THE GENERAL STATUTES OF NORTH CAROLINA

1967 SUPPLEMENT

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

UNDER THE DIRECTION OF
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Volume 2A

Place in Pocket of Corresponding 1966 Replacement Volume of Main Set

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Preface

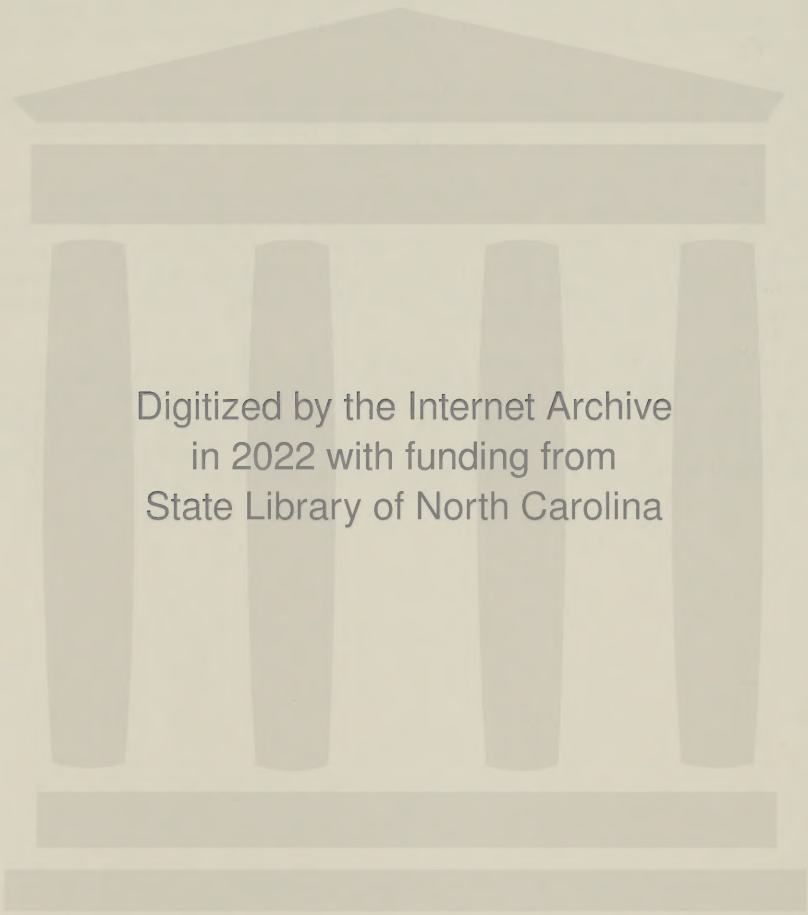
This Supplement to Replacement Volume 2A contains the general laws of a permanent nature enacted at the 1967 Session of the General Assembly, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show new sections and also old sections with changed captions. An index to all statutes codified herein appears in the Cumulative Supplement to Replacement Volumes 4B and 4C.

A majority of the Session Laws are made effective upon ratification but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after thirty days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement, and any suggestions they may have for improving the General Statutes, to the Division of Legislative Drafting and Codification of Statutes of the Department of Justice, or to The Michie Company, Law Publishers, Charlottesville, Virginia.



Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1967 Session of the General Assembly affecting Chapters 28 through 52A of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports volumes 265 (p. 217)-271 (p. 226).
Federal Reporter 2nd Series volumes 347 (p. 321)-378 (p. 376).
Federal Supplement volumes 242 (p. 513)-269 (p. 96).
United States Reports volumes 381 (p. 532)-387 (p. 427).
Supreme Court Reporter volumes 86-87 (p. 1608).
North Carolina Law Review volumes 43 (p. 667)-45 (p. 809).

The General Statutes of North Carolina
1967 Supplement

VOLUME 2A

Chapter 28.

Administration.

Article 17.
Distribution.

Sec.

Article 1.

Probate Jurisdiction.

§ 28-1. Clerk of superior court has probate jurisdiction.

Probate May Not Be Denied on Ground Involving Construction.—The clerk has no right to exclude any part of a will from probate on any ground which involves the construction of the will where testamentary intent is disclosed. Ravenel v. Shipman, 271 N.C. 193, 155 S.E.2d 484 (1967).

Clerk May Vacate Order, etc.—Since the clerk of the superior court of each county has original and exclusive jurisdiction of proceedings to probate a will, he is the tribunal to which a motion is properly made to set aside the probate of a purported will—or part thereof—for any inherent and fatal defect appearing upon the face of the instrument. Ravenel v. Shipman, 271 N.C. 193, 155 S.E.2d 484 (1967).

Direct Attack.—The validity of the appointment of an administrator may not be collaterally attacked in an action against such administrator, but may be directly attacked by any person in interest, including an administratrix of the decedent appointed in another state, by motion before the clerk of the superior court who made the appointment to vacate and set aside the letters of administration theretofore issued by such clerk. King v. Snyder, 269 N.C. 148, 152 S.E.2d 92 (1967).

Administrator Defending Wrongful Death Action Estopped to Deny Validity of Appointment.—An administrator appointed in this State who undertakes to defend an action for wrongful death by moving to set aside a default judgment and filing answer is thereafter estopped to deny the validity of his own appointment, and the court correctly denies his motion to dismiss the action for lack of jurisdiction of his person or the estate. The validity of his appointment is not before the court, and it is error for the court to find facts in regard thereto. King v. Snyder, 269 N.C. 148, 152 S.E.2d 92 (1967).

(1)

Applied in King v. Snyder, 269 N.C. 148, 152 S.E.2d 92 (1967).

(4)

Applied in King v. Snyder, 269 N.C. 148, 152 S.E.2d 92 (1967).

§ 28-2. Exclusive in clerk who first gains jurisdiction.

Quoted in King v. Snyder, 269 N.C. 148, 152 S.E.2d 92 (1967).

ARTICLE 6.

Collectors.

§ 28-25. Appointment of collectors.—When, for any reason other than a situation provided for in chapter 28A entitled "Estates of Missing Persons," a delay is necessarily produced in the admission of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent. (R. C., c. 46, s. 9; C. C. P., s. 463; 1868-9, c. 113, s. 115; Code, s. 1383; Rev., s. 22; C. S., s. 24; 1924, c. 43; 1965, c. 815, s. 2; 1967, c. 24, s. 14.)

Editor's Note.—

The 1967 amendment, originally effective Oct. 1, 1967, substituted "admission" for "administration" near the beginning of the section. Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

ARTICLE 8.

Bonds.

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

No provision in this chapter shall be construed as requiring a bond of an administrator appointed solely for the purpose of bringing an action for the wrongful death of the deceased; such administrator shall be exempt from the requirements of a bond until such time as he shall receive property into the estate of the deceased. (C. C. P., s. 468; 1870-1, c. 93; Code, s. 1388; Rev., s. 319; C. S., s. 33; 1935, c. 386; 1949, c. 971; 1967, c. 41, s. 1.)

Editor's Note.—

The 1967 amendment added the second paragraph. Section 2 of the amendatory act provides: "All laws and clauses of laws in conflict with this act are hereby repealed, except that such laws shall con-

tinue in force and effect with respect to bonds obtained by administrators prior to the effective date of this act." The act was ratified March 14, 1967, and became effective on ratification.

§ 28-40. Oath and bond required before letters issue.—Before letters testamentary, letters of administration with the will annexed, letters of administration or letters of collection are issued to any person, he must give the bond required by law and must take and subscribe an oath or affirmation before the clerk, or before any other officer of any state or country authorized by the laws of North Carolina to administer oaths, that he will faithfully and honestly discharge the duties of his trust, which oath must be filed in the office of the clerk.

No provision in this chapter shall be construed as requiring a bond of an administrator appointed solely for the purpose of bringing an action for the wrongful death of the deceased; such administrator shall be exempt from the requirements of a bond until such time as he shall receive property into the estate of the deceased. (C. C. P., ss. 467, 468; 1870-1, c. 93; Code, ss. 1387, 1388, 2169; Rev., s. 29; C. S., s. 39; 1923, c. 56; 1967, c. 41, s. 1.)

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ARTICLE 11.

Assets.

§ 28-68. Payment to clerk of money owed intestate.

Local Modification.—Union: 1959, c. 663.

ARTICLE 15.

Proof and Payment of Debts of Decedent.

§ 28-105. Order of payment of debts.

Second class. Funeral expenses to the extent of six hundred dollars ($600.00). This limitation shall not include cemetery lot or gravestone. The preferential limitation herein granted shall be construed to be only a limit with respect to preference of payment and shall not be construed to be a limitation on reasonable funeral expenses which may be incurred; nor shall the preferential limitation of payment in the amount of six hundred dollars ($600.00) be diminished by any Veterans Administration, social security or other federal governmental benefits awarded to the estate of the deceased or to his or her beneficiaries.

(1967, c. 1066.)

Editor's Note.—

The 1967 amendment added the last sentence in this paragraph.

As only the provision as to second class debts was affected by the amendment, the rest of the section is not set out.

ARTICLE 16.

Accounts and Accounting.

§ 28-147. Suits for accounting at term.

Applied in Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

ARTICLE 17.

Distribution.

§ 28-152. Distribution to nonresident trustee only upon appointment of process agent.—(a) No assets of the estate of a deceased person subject to administration in this State shall be delivered or transferred to a trustee of a testamentary trust or an inter vivos trust who is a nonresident of this State who has not appointed an agent for the service of civil process for actions or proceedings arising out of the administration of the trust with regard to such property.

(b) If property is delivered or transferred to a trustee in violation of this section, process may be served outside this State or by publication, as provided by the rules of civil procedure, and the courts of this State shall have the same jurisdiction over the trustee as might have been obtained by service upon a properly appointed process agent. The provisions of this section with regard to jurisdiction shall be in addition to other means of obtaining jurisdiction permissible under the laws of this State. (1967, c. 947.)

Editor's Note. — The act inserting this section is effective Oct. 1, 1967.

ARTICLE 19.

Actions by and against Representative.

§ 28-172. Action survives to and against representative.

The right of a ward to sue his guardian for lack of diligence in the care of the estate survives to the ward's administrator. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

§ 28-173. Death by wrongful act; recovery not assets; dying declarations.

I. IN GENERAL.

Editor's Note.—

For note on parent-child tort immunity, see 44 N.C.L. Rev. 1169 (1966).

The right of action for wrongful death, etc.—

In accord with 2nd paragraph in original. See Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

No Such Right Existed, etc.—

At common law there was no right of action for wrongful death. Such right of action exists only by virtue of this section. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

What Constitutes, etc.—

In accord with 2nd paragraph in original. See Harris v. Wright, 268 N.C. 654, 151 S.E.2d 563 (1966).

Negligence alone, without "pecuniary injury resulting from such death," does not create a cause of action under this section. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

Nonsuit.—

Nonsuit held proper in action for wrongful death resulting when intestate drove into the side of a train which had been standing at nighttime, blocking the crossing, for some 30 seconds prior to the injury, with its ground lights, its platform light, and cab lights burning. Morris v. Winston-Salem Southbound Ry., 265 N.C. 537, 144 S.E.2d 598 (1965).

Applied in Burton v. Groghan, 265 N.C. 392, 144 S.E.2d 147 (1965).

II. LIMITATION OF THE ACTION.

And Time Is No Longer, etc.—

Section 1-53 and this section were amended in 1951 so as to remove from the latter section the provision previously contained therein fixing the period of time in which an action for damages for wrongful death must be instituted and so as to make such action subject to the two-year statute of limitations set forth in § 1-53. The effect of the amendment was to make the time limitation a statute of limitations and no longer a condition precedent to the right to bring and maintain the action. Kinlaw v. Norfolk So. Ry., 269 N.C. 110, 152 S.E.2d 329 (1967).

Action by Ancillary Administrator.—The fact that an action for wrongful death is brought by an ancillary administrator appointed in this State does not constitute

the action one accruing to a resident of this State within the meaning of the proviso to § 1-21. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

III. PARTIES TO THE ACTION.

Suit Must Be Brought, etc.—

The only party who may maintain an action under this section for the wife's wrongful death is the executor, administrator, or collector of the decedent. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

The right of action conferred by this section vests in the personal representative of the deceased. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

The real party in interest, etc.—

Although an action for wrongful death must be brought by the personal representative of the deceased, the personal representative is not the real party in interest and the action does not accrue in his favor. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Personal Representative Has Authority and Responsibility.—The personal representative who institutes a wrongful death action is not a mere figurehead or naked trustee but has authority as well as responsibility. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

Viable Child Born Dead.—Under this section there can be no right of action for the wrongful prenatal death of a viable child en ventre sa mère. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

Where the Supreme Court based its decision on the ground there can be no evidence from which to infer "pecuniary injury resulting from" the wrongful prenatal death of a viable child en ventre sa mère, since it is all sheer speculation, it is not necessary to decide the debatable question as to whether a viable child en ventre sa mère, who is born dead, is a person within the meaning of the Wrongful Death Act. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

Action by Administrator of Child, etc.—

In accord with 2nd paragraph in original. See First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

The right of action for wrongful death is limited to such as would, if the injured party had lived, have entitled him to an action for damages therefor. Hence, the administrator of an unemancipated child whose death is caused by the negligence of his parent has no cause of action against the parent for the wrongful death of the child because such child, if he had lived, would have had no cause of action against the parent on account of his injuries. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Action by Representative of Parent against Child.—Neither a parent nor his personal representative has an action for wrongful death against an unemancipated child or his representative. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Action by Administrator of Wife, etc.—

If a wife's death is caused by the actionable negligence of her husband, this section creates and authorizes an action by her personal representative to recover for her wrongful death. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

IV. DISTRIBUTION OF RECOVERY.

Existence of Beneficiaries Immaterial.—

Recovery, if negligence is proved, is by the decedent's personal representative and is not conditioned upon the decedent's leaving dependents or beneficiaries of his estate. Abernethy v. Utica Mut. Ins. Co., 373 F.2d 565 (4th Cir. 1967).

There is no exception or provision in this section to the effect the personal representative's right to maintain an action depends in any way on the identity of the particular persons who, under the Intestate Succession Act, would be entitled to the recovery. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

A certain liability is imposed for death, and that liability is exclusive. No other responsibility is left which springs from the occurrence upon which liability rests—death—and the effect of the compensation as a satisfaction of all other claims is in no way limited or impaired by the circumstances of the identity of the persons to whom it is paid or because in a given case no one survives to take advantage of the statute. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Evidence of the decedent's dependents or beneficiaries is irrelevant and inadmissible. Abernethy v. Utica Mut. Ins. Co., 373 F.2d 565 (4th Cir. 1967).

§ 28-174. Damages recoverable for death by wrongful act.

Editor's Note.—

For comment on wrongful death damages in North Carolina, see 44 N.C.L. Rev. 402 (1966).

For case law survey as to damages, see 44 N.C.L. Rev. 993 (1966).

Damages may not be assessed on the basis of sheer speculation, devoid of factual substantiation. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

But Jury May Base Speculation on Facts.—Damages in any wrongful death action are to some extent uncertain and speculative. A jury may indulge in speculation in assessing damages where it is necessary and there are sufficient facts to support speculation. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

Only Right to Compensation, etc.—

In accord with original. See Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

In the absence of pecuniary loss the cause of action will not lie. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

This section by express language limits recovery to "such damages as are a fair and just compensation for the pecuniary injury resulting from such death." Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

When the Death Act was enacted in 1848, it expressly limited damages to pecuniary loss. The same limitation remains today. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

This section and § 28-173, which gives the right of action for wrongful death, confines the recovery to "such damages as are a fair and just compensation for the pecuniary injury resulting from such death," and by the express language of this section this is a prerequisite to the right to recover damages under the Wrongful Death Statute. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

But exemplary or punitive damages, etc.—

In accord with 2nd paragraph in original. See Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

No damages are to be allowed, etc.—

This section does not contemplate solatium for the plaintiff, nor punishment for the defendant. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

Nominal damages, etc.—

In accord with 2nd paragraph in original. See Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

Funeral Bill Is Not Item of Damages.—Section 28-173 permits the amount recovered in an action for wrongful death to be applied to the payment of the burial expenses of the deceased, but the funeral bill itself is not an item of damages. Burton v. Croghan, 265 N.C. 392, 144 S.E.2d 147 (1965).

Wrongful Death of Child.—

The measure of damages for the death of a child is the same as for an adult, notwithstanding the difficulty of applying the rule is greatly increased in the case of an infant. Burton v. Croghan, 265 N.C. 392, 144 S.E.2d 147 (1965).

§ 28-175. Actions which do not survive.

Action against Guardian for Lack of Diligence.—An action brought by the administrator of a ward's estate against the guardian to recover money lost because of lack of diligence by the guardian is not one for relief which could not be enjoyed, or the granting of which would be nugatory after death, so as to fall within the class specified in subdivision (3) of this section. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

Chapter 28A.

Estates of Missing Persons.

§ 28A-1. Death not presumed from seven years' absence; exposure to peril to be considered.

Editor's Note.—For article on estates of missing persons in North Carolina, see 44 N.C.L. Rev. 275 (1966).

Chapter 29.

Intestate Succession.

Article 1.

General Provisions.

§ 29-1. Short title.

Wrongful Death Beneficiaries Determined as of Time of Death.—The persons who, under the Intestate Succession Act, are entitled to the recovery in a wrongful death action are to be determined as of the time of the decedent's death. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

Article 2.

Shares of Persons Who Take Upon Intestacy.

§ 29-13. Descent and distribution upon intestacy.

The power of the legislature to determine who shall take the property of a person dying subsequent to the effective date of a legislative act cannot be doubted. Johnson v. Blackwelder, 267 N.C. 209, 148 S.E.2d 30 (1966).

Law at Time of Death Governs.—It is well settled that an estate must be distributed among heirs and distributees according to the law as it exists at the time of the death of the ancestor. Johnson v. Blackwelder, 267 N.C. 209, 148 S.E.2d 30 (1966).

Even Though Decedent Became Incompetent to Make Will Before Law Changed.—Where it was alleged that an intestate became mentally incapable of making a will prior to ratification of the Intestate Succession Act on June 10, 1959, and that such mental incapacity continued until his death, and it was contended that the intestate's personal estate should be distributed in accordance with the Intestate Succession Law as it existed on June 9, 1959, it was held that this contention assumes: Before he became mentally incapable of making a will, the intestate had knowledge of and was pleased with the statutes of descent and distribution; if he had made a will, he would have disposed of his estate as provided by the statutes then in effect; he would have been displeased with the provisions of the 1959 act; and, but for his mental incapacity, would have made a will disposing of his estate as provided by the statutes in effect prior to ratification of the 1959 act. Such successive assumptions underlying the contention are unwarranted. They relate to matters that lie wholly within the realm of speculation. The intestate had no vested right in the statutes of descent and distribution in effect prior to the ratification of the 1959 act. He was charged with knowledge that these statutes were subject to change by the General Assembly. Johnson v. Blackwelder, 267 N.C. 209, 148 S.E.2d 30 (1966).

The determinative fact is that the intestate made no will. Hence, his estate "shall descend and be distributed" in accordance with the statutes in effect on the date of his death, namely, this chapter. Johnson v. Blackwelder, 267 N.C. 209, 148 S.E.2d 30 (1966).

§ 29-14. Share of surviving spouse.

No Lineal Descendants.—There being no lineal descendants, under this section the surviving widow is entitled to "all the net estate" of an intestate. Johnson v. Blackwelder, 267 N.C. 209, 148 S.E.2d 30 (1966).

Cited in Swain v. Tillet, 269 N.C. 46, 152 S.E.2d 297 (1967).

Article 8.

Election to Take Life Interest in Lieu of Intestate Share.

§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.

Inchoate Right to Dower May Be Protected by Redemption from Tax Sale.—A wife who claims in property an inchoate right to dower is possessed of such an in-

terest that she clearly has the right to protect such interest by redeeming such property from a tax sale. Samet v. United States, 242 F. Supp. 214 (M.D.N.C. 1965).

Cited in McLeod v. McLeod, 266 N.C. 144, 146 S.E.2d 65 (1966).

Chapter 30.

Surviving Spouses.

ARTICLE 1.

Dissent from Will.

§ 30-1. Right of dissent.

Article Was Unconstitutional, etc.— This section and §§ 30-2 and 30-3, insofar as they gave a husband the right in certain instances to dissent from his deceased wife's will and take a specified share of her estate were unconstitutional under former N.C. Const., Art. X, § 6, to the extent that they diminished pro tanto a devise of her separate estate in accordance with a will executed by her. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

But Husband's Right to Dissent Has Been Restored by Constitutional Amendment.—The effect of the adoption by the voters of the amendment to N.C. Const., Art. X, § 6, was to restore, subject to the qualifications set forth in Session Laws 1963, c. 1209, the right of the husband to dissent from the will of his wife. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

Where, at the time of his wife's death in 1965, the amendment to N.C. Const., Art. X, § 6, authorizing the legislature to empower a husband to dissent from his wife's will had been certified but the legislation reenacting this section and §§ 30-2, and 30-3 had not become effective, the husband had a right to dissent from his wife's will based on anticipatory provisions of Session Laws 1963, c. 1209, which directed the submission of the constitutional amendment, and which provided that the word "spouse" should apply to both husband and wife in certain statutes. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

And Husband and Wife Have Same Rights.—Session Laws 1963, c. 1209 was enacted to abrogate the effect of the decision in Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962), and to make the rights of husbands and wives the same in each other's separate property. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

Cited in O'Neil v. O'Neil, 271 N.C. 106, 155 S.E.2d 495 (1967).

§ 30-2. Time and manner of dissent.

The guardian of an incompetent widower is authorized to file a dissent by him from his wife's will. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

Chapter 31.

Wills.

Article 2.
Revocation of Will.

ARTICLE 2.

Revocation of Will.

§ 31-5.1. Revocation of written will.

Quoted in In re Will of Burton, 267 N.C. 729, 148 S.E.2d 862 (1966).

§ 31-5.3. Will not revoked by marriage; dissent from will made prior to marriage.—A will is not revoked by a subsequent marriage of the maker; and the surviving spouse may dissent from such will made prior to the marriage in the same manner, upon the same conditions, and to the same extent, as a surviving spouse may dissent from a will made subsequent to marriage. (1844, c. 88, s. 10; R. C., c. 119, s. 23; Code, s. 2177; Rev., s. 3116; C. S., s. 4134; 1947, c. 110; 1953, c. 1098, s. 5; 1967, c. 128.)

Editor's Note.—

The 1967 amendment rewrote this section, which formerly provided that a will was revoked by the subsequent marriage of the maker, subject to certain exceptions. The amendatory act is applicable only to wills of persons dying on or after Oct. 1, 1967.

