on conviction thereof shall forfeit all his right, interest and estate in such office, and every part and parcel thereof, and shall be imprisoned and fined at the discretion of the court.

Rev., s. 3571; Code, s. 998; R. C., c. 34, s. 33; 5, 6 Edw. VI, c. 16, ss. 1, 5.

Sheriff farming out office, see section 3946.

4383. Acting as officer before qualifying as such. If any officer shall enter on the duties of his office before he executes and delivers to the authority entitled to receive the same the bonds required by law, and qualifies by taking and subscribing and filing in the proper office the oath of office prescribed, he shall be guilty of a misdemeanor and shall be ejected from his office.

Rev., s. 3565; Code, s. 79.

4384. Willfully failing to discharge duties. If any clerk of any court of record, sheriff, justice of the peace, county commissioner, county surveyor, coroner, treasurer, constable or official of any of the state institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense, and shall also be fined or imprisoned in the discretion of the court.

Rev., s. 3592; 1901, c. 270, s. 2.

If an officer willfully fails to perform his duty he is subject to indictment; and if such failure is wilful and corrupt he may be removed from office: *Battle v. Rocky Mount*, 156-329.

Sheriff indictable for failure to return process: *State v. Berry*, 169-371. County commissioners indictable for failure to provide suitable courthouse: *Ward v. Comrs.*, 146-534; *State v. Leeper*, 146-655—or for failure to provide four (now six) months public school, *Board of Education v. Comrs.*, 150-116; *Collie v. Comrs.*, 145-170. Enforced by mandamus: *Ibid.*; *Gilmer v. Holton*, 98-26. Manner of levying tax is within commissioners' discretion: *Board of Education v. Comrs.*, 150-116.

For penalty, acting without bond, see section 325.

For fuller annotations, see under section 4385.

Cases as to clerk of court prior to this enactment: *State v. Dayton*, 119-880; *State v. Connelly*, 104-794—as to register of deeds, *State v. Snuggs*, 85-541—as to sheriff, *State v. Joyce*, 2-43; *State v. Johnston*, 2-293—as to county commissioners, *State v. Hatch*, 116-1003; *State v. Justices*, 11-194—as to town commissioners, *State v. Comrs.*, 48-399—as to overseer of poor, *State v. Hawkins*, 77-494.

4385. Failing to make reports and discharge other duties. If any state or county officer shall fail, neglect or refuse to make, file or publish any report,

statement or other paper, or to deliver to his successor all books and other property belonging to his office, or to pay over or deliver to the proper person all moneys which come into his hands by virtue or color of his office, or to discharge any duty devolving upon him by virtue of his office and required of him by law, he shall be guilty of a misdemeanor.

Rev., s. 3576.

Officer abusing or fraudulently exceeding definite powers conferred is guilty hereunder even though no injury results to any one. The crime consists in his public example, in perverting powers committed to him as instruments of benefit to, and safety of the rights of, the citizens: *State v. Glasgow*, 1-264.

Officer who must exercise his judgment or discretion is not indictable for errors honestly made, but any officer acting corruptly is liable both criminally and civilly, whether acting under the law or without the law: *State v. Powers*, 75-281; *Staton v. Wimberly*, 122-107; see *State v. Williams*, 34-173—but honesty and good intent are not always a good defense when wilful carelessness, resulting in injury to public, is shown, *State v. Hatch*, 116-1003; see *Turner v. McKee*, 137-254, and cases there cited.

This section embraces acts of omission only, and does not extend to every illegal act done by virtue of office: *State v. Snuggs*, 85-541; see, also, *State v. Hatch*, 116-1003.

Officer not indictable for obeying unconstitutional act, nor for refusing to perform duties under act repealed by unconstitutional one, at least until after court declares same unconstitutional: *State v. Godwin*, 123-697; see *State v. Powers*, 75-281.

Officer cannot refuse to act because of certain supposed defects in indictment in this case: *State v. Davis*, 111-729.

Indictment must allege that officer was required to take oath of office: *State v. Pritchard*, 107-921. Indictment alleging that defendant "did receive and consent to receive" unlawful compensation not defective because word "and" used instead of word "or": *State v. Wynne*, 118-1206. Indictment against overseer of poor for failure to provide adequately for paupers must state names of paupers or that their names are unknown: *State v. Hawkins*, 77-494. Sufficiency of indictment: *State v. Cole*, 156-618.

De facto officers indictable hereunder: *State v. Wynne*, 118-1206. As to de facto officers generally, see annotations under section 3204.

Secretary of state indictable for fraudulently issuing land warrants: *State v. Glasgow*, 1-264.

Clerk of court not indictable hereunder for embezzling distributee's share paid to him by administrator: *State v. Connelly*, 104-794. Semble, that clerk indictable hereunder for neglecting to send up transcript of appeal in criminal action, whether fees paid or not: *State v. Deyton*, 119-880. Failure of clerk to pay over a license tax raises presumption that such failure was wilful, and clerk must rebut presumption: *State v. Heaton*, 77-505.

Register of deeds not indictable hereunder for issuing marriage license to female under marriageable age without written consent of father: *State v. Snuggs*, 85-541.

Chief clerk of house of representatives liable for negligently permitting bill to be delivered for enrollment, and enrolling clerk for enrolling a bill which had not been passed; as to sufficiency of evidence to warrant verdict of guilty, see *State v. Satterfield*, 121-558; *State v. Brown*, 119-789.

Sheriff indictable for false return: *State v. Joyce*, 2-43—even though deputy made the return in sheriff's name, *State v. Johnston*, 2-293; see section 3936. Officer failing to return civil process: *State v. Berry*, 169-371.

County commissioners selling county property at grossly inadequate price and for less than could have been obtained by reasonable effort, and without opportunity for competition, is evidence of omission of duty: *State v. Hatch*, 116-1003. County commissioners indictable for failure to levy taxes to build a jail: *State v. Justices*, 11-194.

Town commissioners indictable for failure to let out repairing of streets and to levy tax therefor when statute empowers and requires them to do so: *State v. Comrs.*, 48-399.

Overseer of poor indictable hereunder for neglect of duties or abuse of powers: *State v. Hawkins*, 77-494.

Registrar of election not indictable for refusing to register voter for failure to pay taxes, though such provision requiring it may be unconstitutional: *State v. Powers*, 75-281. Failure of an officer in a primary election to perform his duty properly: *State v. Cole*, 156-618.

Officer armed with process for a breach of the peace may lawfully break open doors of house, after having been refused entrance, to effect the arrest, if he act in good faith, and is not indictable hereunder: *State v. Mooring*, 115-709.

4386. Swearing falsely to official reports. If any clerk, sheriff, register of deeds, county commissioner, county treasurer, justice of the peace, constable or other county officer shall willfully swear falsely to any report or statement required by law to be made or filed, concerning or touching the county, state or school revenue, he shall be guilty of a misdemeanor.

Rev., s. 3605; Code, s. 731; 1874-5, c. 151, s. 4; 1876-7, c. 276, s. 4.

4387. Making of false report by bank examiners; accepting bribes. If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank which shall have been examined by him, with the intent to aid or abet the officers, owners or agents of such bank in continuing to operate an insolvent bank; or if any such examiner shall receive or accept any bribe or gratuity, given for the purpose of inducing him not to file any report of an examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the state's prison for not less than four months nor more than ten years.

Rev., s. 3324; 1903, c. 275, s. 24.

4388. Director of public trust contracting for his own benefit. If any person, appointed or elected a commissioner or director to discharge any trust wherein the state or any county, city or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor.

Rev., s. 3572; Code, s. 1011; R. C., c. 34, s. 38; 1825, c. 1269; 1826, c. 29.

A county commissioner is indictable for receiving extra pay for his time, etc., in investigating a bridge: *Davidson v. Guilford*, 152-436. A member of a board of aldermen who is also an officer of private corporation is liable under this section for contracting with the private corporation: *State v. Williams*, 153-595.

Section does not extend to contracts between a city and those having an employee as alderman: *State v. Weddell*, 153-587. Not necessary to show moral turpitude to convict under this section: *Ibid*.

4389. Speculating in claims against towns, cities and the state. If any clerk, sheriff, register of deeds, county treasurer or other county, city, town or state officer shall engage in the purchasing of any county, city, town or state claim at a less price than its full and true value, or at any rate of discount thereon, or be interested in any speculation in any such claim, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, and also shall be liable to removal from office at the discretion of the court.

Rev., s. 3575; Code, s. 1009; 1868-9, c. 260.

Sheriff not guilty where he purchases county claims below par for benefit of county and at instance of county commissioners: *State v. Garland*, 134-749.

4390. Acting as agent for those furnishing supplies for schools and other state institutions. If any member of any board of directors, board of managers,

board of trustees of any of the educational, charitable, eleemosynary or penal institutions of the state, or any member of any board of education, or any county or district superintendent or examiner of teachers, or any trustee of any school or other institution supported in whole or in part from any of the public funds of the state, or any officer, agent, manager, teacher or employee of such boards, shall have any pecuniary interest, either directly or indirectly, proximately or remotely, in supplying any goods, wares or merchandise of any nature or kind whatsoever for any of said institutions or schools; or if any of such officers, agents, managers, teachers or employees of such institution or school or state or county officer shall act as agent for any manufacturer, merchant, dealer, publisher or author for any article of merchandise to be used by any of said institutions or schools; or shall receive, directly or indirectly, any gift, emolument, reward or promise of reward for his influence in recommending or procuring the use of any manufactured article, goods, wares or merchandise of any nature or kind whatsoever by any of such institutions or schools, he shall be forthwith removed from his position in the public service, and shall upon conviction be deemed guilty of a misdemeanor and fined not less than fifty dollars nor more than five hundred dollars and be imprisoned, in the discretion of the court.

Rev., s. 3833; 1899, c. 732, s. 73; 1897, c. 543.

See section 4388.

4391. Buying school supplies from interested officer. If any county board of education or school committee shall buy school supplies in which any member has a pecuniary interest, or if any school officers or teachers shall receive any gift, emolument, reward or promise of reward for influence in recommending or procuring the use of any school supplies for the schools with which they are connected, such person shall be removed from his position in the public service and shall, upon conviction, be deemed guilty of a misdemeanor.

Rev., s. 3835; 1901, c. 4, s. 69.

See section 4388.

4392. Selling bonds without giving proper notice. It shall be unlawful for any board of county commissioners, board of road commissioners, school board or school committee, or any drainage commissioner or board of drainage commissioners of any county, city, town, road, school, or drainage district to sell bonds for any purpose, either at public or private sale, without giving notice of the time and place of sale in some newspaper published in such county, city or town at least thirty days prior to the date of sale: Provided, that where there is no newspaper published in the county, such notice shall be posted at the courthouse door in such county at least thirty days prior to the sale.

Any violation of this section by any person or corporation whose duty it shall be to issue and sell such bonds shall constitute a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court.

1917, cc. 147, 174.

4393. Allowing prisoners to escape; burden of proof. If any person charged with a crime or sentenced by the court upon conviction of any offense, shall be legally committed to any sheriff, constable or jailer, or shall be arrested by any sheriff, deputy sheriff or coroner acting as sheriff, by virtue of any *capias* issuing on a bill of indictment, information or other criminal proceeding, and such

sheriff, deputy sheriff, coroner, constable or jailer, willfully or negligently, shall suffer such person, so charged or sentenced and committed, to escape out of his custody, the sheriff, deputy sheriff, coroner, constable or jailer so offending, being thereof convicted, shall be removed from office, and shall be fined or imprisoned, or both, at the discretion of the court before whom the trial may be had; and in all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that the person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence: Provided, that such removal of a sheriff shall not affect his duty or power as a collector of the public revenue, but he shall proceed on such duty and be accountable as if such conviction and removal had not been had.

Rev., s. 3577; Code, s. 1022; R. C., c. 34, s. 35; 1791, c. 343, s. 1; 1905, c. 350.

Escape defined: State v. Ritchie, 107-857; State v. Johnson, 94-924.

This section contemplates two kinds of escape—one the result of negligence and the other the result of wilful act of officer: State v. McLain, 104-894. Actual negligence the test of guilt when negligence charged: State v. Johnson, 94-924—and it is implied when prisoner escapes; exceptions, *Ibid.* Officer must use due diligence and good faith to keep prisoner, and as to whether he did is a question for the jury: State v. Blackley, 131-726; State v. Lewis, 113-622; State v. Hunter, 94-829. Failure to put handcuffs on prisoner is not negligence per se: *Ibid.*

Not necessary to charge in indictment that escape was “wilfully” or “unlawfully” permitted, but that it is “negligently” permitted is sufficient: State v. McLain, 104-894. Indictment lies at common law for an escape independently of this section: State v. Ritchie, 107-857; State v. Johnson, 94-924. It will not be quashed on the ground that the judgment against prisoner committed was illegal: State v. Garrell, 82-581.

Indictment for assisting escape must show prisoner lawfully imprisoned: State v. Jones, 78-420. Defendant cannot justify by showing judgment against prisoner erroneous: State v. Garrell, 82-580. Parol mittimus from justice will not make officer acting under it liable for escape: State v. Dean, 48-393.

Where escape pending appeal, appeal will not be dismissed, but may be continued till prisoner retaken: State v. Cody, 119-908; State v. Jacobs, 107-772; State v. Pickett, 94-97—or court can proceed, and judgment will not be invalid simply because prisoner was not in custody or before the court, State v. Jacobs, 107-772.

Procedure where prisoner under death sentence escapes and is not recaptured before date set for execution, see State v. Cardwell, 95-643.

When escape proved or admitted, burden to show that it was not unlawfully allowed or that there was no negligence shifts to defendant: State v. Lewis, 113-622; State v. Kittelle, 110-573; State v. Hunter, 94-829.

Compare, as to indictment charging that prisoner was lawfully detained, State v. Jones, 78-420.

4394. Solicitor to prosecute officer for escape. It shall be the duty of solicitors, when they shall be informed or have knowledge of any felon, or person otherwise charged with any crime or offense against the state, having within their respective districts escaped out of the custody of any sheriff, deputy sheriff, coroner, constable or jailer, to take the necessary measures to prosecute such sheriff or other officer so offending.

Rev., s. 2822; Code, s. 1023; R. C., c. 34, s. 36; 1791, c. 343, s. 2.

See annotations under section 4393.

4395. Disposing of public documents or refusing to deliver them over to successor. It shall be the duty of the clerk of the superior court of each county,

and every other person to whom the acts of the general assembly, supreme court reports or other public documents are transmitted or deposited for the use of the county or the state, to keep the same safely in their respective offices; and if any such person having the custody of such books and documents, for the uses aforesaid, shall negligently and willfully dispose of the same, by sale or otherwise, or refuse to deliver over the same to his successor in office, he shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, at the discretion of the court.

Rev., s. 3598; Code, s. 1073; 1881, c. 151.

4396. Failing to return process or making false return. If any sheriff, constable or other officer, whether state or municipal, or any person who shall presume to act as any such officer, not being by law authorized so to do, refuse or neglect to return any precept, notice or process, to him tendered or delivered, which it is his duty to execute, or make a false return thereon, he shall forfeit and pay to any one who will sue for the same one hundred dollars, and shall moreover be guilty of a misdemeanor.

Rev., s. 3604; Code, s. 1112; R. C., c. 34, s. 118; 1818, c. 980, s. 3; 1827, c. 20, s. 4.

See generally: *Harrell v. Warren*, 100-259. This applies to civil process as well as to criminal process (overruling *Mfg. Co. v. Buxton*, 105-74): *State v. Berry*, 169-371.

Not liable for penalty for declining to receive a process which at that time could not be served: *Fentress v. Brown*, 61-373.

Several penalties against the same defendant may be joined, and when they exceed \$200 superior court has jurisdiction: *Burrell v. Hughes*, 116-431.

That the clerk of the court mailed a process to sheriff of another county is prima facie evidence that sheriff received it, and will support a judgment nisi, if there is no return of the process: *State v. Latham*, 51-233.

Section cited in *State v. Brown*, 119-827. Compare *State v. Ferguson*, 76-197; *State v. Johnston*, 2-293; *State v. Joyce*, 2-43.

4397. Failing to surrender tax-list for inspection and correction. If any sheriff or tax collector shall refuse or fail to surrender his tax-list for inspection or correction upon demand by the authorities imposing the tax, or their successors in office, he shall be guilty of a misdemeanor, and shall be imprisoned not more than five years, and fined not exceeding one thousand dollars, at the discretion of the court.

Rev., s. 3788; Code, s. 3823; 1870-1, c. 177, s. 2.

See section 2681. Section cited in *Covington v. Rockingham*, 93-139; *Guano Co. v. Tarboro*, 126-70; *Wilson v. Green*, 135-352.

4398. Failing to file report of fines. If any officer who is by law required to file any report or statement of fines or penalties with the county board of education shall fail so to do at or before the time fixed by law for the filing of such report, he shall be guilty of a misdemeanor.

Rev., s. 3579; 1901, c. 4, s. 62.

4399. Failure of ex-justice of the peace to turn over books and papers. If any justice of the peace, on expiration of his term of office, or if any personal representative of a deceased justice of the peace shall, after demand upon him by the clerk of the superior court, willfully fail and refuse to deliver to the clerk of the

superior court all docket, all law and other books, and all official papers which came into his hands by virtue or color of his office, he shall be guilty of a misdemeanor.

Rev., s. 3578; Code, ss. 828, 829; 1885, c. 402.

Section cited in *Bailey v. Hester*, 101-540; *Whitehurst v. Transportation Co.*, 109-344.

ART. 30. MISCONDUCT IN PRIVATE OFFICE

4400. Failure of certain railroad officers to account with successors. If the president and directors of any railroad company, and any person acting under them, shall, upon demand, fail or refuse to account with the president and directors elected or appointed to succeed them, and to transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company, they shall be guilty of a felony, and shall be punished by imprisonment in the state's prison for not less than one nor more than five years, and be fined at the discretion of the court. All persons conspiring with any such president, directors or their agents to defeat, delay or hinder the execution of this section shall be guilty of a misdemeanor, and shall be punished in like manner. The governor is hereby authorized, at the request of the president, directors and other officers of any railroad company, to make requisition upon the governor of any other state for the apprehension of any such president failing to comply with this section.

Rev., s. 3760; Code, ss. 2001, 2002; 1870-1, c. 72, ss. 1-3.

Acts of February 5, 1870, and of March 8, 1870, which dispose of special tax bonds, make this section refer only to money, choses in action, property and effects belonging to the company: *State v. Jones*, 67-210.

4401. Malfeasance of bank officers and agents. If any president, director, cashier, teller, clerk or agent of any bank or other corporation shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the bank, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false entry in any book, report or statement of the bank with the intent in either case to injure or defraud or to deceive any officer of the bank, or if any person shall aid and abet in the doing of any of these things, he shall be guilty of a felony, and upon conviction shall be imprisoned in the state's prison for not less than four months nor more than fifteen years, and likewise fined, at the discretion of the court.

Rev., s. 3325; 1903, c. 275, s. 15.

See *State v. Dewey*, 139-556.

4402. Making false entries in banking accounts; misrepresenting assets and liabilities of banks. If any person shall willfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any corporation, partnership, firm or individual transacting a banking business, or shall knowingly subscribe to or exhibit false papers, with the intent to deceive any person authorized to examine into the affairs of such corporation, partnership, firm or individual, or shall willfully and knowingly make, state or publish any false statement of the amount of the assets or liabilities of any such corpora-

tion, partnership, firm or individual, he shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the state's prison not less than four months nor more than ten years.

Rev., s. 3326; 1903, c. 275, s. 27.

ART. 31. PRISON BREACH AND PRISONERS

4403. Escape of hired prisoners from custody. If any prisoner, who shall be removed from the prison of the respective counties, cities and towns under the law providing for the hiring out of prisoners by counties and towns, shall escape from the person or company having him in custody, he shall be guilty of a misdemeanor, and shall be imprisoned at hard labor not more than thirty days, or fined not more than fifty dollars.

Rev., s. 3658; Code, s. 3455; 1876-7, c. 196, s. 4.

Counties and towns may hire out convict prisoners, see sections 1356-1358.

4404. Prison breach and escape. If any person shall break prison, being lawfully confined therein, or shall escape from the custody of any superintendent, guard or officer, he shall be guilty of a misdemeanor.

Rev., s. 3657; Code, s. 1021; R. C., c. 34, s. 19; 1 Edw. II, st. 2d; 1909, c. 872.

This section reduces common-law offense from a felony to a misdemeanor: *State v. Brown*, 82-585.

4405. Permitting escape of or maltreating hired convicts. If any person charged in any way with the control or management of convicts, hired for service outside of the state's prison, shall negligently permit them to escape, or shall maltreat them, he shall be guilty of a misdemeanor; but this provision shall not be held to relieve any person from any criminal liability.

Rev., s. 3659; Code, s. 3450; 1881, c. 127, s. 2.

See annotations under section 4393. Negligence is implied, unless the escape is occasioned by the act of God or an irresistible adverse force: *State v. Johnson*, 94-924.

Officers and agents will not be held to the strict common-law responsibility for the custody of convicts employed outside of the penitentiary; actual negligence being the test of guilt: *State v. Johnson*, 94-924. Section cited in *State v. Sneed*, 94-809.

4406. Conveying messages and weapons to convicts and other prisoners. If any person shall convey to or from any convict any letters or oral messages, or shall convey to any convict or person imprisoned, charged with crime and awaiting trial any weapon or instrument by which to effect an escape, or that will aid him in an assault or insurrection, or shall trade with a convict for his clothing or stolen goods, or shall sell to him any article forbidden him by prison rules, he shall be guilty of a misdemeanor: Provided, that when a murder, an assault or an escape is effected with the means furnished, the person convicted of furnishing the means shall be sentenced to not less than four years hard labor in the state's prison.

Rev., s. 3662; Code, s. 3441; 1873-4, c. 158, s. 12; 1911, c. 11.

4407. Injury to prisoner by jailer. If the keeper of a jail shall do, or cause to be done, any wrong or injury to the prisoners committed to his custody, contrary to law, he shall not only pay treble damages to the person injured, but shall be guilty of a misdemeanor.

Rev., s. 3661; Code, s. 3463; R. C., c. 87, s. 8; 1795, c. 433, s. 6.

4408. Confining prisoners to improper apartments. If the sheriff or jailer shall wantonly or unnecessarily confine those committed to his custody in any apartment, other than that provided and designated by law for persons of the description of the prisoner, he shall be guilty of a misdemeanor.

Rev., s. 3660; Code, s. 3471; R. C., c. 87, s. 16; 1795, c. 433, s. 4.

4409. Requiring female prisoners to work in chain-gang. If any officer, either judicial, executive or ministerial, shall order or require the working of any female on the streets or roads in any group or chain-gang in this state, he shall be deemed guilty of a misdemeanor.

Rev., s. 3596; 1897, c. 270.

SUBCHAPTER 10. OFFENSES AGAINST THE PUBLIC PEACE

ART. 32. OFFENSES AGAINST THE PUBLIC PEACE

4410. Carrying concealed weapons. If any one, except when on his own premises, shall carry concealed about his person any bowie-knife, dirk, dagger, slung-shot, loaded cane, brass, iron or metallic knuckles or razor or other deadly weapon of like kind, he shall be guilty of a misdemeanor, and shall be fined or imprisoned at the discretion of the court. If any one, except on his own premises, shall carry concealed about his person any pistol or gun, he shall be guilty of a misdemeanor and shall be fined not less than fifty dollars nor more than two hundred dollars, or imprisoned not less than thirty days nor more than two years, at the discretion of the court. Upon conviction or submission the deadly weapon with reference to which the defendant shall have been convicted shall be condemned and ordered confiscated and destroyed by the judge presiding at the trial. If any one, not being on his own lands, shall have about his person any such deadly weapon, such possession shall be prima facie evidence of the concealment thereof. This section shall not apply to the following persons: officers and soldiers of the United States Army, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the state guard when called into actual service, officers of the state, or of any county, city or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties.

Rev., s. 3708; Code, s. 1005; 1917, c. 76; 1919, c. 197, s. 8.

Meaning of "his own premises": State v. Bridgers, 169-309; State v. Hewell, 90-705; State v. Terry, 93-585; State v. Anderson, 129-521; State v. Perry, 120-580. Statute embraces a "butcher's knife": State v. Erwin, 91-545. "Fine or imprisonment" does not mean both: State v. Taylor, 124-803. The exceptions do not include officers of corporations which invite the public to use their lines for travel: State v. Perry, 120-580—nor do they include a mail carrier, State v. Boone, 132-1107.

This offense consists in the guilty intent to carry the weapon concealed, and does not depend upon the intent to use it: State v. Brown, 125-704; State v. Reams, 121-556; State v. Lilly, 116-1049; State v. Dixon, 114-850; State v. Brodnax, 91-543; State v. Gilbert, 87-527.

Carrying concealed weapons off one's premises is not excused even in self-defense: State v. Woodlief, 172-885; State v. Speller, 86-697—nor is it excused when carried for hunting, State v. Woodfin, 87-526.

A person acting in ignorance of the law, in good faith, and upon the advice of the clerk of the court or an attorney, but in violation of the statute, is not excused: State v. Simmons, 143-613.

Statute constitutional: *State v. Speller*, 86-697. Superior court has exclusive jurisdiction: *State v. Ramsour*, 113-642.

Whether or not weapon is concealed is a question for the jury: *State v. Lilly*, 116-1049; *State v. Reams*, 121-556. Defendant offering himself as witness may be asked if he has carried concealed weapon off his premises within the two years next preceding the indictment, and can be compelled to answer it, he having waived his constitutional privilege to refuse to incriminate himself: *State v. Allen*, 107-805; *State v. Mitchell*, 119-784. A mere servant or hireling is indictable if he carry weapon concealed on his master's premises: *State v. Dayton*, 119-880.

A verdict "guilty of carrying concealed weapon in a suitcase" is not sufficient: *State v. Parker*, 152-790.

PRIMA FACIE CASE AND BURDEN OF PROOF. Where defendant has two pistols buckled around him, without scabbards and naked on a belt, the prima facie case of the statute is rebutted: *State v. Roten*, 86-701. Prima facie case raised by the statute may be rebutted, and is by a specific finding that the act was done without intent to conceal it: *State v. Brown*, 125-704; *State v. Gilbert*, 87-527; *State v. Dixon*, 114-850, overruling *State v. Harrison*, 93-605; *State v. Brodnax*, 91-543. Statute makes possession prima facie evidence of concealment, and the burden is upon the defendant to rebut the presumption by satisfactory proof to jury: *State v. Hamby*, 126-1066; *State v. Reams*, 121-556; *State v. Lilly*, 116-1049; *State v. McManus*, 89-555. As to effect of "prima facie evidence," see *State v. Wilkerson*, 164-432.

The burden is upon a civil officer to show that he was actually engaged in the discharge of his official duty: *State v. Simmons*, 143-613; *State v. Hayne*, 88-625.

Section cited in *State v. McNeely*, 92-829; *State v. Barrett*, 138-635; *State v. Divine*, 93-784; *State v. McBrayer*, 98-626. Compare *State v. Wilson*, 84-777.

4411. Sending, accepting or bearing challenges to fight duels. If any person shall send, accept or bear a challenge to fight a duel, though no death ensue, he, and all such as counsel, aid and abet him, shall be guilty of a misdemeanor, and shall, moreover, be ineligible to any office of trust, honor or profit in the state, any pardon or reprieve notwithstanding.

Rev., s. 3628; Code, s. 1012; R. C., c. 34, s. 48; 1802, c. 608, s. 1.

For fighting a duel when death ensues, see section 4203. Duel defined to be a combat between two persons, fought with deadly weapons by agreement: *State v. Fritz*, 133-727.

Challenge may be by word or letter: *State v. Farrier*, 8-487. A challenge to fight with fists and hands, no deadly weapon to be used, is not a challenge to fight a duel: *State v. Fritz*, 133-725.

A challenge to fight a duel out of the state is indictable: *State v. Farrier*, 8-487.

Jurisdiction is in superior court, but on indictment in superior court accused may be found guilty and convicted of a simple assault: *State v. Fritz*, 133-725—and punishment should be such as justice of the peace could inflict, *Ibid*.

Indictment need not set out copy of challenge: *State v. Farrier*, 8-487.

4412. Engaging in and betting on prize fights. If any two or more persons engage in a prize fight, sparring match or glove or fist contest for money or other valuable prize or stake; or if any person bet or lay a wager on the result thereof or advise, aid or abet in any way whatever in promoting the same, he shall be fined not less than five hundred dollars, or imprisoned in the state's prison or jail for not less than one year nor more than five years, or both, in the discretion of the court.

Rev., s. 3707; 1895, c. 28, ss. 1-4.

Governor to prevent prize fights, see section 7636 (6).

4413. Disturbing picnics, entertainments and other meetings. If any person shall willfully interrupt or disturb any picnic, excursion party, school entertainment, political meeting, or any meeting or other organization whatsoever

lawfully and peaceably held, either at, within or without the place where such picnic, excursion party, school entertainment, political meeting or other meeting or organization is held, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, in the discretion of the court.

Rev., s. 3704; 1897, c. 213.

Wilful disturbance of Sunday school is indictable at common law and under the statute: *State v. Branner*, 149-559. Disturbing a religious meeting at a private residence is indictable: *State v. Starnes*, 151-724.