§ 31-5.7. Specific provisions for revocation exclusive; effect of changes in circumstances.

Mental Incompetency Does Not Revoke Will.— The fact that a testator became mentally incompetent to manage his business affairs or to understand the extent of his holdings, even if the mental condition continued to his death, would not revoke his will in whole or in part. Abbott v. Abbott, 269 N.C. 579, 153 S.E.2d 39 (1967).

Article 5.

Probate of Will.

§ 31-19. Probate conclusive until vacated; substitution of consolidated bank as executor or trustee under will.

Conclusively Valid, etc.—

In accord with 3rd paragraph in original. See Johnson v. Stevenson, 269 N.C. 200, 152 S.E.2d 214 (1967).

Once a paper-writing has been probated as a will, every part of its stands until set aside by the appropriate tribunal. Ravenel v. Shipman, 271 N.C. 193, 155 S.E.2d 484 (1967).

Same—Even for Fraud.—

The probate of a will in common form is conclusive as to the validity of the instrument until set aside in a caveat proceeding duly instituted, and while the beneficiaries under the will may be held trustees ex maleficio for extrinsic fraud which interferes with the right to caveat the instrument, the probate may not be collaterally attacked for intrinsic fraud constituting grounds for attack of the instrument by caveat proceedings when there is nothing to show that plaintiff's right to attack by caveat was interfered with in any manner. Johnson v. Stevenson, 269 N.C. 200, 152 S.E.2d 214 (1967).

Clerk May Revoke Probate.—Where the clerk of the superior court has probated as a will a document which has not been executed in accordance with the statutory requirements for probate or which shows on its face that it was not intended as a testamentary disposition of the author's property, or when other jurisdictional requirements for probate are shown to be lacking, the clerk may revoke his probate. Ravenel v. Shipman, 271 N.C. 193, 155 S.E.2d 484 (1967).

§ 31-24. Probate when witnesses are nonresident; examination before notary public.—Where one or more of the subscribing witnesses to the will of a testator, resident in this State, reside in another state, or in another county in this State than the one in which the will is being probated, the examination of such witnesses may be had, taken and subscribed in the form of an affidavit, before a notary public residing in the county and state in which the witnesses reside or the clerk of superior court thereof; and the affidavits, so taken and subscribed, shall be transmitted by the notary public or clerk of superior court, under his hand and official seal, to the clerk of the court before whom the will has been filed for probate. If such affidavits are, upon examination by the clerk, found to establish the facts necessary to be established before the clerk to authorize the probate of the will if the witnesses had appeared before him personally, then it shall be the duty of the clerk to order the will to probate, and record the will with the same effect as if the subscribing witnesses had appeared

before him in person and been examined under oath. (1917, c. 183; C. S., s. 4149; 1933, c. 114; 1957, c. 587, ss. 1, 1A.)

Editor's Note.—
This section is set out to correct a typographical error in the original.

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.

But when a caveat is filed, etc.—
In accord with original. See In re Will of Burton, 267 N.C. 729, 148 S.E.2d 862 (1966).

Probate in Common Form, etc.—
When a will is probated in solemn form it cannot be caveated a second time unless or until the verdict and judgment probating the will in solemn form is set aside upon a motion in the original cause; therefore, the will, if it was first probated in common form, still stands as the last will and testament until declared void in a direct proceeding in the nature of a caveat. In re Will of Burton, 267 N.C. 729, 148 S.E.2d 862 (1966).

The attack upon a will, etc.—
In accord with 1st paragraph in original. See Johnson v. Stevenson, 269 N.C. 200, 152 S.E.2d 214 (1967).

Thus, Another Purported Will, etc.—
In accord with original. See In re Will of Burton, 267 N.C. 729, 148 S.E.2d 862 (1966).

Direct Attack by Caveat Held Adequate Remedy.—Where the grounds on which plaintiff sought to establish a constructive trust in property disposed of by her parents' will were equally available as grounds for direct attack on the will by caveat, this right of direct attack by caveat gave plaintiff a full and complete remedy at law, and she was not entitled to equitable relief. Johnson v. Stevenson, 269 N.C. 200, 152 S.E.2d 214 (1967).

ARTICLE 7.

Construction of Will.

§ 31-43. General gift by will an execution of power of appointment.

Purpose of Section.—It has been suggested that this section was passed to guard against the inadvertence of a life tenant with a general power of appointment. Accustomed throughout his life to treating the land as if it were his in fee, he might overlook making a specific appointment of the particular property and attempt to dispose of it by a general devise. In such event, if he owned other property which would pass under the devise, the power remained unexecuted and his devisees lost the property by his default. Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966).

This section is identical with § 27 of the English Wills Act of 1837 (7 Wm. IV & 1 Vict. ch 26). Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966).

Which Is Held Applicable Only to General Powers.—Construing the Wills Act of 1837, the English courts have held that § 27, which is identical with this section, is applicable only to general powers of appointment. Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966).

As Is This Section.—The effect of this section is that a general devise or bequest shall be construed to include any real or personal property which the testator may have power to appoint in any manner he may think proper and shall operate as an execution of such power unless a contrary intention appears in the will. A power to appoint in any manner the donee may think proper is a power upon which no restrictions are imposed—a general power. This section thus applies only to general powers of appointment. Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966).

The case of Johnston v. Knight, 117 N.C. 122, 23 S.E. 92 (1895), merely applied the rule that where the donee of a power, general or special, clearly manifests an intention to execute it, effect will be given to his intent. It did not extend the applications of this section to special powers. Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966).

Hence, Special Power Is Not Executed by General Devise Not Showing Such Intent.—A general devise by a testator to his

wife cannot be construed to include trust property over which he had a special or limited power of appointment, where his will discloses no intent to execute the power, since this section applies only to general powers. Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966).

Chapter 31A.

Acts Barring Property Rights.

Article 1.

Rights of Spouse.

§ 31A-1. Acts barring rights of spouse.

Right to Take under Will Not Forfeited by Abandonment.—The right of the widow to take under her husband's will that which he saw fit to bequeath or devise to her is not among the rights which this section declares forfeited by her abandonment of him. Abbott v. Abbott, 269 N.C. 579, 153 S.E.2d 39 (1967).

Chapter 32.

Fiduciaries.

Article 1.

Uniform Fiduciaries Act.

§ 32-2. Definition of terms.

Editor's Note.—
For article on constructive trusts in North Carolina, see 45 N.C.L. Rev. 424 (1967).

Article 3.

Powers of Fiduciaries.

§ 32-27. Powers which may be incorporated by reference in trust instrument.

(5) Continue Business.—To the extent and upon such terms and conditions and for such periods of time as the fiduciary shall deem necessary or advisable, to continue or participate in the operation of any business or other enterprise, whatever its form of organization, including but not limited to the power:

a. To effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

b. To dispose of any interest therein or acquire the interest of others therein;

c. To contribute thereto or invest therein additional capital, or to lend money thereto, in any such case upon such terms and conditions as the fiduciary shall approve from time to time;

d. To determine whether the liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate or trust set aside for use in the business or to the estate or trust as a whole; and

e. In all cases in which the fiduciary is required to file accounts in any court or in any other public office, it shall not be necessary to itemize receipts and disbursements and distributions of prop-

erty but it shall be sufficient for the fiduciary to show in the account a single figure or consolidation of figures, and the fiduciary shall be permitted to account for money and property received from the business and any payments made to the business in lump sum without itemization.

(29) Apportion and Allocate Receipts and Expenses.—Where not otherwise provided by the Uniform Principal and Income Act, as contained in chapter 37 of the General Statutes, to determine:

a. What is principal and what is income of any estate or trust and to allocate or apportion receipts and expenses as between principal and income in the exercise of the fiduciary's discretion, and, by way of illustration and not limitation of the fiduciary's discretion, to charge premiums on securities purchased at a premium against principal or income or partly against each;

b. Whether to apply stock dividends and other noncash dividends to income or principal or apportion them as the fiduciary shall deem advisable; and

c. What expenses, costs, taxes (other than estate, inheritance, and succession taxes and other governmental charges) shall be charged against principal or income or apportioned between principal and income and in what proportions.

(1967, c. 24, s. 15; c. 956.)

Editor's Note.—Session Laws 1967, c. 24, originally effective Oct. 1, 1967, substituted, in paragraph (c) of subdivision (5), "contribute thereto or invest therein additional capital" for "contribute or invest additional capital thereto." Session Laws 1967, c. 1078, amends c. 24 of the amendatory act so as to make it effective July 1, 1967.

Session Laws 1967, c. 956, effective Oct. 1, 1967, inserted "Where not otherwise provided by the Uniform Principal and Income Act, as contained in chapter 37 of the General Statutes," at the beginning of subdivision (29).

As the rest of the section was not changed by the amendments, only subdivisions (5) and (29) are set out.

Chapter 33.

Guardian and Ward.

Article 8.
Estates without Guardian.

Sec.
33-50, 33-51. [Repealed.]

ARTICLE 1.

Creation and Termination of Guardianship.

§ 33-1. Jurisdiction in clerk of superior court.

The superior court has no power to appoint a general guardian, in the absence of other matters of which the court has jurisdiction. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

Applied in Grant v. Banks, **270 N.C. 473,** 155 S.E.2d 87 (1967).

§ 33-7. Proceedings on application for guardianship.

Quoted in In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

§ 33-9. Removal by clerk.

Section 1-276 Is Inapplicable to Removals.—Appeals under § 1-276 are confined to civil actions and special proceedings. The decisions are plenary that the

removal of a guardian is neither. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

Appellate Jurisdiction of Superior Court over Removals Is Derivative.—In the appointment and removal of guardians, the appellate jurisdiction of the superior court is derivative, and appeals present for review only errors of law committed by the clerk. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

Article 2.

Guardian's Bond.

§ 33-12. Bond to be given before receiving property. — No guardian appointed for an infant, idiot, lunatic, insane person or inebriate, shall be permitted to receive property of the infant, idiot, lunatic, insane person or inebriate until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court; provided, however, that when a guardian is appointed for an infant, idiot, lunatic, insane person or inebriate for the purpose of bringing an action on behalf of that infant, idiot, lunatic, insane person or inebriate and when there are no other assets in the ward's estate or other assets belonging to the minor in the State of North Carolina, such guardian shall not be required to give sufficient security until such time as the property is turned over to such guardian, at which time the guardian shall give sufficient security approved by a judge or the court to account for and apply the same under the directions of the court. (C. C. P., s. 355; Code, s. 1573; Rev., s. 1777; C. S., s. 2161; 1967, c. 40, s. 1.)

Editor's Note. — The 1967 amendment added the proviso. Section 2 of the amendatory act provides: "All laws and clauses of laws in conflict with this act are hereby repealed, except that such laws shall continue in force and effect with respect to actions already filed by guardians who have obtained bonds before the effective date of this act." The act was ratified March 14, 1967, and made effective on ratification.

§ 33-17. Relief of endangered sureties.

Successor Guardian and Ward Are Not Bound by Adjudication If Not Parties.—A determination in a proceeding between the surety and the former guardian is not conclusive as against a successor guardian and the ward, neither of whom was a party to that proceeding when the adjudication was made. State ex rel. Northwestern Bank v. Fidelity & Cas. Co., 268 N.C. 234, 150 S.E.2d 396 (1966).

Article 3.

Powers and Duties of Guardian.

§ 33-20. Guardian to take charge of estate.

Guardian Must Preserve Estate and Enforce Ward's Rights.—It is the duty of the guardian to preserve the estate of the ward and to take practicable action to enforce the ward's rights against others. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

He Must Diligently Collect Obligation Owing Ward.—It is the duty of a guardian of the estate of an incompetent person to exercise due diligence in the collection of an obligation owing to the ward. The guardian is liable to the ward's estate for any loss to it by his failure to do so. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

Including Damages for Wrongs Done Ward.—It is the duty of the guardian of the estate of an incompetent to collect, insofar as practicable, all moneys due the ward, including damages for wrongs done to the ward which are known to the guardian. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

He Is Liable for All He Ought to Have Received.—A guardian is liable not only for what he receives, but for all he ought to have received of his ward's estate. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

ARTICLE 4.

Sales of Ward's Estate.

§ 33-31. Special proceedings to sell; judge's approval required.— On application of the guardian or ancillary guardian appointed pursuant to G.S. 33-31.2, by petition, verified upon oath, to the superior court, showing that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale or mortgage be had by such person, in such way and on such terms as may be most advantageous to the interest of the ward; all petitions filed under the authority of this section wherein an order is sought for the sale or mortgage of the ward's real estate or both real and personal property shall be filed in the superior court of the county in which all or any part of the real estate is situated; if the order of sale demanded in the petition is for the sale or mortgage of the ward's personal estate, the petition may be filed in the superior court of the county in which any or all of such personal estate is situated; no mortgage shall be made until approved by the judge of the court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale or mortgage shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify, provided that on and after January 1, 1968, no sales of property belonging to minors or incompetents prior to July 3, 1967, by next friend, guardian ad litem, or commissioner of the court regular in all other respects shall be declared invalid nor shall any claim or defense be asserted on the grounds that said sale was not made by a duly appointed guardian as provided herein or on the grounds that said minor or incompetent was not represented by a duly appointed guardian. The guardian may not mortgage the property of his ward for a term of years in excess of the term fixed by the court in its decree. The word "mortgage" whenever used herein shall be construed to include deeds in trust. The word "guardian" whenever used herein shall be construed to include next friend, guardian ad litem, or commissioner of the court acting pursuant to this article. Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases. The procedure for a sale pursuant to this section shall be provided by article 29A of chapter 1 of the General Statutes. (1827, c. 33; R. C., c. 54, ss. 32, 33; 1868-9, c. 201, s. 39; Code, s. 1602; Rev., s. 1798; 1917, c. 258, s. 1; C. S., s. 2180; 1923, c. 67, s. 1; 1945, c. 426, s. 1; c. 1084, s. 1; 1949, c. 719, s. 2; 1951, c. 366, s. 2; 1967, c. 1084.)

Editor's Note.—

The 1967 amendment added the proviso at the end of the first sentence and inserted the present fourth sentence.

Same—Clerk.—

A clerk of the superior court has no jurisdiction with respect to infants or with respect to property, real or personal, of infants, except such as is conferred by statute. Wilson v. Pemberton, 266 N.C. 782, 147 S.E.2d 217 (1966).

Petition Signed by Person, etc.—

A clerk of the superior court has the power to authorize the sale of property, real or personal, owned by an infant, only upon the application of his duly appointed and duly qualified guardian by petition duly verified by such guardian. An order made by a clerk of the superior court for the sale of the infant's property, real or personal, on the petition of one who is not his duly appointed and duly qualified guardian is void. All proceedings under color of such order are void, and no rights to the property of the infant can be acquired under such order. Wilson v. Pemberton, 266 N.C. 782, 147 S.E.2d 217 (1966) (decided prior to the 1967 amendment to this section).

And in Such Case, etc.—

In accord with original. See Wilson v. Pemberton, 266 N.C. 782, 147 S.E.2d 217 (1966) (decided prior to the 1967 amendment to this section).

§ 33-32. Fund from sale has character of estate sold and subject to same trusts.

Proceeds Descend as Realty on Death of Lunatic. — The general rule is that where the real estate of a lunatic is sold under a statute or by order of court, the proceeds of sale remain realty for the purpose of devolution on his death intestate while still a lunatic. Grant v. Banks, 270 N.C. 473, 155 S.E.2d 87 (1967).

Article 5.

Returns and Accounting.

§ 33-42. Expenses and disbursements credited to guardian.

Cited in State ex rel. Northwestern Bank v. Fidelity & Cas. Co., 268 N.C. 234, 150 S.E.2d 396 (1966).

Article 8.

Estates without Guardian.

§§ 33-50, 33-51: Repealed by Session Laws 1967, c. 218, s. 4.

Chapter 34.

Veterans' Guardianship Act.

Sec.

34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, public guardians, or where wards are members of same family.

§ 34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, public guardians, or where wards are members of same family.—It shall be unlawful for any person, other than a public guardian qualified under article 6, chapter 33, General Statutes of North Carolina, to accept appointment as guardian of any United States Veterans Administration ward, if such person shall at the time of such appointment be acting as guardian for five wards. For the purpose of this section, all minors of same family unit shall constitute one ward. In all appointments of a public guardian for United States Veterans Administration wards, the guardian shall furnish a separate bond for each appointment as required by G.S. 34-9. If, in any case, an attorney for the United States Veterans Administration presents a petition under this section alleging that an individual guardian other than a public guardian is acting in a fiduciary capacity for more than five wards and requesting discharge of the guardian for that reason, then the court, upon satisfactory evidence that the individual guardian is acting in a fiduciary capacity for more than five wards, must require a final accounting forthwith from such guardian and shall discharge the guardian in such case. Upon the termination of a public guardian's term of office, he may be permitted to retain any appointments made during his term of office.

This section shall not apply to banks and trust companies licensed to do trust business in North Carolina. (1929, c. 33, s. 4; 1967, c. 564, s. 1.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, rewrote this section.

§ 34-10. Guardian's accounts to be filed; hearing on accounts.—Every guardian, who shall receive on account of his ward any moneys from the

Bureau, shall file with the court annually, on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account under oath of all moneys so received by him, of all disbursements thereof, and showing the balance thereof in his hands at the date of such account and how invested. A certified copy of each of such accounts filed with the court shall be sent by the guardian to the office of the Bureau having jurisdiction over the area in which such court is located.

At the time such account is filed the clerk of the superior court shall require the guardian to exhibit to the court all investments and bank statements showing cash balance and the clerk of the superior court shall certify on the original account and the certified copy which the guardian sends the Bureau that an examination was made of all investments and cash balance and that same are correctly stated in the account; provided that banks, organized under the laws of North Carolina or the Acts of Congress, engaged in doing a trust and fiduciary business in this State, when acting as guardian, or in other fiduciary capacity, shall be exempt from the requirement of exhibiting such investments and bank statements, and the clerk of the superior court shall not be required to so certify as to the accounts of such banks, except that in addition to the officers verifying the account, there shall be added a certificate of other officers of the bank certifying that all assets referred to in the account are held by the guardian. If objections are raised to such an accounting, the court shall fix a time and place for the hearing thereon not less than fifteen days nor more than thirty days from the date of filing such objections, and notice shall be given by the court to the aforesaid Bureau office and the North Carolina Department of Veterans Affairs by mail not less than fifteen days prior to the date fixed for the hearing. Notice of such hearing shall also be given to the guardian. (1929, c. 33, s. 10; 1933, c. 262; s. 1; 1945, c. 723, s. 2; 1961, c. 396, s. 2; 1967, c. 564, s. 5.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, substituted "North Carolina Department of Veterans Affairs" for "North Carolina Veterans Commission" near the end of the section.

§ 34-12. Compensation at 5 percent; additional compensation; premiums on bonds.—Compensation payable to guardians shall not exceed five percent of the income of the ward during any year, except that the court may approve compensation in the accounting in an amount not to exceed twenty-five dollars ($25.00) from an estate where the income for any one year is less than five hundred dollars ($500.00). In the event of extraordinary services rendered by such guardian the court may, upon petition and after hearing thereon, authorize additional compensation therefor, payable from the estate of the ward. Notice of such petition and hearing shall be given the proper office of the Bureau and the North Carolina Department of Veterans Affairs in the manner provided in § 34-10. No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. (1929, c. 33, s. 12; 1945, c. 723, s. 2; 1967, c. 564, ss. 2, 5.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, added the exception clause to the first sentence and substituted "North Carolina Department of Veterans Affairs" for "North Carolina Veterans Commission" in the third sentence.

§ 34-13. Investment of funds.

(3) By loaning the same upon real estate securities in which the guardian has no interest, such loans not to exceed fifty percent (50%) of the actual appraised or assessed value, whichever may be lower, and said loans when made to be evidenced by a note, or notes, or bond, or bonds, under seal of the borrower and secured by first mortgage or first deed of trust. Said guardian before making such investment on real estate mortgages shall secure a certificate of title from some reputable at-

torney certifying that the same is the first lien on real estate and also setting forth the tax valuation thereof for the current year: Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or his dependents upon petition and order of the clerk of superior court, said order to be approved by the resident or presiding judge of the superior court, and provided further that copy of said petition shall be forwarded to said Bureau before consideration thereof by said court. Any guardian may encumber the home or farm so purchased for the entire purchase price or balance thereof to enable the ward to obtain benefits provided in Title 38, U.S. Code, chapter 37, upon petition to and order of the clerk of superior court of the county of appointment of said guardian and approved by the resident or presiding judge of the superior court. Notice of hearing on such petition, together with copy of the petition, shall be given to the United States Veterans Administration and the North Carolina Department of Veterans Affairs by mail not less than 15 days prior to the date fixed for the hearing.

(5) By depositing the funds either in a savings account in any federally insured bank in North Carolina or by purchasing a certificate of deposit issued by any federally insured bank in North Carolina, to the extent that such investment is insured by the Federal Deposit Insurance Corporation.

(1967, c. 564, ss. 3, 4.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, added the last two sentences of subdivision (3) and added "to the extent that such investment is insured by the Federal Deposit Insurance Corporation" at the end of subdivision (5).

As the rest of the section was not changed by the amendment, only subdivisions (3) and (5) are set out.

§ 34-14. Application of ward's estate.—A guardian may apply any income received from the Veterans Administration for the benefit of the ward in the same manner and to the same extent as other income of the estate without the necessity of securing an order of court. A guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing, notice of which has been given the proper officer of the Bureau and the North Carolina Department of Veterans Affairs in the manner provided in § 34-10. (1929, c. 33, s. 14; 1945, c. 723, s. 2; 1961, c. 396, s. 3; 1967, c. 564, s. 5.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, substituted "North Carolina Department of Veterans Affairs" for "North Carolina Veterans Commission" near the end of the section.

§ 34-15. Certified copy of record required by Bureau to be furnished without charge.—Whenever a copy of any public record is required by the Bureau or the North Carolina Department of Veterans Affairs to be used in determining the eligibility of any person to participate in benefits made available by such Bureau, the official charged with the custody of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the representative of such Bureau or the North Carolina Department of Veterans Affairs with a certified copy of such record. (1929, c. 33, s. 15; 1945, c. 723, s. 2; 1967, c. 564, s. 5.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, substituted "North Carolina Department of Veterans Affairs" for "North Carolina Veterans Commission" in two places in this section.

Chapter 35.

Persons with Mental Diseases and Incompetents.

ARTICLE 2.

Guardianship and Management of Estates of Incompetents.

§ 35-2. Inquisition of lunacy; appointment of guardian.

Conclusiveness of Adjudication.— The executed contract of a mentally incompetent person is ordinarily voidable and not void. If, however, the person has been adjudged incompetent from want of understanding to manage his affairs and the court has appointed a guardian for him, he is conclusively presumed insane insofar as parties and privies to the guardianship proceedings are concerned; as to all others, it is presumptive (but rebuttable) proof of the ward's incapacity. Chesson v. Pilot Life Ins. Co., 268 N.C. 98, 150 S.E.2d 40 (1966).

ARTICLE 4.

Mortgage of Sale of Estates Held by the Entireties.

§ 35-14. Where one spouse or both incompetent; special proceeding before clerk.

Cited in North Carolina State Highway Comm'n v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967).

ARTICLE 7.

Sterilization of Persons Mentally Defective.

§ 35-36. State institutions authorized to sterilize mental defectives. —The governing body or responsible head of any penal or charitable institution supported wholly or in part by the State of North Carolina, or any subdivision thereof, is hereby authorized and directed to have the necessary operation for asexualization, or sterilization, performed upon any mentally diseased or feeble-minded inmate or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, or for the public good: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall first be complied with. (1933, c. 224, s. 1; 1967, c. 138, s. 1.)

Editor's Note.— The 1967 amendment deleted provisions making this section applicable to epileptic inmates or patients.

§ 35-37. Operations on mental defectives not in institutions. — It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense, to have one of the operations described in § 35-36, performed upon any mentally diseased or feeble-minded resident of the county, not an inmate of any public institution, upon the request and petition of the director of public welfare or other similar public official performing in whole or in part the functions of such director, or of the next of kin, or the legal guardian of such mentally defective person: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall be first complied with. (1933, c. 224, s. 2; 1961, c. 186; 1967, c. 138, s. 2.)

Editor's Note. — The 1967 amendment deleted provisions making this section applicable to epileptics.

§ 35-38. Restrictions on such operations.—No operation under this article shall be performed by other than a duly qualified and registered North

Carolina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this article by the responsible executive head of the institution or board, or the director of public welfare, or other similar official performing in whole or in part the functions of such director, or the next of kin or legal guardian having custody or charge of the feeble-minded or mentally defective inmate, patient on noninstitutional individual. (1933, c. 224, s. 3; 1961, c. 186; 1967, c. 138, s. 3.)

Editor's Note. — The 1967 amendment deleted a reference to epileptics near the end of the section.

§ 35-39. Prosecutors designated; duties.—If the person upon whom the operation is to be performed is an inmate or patient of one of the institutions mentioned in § 35-36, the executive head of such institution or his duly authorized agent shall act as prosecutor of the case. The county director of public welfare may act as prosecutor or petitioner in instituting sterilization proceedings in the case of any feeble-minded or mentally diseased person who is on parole from a State institution, and in the case of any such person who is an inmate of a State institution, when authorized to do so by the superintendent of such institution. If the person upon whom the operation is to be performed is an inmate or patient of a charitable or penal institution supported by the county, the executive head of such institution or his duly authorized agent, or the county director of welfare or such other official performing in whole or in part the functions of such director of the county in which such county institution is situated, shall act as petitioner in instituting proceedings before the Eugenics Board. If the person to be operated upon is not an inmate of any such public institution, then the director of welfare or such other official performing in whole or in part the functions of such director of the county of which said inmate, patient, or noninstitutional individual to be sterilized is a resident, shall be the prosecutor.

It shall be the duty of such prosecutor promptly to institute proceedings as provided by this article in any of the following circumstances:

(1) When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient, inmate, or noninstitutional individual, that he or she be operated upon.

(2) When in his opinion it is for the public good that such patient, inmate or noninstitutional individual be operated upon.

(3) When in his opinion such patient, inmate, or noninstitutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.

(4) When requested to do so in writing by the next of kin or legal guardian of such patient, inmate or noninstitutional individual.

(5) In all cases as provided for in § 35-55. (1933, c. 224, s. 4; 1935, c. 463, s. 1; 1937, c. 243; 1961, c. 186; 1967, c. 138, s. 4.)

Editor's Note. — The 1967 amendment deleted "epileptic" following "feeble-minded" in the second sentence.

§ 35-57. Temporary admission to State hospitals for sterilization. —Any feeble-minded or mentally diseased person, for whom the Eugenics Board of North Carolina has authorized sterilization, may be admitted to the appropriate State hospital for the performance of such operation. The order of the Eugenics Board authorizing a surgeon on the regular or consulting staff of the hospital to perform the operation will be sufficient authority to the superintendent of such hospital to receive, restrain, and control the patient until such time as it is deemed wise to release such patient. All such admissions shall be at the discretion of the superintendent of the State hospital, and in making any agreement with any

county or any State institution to perform such operations, the State hospital may collect a fee which shall not be greater than the cost of such operation and the cost of care and maintenance for the duration of the operation and the time required for the patient to recuperate.

The order of the Eugenics Board and the agreement of the superintendent of the State hospital to admit such patient shall be full and sufficient authority for the prosecutor or the sheriff of the county to deliver such patient to the proper State hospital. (1937, c. 221; 1967, c. 138, s. 5.)

Editor's Note. — The 1967 amendment deleted "epileptic" following "feeble-minded" near the beginning of the section.

Chapter 36.

Trusts and Trustees.

ARTICLE 3.

Resignation of Trustee.

§ 36-9. Clerk's power to accept resignations.

Cited in King v. Snyder, 269 N.C. 148, 152 S.E.2d 92 (1967).

§ 36-18.2. **Trustee may renounce.** — (a) Any person or corporation named as trustee in any will admitted to probate in this State, or any substitute trustee, may, at any time prior to qualifying as required by G.S. 28-53 or taking any action as trustee if such qualification is not required, and whether or not such person or corporation is entitled to so qualify or act, renounce such trusteeship by a writing filed with the clerk of the superior court of the county in which the will is admitted to probate. Upon receipt of such renunciation the clerk shall give notice thereof to all persons interested in the trust, including successor or substitute trustees named in the will, which notice shall also comply with the requirements of subsection (e) of this section.

(b) If the will names or identifies a substitute trustee in case of renunciation, the provisions of the will shall be complied with, and the clerk shall enter an appropriate order appointing the substitute trustee in accordance therewith unless the substitute trustee also renounces. A substitute trustee so named shall succeed to the office of trustee upon the date of the order of appointment by the clerk unless the will provides otherwise.

(c) If the will does not name or identify a substitute trustee in case of renunciation, and it appears that a substitute trustee should be appointed, the clerk shall appoint some fit and suitable person or corporation as substitute trustee. If the will does not name or identify a substitute trustee, but contains provisions regarding the selection of a substitute trustee, such provisions shall be complied with unless the clerk determines that such provisions would result in the selection of an unfit or unsuitable trustee. A substitute trustee so appointed shall succeed to the office of trustee upon the date of the order of appointment unless the will provides otherwise.

(d) A substitute trustee shall, upon succeeding to the office of trustee, unless the will provides otherwise, have such powers and duties and be vested with the title to the property included in the trust, as if the substitute trustee had been originally named in the will.

(e) Each notice required by this section shall be written notice, and shall identify the proceeding and apprise the person to be notified of the nature of the action to be taken. Service of such notice may be in the same manner as is provided for service of notice in civil actions, or by mailing the notice to the person to be notified at his last known address. Service of the notice must be completed not less than ten days prior to the date the hearing is held or the action is taken. Service by mail shall be complete upon deposit of the notice enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office Department.

(f) The clerk of superior court shall docket, record, and index all proceedings pursuant to this section in the same manner as special proceedings, and shall also enter with the recorded will a notation that the trustee has renounced and a reference to the book and page number, file, or other place where the record may be found. (1967, c. 99.)

Editor's Note.——The act adding this section is effective Oct. 1, 1967.

Article 4.

Charitable Trusts.

§ 36-23.1. Gifts, etc., for religious, educational, charitable or benevolent uses or purposes.

The General Assembly acted within its competence in enacting this section. Banner v. North Carolina Nat'l Bank, 266 N.C. 337, 146 S.E.2d 89 (1966).

§ 36-23.2. Charitable Trusts Administration Act.—(a) If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment or if a device or bequest for charity, at the time it was intended to become effective is illegal, or impossible or impracticable of fulfillment, and if the settlor, or testator, manifested a general intention to devote the property to charity, any judge of the superior court may, on application of any trustee, executor, administrator or any interested party, or the Attorney General, order an administration of the trust, devise or bequest as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator. In every such proceeding, the Attorney General, as representative of the public interest, shall be notified and given an opportunity to be heard. This section shall not be applicable if the settlor or testator has provided, either directly or indirectly, for an alternative plan in the event the charitable trust, devise or bequest is or becomes illegal, impossible or impracticable of fulfillment. However, if the alternative plan is also a charitable trust or devise or bequest for charity and such trust, devise or bequest for charity fails, the intention shown in the original plan shall prevail in the application of this section.

(b) The words "charity" and "charitable," as used in this section shall include, but shall not be limited to, any eleemosynary, religious, benevolent, educational, scientific, or literary purpose. (1967, c. 119.)

Editor's Note.—The act adding this section is effective Oct. 1, 1967.

Section Based on Model Act. — This section is based largely upon the Model Act Concerning the Administration of Charitable Trusts, Devises and Bequests, which was prepared by the National Conference of Commissioners on Uniform State Laws. Special Report of the General Statutes Commission on Chapter 119, Session Laws 1967.

It Sanctions and Defines Public Policy. —It has long been a strong public policy that, if possible, gifts for charitable purposes should not fail because of unforeseen events, but that the courts should

assist in carrying out charitable purposes. This section lends statutory sanction and definition to that policy. Special Report of the General Statutes Commission on Chapter 119, Session Laws 1967.

Purpose. — This section will meet the problem which exists when the person who creates a charitable trust, bequest or devise is dead or otherwise unable to modify the gift to meet unforseen changes in the circumstances. Special Report of the General Statutes Commission on Chapter 119, Session Laws 1967.

Scope. — This section applies only to cases of charitable gifts, created by trust or will, which fail, and not to trusts, devises or bequests created for private purposes. Special Report of the General Statutes Commission on Chapter 119, Session Laws 1967.

The application of this section is limited to those cases in which no provision for an alternative plan has been made, and a person creating a charitable trust, bequest or devise is free, as he has always been, to provide for the disposition of the property and prevent the court's having to make the determination. Special Report of the General Statutes Commission on Chapter 119, Session Laws 1967.

"Charity" and "Charitable".—The definition of the words "charity" and "charitable" is not limited to those particular purposes listed in this section. Special Report of the General Statutes Commission on Chapter 119, Session Laws 1967.

ARTICLE 5.

Uniform Trusts Act.

§ 36-28. Trustee buying from or selling to self.

The purpose of this section is to clarify and strengthen rules regarding loyalty by a trustee to the interests of his cestuis que trust. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

Court May Relieve Trustee of Restriction of This Section.—Section 36-42, by allowing a court of competent jurisdiction to relieve the trustee of "any or all of the duties and restrictions" placed upon him by this article, gives statutory authority to the court to relieve the trustee of the restriction that he cannot purchase property from the trust. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

Recognizing and reaffirming the stern rule of equity that a trustee cannot be both vendor and vendee, there are rare and justifiable exceptions when the court, in the exercise of its inherent equitable powers, may authorize a purchase of trust property by the trustee, upon full findings of fact that (1) complete disclosure of all facts was made by the trustee, (2) the sale would materially promote the best interests of the trust and its beneficiaries, and (3) there are no other purchasers willing to pay the same or a greater price than offered by the trustee. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

§ 36-42. Power of the court.

Court May Relieve Trustee of Restriction on Purchasing Trust Property.—This section, by allowing a court of competent jurisdiction to relieve the trustee of "any or all of the duties and restrictions" placed upon him by this article, gives statutory authority to the court to relieve the trustee of the restriction that he cannot purchase property from the trust. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

Chapter 38.

Boundaries.

§ 38-1. Special proceeding to establish.

Purpose of Processioning.—

In accord with 2nd paragraph in original. See Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

Quoted in Johnson v. Daughety, 270 N.C. 762, 155 S.E.2d 205 (1967).

Cited in Gahagan v. Gosnell, 270 N.C. 117, 153 S.E.2d 879 (1967).

§ 38-2. Occupation sufficient ownership.

Quoted in Johnson v. Daughety, 270 N.C. 762, 155 S.E.2d 205 (1967).

§ 38-3. Procedure.—(a).

Applicability of Section.—The procedure prescribed by this section is applicable only in case of a dispute as to the true location of the boundary line between adjoining landowners. Johnson v. Daughety, 270 N.C. 762, 155 S.E.2d 205 (1967).

Burden of Proof.—

In accord with 3rd paragraph in original. See Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

If the plaintiffs are unable to show by the greater weight of evidence the location of the true dividing line at a point more favorable to them than the line as contended by the defendants, the jury should answer the issue in accord with the contentions of the defendants. Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

Questions of Law and Fact.—

In accord with original. See Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

A description contained in a junior conveyance cannot be used to locate the lines called for in a prior conveyance. The location of the lines called for in the prior conveyance is a question of fact to be ascertained from the description there given. Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

§ 38-4. Surveys in disputed boundaries.—(a) When in any action or special proceeding pending in the superior court the boundaries of lands are drawn in question, the court may, if deemed necessary, order a survey of the lands in dispute, in accordance with the boundaries and lines expressed in each party's titles, and such other surveys as shall be deemed useful.

(b) Surveys pursuant to this section shall be made by one surveyor appointed by the court, unless the court, in its discretion, determines that additional surveyors are necessary. The surveyor or surveyors shall proceed according to the order of the court, and make the surveys and as many plats thereof as shall be ordered.

(c) Upon the request of any party to the action or special proceeding, the court shall call such surveyor or surveyors as the court's witn ss, and any party to such action or proceeding shall have the privilege of direct examination, cross-examination, and impeachment of such witness. The fact that such witness is called by the court shall not change the weight, effect or admissibility of the testimony of such witness, and upon the request of any party to the suit, the court shall so instruct the jury.

(d) The court shall make an allowance for the fees of the surveyor or surveyors and they shall be taxed as a part of the costs. The court may, in its discretion, require the parties to make a deposit to secure the payment of such tees, and may, in its discretion, provide for the payment of such fees prior to the termination of the suit. (1779, c. 157; 1786, c. 252; R. C., c. 31, s. 119; Code, c. 939; Rev., s. 1504; C. S., s. 364; 1967, c. 33.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, rewrote this section.

Cited in York Indus. Center v. Michigan Mut. Liab. Co., 271 N.C. 158, 155 S.E.2d 501 (1967).

Chapter 39.

Conveyances.

ARTICLE 1.

Construction and Sufficiency.

§ 39-1.1. In construing conveyances court shall give effect to intent of the parties.—(a) In construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all of the provisions of the instrument.

(b) The provisions of subsection (a) of this section shall not prevent the application of the rule in Shelley's case. (1967, c. 1182.)

Editor's Note.—Session Laws 1967, c. 1182, adding this section, is effective Jan. 1, 1968.

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-13.3. Conveyances between husband and wife.

Editor's Note.—

For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

ARTICLE 3.

Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void.

I. GENERAL CONSIDERATION.

Editor's Note.—

For a discussion of the constructive trust as a remedy for the defrauded creditor, see 45 N.C.L. Rev. 424 (1967).

§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.

Holder of Bearer Note Secured by Deed of Trust Held Not Necessary Party.—Where the note which a deed of trust purports to secure is payable to bearer, the plaintiff alleges it is "a false and fictitious paper-writing" and that the identity of the supposed bearer "remains unknown to plaintiff," the trustee in the deed of trust which purports to secure the payment of such note is a party to the action and has participated actively in its defense, whatever may be the situation where the holder of the indebtedness is named in the deed of trust and known, the holder of the alleged note cannot be deemed a necessary party to the action to set aside the deed of trust which purports to secure it. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Presumptions, etc.—

The effect of this section is to destroy any presumption of vitiating fraud in the making of a voluntary gift or settlement solely from the indebtedness of the donor or settler, and to make the failure to retain property fully sufficient and available for the satisfaction of creditors a requisite of such presumption. Hood v. Cobb, 207

N.C. 128, 176 S.E. 288 (1934); Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Even though it is shown that a conveyance by a debtor was voluntary (that is, not for value), the burden of proof is, nevertheless, upon the plaintiff to show that the grantor did not retain property sufficient to pay his debts. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Earlier decisions of the Supreme Court were to the effect that, notwithstanding this section, there was a presumption of fraudulent intent in the case of a voluntary conveyance by a debtor and the burden rested upon the party seeking to uphold the voluntary conveyance to show retention by the grantor of property sufficient to pay his then debts. These cases may no longer be regarded as correct statements of the law of this jurisdiction with regard to the question of which party must ultimately bear the burden of proof upon the question of retention by the grantor of sufficient property to pay his then existing debts. That burden is now placed upon the party attacking the conveyance. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Evidence of Tax Valuation, etc.—

If, in order to survive a motion for judgment of nonsuit, the plaintiff must offer evidence sufficient in itself to show that its debtors, the defendant grantors in the deed of trust, did not retain property sufficient to pay their indebtedness to the plaintiff (no other debts being shown in the record), the judgment of nonsuit must be sustained where the only evidence offered by the plaintiff, upon this point, consisted of the tax listings by such defendants of their tangible properties in a particular county. Such tax listings do not negative the possibilities that these defendants, after executing the deed of trust in question, retained, and still retain, bank accounts or other intangible properties in the county or elsewhere, or tangible property, real or personal, located in another county, sufficient to pay the claim of the plaintiff and whatever other indebtedness these defendants may owe. Therefore, the evidence introduced by the plaintiff is not sufficient, alone, to show that the defendant grantors did not retain property sufficient to pay their debts when they executed the deed of trust now under attack. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Evidence Sufficient to Carry Issue of Intent to Jury.—Though the ultimate burden of proof rests upon the plaintiff to show either actual intent by the defendant grantors to defraud their creditors or failure by them to retain property sufficient to pay their then existing debts, when the plaintiff introduces an admission by the defendants that their deed of trust was "voluntary," and introduces evidence that they were then indebted to the plaintiff, which debt has not been paid, this is evidence tending to show an intent to delay, hinder, and defraud creditors sufficient to carry the case to the jury for its determination of the issue, and a judgment of nonsuit is improperly granted. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

§ 39-23: Repealed by Session Laws 1965, c. 700, s. 2, effective at midnight June 30, 1967.

Article 7.

Uniform Vendor and Purchaser Risk Act.

§ 39-39. Risk of loss.

Editor's Note.—For article on options to purchase real property in North Carolina, see 44 N.C.L. Rev. 63 (1965).

Chapter 40.

Eminent Domain.

ARTICLE 1.

Right of Eminent Domain.

§ 40-1. Corporation in this chapter defined.

Editor's Note.—

For case law survey as to eminent domain, see 44 N.C.L. Rev. 941, 1003 (1966). For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

Applied in City of Durham v. Eastern Realty Co., 270 N.C. 631, 155 S.E.2d 231 (1967).

§ 40-2. By whom right may be exercised.

I. GENERAL CONSIDERATION.

Editor's Note.—

For note on public use in North Carolina, see 44 N.C.L. Rev. 1142 (1966).

Founded on Necessity.—

Public necessity alone justifies governmental taking of private property. State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

II. NATURE AND PURPOSE.

The use which will justify the taking of private property under the exercise of the right of eminent domain is the use by or for the government, the general public, or some portion thereof as such, and not the use by or for particular individuals or for the benefit of particular estates. The use, however, may be limited to the inhabitants of a small locality, but the benefit must be in common. State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

"Public use," as applied in the exercise of the power of eminent domain, is not capable of a precise definition applicable to all situations. The term is elastic, and keeps pace with changing conditions, since the progressive demands of society and changing concepts of governmental duties and functions are constantly bringing new subjects forward as being for "public use." State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

Question for Court.—In any proceeding for condemnation under the sovereign power of eminent domain, what is a public use is a judicial question for ultimate decision by the court as a matter of law, reviewable upon appeal. State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

Scenic Value of Road May Be Considered.—The scenic value of a road and its necessity as a part of the system of scenic highways for the public may be considered in determining whether taking over the road is for a public or private purpose. State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

IV. TO WHOM GRANTED.

Municipalities Operating Water and Sewer Systems.—This chapter confers the right of eminent domain upon municipalities operating water and sewer systems. If such corporation is unable to agree with a landowner for the purchase of land it needs for such purpose, it may acquire the land, or an easement therein, by following the procedure there set forth. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

V. COMPENSATION ESSENTIAL.

Necessity for Compensation.—

In the exercise of the sovereign power of eminent domain, private property can be taken only for a public use and upon the payment of just compensation. State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

ARTICLE 2.

Condemnation Proceedings.

§ 40-11. Proceedings when parties cannot agree.

Editor's Note.—

For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

Applied in Carolina Power & Light Co. v. Briggs, 268 N.C. 158, 150 S.E.2d 16 (1966).

§ 40-12. Petition filed; contains what; copy served.

What Petition Must Allege.—

In accord with 3rd paragraph in original. See State Highway Comm'n v. Phillips, 267 N.C. 369, 148 S.E.2d 282 (1966).

Landowner Has Right to Answer and a Hearing.—It is apparent that this section and § 40-16 do not contemplate a perfunctory proceeding, leading automatically to the granting of the petition. They do not contemplate a landowner standing helpless before the demand of a unit of government. He may deny any of the allegations in the petition and is entitled to a hearing before commissioners are appointed to appraise the damages he will sustain if his property is taken. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

§ 40-16. Answer to petition; hearing; commissioners appointed.

Landowner Has Right to Answer and a Hearing.—See same catchline in note to § 40-12.

Where Only Issue of Just Compensation Is Raised.—Where the answer does not deny the right of the city to acquire the desired easements by condemnation and raises no issue save that of just compensation, the only matter to be determined by the clerk at the initial hearing is the selection and appointment of the commissioners and the fixing of the time and place for their first meeting. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Clerk Is to Hold Hearing, etc.—

In accord with original. See City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

All motions made before the clerk, other than those grantable as a matter of course or those specifically provided for by law, require notice to the parties affected thereby. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

The statutory procedure is designed to provide to the landowner a fair determination of his damages. It would be converted into a farce if it were construed to permit the clerk to appoint commissioners, the commissioners to meet, to determine the damages and report the same to the clerk, and the clerk twenty days later to enter a final judgment, all with no notice whatever to the landowner, other than the original summons in the proceedings, and all before the time for filing his answer, as extended by the clerk, expired. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Effect of Notice of Hearing.—If the landowner is given notice of the hearing before the clerk, this would, no doubt, be sufficient to charge him with notice of an order entered by the clerk, at such hearing, appointing commissioners and fixing the time and place for their first meeting. In turn, this would charge him with notice of actions of the commissioners at such first meeting, including the adjournment of such meeting to another time and place. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

§ 40-17. Powers and duties of commissioners.