4414. **Disturbing schools and scientific and temperance meetings; injuring property of schools and temperance societies.** If any person shall willfully interrupt or disturb any public or private school or temperance society or organization or any meeting lawfully and peacefully held for the purpose of literary and scientific improvement, or for the discussion of temperance or question of moral reform, either within or without the place where such meeting or school is held, or injure any school building, or deface any school furniture, apparatus or other school property, or property of any temperance society or organization, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not more than thirty days.

Rev., s. 3838; Code, s. 2592; 1885, c. 140; 1901, c. 4, s. 28.

Claiming the right to occupy a schoolhouse and refusing to surrender it to one elected to teach a public school thereat, and thus preventing the school's being held there, is not interrupting or disturbing a public school within this section: *State v. Spray*, 113-686.

Section cited: *State v. Cooper*, 104-890.

4415. **Disturbing religious congregations.** If any person shall be intoxicated or shall be guilty of any rude and disorderly conduct at any place where people are accustomed to meet for divine worship, and while the people are there assembled for such worship, whether such worship should have begun or not, he shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned in the discretion of the court.

Rev., s. 3706; 1901, c. 738.

DECISIONS ON SIMILAR STATUTES. To make the disturbance indictable the people must have collected together at or about the time and at the place where the public worship is to take place: *State v. Bryson*, 82-576. Disturbing a congregation engaged in public worship is indictable, though it be not in a church, chapel or meeting-house especially set apart for that purpose: *State v. Ramsey*, 78-448; *State v. Swink*, 20-492—in private house, *State v. Starnes*, 151-724. Disturbing Sunday school: *State v. Branner*, 149-559.

Not indictable if the disturbance takes place after the service is over: *State v. Davis*, 126-1059; *State v. Ramsey*, 78-448; *State v. Fisher*, 25-111. Where two men fight near a church and a third party runs to church and calls out, "They are fighting at the fire," the two men are not guilty hereunder: *State v. Kirby*, 108-772.

Disturbance of a church congregation by singing is not indictable where the singer is taking part conscientiously in the service: *State v. Ramsey*, 78-448; *State v. Linkhaw*, 69-215.

Insufficiency of indictment: *State v. Bryson*, 82-576. Sufficiency of evidence: *State v. Jasper*, 15-323; *State v. Ramsey*, 78-448.

4416. **Detectives going armed in a body.** If any body of men composed of more than three persons, calling themselves detectives or claiming to be in the employ of any detective agency or known and designated as detectives, shall go armed, they shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court.

Rev., s. 3703; 1893, c. 191.

SUBCHAPTER 11. OFFENSES AGAINST THE PUBLIC SAFETY

ART. 33. OFFENSES AGAINST THE PUBLIC SAFETY

4417. **Malicious injury of property of railroads and other carriers; causing death or other physical injury thereby.** If any person shall willfully and maliciously put or place any matter or thing upon, over or near any railroad track; or shall willfully and maliciously destroy, injure or remove the road-bed, or any part thereof, or any rail, sill or other part of the fixture appurtenant to or constituting or supporting any portion of the track of such railroad; or shall willfully and maliciously do any other thing with intent to obstruct, stop, hinder, delay or displace the cars traveling on such road, or to stop, hinder or delay the passengers or others passing over the same; or shall willfully and maliciously injure the road-bed or the fixtures aforesaid, or any part thereof, with any other intent whatsoever, such person so offending shall be guilty of a felony and shall be fined not exceeding one thousand dollars nor less than two hundred dollars, and be imprisoned in the state's prison or county jail not less than four months nor more than ten years, and shall be committed to jail till he find surety for his good behavior, for a space of time of not less than three nor more than seven years. If it shall happen that by reason of the commission of the offenses aforesaid, or any of them, any engine or car shall be displaced from the track, or shall be stopped, hindered or delayed, so that any one thereby be instantly killed, or so wounded or hurt as to die therefrom in twelve calendar months thereafter, or shall thereby be maimed or be disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aiders and abettors, on conviction, shall suffer death, if the person is killed, and shall be imprisoned in the state's prison not less than five nor more than sixty years if the person is maimed or disabled. If any person shall maliciously destroy or injure any plank-road, turnpike or canal, or any appurtenance or fixture belonging thereto or used therewith, or shall maliciously destroy or injure any lock, dam or sluice, the same being a part of any work erected or made for the purpose of navigation, or improving the navigation of any water, the person so offending shall be guilty of a misdemeanor, and shall suffer the like punishment as in this section is provided for maliciously injuring a railroad.

Rev., s. 3754; Code, s. 1098; R. C., c. 34, ss. 99, 100; 1838, c. 38; 1879, c. 255, s. 2; 1911, c. 200.

Section cited in *State v. Holder*, 153-606.

4418. **Injuring without malice property of railroads and other carriers; causing death or other physical injury thereby.** If any person, unlawfully and on purpose, but without malice, shall commit any of the offenses mentioned in the preceding section, he shall be guilty of a misdemeanor. If it shall happen that by reason of the commission of any such offense any person shall be instantly killed, or so wounded or hurt as to die therefrom in twelve calendar months thereafter, or shall thereby be maimed or disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aiders and abettors, shall be imprisoned not less than twelve months, and fined at the discretion of the court.

Rev., s. 3755; Code, s. 1099; R. C., c. 34, s. 101.

4419. Shooting or throwing at trains or passengers. If any person shall willfully and unlawfully cast, throw or shoot any stone, rock, bullet, shot, pellet or other missile at, against, or into any railroad car, locomotive or train, or any person thereon, while such car or locomotive shall be in progress from one station to another, or while such car, locomotive or train shall be stopped for any purpose, the person so offending shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment in the county jail or state's prison, at the discretion of the court.

Rev., s. 3763; Code, s. 1100; 1887, c. 19; 1876-7, c. 4; 1911, c. 179.

The presumption that every man intends the natural consequences of his acts is only prima facie, and where there is evidence that defendant was drunk, the intent is properly left to jury: *State v. Barbee*, 92-820.

Indictment must aver that the train was in actual motion or stopped for a temporary purpose: *State v. Boyd*, 86-634.

Not necessary to show that the pistol discharged by defendant was loaded with ball or shot, or that the car was struck, and burden is on defendant to show that pistol was unloaded, as matter in defense: *State v. Hinson*, 82-597.

Section referred to in *State v. Holder*, 153-606.

4420. Operating trains and street cars while intoxicated. Any train dispatcher, telegraph operator, engineer, fireman, flagman, brakeman, switchman, conductor, motorman, or other employee of any steam, street, suburban or inter-urban railway company, who shall be intoxicated while engaged in running or operating, or assisting in running or operating, any railway train, shifting-engine, or street or other electric car, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the court.

Rev., s. 3758; Code, s. 1972; 1891, c. 114; 1871-2, c. 138, s. 38; 1907, c. 330.

4421. Displaying false lights on seashore. If any person shall make or display, or cause to be made or displayed, any false light or beacon on or near the seacoast, for the purpose of deceiving and misleading masters of vessels, and thereby putting them in danger of shipwreck, he shall be guilty of a felony, and shall be imprisoned in the state's prison for not less than four months nor more than ten years.

Rev., s. 3430; Code, s. 1024; R. C., c. 34, s. 58; 1831, c. 42.

4422. Local: Building unguarded barbed-wire fences along public highways. If any person shall erect or maintain a barbed-wire fence along any public road or highway, and within ten yards thereof, without putting a railing, smooth wire, board or plank on the top of such fence not less than three inches in width, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court. This section shall apply to the counties of Rowan, Swain, Catawba, Greene, Richmond, Stokes, Rutherford, Forsyth, Yadkin, Brunswick, Durham, Wilkes, Stanly, Cumberland, Iredell, Macon and Mitchell: Provided, that in Rutherford county only a railing or plank shall be used at the top of such fence.

Rev., s. 3769; 1895, c. 65; 1899, c. 43; 1899, c. 225; 1905, c. 220; 1909, cc. 318, 604, 629, 810.

A board fence with barbed wire on top, within ten yards of a public highway, is a violation of this section: *State v. Thomas*, 149-565.

4423. Exploding dynamite cartridges and bombs. If any person shall fire off or explode, or cause to be fired off or exploded, except for mechanical purposes:

in a legitimate business, any dynamite cartridge, bomb or other explosive of a like nature, he shall be guilty of a misdemeanor.

Rev., s. 3794; 1887, c. 364, s. 53.

4424. Storing explosives near causeway on Eagle's island. It shall be unlawful for any person, firm or corporation to erect or keep any magazine or other building for the storage of gunpowder, dynamite or other explosives within one hundred yards of the road or causeway on Eagle's island between the Cape Fear and Brunswick rivers: Provided, however, that this section shall not apply to warehouses for the storage of spirits of turpentine, rosin and tar. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than fifty nor more than two hundred dollars, or be imprisoned thirty days, or both, in the discretion of the court. 1907, c. 768.

4425. Keeping for sale or selling explosives without a license. If any dealer or other person shall sell or keep for sale any dynamite cartridges, bombs or other combustibles of a like kind, without first having obtained from the board of commissioners of the county where such person or dealer resides a license for that purpose, he shall be guilty of a misdemeanor.

Rev., s. 3817; 1887, c. 364, ss. 1, 4.

4426. Failing to enclose marl beds. If any person shall open any marl bed without surrounding it with a lawful fence, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, this shall not apply to any person whose marl bed is situated inside his own enclosure.

Rev., s. 3796; 1887, cc. 235, 268.

SUBCHAPTER 12. GENERAL POLICE REGULATIONS

ART. 34. LOTTERIES AND GAMING

4427. Advertising lotteries. If any one, by writing or printing or by circular or letter or in any other way, advertise or publish an account of a lottery, whether within or without this state, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest therein, or where or how it may be obtained, he shall be guilty of a misdemeanor.

Rev., s. 3725; 1887, c. 211.

4428. Dealing in lotteries. If any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person, by such way and means, expose or set to sale any house, real estate, goods, chattels, cash, written evidence of debt, certificates of claims or any other thing of value whatsoever, every person so offending shall be guilty of a misdemeanor, and shall be fined not exceeding two thousand dollars or imprisoned not exceeding six months, or both, in the discretion of the court. Any person who engages in disposing of any species of property whatsoever, including money and evidences of debt,

or in any manner distributes gifts or prizes upon tickets or certificates sold for that purpose, shall be held liable to prosecution under this section.

Rev., s. 3726; Code, s. 1047; R. C., c. 34, s. 69; 1834, c. 19, s. 1; 1874-5, c. 96.

“Lottery” defined: *State v. Love*, 178-770; *State v. Perry*, 154-616; *Winston v. Beeson*, 135-271. Chance is the essential element of a lottery, as where one by paying a small sum regularly for a certain time has the “chance” of being the recipient of a gift: *State v. Lipkin*, 169-265.

Note given in consideration of lottery or gift enterprise is invalid: *Mfg. Co. v. Benjamin*, 172-53. Contract of surety company to secure the performance of such contract is also void: *Basnight v. Mfg. Co.*, 174-206.

The right conferred in the charter of a corporation to carry on a lottery is a mere license and not a contract between the state and the corporation, and act of 1874-75, ch. 96, is constitutional: *State v. Morris*, 77-512.

The charter of a corporation giving it the right to sell and dispose of any property, placed in its hands for sale, in any mode or manner the corporation may deem best, does not authorize it to sell property in violation of this section: *State v. Krebs*, 64-604.

The purchase of a lottery ticket is not punishable hereunder: *State v. Bryant*, 74-207—but it seems to be punishable under section 4430, *State v. DeBoy*, 117-705.

Examples of lotteries: *State v. Lumsden*, 89-572; *State v. Bryant*, 74-207.

Punishment held not excessive: Compare *State v. Miller*, 94-907.

4429. Selling lottery tickets and acting as agent for lotteries. If any person shall sell, barter or otherwise dispose of any lottery ticket or order for any number or shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the state for or on behalf of any such lottery, to be drawn or paid either out of or within the state, such person shall be guilty of a misdemeanor, and shall be punished as provided for in the preceding section.

Rev., s. 3727; Code, s. 1048; R. C., c. 34, s. 70; 1834, c. 19, s. 2.

The purchase of a lottery ticket is not punishable hereunder: *State v. Bryant*, 74-207—but it seems to be punishable under section 4430, see *State v. DeBoy*, 117-705.

4430. Gambling. If any person play at any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, both those who play and those who bet thereon shall be guilty of a misdemeanor.

Rev., s. 3715; 1891, c. 29.

Punishment in Avery county, see P. L. 1919, c. 105. For dealing in futures, see sections 2147-2149.

Defendant “did unlawfully and wilfully play at a game of cards at which money was bet,” held to sufficiently describe a game of chance: *State v. Taylor*, 111-680.

“Ten-pins” not a “game of chance” within this section: *State v. King*, 113-631; see, also, *State v. Gupton*, 30-271. A “raffle” is a “game of chance”: *State v. DeBoy*, 117-702. As to games of chance generally, see *Ibid.* All who participate in game of chance are principals: *Ibid.*

Indictment may charge the offense hereunder together with the offense of keeping and maintaining a gaming house: *State v. Morgan*, 133-743—and state need not make election, *Ibid.*

Witnesses may be compelled to testify, although their testimony tends to criminate them, as they are pardoned under section 1800: *State v. Morgan*, 133-743.

Infant under fourteen playing at “shooting craps,” not knowing it to be unlawful, but knowing right from wrong, not guilty: *State v. Yeargan*, 117-706.

Indictment charging that defendant did unlawfully play at a game of cards, without charging that he bet on the game, is defective: *State v. Brannen*, 53-208.

4431. Allowing gambling in houses of public entertainment; duty of police officers; penalty. If any keeper of an ordinary or other house of entertainment,

or of a house wherein liquors are retailed, shall knowingly suffer any game, at which money or property, or anything of value, is bet, whether the same be in stake or not, to be played in any such house, or in any part of the premises occupied therewith; or shall furnish persons so playing or betting either on said premises or elsewhere with drink or other thing for their comfort or subsistence during the time of play, he shall be guilty of a misdemeanor, and shall be fined not less than five hundred dollars and be imprisoned not less than six months. Any person who shall be convicted under this section shall, upon such conviction, forfeit his license to do any of the businesses mentioned in this section, and shall be forever debarred from doing any of such businesses in this state. The court shall embody in its judgment that such person has forfeited his license, and no board of county commissioners, board of town commissioners or board of aldermen shall thereafter have power or authority to grant to such convicted person or his agent a license to do any of the businesses mentioned herein. It shall be the duty of every police officer of the cities, towns and villages of this state to make diligent inquiry and to exercise constant watchfulness to discover whether any of the offenses enumerated in this section are being committed, and to report once a week under oath to the mayor or other chief officer of his city, town or village, whether such offenses are being committed, and all the facts within his knowledge, or of which he has information relating thereto. If any such police officer shall know or have information that such offenses are being committed and shall fail or neglect to report the same to such mayor or other chief officer, together with all the information known to him, as to the person or persons committing the same, the time and place of the commission and the names of the witnesses thereto, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court, and shall forfeit his office. It shall be the duty of such mayor or other chief officer to require the report herein provided for, and to require that the same shall be verified by the oath of such policeman, and if it appear upon such report that any of the said offenses have been committed, it shall be the duty of such mayor or other chief officer to issue his warrant for the arrest of the offender. Any such mayor or other chief officer of any city, town or village who shall fail or neglect to require the reports herein mentioned, or shall fail or neglect to require of such police officer to verify the same upon oath, or who shall refuse or neglect, upon its appearing from such reports that there is probable cause to believe that any of the said offenses have been committed, to issue his warrant for the arrest of the offender, shall be guilty of a misdemeanor. Any person committing any of the offenses mentioned in this section shall be liable to a penalty of five hundred dollars, to be recovered by suit in the superior court in the county in which such offense may have been committed, one-half thereof to the use of the person bringing such suit and one-half to the school fund for the county.

Rev., s. 3716; Code, s. 1043; 1901, c. 753; R. C., c. 34, s. 76; 1799, c. 526; 1801, c. 581; 1831, c. 26.

What included in "premises occupied therewith": *State v. Terry*, 20-325; see, also, *State v. Black*, 31-378; *State v. Keisler*, 51-73.

Only necessary to show the fact that liquor was retailed in the house, and not necessary to show that the retailer has complied with the law in obtaining a license: *State v. Hawkins*, 91-626; *State v. Terry*, 20-325.

A fine of \$2,000 and imprisonment for thirty days held not excessive punishment: *State v. Miller*, 94-904.

4432. Gambling with faro-banks and tables. If any person shall open, establish, use or keep a faro-bank, or a faro-table, with the intent that games of chance may be played thereat, or shall play or bet thereat any money, property or other thing of value, whether the same be in stake or not, he shall be guilty of a misdemeanor, and shall be fined at least two hundred dollars and imprisoned not less than three months.

Rev., s. 3717; Code, s. 1044; R. C., s. 71; 1848, c. 34; 1856-7, c. 25.

Section cited in *State v. Bryant*, 74-207; *State v. Norwood*, 94-936.

4433. Keeping gaming tables or betting thereat. If any person shall establish, use or keep any gaming table (other than a faro-bank), by whatever name such table may be called, at which games of chance shall be played, he shall on conviction thereof be fined not less than two hundred dollars and shall be imprisoned not less than thirty days; and every person who shall play thereat or thereat bet any money, property or other thing of value, whether the same be in stake or not, shall be guilty of a misdemeanor, and shall be fined not less than ten dollars.

Rev., s. 3718; Code, s. 1045; R. C., c. 34, s. 72; 1791, c. 336; 1798, c. 502, s. 2.

“Shuffle-board” is a game of skill and not a game of chance: *State v. Bishops*, 30-266.
 “Ten-pins” not a game of chance: *State v. Gupton*, 30-271.

Indictment need duly charge offense in words of statute: *State v. Howe*, 100-449.

Section cited in *State v. DeBoy*, 117-705; *State v. Norwood*, 94-939; *State v. Bryant*, 74-207.

4434. Allowing gaming tables on premises. If any person shall knowingly suffer to be opened, kept or used in his house or on any part of the premises occupied therewith, any of the gaming tables by this article prohibited, he shall forfeit and pay to any one who will sue therefor two hundred dollars, and shall also be guilty of a misdemeanor and fined and imprisoned.

Rev., s. 3719; Code, s. 1046; R. C., c. 34, s. 73; 1798, c. 502, s. 3; 1800, c. 5, s. 2.

See *State v. Black*, 94-809.

4435. Gaming tables to be destroyed by justices and police officers. All justices of the peace, sheriffs, constables and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by this article is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction.

Rev., s. 3720; Code, s. 1049; R. C., c. 34, s. 74; 1791, c. 336; 1798, c. 502, s. 2.

Section cited and approved in *State v. Homer*, 139-226.

4436. Property exhibited by gamblers to be seized; disposition of same. All moneys or other property or thing of value exhibited for the purpose of alluring persons to bet on any game shall be liable to be seized by any justice of the peace, or by any person acting under his warrant. Of the moneys or other property or thing which shall be so seized one-half shall belong to the person seizing them, and the other half shall go to the use of the poor.

Rev., s. 3722; Code, s. 1051; R. C., c. 34, s. 77; 1798, c. 502, s. 3.

Section cited and approved in *Daniels v. Homer*, 139-226.

4437. Opposing destruction of gaming tables and seizure of property. If any person shall oppose the destruction of any prohibited gaming table, or the seizure

of any moneys, property or other thing staked on forbidden games, or shall take and carry away the same or any part thereof after seizure, he shall forfeit and pay to the person so opposed one thousand dollars, for the use of the state and the person so opposed, and shall, moreover, be guilty of a misdemeanor.

Rev., s. 3723; Code, s. 1052; R. C., c. 34, s. 78; 1798, c. 502, s. 4.

Section cited and approved in *Daniels v. Homer*, 139-226.

ART. 35. PROTECTION OF MINORS

4438. Selling cigarettes to minors. If any person shall sell, give away or otherwise dispose of, directly or indirectly, cigarettes, or tobacco in the form of cigarettes, or cut tobacco in any form or shape which may be used or intended to be used as a substitute for cigarettes, to any minor under the age of seventeen years; or if any person shall aid, assist or abet any other person in selling such articles to such minor, he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine or imprisonment in the discretion of the court.

Rev., s. 3804; 1891, c. 276.

4439. Aiding minors in procuring cigarettes; duty of police officers. If any person shall aid or assist any minor child under seventeen years old in obtaining the possession of cigarettes, or tobacco in any form used as a substitute therefor, by whatsoever name it may be called, he shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court.

It shall be the duty of every police officer, upon knowledge or information that any minor under the age of seventeen years is or has been smoking any cigarette, to inquire of any such minor the name of the person who sold or gave him such cigarette, or the substance from which it was made, or who aided and abetted in effecting such gift or sale. Upon receiving this information from any such minor, the officer shall forthwith cause a warrant to be issued for the person giving or selling, or aiding and abetting in the giving or selling of such cigarette or the substance out of which it was made, and have such person dealt with as the law directs. Any such minor who shall fail or refuse to give to any officer, upon inquiry, the name of the person selling or giving him such cigarette, or the substance out of which it was made, shall be guilty of a misdemeanor.

Rev., s. 3805; 1891, c. 276, s. 2; 1913, c. 185.

4440. Selling or giving weapons to minors. If any person shall knowingly sell, offer for sale, give or in any way dispose of to a minor any pistol or pistol cartridge, brass knucks, bowie-knife, dirk, loaded cane or sling-shot, he shall be guilty of a misdemeanor.

Rev., s. 3832; 1893, c. 514.

4441. Permitting young children to use dangerous firearms. Any person, being the parent or guardian of, or standing in loco parentis to, any child under the age of twelve years, who shall knowingly permit such child to have the possession or custody of, or use in any manner whatever, any gun, pistol or other dangerous firearm, whether such firearm be loaded or unloaded, or any other person who shall knowingly furnish such child any such firearm, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

1913, c. 32.

4442. Permitting minors to enter barrooms, billiard rooms and bowling alleys.

If the keeper or owner of any barroom, billiard room or bowling alley shall allow any minor to enter or remain in such barroom, billiard room or bowling alley, where before such minor enters or remains in such barroom, billiard room or bowling alley, the owner or keeper thereof has been notified by the parents or guardian of such minor not to allow him to enter or remain in such barroom, billiard room or bowling alley, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., s. 3729; 1897, c. 278.

4443. Exposing children to fire. If any person shall leave any child of the age of seven years or less locked or otherwise confined in any dwelling, building or enclosure, and go away from such dwelling, building or enclosure without leaving some person of the age of discretion in charge of the same, so as to expose the child to danger by fire, the person so offending shall be guilty of a misdemeanor, and shall be punished at the discretion of the court.

Rev., s. 3795; 1893, c. 12.

4444. Marrying females under fourteen years old. If any person shall marry a female under the age of fourteen years, he shall be guilty of a misdemeanor.

Rev., s. 3368; Code, s. 1083; R. C., c. 34, s. 46; 1820, c. 1041, ss. 1, 2.

Compare *State v. Watts*, 32-369. **Proving marriage by admissions of defendant:** *State v. Melton*, 120-591; *State v. Wylde*, 110-500—by record of book of marriages, *State v. Melton*, 120-591—by eye-witness to marriage, *State v. Wylde*, 110-500.

4445. Separating child under six months old from mother. It shall be unlawful for any person to separate or aid in separating any child under six months old from its mother for the purpose of placing such child in a foster home or institution, or with the intent to remove it from the state for such purpose, unless the consent in writing for such separation shall have been obtained from the clerk of the superior court and the county health officer of the county in which the mother resides, or of the county in which the child was born; and it shall be unlawful for any mother to surrender her child for such purpose without first having obtained such consent. Any person violating this section shall, upon conviction, be fined not exceeding five hundred dollars or imprisoned for one year, or both, in the discretion of the court.

1917, c. 59; 1919, c. 240.

4446. Failing to pay minors for doing certain work. Whenever any person, having a contract with any corporation, company or person for the manufacture or change of any raw material by the piece or pound, shall employ any minor to assist in the work upon the faith of and by color of such contract, with intent to cheat and defraud such minor, and, having secured the contract price, shall willfully fail to pay the minor when he shall have performed his part of the contract work, whether done by the day or by the job, the person so offending shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 3428a; 1893, c. 309.

ART. 36. PROTECTION OF THE FAMILY

4447. Abandonment of family by husband. If any husband shall willfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor.

Rev., s. 3355; Code, s. 970; 1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92.

There must be a willful abandonment and a failure to support: *State v. Taylor*, 175-833; *State v. Smith*, 164-475. Abandonment and failure to support are both essential, and they must have occurred in this state: *State v. Toney*, 162-635; but see *State v. Kerby*, 110-558, where failure to support children is sufficient to establish guilt. To constitute abandonment it is not necessary that husband should leave the state: *Witty v. Barham*, 147-479. Consent of wife to separation is not abandonment, but subsequent acts may constitute it: *Ibid.* "Willful abandonment" construed: *State v. Deaton*, 65-496. Wife guilty of adultery, husband not liable for abandonment: *State v. Hopkins*, 130-647.

Statute of limitations bars indictment after two years from separation: *State v. Davis*, 79-603. Abandonment is not a continuous offense for which husband can be twice indicted, the act of separation being the gist of the offense: *State v. Davis*, 79-603; *State v. Dunston*, 78-418. When the first abandonment might be barred by the statute, a new abandonment within the time would sustain the charge: *State v. Hannon*, 168-215. If, upon trial for abandonment of wife and children, husband agrees to support them and does not, this is a new abandonment for which he may be indicted: *State v. Davis*, 79-603.

Jurisdiction is in superior court: *State v. Woolard*, 119-779. Indictment must aver failure to support: *State v. May*, 132-1020—and must allege "willful" abandonment, *State v. Hopkins*, 130-649.

Competent for wife to testify as to fact of abandonment: *State v. Brown*, 67-470—and as to fact of marriage (explaining or overruling *State v. Brown*), *State v. Chester*, 172-946.

Where husband claimed he abandoned wife on account of her adultery, which she denied, it is error to leave question of guilt to jury to depend upon question of adultery, as that is collateral: *State v. Hopkins*, 130-647.

Case where defendant pleads that marriage to prosecutrix was void: *State v. Davis*, 79-603. Section cited in *Steele v. Steele*, 104-637.

4448. Evidence that abandonment was willful. If the fact of abandonment of and failure to provide adequate support for the wife and children shall be proved, or, while being with such wife, neglect by the husband to provide for the adequate support of such wife or children shall be proved, then the fact that such husband neglects applying himself to some honest calling for the support of himself and family, and is found sauntering about, endeavoring to maintain himself by gaming or other undue means, or is a common frequenter of drinking houses, or is a known common drunkard, shall be presumptive evidence that such abandonment and neglect is willful.

Rev., s. 3356; Code, s. 971; 1868-9, c. 209, s. 3.

Section cited in *Steele v. Steele*, 104-637.

4449. Order of support from husband's property or earnings. Upon any conviction for abandonment, any judge or any recorder having jurisdiction thereof may, in his discretion, make such order as in his judgment will best provide for the support, as far as may be necessary, of the deserted wife or children, or both, from the property or labor of the defendant.

1917, c. 259.

4450. Failure of husband to provide adequate support for family. If any husband, while living with his wife, shall willfully neglect to provide adequate

support for such wife or the children which he has begotten upon her, he shall be guilty of a misdemeanor.

Rev., s. 3357; Code, s. 972; 1868-9, c. 209, s. 2; 1873-4, c. 176, s. 11; 1879, c. 92.

Indictment, sufficiency of: *State v. Kerby*, 110-558. Section cited in *State v. May*, 132-1020.

ART. 37. INTOXICATING LIQUORS

4451. Adulteration of liquors. If any person shall adulterate any spirituous, alcoholic, vinous or malt liquors by mixing the same with any substance of whatever kind, except as provided in the following section, or if any person shall sell or offer to sell any spirituous, alcoholic, vinous or malt liquors, knowing the same to be thus adulterated, or shall import into this state any spirituous or intoxicating liquors, and sell or offer to sell such liquor, knowing the same to be adulterated, he shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court.

Rev., s. 3512; Code, s. 982; 1858-9, c. 57, ss. 1, 4.

Construe this section with section 4752. Compare, as to intent, *State v. Powell*, 141-780.

4452. Selling recipe for adulterating liquors. If any person shall sell or offer to sell any recipe or formula whatever for adulterating any spirituous or alcoholic liquors, by mixing the same with any substance of whatever kind, except as is herein provided, he shall be guilty of a felony, and shall be fined or imprisoned as is provided in the preceding section: Provided, that this section and the two sections that immediately precede and follow it respectively shall not be so construed as to prevent druggists, physicians and persons engaged in the mechanical arts from adulterating liquors for medical and mechanical purposes.

Rev., s. 3513; Code, s. 984; 1858-9, c. 57, ss. 2, 3.

4453. Manufacturing or selling poisonous liquors. If any person shall manufacture, sell, or in any way deal out spirituous liquors, of any name or kind, to be used as a drink or beverage, and the same shall be found to contain any foreign properties or ingredients poisonous to the human system, he shall be guilty of a felony and shall be imprisoned in the state's prison not less than five years, and may be fined in the discretion of the court. It shall be competent for any citizen, after making purchase of any spirituous liquor, to cause the same to be analyzed by some known competent chemist, and if upon such analysis it shall be found to contain any foreign poisonous matter, it shall be prima facie evidence against the party making such a sale.

Rev., s. 3522; Code, s. 983; 1873-4, c. 180, ss. 1, 2.