General Benefits.—

In determining the compensation to be paid to the landowner, account must be taken of benefits to his property from the construction of the proposed improvement. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Notice to Parties.—

This statute contemplates notice to the landowner of the meeting of the commissioners at which they are to "hear" his proofs and allegations. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

The statutory procedure is designed to provide to the landowner a fair determination of his damages. It would be converted into a farce if it were construed to permit the clerk to appoint commissioners, the commissioners to meet, to determine the damages and report the same to the clerk, and the clerk twenty days later to enter a final judgment, all with no notice whatever to the landowner, other than the original summons in the proceedings, and all before the time for filing his answer, as extended by the clerk, expired. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

If the landowner is given notice of the hearing before the clerk, this would, no doubt, be sufficient to charge him with notice of an order entered by the clerk, at such hearing, appointing commissioners and fixing the time and place for their first meeting. In turn, this would charge him with notice of actions of the commissioners at such first meeting, including the adjournment of such meeting to another time and place. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Report Failing to Show Hearing.—A commissioners' report that simply states that the commissioners met on a certain day in the office of the clerk and "subsequently visited the premises of the defendant, and after taking into full consideration the quality and quantity of the land involved, and all inconveniences likely to result to the defendant from the condemnation of said rights-of-way," asserted the damages at zero, does not purport to show any hearing by the commissioners of "the proofs and allegations of the parties," as required both by the statute and by the order of the clerk. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Additional Burdens.—

Where a city proposes to lay the sewer and water lines in the right-of-way of a state highway, the owner of the fee in this land is entitled to just compensation for an additional burden beyond that of the original easement for the highway. The laying of a water main or sewer line in the right-of-way of a highway is an additional burden upon the owner of the fee. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

§ 40-19. Exceptions to report; hearing; appeal; when title vested; restitution.

Landowner Has Right to File Exceptions and Be Heard.—The landowner has the right to file exceptions to the report of the commissioners within twenty days after the report is filed. He is entitled to be heard upon his exceptions. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Clerk to Make Determination, etc.—

The statutory procedure is designed to provide to the landowner a fair determination of his damages. It would be converted into a farce if it were construed to permit the clerk to appoint commissioners, the commissioners to meet, to determine the damages and report the same to the clerk, and the clerk twenty days later to enter a final judgment, all with no notice whatever to the landowner, other than the original summons in the proceedings, and all before the time for filing his answer, as extended by the clerk, expired. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Interest from Date Petitioner Entitled to Possession.—Respondents, in an action to take land under eminent domain, are entitled to interest from the date the petitioner acquires the right to possession and not from the date the proceedings were instituted. Carolina Power & Light Co. v. Briggs, 268 N.C. 158, 150 S.E.2d 16 (1966).

Recordari Properly Denied.—The landowner must file exceptions to the final report of the commissioners within twenty days after the report is filed, with right to appeal to the superior court at term, and when the landowner files no exceptions and does not appeal from the order of confirmation by the clerk, recordari to the superior court is properly denied when the application therefor merely alleges merit without specifying facts supporting this conclusion, fails to negate laches, and the application is not made to the next succeeding term of the superior court. Redevelopment Comm'n v. Capehart, 268 N.C. 114, 150 S.E.2d 62 (1966).

Denial of Vacation of Confirmation May Not Be Affirmed on Ground Additional Appraisals Will Not Give Recovery.—The court may not affirm the clerk's denial of a motion to vacate the judgment of confirmation on the ground that there is no reasonable probability that any additional appraisals, hearings, or trials would result in any recovery on the part of the defendant. Under the statutes, that is not for the court below or for the Supreme Court to determine. That can be determined only by commissioners who are appointed after the notice and hearing contemplated by § 40-16 and who thereupon proceed as directed by § 40-17. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

ARTICLE 3.

Public Works Eminent Domain Law.

§ 40-30. Title of article.

Editor's Note.—

For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

§ 40-37. Determination of issues raised by objections; waiver by failure to file; final judgment; guardian ad litem.

Discretion of Commissioners.—
In accord with original. See Philbrook v. Chapel Hill Housing Authority, 269 N.C. 598, 153 S.E.2d 153 (1967).

Chapter 41.

Estates.

§ 41-1. Fee tail converted into fee simple.

I. GENERAL CONSIDERATION.

"Heirs of their bodies," etc.—
When the term "heirs of the body" is used in its technical sense, it imports a class of persons to take indefinitely in succession, from generation to generation. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

II. RULE IN SHELLEY'S CASE.

Editor's Note.—
For case law survey as to the rule in Shelley's case, see 44 N.C.L. Rev. 1036 (1966).

Statement of Rule.—
In accord with original. See Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

The rule in Shelley's case says, in substance, that if an estate of freehold be limited to A, with remainder to his heirs, general or special, the remainder, although importing an independent gift to the heirs, as original takers, shall confer the inheritance on A, the ancestor. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

Nature and Operation, etc.—
The rule in Shelley's case operates as a rule of property without regard to the intent of the grantor or devisor. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

The rule in Shelley's case applies to personalty as well as to realty. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

Whenever applicable, the rule in Shelley's case applies to both real and personal property in this jurisdiction. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

Difference between Words of Purchase and Words of Limitation.—In considering the applicability of the rule in Shelley's case, it is important to draw and constantly keep in mind the difference between words of purchase and words of limitation. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

When the rule in Shelley's case says that the words "heirs" or the "heirs of the body" of A are words of limitation and not words of purchase, it simply means that "heirs" or the "heirs of the body" refer to and are read in connection with the estate given to A, extending or modifying that estate, and are not taken as describing a group to whom an estate will first attach. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

"Heirs" or "Heirs of Body."—
The rule in Shelley's case applies whenever judicial exposition determines that heirs are described, though informally, under a term correctly descriptive of other objects, but stands excluded whenever it determines that other objects are described, though informally, under the term heirs. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

III. APPLICATION AND ILLUSTRATIVE CASES.

Conveyance to One and Heirs, etc.—
A devise to A for life and at her death to the heirs of her body presents a classic case for application of the rule in Shelley's case. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

By a devise to A for life and at her death to the heirs of her body, the rule in Shelley's case, and the doctrine of merger, give A an estate tail which this section converts into a fee simple. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

Where testatrix devised and bequeathed all her property to her daughter during her lifetime and at her death to the "heirs of her body, if any," with further provision that if the daughter should die before testatrix without heirs of the body, the property should go to named collateral kin, the daughter took a fee tail under the rule

in Shelley's case, which was converted into a fee simple by this section. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

Conveyance to One and His Children.—When the devise is to one for life and after his death to his children or issue, the rule in Shelley's case has no application, unless it manifestly appears that such words are used in the sense of heirs generally. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

The use of the word "children," etc.—The word "children" is ordinarily a word of purchase. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

"Or Other Lineal Descendants".—The superadded words "or other lineal descendants . . . to have and to hold the same to them and their heirs, executors and administrators absolutely" do not demonstrate that testator contemplated an indefinite succession from generation to generation. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

§ 41-2. Survivorship in joint tenancy abolished; proviso as to partnership.

I. GENERAL CONSIDERATION.

Editor's Note.—For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

Editor's Note.—For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

§ 41-6.1. **Meaning of "next of kin".**—A limitation by deed, will, or other writing, to the "next of kin" of any person shall be construed to be to those persons who would take under the law of intestate succession, unless a contrary intention appears by the instrument. (1967, c. 948.)

§ 41-10. Titles quieted.

III. PLEADING AND PRACTICE.

B. Pleadings.

Sufficiency of Bill, etc.—A complaint alleging that plaintiffs are the owners of a described tract of land by record title and that the State claims an interest therein by virtue of a specified registered deed, that plaintiffs have a superior title, and that the State's claim constituted a cloud on plaintiff's title is sufficient to state a cause of action to quiet title, and such action may be maintained against the State under the provisions of § 41-10.1. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

§ 41-10.1. Trying title to land where State claims interest.

Sufficiency of Complaint.—A complaint alleging that plaintiffs are the owners of a described tract of land by record title and that the State claims an interest therein by virtue of a specified registered deed, that plaintiffs have a superior title, and that the State's claim constituted a cloud on plaintiff's title is sufficient to state a cause of action to quiet title, and such action may be maintained against the State under the provisions of this section. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

§ 41-11. Sale, lease or mortgage in case of remainders.

I. GENERAL CONSIDERATION.

Amendment Effective July 1, 1969.—Session Laws 1967, c. 954, s. 3, effective July 1, 1969, will substitute "Rule 4 of the Rules of Civil Procedure" for "§ 1-94" in the second sentence.

The Rules of Civil Procedure are found in § 1A-1.

Chapter 42.

Landlord and Tenant.

Article 1.

General Provisions.

§ 42-1. Lessor and lessee not partners.

Editor's Note.—For case law survey as to landlord and tenant, see 44 N.C.L. Rev. 1027 (1966).

§ 42-3. Term forfeited for nonpayment of rent.

Cited in Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

§ 42-10. Tenant not liable for accidental damage.

Editor's Note.—For note on lessee's liability for sublessee's negligence, see 45 N.C.L. Rev. 295 (1966).

§ 42-14. Notice to quit in certain tenancies.

Effect of Holding Over.—

In the absence of a provision in the lease for an extension of the term, when a tenant under a lease for a fixed term of one year, or more, holds over after the end of the term the lessor may eject him or recognize him as a tenant. Kearney v. Hare, 265 N.C. 570, 144 S.E.2d 636 (1965).

When a tenant under a lease for a fixed term of one year, or more, holds over after the end of the term and the lessor elects to treat him as a tenant, such a tenancy may be terminated by either party at the end of any year thereof by giving notice of his intent so to terminate it thirty days before the end of such year. Kearney v. Hare, 265 N.C. 570, 144 S.E.2d 636 (1965).

If the lessor elects to treat as a tenant one holding over after the end of the term of a lease for one year or more, a new tenancy relationship is created as of the end of the former term. This is, by presumption of law, a tenancy from year to year, the terms of which are the same as those of the former lease insofar as they are applicable, in the absence of a new contract between them or of other circumstances rebutting such presumption. Such a tenancy may be terminated by either party at the end of any year thereof by giving notice of his intent so to terminate it thirty days before the end of such year. Kearney v. Hare, 265 N.C. 570, 144 S.E.2d 636 (1965).

Nothing else appearing, when a tenant for a fixed term of one year or more holds over after the expiration of such term, the lessor has an election. He may treat him as a trespasser and bring an action to evict him and to recover reasonable compensation for the use of the property, or he may recognize him as still a tenant, having the same rights and duties as under the original lease, except that the tenancy is one from year to year and is terminable by either party upon giving to the other thirty days' notice directed to the end of any year of such new tenancy. Coulter v. Capitol Fin. Co., 266 N.C. 214, 146 S.E.2d 97 (1966).

Same—Change of Notice Period by Agreement.—Where a lease for an original term of thirty-six months provided that, "should the lessee remain in possesion of the leased premises beyond the expiration of the original term or any renewal or extension of this lease, which shall result in a tenancy from month to month, this lease may be terminated by either party upon the giving of thirty (30) days' written notice to the other party," the purpose of the clause was held to have been to provide that in such circumstances the tenancy would be from month to month, and so terminable by either party at the end of any month, but only upon thirty days' notice rather than upon the seven days' notice which would otherwise be sufficient to terminate a month to month tenancy under this section. Coulter v. Capitol Fin. Co., 266 N.C. 214, 146 S.E.2d 97 (1966).

ARTICLE 2.

Agricultural Tenancies.

§ 42-15. Landlord's lien on crops for rents, advances, etc.; enforcement.

I. IN GENERAL.

Editor's Note.—

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

ARTICLE 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.

I. APPLICATION AND SCOPE.

Remedy Is Restricted, etc.—

In accord with original. See Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

Same—Entry as Vendee.—

A vendee under a contract for sale and purchase of land is not such a tenant as may be evicted by summary ejectment under this section. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

III. BREACH OF PROVISION OF LEASE.

Condition Must Be in Lease.—

Except in cases where § 42-3 writes into a contract of a lease of lands, when the lease is silent thereon, a forfeiture of the terms of the lease upon failure of the lessee to pay the rent within ten days after a demand is made by the lessor or his agent for all past due rent, with right of the lessor to enter and dispossess the lessee, a breach of the conditions of a lease between a landlord and tenant cannot be made the basis of summary ejectment unless the lease itself provides for termination of such breach or reserves the right of reentry for such breach. Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

Breach of a condition in a lease that lessee should not use or permit the use of any portion of the premises for any unlawful purpose or purposes, without provision in the lease automotically terminating the lease or reserving the right of reentry for breach of such condition, cannot be made the basis of summary ejectment, and provision in the lease that should the landlord bring suit because of the breach of any covenant and should prevail in such suit, the tenant should pay reasonable attorney's fees, does not constitute a provision automatically terminating the lease for breach of such condition or preserve the right of reentry. Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

Provisions for Termination on Receivership or Bankruptcy Are Not Void.—The provisions of a lease authorizing lessors to terminate the lease and repossess the property upon the appointment of a receiver for lessee or adjudication that it was a bankrupt are not void. They are not contrary to public policy nor prohibited by statute. To the contrary, similar provisions are frequently inserted in leases, particularly when of long duration. Carson v. Imperial '400' Nat'l, Inc., 267 N.C. 229, 147 S.E.2d 898 (1966).

§ 42-28. Summons issued by justice on verified complaint.

Applied in Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

Chapter 43.
Land Registration.

ARTICLE 3.

Procedure for Registration.

§ 43-9. Summons issued and served; disclaimer.

Amendment Effective July 1, 1969.— Session Laws 1967, c. 954, s. 3, effective July 1, 1969, rewrites the first of this section so that it will read as follows: "Sum-

mons shall be issued and shall be returnable as in other cases of special proceedings, except that the return shall be at least sixty days from the date of the summons." Compare Rule 4 of the Rules of Civil Procedure (§ 1A-1) and the amendment to the special proceeding statute, § 1-394.

Chapter 44.

Liens.

Article 1.

Mechanics', Laborers', and Materialmen's Liens.

§ 44-1. On buildings and property, real and personal.

Cross Reference.

As to possessory liens on personal property, see §§ 44A-1 to 44A-6.

I. GENERAL CONSIDERATION.

Editor's Note.—

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

Section 44-43 and this section set out the way and manner in which a lien can be perfected under North Carolina law. G. L. Wilson Bldg. Co. v. Leatherwood, 268 F. Supp. 609 (W.D.N.C. 1967).

Cited in Neal v. Whisnant, 266 N.C. 89, 145 S.E.2d 379 (1965).

§§ 44-2 to 44-5: Repealed by Session Laws 1967, c. 1029, s. 2, effective at midnight June 30, 1967.

Cross Reference.—As to possessory liens on personal property, see §§ 44A-1 to 44A-6.

ARTICLE 3.

Liens on Vessels.

§§ **44-15 to 44-27**: Repealed by Session Laws 1967, c. 1029, s. 2, effective at midnight June 30, 1967.

Cross Reference.—As to possessory liens on personal property, see §§ 44A-1 to 44A-6.

ARTICLE 4.

Warehouse Storage Liens.

§§ **44-28, 44-29**: Repealed by Session Laws 1967, c. 562, s. 6, effective at midnight June 30, 1967.

Cross Reference.—See Editor's note to § 25-1-201.

ARTICLE 5.

Liens of Hotel, Boarding and Lodging House Keeper.

§§ **44-30 to 44-32**: Repealed by Session Laws 1967, c. 1029, s. 2, effective at midnight June 30, 1967.

Cross Reference.—As to possessory liens on personal property, see §§ 44A-1 to 44A-6.

ARTICLE 6.

Liens of Livery Stable Keepers.

§§ **44-33 to 44-35**: Repealed by Session Laws 1967, c. 1029, s. 2, effective at midnight June 30, 1967.

Cross Reference. — As to possessory liens on personal property, see §§ 44A-1 to 44A-6.

ARTICLE 7.

Liens on Colts, Calves and Pigs.

§§ **44-36 to 44-37.1**: Repealed by Session Laws 1967, c. 1029, s. 2, effective at midnight June 30, 1967.

Cross Reference. — As to possessory liens on personal property, see §§ 44A-1 to 44A-6.

ARTICLE 8.

Perfecting, Recording, Enforcing and Discharging Liens.

§ 44-38. Claim of lien to be filed; place of filing.

There Is No Lien If Claim Is Defective.—The claim of lien is the foundation of the action to enforce the lien, and if such lien is defective when filed, it is no lien. Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

Particularity Required of Claim Filed.—In accord with 4th paragraph in original. See Mebane Lumber Co. v. Avery & Bullock Builders, 270 N.C. 337, 154 S.E.2d 665 (1967).

When Itemization Not Required.—Where the contract is to complete a building for one sum, it is not required that the labor and materials furnished shall be itemized. Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

Where the plaintiff contracted to do cer-

tain work for the defendant for "a stated amount," or to furnish materials for a "gross sum," the contract is entire, and particular itemization of the claim of lien is not required, as is required for divisible contracts for materials or labor. Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

Instance of Insufficiency.—A claim of lien based on separate statements respectively specifying the date materials were furnished and the amount due therefor, but describing the materials only as loads delivered on the respective dates, disclosed that the materials were furnished under a severable and not an entire contract, and the materials were not itemized as required by this section for a valid lien. Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

When Defect Not Cured, etc.—

A defect in a lien cannot be cured by amendment after the filing period has expired, nor by alleging the necessary facts in the pleadings in an action to enforce the lien. Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

Applied in Neal v. Whisnant, 266 N.C. 89, 145 S.E.2d 379 (1965).

Cited in G. L. Wilson Bldg. Co. v. Leatherwood, 268 F. Supp. 609 (W.D.N.C. 1967).

§ **44-38.1**: Repealed by Session Laws 1967, c. 562, s. 7, effective at midnight June 30, 1967.

Cross Reference.—See Editor's note to § 25-1-201.

§ 44-39. Time of filing notice.

Lien Relates Back.—

For there to be an effective labor or materialman's lien relating back to the date the work was begun or the materials furnished, the claim of lien must be filed in the office of the clerk of superior court of the county in which the land is located within six months from and after the date the work was completed or the materials furnished. Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

§ 44-43. Action to enforce lien; perfection of lien by filing claim with receiver.

Section 44-1 and this section set out the way and manner in which a lien can be perfected under North Carolina law. G. L. Wilson Bldg. Co. v. Leatherwood, 268 F. Supp. 609 (W.D.N.C. 1967).

Article 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to persons non sui juris.—From and after March 26, 1935, there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State, the said lien in favor of any person or corporation to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for drugs, medical supplies, and medical services rendered by any physician, dentist, trained nurse, or hospitalization, or hospital attention and/or services rendered in connection with the injury in compensation for which the said damages have been recovered. Where damages are recovered for and in behalf of minors or persons non compos mentis, such liens shall attach to the sum recovered as fully and effectively as if the said person were sui juris.

Notwithstanding the provisions of paragraph one of this section, no lien therein provided for shall be valid with respect to any claims whatsoever unless the person or corporation entitled to the lien therein provided for shall file a claim with the clerk of the court in which said civil action is instituted within 30 days after the institution of such action and further provided that the physician, dentist, trained nurse, hospital or such other person as has a lien hereunder shall, without charge to the attorney as a condition precedent to the creation of such lien, fur-

nish upon request to the attorney representing the person in whose behalf the claim for personal injury is made, an itemized statement, hospital record, or medical report for the use of such attorney in the negotiation settlement or trial of the claim arising by reason of the personal injury.

No liens of the character provided for in the first paragraph of this section shall hereafter be valid with respect to money that may be recovered in any pending civil actions in this State unless claims based on such liens are filed with the clerk of the court in which the action is pending within 90 days after April 5, 1947.

No action shall lie against any clerk of court or any surety on any clerk's bond to recover any claims based upon any lien or liens created by the first paragraph of this section when recovery has heretofore been had by the person injured, and no claims against such recovery were filed with the clerk by any person or corporation, and the clerk has otherwise disbursed according to law the money recovered in such action for personal injuries. (1935, c. 121, s. 1; 1947, c. 1027; 1959, c. 800, s. 1; 1967, c. 1204, s. 1.)

Editor's Note.— The 1967 amendment added at the end of the second paragraph the language beginning with the words "and further provided." Section 3 of the amendatory act provides that it shall not affect any civil action filed prior to Sept. 1, 1967.

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

ARTICLE 10.

Agricultural Liens for Advances.

§§ 44-52 to 44-64: Repealed by Session Laws 1965, c. 700, s. 2, effective at midnight June 30, 1967.

ARTICLE 12.

Liens on Leaf Tobacco and Peanuts.

§ 44-69. Effective period for lien on leaf tobacco sold in auction warehouse.

Editor's Note. — For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

ARTICLE 13.

Factors' Liens.

§§ 44-70 to 44-76: Repealed by Session Laws 1965, c. 700, s. 2, effective at midnight June 30, 1967.

ARTICLE 14.

Assignment of Accounts Receivable and Liens Thereon.

§§ 44-77 to 44-85: Repealed by Session Laws 1965, c. 700, s. 2, effective at midnight June 30, 1967.

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

Article 1.

Possessory Liens on Personal Property.

§ 44A-1. Definitions.—As used in this article

(1) "Legal possessor" means

a. Any person entrusted with possession of personal property by an owner thereof, or

b. Any person in possession of personal property and entitled thereto by operation of law.

(2) "Lienor" means any person entitled to a lien under this article.

(3) "Owner" means

a. Any person having legal title to the property, or

b. A lessee of the person having legal title, or

c. A debtor entrusted with possession of the property by a secured party, or

d. A secured party entitled to possession, or

e. Any person entrusted with possession of the property by his employer or principal who is an owner under any of the above.

(4) "Secured party" means a person holding a security interest.

(5) "Security interest" means any interest in personal property which interest is subject to the provisions of article 9 of the Uniform Commercial Code, or any other interest intended to create security in real or personal property. (1967, c. 1029, s. 1.)