Section cited: *State v. Barrett*, 138-635. Compare, as to prima facie case, *State v. Barrett*, 138-630. Sale of poisonous drink: *State v. Keever*, 177-114.

4454. Selling or giving away liquor near political speaking. If any person shall sell or give away, either directly or indirectly, any spirituous liquors, wine or bitters containing alcohol, within two miles of any place at which political public speaking shall be advertised to take place, and does take place, during the day on which such speaking shall take place, he shall be guilty of a misdemeanor, and shall be fined not less than ten dollars nor more than twenty dollars, or imprisoned not exceeding twenty days.

Rev., s. 3528; Code, s. 1079; 1879, c. 212.

Section cited: *State v. Eaves*, 106-755. Compare: *State v. Knotts*, 131-705.

4455. Giving intoxicants to unmarried minors under seventeen years old. If any person shall give intoxicating drinks or liquors to any unmarried minor under the age of seventeen years; or if any person shall aid, assist or abet any other person in giving such drinks or liquors to such minor, he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine or imprisonment in the discretion of the court; but nothing in this section shall prevent any parent or other person standing in loco parentis from giving or administering any such drinks or liquors to his minor child for medicinal purposes, nor any physician from giving or administering such drinks or liquors to any minor patient under his care; nor shall this section apply to the giving or using of wine in the administration of the sacrament.

1915, c. 82.

4456. Selling or giving intoxicants to unmarried minors by dealers; liability for exemplary damages. If any dealer in intoxicating drinks or liquors sell, or in any manner part with for a compensation therefor, either directly or indirectly, or give away such drinks or liquors, to any unmarried person under the age of twenty-one years, knowing such person to be under the age of twenty-one years, he shall be guilty of a misdemeanor; and such sale or giving away shall be prima facie evidence of such knowledge. Any person who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit shall be considered a dealer within the meaning of this section.

The father, or if he be dead, the mother, guardian or employer of any minor to whom a sale or gift shall be made in violation of this section, shall have a right of action in a civil suit against the person so offending by such sale or gift, and upon proof of such illicit sale or gift shall recover from the party so offending such exemplary damages as a jury may assess: Provided, that such assessment shall not be less than twenty-five dollars.

Rev., ss. 3524, 3525; Code, ss. 1077, 1078; 1873-4, c. 68; 1881, c. 242.

Physician who keeps liquor for sale or profit is a "dealer": State v. McBrayer, 98-619.

Dealer guilty, although authorized to make sale by father of minor: State v. Lawrence, 97-492—but the dealer is not guilty where the minor acts merely as agent for the father in making the purchase, the dealer knowing the liquor was for the father, State v. Walker, 103-413.

Dealer who supplies liquor to minor at request of adult is guilty, and the adult is an aider and abettor: State v. Scoggins, 107-959; State v. Best, 108-747.

Dealer responsible for sale to minor by his agent, although without his knowledge and against his instructions: State v. Kittelle, 110-560—but seems contra as to druggist, when sale is made by a registered pharmacist, State v. Neal, 133-689.

In case of an interstate shipment, with draft and bill of lading to the consignor, notify, the cashier of a bank, paying the draft and delivering the bill of lading to the purchaser, is not guilty of selling: State v. Fisher, 162-550. Construction of this section with reference to interstate commerce and the effect of the Wilson act: Ibid.

"Civil damage act" creates a new cause of action, and a "dealer" is liable as herein provided: Spencer v. Fisher, 161-116. It is necessary to allege that the minor is unmarried: Spencer v. Fisher, 158-264.

Several defendants may be indicted and convicted hereunder for a single unlawful act: State v. Scoggins, 107-959. Sufficiency of description in indictment, State v. Best, 108-747. Sufficiency of evidence: State v. Scoggins, 107-959. When liquid is plainly intoxicating, the court will so declare; but when it is doubtful, it is a question for the jury: State v. Parker, 139-586. Unlawful intent conclusively presumed from the doing of the act: State v. McBrayer, 98-619; State v. Scoggins, 107-959.

Section cited: State v. Austin, 114-855; Holloman v. Howard, 119-155; State v. Barrett, 138-635.

Compare: State v. Wray, 72-253—as to constitutionality, State v. Austin, 114-855—as to prima facie case, State v. Barrett, 138-635.

ART. 38. PUBLIC DRUNKENNESS

4457. Public drinking on railway passenger cars; copy of section to be posted. Any person who shall publicly engage in the drinking of intoxicating liquors in the presence of passengers on any passenger car shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than fifty dollars, or imprisoned not to exceed thirty days. This section shall not apply to any smoking compartment or to any closet, dining or buffet car. It shall be the duty of all railway companies to have posted a copy of this section in all passenger coaches used for transporting passengers within the state.

1907, c. 455.

4458. Local: Public drunkenness. If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting, in any county, township, city, town, village or other place herein named, he shall be guilty of a misdemeanor, and upon conviction shall be punished as is provided in this section:

1. By a fine of not more than fifty dollars, or by imprisonment for not more than thirty days, in the counties of Ashe, Catawba, Cleveland, Dare, Gaston, Graham, Greene, Haywood, Henderson, Hyde, Jackson, Lincoln, Macon, Madison, Mecklenburg, Moore, Pitt, Richmond, Rutherford, Scotland, Stanly, Swain, Union, Vance, Warren and Washington, in the townships of Fruitville and Poplar branch in Currituck county, and at Pungo in Beaufort county.

1907, cc. 305, 785, 900; 1908, c. 113; 1909, c. 815; P. L. 1915, c. 790; P. L. 1917, cc. 447, 475; P. L. 1919, cc. 148, 200.

2. By a fine of not less than three dollars nor more than fifty dollars, or by imprisonment for not more than thirty days, in Yancey county.

1909, c. 256.

3. By a fine of not less than two dollars and fifty cents nor more than fifty dollars, or by imprisonment for not more than thirty days, in Buncombe county.

1909, c. 271.

4. By a fine of not less than five dollars nor more than twenty-five dollars, or by imprisonment for not more than ten days, in Cherokee and Yadkin counties.

1907, c. 976.

5. By a fine of not less than three dollars nor more than five dollars in Clay county, all such fines to go to the public school fund of that county.

1907, c. 309.

6. By a fine of not less than five dollars nor more than ten dollars in Wake county, all such fines to go to the general road fund of that county.

1907, c. 908.

7. By a fine of not more than fifty dollars, or by imprisonment for not more than thirty days, in Mitchell county: Provided, that this subsection shall not apply to incorporated towns in that county.

1909, c. 111.

8. By a fine of not less than five dollars nor more than fifty dollars, or by imprisonment for not more than ten days, in the village of Kannapolis, or on the premises or within one mile of the Kannapolis cotton mills.

1909, c. 46, s. 2.

9. By a fine, for the first offense, of not less than ten nor more than twenty dollars; for second and further offense, not less than twenty nor more than thirty dollars, or imprisoned for not more than twenty days, in Transylvania county.

P. L. 1919, c. 190.

Rev., s. 3733; 1897, c. 57; 1899, cc. 87, 208, 608, 638; 1901, c. 445; 1903, cc. 116, 124, 523, 758.

ART. 39. VAGRANTS AND TRAMPS

4459. **Persons classed as vagrants.** If any person shall come within any of the following classes, he shall be deemed a vagrant, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, however, that this limitation of punishment shall not be binding except in cases of a first offense, and in all other cases such person may be fined or imprisoned, or both, in the discretion of the court:

1. Persons wandering or strolling about in idleness who are able to work and have no property to support them.

2. Persons leading an idle, immoral or profligate life, who have no property to support them and who are able to work and do not work.

3. All persons able to work having no property to support them and who have not some visible and known means of a fair, honest and reputable livelihood.

4. Persons having a fixed abode who have no visible property to support them and who live by stealing or by trading in, bartering for or buying stolen property.

5. Professional gamblers living in idleness.

6. All able-bodied men having no other visible means of support who shall live in idleness upon the wages or earnings of their mother, wife or minor children, except of male children over eighteen years old.

7. Keepers and inmates of bawdy-houses, assignation houses, lewd and disorderly houses, and other places where illegal sexual intercourse is habitually carried on: Provided, that nothing here is intended or shall be construed as abolishing the crime of keeping a bawdy-house, or lessening the punishment by law for such crime.

Rev., s. 3740; 1905, c. 391; 1907, c. 1012, s. 1; 1913, c. 75; 1915, c. 1.

Under subsection 7 reputation of house may be considered in evidence: *State v. Price*, 175-804. The circumstances with reputation of house may show guilt of vagrancy: *Ibid*.

Compare under act 1866, ch. 42, *State v. Custer*, 65-339.

4460. **Police officers to furnish list of disorderly houses; inmates competent and compellable to testify.** It shall be the duty of the chief of police, marshal, constable or other chief ministerial officer of each city and town in this state to furnish every thirty days to the police justice, recorder, mayor or other trial officer of such city or town a list of the bawdy, assignation, lewd and disorderly houses and other places where illegal sexual intercourse is carried on, together with the names of the keepers and inmates of such houses and places, in such city

or town; and it shall be the duty of such police justice, recorder, mayor or other trial officer, upon the filing of such list, to issue his warrant for the persons declared in subsection seven of the preceding section to be vagrants, and to punish in accordance with the provisions of that section such of them as may be found guilty. In all trials under said subsection seven of the preceding section any keeper or inmate of any of the houses or places named, or his employees, shall be competent and compellable to give evidence of the character and nature of such house or place and of the character and acts of the keepers and inmates thereof; but the person so testifying shall not be prosecuted or punished for the commission of any crime about which he shall have been required to testify.

If any chief of police, marshal, constable or other chief ministerial officer of any city or town shall fail to furnish the list of houses and places provided for in this section, or shall suppress the name of any person whom he is required herein to report, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court.

1907, c. 1012, ss. 2, 3.

4461. Tramp defined and punishment provided; certain persons excepted. If any person shall go about from place to place begging or subsisting on charity, he shall be denominated a tramp, and shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days: Provided, that any person who shall furnish satisfactory evidence of good character shall be discharged without cost. Any act of begging or vagrancy by any person, unless a well-known object of charity, shall be evidence that the person committing the same is a tramp. This section shall not apply to any woman, to any minor under the age of fourteen years, or to any blind person.

Rev., s. 3735; Code, ss. 3828, 3829, 3831, 3833; 1897, c. 268; 1879, c. 198, ss. 1, 4, 6.

4462. Trespassing and the carrying of dangerous weapons by tramps. If any tramp shall enter any dwelling-house or kindle any fire on the land of another without the consent of the owner or occupant thereof, or shall kindle a fire on any highway, or shall be found carrying any firearm or other dangerous weapon, or shall threaten to do any injury to the person, or to the real or personal estate, of another, he shall be punished by imprisonment at the discretion of the court, not to exceed twelve months.

Rev., s. 3736; Code, s. 3829; 1879, c. 198, s. 2.

4463. Malicious injuries by tramps to persons and property. If any tramp shall willfully and maliciously do any injury to the person, or to the real or personal estate, of another, he shall be punished by imprisonment, at the discretion of the court, not to exceed three years.

Rev., s. 3737; Code, s. 3830; 1879, c. 198, s. 3.

4464. Arrest of tramps by persons who are not officers. Any person, upon a view of any offense described in the three preceding sections, shall cause the offender to be arrested upon a warrant and taken before some justice of the peace, or he may apprehend the offender and take him before a justice of the peace, for examination, and, on his conviction, he shall be entitled to the same fee as a sheriff.

Rev., s. 3738; Code, s. 3832; 1879, c. 198, s. 5.

ART. 40. REGULATION OF SALES

4465. Selling or offering to sell meat of diseased animals. If any person shall knowingly and willfully slaughter any diseased animal and sell or offer for sale any of the meat of such diseased animal for human consumption, or if any person knows that the meat offered for sale or sold for human consumption by him is that of a diseased animal, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court.

Rev., s. 3442; 1905, c. 303.

Section referred to in *Ward v. Sea Food Co.*, 171-33.

4466. Unauthorized dealing in railroad tickets. If any person shall sell or deal in tickets issued by any railroad company, unless he is a duly authorized agent of the railroad company, or shall refuse upon demand to exhibit his authority to sell or deal in such tickets, he shall be guilty of a misdemeanor.

Rev., s. 3764; 1895, c. 83, s. 1.

Compare under act of 1891, ch. 290, decision that sale of one ticket no offense: *State v. Ray*, 109-736.

4467. Sale of cotton at night under certain conditions. If any person shall buy, sell, deliver or receive, for a price, or for any reward whatever, any cotton in the seed, or any unpacked lint cotton, brought or carried in a basket, hamper or sheet, or in any mode where the quantity is less than what is usually baled, or where the cotton is not baled, between the hours of sunset and sunrise, such person so offending shall be guilty of a misdemeanor. On conviction, in Mecklenburg and Nash counties, the offender shall be imprisoned not less than three months nor more than twelve months, and shall also be liable to a penalty of two hundred dollars, one-half of which shall go to the party suing for same and one-half to the public schools of the county.

Rev., s. 3813; Code, s. 1006; 1873-4, c. 62; 1874-5, c. 70; 1905, c. 417.

Similar statute held constitutional: *State v. Moore*, 104-714.

Indictment must set forth the manner in which the articles were "brought or carried": *State v. Whiteacre*, 98-753.

4468. Local: Sale of corn at night in less than five-bushel lots. If any person shall buy, sell, deliver or receive for a price or for any reward whatever, any corn in the ear or shelled of a less amount than five bushels, between the hours of sunset and sunrise, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding fifty dollars or imprisoned not exceeding thirty days. In all prosecutions under this section it shall be necessary for the state only to allege and prove that the defendant bought or received the corn as charged, and the burden shall be upon the defendant to show that the provisions of this section have been complied with: Provided, this section shall apply only to the counties of Beaufort, Hyde, Martin, Tyrrell, Washington, Pamlico, Halifax and Edgecombe.

Rev., s. 3809; 1889, c. 90; 1891, c. 6; 1891, c. 8.

ART. 41. REGULATION OF EMPLOYER AND EMPLOYEE

4469. Enticing servant to leave master. If any person shall entice, persuade and procure any servant by indenture, or any servant who shall have contracted

in writing or orally to serve his employer, to leave unlawfully the service of his master or employer; or if any person shall knowingly and unlawfully harbor and detain, in his own service and from the service of his master or employer, any servant who shall unlawfully leave the service of such master or employer, then, in either case, such person and servant shall be guilty of a misdemeanor and shall be fined not exceeding one hundred dollars or imprisoned not exceeding six months.

Rev., s. 3365; Code, ss. 3119, 3120; 1866, c. 58; 1866-7, c. 124; 1881, c. 303.

Section held constitutional: *State v. Harwood*, 104-724. No defense at common law to entice infant from the service of parent: *State v. Rice*, 76-194. Section has reference only to "enticing" servants, and indictment will not lie hereunder against servant for wilfully breaking contract to labor: *State v. Daniel*, 89-553. Section does not apply where the servant has merely made a contract to serve; he must be induced to leave the service of his master: *Sears v. Whitaker*, 136-37. There must be something more than mere employment; it must appear that defendant enticed or persuaded servant to leave the master: *State v. Holly*, 152-839.

Contract that tenant, as part of the rent, will work for landlord when he can leave his own crop and when he is needed by landlord does not constitute the relation here contemplated: *State v. Hoover*, 107-795; *State v. Etheridge*, 169-263.

It is a violation of the statute to entice a servant, although the contract for labor be voidable on account of the infancy of the servant: *State v. Harwood*, 104-724—but if the contract is entered into without the consent of the parents they may demand such infant to leave the service of his employer, without incurring any liability hereunder: *State v. Anderson*, 104-771.

Contract must be by indenture, in writing or oral: *State v. Rice*, 76-194; *State v. Anderson*, 104-771.

Indictment, sufficiency of: *State v. Harwood*, 104-724. Section cited in *Haskins v. Royster*, 70-601.

4470. Local: Hiring servant who has unlawfully left employee. If any person shall knowingly hire, employ, harbor or detain in his own service any servant, employee, tenant, or wage hand of any other person, who shall have contracted in writing, or orally, for a fixed period of time to serve his employer, and who shall have left the service of his employer in violation of his contract, he shall be guilty of a misdemeanor, and shall be civilly liable in damages to the party so aggrieved. This section shall apply to the following counties: Beaufort, Edgecombe, Person, Pitt, Washington, Warren, Vance, Pender, Halifax, Guilford, Granville, Hertford, Richmond, Wake, Wayne and Caswell.

Rev., s. 3374; 1901, c. 682; 1903, c. 365; 1907, c. 238, s. 2; 1907, c. 402; 1919, c. 274.

4471. Enticing seamen from vessel. If any person shall induce any seaman, in the employment of any domestic or foreign vessel, in any of the ports of North Carolina, to leave any such vessel before his term of service shall have expired, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

Rev., s. 3555; Code, s. 1108; 1879, c. 219, s. 1; 1881, c. 256, s. 1.

4472. Secreting or harboring deserting seamen. If any person shall secrete or harbor any seaman who has deserted from any domestic or foreign vessel, knowing that such seaman has deserted, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days; and if such seaman be found concealed or secreted by any person on his

premises, such concealment and secretion shall be deemed *prima facie* evidence that such person knew that such seaman was a deserter.

Rev., s. 3556; Code, s. 1109; 1879, c. 219, s. 2; 1881, c. 256, s. 2.

Compare, as to *prima facie* case: *State v. Barrett*, 138-636.

4473. Search warrants for deserting seamen. If any credible witness shall complain, upon oath before any justice of the peace, that any person has concealed on his premises any seaman who has deserted from any such domestic or foreign vessel, it shall be lawful for such justice to grant a search warrant to be executed within the limits of his county to any proper officer, authorizing him to search for such seaman, and to arrest the person on whose premises he may be found; and the person on whose premises such seaman shall be found shall be adjudged to pay the costs of the search warrant, if on examination it shall appear that such seaman was secreted or concealed by such person; otherwise the costs shall be paid by the party making the complaint.

Rev., s. 3557; Code, s. 1110; 1881, c. 256, s. 3.

4474. Appeal in cases of deserting seamen regulated. In all cases arising under the three preceding sections, if any appeal is prayed by either party at the time of the trial, it shall be granted; but no appeal shall be granted by any justice at any time after the final hearing of the case. In case an appeal is prayed at the trial, it shall be the duty of the justice to proceed immediately to reduce to writing the testimony of any witness whose testimony is material (if such witness shall be master, officer or seaman on board of any vessel), in the presence of the adverse party, who may cross-question such witness, which testimony shall be subscribed by such witness and returned by the justice with the papers in the case; and on the hearing in the appellate court, the testimony so taken and reduced to writing by the justice shall be read, heard and accepted as the true and lawful testimony of such witness, as if such person were in person present to give evidence. For reducing such testimony to writing the justice shall receive the same fees as are allowed for taking depositions.

Rev., s. 3558; Code, s. 1111; 1881, c. 256, ss. 4, 5.

4475. Influencing agents and servants in violating duties owed employers. Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; any agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives, directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be guilty of a misdemeanor and shall be punished in the discretion of the court.

1913, c. 190, s. 1.

4476. Witness required to give self-criminating evidence; no suit or prosecution to be founded thereon. No person shall be excused from attending, testifying or producing books, papers, contracts, agreements and other documents before any court, or in obedience to the subpoena of any court, having jurisdiction of the crime denounced in the preceding section, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or to subject him to a penalty or to a forfeiture; but no person shall be liable to any suit or prosecution, civil or criminal, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before such court or in obedience to its subpoena or in any such case or proceeding: Provided, that no person so testifying or producing any such books, papers, contracts, agreements or other documents shall be exempted from prosecution and punishment for perjury committed in so testifying.

1913, c. 190, s. 2.

4477. Blacklisting employees. If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent or corporation shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars; and such person, agent, company or corporation shall be liable in penal damages to such discharged person, to be recovered by civil action. This section shall not be construed as prohibiting any person or agent of any company or corporation from furnishing in writing, upon request, any other person, company or corporation to whom such discharged person or employee has applied for employment, a truthful statement of the reason for such discharge.

1909, c. 858, s. 1.

Statute explained: *Seward v. R. R.*, 159-241. This section should be construed in the light of the common-law rule in regard to discharge: *Ibid.* The statement as to a discharged employee is not privileged, if made maliciously: *Ibid.*

4478. Conspiring to blacklist employees. It shall be unlawful for two or more persons to agree together to blacklist any discharged employee or to attempt, by words or writing or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left the service of his employer, from obtaining employment with any other person or company. Persons violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court.

1909, c. 858, s. 2.

See section 4477.

4479. Issuing nontransferable script to laborers. If any person who employs laborers by the day, week or month shall issue in payment for the services of such laborers any ticket, certificate or other script bearing upon its face the word "nontransferable," or shall issue such ticket, certificate or other script in any form that would render it void by transfer from the person to whom issued, or shall refuse to pay to the person holding the same its face value, he shall be

guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten dollars nor more than fifty dollars for each offense, or imprisoned not more than thirty days.

Rev., s. 3730; 1889, c. 280; 1891, c. 78; 1891, c. 456; 1891, c. 46; 1891, cc. 167, 370; 1895, c. 127; 1891, cc. 167, 456.

This does not authorize the assignee of a ticket or script payable in merchandise to demand and receive payment in money: *Marriner v. Roper Co.*, 112-164. Meaning of "face value": *Ibid.*

ART. 42. REGULATION OF LANDLORD AND TENANT

4480. Local: Violation of certain contracts between landlord and tenant. If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully abandon the same without good cause and before paying for such advances; or if any landlord shall contract with a tenant or cropper to furnish him advances to enable him to make a crop, and shall willfully fail or refuse, without good cause, to furnish such advances according to his agreement, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any person employing a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof, and shall also be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. This section shall apply to the following counties only: Wayne, Lenoir, Greene, Johnston, Jones, Onslow, Craven, Cleveland, Sampson, Pitt, Duplin, Gates, Cumberland, Perquimans, Chowan, Robeson, Bladen, Nash, Harnett, Edgecombe, Hertford, Wilson, Rockingham, Pender, Currituck, Gaston, Northampton, Beaufort, Chatham, Tyrrell, Mecklenburg, Halifax, Caswell, Camden, Cabarrus, Columbus, Martin, Washington, Wake, Alexander, Montgomery, Pamlico, Rowan, Rutherford, Bertie, Warren and Lincoln.

Rev., s. 3366; 1905, cc. 297, 383, 445, 820; 1907, c. 84, s. 1; 1907, c. 595, s. 1; 1907, cc. 8, 639, 719, 869.

Distinction between tenant or cropper and servant: *State v. Etheridge*, 169-263.

Indictment should allege fraud, and abandonment of crop without cause, and before paying for advances: *State v. Williams*, 150-802.

Justice of the peace has final jurisdiction: *State v. Wilkes*, 149-453.

4481. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant. If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully refuse to cultivate such crops or negligently or willfully abandon the same without good cause and before paying for such advances; or if any landlord who induces another to become tenant or cropper by agreeing to furnish him advances to enable him to make a crop, shall willfully fail or refuse without good cause to furnish such advances according to his agreement; or if any person shall entice, persuade or procure any tenant, lessee or cropper, who has made a contract agreeing to cultivate the land of another, to abandon or to refuse or fail to cultivate such land, or after notice shall harbor or detain on his own premises, or on the premises of another, any such tenant, lessee or cropper, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars or imprisoned not more than thirty days. Any person who employs a tenant or

cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof. This section shall apply only to the following counties: Wake, Hyde, Anson, Hertford, Sampson, Franklin, Union, Richmond, Moore, Lincoln, Rowan, Rutherford and Halifax.

Rev., s. 3367; 1905, c. 299, ss. 1-7; 1907, c. 84, s. 2; 1907, c. 23S, s. 1; 1907, c. 595, s. 2; 1907, cc. 543, 810.

Married women not liable under this section for breach of contract unless contract falls within the exceptions in Revisal, section 2094: *State v. Robinson*, 143-620. See section 2507, changing section 2094 of Revisal.

4482. Local: Tenant violating contract not to rent land from others. Whenever land shall be rented for agricultural purposes and the tenant renting the same shall, at the time thereof or at any subsequent time during the term of such renting, enter into a contract in writing with his lessor, from whom he so rented, that he, the tenant, will not thereafter, without the lessor's consent, rent any land for agricultural purposes from any other person than such lessor during the same term of renting, nor become a cropper on the land of any other person than the lessor during such term, any tenant who shall willfully violate the written contract so entered into by him, without just cause and lawful excuse therefor, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding fifty dollars or by imprisonment for not more than thirty days. This section shall apply only to Greene County.

1907, c. 981.

ART. 43. CRUELTY TO ANIMALS

4483. Cruelty to animals; construction of section. If any person shall willfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, cruelly beat, needlessly mutilate or kill or cause or procure to be overdriven, overloaded, wounded, injured, tortured, tormented, deprived of necessary sustenance, cruelly beaten, needlessly mutilated or killed as aforesaid, any useful beast, fowl or animal, every such offender shall for every such offense be guilty of a misdemeanor. In this section, and in every law which may be enacted relating to animals, the words "animal" and "dumb animal" shall be held to include every living creature; the words "torture," "torment" or "cruelty" shall be held to include every act, omission or neglect whereby unjustifiable physical pain, suffering or death is caused or permitted; but such terms shall not be construed to prohibit lawful shooting of birds, deer and other game for human food.

Rev., s. 3299; Code, ss. 2482, 2490; 1891, c. 65; 1881, c. 34, s. 1; 1881, c. 368, ss. 1, 15; 1907, c. 42.

See generally: *State v. Neal*, 120-621; *State v. Isley*, 119-862; *State v. Tweedy*, 115-704; *State v. Porter*, 112-887; *State v. Butts*, 92-784; *State v. Sheets*, 89-543. Section construed in *State v. Porter*, 112-887; *State v. Neal*, 120-613.

As to sufficiency of indictment, see *State v. Allison*, 90-733; *State v. Butts*, 92-784; *State v. Watkins*, 101-702; *State v. Tweedy*, 115-704; *State v. Neal*, 120-621.

Where there is no finding that the act was "wilfully and unlawfully" done, a verdict cannot be sustained: *State v. Tweedy*, 115-704; *State v. Isley*, 119-862.

The needless killing of chickens is of itself cruelty hereunder, though done without torture: *State v. Neal*, 120-613—and this is so even though they may be destroying crop, and owner has been warned, *Ibid*.

Killing or wounding pigeons for sport is within the statute: *State v. Porter*, 112-887—as is also impaling a chicken on a sharp stick and beating a hen till she died, *State v. Neal*, 120-613—as also, poisoning a chicken, *State v. Bossee*, 145-579.

Killing a dog when it was not necessary to protect defendant's property: *State v. Smith*, 156-628. Civil action for damages: *Scott v. Cates*, 175-336. An officer killing an unmuzzled dog by authority of a valid town ordinance is not guilty under this section: *State v. Clifton*, 152-800.

Justice has no original jurisdiction of offense of cruelty to animals: *State v. Bossee*, 145-579.

Section cited in *State v. Holt*, 90-749.

4484. Instigating or promoting cruelty to animals. If any person shall willfully set on foot, or instigate, or move to, carry on, or promote, or engage in, or do any act towards the furtherance of any act of cruelty to any animal, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 3300; Code, s. 2487; 1891, c. 65; 1881, c. 368, s. 6.

Section cited in *State v. Porter*, 112-887; *State v. Allison*, 90-734.

4485. Bear-baiting, cock-fighting and similar amusements. If any person shall keep, or use, or in any way be connected with, or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting, or baiting any bull, bear, dog, cock, or other animal; or if any person shall encourage, aid or assist therein, or shall permit or suffer any place to be so kept or used, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 3301; Code, s. 2483; 1891, c. 65; 1881, c. 368, s. 2.

For special act for Cabarrus county, see acts of 1907, c. 436. Section cited in *State v. Allison*, 90-734; *State v. Holt*, 90-750.

4486. Conveying animals in a cruel manner. If any person shall carry or cause to be carried in or upon any vehicle or other conveyance, any animal in a cruel or inhuman manner, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. Whenever an offender shall be taken into custody therefor by any officer, the officer may take charge of such vehicle or other conveyance and its contents, and deposit the same in some safe place of custody. The necessary expenses which may be incurred for taking charge of and keeping and sustaining the vehicle or other conveyance shall be a lien thereon, to be paid before the same can be lawfully reclaimed; or the said expenses, or any part thereof remaining unpaid, may be recovered by the person incurring the same of the owner of such animal in an action therefor.

Rev., s. 3302; Code, s. 2486; 1891, c. 65; 1881, c. 368, s. 5.

ART. 44. ANIMAL DISEASES

4487. Selling, using or exposing diseased animals. If any person shall sell, offer for sale, use or expose, or cause or procure to be sold, offered for sale, used or exposed, any horse or other animal having the disease known as glanders or farcy, or any other contagious or infectious disease known by such person to be

dangerous to life, or which shall be diseased past recovery, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 3295; Code. s. 2488; 1891, c. 65; 1881, c. 368, s. 7.

4488. Disposal of carcasses of animals. It shall be unlawful for any person, firm or corporation to permit knowingly the bodies of animals or fowls dying of disease of any kind to remain unburied or unburned on the land which such person, etc., owns, rents, or has charge of in any capacity, for the space of twenty-four hours after the death of said animal or fowl; such burying to be of such a depth as to prevent disinterment by prowling dogs.

1919, c. 36.