Editor's Note. — Session Laws 1967, c. 1029, s. 1, which added this article, became effective at midnight June 30, 1967. For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

§ 44A-2. Persons entitled to lien on personal property.—(a) Any person who alters, repairs, services, treats, or improves personal property in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the personal property has a lien upon the property. The amount of the lien shall be the lesser of

(1) The reasonable charges for the services and materials; or

(2) The contract price; or

(3) One hundred dollars ($100.00) if the lienor has dealt with a legal possessor who is not an owner.

This lien shall have priority over perfected and unperfected security interests.

(b) Any person engaged in the business of operating a hotel, motel, or boardinghouse has a lien upon all baggage, vehicles and other personal property brought upon his premises by a guest or boarder who is an owner thereof to the extent of reasonable charges for the room, accommodations and other items or services furnished at the request of the guest or boarder. This lien shall not have priority over any security interest in the property which is perfected at the time the guest or boarder brings the property to said hotel, motel or boardinghouse.

(c) Any person engaged in the business of boarding animals has a lien on the animals boarded for reasonable charges for such boarding which are contracted for with an owner or legal possessor of the animal and which become due and payable within 90 days preceding the mailing of notice of sale provided for in § 44A-4. This lien shall have priority over perfected and unperfected security interests. (1967, c. 1029, s. 1.)

§ 44A-3. When lien arises and terminates.—Liens conferred under this article arise only when the lienor acquires possession of the property and terminate and become unenforceable when the lienor voluntarily relinquishes the possession of the property upon which a lien might be claimed, or when an owner, his agent, a legal possessor or any other person having a security or other interest in the property tenders prior to sale the amount secured by the lien plus reasonable storage, boarding and other expenses incurred by the lienor. The reacquisition of possession of property voluntarily relinquished shall not reinstate the lien. (1967, c. 1029, s. 1.)

§ 44A-4. Enforcement of lien.—(a) Enforcement by Sale.—If the charges for which the lien is claimed under this article remain unpaid or unsatisfied for 30 days following the maturity of the obligation to pay any such charges, the lienor may enforce the lien by public or private sale as provided in this section.

(b) Private Sale.—Sale by private sale may be made in any manner that is commercially reasonable. Not less than 20 days prior to the date of the proposed private sale, the lienor shall cause notice to be mailed, as provided in subsection (e) hereof, to the person having legal title to the property, or if such person cannot be reasonably ascertained, to the person with whom the lienor dealt, and to each secured party or other person claiming an interest in the property, who is actually known to the lienor, by registered or certified mail. The lienor shall not purchase, directly or indirectly, the property at private sale and such a sale to the lienor shall be voidable.

(c) Request for Public Sale.—If an owner, any secured party, or other person claiming an interest in the property notifies the lienor, prior to the date upon or after which the sale by private sale is proposed to be made, that public sale is requested, sale by private sale shall not be made. After request for public sale is received, notice of public sale must be given as if no notice of sale by private sale had been given.

(d) Public Sale.—(1) Not less than 20 days prior to sale by public sale the lienor

a. Shall cause notice to be mailed, as provided in subsection (e) hereof, to the person having legal title to the property, or if such person cannot be reasonably ascertained, the person with whom the lienor dealt, and to each secured party or other person claiming an interest in the property, who is actually known to the lienor, by registered or certified mail; and

b. Shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held and by publishing notice of sale once per week for two consecutive weeks in a newspaper of general circulation in the same county.

(2) A public sale must be held on a day other than Sunday and between the hours of 10:00 A.M. and 4:00 P.M.:

a. In any county where any part of the contract giving rise to the lien was performed, or

b. In the county where the obligation secured by the lien was contracted for.

(3) A lienor may purchase at public sale.

(e) Notice of Sale.—(1) The notice of sale shall include:

a. The name and address of the lienor.

b. The name of the person having legal title to the property, or if such person cannot be reasonably ascertained, the name of the person with whom the lienor dealt.

c. A description of the property.

d. The amount due for which the lien is claimed.

e. The place of the sale.

f. If a private sale the date upon or after which the sale is proposed to be made, or if a public sale the date and hour when the sale is to be held.

(2) Notice of sale required to be mailed shall be mailed to the address furnished to the lienor, or if no address has been furnished, to the last known address of the person entitled to the notice. If no address is known or reasonably ascertainable, it shall not be necessary to mail the notice.

(f) Notice to Commissioner of Motor Vehicles.—If the property upon which the lien is claimed is a motor vehicle that is required to be registered, the lienor shall send a copy of the notice of sale to the Commissioner of Motor Vehicles as required by G.S. 20-114 (c).

(g) Damages for Noncompliance.—If the lienor fails to comply substantially with any of the provisions of this section, the lienor shall be liable to the person having legal title to the property in the sum of one hundred dollars ($100.00), together with a reasonable attorney's fees [fee] as awarded by the court. Damages provided by this section shall be in addition to actual damages to which any party is otherwise entitled. (1967, c. 1029, s. 1.)

Editor's Note. — The word "fee" in brackets in subsection (g) is suggested as a correction of "fees," which appears in the 1967 Session Laws.

§ **44A-5. Proceeds of sale.**—The proceeds of the sale shall be applied as follows:

(1) Payment of reasonable expenses incurred in connection with the sale. Expenses of sale include but are not limited to reasonable storage and boarding expenses after giving notice of sale.

(2) Payment of the obligation secured by the lien.

(3) Any surplus shall be paid to the person entitled thereto. (1967, c. 1029, s. 1.)

§ **44A-6. Title of purchaser.**—A purchaser for value at a properly conducted sale, and a purchaser for value without constructive notice of a defect in the sale who is not the lienor or an agent of the lienor, acquires title to the property free of any interests over which the lienor was entitled to priority. (1967, c. 1029, s. 1.)

Chapter 45.

Mortgages and Deeds of Trust.

Article 1.

Chattel Securities.

§§ 45-1 to 45-3.1: Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

Cross Reference.—See Editor's note to § 25-1-201.

Article 2.

Right to Foreclose or Sell under Power.

§ 45-7. Agent to sell under power may be appointed by parol.—All sales of real property, under a power of sale contained in any mortgage or deed of trust to secure the payment of money, by any mortgagee or trustee, through an agent or attorney for that purpose, appointed orally or in writing by such mortgagee or trustee, whether such writing has been or shall be registered or not, shall be valid, whether or not such mortgagee or trustee was or shall be present at such sale. (1895, c. 117; Rev., s. 1035; C. S., s. 2581; 1967, c. 562, s. 2.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, substituted "real property" for "property, real or personal" near the beginning of the section. See Editor's note to § 25-1-201.

§ 45-8. Survivorship among donees of power of sale.—In all mortgages and deeds of trust of real property wherein two or more persons, as trustees or otherwise, are given power to sell the property therein conveyed or embraced, and one or more of such persons dies, any one of the persons surviving having such power may make sale of such property in the manner directed in such deed, and execute such assurances of title as are proper and lawful under the power so given; and the act of such person, in pursuance of said power, shall be as valid and binding as if the same had been done by all the persons on whom the power was conferred. (1885, c. 327, s. 2; Rev., s. 1033; C. S., s. 2582; 1967, c. 562, s. 2.)

Editor's Note.—
The 1967 amendment, effective at midnight June 30, 1967, inserted "of real property" near the beginning of the section. See Editor's note to § 25-1-201.

§ 45-10. Substitution of trustees in mortgages and deeds of trust.—In addition to the rights and remedies now provided by law, the holders or owners of a majority in amount of the indebtedness, notes, bonds, or other instru-

ments evidencing a promise or promises to pay money and secured by mortgages, deeds of trust, or other instruments conveying real property, or creating a lien thereon, may substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee, by the execution of a paper-writing whenever it appears:

(1) In the case of individual trustees: That the trustee then named in such mortgage, deed of trust, or other instrument securing the payment of money, has died, or has removed from the State, or is not a resident of this State or cannot be found in this State, or has disappeared from the community of his residence so that his whereabouts remains unknown in such community for a period of three months or more; or that he has become incompetent to act mentally or physically, or has been committed to any institution, private or public, on account of inebriacy or conviction of a criminal offense; or that he has refused to accept such appointment as trustee or refuses to act or has been declared a bankrupt; or that a petition in involuntary bankruptcy has been filed against him, or that a suit has been instituted in any court of this State asking relief against him on account of insolvency; or that a cause of action has been asserted against him on account of fraud against his creditors.

(2) In the case of corporate trustees: That the trustee is a foreign corporation or has ceased to do business, or has ceased to exercise trust powers, or has excluded from its regular business the performance of such trusts; or that the corporation has been declared bankrupt, or has been placed in the hands of a receiver; or that insolvency proceedings have been instituted in any court of this State or in any court of the United States against it, or that any action has been instituted in either of said courts against it in which relief is asked on the ground of insolvency or fraud against its creditors; or that any officer or commission of this State, or any employee of such commission or officer, has taken charge of its affairs for the purpose of liquidation pursuant to any statute.

The powers recited in this section shall be cumulative and optional. (1931, c. 78, ss. 1, 2; 1935, c. 227; 1943, c. 543; 1967, c. 562, s. 2.)

Editor's Note.—

The 1967 amendment, effective at midnight June 30, 1967, deleted "or personal" between "real" and "property" near the middle of the opening paragraph. See Editor's note to § 25-1-201.

§ 45-11. Appointment of substitute trustee upon application of subsequent or prior lienholders; effect of substitution.—When any person, firm, corporation, county, city or town holding a lien on real property upon which there is a subsequent or prior lien created by a mortgage, deed of trust or other instrument, the mortgagee or trustee therein named being dead or having otherwise become incompetent to act, files a written application with the clerk of the superior court of the county in which said property is located, setting forth the facts showing that said mortgagee or trustee is then dead or has become incompetent to act, the said clerk of the superior court, upon a proper finding of fact that said mortgagee or trustee is dead or has become incompetent to act, shall enter an order appointing some suitable and competent person, firm or corporation as substitute trustee upon whom service of process may be made, and said substitute trustee shall thereupon be vested with full power and authority to defend any action instituted to foreclose said property as fully as if he had been the original mortgagee or trustee named; but the substitute trustee shall have no power to cancel said mortgage or deed of trust without the joinder of the holder of the notes secured thereby. Said application shall not be made prior to the

expiration of thirty days from the date the original mortgagee or trustee becomes incompetent to act. (1941, c. 115, s. 1; 1967, c. 562, s. 2.)

Editor's Note.—The 1967 amendment, effective at midnight June 30, 1967, deleted "or personal" between "real" and "property" near the beginning of the section. See Editor's note to § 25-1-201.

§ 45-18. Validation of certain acts of substituted trustees.—Whenever before April 1, 1967, a trustee has been substituted in a deed of trust in the manner provided by §§ 45-10 to 45-17, but the instrument executed by the holder and/or owners of all or a majority in amount of the indebtedness, notes, bonds, or other instruments secured by said deed of trust, and the certificate of the clerk of the superior court executed in connection therewith under the provisions of § 45-12, have not been registered as provided by said sections until after the substitute trustee has exercised some or all of the powers conferred by said deed of trust upon the trustee therein, including the advertising of the property conveyed by said deed of trust for sale, the sale thereof, and the execution of a deed by such substituted trustee to the purchaser at such sale, all such acts of said substituted trustee shall be deemed valid and effective in the same manner and to the same extent as if said instrument substituting said trustee, and the clerk's certificate thereon has been registered prior to the performance by said substituted trustee of any one or more of said acts, or other acts authorized by such deed of trust. (1939, c. 13; 1963, c. 241; 1967, c. 945.)

Editor's Note.—The 1967 amendment substituted "April 1, 1967" for "February 1, 1963" near the beginning of the section. The amendatory act is effective June 27, 1967, but provides that it shall not affect pending litigation.

ARTICLE 2A.

Sales under Power of Sale.

Part 1. General Provisions.

§ 45-21.1. Definition.—As used in this article, "sale" means only a sale of real property pursuant to an express power of sale contained in a mortgage or deed of trust. (1949, c. 720, s. 1; 1967, c. 562, s. 2.)

Cross References.—As to judicial sales, see §§ 1-339.1 to 1-339.40. As to execution sales, see §§ 1-339.41 to 1-339.71.

Editor's Note. – The 1967 amendment, effective at midnight June 30, 1967, rewrote this section, eliminating all references to sales of personal property. See Editor's note to § 25-1-201.

§§ 45-21.5, 45-21.6: Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

Cross Reference.—See Editor's note to § 25-1-201.

§ 45-21.11. Application of statute of limitations to serial notes.—When a series of notes maturing at different times is secured by a mortgage or deed of trust and the exercise of the power of sale for the satisfaction of one or more of the notes is barred by the statute of limitations, that fact does not bar the exercise of the power of sale for the satisfaction of indebtedness represented by other notes of the series not so barred. (1949, c. 720, s. 1; 1967, c. 562, s. 2.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, substituted "mortgage or deed of trust" for "mortgage, deed of trust or conditional sale contract" near the beginning of the section. See Editor's note to § 25-1-201.

§ 45-21.12. Power of sale barred when foreclosure barred.—(a) Except as provided in subsection (b), no person shall exercise any power of sale contained in any mortgage or deed of trust, or provided by statute, when an action

to foreclose the mortgage or deed of trust, or to enforce the conditional sale contract, is barred by the statute of limitations.

(b) If a sale pursuant to a power of sale contained in a mortgage or deed of trust, or provided by statute, is commenced within the time allowed by the statute of limitations to foreclose such mortgage or deed of trust, or to enforce such conditional sale contract, the sale may be completed although such completion is effected after the time when commencement of an action to foreclose would be barred by the statute. For the purpose of this section, a sale is commenced when the notice of the sale is first posted or published as provided by this article or by the terms of the instrument pursuant to which the power of sale is being exercised.

(1949, c. 720, s. 1; 1967, c. 562, s. 2.)

Editor's Note.—

The 1967 amendment, effective at midnight June 30, 1967, deleted references to conditional sales contract in subsection (a) and near the beginning of subsection (b). See Editor's note to § 25-1-201.

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

§ 45-21.13: Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

Cross Reference.—

See Editor's note to § 25-1-201.

Part 2. Procedure for Sale.

§ 45-21.16. Contents of notice of sale.

(4) Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

(1967, c. 562, s. 2.)

Editor's Note.—

The 1967 amendment, effective at midnight June 30, 1967, repealed subdivision (4). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, it is not set out.

Applied in Financial Servs. Corp. v. Welborn, 269 N.C. 563, 153 S.E.2d 7 (1967).

§ 45-21.17. Posting and publishing notice of sale of real property.

(c) When the notice of sale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and

(2) The date of the last publication shall be not more than 10 days preceding the date of the sale.

(1967, c. 979, s. 3.)

Editor's Note.—

The 1967 amendment, effective Oct. 1, 1967, substituted "be not more than 10" for "not be more than seven" in subdivision (2) of subsection (c).

As only subsection (c) was affected by the amendment, the rest of the section is not set out.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

§§ 45-21.18, 45-21.19: Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

Cross Reference.—See Editor's note to § 25-1-201.

§ **45-21.20. Satisfaction of debt after publishing or posting notice, but before completion of sale.**—A power of sale is terminated if, prior to the time fixed for a sale, or prior to the expiration of the time for submitting any upset bid after a sale or resale has been held, payment is made or tendered of—

(1) The obligation secured by the mortgage or deed of trust, and

(2) The expenses incurred with respect to the sale or proposed sale, which in the case of a deed of trust also include compensation for the trustee's services under the conditions set forth in G.S. 45-21.15. (1949, c. 720, s. 1; 1967, c. 562, s. 2.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, eliminated a reference to conditional sale contract in subdivision (1). See Editor's note to § 25-1-201.

§ **45-21.21. Postponement of sale.**

(b) Upon postponement of a sale, the person exercising the power of sale shall personally, or through his agent or attorney—

(1) At the time and place advertised for the sale, publicly announce the postponement thereof, and

(2) On the same day, attach to or enter on the original notice of sale or a copy thereof, posted at the courthouse door, as provided by G.S. 45-21.17, a notice of the postponement.

(1967, c. 562, s. 2.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, rewrote subdivision (2) of subsection (b) so as to make it inapplicable to notice of postponement of sale of personal property. See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ **45-21.25**: Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

Cross Reference.—See Editor's note to § 25-1-201.

§ **45-21.27. Upset bid on real property; compliance bonds.**—(a) An upset bid is an advanced, increased, or raised bid whereby any person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten percent (10%) of the first $1000 thereof plus five percent (5%) of any excess above $1000, but in any event with a minimum increase of $25, such increase being deposited in cash, or by certified check or cashier's check satisfactory to the said clerk, with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report; such deposit to be made with the clerk of superior court before the expiration of the tenth day, and if the tenth day shall fall upon a Sunday or holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made on the day following when said office is open for the regular dispatch of its business. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions of subsection (b).

(b) The clerk of the superior court may require the person submitting an upset bid also to deposit a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The amount of such bond shall not exceed the amount of the upset bid less the amount of the required deposit.

(c) The clerk of the superior court may in the order of resale require the highest bidder at a resale had pursuant to an upset bid to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The bond shall be in such amount as the clerk deems adequate, but in

no case greater than the amount of the bid of the person being required to furnish the bond.

(d) A compliance bond, such as is provided for by subsections (b) and (c), shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with his bid. (1949, c. 720, s. 1; 1963, c. 377; 1967, c. 979, s. 3.)

Editor's Note.—

The 1967 amendment, effective Oct. 1, 1967, added at the end of the first sentence of subsection (a) the language which follows the semicolon and substituted "resale" for "sale" near the beginning of subsection (c).

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

§ 45-21.29. Resale of real property; jurisdiction; procedure; orders for possession.

(k) Orders for possession of real property sold pursuant to this article, in favor of the purchaser and against any party or parties in possession at the time of the sale who remain in possession at the time of application therefor, may be issued by the clerk of the superior court of the county in which such property is sold, when:

(1) Such property has been sold in the exercise of the power of sale contained in any mortgage or deed of trust or granted by this article, and

(2) The purchaser is entitled to possession, and

(3) The purchase price has been paid, and

(4) The sale has been consummated, or if a resale is held, such resale has been confirmed, and

(5) Ten days' notice has been given to the party or parties in possession at the time of the sale or resale who remain in possession at the time application is made, and

(6) Application is made to such clerk by the mortgagee, the trustee named in such deed of trust, any substitute trustee, or the purchaser of the property. (1949, c. 720, s. 1; 1951, c. 252, s. 3; 1965, c. 299; 1967, c. 979, s. 3.)

Editor's' Note.—

The 1967 amendment, effective Oct. 1, 1967, rewrote subsection (k).

As only subsection (k) was affected by the amendment, the rest of the section is not set out.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

§ 45-21.29a. Necessity for confirmation of sale.—No confirmation of sales of real property made pursuant to this article shall be required except as provided in G.S. 45-21.29 (h) for resales. If in case of an original sale under this article no upset bid has been filed at the expiration of the ten-day period, as provided in G.S. 45-21.27, the rights of the parties to the sale become fixed. (1967, c. 979, s. 3.)

Editor's Note. — Session Laws 1967, c. 979, s. 3, adding this section, is effective Oct. 1, 1967.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

§ 45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.

(b) Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

(1967, c. 562, s. 2.)

Editor's Note.—

The 1967 amendment, effective at midnight June 30, 1967, repealed subsection (b). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, it is not set out.

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.—(a) The proceeds of any sale shall be applied by the person making the sale, in the following order, to the payment of—

(1) Costs and expenses of the sale, including the trustee's commission, if any, and a reasonable auctioneer's fee if such expense has been incurred;

(2) Taxes due and unpaid on the property sold, as provided by G.S. 105-408, unless the notice of sale provided that the property be sold subject to taxes thereon and the property was so sold;

(3) Special assessments, or any installments thereof, against the property sold, which are due and unpaid, as provided by G.S. 105-408, unless the notice of sale provided that the property be sold subject to special assessments thereon and the property was so sold;

(4) The obligation secured by the mortgage, deed of trust or conditional sale contract.

(1967, c. 562, s. 2.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, deleted "if the property sold is real property" following the references to § 105-408 in subdivisions (2) and (3) of subsection (a). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Cited in Sullivan v. Johnson, 268 N.C. 443, 150 S.E.2d 777 (1966).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.—When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered

in any foreclosure suit nor to any sale made and confirmed prior to April 18, 1933. (1933, c. 275, s. 3; 1949, c. 720, s. 3; 1967, c. 562, s. 2.)

Editor's Note.—
The 1967 amendment, effective at midnight June 30, 1967, deleted "or personal property" following "real estate" near the beginning of the section. See Editor's note to § 25-1-201.

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.—In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out. (1933, c. 36; 1949, c. 720, s. 3; c. 856; 1961, c. 604; 1967, c. 562, s. 2.)

Editor's Note.—
The 1967 amendment, effective at midnight June 30, 1967, deleted the former second paragraph, which related to sales under conditional sales contracts. See Editor's note to § 25-1-201.

Article 4.

Discharge and Release.

§ 45-37. Discharge of record of mortgages and deeds of trust.—Any deed of trust or mortgage registered as required by law may be discharged and released in the following manner:

(1) The trustee or mortgagee or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortgagee or legal representative, may, in the presence of the register of deeds or his deputy, acknowledge the satisfaction of the provisions of such deed of trust or mortgage, whereupon the register or his deputy shall forthwith make upon the margin of the record of such deed of trust or mortgage an entry of such acknowledgment of satisfaction, which shall be signed by the trustee, mortgagee, legal representative or attorney, and witnessed by the register or his deputy, who shall also affix his name thereto: Provided, however, that in those counties in which deeds of trust and mortgages are recorded in the offices of the register of deeds by a microphotographic process or by any other method of process which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments, the trustee or mortgagee or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortgagee or legal representative must also present to the register of deeds or his deputy a document or instrument constituting a notice of satisfaction and containing the information set out in the provisions of G.S. 45-37.2, which notice of satisfaction must be signed by the trustee, mortgagee, legal representative or attorney, and witnessed by the register or his deputy, who shall also affix his name thereto, and which shall be recorded in accordance with law.

(2) Upon the exhibition of any mortgage, deed of trust or other instrument intended to secure the payment of money, accompanied with the bond

or note, to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee, trustee, or assignee of the same, or by any chartered active banking institution in the State of North Carolina, when so endorsed in the name of the bank by an officer thereof, the register or his deputy shall cancel the mortgage or other instrument by entry of "satisfaction" on the margin of the record; and the person so claiming to have satisfied the debt may retain possession of the bond or mortgage or other instrument: Provided, that if such mortgage or deed of trust provides in itself for the payment of money and does not call for or recite any note secured by it, then the exhibition of such mortgage or deed of trust alone to the register of deeds or his deputy, with endorsement of payment and satisfaction, shall be sufficient. But if the register or his deputy requires it, he shall file a receipt to him showing by whose authority the mortgage or other instrument was cancelled. Provided, however, that in any county in which deeds of trust and mortgages or other instruments intended to secure the payment of money are recorded in the office of the register of deeds by microphotographic process or by any other method of process which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments, the register of deeds shall, in lieu of cancelling the mortgage or other entry by an entry of satisfaction on the margin of the record, require the person exhibiting such instruments to also sign a notice of satisfaction sufficient to comply with the provisions of G.S. 45-37.2, which said notice of satisfaction is to be recorded and indexed in accordance with law.

(3) Upon the exhibition of any mortgage, deed of trust, or other instrument intended to secure the payment of money by the grantor or mortgagor, his agent or attorney, together with the notes or bonds secured thereby, to the register of deeds or his deputy of the county where the same is registered, the deed of trust, mortgage, notes or bonds being at the time of said exhibition more than ten years old, counting from the date of maturity of the last note or bond, the register or his deputy shall make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not. Provided, however, that in any county in which deeds of trust and mortgages and other instruments intended to secure the payment of money are recorded in the office of the register of deeds by microphotographic process or by any other method of process which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments, the register of deeds shall, in lieu of making an entry of cancellation in satisfaction on the margin of the record, require the presentation for recordation of a notice of satisfaction sufficient to comply with the provisions of G.S. 45-37.2.

(4) Upon the presentation of any deed of trust given to secure the bearer or holder of any negotiable instruments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof, to the register of deeds or his deputy of the county in which same is recorded, the said register or his deputy shall cancel such deed of trust by entry of satisfaction upon the record and such entry of satisfaction shall be valid and binding upon all persons: Provided that prior to such presentation and cancellation, any person rightfully entitled to any such deed of trust, or evidences of indebtedness, which have been lost or stolen, may notify the register of deeds, or his deputy, in writing of such loss

or theft, and said register, or his deputy, shall make a marginal entry in writing thereof, together with the date such notice is given, upon the record of the deed of trust concerned, and thereafter same shall not be cancelled as above provided until the ownership of said instruments shall have been lawfully determined: Provided that nothing herein shall be construed so as to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof. Provided, however, that in any county in which deeds of trust and mortgages are recorded in the office of the register of deeds by microphotographic process or by any other method of process which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments, the register of deeds, in lieu of making notices of satisfaction and cancellation upon the recorded instruments, shall require the submission for recordation of a notice of satisfaction sufficient to comply with the provisions of G.S. 45-37.2.

(5) The conditions of every mortgage, deed of trust, or other instrument securing the payment of money shall be conclusively presumed to have been complied with or the debts secured thereby paid as against creditors or purchasers for a valuable consideration from the trustor, mortgagor, or grantor, from and after the expiration of fifteen years from the date when the conditions of such instrument by the terms thereof are due to have been complied with, or the maturity of the last installment of debt or interest secured thereby, irrespective of whether the credit was extended or the purchase was made before or after the expiration of said fifteen years, unless the holder of the indebtedness secured by such instrument or party secured by any provision thereof shall file an affidavit with the register of deeds of the county where such instrument is registered, in which shall be specifically stated the amount of debt unpaid, which is secured by said instrument, or in what respect any other condition thereof shall not have been complied with, whereupon the register of deeds shall record such affidavit and refer on the margin of the record of the instrument referred to therein the fact of the filing of such affidavit, and a reference to the book and page where it is recorded. Or in lieu of such affidavit the holder may enter on the margin of the record any payments that have been made on the indebtedness secured by such instrument, and shall in such entry state the amount still due thereunder. This entry must be signed by the holder and witnessed by the register of deeds. Provided, however, that this subdivision shall not apply to any deed, mortgage, deed of trust or other instrument made or given by any railroad company, or to any agreement of conditional sale, equipment trust agreement, lease, chattel mortgage or other instrument relating to the sale, purchase or lease of railroad equipment on rolling stock, or of other personal property. This subdivision shall be applicable from and after one year from March 20, 1945, to all instruments executed prior to the enactment of chapter one hundred and ninety-two of the Public Laws of one thousand nine hundred and twenty-three, and any person affected hereby shall have until said date to file the affidavit with the register of deeds referred to herein or make the entry on the margin of the record as herein provided for; provided, also, that this subdivision shall be applicable from and after July 1st, 1947, to all instruments executed subsequent to March 6th, 1923, and prior to January 2nd, 1924, and any person affected by this proviso shall have until July 1st, 1947, to file the affidavit with the register of deeds referred to herein or make the entry on the margin of the record as herein provided for.

Every such entry thus made by the register of deeds or his deputy, and every such entry thus acknowledged and witnessed, shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded. Provided, however, that in any county in which deeds of trust and mortgages are recorded in the office of the register of deeds by microphotographic process or by any other method of process which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments, it shall not be necessary for the register of deeds, upon recording such affidavit, to refer on the margin of the record of the instrument referred to therein the fact of the filing of such affidavit, and a reference to the book and page where it is recorded. (1870-1, c. 217; Code, s. 1271; 1891, c. 180; 1893, c. 36; 1901, c. 46; Rev., s. 1046; 1917, c. 49, s. 1; c. 50, s. 1; C. S., s. 2594; 1923, c. 192, s. 1; c. 195; 1935, c. 47; 1945, c. 988; 1947, c. 880; 1951, c. 292, s. 1; 1967, c. 765, ss. 1-5.)

Editor's Note.—

Subdivision (5), without the present last sentence thereof, was added to this section by Session Laws 1923, c. 192, ratified March 6, 1923, and effective January 1, 1924. The subdivision as originally enacted was held to be prospective only, and inapplicable to persons becoming creditors or purchasers, or to instruments executed, before its effective date, in Hicks v. Kearney, 189 N.C. 316, 127 S.E. 205 (1925); Humphrey v. Stevens, 191 N.C. 101, 131 S.E. 383 (1926); Roberson v. Matthews, 200 N.C. 241, 156 S.E. 496 (1931); Dixie Grocery Co. v. Hoyle, 204 N.C. 109, 167 S.E. 469 (1933). See also Thomas v. Myers, 229 N.C. 234, 49 S.E.2d 478 (1948). The portion of the last sentence of subdivision (5) preceding the proviso was added by Session Laws 1945, c. 988, and the proviso was added by Session Laws 1947, c. 880. Session Laws 1951, c. 292, s. 1, amended subdivision (5) by inserting in the first sentence the words "irrespective of whether the credit was extended or the purchase was made before or after the expiration of said fifteen years." Section 2 of the 1951 amendatory act provided that from and after July 1, 1952, subdivision (5) as amended should be applicable to all instruments executed prior to March 20, 1951, and any person affected by the act should have until July 1, 1952, to file with the register of deeds the affidavit referred to in subdivision (5), or to make the entry on the margin of the record as therein provided.

The 1967 amendment added at the end of subdivisions (1), (2), (3) and (4) and at the end of the last paragraph of the section the provisos relating to counties in which deeds of trust and mortgages are recorded by a microphotographic process or by any other method of process which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments.

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

§ 45-37.2. Recording satisfactions of deeds of trust and mortgages in counties using microfilm.—In any county in which deeds of trust and mortgages are recorded in the office of the register of deeds by a microphotographic process or by any other method or process which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments, the register of deeds shall record the satisfaction and cancel the record of each such instrument satisfied by recording a notice of satisfaction which shall consist of a separate instrument, or that part of the original deed of trust or mortgage re-recorded, reciting the names of all parties to the original instrument, the amount of the obligation secured, the date of satisfaction of the obligation, the appropriate entry of satisfaction as provided in G.S. 45-37, a reference by book and page number to the record of the instrument satisfied, and the date of recording the notice of satisfaction. (1963, c. 1021, s. 1; 1967, c. 765, s. 6.)

Editor's Note.—The 1967 amendment deleted the former last sentence, relating to entries in the alphabetical indexes kept by register of deeds.

Article 5.

Miscellaneous Provisions.

§ 45-45.1. Release of mortgagor by dealings between mortgagee and assuming grantee.

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

Article 6.

Uniform Trust Receipts Act.

§§ **45-46 to 45-66:** Repealed by Session Laws 1965, c. 700, s. 2, effective at midnight June 30, 1967.

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

§ 46-3. Petition by cotenant or personal representative of cotenant.

I. IN GENERAL.

In this State partition proceedings have been consistently held to be equitable in nature, and the court has jurisdiction to adjust all equities in respect to the property. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

And Petitioner Must Do Equity.—Partition is always subject to the principle that he who seeks it by coming into equity for relief must do equity. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Tenant in Common Is Entitled, etc.— Prima facie, a tenant in common is entitled, as a matter of right, to a partition of the lands so that he may enjoy his share in severalty. If, however, an actual partition cannot be made without injury to some or all of the parties interested, he is equally entitled to a partition by sale. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

But Tenant in Common May Waive Right by Contract.—While it is the general rule that a tenant in common may have partition as a matter of right, it is equally well established that a cotenant may, either by an express or implied contract, waive his right to partition for a reasonable time. When he does, partition will be denied him or his successors who take with notice. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Equity will not award partition at the suit of one in violation of his own agreement or in violation of a condition or restriction imposed on the estate by one through whom he claims. The objection to partition in such cases is in the nature of an estoppel. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

The refusal of partition to one who has brought suit therefor in violation of his contract appears to bear a close analogy to the grant of specific performance of a contract. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Burden of Proof.—The burden is on him who seeks a sale in lieu of actual partition to allege and prove the facts upon which the order of sale must rest. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Nonsuit. — General rules governing involuntary termination on nonsuits in civil actions apply to special proceedings for partition. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

If the petitioner has no interest in the lands described in the petition, or no present right to partition, the proceeding is properly dismissed. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

Tenants in common are entitled, etc.— Prima facie, a tenant in common is entitled, as a matter of right, to a partition of the lands so that he may enjoy his share in severalty. If, however, an actual partition cannot be made without injury to some or all of the parties interested, he is equally entitled to a partition by sale. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

The burden, etc.— The burden is on him who seeks a sale in lieu of actual partition to allege and prove the facts upon which the order of sale must rest. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Life Estate Does Not Bar Sale of Reversion or Remainder.— The existence of a life estate is not, per se, "a bar to a sale for partition of the remainder or reversion thereof," since, for the purpose of partition, tenants in common are deemed seized and possessed as if no life estate existed. The actual possession of the life tenant, however, cannot be disturbed so long as it exists. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

§ 46-23. Remainder or reversion sold for partition; outstanding life estate.

Rule under Section.— The existence of a life estate is not, per se, "a bar to a sale for partition of the remainder or reversion thereof," since, for the purpose of partition, tenants in common are deemed seized and possessed as if no life estate existed. The actual possession of the life tenant, however, cannot be disturbed so long as it exists. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

ARTICLE 4.

Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.

Editor's Note.— For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

Chapter 47.

Probate and Registration.

Article 1.

Probate.

Article 2.

Registration.

Article 3.

Forms of Acknowledgment, Probate and Order of Registration.

Article 1.

Probate.

§ 47-2. Officials of the United States, foreign countries, and sister states.—The execution of all such instruments and writings as are permitted or required by law to be registered may be proved or acknowledged before any one of the following officials of the United States, of the District of Columbia, of the several states and territories of the United States, of countries under the dominion of the United States and of foreign countries: Any judge of a court of record, any clerk of a court of record, any notary public, any commissioner of deeds, any commissioner of oaths, any mayor or chief magistrate of an incorporated town or city, any ambassador, minister, consul, vice-consul, consul general, vice-consul general, or commercial agent of the United States, any justice of the peace of any state or territory of the United States, any officer of the army or air force of the United States or United States marine corps having the rank of warrant officer or higher, any officer of the United States navy or coast guard having the rank of warrant officer, or higher, or any officer of the United States merchant marine having the rank of warrant officer, or higher. No official seal shall be required of said military, naval or merchant marine official, but he shall sign his name, designate his rank, and give the name of his ship or military organization and the date, and for the purpose of certifying said acknowledgment, he shall use a form in substance as follows:

On this the ..... day of ....., 19...., before me ....., the undersigned officer, personally appeared ....., known to me (or satisfactorily proven) to be accompanying or serving in or with the armed forces of the United States (or to be the spouse of a person accompanying or serving in or with the armed forces of the United States) and to be the person whose name is subscribed to the within instruments and acknowledged that ..... he ..... executed the same for the purposes therein contained. And the undersigned does further certify that he is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States.

.....
Signature of Officer

.....
Rank of Officer and command to which attached.

If the proof or acknowledgment of the execution of an instrument is had before a justice of the peace of any state of the United States other than this State or of any territory of the United States, the certificate of such justice of the peace shall be accompanied by a certificate of the clerk of some court of record of the county in which such justice of the peace resides, which certificate of the clerk shall be under his hand and official seal, to the effect that such justice of the peace was at the time the certificate of such justice bears date an acting justice of the peace of such county and state or territory and that the genuine signature of such justice of the peace is set to such certificate. (1899, c. 235, s. 5; 1905, c. 451; Rev., s. 990; 1913, c. 39, s. 1; Ex. Sess. 1913, c. 72, s. 1; C. S., s. 3294; 1943, c. 159, s. 1; c. 471, s. 1; 1945, c. 6, s. 1; 1955, c. 658, s. 1; 1957, c. 1084, s. 1; 1967, c. 949.)

Editor's Note.— The 1967 amendment added the words within the second set of parentheses in the form.

§ 47-14. Register of deeds to pass on certificate and register instruments; order by judge. — (a) When an instrument is offered for registration, the register of deeds shall examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears on the face of the instrument that the execution thereof by one or more of the signers has been duly

proved or acknowledged and the certificate or certificates to that effect are in due form, he shall so certify, and shall register the instrument, together with the certificates.

(b) If a register of deeds denies registration pursuant to subsection (a), the person offering the instrument for registration may present the instrument to a judge, as provided in subsection (c), and he shall examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears on the face of the instrument that the execution thereof by one or more of the signers has been duly proved or acknowledged and the certificates to that effect are in due form, he shall so adjudge, and shall order the instrument to be registered, together with the certificates, and the register of deeds shall register them accordingly.

(c) When a district court has been established in the district including the county in which the instrument is to be registered, application for an order for registration pursuant to subsection (b) shall be made to any judge of the district court in the district including the county in which the instrument is to be registered. Until a district court has been established, application for an order for registration pursuant to subsection (b) may be made to a resident judge of superior court residing in the district including the county in which the instrument is to be registered, a judge regularly holding the superior courts of the district including the county in which the instrument is to be registered, any judge holding a session of superior court, either civil or criminal, in the district including the county in which the instrument is to be registered, or a special judge of superior court residing in the district including the county in which the instrument is to be registered.

(d) Registration of an instrument pursuant to this section is not effective with regard to parties who have not executed the instrument or whose execution thereof has not been duly proved or acknowledged. (1899, c. 235, s. 7; 1905, c. 414; Rev., s. 999; C. S., s. 3305; 1921, c. 91; 1939, c. 210, s. 2; 1967, c. 639, s. 1.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, rewrote this section.

ARTICLE 2.

Registration.

§ 47-17.1. Documents registered or ordered to be registered in certain counties to designate draftsman; exceptions. — The registers of deeds of the counties named below shall not accept for registration, nor shall any judge order registration pursuant to G.S. 47-14, of any papers or documents, with the exception of holographic wills, executed after July 1, 1953, unless there shall appear on the cover page of said papers or documents following the words "drawn by" the signature of the person who drafted said papers or documents, or unless in some other manner the cover page shall clearly designate the draftsman of such document: Provided that papers or documents prepared in other counties of North Carolina or in other states or counties for registration in any of said counties, or papers or documents prepared by any party to such papers or documents may be registered or ordered to be registered without such designation on the cover page of such papers or documents. This section shall apply to the following counties only: Alamance, Alexander, Buncombe, Carteret, Catawba, Chatham, Cherokee, Craven, Cumberland, Davidson, Duplin, Durham, Gaston, Gates, Graham, Johnston, Lincoln, McDowell, Madison, Mecklenburg, Montgomery, New Hanover, Orange, Pamlico, Perquimans, Randolph, Rowan, Surry, Swain, Transylvania, Union, Wake, Watauga and Wilkes. (1953, c. 1160; 1955, cc. 54, 59, 87, 88, 264, 280, 410, 628, 655; 1957, cc. 431, 469, 932, 982, 1119, 1290; 1959, cc. 266, 312,

548, 589; 1961, cc. 789, 1167; 1965, cc. 160, 597, 830; 1967, cc. 42, 139; c. 639, s. 2; c. 658.)

Editor's Note.—

The first 1967 amendment made this section applicable to Carteret County, and the second 1967 amendment made it applicable to Craven County.

The third 1967 amendment, effective Oct. 1, 1967, substituted "The registers of deeds of the counties named below shall not accept for registration, nor shall any judge order registration pursuant to G.S. 47-14, of" for "The clerks of the superior courts of the counties named below shall not accept for probate or recordation" at the beginning of the section, and substituted "registration" for "probate or recordation" and "may be registered or ordered to be registered" for "may be accepted for probate or recordation" in the proviso to the first sentence.

The fourth 1967 amendment made this section applicable to Pamlico County.

Session Laws 1955, c. 273, referred to in the replacement volume, was amended by Session Laws 1967, c. 742.

§ 47-18. Conveyances, contracts to convey and leases of land.

I. IN GENERAL.

Editor's Note.—

For article concerning the quest for clear land titles in North Carolina, see 44 N.C.L. Rev. 89 (1965). For case law survey as to recordation, see 44 N.C.L. Rev. 1032 (1966).

III. WHAT INSTRUMENTS AFFECTED.

A tobacco acreage allotment is not within the purview of this section. Hart v. Hassell, 250 F. Supp. 893 (E.D.N.C. 1966).

V. NOTICE.

No Notice, etc.—

An unrecorded contract to convey land is not valid as against a subsequent purchaser for value, or those holding under such a purchaser, even though he acquired title with actual notice of the contract. Beasley v. Wilson, 267 N.C. 95, 147 S.E.2d 577 (1966).

§ 47-18.1. Registration of certificate of corporate merger or consolidation.—(a) If title to real property in this State is transferred by operation of law upon the merger or consolidation of two or more corporations, such transfer is effective against lien creditors or purchasers for a valuable consideration from the corporation formerly owning the property, only from the time of registration of a certificate thereof as provided in this section, in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county.

(b) The Secretary of State shall adopt uniform certificates of merger or consolidation, to be furnished for registration, and shall adopt such fees as are necessary for the expense of such certification.

(c) A certificate of the Secretary of State prepared in accordance with this section shall be registered by the register of deeds in the same manner as deeds, and for the same fees, but no formalities as to acknowledgment, probate, or approval by any other officer shall be required. The name of the corporation formerly owning the property shall appear in the "Grantor" index, and the name of the corporation owning the property by virtue of the merger or consolidation shall appear in the "Grantee" index. (1967, c. 950, s. 3.)

Editor's Note. — The act inserting this section is effective on and after Oct. 1, 1967.

§ 47-20. Deeds of trust, mortgages and conditional sales contracts; effect of registration.—No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this article; provided however that any

transaction subject to the provisions of the Uniform Commercial Code (chapter 25 of the General Statutes) is controlled by the provisions of that act and not by this section. (1829, c. 20; R. C., c. 37, s. 22; Code, s. 1254; Rev., s. 982; 1909, c. 874, s. 1; C. S., s. 3311; 1953, c. 1190, s. 1; 1959, c. 1026, s. 2; 1965, c. 700, s. 8; 1967, c. 562, s. 5.)

I. IN GENERAL.

Editor's Note.—

The 1967 amendment, effective at midnight June 30, 1967, substituted the proviso at the end of the section for the phrase "unless subject to the filing requirements of article 9 of the Uniform Commercial Code (chapter 25 of the General Statutes) and duly filed pursuant thereto." See Editor's note to § 25-1-201.

IV. RIGHTS OF PERSONS PROTECTED.

Trustee in Bankruptcy.—

A trustee in bankruptcy stands in the shoes of a "purchaser for a valuable consideration," from the period of four months prior to the time of the filing of the petition in bankruptcy. In the Matter of Dail, 257 F. Supp. 326 (E.D.N.C. 1966).

§ 47-20.2. Place of registration; personal property.

Applied in In the Matter of Dail, 257 F. Supp. 326 (E.D.N.C. 1966).

§ 47-20.5. Real property; effectiveness of after-acquired property clause.—(a) As used in this section, "after-acquired property clause" means any provision or provisions in an instrument which create a security interest in real property acquired by the grantor of the instrument subsequent to its execution.

(b) As used in this section, "after-acquired property," and "property subsequently acquired" mean any real property which the grantor of a security instrument containing an after-acquired property clause acquires subsequent to the execution of such instrument, and in which the terms of the after-acquired property clause would create a security interest.

(c) An after-acquired property clause is effective to pass after-acquired property as against lien creditors or purchasers for a valuable consideration from the grantor of the instrument containing the after-acquired property clause only from the time of registration of the instrument as provided in this article. It is then effectively registered as to real property subsequently acquired for a period of not more than five years from such registration, unless there is an extension as provided in subsection (d); provided, however, that such five-year limitation shall not apply to an after-acquired property clause in an instrument which creates a security interest made by a public utility as defined in G.S. 62-3 (23) or by electric or telephone membership corporations incorporated or domesticated in North Carolina.

(d) The effectiveness of the registration of an after-acquired property clause may be extended by the registration of a notice of extension. A notice of extension may be registered within six months prior to the expiration of the five-year period specified in subsection (c). Upon the timely registration of a notice of extension, the effectiveness of the registration of the after-acquired property clause is continued for five years after the last date to which the registration was effective, whereupon it becomes ineffective as provided in subsection (c) unless another notice of extension is registered.

(e) The notice of extension shall

(1) Show that effective registration of the after-acquired property clause is extended,

(2) Include the names of the parties to the instrument containing the after-acquired property clause,

(3) Refer to the book and page where the instrument containing the after-acquired property clause is registered, and

(4) Be signed by the grantee or the person secured by the instrument containing the after-acquired property clause or his successor in interest.

(f) The register of deeds shall index the notice of extension in the same manner as the instrument containing the after-acquired property clause. (1967, c. 861, s. 1.)

Editor's Note. — In Session Laws 1967 this section was numbered 47-20.1. Since this chapter in the replacement volume already contained sections numbered 47-20.1 through 47-20.4, the section added by Session Laws 1967 has been renumbered 47-20.5 herein.