Burial of dead animals in Scotland county, see P. L. 1919, c. 143.

4489. Animals affected with glanders to be killed. If the owner of any animal having the glanders or farcy shall omit or refuse, upon discovery or knowledge of its condition, to deprive the same of life at once, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days.

Rev., s. 3296; Code, s. 2489; 1891, c. 65; 1881, c. 368, s. 8.

4490. Hogs affected with cholera to be segregated and confined. If any person having swine affected with the disease known as hog cholera, or any other infectious or contagious disease, who discovers the same, or to whom notice of the fact shall be given, shall fail or neglect for one day to secure the diseased swine from the approach of or contact with other hogs not so affected, by penning or otherwise securing and effectually isolating them; so that they shall not have access to any ditch, canal, branch, creek, river or other water-course which passes beyond the premises of the owners of such swine, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., s. 3297; 1889, c. 173, s. 1; 1891, c. 67, ss. 1, 3; 1903, c. 106; 1899, c. 47; 1913, c. 120.

4491. Shipping hogs from cholera-infected territory. It shall be unlawful for any person, firm or corporation in any district or territory infected by cholera to bring, carry, or ship hogs into any stock-law section or territory, unless such hogs have been certified to be free from cholera either by the farm demonstration agent of the county or some other suitable person to be designated by the clerk of the superior court. Any violation of this section shall constitute a misdemeanor.

1917, c. 203.

4492. Distributing, selling or using hog-cholera virus without permission. It shall be unlawful for any person, firm or corporation to distribute, sell or use virulent blood from cholera-infected hogs, or "virus," unless and until written permission has been obtained from the state veterinarian for such distribution, sale or use. Any person, firm or corporation guilty of violating the provisions of this section, or failing or refusing to comply with the requirements hereof, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty nor more than one hundred dollars for each offense, and may be

imprisoned, in the discretion of the court, not less than ten nor more than thirty days. The offender shall also be liable to any person injured on account of such violation to the full amount of all damages and costs.

1915, c. 88.

ART. 45. PROTECTION OF LIVESTOCK RUNNING AT LARGE

4493. Failing to show hide and ears of livestock killed while running at large. If any person shall kill any neat cattle, sheep or hogs in the woods or range, and shall for two days fail to show the hide and ears to the nearest justice or to two freeholders, he shall be guilty of a misdemeanor. In Tyrrell county this section extends to the killing of neat cattle in enclosures.

Rev., s. 3315; Code, s. 2318; R. C., c. 17, s. 2; 1901, c. 546; 1907, c. 821.

4494. Molesting or injuring livestock. If any person shall unlawfully and on purpose drive any livestock, lawfully running at large in the range, from said range, or shall kill, maim or injure any livestock, lawfully running at large in the range or in the field or pasture of the owner, whether done with the actual intent to injure the owner, or to drive the stock from the range, or with any other unlawful intent, every such person, his counselors, aiders, and abettors, shall be guilty of a misdemeanor. In the counties of Graham, Swain, Haywood, Jackson and Transylvania he shall be guilty of a felony and shall be punished as if convicted of larceny: Provided, that nothing herein contained shall prohibit any person from driving out of the range any stock unlawfully brought from other states or places. In any indictment under this section it shall not be necessary to name in the bill or prove on the trial the owner of the stock molested, maimed, killed or injured.

Rev., s. 3314; Code, s. 1002; 1885, c. 383; 1887, c. 368; 1895, c. 190; R. C., c. 34, s. 104; 1850, c. 94, ss. 1, 2.

See generally: State v. Rivers, 90-738; State v. Hill, 79-656. As to indictment generally, see State v. Hill, 79-656.

Wounding of cattle maliciously is not indictable at common law: State v. Hill, 79-656; State v. Manuel, 72-201.

Person is not liable under section 104, chapter 34, Rev. Code, for injuring stock within his own field which is inclosed and under cultivation: State v. Waters, 51-276.

Section merely cited in State v. Tweedy, 115-704; State v. Pollard, 83-597; State v. Simpson, 73-269.

4495. Altering the brands of and misbranding another's livestock. If any person shall knowingly alter or deface the mark or brand of any other person's horse, mule, ass, neat cattle, sheep, goat, or hog, or shall knowingly mismark or brand any such beast that may be unbranded or unmarked, not properly his own, with intent to defraud any other person, the person so offending shall be guilty of a felony, and shall be punished as if convicted of larceny.

Rev., s. 3317; Code, s. 1001; R. C., c. 34, s. 57; 1797, c. 485, s. 2.

Indictment; sufficiency of: State v. King, 84-737; State v. O'Neal, 29-251; State v. Davis, 24-153.

Parol evidence allowed to prove "marks" of prosecutor: State v. King, 84-737.

4496. Placing poisonous shrubs and vegetables in public places. If any person shall throw into or leave exposed in any public square, street, lane, alley

or open lot in any city, town or village, or in any public road, any mockorange or other poisonous shrub, plant, tree or vegetable, he shall be liable in damages to any person injured thereby and shall also be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court.

Rev., s. 3318; 1887, c. 338.

ART. 46. PROTECTION OF LETTERS, TELEGRAMS, AND TELEPHONE MESSAGES

4497. Wrongfully obtaining or divulging knowledge of telephonic messages. If any person wrongfully obtain, or attempt to obtain, any knowledge of a telephonic message by connivance with a clerk, operator, messenger or other employee of a telephone company, or, being such clerk, operator, messenger or employee, willfully divulge to any but the person for whom it was intended, the contents of a telephonic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court.

Rev., s. 3848; 1903, c. 599.

4498. Violating privacy of telegraphic messages; failure to transmit and deliver same promptly. If any person wrongfully obtain, or attempt to obtain, any knowledge of a telegraphic message by connivance with a clerk, operator, messenger, or other employee of a telegraph company, or, being such clerk, operator, messenger, or other employee, willfully divulge to any but the person for whom it was intended, the contents of a telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, or willfully refuse or neglect duly to transmit or deliver the same, he shall be guilty of a misdemeanor.

Rev., s. 3846; 1889, c. 41, s. 1.

4499. Unauthorized opening, reading or publishing of sealed letters and telegrams. If any person shall willfully, and without authority, open or read, or cause to be opened or read, a sealed letter or telegram, or shall publish the whole or any portion of such letter or telegram, knowing it to have been opened or read without authority, he shall be guilty of a misdemeanor.

Rev., s. 3728; 1889, c. 41, s. 2.

Indictment must charge the opening without authority of a sealed letter or telegram, or the publishing of the whole or any portion of such letter or telegram knowing it to have been opened and read without authority: *State v. Bagwell*, 107-859.

ART. 47. MISCELLANEOUS POLICE REGULATIONS

4500. Desecration of state and national flag. Any person who in any manner, for exhibition or display, shall place or cause to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag, standard, color or ensign of the United States or state flag or ensign of this state, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign upon which shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design or drawing or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale or to give away, or for use for any purpose, any article or

substance of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark or distinguish the article or substance upon which it is so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding fifty dollars or by imprisonment for not more than thirty days. Any person violating this section shall also forfeit a penalty of fifty dollars for each offense, to be recovered with costs in a civil action or suit in any court having jurisdiction. Such action or suit may be brought by and in the name of any citizen of this state, and such penalty, when collected, less the costs and expenses of the action or suit, shall be paid one-half to the person suing and one-half to the school fund of the county in which suit was brought; and two or more penalties may be sued for and recovered in the same action or suit.

The words, flag, standard, color or ensign, as used in this section, shall include any flag, standard, color, ensign, or any picture or representation of any of them, made of any substance or represented on any substance, and of any size, evidently purporting to be a flag, standard, color or ensign of the United States of America, or a picture or a representation of any of them, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe it to represent the flag, colors, standard or ensign of the United States of America.

The possession by any person other than a public officer, as such, of a flag, standard, color, ensign, article, substance, or thing, on which there is anything made unlawful by this section, shall be presumptive evidence that the same is in violation of this section.

1917, c. 271.

4501. Pollution of water or lands used for dairy purposes. It shall be unlawful for any person, firm, or corporation owning lands adjoining the lands of any person, firm, or corporation which are or may be used for dairy purposes or for grazing milk cows, to dispose of or permit disposal of any animal, mineral, chemical, or vegetable refuse, sewage or other deleterious matter in such way as to pollute the water on the lands so used or which may be used for dairy purposes or for grazing milk cows, or to render unfit or unsafe for use the milk produced from cows feeding upon the grasses and herbage growing on such lands. This section shall not apply to incorporated towns maintaining a sewer system. Any one violating the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars or imprisoned for not more than thirty days, or both, and each day that such pollution is committed or exists shall constitute a separate offense.

1919, c. 222.

4502. Cutting timber on town watershed without disposing of boughs and débris; misdemeanor. Any person, firm or corporation owning lands or the standing timber on lands within four hundred feet of any watershed held or owned by any city or town, for the purpose of furnishing a city or town water

supply, upon cutting or removing the timber or permitting the same cut or removed from lands so within four hundred feet of said watershed, or any part thereof, shall, within three months after cutting, or earlier upon written notice by said city or town, remove or cause to be burned under proper supervision all tree-tops, boughs, laps and other portions of timber not desired to be taken for commercial or other purposes, within four hundred feet of the boundary line of such part of such watershed as is held or owned by such town or city, so as to leave such space of four hundred feet immediately adjoining the boundary line of such watershed, so held or owned, free and clear of all such tree-tops, laps, boughs and other inflammable material caused by or left from cutting such standing timber, so as to prevent the spread of fire from such cutover area and the consequent damage to such watershed. Any such person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor.

1913, c. 56.

This is a valid exercise of police power: *State v. Perley*, 173-783.

4503. Injuring notices and advertisements. If any person shall wantonly or maliciously mutilate, deface, pull or tear down, destroy or otherwise damage any notice, sign or advertisement, unless immoral or obscene, whether put up by an officer of the law in performance of the duties of his office or by some other person for a lawful purpose, before the object for which such notice, sign or advertisement was posted shall have been accomplished, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding twenty-five dollars or imprisoned not exceeding thirty days at the discretion of the court. Nothing herein contained shall apply to any person mutilating, defacing, pulling or tearing down, destroying or otherwise damaging notices, signs or advertisements put upon his own land or lands of which he may have charge or control, unless consent of such person to put up such notice, sign or advertisement shall have first been obtained, except those put up by an officer of the law in the performance of the duties of his office.

Rev., s. 3709; 1885, c. 302.

4504. Defacing or destroying public notices and advertisements. If any person shall willfully and unlawfully deface, tear down, remove or destroy any legal notice or advertisement authorized by law to be posted by any officer or other person, the same being actually posted at the time of such defacement, tearing down, removal or destruction, during the time for which such legal notice or advertisement shall be authorized by law to be posted, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days.

Rev., s. 3710; Code, s. 981: 1876-7, c. 215.

4505. Erecting signals and notices in imitation of those of railroads. No person, firm or corporation other than a railroad or street railway company shall, for advertisement or other purposes, erect and maintain on or near any highway any cross-arm post or other post or standard containing the words "Stop! Look! Listen!" or other such words or combinations of words in imitation of railroad signals or notices. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, in the discretion of the court.

1917, c. 230.

4506. Operating automobile while intoxicated. Any person who shall, while intoxicated or under the influence of intoxicating liquors or bitters, morphine or other opiates, operate an automobile upon the public highways of any county or the streets of any city or town in this state, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisoned not less than thirty days, or both, at the discretion of the court.

1919, c. 234.

4507. Sale of Jamaica ginger. It shall be unlawful for any person, firm, or corporation to sell the compound known as Jamaica ginger except upon the prescription of a duly licensed and regular practicing physician; the person, firm, or corporation selling Jamaica ginger upon prescription shall keep a list of said prescriptions, and shall allow said list to be examined by any officer of the law, and no prescription shall ever be filled but once; it shall be unlawful for any physician to give a prescription for Jamaica ginger except to a person directly under his care, and then only in good faith for medicinal purposes only.

1919, c. 288; P. L. 1913, c. 761.

4508. Furnishing intoxicants, poisons or firearms to inmates of charitable and penal institutions. If any person shall sell or give to any inmate of any charitable or penal institution any intoxicating drink or any narcotic, poison or poisonous substance, except upon the prescription of a physician, or shall give or sell to any such inmate any deadly weapon, or any cartridge or ammunition for firearms of any kind, he shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined or imprisoned at the discretion of the court; and if he be an officer or employee of any institution of the state, he shall be dismissed from his office.

Rev., s. 3517; 1899, c. 1, s. 52.

Compare, as to constitutionality, *State v. Barringer*, 110-525. *Dentist not a "physician"*: *State v. McMinn*, 118-1259.

4509. Usurious loans on household and kitchen furniture. Any person, firm or corporation who shall lend money in any manner whatsoever by note, chattel mortgage, conditional sale or otherwise, upon any article of household or kitchen furniture, and shall take, receive, reserve or charge a greater rate of interest than six per cent, either before or after the interest may accrue, or who shall refuse to give receipts for payments on interest or principal of such loan, or who shall fail and refuse to surrender the note and security when the same is paid off or a new note and mortgage is given in renewal, unless such new mortgage shall state the amount still due by the old note or mortgage and that the new one is given as additional security, shall be guilty of a misdemeanor, and in addition thereto shall forfeit double the interest which has been theretofore paid.

1907, c. 110.

Indictable to charge usury in debt secured by mortgage on household and kitchen furniture: *State v. Davis*, 157-648. Section declared constitutional: *Ibid.*

This section does not change the rule that the debtor asking for equitable relief must pay legal rate: *Owens v. Wright*, 161-127.

4510. Digging ginseng on another's land during certain months. All persons shall be allowed to dig ginseng at any time of the year for the purpose of

replanting the same. If any person dig ginseng, except on his own premises, or for the purpose of replanting the same, between the first day of April and the first day of September, he shall forfeit and pay the sum of ten dollars for each day's or part of a day's digging, and shall also be guilty of a misdemeanor.

Rev., ss. 3502, 3714; Code, s. 1053; 1866-7, c. 60; 1905, c. 211.

For larceny of ginseng, see section 4258.

4511. Shooting rifles across Currituck sound and waters of Dare county. If any person shall shoot a rifle across or over the waters of Currituck sound, or the waters of Dare county, except in East Lake township, he shall be guilty of a misdemeanor and shall be fined not less than ten dollars nor more than fifty dollars, or imprisoned not less than ten days nor more than thirty days.

Rev., s. 3734; 1889, c. 21, ss. 1, 2; 1903, c. 617.

CHAPTER 83

CRIMINAL PROCEDURE

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ART. 1. GENERAL PROVISIONS

4512. Statute of limitations for misdemeanors. All misdemeanors, and petit larceny where the value of the property does not exceed five dollars, except the offenses of perjury, forgery, malicious mischief, and other malicious misdemeanors, deceit, and the offense of being accessory after the fact, now made a misdemeanor, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards: Provided, that in case any of the misdemeanors, hereby required to be prosecuted within two years, shall have been committed in a secret manner, the same may be prosecuted within two years after the discovery of the offender: Provided further, that if any indictment found within that time shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offense, within one year after the first shall have been abandoned by the state.

Rev., s. 3147; Code, s. 1177; R. C., c. 35, s. 8; 1826, c. 11; 1907, c. 408.

“Deceit” defined: *State v. Christianbury*, 44-46; *State v. Crowell*, 116-1052. “Secret manner” construed: *State v. Watts*, 32-369; *State v. Christianbury*, 44-46.

Section not applicable to a continuous nuisance: *State v. Long*, 94-896; *State v. Holman*, 104-861—to slander of an innocent woman, *State v. Claywell*, 98-731—to conspiracy, which is a felony, *State v. Mallett*, 125-718; *State v. Christianbury*, 44-46—to bastardy proceeding, *State v. Hedgepeth*, 122-1039; *State v. Perry*, 122-1043.

An indictment or presentment is the beginning of the prosecution and arrests the running of statute of limitations; and a nol. pros. does not cause the statute to run again: *State v. Williams*, 151-660. Presentment within two years sufficient, although indictment after two years, *State v. Cox*, 28-440; *State v. Cooper*, 104-890. What constitutes a presentment: *State v. Morris*, 104-837.

Indictment, although by wrong name, sufficient to take out of statute: *State v. Hailey*, 51-42—for assault and battery after two years insufficient, *State v. Mason*, 66-636; *State v. Frisbee*, 142-671. State not restricted to offense charged in indictment, if same offense proved within two years, *State v. Newsom*, 47-173.

Discretion in allowing statutes as defense when not pleaded, see *Privett v. Calloway*, 75-233.

4513. Issue and return of criminal process. All process, warrants and precepts, issued by any judge or justice of the peace, or clerk of any court, on any criminal prosecution, may issue at any time, and be made returnable to any day of the term of the court, to which such warrant, process, or precept is returnable.

Rev., s. 3148; Code, s. 1178; R. C., c. 35, s. 9; 1777, c. 115, s. 15.

4514. Date of receipt and service indorsed on process. Every sheriff or other officer shall indorse on all process and subpoenas issuing in criminal cases, whether for the state or defendant, the day when such process and subpoenas came to hand, and also the day of their execution; and on failure of any sheriff or other officer to perform either of said duties he shall forfeit and pay the sum of ten dollars for every case of neglect, to be recovered for the use of the state, in the same manner as forfeitures are recovered against sheriffs by parties in civil suits for failure to make due return of process delivered to them.

Rev., s. 3149; Code, s. 1179; R. C., c. 35, s. 10; 1850-1, c. 57.

4515. Accused entitled to counsel. Every person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense.

Rev., s. 3150; Code, s. 1182; R. C., c. 35, s. 13; 1777, c. 115, s. 85.

Argument of counsel: *State v. Whit*, 50-224; *State v. Smallwood*, 78-560; *State v. Rogers*, 112-874; *State v. Powell*, 94-965; *State v. Robinson*, 124-801; *State v. Anderson*, 101-758; *State v. Collins*, 70-241.

Comment of counsel: *State v. Sykes*, 79-618; *State v. Davis*, 92-764; *State v. Collins*, 70-241; *State v. Noland*, 85-576; *State v. Smallwood*, 78-560; *State v. Powell*, 94-965; *State v. Miller*, 75-73; *State v. Sheets*, 89-543; *State v. Powell*, 106-635; *State v. Speaks*, 94-865; *State v. Rogers*, 94-860; *State v. Jones*, 77-520; *State v. Lewis*, 93-581; *State v. Kiger*, 115-746; *State v. Craine*, 120-601; *State v. Caveness*, 78-484; *State v. Gay*, 94-418; *State v. Underwood*, 77-502; *State v. Weddington*, 103-364; *State v. Pearson*, 119-871; *State v. Hill*, 114-780; *State v. Smallwood*, 75-104; *State v. Rivers*, 90-738; *State v. Wilson*, 90-736; *State v. Harrison*, 145-414, and cases cited.

Presence of defendant at trial in criminal case: *State v. Cherry*, 154-624; *State v. Frieze*, 170-710.

Retorts and repartee of counsel, which brings applause from crowd, not ground for new trial: *State v. Harrison*, 145-408.

4516. Fees allowed counsel assigned to defend in capital case. Whenever an attorney is appointed by the judge to defend a person charged with a capital crime, he shall receive such fee for performing this service as the judge may allow, not to exceed twenty-five dollars; but the judge shall not allow any fee until he is satisfied that the defendant charged with the capital crime is not able to employ counsel. The fees so allowed by the judge shall be paid by the county in which the indictment was found.

1917, c. 247.

4517. Imprisonment to be in county jail. No person shall be imprisoned by any judge, court, justice of the peace, or other peace officer except in the common jail of the county, unless otherwise provided by law: Provided, that whenever the sheriff of any county shall be imprisoned, he may be imprisoned in the jail of any adjoining county.

Rev., s. 3151; Code, s. 1174; R. C., c. 35, s. 6; 1797, c. 474, s. 3; 1879, c. 12.

See *State v. Norwood*, 93-578.

4518. Post-mortem examinations directed. In all cases of homicide, any officer prosecuting for the state may, at any time, direct a post-mortem examination of the deceased to be made by one or more physicians to be summoned for the purpose; and the physicians shall be paid a reasonable compensation for such examination, the amount to be determined by the court and taxed in the costs, and if not collected out of the defendant the same shall be paid by the county.

Rev., s. 3152; Code, s. 1214; R. C., c. 35, s. 49.

How county required to pay expense of examination: *Withers v. Comrs.*, 163-341.

4519. Stolen property returned to owner. Upon the conviction of any felon for robbing or stealing any money, goods, chattels, or other estate of any description whatever, the person from whom such goods, money, chattels or other estate were robbed or stolen shall be entitled to restitution thereof; and the court may award restitution of the articles so robbed or stolen, and make all such orders and issue such writs of restitution or otherwise as may be necessary for that purpose.

Rev., s. 3153; Code, s. 1201; R. C., c. 35, s. 34; 21 Hen. VIII, c. 11.

4520. Magistrate may associate another with him. Any magistrate, to whom any complaint may be made, or before whom any prisoner may be brought, as

by law provided, may associate with himself any other magistrate of the same county; and the powers and duties herein mentioned may be executed by the two magistrates so associated.

Rev., s. 3154; Code, s. 1159; 1868-9, c. 178, subc. 3, s. 28.

Constitutional: *State v. Flowers*, 109-841.

4521. Speedy trial or discharge on commitment for felony. When any person who has been committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer in open court to be brought to his trial, shall not be indicted some time in the next term of the superior or criminal court ensuing such commitment, the judge of the court, upon notice in open court on the last day of the term, shall set at liberty such prisoner upon bail, unless it appear upon oath that the witnesses for the state could not be produced at the same term; and if such prisoner, upon his prayer as aforesaid, shall not be indicted and tried at the second term of the court, he shall be discharged from his imprisonment: Provided, the judge presiding may, in his discretion, refuse to discharge such person if the time between the first and second terms of the court be less than four months.

Rev., s. 3155; Code, s. 1658; 1868-9, c. 116, s. 33; 1913, c. 2.

The requirements of this section are peremptory, but no appeal lies from the refusal of the court to grant a discharge, the remedy being by certiorari: *State v. Webb*, 155-426.

See *State v. Herndon*, 107-938.

ART. 2. WARRANTS

4522. Who may issue warrant. The following persons respectively have power to issue process for the apprehension of persons charged with any offense, and to execute the powers and duties conferred in this chapter, namely: The chief justice and the associate justices of the supreme court, the judges of the superior court, judges of criminal courts, presiding officers of inferior courts, justices of the peace, mayors of cities, or other chief officers of incorporated towns.

Rev., s. 3156; Code, s. 1132; 1868-9, c. 178, subc. 3, s. 1.

Mayor pro tem. may issue process: *State v. Thomas*, 141-791. Pubic-local laws 1913, c. 569, s. 9, authorizes the judge of recorder's court or chief of police to issue process: *State v. Turner*, 170-701.

Justice of the peace may issue process to another county than his own, which must be endorsed by a justice of the second county: *State v. James*, 80-372; see section 4526.

Section referred to in *State v. Joyner*, 127-543; *State v. Jones*, 100-438.

4523. Complainant examined on oath. Whenever complaint is made to any such magistrate that a criminal offense has been committed within this state, or without this state and within the United States, and that a person charged therewith is in this state, it shall be the duty of such magistrate to examine on oath the complainant and any witnesses who may be produced by him.

Rev., s. 3157; Code, s. 1133; 1868-9, c. 178, subc. 3, s. 2.

Complaint when crime committed in another state: *State v. James*, 80-370.

No written complaint or affidavit is required: *State v. Bryson*, 84-780; *State v. Peters*, 107-879. Before warrant issues, complaint must be made on oath: *Merrimon v. Comrs.*, 106-369—and must show offense, *State v. Moore*, 136-581—need not be signed, *State v. Ransome*, 2-1.

Warrant need not state that it was issued on a sworn complaint: *State v. Price*, 111-703.

4524. Warrant issued; contents. If it shall appear from such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant under his hand, with or without seal, reciting the accusation, and commanding the officer to whom it is directed forthwith to take the person accused of having committed the offense, and bring him before a magistrate, to be dealt with according to law. A justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officer of his county.

Rev., s. 3158; Code, s. 1134; 1901, c. 668; 1868-9, c. 178, subc. 3, s. 3.

Special provision as to justice's warrant in Pender county, P. L. 1917, c. 333.

FORM AND CONTENTS OF WARRANTS. Necessity for seal: *Lineberger v. Tidwell*, 104-512. Warrant need not recite that the complaint was on oath: *State v. Price*, 111-70; *Merrimon v. Comrs.*, 106-371. Description need not be as exact as indictment: *State v. Jones*, 88-671. Must recite accusation: *State v. Jones*, 88-671. Rule as to stating the offense when the statute contains an exception or proviso: *State v. Moore*, 166-284. Verbal orders of no effect: *State v. Jones*, 78-455. No written complaint or affidavit necessary: *State v. Bryson*, 84-780; *State v. Peters*, 107-879.

On a motion to quash or in arrest of judgment the warrant is to be considered in connection with the affidavit: *State v. Hinton*, 158-625; *State v. Yellowday*, 152-793; *State v. Davis*, 111-729; *State v. Winslow*, 95-649.

Warrant may be amended, when: *State v. Vaughan*, 91-532; *State v. Crook*, 91-536; *State v. Sykes*, 104-694; *State v. Taylor*, 118-1262; *State v. Norman*, 110-484—in superior court, *State v. Telfair*, 130-645; *State v. Cauble*, 70-62. Power of superior court to amend warrant: *State v. Lee*, 164-533; *State v. Poythress*, 174-809.

Defective process is waived by appearing and submitting to the jurisdiction of the court: *State v. Cale*, 150-805.

Warrant sufficient in form to protect the officer: *State v. Gupton*, 166-257.

4525. Where warrant may be executed. Warrants issued by any justice of the supreme court, or by any judge of the superior court, or of a criminal court, may be executed in any part of this state; warrants issued by a justice of the peace, or by the chief officer of any city or incorporated town, may be executed in any part of the county of such justice, or in which such city or town is situated, and on any river, bay or sound forming the boundary between that and some other county, and not elsewhere, unless indorsed as prescribed in the section following.

Rev., s. 3159; Code, s. 1135; 1868-9, c. 178, subc. 3, s. 4.

4526. Warrant indorsed and served in another county. If the person against whom any warrant is issued by a justice of the peace or chief officer of a city or town shall escape, or be in any other county out of the jurisdiction of such justice or chief officer, it shall be the duty of any justice of the peace, or any other magistrate within the county where such offender shall be, or shall be suspected to be, upon proof of the handwriting of the magistrate or chief officer issuing the warrant, to indorse his name on the same, and thereupon the person, or officer to whom the warrant was directed, may arrest the offender in that county: Provided, that an officer to whom a warrant charging the commission of a felony is directed, who is in the actual pursuit of a person known to him to be the one charged with the felony, may continue the pursuit without such indorsement. The justice of the peace or a chief officer of a city or town shall direct his warrant to the sheriff or other lawful officer of his county, and such warrant when

so indorsed as herein prescribed shall authorize and compel the sheriff or other officer of any county in the state, in which such indorsement is made, to execute the same.

Rev., s. 3160; Code, s. 1136; 1917, c. 30; 1901, c. 668; 1868-9, c. 178, subc. 3, s. 5.

For indorsement, see *State v. James*, 80-370. Restricted to criminal cases: *Fisher v. Bulard*, 109-574.

4527. Magistrate not liable for indorsing warrant. No magistrate shall be liable to any indictment, action for trespass or other action for having indorsed any warrant pursuant to the provisions of the last section, although it should afterward appear that such warrant was illegally or improperly issued.

Rev., s. 3161; Code, s. 1137; 1868-9, c. 178, subc. 3, s. 6.

Exemption extends to all who aid in execution: *State v. James*, 80-370.

4528. Before what magistrate a warrant returned. Persons arrested under any warrant issued for any offense, where no provision is otherwise made, shall be brought before the magistrate who issued the warrant; or, if he be absent, or from any cause unable to try the case, before the nearest magistrate in the same county; and the warrant by virtue of which the arrest shall have been made, with a proper return indorsed thereon and signed by the officer or person making the arrest, shall be delivered to such magistrate.

Rev., s. 3162; Code, s. 1143; 1868-9, c. 178, subc. 3, s. 12.

See generally: *State v. James*, 78-455. Returnable before mayor pro. tem., when: *State v. Thomas*, 141-791. Magistrate may make warrant returnable before himself or some other magistrate: *State v. Lord*, 145-479—or before a recorder who has jurisdiction, *Ibid*.

ART. 3. SEARCH WARRANTS

4529. In what cases issued, and where executed. If any credible witness shall prove, upon oath, before any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, that there is a reasonable cause to suspect that any person has in his possession, or on his premises, any property stolen, or any false or counterfeit coin resembling, or apparently intended to resemble, or pass for, any current coin of the United States, or of any other state, province or country, or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of any such coin; or any false and counterfeit notes, bills or bonds of the United States, or of the state of North Carolina, or of any other state or country, or of any county, city or incorporated town; or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of such note, bill or bond, it shall be lawful for such justice, mayor or chief magistrate of any incorporated town to grant a warrant, to be executed within the limits of his county or of the county in which such city or incorporated town is situated, to any proper officer, authorizing him to search for such property, and to seize the same, and to arrest the person having in possession or on whose premises may be found such stolen property, counterfeit coin, counterfeit notes, bills or bonds, or the instruments, tools or engines for making the same, and to bring them before any magistrate of competent jurisdiction, to be dealt with according to law.

Rev., s. 3163; Code, s. 1171; 1868-9, c. 178, subc. 3, s. 38.

Right to issue at common law: *State v. McDonald*, 14-468.

4530. Nature of warrant and procedure thereon. Such search warrant shall describe the article to be searched for with reasonable certainty, and by whom the complaint is made, and in whose possession the article to be searched for is supposed to be; it shall be made returnable as other criminal process is by law required to be, and the proceedings thereupon shall be as required in other cases of criminal complaint.

Rev., s. 3164; Code, s. 1172; 1868-9, c. 178, subc. 3, s. 39.

Search warrant for seaman, see section 4473.

ART. 4. PEACE WARRANTS

4531. Officers authorized to issue peace warrants. The following magistrates have power to cause to be kept all the laws made for the preservation of the public peace, and in execution of that power to require persons to give security to keep the peace, in the manner provided in this chapter, namely: The chief justice and associate justices of the supreme court, the judges of the superior courts, and of any special courts which may hereafter be created, the justices of the peace, the mayors or other chief officers of all cities and towns.

Rev., s. 3165; Code, s. 1216; 1868-9, c. 178, subc. 2, s. 1.

Peace warrant is a criminal action and is within the exclusive original jurisdiction of a justice of the peace: *State v. Oates*, 88-668; *State v. Locust*, 63-574. Peace warrant must show facts from which fear is well founded: *State v. Cooley*, 78-538. Error for justice of the peace to bind over to the superior court applicant for a peace warrant: *State v. Arthur*, 75-139.

See generally: *State v. Arthur*, 75-139; *State v. Sneed*, 84-816.

4532. Complaint and examination. Whenever complaint is made in writing, and upon oath, to any such magistrate that any person has threatened to commit any offense against the person or property of another, it shall be the duty of such magistrate to examine such complainant and any witnesses who may be produced on oath, to reduce such examination to writing, and to cause the same to be subscribed by the parties so examined.

Rev., s. 3166; Code, s. 1217; 1868-9, c. 178, subc. 2, s. 2.

Where no threat alleged, nor fact nor circumstance from which court can determine whether there is fear of prosecutor, quashed: *State v. Cooley*, 78-538; *State v. Goram*, 83-664.

4533. Warrant issued. If it shall appear from such examination that there is just reason to fear the commission of any such offense by the person complained of, it shall be the duty of the magistrate to issue a warrant under his hand, with or without a seal, reciting the complaint, and commanding the officer to whom it is directed forthwith to apprehend the person so complained of, and bring him before such magistrate or some other magistrate authorized to issue such warrant.

Rev., s. 3167; Code, s. 1218; 1868-9, c. 178, subc. 2, s. 3.

See generally: *State v. Cooley*, 78-538; *State v. Arthur*, 75-139; *State v. Goram*, 83-664.

4534. To whom warrant directed. The warrant shall be directed to the sheriff, coroner or any constable, each of whom shall have power to execute the same within his county; and if no sheriff, coroner or constable can conveniently be found, the warrant may be directed to any person whatever, who shall have

power to execute the same within the county in which it is issued. No justice of the peace, or mayor, or other chief officer of any city or town shall direct his warrant to any officer outside the county of said justice or chief officer.

Rev., s. 3169; Code, s. 1219; 1868-9, c. 178, subc. 2, s. 4.

When directed to private person: *State v. Campbell*, 107-948; *McKee v. Angel*, 90-60.

See generally: *State v. Campbell*, 107-948.

4535. Defendant recognized to keep the peace. Whenever any person complained of on a peace warrant is brought before a justice of the peace, such person may be required to enter into a recognizance, payable to the state of North Carolina, in such sum, not exceeding one thousand dollars, as such justice shall direct, with one or more sufficient sureties, to appear before some justice of the peace within a period not exceeding six months, and not depart the court without leave, and in the meanwhile to keep the peace and be of good behavior towards all the people of the state, and particularly towards the person requiring such security.

Rev., s. 3170; Code, ss. 894, 1220; 1879, c. 92, s. 9.

Gives to justices of the peace exclusive original jurisdiction of peace warrants and proceedings thereunder: *State v. Oates*, 88-668.

4536. Defendant discharged, or new recognizance required. If the complainant does not appear, the party recognized shall be discharged, unless good cause be shown to the contrary. If the respective parties appear, the court shall hear their allegations and proofs, and may either discharge the recognizance taken or they may require a new recognizance, as the circumstances of the case may require, for such time as may appear necessary, not exceeding one year.

Rev., s. 3171; Code, s. 1226; 1868-9, c. 178, subc. 2, s. 12.

4537. Defendant imprisoned for want of security. If such recognizance is given, the party complained of shall be discharged; if such person fails to find such security, it shall be the duty of the magistrate to commit him to prison until he shall find the same, specifying in the mittimus the cause of commitment and the sum in which such security was required.

Rev., s. 3172; Code, s. 1221; 1868-9, c. 178, subc. 2, s. 6.

Prisoner hereunder may be worked on the roads: *State v. Yandle*, 119-874.

4538. How discharged from imprisonment. Any person committed for not finding sureties of the peace as above provided, may be discharged by any magistrate upon giving such security as was originally required of such person, or by a justice of the supreme court, or judge of the superior or criminal court, by giving such other security as may seem sufficient.

Rev., s. 3174; Code, s. 1222; 1868-9, c. 178, subc. 2, s. 7.

4539. Defendant may appeal. In all proceedings on peace warrants the defendant may appeal from the decision of the justice of the peace to the superior court by giving the bond required by the justice of the peace to keep the peace, in addition to the appeal bond, when the case shall be heard by the judge holding the court in the county.

Rev., s. 3173; 1901, c. 66.

This section renders obsolete *State v. Walker*, 94-857; *State v. Lyon*, 93-575; *State v. Gregory*, 118-1199.

4540. Breach of peace in presence of court. Every person who, in the presence of any magistrate specified in the first section of this article, or in the presence of any court of record, shall make any affray, or threaten to kill or beat another, or to commit any offense against his person or property; and all persons who, in the presence of such magistrate or court, shall contend with hot and angry words, may be ordered by such magistrate or court, without any other proof, to give such security as above specified, and in case of failure so to do, may be committed as above provided.

Rev., s. 3168; Code, s. 1224; 1868-9, c. 178, subc. 2, s. 9.

4541. Recognizance returned to superior court. Every recognizance taken pursuant to the provisions of this article shall be transmitted by the magistrate taking the same to the next term of the superior court for the county in which the offense is charged to have been committed.

Rev., s. 3175; Code, s. 1223; 1868-9, c. 178, subc. 2, s. 8.

ART. 5. ARREST

4542. Persons present may arrest for breach of peace. Every person present at any riot, rout, affray or other breach of the peace, shall endeavor to suppress and prevent the same, and, if necessary for that purpose, shall arrest the offenders.

Rev., s. 3176; Code, s. 1124; 1868-9, c. 178, subc. 1, s. 1.

Duty of private person to arrest when the act was done in his presence: *Neal v. Joyner*, 89-289; *State v. Campbell*, 107-953.

See generally: *Merrimon v. Comrs.*, 106-371; *State v. Campbell*, 107-948; *State v. Stancill*, 128-606; *State v. Belk*, 76-10; *Sossamon v. Cruse*, 133-470; *State v. McAfee*, 107-812.

4543. Arrest for felony, without warrant. Every person in whose presence a felony has been committed may arrest the person whom he knows or has reasonable ground to believe to be guilty of such offense, and it shall be the duty of every sheriff, coroner, constable or officer of police, upon information, to assist in such arrest.

Rev., s. 3177; Code, s. 1129; 1868-9, c. 178, subc. 1, s. 6.

Felony must be committed in presence of party making the arrest: *Martin v. Houck*, 141-317.

Party making arrest must make known his purpose, else he will be guilty of a trespass: *State v. Bryant*, 65-327.

See generally: *Neal v. Joyner*, 89-287; *State v. Bryant*, 65-327; *State v. Stancill*, 128-606 (see dissenting opinion of Cook, J.); *State v. McNinch*, 90-695; *Martin v. Houck*, 141-317.

4544. When officer may arrest without warrant. Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest.

Rev., s. 3178; Code, s. 1126; 1868-9, c. 178, subc. 1, s. 3.

When an officer may arrest without warrant: *Hobbs v. Washington*, 168-293; *State v. Rogers*, 166-388. **Right of officer to arrest convict without warrant:** *State v. Finch*, 177-599.

Superintendent of convict gang not such an officer as is contemplated by section: *State v. Stancill*, 128-606. **Police officer's right to arrest without a warrant confined to limits of town:** *Martin v. Houck*, 141-317; *Sossamon v. Cruse*, 133-470; *State v. Sigman*, 106-728.

Jury judges of the reasonableness of the grounds for arrest, but not of the force necessary: *State v. McNinch*, 90-695.

See generally: *State v. Beal*, 170-764; *State v. Belk*, 76-10; *Neal v. Joyner*, 89-287; *State v. McNinch*, 90-695; *Merrimon v. Comrs.*, 106-371; *Martin v. Houck*, 141-317.

For further annotations, see under sections 2639, 2642.

For power of officer to arrest in Kannapolis, see 1909, c. 46.

4545. House broken open to prevent felony. All persons are authorized to break open and enter a house to prevent a felony about to be committed therein.

Rev., s. 3179; Code, s. 1127; 1868-9, c. 178, subc. 1, s. 4.

4546. When officer may break and enter houses. If a felony or other infamous crime has been committed, or a dangerous wound has been given and there is reasonable ground to believe that the guilty person is concealed in a house, it shall be lawful for any sheriff, coroner, constable, or police officer, admittance having been demanded and denied, to break open the door and enter the house and arrest the person against whom there shall be such ground of belief.

Rev., s. 3180; Code, s. 1128; 1868-9, c. 178, subc. 1, s. 5.

4547. Persons summoned to assist in arrest. Every person summoned by a judge, justice, mayor, intendant, chief officer of any incorporated town, sheriff, coroner or constable, to aid in suppressing any riot, rout, unlawful assembly, affray or other breach of the peace, or to arrest the persons engaged in the commission of such offenses, or to prevent the commission of any felony or larceny which may be threatened or begun, shall do so.

Rev., s. 3181; Code, s. 1125; 1868-9, c. 178, subc. 1, s. 2.

See section 4379, as to punishment for failure to assist. This section does not authorize justice of the peace, after an affray is over, to summon persons to arrest the participants without a warrant: *State v. Campbell*, 107-948. It is the duty of those summoned to aid the officer, and the protection extended to the officer extends to them: *State v. McMahan*, 103-379.

See generally: *State v. Stancill*, 128-606 (see dissenting opinion of Cook, J.); *Merrimon v. Comrs.*, 106-369.

4548. Procedure on arrest without warrant. Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law.

Rev., s. 3182; Code, s. 1130; 1868-9, c. 178, subc. 1, s. 7.

See generally: *Braddy v. Hodges*, 99-319; *Martin v. Houck*, 141-317; *Merrimon v. Comrs.*, 106-369; *State v. Moore*, 136-582. Section cited in *Hobbs v. Washington*, 168-293.

ART. 6. FUGITIVES FROM JUSTICE

4549. Outlawry for felony. In all cases where any two justices of the peace, or any judge of the supreme, superior, or criminal courts shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest and service of the usual process of the law, the judge, or the two justices, being justices of the county wherein such person

is supposed to lurk or conceal himself, are hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also, when issued by any judge, empowering and requiring the sheriff of any county in the state in which such fugitive shall be, and when issued by two justices, empowering and requiring the sheriff of the county of the justices, to take such power with him as he shall think fit and necessary for the going in search and pursuit of, and effectually apprehending, such fugitive from justice, which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the judge or justices shall direct; and if any person against whom proclamation has been thus issued, continue to stay out, lurk and conceal himself, and do not immediately surrender himself, any citizen of the state may capture, arrest and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation or impeachment of any crime.

Rev., s. 3183; Code, s. 1131; 1868-9, c. 178, subc. 1, s. 8; 1866, c. 62.

Even "outlaws" are entitled to be "called upon and warned to surrender" before they are allowed to be slain: *State v. Stancill*, 128-606 (see dissenting opinion, Cook, J.). Fugitive from justice defined: *State v. Hall*, 115-811.

See generally: *State v. Stancill*, 128-606; *Wilson v. R. R.*, 142-343 (concurring opinion of Walker, J.).

See chapter Extradition in Appendix to Consolidated Statutes.

4550. Fugitives from another state arrested. Any justice of the supreme court, or any judge of the superior court or of any criminal court, or any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, on satisfactory information laid before him that any fugitive or other person in the state has committed, out of the state and within the United States, any offense which, by law of the state in which the offense was committed, is punishable either capitally or by imprisonment for one year or upwards in any state prison, has full power and authority, and is hereby required, to issue a warrant for such fugitive or other person and commit him to any jail within the state for the space of six months, unless sooner demanded by the public authorities of the state wherein the offense may have been committed, pursuant to the act of congress in that case made and provided. If no demand be made within that time the fugitive or other person shall be liberated, unless sufficient cause be shown to the contrary.

Rev., s. 3184; Code, s. 1165; 1895, c. 103; 1868-9, c. 178, subc. 3, s. 34.

Warrant must issue before arrest can be lawfully made: *State v. Shelton*, 79-605.

Departure from jurisdiction, after the commission of an act in furtherance of a crime subsequently consummated, is a flight from justice: *In re Sultan*, 115-57.

See generally: *In re Hughes*, 61-57; *In re Patterson*, 99-407; *State v. Glover*, 112-896; *In re Sultan*, 115-57; *State v. Hall*, 115-811 cured by section 4604.

For forms for extradition papers, see chapter Extradition in Appendix to Consolidated Statutes.

4551. Record kept, and copy sent to governor. Every magistrate committing any person under the preceding section shall keep a record of the whole proceedings before him, and immediately transmit a copy thereof to the governor for such action as he may deem fit therein under the law.

Rev., s. 3185; Code, s. 1166; 1868-9, c. 178, subc. 3, s. 35.

4552. Duty of governor. The governor shall immediately inform the governor of the state or territory in which the crime is alleged to have been committed, or the president of the United States, if it be alleged to have been committed within the District of Columbia, of the proceedings had in such case.

Rev., s. 3186; Code, s. 1167; 1868-9, c. 178, subc. 3, s. 36.

4553. Person surrendered on order of governor. Every sheriff or jailer in whose custody any person so committed shall be, upon the order of the governor, shall surrender him to the person named in such order.

Rev., s. 3187; Code, s. 1168; 1868-9, c. 178, subc. 3, s. 37.

4554. Governor may employ agents, and offer rewards. The governor, on information made to him of any person, whether the name of such person be known or unknown, having committed a felony or other infamous crime within the state, and of having fled out of the jurisdiction thereof, or who conceals himself within the state to avoid arrest, or who, having been convicted, has escaped and cannot otherwise be apprehended, may either employ a special agent, with a sufficient escort, to pursue and apprehend such fugitive, or issue his proclamation, and therein offer a reward, not exceeding four hundred dollars, according to the nature of the case, as in his opinion may be sufficient for the purpose, to be paid to him who shall apprehend and deliver the fugitive to such person and at such place as in the proclamation shall be directed; and he may from time to time issue his warrants on the state treasurer for sufficient sums of money for such purpose.

Rev., s. 3188; Code, s. 1169; 1891, c. 421; R. C., c. 35, s. 4; 1800, c. 561; 1866, c. 28; 1868-9, c. 52; 1870-1, c. 15; 1871-2, c. 29.

See generally: *Burton v. Furman*, 115-171.

4555. Officer entitled to reward. Any sheriff or other officer who shall make an arrest of any person charged with crime for whose apprehension a reward has been offered, is entitled to such reward, and may sue for and recover the same in any court in this state having jurisdiction: Provided, that no reward shall be paid to any sheriff or other officer for any arrest made for a crime committed within the county of such sheriff or officer making such arrest: Provided further, that the foregoing proviso shall not apply to Wake county; and that in Wake county, upon conviction of convict of an escape, the reward paid to the sheriff or other officer for the apprehension of such escaped convict shall be taxed against such convict in the bill of costs.

1913, c. 132; 1917, c. 8.

This changes the rule stated in *Malpass v. Governor*, 70-130.

4556. Expenses paid, in bringing fugitive from another state. In all cases where the governor of the state has made a requisition on the governor of another state for any fugitive from justice and has sent an agent to receive such fugitive, it shall be lawful for the governor to issue a warrant on the state treasurer for the amount of money necessary to pay the expenses of the agent and other costs in the arresting of the fugitive from justice, to be paid by the treasurer of the state.

Rev., s. 3189; Code, s. 1170; 1870-1, c. 82.

See generally: *Burton v. Furman*, 115-171.

ART. 7. PRELIMINARY EXAMINATION

4557. Waiver of examination. If any person arrested desires to waive examination and give bail, it is the duty of the officer making the arrest to take him before any magistrate of the county in which the offense is charged to have been committed, or before any judge of the supreme or superior court.

Rev., s. 3190; Code, ss. 1138, 1139; 1868-9, c. 178, subc. 3, ss. 7, 8.

For bail, see section 4477.

4558. Procedure, when justice has not final jurisdiction. In all cases where a justice of the peace has not final jurisdiction of the offense, he shall desist from any final determination of the action or complaint, and proceed as hereinafter provided.

Rev., s. 3191; Code, s. 896; 1868-9, c. 178, subc. 4, s. 7; 1879, c. 302, s. 2.

Justice of the peace has no jurisdiction after he binds prisoner over to court: *State v. Lucas*, 139-569. For criminal jurisdiction of justices of the peace, see section 1481.

4559. Duty of examining magistrate. The magistrate before whom any such person shall be brought shall proceed, as soon as may be, to examine the complainant and the witnesses produced in support of the prosecution on oath, in the presence of the prisoner, in regard to the offense charged, and in regard to any other matters connected with such charge which such magistrate may deem pertinent. The defendant shall be allowed a reasonable time before the hearing begins in which to send for and advise with counsel.

Rev., s. 3192; Code, ss. 1144, 1145; 1868-9, c. 178, subc. 3, s. 13.

Examination taken hereunder may be used before the grand or petit jury when the witness is dead: *State v. Valentine*, 29-225; *State v. King*, 86-603; *State v. Bridgers*, 87-562; see section 4572.

Admissions of prosecuting witness are admissible against him on another trial for the same or any other offense: *State v. Simpson*, 133-676. Prisoner entitled to counsel: *State v. Matthews*, 66-106.

See generally: *State v. James*, 78-455; *State v. Bridgers*, 87-562; *State v. Conrad*, 95-666; *State v. Ellis*, 97-447; *State v. Jones*, 100-438; *State v. Staton*, 114-813; *State v. Hawkins*, 115-715; *State v. Moore*, 136-581.

4560. Testimony reduced to writing; right to counsel. The evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively. If desired by the person arrested, his counsel shall be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; and the prisoner or his counsel shall be allowed to cross-examine the complainant and the witnesses for the prosecution.

Rev., s. 3193; Code, ss. 1146, 1150; 1868-9, c. 178, subc. 3, ss. 14, 19.

Justice of the peace required to take down only the substance of what witness says: *State v. Bridgers*, 87-562. Notes of evidence made by the committing magistrate are not conclusive as to the testimony of a witness: *State v. Hooper*, 151-646.

Magistrate can testify as to what witness swore before him, although such testimony was reduced to writing: *State v. Adair*, 66-298; *State v. Jordan*, 110-491. Testimony taken hereunder cannot be used as evidence in chief, but only to refresh memory or contradict statement made by witness: *State v. McLeod*, 8-344; *State v. Adair*, 66-278; *State v. Jordan*, 110-491—unless witness is dead: *State v. Valentine*, 29-225; *State v. King*, 86-603; *State v. Bridgers*, 87-562—too ill to be present, or insane, or removed from the state at instigation of defendant;

and proof that he did not respond to summons is not sufficient, *State v. King*, 86-603; see section 4572.

Admissions or confessions made under oath by prisoner before committing magistrate inadmissible: *State v. Parker*, 132-1014. Prisoner entitled to benefit of counsel: *State v. Matthews*, 66-106.

See generally: *State v. Conrad*, 95-666; *State v. Staton*, 114-815.

4561. Prisoner examined; advised of rights. The magistrate shall then proceed to examine the prisoner in relation to the offense charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed by the magistrate of the charge made against him, and that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings.

Rev., s. 3194; Code, ss. 1145, 1146; 1868-9, c. 178, subc. 3, ss. 14, 15.

Prisoner must have a full and perfect knowledge of his rights, but the caution need not be in the exact words of the statute: *State v. King*, 162-580; *State v. Rorie*, 74-148; *State v. Rogers*, 112-875; *State v. DeGraff*, 113-688.

Such caution need only be given when the prisoner is examined before a magistrate: *State v. Howard*, 92-776—and the examination must have begun, *State v. Conrad*, 95-666. Caution comes too late to make confession admissible, when a question is asked before such caution is given: *State v. Matthews*, 66-106.

Any admission or confession made by the prisoner while under oath before a committing magistrate, whether reduced to writing or not, or made in the presence of witnesses, should not be used in evidence: *State v. Parker*, 132-1014.

When prisoner takes the stand as a witness in his own behalf and is sworn, this section does not apply: *State v. Ellis*, 97-447; *State v. Hawkins*, 115-712; *State v. Simpson*, 133-676. Right of prisoner to testify in his own behalf, see sections 1799, 1802.

See generally: *State v. Vaughan*, 156-615; *State v. Moore*, 136-581; *State v. Parker*, 132-1014; *State v. Hawkins*, 115-712; *State v. Ellis*, 97-447; *State v. Howard*, 92-772; *State v. Pressley*, 90-730; *State v. Spier*, 86-600; *State v. Needham*, 78-474; *State v. Matthews*, 66-106.

4562. Exclusion of witnesses at examination. The witnesses produced on the part either of the prisoner or of the prosecution shall not be present at the examination of the prisoner; and while any witness is under examination the magistrate may exclude from the place in which such examination is had all witnesses who have not been examined, and may cause the witnesses to be kept separate and prevented from conversing with each other until they shall have been examined.

Rev., s. 3195; Code, s. 1149; 1868-9, c. 178, subc. 3, s. 18.

For excluding bystanders in trials for rape, see section 4636.

Sequestration of witnesses in trials generally is within the discretion of the court, and upon violation of the order the court may refuse to allow the witness to testify: *State v. Davis*, 175-723; *Lee v. Thornton*, 174-288; *State v. Lowry*, 170-730; *State v. Hodge*, 142-676.

“Witnesses should not be present at examination of prisoner” quoted and discussed: *State v. Parker*, 132-1014; *State v. Moore*, 136-581.

4563. Answers in writing, read to prisoner, signed by magistrate. The answer of the prisoner to the several interrogatories shall be reduced to writing by the magistrate, or under his direction. They shall be read to the prisoner, who may correct or add to them; and when made conformable to what he declares is the truth, shall be certified and signed by the magistrate.

Rev., s. 3196; Code, s. 1147; 1868-9, c. 178, subc. 3, s. 16.

The magistrate is not required to put down the very words of the witness, but an accurate substance of the testimony is sufficient: *State v. Bridgers*, 87-562.

The section does not require that the examination shall be certified under the private or official seal of the committing magistrate: *State v. Pressley*, 90-730.

See generally: *State v. Parker*, 132-1014.

Section merely referred to in *State v. Suggs*, 90-530.

4564. Witnesses for defendant examined. After the examination of the prisoner is complete, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel in such examination.

Rev., s. 3197; Code, s. 1148; 1868-9, c. 178, subc. 3, s. 17.

See generally: *State v. Parker*, 132-1014.

4565. Examination of prisoner not required in misdemeanors. Nothing contained in the preceding sections shall be construed to require any magistrate, before whom a prisoner charged with a misdemeanor shall be brought, to take the examination of such prisoner, except where such magistrate shall deem it material so to do, or where such examination shall be required by the prisoner.

Rev., s. 3198; Code, s. 1153; 1868-9, c. 178, subc. 3, s. 22.

Right of prisoner to testify in his own behalf, see sections 1799, 1802.

4566. When prisoner discharged. If, upon examination of the whole matter, it shall appear to the magistrate either that no offense has been committed by any person or that there is no probable cause for charging the prisoner therewith, he shall discharge such prisoner.

Rev., s. 3199; Code, s. 1151; 1868-9, c. 178, subc. 3, s. 20.

See *State v. Lucas*, 139-567.

4567. When prisoner held to answer charge. If it shall appear that an offense has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, if the offense be bailable, and the prisoner offer sufficient bail, such bail shall be taken and the prisoner discharged; if no bail be offered, or the offense be not bailable, the prisoner shall be committed to prison.

Rev., s. 3202; Code, ss. 1152, 1156; 1868-9, c. 178, subc. 3, ss. 21, 25.

Section cited and discussion had of bail in capital offenses: *State v. Herndon*, 107-939 (dissenting opinion of Merrimon, C. J.).

After committing or binding prisoner over to superior court, a justice of the peace has no further power or jurisdiction: *State v. Lucas*, 139-567.

Section merely cited in *Lovick v. R. R.*, 129-427.

4568. Witnesses against prisoner recognized. The magistrate shall bind by recognizances the prosecutor and all the material witnesses against such prisoner to appear and testify at the next term of the court having jurisdiction for the county in which the offense is alleged to have been committed.

Rev., s. 3203; Code, s. 1152; 1868-9, c. 178, subc. 3, s. 21.

A justice of the peace or magistrate cannot require a witness to give bond for his appearance before such justice or magistrate: *Lovick v. R. R.*, 129-427.

After committing or binding the prisoner and witnesses against him over to the superior court, a justice of the peace has no further power or jurisdiction: *State v. Lucas*, 139-567.

4569. Witnesses required to give security for appearance. Whenever the magistrate is satisfied by the proof that there is good reason to believe that any such witness will not fulfill the conditions of the recognizance unless security be

required, he may order the witness to enter into a recognizance with such sureties as he shall deem meet for his appearance at such court.

Rev., s. 3204; Code, s. 1154; 1868-9, c. 178, subc. 3, s. 23.

A justice of the peace or magistrate cannot require a witness to give bond for his appearance before such justice or magistrate: *Lovick v. R. R.*, 129-427.

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

Rev., s. 3200; 1893, c. 461, s. 2.

As to venue, see *State v. Lewis*, 142-626 (concurring and dissenting opinions).

4571. Witnesses in lynching not privileged. In all investigations before a justice of the peace, coroner, judge, grand jury, or courts and jury, on the trial of the cause, as authorized by the preceding section or under existing law, no person shall be excused from testifying touching his knowledge or information in regard to the offense being investigated, upon the ground that his answer might tend to subject him to prosecution, pains or penalties, or that his evidence might tend to criminate himself; but no discovery made by such witness upon any such examination shall be used against him in any court or in any penal or criminal prosecution, and he shall, when so examined as a witness for the state, be altogether pardoned of any and all participation in any crime arising under the provisions of the preceding section, or under existing law, concerning which he is required to testify.

Rev., ss. 1638, 3201; 1893, c. 461, s. 5.

For cases on section analogous to this, see section 1800. Force and effect of original act, of which section is part, not impaired by fact that same is split up and different sections placed under appropriate heads: *State v. Lewis*, 142-626.

The part of this statute with reference to pardon of witness is constitutional, and witness is pardoned even though his evidence did not tend to criminate himself: *State v. Bowman*, 145-452. Plea of pardon treated as motion to quash, so that state can appeal: *Ibid.*

4572. Proceedings certified to court; used as evidence. All examinations and recognizances taken pursuant to the provisions of this chapter shall be certified by the magistrate taking the same to the court at which the witnesses are bound to appear, within twenty days after the taking of such examinations and recognizances: Provided, that any criminal case tried within twenty days before the

sitting of criminal court shall be returned on Saturday before the court convenes. The examinations taken and subscribed as herein prescribed may be used as evidence before the grand jury, and on the trial of the accused, provided he was present at the taking thereof and had an opportunity to hear the same and to cross-examine the deposing witness, if such witness be dead or so ill as not to be able to travel, or by procurement or connivance of the defendant has removed from the state, or is of unsound mind.

Rev., s. 3205; Code, s. 1157; 1913, c. 24; 1868-9, c. 178, subc. 3, s. 26.

See section 4560. Section discussed: *State v. King*, 86-603. Section referred to as sufficient taking of evidence: *State v. Wilson*, 158-599.

Such examination, to be used as evidence, need not contain the exact words of the witness: *State v. Bridgers*, 87-562.

That such examination may be used as evidence in chief, it must have been taken in accordance with the statute: *State v. Pierce*, 91-610; *State v. Jordan*, 110-495—and it must be shown what has become of the witness: *State v. Grady*, 83-646; *State v. King*, 86-603; *State v. Pierce*, 91-610.

Section merely cited: *State v. Lucas*, 139-569.

4573. Penalty for failing to return. If any magistrate shall refuse or neglect to return to the proper court any such examination or recognizance by him taken, he may be compelled by rule of court forthwith to return the same, and in case of disobedience of such rule, may be proceeded against by attachment as for contempt of court as provided by law.

Rev., s. 3206; Code, s. 1158; 1868-9, c. 178, subc. 3, s. 27.

ART. 8. BAIL

4574. Officers authorized to take bail, before imprisonment. Officers before whom persons charged with crime, but who have not been committed to prison by an authorized magistrate, may be brought, have power to take bail as follows:

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

See generally: *State v. Herndon*, 107-939 (dissenting opinion of Merrimon, C. J.).