Section 3, c. 861, Session Laws 1967, provides that the act shall become effective at midnight on June 30, 1967, and shall apply to all instruments registered after that date.

§ 47-27. Deeds of easements.

This section is expressly applicable to the Highway Commission. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

Deeds of Easements Invalid Prior to Recordation. — This section makes deeds and conveyances of easements and rights-of-way invalid as to creditors and purchasers for value prior to recordation. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

§ 47-30. Plats and subdivisions; mapping requirements.

(k) The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Anson, Ashe, Beaufort, Brunswick, Camden, Caswell, Cherokee, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lenoir, Lincoln, McDowell, Madison, Martin, Mitchell, Northampton, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Tyrrell, Union, Vance, Warren, Washington, Watauga and Yadkin.

(l) The provisions of this section shall not apply to the registration of highway right-of-way plans provided for in G.S. 136-19.4. (1911, c. 55, s. 2; C. S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249; 1953, c. 47, s. 1; 1959, c. 1235, ss. 1, 3A, 3.1; 1961, cc. 7, 111, 164, 199, 252, 660, 687, 932, 1122; 1963, c. 71, ss. 1, 2; cc. 180, 236; c. 361, s. 1; c. 403; 1965, c. 139, s. 1; 1967, c. 228, s. 2; c. 394.)

Editor's Note.—

The first 1967 amendment, effective July 1, 1967, added subsection (l).

The second 1967 amendment inserted "McDowell" in subsection (k).

As the rest of the section was not changed by the amendments, only subsections (k) and (l) are set out.

Article 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-37. Certificate and adjudication of registration.—(a) The form of certification for registration by the register of deeds pursuant to § 47-14 (a) shall be substantially as follows:

North Carolina, ... County.

The foregoing (or annexed) certificate of (here give name and official title of the officer signing the certificate passed upon) is certified to be correct.

This ..... day of ....., A.D. .....

.....Signature.....
Register of Deeds

(b) The form of adjudication and order of registration by a judge pursuant to § 47-14 (b) and (c) shall be substantially as follows:

North Carolina, ... County.

The foregoing (or annexed) certificate of (here give name and official title of

the officer signing the certificate passed upon) is adjudged to be correct. Let the instrument and the certificate be registered.

This ..... day of ....., A.D. .....

.....
(Signature of Judge)

(1899, c. 235, s. 7; 1905, c. 344; Rev., ss. 1001, 1010; C. S., s. 3322; 1967, c. 639, s. 3.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, rewrote this section.

§ 47-39. Form of acknowledgment of conveyances and contracts between husband and wife.—When an instrument or contract purports to be signed by a married woman and such instrument or contract comes within the provisions of G.S. 52-6 of the General Statutes, the form of certificate of her acknowledgment before any officer authorized to take the same shall be in substance as follows:

North Carolina, ... County.

I (here give name of the official and his official title), do hereby certify that (here give name of the married woman who executed the instrument), wife of (here give husband's name), personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument; and the said (here give married woman's name), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, does state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she does still voluntarily assent thereto.

And I do further certify that it has been made to appear to my satisfaction, and I do find as a fact, that the same is not unreasonable or injurious to her.

Witness my hand and (when an official seal is required by law) official seal, this ..... (day of month), A. D. ..... (year).

(Official seal)

.....
(Signature of officer.)

(1899, c. 235, s. 8; 1901, c. 637; Rev., s. 1003; C. S., s. 3324; 1945, c. 73, s. 14; 1957, c. 1229, s. 2; 1967, c. 24, s. 26.)

Editor's Note.—The 1967 amendment, originally effective Oct. 1, 1967, substituted "52-6" for "52-12" in the opening paragraph. Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

Applied in Mitchell v. Mitchell, 270 N.C. 253, 154 S.E.2d 71 (1967).

Article 6.

Execution of Powers of Attorney.

§ 47-115.1. Appointment of attorney in fact which may be continued in effect notwithstanding incapacity or mental incompetence of the principal therein.

(k) In the event that any power of attorney executed pursuant to the provisions of this section does not contain the amount of commissions that the attorney in fact is entitled to receive or the way such commissions are to be determined, and the principal should thereafter become incompetent, the commissions such attorney in fact shall receive shall be fixed in the discretion of the clerk of superior court pursuant to the provisions of G.S. 28-170. (1961, c. 341, s. 1; 1967, c. 1087.)

Editor's Note. — The 1967 amendment added subsection (k). As the rest of the section was not affected by the amendment, it is not set out.

Chapter 48.

Adoptions.

§ 48-1. Legislative intent; construction of chapter.

Editor's Note.—
Session Laws 1967, c. 880, s. 1, effective July 1, 1967, changed the heading of this chapter from "Adoption of Minors" to "Adoptions."

§ 48-3. What minor children may be adopted.

Editor's Note.—
Session Laws 1967, c. 880, s. 2, effective July 1, 1967, changed the catchline of this section from "Who may be adopted" to "What minor children may be adopted."

§ 48-4. Who may adopt children. — (a) Any person over twenty-one years of age may petition in a special proceeding in the superior court to adopt a minor child and may also petition for a change of the name of such child. If the petitioner has a husband or wife living, competent to join in the petition, such spouse shall join in the petition.

(b) Provided, however, that if the spouse of the petitioner is a natural parent of the child to be adopted, such spouse need not join in the petition but need only to give consent as provided in G.S. § 48-7 (d).

(c) Provided further, that the petitioner or petitioners shall have resided in North Carolina, or on federal territory within the boundaries of North Carolina, for six months next preceding the filing of the petition unless the petition is for the adoption of a stepchild as provided in subsection (b) or for the adoption of a child who is by blood the grandchild of one of the petitioners, or unless, in the case of a child born out of wedlock, the petitioners file an affidavit with the court as described in subsection (d). In cases where the petition is for the adoption of a child who is by blood the grandchild of one of the petitioners and in the case of a child born out of wedlock and where the petitioners file an affidavit with the court as described in subsection (d) and in cases where the petition is for the adoption of a stepchild, the petitioner must be in fact residing in North Carolina, or on a federal territory within the boundaries of North Carolina, at the time the petition is filed. The provisions of this subsection concerning the adoption of a grandchild shall apply in the case of any petition filed on or after January 1, 1967.

(d) In the case of a child born out of wedlock, if the putative father of the child or the putative father and his spouse are petitioners seeking to adopt the child, and the petitioners shall state in an affidavit filed with the court that the male petitioner is the father of the child or that he is believed by the petitioners to be the father of the child, and that the child was born out of wedlock, and the petitioners must be in fact residing in North Carolina, or on a federal territory within the boundaries of North Carolina, at the time the petition is filed. (1949, c. 300; 1963, c. 699; 1967, c. 619, ss. 1-3; c. 693.)

Editor's Note.—
The first 1967 amendment, effective July 1, 1967, inserted in subsection (c) the provisions as to adoption of a grandchild and a child born out of wedlock and added subsection (d).

The second 1967 amendment, effective July 1, 1967, substituted "six months" for "one year" in subsection (c).

§ 48-9.1. Additional effects of surrender and consent given to director of public welfare or to licensed child-placing agency; custody of

child; disposition of certain unadoptable children. — The legal effects of written surrender and general consent to adoption given to and accepted by a director of public welfare or a licensed child-placing agency in accordance with G.S. 48-9 (a) (1) shall be as follows:

(1) The county department of public welfare which the director represents, or the child-placing agency, to whom surrender and consent has been given, shall have legal custody of the child and the rights of the consenting parties, except inheritance rights, until entry of the interlocutory decree provided for in G.S. 48-17, or until the final order of adoption is entered if the interlocutory decree is waived by the court in accordance with G.S. 48-21, or until consent is revoked within the time permitted by law, or unless otherwise ordered by a court of competent jurisdiction. A county department of public welfare having custody of the child shall pay the costs of the care of the child prior to placement for adoption.

(2) Upon receipt of written notice from a county department of public welfare or duly licensed adoption agency which has accepted surrender, release and consent to adoption, that a child is unadoptable for physical, mental, or other causes, the county department of public welfare of the child's legal settlement at the time of the child's birth shall assume custody and full responsibility for the care of the child and shall acknowledge acceptance of custody and responsibility in writing to the notifying agency. Certified copies of the notice and acceptance shall be filed by the county department of public welfare with the State Department of Public Welfare. Such transfer of custody of the child shall be accompanied by the surrender, release and consent and the county department of public welfare shall thereafter have the same authority to place the child and give consent for his adoption as given to the original agency. In the event of controversy as to the county of the child's legal settlement at the time of his birth, any court assuming jurisdiction over the controversy shall determine which county department of public welfare shall be responsible for the care and custody of the child in accordance with the provisions of G.S. 110-29 (3). The county of the child's settlement at the time of his birth shall be deemed the county of residence of the child for the purpose of making appropriate disposition of the child under G.S. 110-29 (3). If the court shall award custody of the child to a county department of public welfare, the court shall order the child-placing agency to deliver the surrender and consent in its possession to the county department of public welfare to which custody of the child has been given. The county department of public welfare, upon receiving custody of the child and the surrender and consent, shall have authority to give consent to the adoption of the child as in the case of surrender and consent given initially to a director of public welfare. The agency or director of public welfare having the surrender, release and consent and the custody of the child may make mutually voluntary placement of the child with one or more of those who surrendered the child, as to the agency or director may seem in the best interest of the child and the parties to the surrender, provided the placement is approved by a court of competent jurisdiction. (1967, c. 926, s. 1.)

Editor's Note.—Section 3, c. 926, Session Laws 1967, provides that the act shall be effective on and after July 1, 1967.

§ 48-21. Final order of adoption; termination of proceeding within three years.

(c) Upon examination of the written report required under G.S. 48-16, the

court may, in its discretion, waive the entering of the interlocutory decree and the probationary period and grant a final order of adoption when one of the petitioners is the putative father of the child and the petitioners file with the court the affidavit described in G.S. 48-4 (d) or when the child is by blood a grandchild, great grandchild, nephew or niece, grandnephew or grandniece, brother or sister, half brother or half sister, of one of the petitioners or is the stepchild of the petitioner, or where the child is at least twelve years of age and has resided in the home of the petitioners for five years prior to the filing of the petition and consents to the adoption as provided in G.S. 48-10.

(1967, c. 19; c. 619, s. 4.)

Editor's Note.—The first 1967 amendment inserted, in subsection (c), "brother or sister, half brother or half sister." The amendment also substituted "twelve" for "sixteen" in the provision in subsection (c) as to adoption of a child who has resided in the home of the petitioners for five years and consents to the adoption.

The second 1967 amendment, effective July 1, 1967, inserted in subsection (c) "when one of the petitioners is the putative father of the child and the petitioners file with the court the affidavit described in G.S. 48-4(d) or."

As the rest of the section was not changed by the amendments, only subsection (c) is set out.

§ 48-23. Legal effect of final order.

(2) The natural parents of the person adopted, if living, shall, from and after the entry of the final order of adoption, be relieved of all legal duties and obligations due from them to the person adopted, and shall be divested of all rights with respect to such person. This section shall not affect the duties, obligations, and rights of a putative father who has adopted his own child.

(1967, c. 619, s. 5.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, added the second sentence of subdivision (2).

As the rest of the section was not changed by the amendment, only subdivision (2) is set out.

§ 48-24. Recordation of adoption proceedings.—(a) Only the final order of adoption or the final order dismissing the proceeding, and no other papers relating to the proceeding, shall be recorded in the office of the clerk of the superior court in the county in which the adoption takes place.

(b) A copy of the petition, any affidavit filed in accordance with G.S. 48-4 (d), the consent, the report on the condition and antecedents of the child and the suitability of the foster home, a copy of the interlocutory decree, the report on the placement, and a copy of the final order must be sent by the clerk of the superior court to the State Board of Public Welfare in the following order:

(1) Within ten days after the petition is filed with the clerk of the superior court, a copy of the petition giving the date of the filing of the original petition, any affidavit filed in accordance with G.S. 48-4 (d), and the consent must be filed by the clerk with the State Board of Public Welfare.

(2) Within ten days after an interlocutory decree is entered, a copy of the interlocutory decree giving the date of the issuance of the decree and the report to the court on the condition and antecedents of the child and the suitability of the foster home must be filed by the clerk with the State Board of Public Welfare. When the interlocutory decree is waived, as provided in G.S. § 48-21 the said report and the recommendation to waive the interlocutory decree shall be so filed by the clerk.

(3) Within ten days after the final order of adoption is made the clerk must file with the State Board of Public Welfare the report on the supervi-

sion of the placement during the interlocutory period, and a copy of the final order.

(c) The said Board must cause all papers and reports related to the proceeding to be permanently indexed and filed. (1949, c. 300; 1967, c. 619, ss. 6, 7.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, inserted "any affidavit filed in accordance with G.S. 48-4 (d)" in the opening paragraph of subsection (b) and in subdivision (1) of subsection (b).

§ 48-29. Change of name; report to State Registrar; new birth certificate to be made.—(a) For proper cause the court may decree that the name of the child shall be changed to such name as may be prayed in the adoption petition or in a petition subsequently filed with the court by the adoptive parents. When the name of any child is so changed, the court shall forthwith report such change to the Office of Vital Statistics of the State Board of Health. Upon receipt of the report, the State Registrar of the Office of Vital Statistics shall prepare a new birth certificate for the child named in the report which shall contain the following information: Full adoptive name of child, sex, date of birth, race of adoptive parents, full name of adoptive father, full maiden name of adoptive mother, and such other pertinent information not inconsistent herewith as may be determined by the State Registrar. The city and county of residence of the adoptive parents at the time the petition is filed shall be shown as the place of birth, and the names of the attending physician and the local registrar shall be omitted: Provided, that when the adoptive parents reside in another state at the time the petition is filed the city and county of birth of the child shall be the same on the new birth certificate as on the original certificate, except as otherwise provided in subsection (d). No reference shall be made on the new certificate to the adoption of the child, nor shall the adopting parents be referred to as foster parents.

(d) This section shall apply in the case of a child born outside the State if the adoptive parents procure and furnish to the State Registrar a certified copy of the final order of adoption to be forwarded by the State Registrar to the appropriate vital statistics agency in the state of the child's birth, and further, if the adoptive parents procure and furnish to the State Registrar a birth certificate issued for the child by a duly authorized agency or representative of the state in which the child was born. The certificate so issued shall constitute the original certificate referred to in subsections (a) and (b). If the adoptive parents of a child born outside the State reside in another state at the time the petition is filed, the city and county of the court issuing the final order of adoption shall be shown on the new certificate as the place of birth. (1949, c. 300; 1951, c. 730, ss. 1-4; 1955, c. 951, s. 1; 1967, c. 1042, ss. 1-3.)

Editor's Note. — The 1967 amendment deleted "shown" following "cause" near the beginning of the first sentence in subsection (a), inserted "adoption" preceding the first "petition" in that sentence, added "or in a petition subsequently filed with the court by the adoptive parents" at the end of such sentence, added "except as otherwise provided in subsection (d)" at the end of the fourth sentence in subsection (a) and added subsection (d).

As the rest of the section was not affected by the amendment, it is not set out.

Section 3½ of c. 1042, Session Laws 1967, provides that sections 2 and 3 of the act (adding the exception at the end of the fourth sentence in subsection (a) and adding subsection (d), respectively) "shall apply only to the birth certificate of the child whose adoption is recorded under North Carolina Index Number 16429 in the files of the State Department of Public Welfare."

§ 48-36. Adoption of persons who are twenty-one or more years of age.—(a) Any person who is 21 or more years of age, or any two such persons who are lawfully married to each other, may petition the clerk of superior court that such person or persons be declared the adoptive parents of any other person who is 21 or more years of age who shall file with the clerk written consent to such adoption. The petitioners and the person to be adopted must have resided in North

Carolina or on a federal territory therein for six months immediately preceding the filing of the petition. The petition and consent must be filed in the county where the person to be adopted resides. The clerk shall not enter any order granting the petition until it has been made to appear to him that one copy each of the petition and the consent have been posted at the courthouse door continuously for 10 days immediately preceding such order. For good cause shown, the clerk may issue an order declaring the petitioners to be the adoptive parents of the person consenting to be adopted.

(b) Upon entry of the order of adoption in accordance with the provisions of subsection (a) of this section, the rights, duties, and obligations of the adoptive parents and the person adopted shall be, in relation to each other, and in relation to all other persons, the same as if the adoption had been completed under the provisions of this chapter other than those contained in this section, and as if the adoption had taken place immediately before the person adopted became 21 years of age; provided, however, the provisions of this section shall not relieve any person of any duty to support any other person, nor shall the provisions of this section relieve any person of any criminal liability, arising under any other provision of law, for failure to provide support for any person.

(c) Except as provided in subsection (b) of this section, the provisions of this chapter which are not a part of this section shall not apply to the adoption of persons who are more than 21 years of age. (1967, c. 880, s. 3.)

Editor's Note.—Section 5, c. 880, Session Laws 1967, provides that the act shall be effective on and after July 1, 1967.

Chapter 49.

Bastardy.

Article 3.

Civil Actions Regarding Illegitimate Children.

Article 1.

Support of Illegitimate Children.

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

State Must Prove, etc.—

In a prosecution under this section the burden is upon the State upon defendant's plea of not guilty to prove not only that defendant is the father of the child and had refused or neglected to support the child, but further that his refusal or neglect was willful. State v. Mason, 268 N.C. 423, 150 S.E.2d 753 (1966).

Instruction as to Willfulness.—

In a prosecution under this section an instruction that the jury should find defendant guilty if it found from the evidence beyond a reasonable doubt that defendant was the father of the child, without submitting the question of whether defendant willfully refused to support the child, must be held for prejudicial error. State v. Mason, 268 N.C. 423, 150 S.E.2d 753 (1966).

Submission of Interrogatories or Issues Is Approved.—The submission of interrogatories or issues in criminal prosecutions under this section is now the approved practice, the questions and answers being treated as a special verdict. State v. McKee, 269 N.C. 280, 152 S.E.2d 204 (1967).

Applied in State v. Cooke, 268 N.C. 201, 150 S.E.2d 226 (1966).

§ 49-4. When prosecution may be commenced.

Proof Required under Subdivision (3).— Where the prosecution was not begun within three years next after the birth, neither was paternity judicially determined within that time, the State must meet the requirements of subdivision (3) of this section and prove not only that defendant made payments for the child's support within the three years next after its birth but also that the warrant was issued within three years from the date of the last payment. State v. McKee, 269 N.C. 280, 152 S.E.2d 204 (1967).

§ 49-8. Power of court to modify orders; suspend sentence, etc.

Local Modification. — Person: 1967, c. 848, s. 1.

ARTICLE 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.—(a) The paternity of a child born out of wedlock may be established by civil action. Such establishment of paternity shall not have the effect of legitimation.

(b) Proof of paternity pursuant to this section shall be beyond a reasonable doubt.

(c) Such action for paternity may be commenced within one of the following periods:

(1) Three years next after the birth of the child; or

(2) Where the reputed father has acknowledged paternity of the child by payments for the support thereof within three years next after the birth of such child, three years from the date of the last payment whether such last payment was made within three years of the birth of such child or thereafter, but such action must be commenced before the child attains the age of 18 years. (1967, c. 993, s. 1.)

Editor's Note.—Section 4, c. 993, Session Laws 1967, provides that the act shall become effective Oct. 1, 1967.

§ 49-15. Custody and support of illegitimate children when paternity established.—Upon and after the establishment of paternity of an illegitimate child pursuant to G.S. 49-14, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of such father and mother. When paternity has been established, the father becomes responsible for medical expenses incident to the pregnancy and the birth of the child. (1967, c. 993, s. 1.)

§ 49-16. Parties to proceeding.—Proceedings under this article may be brought by:

(1) The mother, the father, the child, or the personal representative of any of them, or

(2) When the child, or the mother in case of medical expenses, is likely to become a public charge, the director of public welfare or such person as by law performs the duties of such official,

a. In the county where the mother resides or is found,

b. In the county where the putative father resides or is found, or

c. In the county where the child resides or is found. (1967, c. 993, s. 1.)

Chapter 50.

Divorce and Alimony.

§ 50-5. Grounds for absolute divorce.

(5) If either party has engaged in an unnatural or abnormal sex act with a person of the same sex or of a different sex or with a beast.

(1967, c. 1152, s. 8.)

Editor's Note. — The 1967 amendment, effective Oct. 1, 1967, rewrote subdivision (5). Section 9 of the amendatory act provides that the act shall not apply to pending litigation.

Only Part of Section Set Out.—As only subdivision (5) was affected by the amendment, the rest of the section is not set out.

§ 50-6. Divorce after separation of one year on application of either party.

Willful Abandonment, etc.—

In accord with 2nd paragraph in original. See O'Brien v. O'Brien, 266 N.C. 502, 146 S.E.2d 500 (1966).

Evidence insufficient to warrant submission of issue of wrongful abandonment as a defense in suit for divorce on ground of separation. Campbell v. Campbell, 270 N.C. 298, 154 S.E.2d 101 (1967).

Effect of Plaintiff's Misconduct, etc.—

From and after the execution of a valid deed of separation, a husband and wife living apart do so by mutual consent. The prior misconduct of one will not defeat his action for divorce under this section, brought two years (now one year) thereafter. Edmisten v. Edmisten, 265 N.C. 488, 144 S.E.2d 404 (1965).

§ 50-7. Grounds for divorce from bed and board.

It is not necessary for the plaintiff, etc.—

To obtain a divorce from bed and board the law requires that defendant establish only one of the grounds specified in this section. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

(1)

Abandonment under This Subdivision Not Synonymous, etc.—

Abandonment under this subdivision is not synonymous with the criminal offense defined in § 14-322. In a prosecution under § 14-322, the State must establish (1) a willful abandonment and (2) a willful failure to provide adequate support. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

Defendant May Not Defeat, etc.—

In accord with original. See Richardson

v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

Ending Cohabitation Is Desertion Whether or Not Support Is Paid.—A wife is entitled to her husband's society and the protection of his name and home in cohabitation. The permanent denial of these rights may be aggravated by leaving her destitute or mitigated by a liberal provision for her support, but if the cohabitation is brought to an end without justification and without the consent of the wife and without the intention of renewing it, the matrimonial offense of desertion is complete. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

Fact That Husband Does, etc.—In accord with original. See Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

(5) Becomes an excessive user of alcohol or drugs so as to render the condition of the other spouse intolerable and the life of that spouse burdensome. (1871-2, c. 193, s. 36; Code, s. 1286; Rev., s. 1562; C. S., s. 1660; 1967, c. 1152, s. 7.)