2. Any justice of the peace or chief magistrate of any incorporated city or town, in all cases of misdemeanor, and in all cases of felony not capital.

Rev., s. 3209; Code, s. 1160; 1868-9, c. 178, subc. 3, s. 29; 1871-2, c. 37.

See generally: *State v. Herndon*, 107-939 (dissenting opinion of Merrimon, C. J.).

4575. Officers authorized to take bail, after imprisonment. Any justice of the supreme court or any judge of a superior court has power to bail persons committed to prison charged with crime in all cases; any justice of the peace or chief magistrate of any incorporated city or town has the same power in all cases where the punishment is not capital.

Rev., s. 3210; Code, s. 1161; 1868-9, c. 178, subc. 3, s. 30.

Section construed: *State v. Herndon*, 107-934. See, also, *State v. Herndon*, 107-939 (dissenting opinion of Merrimon, C. J.). Section cited in *State v. Lucas*, 139-567.

4576. Recognizance filed with clerk. Whenever any prisoner is bailed by any officer under the preceding section, such officer shall immediately cause the recognizance taken by him to be filed with the clerk of the superior court of the county to which the prisoner is recognized.

Rev., s. 3211; Code, s. 1162; 1868-9, c. 178, subc. 3, s. 31.

4577. Bail allowed on preliminary examination. If the offense charged in the warrant be not punishable with death, the magistrate may take from the person so arrested a recognizance with sufficient sureties for his appearance at the next term of the court having jurisdiction, to be held in the county where the offense is alleged to have been committed.

Rev., s. 3207; Code, s. 1139; 1868-9, c. 178, subc. 3, s. 8; 1871-2, c. 37, s. 1.

A recognizance defined: *State v. Mills*, 19-552; *State v. White*, 164-408. A recognizance in the form of a bond with conditions, signed and sealed by defendant and his sureties, is valid: *State v. Jones*, 100-438; *State v. Houston*, 74-549.

See annotations under section 4582.

4578. Duty of magistrate granting bail. Any magistrate taking bail shall certify on the warrant the fact of his having let the defendant to bail, and shall deliver the same, together with the recognizance taken by him, to the officer or other person having charge of the prisoner, who shall deliver the same without unnecessary delay to the clerk of the court in which the prisoner has been recognized to appear.

Rev., s. 3212; Code, s. 1140; 1868-9, c. 178, subc. 3, s. 9.

4579. Sheriff or deputy may take bail. When any sheriff or his deputy arrests the body of any person, in consequence of the writ of *capias* issued to him by the clerk of a court of record on an indictment found, the sheriff or deputy, if the crime is bailable, shall recognize the offender, and take sufficient bail in the nature of a recognizance for his appearing at the next succeeding court of the county where he ought to answer, which recognizance shall be returned with the *capias*; and the sheriff shall in no case become bail himself.

Rev., s. 3208; Code, s. 1180; R. C., c. 35, s. 11; 1797, c. 474, s. 4.

4580. Sheriff may take bail of prisoner in custody. If any person for want of bail shall be lawfully committed to jail at any time before final judgment, the sheriff, or other officer having him in custody, may take sufficient justified bail and discharge him; and the bail bond shall be regarded, in every respect, as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken.

Rev., s. 3228; Code, s. 1232; R. C., c. 11, s. 8.

4581. Bail on continuance before a justice. Upon the continuance of any criminal action returned before any justice of the peace for trial, in which the justice is authorized to take bail on a finding of probable cause or in which he has final jurisdiction, it is the duty of the justice of the peace to take bond for his appearance, payable to the state, on the same being tendered by the accused, with such surety as in his opinion will be sufficient to insure the appearance of the accused for trial at a time and place mentioned in the bond.

Rev., s. 3213; 1889, c. 133.

For mortgage in lieu of personal security, see sections 347, 348.

See generally: *State v. Jenkins*, 121-641.

Before this statute a justice of the peace had no power to allow a party accused of an offense, of which he had no final jurisdiction, to give bail during the postponement of the examination: *State v. Jones*, 100-438; *State v. Jenkins*, 121-641.

ART. 9. FORFEITURE OF BAIL

4582. In recognizance to keep the peace. Every person who shall have entered into a recognizance to keep the peace shall appear according to the obligation thereof; and if he fail to appear the court shall forfeit his recognizance and order it to be prosecuted, in the manner provided by law, unless reasonable excuse for his default be given.

Rev., s. 3214; Code, s. 1225; 1868-9, c. 178, subc. 2, s. 10.

As to jurisdiction in which recognizance prosecuted: *State v. Oates*, 88-668.

A recognizance is a conditional judgment and a scire facias is notice to the cognizor to show cause: *State v. Mills*, 19-552; *State v. Smith*, 66-620. **A bond with conditions, signed and sealed by the parties, is good as a recognizance:** *State v. Houston*, 74-174, 74-549; *State v. Jones*, 100-438.

A recognizance, conditioned for the appearance of a party on one day, is not forfeited by his failure to appear on another day, to which the holding of the court was changed by a law passed after the taking of the recognizance, the law containing no provision to that effect: *State v. The Meltons*, 44-426.

A recognizance, conditioned that the defendant appear at the courthouse in C on the eighth Monday after the fourth Monday in March, is not forfeited by the defendant's failure to appear on the twenty-second of February: *State v. Houston*, 74-174. But where the recognizance is on condition that the defendant appear at the next regular term, and such term is not held on account of the absence of the judge, the defendant must appear at the next special term appointed and held: *State v. Horton*, 123-695.

A defendant bound to appear at court must not depart the court without leave: *State v. Eure*, 172-874; *State v. White*, 164-408.

An agreement by solicitor to discharge defendant if he would become a state's witness against a codefendant will not relieve such defendant from a forfeited recognizance. A recognizance is a matter of record, and can only be discharged by a record or by something of equal solemnity: *State v. Moody*, 69-529.

Forfeited recognizances in general: *State v. Jenkins*, 121-637; *State v. Jones*, 100-438; *State v. Cherry*, 13-550; *State v. Raiford*, 13-214; *State v. Dickinson*, 7-10.

4583. When recognizance deemed broken. No recognizance taken under this chapter shall be deemed to be broken except in the failure of the principal in such recognizance to appear and answer according to the obligation thereof, unless such principal be convicted of some offense amounting in judgment of law to a breach of such recognizance.

Rev., s. 3215; Code, s. 1227; 1868-9, c. 178, subc. 2, s. 12.

See annotations under section 4582. Surety upon appearance bond is not released by principal being drunk and under arrest when his case was called in court and continued, and by principal having since become a fugitive from justice under charge of a different offense: *State v. Holt*, 145-450.

A failure to sign the warrant does not affect the validity of a bond given for appearance: *State v. Mitchell*, 151-716.

4584. Recognizance prosecuted. Whenever evidence of such conviction shall be produced in the court in which the recognizance is filed, it shall be the duty of such court to order the recognizance to be prosecuted, and the solicitor shall cause the proper proceedings to be thereupon taken.

Rev., s. 3216; Code, s. 1228; 1868-9, c. 178, subc. 2, s. 13.

When all the matters are of record, the judge decides the forfeiture without a jury; but when the answer raises an issue of fact, it is to be decided by a jury: *State v. Sanders*, 153-624.

The judgment of forfeiture is entered in the court in which recognizance is filed, and the prosecution for forfeiture is not an independent proceeding: *Ibid.*

4585. Notice of judgment nisi before execution. No execution shall issue upon a forfeited recognizance, or to collect a fine imposed nisi, until a notice has issued against the person who has forfeited his recognizance or upon whom the fine has been imposed, and his sureties.

Rev., s. 3217; Code, s. 1208; R. C., c. 35, s. 43; 1777, c. 115, s. 48.

It is imperative to give the notice required hereunder: *State v. Mills*, 19-554.

4586. What notice must contain. When any recognizance, acknowledged by a principal and sureties, shall be forfeited by two or more of the recognizers, the notice issued thereon shall be jointly against them all, designating which of them are principals and which sureties, and when they are bound in different sums, stating the amount forfeited by each one, and the clerk shall have no greater fee on such notice than is due when it is issued against one defendant.

Rev., s. 3218; Code, s. 1209; R. C., c. 35, s. 44; 1812, c. 836, s. 1.

4587. Service of notice. All notices issuing upon forfeited recognizances shall be executed by leaving a copy with each of the defendants, or at his present place of abode. And in case he cannot be found, and has no known place of abode, and the matter be returned, then a notice shall issue, and on the like return the same shall be deemed duly served.

Rev., s. 3219; Code, s. 1210; R. C., c. 35, s. 45; 1812, c. 836, s. 2.

4588. Judges may remit forfeited recognizances. The judges of the superior courts may hear and determine the petition of all persons who shall conceive they merit relief on their recognizances forfeited; and may lessen, or absolutely remit, the same, and do all and anything therein as they shall deem just and right and consistent with the welfare of the state and the persons praying such relief, as well before as after final judgment entered and execution awarded.

Rev., s. 3220; Code, s. 1205; R. C., c. 35, s. 38; 1788, c. 292, s. 1.

When surety made a deposit for the principal to secure appearance, principal appeared and pleaded guilty and left the court before sentence, the court may, upon notice, condemn the deposit for the forfeiture: *State v. White*, 164-408.

The discretion here given to superior court judges may be exercised either before or after final judgment: *Board of Education v. Moody*, 74-73—and their decision is a matter of judicial discretion, not subject to review except upon alleged error of law or legal inference, *Ibid.*; *State v. Morgan*, 136-600.

Under this section solicitor has no vested right to his fee under an absolute judgment upon a forfeited recognizance which was subsequently set aside by the court in the exercise of its discretion: *State v. King*, 143-681.

Section merely cited in *State v. Horton*, 123-697.

4589. Money refunded by clerk. The clerk of the superior court, on the remission of any forfeited recognizance which has been paid into his office, shall refund the same, or so much thereof as shall be remitted.

Rev., s. 3221; Code, s. 1206; R. C., c. 35, s. 39; 1795, c. 442, s. 1.

Section merely cited: *Moore v. Comrs.*, 70-344.

4590. Money refunded by treasurer. If the money has been paid to the county treasurer, he shall refund it to the person entitled, on his producing an attested copy of the record from the clerk of the court, certifying that such recognizance has been remitted or lessened, signed with his own proper name, with the seal of the court affixed thereto.

Rev., s. 3222; Code, s. 1207; R. C., c. 35, s. 40; 1795, c. 442, s. 2.

4591. Forfeiture of bond before justice. On the failure of the accused to appear at the time and place mentioned in any bond taken by any justice of the peace for a continuance of any cause pending before him, and answer the charge, or, having appeared, shall depart the court without leave thereof first had and obtained, it shall be the duty of the justice of the peace then presiding to enter judgment nisi against the principal and his sureties in the bond for the amount mentioned therein, if the sum does not exceed the sum of two hundred dollars; and immediately issue notice to the principal and the sureties in the bond, giving ten days time, specifying time and place, to appear and show cause, if any they have, why the judgment nisi shall not be made final.

Rev., s. 3223; 1889, c. 133, s. 2.

4592. Judgment final, rendered and enforced. If the defendant shall fail to appear and show satisfactory reasons for not complying with the provisions of the bond, it shall then be the duty of the justice of the peace to render a final judgment thereon for the amount of the same, and immediately make and transmit to the clerk of the superior court a transcript thereof, which shall be entered upon the judgment docket of the court, and the clerk shall issue execution on the final judgment against the principal and his sureties for the collection of the amount thereof as in other judgments in behalf of the state.

Rev., s. 3224; 1889, c. 133, s. 3.

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

Rev., s. 3225; 1889, c. 133, s. 4.

See generally: *State v. Jenkins*, 121-637.

4594. Right of bail to surrender principal. The bail shall have liberty, at any time before execution awarded against him, to surrender to the court from which the process issued, or to the sheriff having such process to return, during the session, or in the recess of such court, the principal, in discharge of himself; and such bail shall, at any time before such execution awarded, have full power and authority to arrest the body of his principal, and secure him until he shall have an opportunity to surrender him to the sheriff or court as aforesaid; and the sheriff is hereby required to receive such surrender, and hold the body of the

defendant in custody as if bail had never been given: Provided, that in criminal proceedings the surrender by the bail, after the recognizance forfeited, shall not have the effect to discharge the bail, but the forfeiture may be remitted in the manner provided for.

Rev., s. 3226; Code, s. 1230; R. C., c. 11, s. 5; 1777, c. 115, s. 20; 1848, c. 7.

See generally: *State v. Schenck*, 138-560; *State v. Lingerfelt*, 109-775.

Condition of bail bond is not performed by the appearance, conviction and sentence of defendant: *State v. Schenck*, 138-560—but defendant must submit to the punishment, *Ibid*.

4595. New bail given upon surrender; liability of sheriff. Any person surrendered in the manner specified in the preceding section shall have liberty, at any time before final judgment against him, to give bail; and in case of such surrender, the sheriff shall take the bail bond or recognizance to the succeeding court; and in case the sheriff shall release such person without bail, or the bail returned be held insufficient, on exception taken, the same term to which such bail bond shall be returned, and allowed by the court, the sheriff, having due notice thereof in criminal cases, shall forfeit to the state the sum of one hundred dollars, to be recovered on motion in like manner as forfeitures for not returning process, and be subject to be indicted for misdemeanor in office; and it shall be the duty of the prosecuting officer to collect the forfeiture; and, in case of a release, the sheriff shall be liable for an escape, and may be prosecuted and punished as provided for in the chapter entitled Crimes.

Rev., s. 3227; Code, s. 1231; R. C., c. 11, s. 6; 1827, c. 40.

4596. Defenses open to bail. Every matter which would entitle the principal to be discharged from arrest may be pleaded by the bail in exoneration of his liability.

Rev., s. 3229; Code, s. 1233; R. C., c. 11, s. 9.

ART. 10. COMMITMENT TO PRISON

4597. Order of commitment. Every commitment to prison of a person charged with crime shall state:

1. The name of the person charged.
2. The character of the offense with which he is charged.
3. The name and office of the magistrate committing him.
4. The manner in which he may be discharged; if upon giving recognizance or bail, the amount of the recognizance, the condition on the performance of which it shall be discharged, and the persons or magistrate before whom the bail may justify.
5. The court before which the prisoner shall be sent for trial.

Rev., s. 3230; Code, s. 1163; 1868-9, c. 178, subc. 3, s. 32.

See generally: *State v. James*, 78-455. The verbal order of a justice of the peace is not sufficient: *Ibid*.

Compare *State v. Armistead*, 106-639.

4598. Commitment to county jail. All persons committed to prison before conviction shall be committed to the jail of the county in which the examination is had, or to that of the county in which the offense is charged to have been

committed: Provided, if the jails of these counties are unsafe, or injurious to the health of prisoners, the committing magistrate may commit to the jail of any other convenient county. And every sheriff or jailer to whose jail any person shall be committed by any court or magistrate of competent jurisdiction shall receive such prisoner and give a receipt for him, and be bound for his safe-keeping as prescribed by law.

Rev., s. 3231; Code, s. 1164; 1868-9, c. 178, subc. 2, s. 33.

4599. Commitment of witnesses. If any witness required to enter into a recognizance, either with or without sureties, shall refuse to comply with such order, it shall be the duty of such magistrate to commit him to prison until he shall comply with such order, or be otherwise discharged according to law.

Rev., s. 3232; Code, s. 1155; 1868-9, c. 178, subc. 3, s. 24.

See generally: *Lovick v. R. R.*, 129-427.

ART. 11. VENUE

4600. In case of lynching. The superior court of any county which adjoins the county in which the crime of lynching shall be committed shall have full and complete jurisdiction over the crime and the offender to the same extent as if the crime had been committed in the bounds of such adjoining county; and whenever the solicitor of the district has information of the commission of such a crime, it shall be his duty to furnish such information to the grand juries of all adjoining counties to the one in which the crime was committed from time to time until the offenders are brought to justice.

Rev., s. 3233; 1893, c. 461, s. 4.

Section held constitutional and generally discussed: *State v. Rumble*, 178-717; *State v. Lewis*, 142-626.

Section merely cited with approval: *State v. Long*, 143-675.

4601. In offenses on waters dividing counties. When any offense is committed on any water, or water-course, whether at high or low water, which water or water-course, or the sides or shores thereof, divides counties, such offense may be dealt with, inquired of, tried and determined, and punished at the discretion of the court, in either of the two counties which may be nearest to the place where the offense was committed.

Rev., s. 3234; Code, s. 1193; R. C., c. 35, s. 24.

Section merely cited in *State v. Lewis*, 142-626.

4602. Assault in one county, death in another. In all cases of felonious homicide when the assault has been made in one county within the state, and the person assaulted dies in any other county thereof, the offender shall be indicted and punished for the crime in the county wherein the assault was made.

Rev., s. 3235; Code, s. 1196; R. C., c. 35, s. 27; 1831, c. 22, s. 1.

No offense hereunder is newly created nor raised to a higher offense, nor an additional punishment annexed, but a difficulty which existed in the trial is merely removed: *State v. Dunkley*, 25-116.

The term "assault" as used here does not mean a mere attempt, but an injury inflicted, of which one dies: *State v. Hall*, 114-909.

Section merely cited in *State v. Lewis*, 142-626.

4603. Assault in this state, death in another. In all cases of felonious homicide, when the assault has been made within this state, and the person assaulted dies without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the same manner, to all intents and purposes, as if the person assaulted had died within the limits of this state.

Rev., s. 3236; Code, s. 1197; R. C., c. 35, s. 28; 1831, c. 22, s. 2.

No offense hereunder is newly created nor raised to a higher offense, nor an additional punishment annexed, but a difficulty which existed in the trial is merely removed: *State v. Dunkley*, 25-116.

Validity of section affirmed: *State v. Hall*, 114-909; *State v. Caldwell*, 115-800. Section held not applicable where party in North Carolina puts in motion a force which kills a party in Tennessee: *State v. Hall*, 114-909.

Section merely cited: *State v. Lewis*, 142-626.

4604. Person in this state injuring one in another. If any person, being in this state, unlawfully and willfully puts in motion a force from the effect of which any person is injured while in another state, the person so setting such force in motion shall be guilty of the same offense in this state as he would be if the effect had taken place within this state.

Rev., s. 3237; 1895, c. 169.

The necessity for this section was brought to attention of legislature by case of *State v. Hall*, 114-909.

Section merely cited in *State v. Lewis*, 142-626.

4605. In county where death occurs. If a mortal wound is given or other violence or injury inflicted or poison is administered on the high seas or land, either within or without the limits of this state, by means whereof death ensues in any county thereof, the offense may be prosecuted and punished in the county where the death happens.

Rev., s. 3238; 1891, c. 68.

Section held constitutional and discussed: *State v. Caldwell*, 115-794.

Section merely cited in *State v. Lewis*, 142-626.

4606. Improper venue met by plea in abatement; procedure. Because the boundaries of many counties are either undetermined or unknown, by reason whereof high offenses go unpunished; therefore, for the more effectual prosecution of offenses committed on land near the boundaries of counties, in the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county in which by the indictment it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement, the truth whereof shall be duly verified on oath or otherwise both as to substance and fact, wherein shall be set forth the proper county in which the supposed offense, if any, was committed; whereupon the court may, on motion of the state, commit the defendant, who may enter into recognizance, as in other cases, to answer the offense in the county averred by his plea to be the proper county; and, on his prosecution in that county, it shall be deemed, conclusively, to be the proper county. But if the state, upon the plea aforesaid, will join issue, and the matter be found for the defendant, he shall be required to enter into recognizance as in other cases to answer the offense in the county averred by his plea to be the proper county, provided the offense be bailable; and, if not bailable, he shall be

committed for trial in the county; and, if it be found for the state, the court in all offenses or misdemeanors shall proceed to pronounce judgment against the defendant, as upon conviction; and, in all cases of felony, the defendant shall be at liberty to plead to the indictment, and be tried on his plea of not guilty.

Rev., s. 3239; Code, s. 1194; R. C., c. 35, s. 25.

For venue in larceny and receiving, see section 4250. For venue in beating way on trains, see section 3508. For venue in indictments against railroads for discriminating against A. and N. C. Railroad, see section 3419.

See generally: *State v. Outerbridge*, 82-618; *State v. Mitchell*, 83-674; *State v. Allen*, 107-805; *State v. Lytle*, 117-799; *State v. Carter*, 126-1011; *State v. Lewis*, 142-626.

Venue is a matter under the control of the legislature: *State v. Woodard*, 123-710; *State v. Lewis*, 142-626. Section only applies to offenses committed wholly within the state: *State v. Mitchell*, 83-674.

In an indictment for murder, offense must be charged in body of bill to have been committed within the district over which the court has jurisdiction: *State v. Adams*, 1-56—but this need not be proven unless prisoner denies it by plea in abatement, *State v. Outerbridge*, 82-617.

Laws conferring, withdrawing or limiting jurisdiction do not enter into and become a constituent part of the offenses to which they apply: *State v. Williamson*, 81-540. The want of an averment of a proper and perfect venue is not fatal to a bill of indictment: *Ibid.*

As to plea in abatement and removal, see generally: *State v. Reid*, 18-377; *State v. Swepson*, 81-571; *State v. Jones*, 88-671; *State v. Haywood*, 94-847; *State v. Flowers*, 109-841; *State v. Lytle*, 117-799; *State v. Woodard*, 123-710; *State v. Holder*, 133-709; *State v. Burton*, 138-578; *State v. Lewis*, 142-626; *State v. Long*, 143-674; *State v. Pace*, 159-462. Plea in abatement must state the facts upon which it is based, and these must be sufficient to defeat the further prosecution of the action: *Emery v. Chappell*, 148-327.

Section merely cited with approval in *Peek v. Culberson*, 104-425; *State v. Harris*, 106-689; *State v. Holder*, 133-709; *State v. Burton*, 138-578.

ART. 12. PRESENTMENT

4607. No arrest nor trial on presentment. No person shall be arrested on a presentment of the grand jury, or put on trial before any court, but on indictment found by the grand jury, unless otherwise provided by law.

Rev., s. 3240; Code, s. 1175; R. C., c. 35, s. 6; 1797, c. 474, s. 3; 1879, c. 12.

Const., Art. I, ss. 11, 13, 17.

There must have been a legal indictment found by a competent grand jury: *State v. Cain*, 8-352; *State v. Griffice*, 74-316.

It is the returning of the bill of indictment, publicly and in open court, and its being there recorded, that makes it effectual; and it need be signed by no one: *State v. Cox*, 28-440.

A bill of indictment is not defective when it is made to appear that the witness has been sworn and examined, although there is no endorsement on the bill to that effect: *State v. Hines*, 84-810; *State v. Roberts*, 19-540.

Defective indictment may be taken advantage of by plea in abatement in apt time: *State v. Seaborn*, 15-305; *State v. Haywood*, 73-437; *State v. Griffice*, 74-316; *State v. Baldwin*, 80-390.

Section merely cited in *State v. Quick*, 72-241.

4608. Names of witnesses indorsed on presentment. When a presentment shall be made of any offense by a grand jury, upon the knowledge of any of their body, or upon the testimony of witnesses, the names of such grand jurors and witnesses shall be indorsed thereon.

Rev., s. 3241; Code, s. 1176; R. C., c. 35, s. 7; 1797, c. 474, s. 2.

Section merely referred to in *State v. Allen*, 83-680.

4609. Subpœna for witnesses on presentment. In issuing subpœnas for witnesses whose names are indorsed on presentments made by the grand jury, the clerk of the court shall name therein the first Tuesday of the term of court as the time for such witnesses to appear and give evidence. And no clerk shall issue a subpœna for any such witness to appear on Monday, except upon written order of the solicitor of the district.

1913, c. 168.

ART. 13. INDICTMENT

4610. Waiver of bill of indictment. No waiver of the finding and return into court of a bill of indictment in any criminal action shall be allowed in the superior courts of this state except in cases wherein the offense charged is a misdemeanor which does not include or contain the element of fraud, deceit or malice; nor shall such waiver be made in any such action except upon a plea of guilty, or a submission, or a plea of *nolo contendere* by the defendant in the same. No such waiver of a bill of indictment shall be allowed by the court unless by the consent of the defendant's counsel in such action, who shall be one either employed by the defendant to defend him in the action or one appointed by the court to examine into the defendant's case and report as to the same to the court; which service by an attorney so appointed by the court shall be rendered without fee or reward.

1907, c. 71.

4611. Bills returned by foreman except in capital cases. Grand juries shall return all bills of indictment in open court through their acting foreman, except in capital felonies, when it shall be necessary for the entire grand jury, or a majority of them, to return their bills of indictment in open court in a body.

Rev., s. 3242; 1889, c. 29.

It is the returning of the bill of indictment in open court, publicly, and its being there recorded, that makes it effectual; and it need be signed by no one: *State v. Cox*, 28-440.

As to waiver of requirement that bill be returned in open court, see *State v. Ledford*, 133-714; but see section 4610.

4612. Substance of judicial proceedings set forth. In every indictment, information, or impeachment in which, by the common law, it may be necessary to set forth at length the judicial proceedings had in any case then or formerly pending in any court, civil or military, or before any justice of the peace, it is sufficient to set forth the substance only of the proceedings, or the substance of such part thereof as makes, or helps to make, the offense prosecuted.

Rev., s. 3243; Code, s. 1184; R. C., c. 35, s. 15.

Legislature has power to modify old form of indictment or to establish new one, provided form established is sufficient to apprise defendant with reasonable certainty of the nature of the offense of which he stands charged: *State v. Harris*, 145-456; see *State v. Tisdale*, 145-424, and cases cited.

Indictment for offense under law amended since offense committed should state that it was committed before amendment: *State v. Massey*, 97-465.

Informalities and mere discrepancies in indictment held not fatal, see *State v. Flowers*, 109-841; *State v. Evans*, 69-40; *State v. Best*, 108-747; *State v. Davis*, 80-384; *State v. Tribatt*, 32-151; see under section 4623.

As to caption and title of case, see *State v. Sprinkle*, 65-463; *State v. Simons*, 68-378; *State v. Sutton*, 5-281.

As to conclusion, see *State v. Kirkman*, 104-911; *State v. Davis*, 80-384; *State v. Tribatt*, 32-151; but see section 4625.

Section cited, commented on and approved: *State v. Davis*, 69-495; *State v. Simmons*, 70-336; *State v. Murphy*, 101-697. Section merely cited: *State v. Haney*, 67-467; *State v. Evans*, 69-40.

4613. Bill of particulars. In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may, in its discretion, require the solicitor to furnish a bill of particulars of such matters.

Rev., s. 3244.

See generally: *State v. Brady*, 107-822; *State v. Gates*, 107-832; *State v. Dunn*, 109-839; *State v. Bryant*, 111-693; *State v. Shade*, 115-757; *Townsend v. Williams*, 117-337; *State v. Pickett*, 118-1231; *State v. Howard*, 129-657; *State v. Van Pelt*, 136-633; *State v. Dewey*, 139-556; *State v. Long*, 143-670; *State v. Holder*, 153-606; *State v. Stephens*, 170-745.

A bill of particulars is not a part of the bill of indictment, and is only intended to enable the defendant to prepare his defense: *State v. Gullede*, 173-746. A bill of particulars, not being made by the grand jury, cannot supply a defect in an indictment: *State v. Cline*, 150-854; *State v. Van Pelt*, 136-633.

The rule governing applications for a bill of particulars stated in *State v. Brady*, 107-822. When application must be made: *State v. Shade*, 115-757; *State v. Leeper*, 146-655. Bill of particulars should be asked instead of waiting and making a motion in arrest: *State v. Corbin*, 157-619.

Bill of particulars must be asked for, and it is within the discretion of the court: *State v. Hinton*, 158-625; *State v. R. R.*, 149-508—and refusal to grant it is not appealable except possibly in a case of gross abuse of discretion, *State v. Dewey*, 139-556.

Section cited in *State v. Horner*, 174-788.

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

Rev., s. 3245; 1887, c. 58.

For full annotations on subject of homicide, and indictments for homicide, see under sections 4200, 4201.

Section held constitutional, and an indictment drawn in accordance with it approved: *State v. Moore*, 104-743; *State v. Brown*, 106-645. See generally: *State v. Arnold*, 107-861—the word “wilfully” is not essential to the validity of an indictment for murder, *State v. Arnold*, 107-861.

Failure to allege whether the person killed was a man or a woman is not defect: *State v. Pate*, 121-659.

Section merely cited: *State v. Hunt*, 128-584; *State v. Matthews*, 142-623.

4615. Form of bill for perjury. In every indictment for willful and corrupt perjury it is sufficient to set forth the substance of the offense charged upon the

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

The jurors for the state, on their oath, present, that A. B., of _____ County, did unlawfully commit perjury upon the trial of an action in _____ court, in _____ County, wherein _____ was plaintiff and _____ was defendant, by falsely asserting, on oath (or solemn affirmation) (here set out the statement or statements alleged to be false), knowing the said statement, or statements, to be false, or being ignorant whether or not said statement was true.

Rev., ss. 3246, 3247; Code, s. 1185; R. C., c. 35, s. 16; 1842, c. 49, s. 1; 1889, c. 83.

See generally: State v. Bryson, 4-115; State v. Ammons, 7-126; State v. Gillimon, 24-372; State v. Hoyle, 28-1; State v. Davis, 69-495; State v. Knight, 84-789; State v. Collins, 85-511; State v. Roberson, 98-751; State v. Murphy, 101-697; State v. Peters, 107-876; State v. Harris, 145-458; State v. Cline, 146-640.

Section enacted in 1791, but repealed by Revised Statutes 1837: State v. Gillimon, 24-372—reënacted in 1842, State v. Hoyle, 28-1.

This section simplifies the charge of perjury, but the constituent elements of the offense remain as before: State v. Peters, 107-876.

On appeal from recorder's court on a charge of perjury, it is necessary that a bill of indictment should be found: State v. Hyman, 164-411.

A bill of indictment for perjury should charge that the matter alleged to be false was material to the issue: State v. Cline, 150-854.

In an indictment for perjury the record of the case in which the perjury is alleged to have been committed need not be set forth, but if such record is set forth, it must be correct: State v. Ammons, 7-126; see, however, State v. Flowers, 109-841. When the record is produced it must correspond to the allegations in the bill of indictment: State v. Harrell, 49-55; State v. Lewis, 93-581.

An indictment for perjury which does not aver that the false oath was taken "wilfully" and "corruptly" is defective: State v. Davis, 84-787. The form of indictment for perjury hereunder approved in State v. Harris, 145-458; State v. Thompson, 113-638; State v. Gates, 107-832.

Section referred to in State v. Cline, 146-640.

4616. Bill for subornation of perjury. In every indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit willful and corrupt perjury, it is sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceedings, and without setting forth the commission or authority of the court or person before whom the perjury was committed or was agreed or promised to be committed.

Rev., s. 3248; Code, s. 1186; R. C., c. 35, s. 17; 1842, c. 49, s. 2.

4617. Former conviction alleged in bill for second offense. In any indictment for an offense which, on the second conviction thereof, is punished with other or greater punishment than on the first conviction, it is sufficient to state that the offender was, at a certain time and place, convicted thereof, without otherwise describing the previous offense; and a transcript of the record of the

first conviction, duly certified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction.

Rev., s. 3249; Code, s. 1187; R. C., c. 35, s. 18.

When the second conviction is punished with other or greater punishment than the first, the first conviction should be charged as here required: *State v. Davidson*, 124-839; *State v. Dunlap*, 159-491. See *In re Holley*, 154-163.

4618. Manner of alleging joint ownership of property. In any indictment wherein it is necessary to state the ownership of any property whatsoever, whether real or personal, which belongs to, or is in the possession of, more than one person, whether such persons be partners in trade, joint tenants or tenants in common, it is sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any such indictment, it is necessary to mention, for any purpose whatsoever, any partners, joint tenants or tenants in common, it is sufficient to describe them in the manner aforesaid; and this provision shall extend to all joint-stock companies and trustees.

Rev., s. 3250; Code, s. 1188; R. C., c. 35, s. 19.

See generally: *State v. Edwards*, 86-666; *State v. Patterson*, 68-292; *State v. Capps*, 71-93.

An indictment for larceny which charges the thing taken to be the property of "A and another or others" is fatally defective under this section: *State v. Harper*, 64-129.

An indictment for injury to livestock, where the property was laid in "A and others," and the proof was that A was the sole owner, is defective and not cured by this section: *State v. Hill*, 79-656.

Section merely cited: *State v. Daniel*, 121-574; *State v. Lewis*, 142-636.

4619. Description in bill for larceny of money. In every indictment in which it is necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it is sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or treasury note, or bank note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank note, shall not be proven.

Rev., s. 3251; Code, s. 1190; 1876-7, c. 68.

See generally: *State v. Reese*, 83-637; *State v. Freeman*, 89-469; *State v. Carter*, 113-639.

A charge of theft of "\$5 in money of the value of \$5" is good, and is sustained by proof of theft of any amount of coin, bank note, etc.: *State v. Carter*, 113-639.

Section merely cited in *State v. Reynolds*, 87-544; *State v. Brown*, 113-645.

4620. Description in bill for embezzlement. In indictments for embezzlement, except when the offense relates to a chattel, it is sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved.

Rev., s. 3252; Code, s. 1020; 1871-2, c. 145, s. 2.

Section cited in *State v. Fain*, 106-760. See sections 4268-4276.

4621. Intent to defraud; larceny and receiving. In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense whatever, it is sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city, town, or parish, or body corporate, or any public officer in his official capacity, or any copartnership or member thereof, or any particular person. The defendant may be charged in the same indictment in several counts with the separate offenses of receiving stolen goods, knowing them to be stolen, and larceny.

Rev., s. 3253; Code, s. 1191; R. C., c. 35, ss. 21, 23; 1852, c. 87, s. 2; 1874-5, c. 62.

See sections 4249-4265. See generally: *State v. Beatty*, 61-52; *State v. Leak*, 80-403; *State v. Lawrence*, 81-522; *State v. Lanier*, 89-517; *State v. Carter*, 113-639; *State v. Brown*, 170-714.

Under this section the court will not order the solicitor to elect on which count of an indictment, charging larceny and receiving stolen goods, he will proceed: *State v. Morrison*, 85-561.

If defendant is convicted upon two counts in an indictment under this section, it is no ground for arrest of judgment that one count is defective; judgment will be given on the sufficient count: *State v. Beatty*, 61-52; *State v. Tisdale*, 61-220; *State v. Bailey*, 73-70; *State v. Leak*, 80-403.

Section cited in *State v. Hastings*, 86-596; *State v. Crass*, 101-783; *State v. Hall*, 108-779.

4622. Separate counts; consolidation. When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated: Provided, that in such consolidating cases the defendant shall be taxed the solicitor's full fee for the first count, and half fees for each subsequent count upon which conviction is had: Provided, this section shall not be construed to reduce the punishment or penalty for such offense or offenses.

1917, c. 168.

4623. Bill or warrant not quashed for informality. Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

Rev., s. 3254; Code, s. 1183; R. C., c. 35, s. 14; 37 Hen. VIII, c. 8; 1784, c. 210, s. 2; 1811, c. 809.

The act of 1811 applied to indictments in the superior courts and cured the same defects that were cured in indictments in the county courts by the act of 1784: *State v. Newmans*, 4-171.

See generally: *State v. Cherry*, 7-7; *State v. Brown*, 12-137; *State v. Moses*, 13-452; *State v. Fore*, 23-378; *State v. Gallimon*, 24-372; *State v. Shepherd*, 30-195; *State v. Boon*, 49-463; *State v. Perry*, 50-252; *State v. Morgan*, 60-243; *State v. Beatty*, 61-52; *State v. Smith*, 63-234; *State v. Bell*, 65-313; *State v. Parker*, 65-453; *State v. Sprinkle*, 65-453; *State v. Wise*, 66-120; *State v. Staton*, 66-640; *State v. Wise*, 67-281; *State v. Davis*, 69-495; *State v. Joyner*, 81-534; *State v. Tytus*, 98-705; *State v. Harris*, 106-683; *State v. Arnold*, 107-861; *State v. Van*

Doran, 109-872; State v. Flowers, 109-841; State v. Barnes, 122-1031; State v. Ridge, 125-655; State v. Bryson, 127-574; State v. Jarvis, 129-698; State v. Marsh, 132-1000; State v. Roberson, 136-587; State v. Cole, 156-618; State v. Rogers, 168-112; State v. Stephens, 170-745; State v. Cain, 175-825.

Motion to quash or to arrest judgment will not be sustained unless the bill is so defective that the court cannot proceed to judgment: State v. Carpenter, 173-767; State v. Taylor, 172-892. While not necessary to allege matters of form, the bill should allege matters of substance so that the court may see the offense charged, and the defendant be informed of the charge: State v. Cline, 150-854; State v. Lunsford, 150-862; State v. Gibson, 170-697.

The rule against technicalities may be invoked to protect defendant in his objection to the bill of indictment: State v. Wood, 175-809.

Essential allegations in an indictment for false pretense: State v. Whedbee, 152-770; State v. Marsh, 162-603—for violation of trust law, State v. Craft, 168-208—for an affray, State v. Lancaster, 169-284—for fornication and adultery, State v. Britt, 150-811. Where a statute makes a crime the indictment is sufficient under this section if it charges the offense in the words of the statute: State v. Roberson, 136-587; State v. Whitley, 141-823; State v. Harrison, 145-408; State v. Leeper, 146-655.

In a charge for a statutory offense, when it is necessary to negative an exception: State v. Moore, 166-284.

If the process is improperly issued and the defendant appears or is brought into court, it may be corrected or set aside and defendant held for new process: State v. Turner, 170-701. An answer to the merits waives the defect: *Ibid.*

INDICTMENTS REMEDIED BY THIS SECTION. One which has a misrecital of the proper county in the caption, State v. Sprinkle, 65-463—where blanks in the caption are not filled out, State v. Francis, 157-612—which uses “said court” for “said county” where the context shows what was meant, State v. Evans, 69-40—which fails to describe the defendant by the addition of his occupation, State v. Newmans, 4-171—which describes the defendant as “N. J. S.” in one place and as “Nimrod, J. S.,” in another, and similar cases, State v. Henderson, 68-348; State v. Best, 108-747; State v. Hester, 122-1047; State v. Drakeford, 162-667—which fails to state the time and place of the offense or states the time incorrectly, when time and place are not of the essence, State v. Cherry, 7-7; State v. Shepherd, 30-195; State v. Wilson, 67-456; State v. Williamson, 81-540; State v. Arnold, 107-861—which omits a word not especially required and where the sense is shown by the context, State v. Lane, 26-113; State v. Simons, 70-336; State v. Rinehart, 75-58; State v. Walker, 87-541; State v. Arnold, 107-861; State v. Barnes, 122-1031; State v. Ridge, 125-655—which omits the word “did” in the indictment, State v. Hawkins, 155-466—which charges “the intent to commit a felony” instead of using the word “feloniously,” State v. Gaffney, 157-624—which merely adds evidential matters, State v. Wynne, 151-644—which uses superfluous words, State v. Guest, 100-411; State v. Arnold, 107-861; State v. Darden, 117-697; State v. Piner, 141-760—for the slander of an innocent woman, which does not set out the words spoken, when the charge is directly made, State v. Haddock, 109-873—for rape, which charges that act was done “violently and feloniously” instead of “forcibly,” State v. Johnson, 67-55—which uses the word “blow” for “wound,” where the context shows that a wound was given and nature of it, State v. Norblett, 47-418—which is for the larceny of a “calf” skin and the proof was the larceny of a “kip” skin, and similar cases, State v. Campbell, 76-261; State v. Underwood, 77-502—which uses the word “spinster” after the name of a married female defendant, State v. Guest, 100-411—which lays the offense as committed against the “act of assembly,” instead of against the “statute,” State v. Tribatt, 32-151—which fails to have the names of the witnesses checked off, as examined, unless it is shown as a fact that the witnesses were not sworn and examined, or one not signed by the foreman or not signed “true bill,” State v. Sultan, 142-572, overruling State v. McBroom, 127-528; State v. Long, 143-670—where a secret assault upon two persons at the same time is charged, State v. Knotts, 168-173—where the affidavit and warrant taken together make the charge definite, State v. Poythress, 174-809. See section 4625.

INDICTMENTS NOT REMEDIED BY SECTION. One which contains several counts, charging distinct and separate felonies, State v. Rell, 80-442; State v. Perdue, 107-853—a count in the indictment which does not contain the name of the defendant and distinctly charge him with the offense, State v. Phelps, 65-450. Cured by section 4625. One for felony which fails to charge that the offense was done “feloniously”: State v. Purdie, 67-25; State v.

Roper, 88-656. One for perjury which does not aver that the defendant "wilfully and corruptly" took the false oath: *State v. Davis*, 84-787. One for assault with intent to commit rape which does not charge the offense to have been done "forcibly and against her will": *State v. Powell*, 106-635; *State v. Marsh*, 132-1000.

SECTION MERELY CITED. See *State v. Hollingsworth*, 100-535; *State v. Murphy*, 101-697; *State v. Fair*, 106-760; *State v. Warren*, 113-683; *State v. Shade*, 115-757; *State v. Darden*, 117-697; *State v. Johnston*, 119-898; *State v. Neal*, 120-620; *State v. Wilson*, 121-654; *State v. Perry*, 122-1023; *State v. Railway Co.*, 125-671; *State v. Lumber Co.*, 153-610.

4624. No quashal for grand juror's failure to pay taxes or being party to suit. No indictment shall be quashed nor shall judgment thereon be arrested by reason of the fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue.

1907, c. 36.

Section referred to in *State v. Banner*, 149-519.

4625. Defects which do not vitiate. No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the statutes" instead of the words "against the form of the statute," or vice versa; nor for omission of the words "against the form of the statute" or "against the form of the statutes," nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offense.

Rev., s. 3255; Code, s. 1189; R. C., c. 35, s. 20; 7 Hen. VIII, c. 8.

See generally: *State v. Moses*, 13-452; *State v. Smith*, 63-234; *State v. Wise*, 66-120; *State v. Williamson*, 81-540; *State v. Kirkman*, 104-911; *State v. Sykes*, 104-694; *State v. Harris*, 106-682; *State v. Peters*, 107-876; *State v. Arnold*, 107-861; *State v. Pate*, 121-659; *State v. Hester*, 122-1050.

Section cited and approved: *State v. Storkey*, 63-7; *State v. Caudle*, 63-30; *State v. Purdie*, 67-326; *State v. Haney*, 67-467; *State v. Simons*, 70-336; *State v. Davis*, 80-385; *State v. Jones*, 80-415; *State v. Parker*, 81-531; *State v. Joyner*, 81-534; *State v. Taylor*, 83-601; *State v. Howard*, 92-778; *State v. Williams*, 117-753; *State v. Long*, 143-670.

It is not necessary that an indictment conclude "against the peace and dignity of the state": *State v. Kirkman*, 104-911 (overruling *State v. Joyner*, 81-534); *State v. Peters*, 107-876—nor "against the form of the statute (or statutes)", *State v. Sykes*, 104-694; *State v. Kirkman*, 104-911; *State v. Harris*, 106-682; *State v. Peters*, 107-876. Indictment need not charge the place where an affray was committed: *State v. Lancaster*, 169-284—nor the time when time is not material, *State v. Francis*, 157-612. To omit the word "and" in describing an "innocent and virtuous woman" is immaterial: *State v. Ratliff*, 170-707. The date charged in the bill is immaterial: *State v. White*, 146-608.

This section does not remedy an indictment for felony which fails to charge that the offense was done "feloniously," *State v. Shaw*, 117-765—an indictment for murder by a stroke or blow which fails to allege the infliction of a "mortal wound," *State v. Morgan*, 85-581—an indictment which charges several distinct and separate offenses in same count may be quashed, but the objection is waived by failure to move in apt time, or by a nol. pros. as to all but one charge, or by verdict, *State v. Burnett*, 142-577.

ART. 14. TRIAL BEFORE JUSTICE

4626. In cases of final jurisdiction. When the justice is satisfied that he has jurisdiction, if no jury is asked for, he shall proceed to determine the case, and shall either acquit the accused or find him guilty, and sentence him to such punishment as the case may require, not to exceed in any case a fine of fifty dollars or imprisonment in the county jail for thirty days.

Rev., s. 3256; Code, s. 897; 1868-9, c. 178, subc. 4, s. 8.

See generally: *State v. Shelly*, 98-673. For jurisdiction of justice in criminal actions, see section 1481 and annotations thereunder.

4627. Trial by jury, if demanded. If either the complainant or the accused shall ask for it, the justice shall allow a trial by jury, as is provided in civil actions before justices of the peace.

Rev., s. 3257; Code, s. 898; 1868-9, c. 178, subc. 4, s. 9.

Constitutionality of trial without jury: *State v. Stewart*, 89-563; see cases collected under Const., Art. I, sec. 13.

Section merely cited in *State v. Powell*, 97-417; *State v. Moore*, 136-581.

4628. What submitted to jury. In case a trial by jury is had, the justice shall submit to the jury in each case simply the question of the guilt or innocence of the accused of the offense charged, and shall enter the verdict on his docket, and adjudge accordingly.

Rev., s. 3258; Code, s. 899; 1868-9, c. 178, subc. 4, s. 10.

4629. Commitment after judgment. The commitment to the county prison shall set forth—

1. The name of the guilty person.
2. The nature of the offense of which he is convicted and the date of the trial.
3. The period of his imprisonment.
4. It shall be directed to the sheriff of the county, or to the keeper of the county jail, and shall direct him to keep the prisoner for the time stated, or until discharged by law.
5. The name of the constable or other officer required to execute it.
6. It shall be signed by the justice and be dated.

Rev., s. 3259; Code, s. 1238; 1868-9, c. 178, subc. 4, s. 17.

See generally: *State v. Armistead*, 106-640.

That the mittimus does not comply, in all respects, with the requirements of this section is no defense to the charge of taking by force, from the custody of a lawful officer, a prisoner legally committed to his charge: *State v. Armistead*, 106-640.

4630. Parties entitled to copy of papers; bar to indictment. The justice shall give to either party on request, and on payment of his lawful fee, a copy of the complaint and of his finding and sentence. Such finding and sentence may be pleaded in bar of any indictment subsequently found for the same offense.

Rev., s. 3260; Code, ss. 902, 903; 1868-9, c. 178, subc. 4, ss. 13, 14.

As to former conviction, see *State v. Lucas*, 139-567. Section merely cited: *State v. Lyon*, 93-575.

4631. Justice to make return of cases to superior court. It is the duty of each justice of the peace on or before Monday of every term of the superior court of

his county, to furnish the clerk of the court with a list of the names and offenses of all parties tried and finally disposed of by such justice of the peace, together with the papers in each case, in all criminal actions, since the last term of the superior court. The clerk of the court shall hand a copy of such list to the solicitor and to the grand jury at each term of court; and no indictment shall be found against any party whose case has been so finally disposed of by any justice of the peace: Provided, that this section shall not be deemed to extend or enlarge or otherwise affect the jurisdiction of justices of the peace, except as provided by law.

Rev., s. 3261; Code, s. 906; 1869-70, c. 110.

Section cited: *State v. Foy*, 98-744; *State v. Latham*, 110-490.

Failure to comply with this section is a misdemeanor by section 4385.

ART. 15. TRIAL IN SUPERIOR COURT

4632. Prisoner standing mute, plea "not guilty" entered. If any person, being arraigned upon or charged in any indictment for any crime, shall stand mute of malice or will not answer directly to the indictment, the court shall order the plea of "not guilty" to be entered on behalf of such person; and the plea so entered shall have the same force and effect as if such person had pleaded the same.

Rev., s. 3262; Code, s. 1198; R. C., c. 35, s. 29; R. S., c. 35, s. 16.

As to deaf-mutes: *State v. Harris*, 53-136.

Plea may be entered after verdict in some cases: *State v. McMillan*, 68-440.

It is within the judge's discretion to allow defendant to withdraw a plea of guilty and enter a plea of not guilty, or vice versa: *State v. Branner*, 149-559.

Plea of former acquittal, effect of, and to what it applies: *State v. Freeman*, 162-594.

Section cited: *State v. Pollard*, 83-598. Also, see *State v. Farrar*, 104-702; *State v. Jackson*, 82-565.

4633. Peremptory challenges of jurors by defendant. Every person on joint or several trial for his life may make a peremptory challenge of twelve jurors and no more; and in all joint or several trials for crimes and misdemeanors, other than capital, every person on trial shall have the right of challenging peremptorily, and without showing cause, four jurors and no more. And to enable defendants to exercise this right, the clerk in all such trials shall read over the names of the jurors on the panel, in the presence and hearing of the defendants and their counsel, before the jury shall be impaneled to try the issue; and the judge or other presiding officer of the court shall decide all questions as to the competency of jurors.

Rev., s. 3263; Code, s. 1199; 1913, c. 31, s. 3; 1887, c. 53; R. C., c. 35, s. 32; 1871-2, c. 39; R. S., c. 35, ss. 19, 21; 1777, c. 115, s. 85; 1812, c. 833; 1801, c. 592, s. 1; 1826, c. 9; 22 Hen. VIII, c. 14, s. 6.

See annotations under sections 2331, 4634. See generally: *State v. Benton*, 19-196; *State v. Hensley*, 94-1021; *State v. Hunt*, 128-584.

Jury trial means by twelve men. In a criminal case the defendant cannot consent to a trial by less than twelve: *State v. Rogers*, 162-656.

Neither of two defendants in an indictment on a joint trial has cause to complain of a challenge by the other: *State v. Smith*, 24-402. The right of the defendant is to object to, not to select, jurors: *State v. Banner*, 149-519.

Prisoner must exhaust his peremptory challenges before he can assign as error the ruling of the court upon the competency of a juror challenged by him: *State v. Hensley*, 94-1021;

State v. Pritchett, 106-667; State v. Kinsauls, 126-1095; State v. Teachy, 138-587; Ives v. Railroad, 142-131; State v. Sultan, 142-569; State v. Bohanon, 142-695; State v. Banner, 149-519; State v. English, 164-497; State v. Terry, 173-761; State v. Carroll, 176-730.

On an indictment for murder, where the solicitor states that he will only ask for a verdict of murder in the second degree or manslaughter, the defendant is not entitled to more than four peremptory challenges: State v. Hunt, 128-584; State v. Caldwell, 129-682.

Standing a juror aside to be called at end of panel is a challenge for cause by the state: State v. Benton, 19-196. Defendant cannot stand jurors aside until panel is finished: State v. Bone, 52-121.

Error to permit state to peremptorily challenge juror after he has been passed upon by state and tendered to prisoner: State v. Fuller, 114-885. But not error to permit state to challenge a juror after passing him and before he was accepted by defendant, when defendant has not exhausted his peremptory challenges: State v. Carroll, 176-730.

Where juror in a capital case states that he is opposed to capital punishment and has religious scruples against acting as a juror, trial court should excuse him: State v. Vick, 132-995. Trial court can excuse juror, before jury impaneled, although solicitor has passed him to prisoner and has not challenged him for cause: *Ibid.*

Where a trial judge rests his refusal to exercise his discretion upon the mistaken opinion, either that it is not vested in him or that the facts are not such as to call for its exercise, it is error: State v. Fuller, 114-885.

Competency of jurors is in the discretion of the court: State v. Bohanon, 142-695; State v. Register, 133-746; State v. Vick, 132-995; State v. Kinsauls, 126-1095; State v. DeGraff, 113-688; State v. Potts, 100-457; State v. Green, 95-611; State v. Hensley, 94-1021; State v. Kilgore, 93-533; State v. Brittain, 89-481; State v. Collins, 70-241; State v. Dove, 32-469; State v. Ellington, 29-61; State v. Benton, 19-196.

Section cited in *Dunn v. R. R.*, 131-449; State v. Hargrove, 100-484; State v. Davis, 80-385; State v. Patrick, 48-443; State v. Caldwell, 46-289; State v. Morgan, 19-348.

CHALLENGE TO ARRAY. Action of trial judge in determining qualifications of a juror, if erroneous, is ground for challenge to the array by motion to quash and set aside entire panel, and in absence of such challenge a defendant cannot be allowed to take advantage of the alleged error after trial and judgment: State v. Moore, 120-570.

It is not a challenge to the array for solicitor to ask "if any member of the jury had formed and expressed the opinion that the prisoner was not guilty, to let it be known": State v. Walker, 145-567.

Not ground of challenge that sheriff failed to summon some drawn from box, or that box not properly revised, there being no charge of corruption or partiality: State v. Stanton, 118-1182; State v. Banner, 149-519—such objection comes too late after a plea of not guilty, *Ibid.*—or that one man named in writ had removed from county; that another was dead when jury list revised; that one was not summoned; nor that sheriff, in copying list, omitted, by mistake, the name of one who in consequence was not summoned, State v. Whitt, 113-716; see, also, State v. Speaks, 94-865—or that no person of color, the prisoner being a colored man, was summoned upon the special venire, State v. Sloan, 97-499.

Provisions of law as to revising of jury list are directory and not mandatory, and it is no cause of challenge to the array that they were not revised at time and place specified, a proper revision having been made: State v. Teachy, 138-587.

CHALLENGE OF JURORS FOR CAUSE. If juror called is biased by prejudice against prisoner's race: State v. McAfee, 64-339—or has a personal grudge, State v. Benton, 19-210. If juror related to parties interested: State v. Potts, 100-457; State v. Perry, 44-330; State v. Shaw, 25-532; State v. Ketchey, 70-621.

If juror formed and expressed an opinion: State v. Potts, 100-457; State v. Green, 95-611; State v. Efer, 85-585; State v. Collins, 70-241; State v. Benton, 19-209—but if juror states he is not so prejudiced that he could not render a fair and impartial verdict, he is competent, State v. Terry, 173-761; State v. Foster, 172-961; State v. Banner, 149-519; State v. Kilgore, 93-533; State v. DeGraff, 113-688; State v. Bohanon, 142-695; State v. Ellington, 29-66; but see State v. Benton, 19-217.

The only requisite for a special venireman is that he is a freeholder of the county: State v. Kilgore, 93-533—no cause of challenge that he has served on jury within two years, *Ibid.*

Party knowing of ground for challenge before trial, and not availing himself of it, shall not have a new trial: State v. McEntyre, 1-267.

Regular juror cannot be challenged on ground that he has served on jury within past two years: *State v. Brittain*, 89-481.

Juror can himself state to court why he is not competent to serve: *State v. Vann*, 162-534; *State v. Benton*, 19-222; *State v. Jones*, 80-415; *State v. Vestal*, 82-563—and if he states, after being accepted, that he has served on jury within past two years, it is not error in the court to then allow a challenge by the state: *State v. Vestal*, 82-563; see *State v. Jones*, 80-415.

A prosecutor in a criminal action to which defendant has not pleaded is not disqualified as a juror in another cause: *State v. Brady*, 107-822. That juror is a nonresident of county is good ground for challenge, but not for a new trial after verdict rendered: *State v. Upton*, 170-769; *State v. White*, 68-158.

Juror prejudiced against prosecuting witness: *State v. Little*, 174-793.

Where cause of challenge admitted by the state, prisoner is bound by his challenge: *State v. Creasman*, 32-395.

4634. Peremptory challenges by the state. In all capital cases the prosecuting officer on behalf of the state shall have the right to challenge peremptorily four jurors for each defendant, but shall not have the right to stand any jurors at the foot of the panel. The challenge must be made before the juror is tendered to the prisoner, and if he will challenge more than four jurors he shall assign for his challenge a cause certain; and in all other cases of a criminal nature a challenge of two jurors shall be allowed in behalf of the state for each defendant, and challenge also for a cause certain, and in all cases of challenge for cause certain the same shall be inquired of according to the custom of the court.

Rev., s. 3264; Code, s. 1200; 1913, c. 31, s. 4; 1907, c. 415; 1887, c. 53; R. C., c. 35, s. 33; 1827, c. 10; 33 Edw. I, c. 4.

For annotations, see sections 2331, 4633.

4635. Challenge to special venire same as to tales jurors. In the trial of all criminal cases, where a special venire shall be ordered, the same causes of challenge to the jurors summoned on the special venire shall be allowed as exist to tales jurors.

Rev., s. 3265; 1887, c. 53.

For causes of challenge, see chapter entitled Jurors.

4636. Exclusion of bystanders in trials for rape. In the trial of cases for rape and of assault with the intent to commit rape, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the court-room all persons except the officers of the court, the defendant and those engaged in the trial of the case; and upon the preliminary hearing before a justice of the peace of the offenses above named, that officer may adopt a like course.

1907, c. 21.

4637. Term expiring during trial extended. In case the term of a court shall expire while a trial for felony shall be in progress, and before judgment shall be given therein, the judge shall continue the term as long as in his opinion it shall be necessary for the purposes of the case; and he may in his discretion exercise the same power in the trial of any other cause under the same circumstances, except civil actions begun after Thursday of the last week.

Rev., s. 3266; Code, s. 1229; 1893, c. 226; C. C. P., s. 397; R. C., c. 31, s. 16; 1830, c. 22.

Section declared constitutional: *State v. Adair*, 66-298; *State v. Jefferson*, 66-309; *State v. Taylor*, 76-64; *State v. Monroe*, 80-373. Section (1893, c. 226) approved: *Bank v. Gilmer*, 116-700.

Expiration of term is no reason, in felony case, to discharge jury before verdict; judge can continue court, and if he is due to begin another court on the next Monday, he can postpone it for four days: *State v. McGimsey*, 80-377—or the governor may designate another judge to hold the next court: *State v. Wood*, 175-809; *State v. R. R.*, 145-495.

See generally: *State v. Penley*, 107-808. Section cited in *State v. Bullock*, 63-570; *State v. Jefferson*, 66-309; *State v. McGimsey*, 80-377; *Taylor v. Erwin*, 119-274.

4638. Justification as defense to libel. Every defendant who is charged by indictment with the publication of a libel may prove on the trial for the same the truth of the facts alleged in the indictment; and if it shall appear to the satisfaction of the jury that the facts are true, the defendant shall be acquitted of the charge.

Rev., s. 3267; Code, s. 1195; R. C., c. 35, s. 26.

See generally: *State v. Lyon*, 89-568. The defendant cannot justify under this section by showing a general report in the neighborhood of the truth of his libelous publication: *State v. White*, 29-180.

Evidence: *State v. Sherman*, 115-773; *State v. Lyon*, 89-568. Variance: *State v. Townsend*, 86-676.

Section cited in *Jones v. Brinkley*, 174-23.

4639. Conviction of assault, when included in charge. On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character.

Rev., s. 3268; 1885, c. 68.

See generally: *State v. Lance*, 166-411; *State v. Hunt*, 128-586; *State v. Fritz*, 133-725; *State v. Nash*, 109-824; *State v. Johnson*, 94-863.

Section explained in *State v. Smith*, 157-578.

4640. Conviction for a less degree or an attempt. Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime.

Rev., s. 3269; 1891, c. 205, s. 2.

See generally, as to murder: *State v. Matthews*, 142-621—as to rape, *State v. Lance*, 166-411. In a charge for murder, defendant may be convicted as accessory before the fact: *State v. Bryson*, 173-803.

Since this section the joinder, in an indictment for an offense, of a count for a lesser offense, or for an attempt to commit the same, is mere surplusage: *State v. Brown*, 113-645.

Section cited in *State v. Horner*, 174-788; *State v. Stephens*, 170-745; *State v. Fenner*, 166-247; *State v. Savage*, 161-245; *State v. Smith*, 157-578.

4641. Burglary in first degree charged, verdict for second degree. When the crime charged in the bill of indictment is burglary in the first degree, the jury may render a verdict of guilty of burglary in the second degree if they deem it proper so to do.

Rev., s. 3270; 1889, c. 434, s. 3.

See generally: *State v. Foster*, 129-704.

4642. Verdict for murder in first or second degree. Nothing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree.

Rev., s. 3271; 1893, c. 85, s. 3.

Section declared constitutional: State v. Cole, 132-1069. **See generally:** State v. Lane, 166-333; State v. Gilchrist, 113-673; State v. Covington, 117-834; State v. Matthews, 142-621.

An indictment, though drawn according to the precedent in use before act of 1893, is in proper form and charges the offense of murder in the first degree: State v. Lipscomb, 134-689.

This section applies equally to all indictments for murder: State v. Matthews, 142-621. **Since the act, when nothing else appears, the killing is presumed to be murder in the second degree:** State v. Wilcox, 118-1131; State v. Dowden, 118-1145; State v. Booker, 123-713; State v. Rhyne, 124-847; State v. Hicks, 125-636; State v. Bishop, 131-733; State v. Daniels, 134-676; State v. Capps, 134-628.

It is the duty of the jury to determine in their verdict whether the crime is murder in the first or second degree: State v. Gadberry, 117-811; **compare** State v. Gilchrist, 113-673; State v. Daniels, 134-675—**and this is duty of petit jury and not the grand jury,** State v. Ewing, 127-555; State v. Hunt, 128-584. **The verdict is construed with reference to the charge and the evidence:** State v. Wiggins, 171-813; State v. Murphy, 157-614—**but the judge should have the jury express in the verdict the degree of the crime,** State v. Bagley, 158-608.

When the whole evidence shows the offense to be murder in the first degree or not guilty, it is not error for the judge to so instruct the jury: State v. Walker, 170-716.

4643. Demurrer to the evidence. When on the trial of any criminal action in the superior court, or in any criminal court, the state has produced its evidence and rested its case, the defendant may move to dismiss the action or for judgment of nonsuit. If the motion is allowed, judgment shall be entered accordingly; and such judgment shall have the force and effect of a verdict of "not guilty" as to such defendant. If the motion is refused, the defendant may except; and if the defendant introduces no evidence, the case shall be submitted to the jury as in other cases, and the defendant shall have the benefit of his exception on appeal to the supreme court.

Nothing in this section shall prevent the defendant from introducing evidence after his motion for nonsuit has been overruled; and he may again move for judgment of nonsuit after all of the evidence in the case is concluded. If the motion is then refused, upon consideration of all of the evidence, the defendant may except; and, after the jury has rendered its verdict, he shall have the benefit of such latter exception on appeal to the supreme court. If defendant's motion for judgment of nonsuit be granted, or be sustained on appeal to the supreme court, it shall in all cases have the force and effect of a verdict of "not guilty."

1913, c. 73; Ex. Sess. 1913, c. 32.

As to nonsuits in criminal cases generally: State v. Killian, 173-792; State v. Carlson, 171-818; State v. Isley, 164-491; State v. Houston, 155-432; State v. Moody, 150-847. **As to sufficient evidence to go to the jury in case of arson,** State v. Clark, 173-739—**as to homicides,** State v. Bridges, 172-879.

Demurrer to the evidence and motion of nonsuit are proper methods of taking advantage of a variance in criminal cases: State v. Gibson, 169-318; s. c., 170-697. **If allowed it has the effect of an acquittal:** State v. Moore, 166-371.

A nonsuit in a criminal case does not interfere with the power of the judge to order a mistrial in his discretion: State v. Andrews, 166-349.

If the defendant's motion is denied and he introduces evidence he loses the benefit of the first motion: State v. Killian, 173-792.

Demurrer to the evidence in criminal case must be taken before verdict: *State v. Leak*, 156-643; *State v. Houston*, 155-432. But the attorney-general may consent to a demurrer to the evidence in the supreme court: *Ibid.* For practice in civil cases, see section 567.

4644. New trial to defendant. The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases.

Rev., s. 3272; Code, s. 1202; R. C., c. 35, s. 35; 1815, c. 895.

See generally: *State v. Gee*, 92-756; *State v. Bennett*, 93-503; *State v. Bailey*, 100-528; *State v. Fuller*, 114-885; *State v. Perry*, 121-533; *State v. Lilliston*, 141-857; *State v. Turner*, 143-641.

Where special verdict is so defective that court cannot pronounce judgment upon it, the rule is to order a new trial: *State v. Hanner*, 143-632, and cases cited.

The defendant is not entitled to a continuance in order that he may apply for a pardon: *State v. Newell*, 172-933—nor is a defendant entitled to be discharged because he has been used as a witness for the state against other defendants, *Ibid.*

When the judge directs the clerk to enter a verdict of not guilty, as upon a variance, and afterwards strikes out the entry and makes a mistrial, such action is not reviewable: *State v. Ford*, 168-165.

Where a trial judge rests his refusal to exercise his discretion upon the mistaken opinion either that it is not vested in him or that the facts are not such as to call for its exercise, it is error: *State v. Fuller*, 114-885; *State v. Perry*, 121-533.

When a motion for a new trial is based upon affidavits, the supreme court will not look into them; the court below must find the facts and spread them on the record: *State v. Best*, 111-638; *State v. DeGraff*, 113-689—and where the trial judge finds the facts and refuses to grant a new trial, his decision on that ground is not reviewable, *State v. Fuller*, 114-885.

The granting of a new trial upon newly discovered evidence is, in criminal cases, within the discretion of the trial judge, in the absence of gross abuse, and the supreme court cannot entertain such a motion, nor can it entertain a petition to rehear a criminal case: *State v. Trull*, 169-363; *State v. Ice Co.*, 166-403; *State v. Arthur*, 151-653; *State v. DeGraff*, 113-689; *State v. Lilliston*, 141-857; *State v. Turner*, 143-641; *State v. Starnes*, 94-973, 97-423; *State v. Rowe*, 98-629.

A new trial will not be granted, on motion, to the state: *State v. Freeman*, 66-647—or for a variance between the allegation and proof, where no exception is taken in the court below, *State v. Craig*, 89-475—or for an erroneous statement of the law which the finding of the jury corrects, *State v. Grady*, 83-643—as a matter of law because a witness was not sworn and the fact was not discovered until after the jury had retired, *State v. Gee*, 92-756—because of abuse of privilege in the argument to the jury, except where it is gross, and probably injured the complaining party and was not properly checked by the trial judge, *State v. Rogers*, 94-860; *State v. Davenport*, 156-596—because a juror is not a resident of the county in which the indictment is tried, *State v. White*, 68-158; *State v. Upton*, 170-769—because a juror who says on oath that he has not made up his opinion, said before summoned that he had made up his opinion, *State v. Scott*, 8-24—because the jury took refreshments after retiring, unless it appear that the refreshments were furnished by the party in whose favor the verdict was given, *State v. Sparrow*, 7-487—or because the jurors were allowed to sleep in separate but adjoining rooms, *State v. Trull*, 169-363.

Where a defendant is acquitted upon one count in an indictment and convicted upon another, and a new trial is awarded, it must be to retry the whole case: *State v. Stanton*, 23-424; see, also, *State v. Grady*, 83-643; *State v. Bridgers*, 87-562.

4645. Nol. pros. after two terms; when capias and subpœnas to issue. A nolle prosequi “with leave” shall be entered in all criminal actions in which the indictment has been pending for two terms of court and the defendant has not been apprehended and in which a nolle prosequi has not been entered, unless the judge for good cause shown shall order otherwise. The clerk of the superior court shall issue a capias for the arrest of any defendant named in any

criminal action in which a *nolle prosequi* has been entered when he has reasonable ground for believing that such defendant may be arrested or upon the application of the solicitor of the district. When any defendant shall be arrested it shall be the duty of the clerk to issue a subpoena for the witnesses for the state indorsed on the indictment.

Rev., s. 3273; 1905, c. 360, ss. 1, 3, 4.

For clerk's *nol. pros.* docket, see section 952.

Solicitor can enter a *nol. pros.* in his discretion: *State v. Thompson*, 10-613—and *capias* cannot again issue without leave of court, *State v. Smith*, 129-547; *State v. Thornton*, 35-256—but when *nol. pros.* "with leave" entered, solicitor can issue *capias* without further leave, *State v. Smith*, 129-546.

Effect of a *nol. pros.* being entered is not to acquit defendant, but he may still be prosecuted for the same offense: *State v. Smith*, 170-742; *Wilkinson v. Wilkinson*, 159-265; *State v. Thornton*, 35-256; see *State v. Smith*, 129-547.

Entering a *nol. pros.*, with leave, does not start the statute of limitations again: *State v. Williams*, 151-660.

4646. Prisoner not to be tried in prison uniform. It shall be unlawful for any sheriff, jailer or other officer to require any person imprisoned in jail to appear in any court for trial dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with shaven or clipped head. And no person charged with a criminal offense shall be tried in any court while dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with head shaven or clipped by or under the direction and requirement of any sheriff, jailer or other officer, unless the head was shaven or clipped while such person was serving a term of imprisonment for the commission of a crime.

Any sheriff, jailer or other officer who violates the provisions of this section shall be guilty of a misdemeanor.

1915, c. 124.

ART. 16. APPEAL

4647. Appeal from justice, trial de novo. The accused may appeal from the sentence of the justice to the superior court of the county. On such appeal being prayed, the justice shall recognize both the prosecutor and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as aforesaid. In all cases of appeal, the trial shall be anew, without prejudice from the former proceedings.

Rev., s. 3274; Code, s. 900; 1868-9, c. 178, subc. 4, s. 11; 1879, c. 92, s. 10.

See generally (for a discussion of this act as amended from time to time): *State v. Powell*, 86-640; *State v. Griffis*, 117-709.

In a criminal prosecution no appeal lies except from a final judgment: *State v. Ford*, 163-165; *State v. Webb*, 155-426. For appeal on peace warrant, see section 4539.

The appeal allowed by this section and under article 4, section 27, of the constitution is for the benefit of the accused only; but so much of the judgment as is personal to the prosecutor and taxes him with the costs may be appealed from: *State v. Powell*, 86-640; *State v. Morgan*, 120-563.

Upon an appeal from a justice of the peace this section does not make it necessary that the defendant should be tried upon an indictment found by a grand jury: *State v. Quick*, 72-241; *State v. Thornton*, 136-616—nor is it necessary when appeal is from a recorder's court, *State v. Freeman*, 172-925; *State v. Dunlap*, 159-491; *State v. Jones*, 145-460; *State v. Lytle*, 138-

738. But if the offense is not within the jurisdiction of the lower court a bill of indictment is necessary: *State v. McAden*, 162-575; *State v. Hooker*, 145-581; *State v. Fesperman*, 108-770; *State v. Hyman*, 164-411.

Defendant not entitled to new trial because punishment imposed by police justice was unauthorized; the case should be remanded for resentencing: *State v. Black*, 150-866.

On appeal from a justice of the peace's refusal to grant a motion in an arrest of judgment, the whole case is brought up and the defendant is entitled to a trial de novo, unless he has pleaded guilty, when he is only entitled to bring up for review the question whether the facts charged and admitted by the plea constitute the offense: *State v. Koonce*, 108-752; *State v. Warren*, 113-683.

4648. Justice to return papers and findings to superior court. In every case in which an appeal shall be prayed the justice shall forthwith transmit to the clerk of the superior court of the county all papers in the case, together with a copy of the verdict, if any, of his determination of the facts if there shall have been no trial by jury, and of the sentence, in which shall be set forth all the facts found by him, as well as his finding of those which were alleged in the complaint and which were found by him not to be proved.

Rev., s. 3275; Code, s. 901: 1868-9. c. 178, subc. 4. s. 12.

Section cited in *State v. Lyon*, 93-575.

4649. When state may appeal. An appeal to the supreme court may be taken by the state in the following cases, and no other. Where judgment has been given for the defendant—

1. Upon a special verdict.
2. Upon a demurrer.
3. Upon a motion to quash.
4. Upon arrest of judgment.

Rev., s. 3276; Code, s. 1237.

As to the law before this section, see *State v. Lane*, 78-547; *State v. Keeter*, 82-457; *State v. Padgett*, 82-544; *State v. Seanlan*, 85-601; *State v. Swepson*, 83-584.

See generally: *State v. Swepson*, 83-584; *State v. Moore*, 84-724; *State v. Powell*, 86-640; *State v. Ballard*, 122-1024; *State v. Savery*, 126-1083; *State v. Southern Ry.*, 126-1073.

State may appeal when judge sustains defendant's demurrer to pleading, and not to the evidence: *State v. Moody*, 150-847. State cannot appeal when judge directs a verdict of not guilty: *Ibid.*—nor when the judge strikes out a plea of guilty and enters a verdict of not guilty without a jury, *State v. Branner*, 149-559.

In case of an appeal lost without laches, the state may have a writ of certiorari as substitute: *State v. Swepson*, 83-584.

Section cited in *State v. Miller*, 97-451; *State v. Monger*, 107-771; *State v. Morgan*, 120-563; *State v. Hinson*, 123-755; *State v. Davidson*, 124-839; *State v. Bost*, 125-710; *State v. Southern Ry.*, 126-1073; *State v. Bowman*, 145-454; *State v. Lancaster*, 169-284.

4650. Appeal by defendant to supreme court. In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the supreme court; and the appeal shall be perfected and the case for the supreme court settled, as provided in civil actions.

Rev., s. 3277; Code, s. 1234; R. C., c. 4, s. 21; 1818. c. 962, s. 4.

The statutory appeal takes the place of the old writ of error: *State v. Webb*, 155-426. Appeal by the defendant in a criminal case from the superior court to the supreme court vacates the judgment of the former: *State v. Applewhite*, 75-229; *State v. Jones*, 69-16; *State v. Miller*, 94-908.

Appeal to obtain a new trial for the admission of improper, or rejection of proper, evidence: *State v. Clark*, 34-151; *State v. Keath*, 83-626; *State v. Barber*, 89-523; *State v. Skidmore*, 109-795.

Appeal, without assigning error or showing new facts, dismissed: *State v. Miller*, 97-450; *State v. Brown*, 106-645.

Premature appeal, if taken otherwise than from a judgment on conviction or on a plea of guilty: *State v. Ford*, 168-165. **No appeal from a motion to quash:** *State v. Burnett*, 173-750.

Withdrawal of appeal by accused in misdemeanors and felonies: *State v. Leak*, 90-655; *State v. Brewer*, 98-607.

Upon suspension of judgment with consent of defendant, he waives his right to appeal on the question of his guilt or innocence: *State v. Tripp*, 168-150.

On appeal by defendant when the complete record cannot be sent up, he should docket the case and ask for certiorari: *State v. McDraughon*, 168-131.

If, pending an appeal in a criminal case, the statute authorizing the indictment is repealed, or when an "amnesty act" which includes the prisoner is passed, judgment will be arrested: *State v. Nutt*, 61-20; *State v. Applewhite*, 75-299.

When, pending the appeal of a prisoner who has been convicted of a capital felony, he makes his escape, the supreme court has power in its discretion to dismiss the appeal or hear or continue it: *State v. DeVane*, 166-281; *State v. Keebler*, 145-560; *State v. Jacobs*, 107-772; *State v. Anderson*, 111-689.

Certiorari as substitute for appeal: *State v. Leak*, 86-647; *Turner v. Quinn*, 92-501; *State v. Butts*, 91-524; *State v. Lee*, 90-652; *State v. Swepson*, 82-541; *State v. Gooch*, 94-983; *State v. Walters*, 97-489; *State v. Sloan*, 97-499; *State v. Webb*, 155-426.

An appeal does not lie from an interlocutory judgment in a criminal action: *State v. Bailey*, 65-426; *State v. Wiseman*, 68-203; *State v. Keeter*, 80-472; *State v. Hinson*, 82-540; *State v. Lock*, 86-647; *State v. Polk*, 91-652; *State v. Hazell*, 95-623; *State v. Webb*, 155-426.

Power of the court to suspend judgment in a criminal case, impose conditions, and punish for violation of such conditions: *State v. Burnette*, 173-734; *State v. Greer*, 173-759; *State v. Johnson*, 169-311; *State v. Tripp*, 168-150; *State v. Everitt*, 164-399; *State v. Hilton*, 151-687.

Judgment in criminal case to be enforced at a future day: *In re Hinson*, 156-250.

Withdrawing juror and ordering a mistrial in criminal case: *State v. Cain*, 175-825; *State v. Upton*, 170-769.

Section cited in *State v. Swepson*, 82-541; *State v. Moore*, 93-501; *State v. Starnes*, 94-974; *State v. Walters*, 97-491; *State v. Griffin*, 117-713; *State v. Deyton*, 119-882.

PERFECTING APPEAL. See under section 642 et seq. **Must be perfected during the term, whether by giving bond or procuring an order dispensing with one:** *State v. Dixon*, 71-204; *State v. Gaylor*, 85-551. **Case for supreme court settled as provided for in civil actions:** *State v. Lee*, 90-352; *State v. Cameron*, 121-572; *State v. Perry*, 122-1018; *State v. Crook*, 91-536; *State v. Byrd*, 93-624. **Duty of presiding judge to make up case on appeal:** *State v. Randall*, 88-611. **If counsel can agree, judge takes no part in case on appeal, but judge's action is final:** *State v. Gooch*, 94-983; *State v. Chaffin*, 125-660. **Difference between case on appeal and record, record controls:** *State v. Carlton*, 107-956. **Exceptions to case on appeal must be specific:** *State v. King*, 119-910. **Judge's case on appeal prima facie correct:** *State v. Jarnigan*, 120-568. **Solicitor must pass on "case on appeal" for the State:** *State v. Cameron*, 121-572—and he is bound by the case passed upon, *State v. Wilson*, 121-650.

The judge cannot authorize the case on appeal to be served upon any other than the solicitor or counsel acting for him: *State v. Stevens*, 152-840.

When appellant's case is served in time and there is no exception or countercase served, it is "the case": *State v. Carlton*, 107-956. **Transcript should be made up in proper form:** *State v. Butts*, 91-524; *State v. Farrar*, 103-411. **Sufficiency of undertaking:** *State v. Byrd*, 93-624.

Supreme court will not consider case on appeal when it does not appear to have been served upon opposing party and no case on appeal appears in the record proper: *State v. Lewis*, 145-585, and cases cited.

4651. Defendant may appeal without security for costs. In all cases of conviction in the superior courts, the defendant shall have the right to appeal without giving security for costs, upon filing an affidavit that he is wholly unable to give security for the costs, and is advised by counsel that he has reasonable cause for the appeal prayed, and that the application is in good faith.

Rev., s. 3278; Code, s. 1235; 1869-70, c. 196, s. 1.

See generally: *State v. Gatewood*, 125-694.

Appeal in forma pauperis allowed only in term by the judge, and it must be perfected during the term at which verdict was rendered: *State v. Gatewood*, 125-694; *State v. Dixon*, 71-204; *State v. Barham*, 85-88; *State v. Gaylor*, 85-551. For an appeal in forma pauperis it must appear that the application is in good faith: *State v. Martin*, 172-977; *State v. DeVane*, 166-283; *State v. Smith*, 152-842.

When an appeal is taken it is to the next term of the supreme court: *State v. Hawkins*, 72-180; *State v. O'Kelly*, 88-609.

The court has no authority to dispense with, or the prosecutor to waive, the requirements of this section: *State v. Kerns*, 90-650; *State v. Moore*, 93-500; *State v. Gatewood*, 125-694. Appeal will be dismissed when defendant files no bond and there is no order allowing him to appeal without bond: *State v. Patrick*, 72-217; *State v. Spurtin*, 80-362; *State v. Walker*, 82-696; *State v. Donaldson*, 83-683; *State v. Gaylor*, 85-551; *State v. Gatewood*, 125-694.

If on appeal in forma pauperis there is an order allowing such an appeal, but no affidavit, the affidavit will be presumed correct; but where the substance of the affidavit is set out, and the court sees that it is incorrect, the appeal must be dismissed: *State v. Jones*, 93-617; *State v. Jackson*, 112-849; *State v. Harris*, 114-830.

The affidavit is a necessary requirement: *State v. Martin*, 172-977. For requirements of affidavit, see *State v. Divine*, 69-390; *State v. Morgan*, 77-510; *State v. Moore*, 93-500; *State v. Payne*, 93-612; *State v. Tow*, 103-350; *State v. Conry*, 103-352; *State v. Duncan*, 107-818; *State v. Wyld*, 110-500; *State v. Shoulders*, 111-637; *State v. Rhodes*, 112-856; *State v. Perkins*, 117-698; *State v. Bramble*, 121-603; *State v. Atkinson*, 141-734.

Section merely cited in *State v. Dixon*, 71-204; *State v. Starnes*, 94-974.

4652. Appeal granted; bail for appearance. It shall be the duty of the judge on filing the affidavit required in the preceding section to grant the appeal without security for costs, and for any bailable offense shall require the defendant to enter into recognizance in a reasonable sum to make his appearance at the first term of the superior court to be held in the county and to further answer the charge preferred.

Rev., s. 3279; Code, s. 1236; 1869-70, c. 196, s. 2.

Appeal in forma pauperis can be allowed only in term time and by the judge: *State v. Gatewood*, 125-694. The order to appeal in forma pauperis must be signed by the judge: *State v. Parish*, 151-659.

Section merely cited in *State v. Spurtin*, 80-362.

4653. Bail pending appeal. When any person convicted of a misdemeanor and sentenced by the court, shall appeal, the court shall allow such person to give bail pending appeal.

Rev., s. 3280; Code, s. 1181; R. C., c. 35, s. 12; 1850-1, c. 2.

The sentence of the defendant does not end the liability of the sureties on the bail bond for appearance: *State v. Schenck*, 138-562—but he must submit to such punishment as shall be adjudged, *Ibid*.

4654. Appeal not to vacate judgment; stay of execution. In criminal cases an appeal to the supreme court shall not have the effect of vacating the judgment appealed from, but upon perfecting the appeal as now required by law, either by giving bond or in forma pauperis, there shall be a stay of execution during the pendency of the appeal. The clerk of the superior court shall, as soon as may be after execution is stayed, as provided in this section, notify the attorney-general thereof. Said notice shall give the name of defendant, the crime of which he was convicted, and, if the statutory time for perfecting the appeal has been extended by agreement, the time of such extension. If for any reason the defendant should wish to withdraw his appeal before the same is docketed in the

supreme court, he may go, or be taken, before the clerk of the superior court in which he was convicted, and said clerk shall enter such withdrawal upon the record of the case, and notify the sheriff, who shall proceed forthwith to execute the sentence.

Rev., s. 3281; 1887, c. 191, s. 1; 1887, c. 192, s. 4; 1919, c. 5.

Section cited and approved: *State v. Jacobs*, 107-772.

4655. Judgment for fines docketed; lien and execution. When the sentence in whole or in part directs the payment of a fine, the judgment shall be docketed by the clerk and be a lien on the real estate of the defendant in the same manner as judgments in civil actions, and executions thereon shall only be stayed, upon an appeal taken, by security being given in like manner as is required in civil cases. Should the judgment be affirmed upon appeal to the supreme court, the clerk of the superior court, on receipt of the certificate from the supreme court, shall issue execution on such judgment.

Rev., s. 3282; 1887, c. 191, s. 3.

4656. Procedure upon receipt of certificate of supreme court. The clerk of the superior court, in all cases where the judgment has been affirmed (except where the conviction is a capital felony), shall forthwith on receipt of the certificate of the opinion of the supreme court notify the sheriff, who shall proceed to execute the sentence which was appealed from. In criminal cases where the judgment is not affirmed the cases shall be placed upon the docket for trial at the first ensuing term of the court after the receipt of such certificate.

Rev., s. 3283; 1887, c. 192, s. 3.

ART. 17. EXECUTION

4657. Death by electrocution. Death by hanging under sentence of law in North Carolina is hereby abolished and electrocution or death by electricity substituted therefor.

1909, c. 443, s. 1.

4658. Manner and place of execution. The mode of executing a death sentence must in every case be by causing to pass through the body of the convict or felon a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict or felon is dead; and the warden of the penitentiary of North Carolina or, in case of his death, inability or absence, a deputy warden shall be the executioner; and when any person, convict or felon shall be sentenced by any court of the state having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the state penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the state penitentiary shall also cause to be provided, in conformity with this article and approved by the governor and council of state, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article.

1909, c. 443, s. 2.

4659. Sentence of death; prisoner taken to penitentiary. Upon the sentence of death being pronounced against any person in the state of North Carolina convicted of a crime punishable by death it shall be the duty of the judge pronouncing such death sentence to make the same in writing, which shall be filed in the papers in the case against such convicted person, and a certified copy thereof shall be transmitted by the clerk of the superior court in which such sentence is pronounced to the warden of the state penitentiary at Raleigh, North Carolina, not more than twenty nor less than ten days before the time fixed in the judgment of the court for the execution of the sentence; and in all cases where there is no appeal from the sentence of death and in all cases where the sentence is pronounced against a prisoner convicted of the crime of rape it shall be the duty of the sheriff, together with at least one deputy, to convey to the penitentiary at Raleigh such condemned felon or convict forthwith upon the adjournment of the court in which the felon was tried, and deliver the convict or felon to the warden of the penitentiary: Provided, that in all cases where an appeal is taken from the death sentence by any person convicted of a crime punishable by death, except the crime of rape, such convicted felon or convict shall not be taken or conveyed to the penitentiary unless, in the judgment of the sheriff of the county in which the felon was tried and the solicitor prosecuting the felon, it shall be deemed necessary for the safety and safe-keeping of the convicted person or felon during the pendency of the appeal.

1909, c. 443, s. 3.

4660. Warden or deputy to execute sentence. The warden or deputy warden (in case of the disability, death or absence of the warden), unless a suspension of execution be ordered, shall cause the person, convict or felon against whom the death sentence has been so pronounced to be electrocuted as provided by this article. At such execution there shall be present the warden or deputy warden, the surgeon or physician of the penitentiary and twelve respectable citizens. The counsel and any relatives of such person, convict or felon and a minister or ministers of the gospel may be present if they so desire.

1909, c. 443, s. 4.

4661. Certificate filed with clerk. The warden, together with the surgeon or physician of the penitentiary, shall certify the fact of the execution of the condemned person, convict or felon to the clerk of the superior court in which such sentence was pronounced, and the clerk shall file such certificate with the papers of the case and enter the same upon the records thereof.

1909, c. 443, s. 5.

4662. Notice of reprieve or new trial. Should the condemned person, convict or felon be granted a reprieve by the governor or obtain a writ of error, or a new trial be granted by the supreme court of the state of North Carolina, or should the execution of the sentence be stayed by any competent judicial tribunal or proceeding, notice of such reprieve, new trial, appeal, writ of error or stay of execution shall be served upon the warden or deputy warden of the penitentiary by the sheriff of Wake county, in case such condemned person is confined in the penitentiary, or upon any sheriff having the custody of any such condemned person, also upon the condemned person himself.

1909, c. 443, s. 6.

4663. **Judgment sustained on appeal, governor fixes day for execution.** In case of an appeal, should the supreme court find no error in the trial or should the execution of the sentence be stayed by any competent judicial tribunal or proceeding, such condemned person, convict or felon shall be executed as heretofore provided in this article, the governor of North Carolina setting the day for such execution; and it is made the duty of the governor to set the date for such execution and notify the warden of the penitentiary thereof.

1909, c. 443, s. 6.

4664. **New trial granted, prisoner taken to place of trial.** Should a new trial be granted the condemned person, convict or felon against whom sentence of death has been pronounced, after he has been conveyed to the penitentiary, then he shall be conveyed back to the place of trial by such guard or guards as the warden of the penitentiary shall direct, their expenses to be paid as is now provided by law for the conveyance of convicts to the penitentiary.

1909, c. 443, s. 7.

4665. **Disposition of body.** Upon application, written or verbal, of any relative as near as the degree of fourth cousin of the person executed, made at any time prior to the execution or on the morning thereof, the body, after execution, shall be prepared for burial under the supervision of the warden or deputy warden and shall be returned to the nearest railroad station of the relative or relatives asking for such body. The cost of preparing the body for burial, including transportation, shall in no case exceed the sum of fifty dollars, and shall be paid by the state of North Carolina upon a warrant of the auditor of the state. In the event that no relative asks for the body of such executed person, convict or felon, the same shall be disposed of as other bodies of convicts dying in the penitentiary.

1909, c. 443, s. 9.

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