Editor's Note. — The 1967 amendment, effective Oct. 1, 1967, rewrote subdivision (5). Section 9 of the amendatory act provides that the act shall not apply to pending litigation.

Only Part of Section Set Out.—As only subdivision (5) was affected by the amendment, the rest of the section is not set out.

§ 50-8. Contents of complaint; verification.—In all actions for divorce the complaint shall be verified in accordance with the provisions of G.S. 1-145 and G.S. 1-148. The plaintiff shall set forth in his or her complaint that the complainant or defendant has been a resident of the State of North Carolina for at least six months next preceding the filing of the complaint, and that the facts set forth therein as grounds for divorce, except in actions for divorce from bed and board, have existed to his or her knowledge for at least six months prior to the filing of the complaint: Provided, however, that if the cause for divorce is one year separation, then it shall not be necessary to allege in the complaint that the grounds for divorce have existed for at least six months prior to the filing of the complaint; it being the purpose of this proviso to permit a divorce after such separation of one year without awaiting an additional six months for filing the complaint: Provided, further, that if the complainant is a nonresident of the State action shall be brought in the county of the defendant's residence, and summons served upon the defendant personally.

In all prior suits and actions for divorce heretofore instituted and tried in the courts of this State where the averments of fact required to be contained in the affidavit heretofore required by this section are or have been alleged and set forth in the complaint in said suits or actions and said complaints have been duly verified as required by G.S. 1-145, said allegations so contained in said complaints shall be deemed to be, and are hereby made, a substantial compliance as to the allegations heretofore required by this section to be set forth in any affidavit; and all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgments and decrees of divorce.

In all suits and actions for divorce heretofore instituted and tried in this State on and subsequent to the 5th day of April, 1951, wherein the statements, averments, or allegations in the verification to the complaint in said suits or actions are not in accordance with the provisions of G.S. 1-145 and 1-148 or the requirements of this section as to verification of complaint or the allegations, statements or averments in the verification contain the language that the facts set forth in the complaint are true "to the best of affiant's knowledge and belief" instead of the language "that the same is true to his (or her) own knowledge" or similar variations in language, said allegations, statements and averments in said verifications as contained in or attached to said complaints shall be deemed to be, and are hereby made, a substantial compliance as to the allegations, averments or statements required by this section to be set forth in any such verifications; and

all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgments and decrees of divorce. (1868-9, c. 93, s. 46; 1869-70, c. 184; Code, s. 1287; Rev., s. 1563; 1907, c. 1008, s. 1; C. S., s. 1661; 1925, c. 93; 1933, c. 71, ss. 2, 3; 1943, c. 448, s. 1; 1947, c. 165; 1949, c. 264, s. 4; 1951, c. 590; 1955, c. 103; 1965, c. 636, s. 3; c. 751, s. 1; 1967, c. 50.)

Editor's Note.—

Session Laws 1967, c. 50, inserted, in the portion of the second sentence preceding the first proviso, "except in actions for divorce from bed and board."

Amendment Effective July 1, 1969.— Session Laws 1967, c. 954, s. 3, effective July 1, 1969, will substitute "Rule 11 of the Rules of Civil Procedure" for "G.S. 1-145" in the first, second and third paragraphs.

The Rules of Civil Procedure are found in § 1A-1.

§ 50-10. Material facts found by jury; parties cannot testify to adultery; waiver of jury trial in certain actions.

Editor's Note.—

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

Judge Can Try Divorce on Grounds of Separation in Absence of Request for Jury. —In a suit for divorce on the grounds of separation, defendant having been personally served with summons, the judge, in the absence of a request for a jury trial filed prior to the call of the action for trial, has authority to hear the evidence, answer the issues, and render judgment thereon. This rule applies equally to contested and uncontested divorce actions. Langley v. Langley, 268 N.C. 415, 150 S.E.2d 764 (1966).

§ 50-11. Effects of absolute divorce.—(a) After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine except as hereinafter set out, and either party may marry again without restriction arising from the dissolved marriage.

(b) No judgment of divorce shall render illegitimate any child in esse, or begotten of the body of the wife during coverture.

(c) Except in case of divorce obtained with personal service on the defendant spouse, either within or without the State, upon the grounds of the adultery of the dependent spouse and except in case of divorce obtained by the dependent spouse in an action initiated by such spouse on the ground of separation for the statutory period a decree of absolute divorce shall not impair or destroy the right of a spouse to receive alimony and other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce.

(d) A divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained shall not impair or destroy the right of the dependent spouse to alimony as provided by the laws of this State. (1871-2, c. 193, s. 43; Code, s. 1295; Rev., s. 1569; 1919, c. 204; C. S., s. 1663; 1953, c. 1313; 1955, c. 872, s. 1; 1967, c. 1152, s. 3.)

Editor's Note.—

The 1967 amendment, effective Oct. 1, 1967, rewrote the section. Section 9 of the amendatory act provides that the act shall not apply to pending litigation.

Absolute Divorce Ends Power to Enter Alimony Order. — When a party has secured an absolute divorce, that puts it beyond the power of the court thereafter to enter an order for alimony. Mitchell v. Mitchell, 270 N.C. 253, 154 S.E.2d 71 (1967) (decided prior to the 1967 amendment).

Quoted in O'Brien v. O'Brien, 266 N.C. 502, 146 S.E.2d 500 (1966).

§ 50-13: Repealed by Session Laws 1967, c. 1153, s. 1, effective October 1, 1967.

Cross References.—

As to action or proceeding for custody of minor child, see §§ 50-13.1 to 50-13.8.

§ 50-13.1. Action or proceeding for custody of minor child.—Any parent, relative, or other person, agency, organization or institution claiming the

right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. (1967, c. 1153, s. 2.)

Editor's Note. — Session Laws 1967, c. 1153, s. 2, adding §§ 50-13.1 to 50-13.8, is effective Oct. 1, 1967.

For case law survey as to custody, see 44 N.C.L. Rev. 1000 (1966).

§ 50-13.2. Who entitled to custody; terms of custody; taking child out of State.—(a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child.

(b) An order for custody of a minor child may grant exclusive custody of such child to one person, agency, organization or institution, or, if clearly in the best interest of the child, provide for custody in two or more of the same, at such times and for such periods as will in the opinion of the judge best promote the interest and welfare of the child.

(c) An order for custody of a minor child may provide for such child to be taken outside of the State, but if the order contemplates the return of the child to this State, the judge may require the person, agency, organization or institution having custody out of this State to give bond or other security conditioned upon the return of the child to this State in accordance with the order of the court. (1957, c. 545; 1967, c. 1153, s. 2.)

Cross Reference.—See note to § 50-13.1.

Editor's Note.—The cases in the following note were decided under former § 50-13, which dealt with custody and maintenance of children in actions for divorce.

The welfare of the child is the paramount consideration. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

The children of the marriage become the wards of the court, and their welfare is the determining factor in custody proceedings. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody. Chriscoe v. Chriscoe, 268 N.C. 554, 151 S.E.2d 33 (1966).

But Trial Court Has Wide Discretion.—While the welfare of a child is always to be treated as the paramount consideration, the courts recognize that wide discretionary power is necessarily vested in the trial courts in reaching decisions in particular cases. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967).

Wishes of Child of Age of Discretion are Entitled to Weight.—The wishes of a child of sufficient age to exercise discretion in choosing a custodian are entitled to considerable weight when the contest is between the parents, but are not controlling. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

But Such Wishes Are Not Controlling.—When the child has reached the age of discretion the court may consider the preference or wishes of the child to live with a particular person. A child has attained an age of discretion when it is of an age and capacity to form an intelligent or rational view on the matter. The expressed wish of a child of discretion is, however, never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

Nor Is Verdict in Divorce Action.—The verdict in a divorce action can be an important factor in the judge's consideration of an award of custody, but it is not legally controlling. It is merely one of the circumstances for him to consider, along with all other relevant factors. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

Or Separation Agreement.—Valid separation agreements, including consent judgments based on such agreements with respect to marital rights, are not final and binding as to custody of minor children. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

A judgment awarding custody is based upon the conditions found to exist at the time it is entered. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare. Swicegood v. Swicegood, 270 N. C. 278, 154 S.E.2d 324 (1967).

Determining the custody of minor children is never the province of a jury; it is

that of the judge of the court in which the proceeding is pending. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

The question of custody is one addressed to the trial court. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

Trial Court Must Make Findings of Fact.—It is error for the court granting a decree of divorce to award the custody of a child without findings of fact from which it could be determined that the order was adequately supported by competent evidence and was for the best interest of the child. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967).

An order awarding custody of a child to the father, without any findings of fact other than a recital that the court had previously awarded custody to the father in a proceeding under former § 17-39, was fatally defective and the case was remanded for a detailed findings of fact. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967).

Such Findings Are Conclusive If Supported by Evidence.—The findings of the trial court in regard to the custody of children are conclusive when supported by competent evidence. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967).

When the court finds that both parties are fit and proper persons to have custody of the children involved and then finds that it is to the best interests of the children for the father to have custody of said children, such holding will be upheld when it is supported by competent evidence. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

§ 50-13.3. Enforcement of order for custody.—(a) The wilful disobedience of an order providing for the custody of a minor child shall be punishable as for contempt as provided by G.S. 5-8 and G.S. 5-9.

(b) Any court of this State having jurisdiction to make an award of custody of a minor child in an action or proceeding therefor, shall have the power of injunction in such action or proceeding as provided in article 37 of chapter 1 of the General Statutes. (1967, c. 1153, s. 2.)

Cross Reference.—See note to § 50-13.1.

§ 50-13.4. Action for support of minor child.—(a) Any parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian may institute an action for the support of such child as hereinafter provided.

(b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, or any person, agency, organization or institution standing in loco parentis shall be liable, in that order, for the support of a minor child. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. Upon proof of such circumstances the judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child, as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support.

(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case.

(d) Payments for the support of a minor child shall be ordered to be paid to the person having custody of the child or any other proper person, agency, organization or institution, or to the court, for the benefit of such child.

(e) Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any interest therein, or a security interest in real property, as the court may order. In every case in which payment for the support of a minor child is ordered and alimony or alimony pendente lite is also ordered, the order shall separately state and identify each allowance.

(f) Remedies for enforcement of support of minor children shall be available as herein provided.

(1) The court may require the person ordered to make payments for the support of a minor child to secure the same by means of a bond, mortgage or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the execution of an assignment of wages, salary or other income due or to become due.

(2) If the court requires the transfer of real or personal property or an interest therein as provided in subsection (e) as a part of an order for payment of support for a minor child, or for the securing thereof, the court may also enter an order which shall transfer title as provided in G.S. 1-227 and G.S. 1-228.

(3) The remedy of arrest and bail, as provided in article 34 of chapter 1 of the General Statutes, shall be available in actions for child support payments as in other cases.

(4) The remedies of attachment and garnishment, as provided in article 35 of chapter 1 of the General Statutes, shall be available in an action for child support payments as in other cases, and for such purposes the child or person bringing an action for child support shall be deemed a creditor of the defendant.

(5) The remedy of injunction, as provided in article 37 of chapter 1 of the General Statutes, shall be available in actions for child support as in other cases.

(6) Receivers, as provided in article 38 of chapter 1 of the General Statutes, may be appointed in actions for child support as in other cases.

(7) A minor child or other person for whose benefit an order for the payment of child support has been entered shall be a creditor within the meaning of article 3 of chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(8) A judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

(9) The wilful disobedience of an order for the payment of child support shall be punishable as for contempt as provided by G.S. 5-8 and G.S. 5-9.

(10) The remedies provided by chapter 1 of the General Statutes, article 28, Execution; article 29B, Execution Sales; and article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for child support as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in article 32 of chapter 1 of the General Statutes.

(11) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available. (1967, c. 1153, s. 2.)

Local Modification. — Person: 1967, c. 848, s. 2.

Cross Reference.—See note to § 50-13.1.

Separation Agreements Are Not Binding on Court.—Valid separation agreements, including consent judgments with respect to marital rights based on such agreements, are not final and binding as to the amount to be provided for the support and education of minor children. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966) (decided under former § 15-13).

But Separation Agreement Cannot Be Ignored.—Provisions of a valid separation agreement including a consent judgment based thereon, cannot be ignored or set aside by the court without the consent of the parties. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

§ 50-13.5. Procedure in actions for custody or support of minor children.—(a) Procedure.—The procedure in actions for custody and support of minor children shall be as in civil actions, except as herein provided. The procedure in habeas corpus proceedings for custody and support of minor children shall be as in other habeas corpus proceedings, except as herein provided. In this § 50-13.5 the words "custody and support" shall be deemed to include custody or support, or both.

(b) Type of Action.—An action brought under the provisions of this section may be maintained as follows:

(1) As a civil action.

(2) By writ of habeas corpus, and the parties may appeal from the final judgment therein as in civil actions.

(3) Joined with an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(4) As a cross action in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(5) By motion in the cause in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(6) Upon the court's own motion in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(7) In any of the foregoing the judge may issue an order requiring that the body of the minor child be brought before him.

(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody.—

(1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.

(2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child when:

a. The minor child resides, has his domicile, or is physically present in this State, or

b. When the court has personal jurisdiction of the person, agency, organization, or institution having actual care, control, and custody of the minor child.

(3) The respective rights of persons, agencies, organizations, or institutions claiming the right to custody of a minor child may be adjudicated even though the minor child is not actually before the court.

(4) Jurisdiction acquired under subdivisions (2) and (3) hereof shall not be divested by a change in circumstances while the action or proceeding is pending.

(5) If at any time a court of this State having jurisdiction of an action or proceeding for the custody of a minor child finds as a fact that a court in another state has assumed jurisdiction to determine the matter, and that the best interests of the child and the parties would be served by having the matter disposed of in that jurisdiction, the court of this State may, in its discretion, refuse to exercise jurisdiction, and dismiss the action or proceeding or may retain jurisdiction and enter such orders from time to time as the interest of the child may require.

(6) If at any time a court of this State having jurisdiction of an action or proceeding for the custody of a minor child finds as a fact that it would not be in the best interests of the child, or that it would work

substantial injustice, for the action or proceeding to be tried in a court of this State, and that jurisdiction to determine the matter has not been assumed by a court in another state, the judge, on motion of any party, may enter an order to stay further proceedings in the action in this State. A moving party under this subdivision must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial. The court may retain jurisdiction of the matter for such time and upon such terms as it provides in its order.

(d) Service of Process; Notice; Interlocutory Orders.—

(1) Service of process in civil actions or habeas corpus proceedings for the custody of minor children shall be as in other civil actions or habeas corpus proceedings. Motions for custody or support of a minor child in a pending action may be made on five days' notice to the other parties and compliance with G.S. 50-13.5 (e).

(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

(e) Notice to Additional Persons in Custody Actions and Proceedings; Intervention.—

(1) The parents of the minor child whose addresses are reasonably ascertainable; any person, agency, organization or institution having actual care, control, or custody of a minor child; and any person, agency, organization or institution required by court order to provide for the support of a minor child, either in whole or in part, not named as parties and served with process in an action or proceeding for the custody of such child, shall be given notice by the party raising the issue of custody.

(2) The notice herein required shall be in the manner provided by the rules of civil procedure for the service of notices in actions. Such notice shall advise the person to be notified of the name of the child, the names of the parties to the action or proceeding, the court in which the action or proceeding was instituted, and the date thereof.

(3) In the discretion of the court, failure of such service of notice shall not affect the validity of any order or judgment entered in such action or proceeding.

(4) Any person required to be given notice as herein provided may intervene in an action or proceeding for custody of a minor child by filing in apt time notice of appearance or other appropriate pleadings.

(f) Venue.—An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action. If an action or proceeding for the custody and support of a minor child has been instituted and an action for annulment or for divorce, either absolute or from bed and board, or for alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action or proceeding may, in its discretion direct that the action or proceeding for custody and support of a minor child be consolidated with such subsequent action, and in the event consolidation

is ordered, shall determine in which court such consolidated action or proceeding shall be heard.

(g) Custody and Support Irrespective of Parents' Rights Inter Partes.—Orders for custody and support of minor children may be entered when the matter is before the court as provided by this section, irrespective of the rights of the wife and the husband as between themselves in an action for annulment or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(h) Court Having Jurisdiction.—When a district court having jurisdiction of the matter shall have been established, actions or proceedings for custody and support of minor children shall be heard without a jury by the judge of such district court, and may be heard at any time. Until a district court having jurisdiction shall have been established, actions or proceedings for custody and support of minor children shall be heard by a resident judge of superior court, a judge regularly holding the superior courts of the district in which the action or proceeding is brought, any judge holding a session of superior court, either civil or criminal, in the district including the county in which the action or proceeding is brought or a special judge of superior court residing in the district. Such action or proceeding may be heard in or out of session. If a court other than the superior court has jurisdiction over such action or proceeding, such jurisdiction shall not be affected by this subsection 50-13.5 (h). (1858-9, c. 53, s. 2; 1871-2, c. 193, ss. 39, 46; Code, ss. 1292, 1296, 1570, 1662; Rev., ss. 1567, 1570, 1854; 1919, c. 24; C. S., ss. 1664, 1667, 2242; 1921, c. 123; 1923, c. 52; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1951, c. 893, s. 3; 1953, cc. 813, 925; 1955, cc. 814, 1189; 1957, c. 545; 1965, c. 310, s. 2; 1967, c. 1153, s. 2.)

Cross Reference.—See note to § 50-13.1.

Editor's Note.—The cases in the following note were decided under former § 50-13, which dealt with custody and maintenance of children in actions for divorce, and former § 50-16, which dealt with custody and support of children in proceedings for alimony without divorce.

For note on voluntary nonsuit in custody action, see 44 N.C.L. Rev. 1138 (1966).

Permitting Custody Orders in Alimony Actions Created Additional Method of Determining Issues as to Children.—The 1955 amendment to former § 50-16, which provided that custody orders were authorized "in the same manner as such orders are entered by the court in an action for divorce," bolstered the decision in Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962), which held that that section created an additional method whereby all questions relating to custody and child support were brought into and determined in the suit for alimony without divorce, in one action. In the matter of Custody of Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967).

Divorce Action Gives Court Jurisdiction of Custody.—In divorce actions, whether for the dissolution of the marriage or from bed and board, the court in which the action is brought acquires jurisdiction over the custody of the unemancipated children of the parties. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

When a divorce action is instituted, jurisdiction over the custody of the children born of the marriage vests exclusively in the court before whom the divorce action is pending and becomes a concomitant part of the court's jurisdiction in the divorce action. In the matter of Custody of Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967).

And Prior Habeas Corpus Decree Does Not Oust such Jurisdiction.—A decree awarding the custody of a child in a habeas corpus proceeding does not oust the court of jurisdiction to hear and determine the custody of the child in a subsequent divorce proceeding. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967).

But Custody Jurisdiction of Court Where Alimony Action Is Pending Is Not Lost.—The general rule that exclusive custody jurisdiction is vested in the divorce court is subject to an exception: A court before which an action for alimony without divorce is pending does not lose its custody jurisdiction to the court of another county in which an action for divorce has been subsequently filed. In the Matter of Custody of Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967).

Jurisdiction of Divorce Court Continues after Divorce.—The jurisdiction of the court over the custody of unemancipated children of the parties in a divorce action continues even after divorce. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

Order Removing Habeas Corpus Proceeding to County of Subsequent Alimony Action Not Disturbed.—In a habeas corpus proceeding instituted by the father to determine the right to custody of his minor son, the order of the court removing the proceeding on motion to a county in which the mother, subsequent to the service of the writ but before the hearing, had instituted an action for alimony without divorce and for the custody of the child, will not be disturbed. In the matter of Macon, 267 N.C. 248, 147 S.E.2d 909 (1966).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.—In an action or proceeding for the custody or support, or both, of a minor child the court may in its discretion allow reasonable attorney's fees to a dependent spouse, as defined in G.S. 50-16.1, who has insufficient means to defray the expenses of the suit. (1967, c. 1153, s. 2.)

Cross Reference.—See note to § 50-13.1.

§ 50-13.7. Modification of order for child support or custody.—(a) An order of a court of this State for custody or support, or both, of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.

(b) When an order for custody or support, or both, of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support or custody which modifies or supersedes such order for custody or support. (1858-9, c. 53; 1868-9, c. 116, s. 36; 1871-2, c. 193, s. 46; Code, ss. 1296, 1570, 1661; Rev., ss. 1570, 1853; C. S., ss. 1664, 2241; 1929, c. 270, s. 1; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1953, c. 813; 1957, c. 545; 1965, c. 310, s. 2; 1967, c. 1153, s. 2.)

Cross Reference.—See note to § 50-13.1.

Editor's Note.—The cases in the following note were decided under former § 17-39.1, which dealt with determining custody of children in habeas corpus proceedings, former § 50-13, which dealt with custody and maintenance of children in divorce proceedings, and former § 50-16, which dealt with custody and support of children in actions for alimony without divorce.

The control and custody of minor children cannot be determined finally. Changed conditions will always justify inquiry by the courts in the interest and welfare of the children, and decrees may be entered as often as the facts justify. In re Herring, 268 N.C. 434, 150 S.E.2d 775 (1966).

Neither agreements nor adjudications for the custody or support of a minor child are ever final. McLeod v. McLeod, 266 N.C. 144, 146 S.E.2d 65 (1966).

As children develop their needs change; nevertheless, the needs must be supplied by the parent, whose ability to supply them may change. For these reasons orders in custody proceedings are not final. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

Hence, Divorce Decree Custody Provision Is Subject to Modification.—The provision of a final decree of divorce awarding the custody of the minor children of the marriage is subject to modification for subsequent change of condition as often as the facts justify. In the Matter of Custody of Marlowe, 268 N.C. 197, 150 S.E.2d 204 (1966).

And Judgment in Custody Suit Is Not Final.—On a hearing in a custody suit the judgment is not intended to be a final determination of the rights of the parties touching the care and control of the child, but, on a change of conditions, properly established, the question may be further heard and determined. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

Because of the court's paramount regard for the welfare of children whose parents are separated, the court, for their benefit, and upon proper showing, may modify or change a custody award. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

Valid Custody Order May Not Be Collaterally Modified.—A valid order awarding custody of the child of the marriage is conclusive upon the parties and may not be modified collaterally by a petition praying that the child's custody be awarded to petitioner during a certain period. Robbins v. Robbins, 266 N.C. 635, 146 S.E.2d 671 (1966).

When the parents were divorced outside this State, either parent may have the question of custody as between them determined in a special proceeding in the superior court. In the Matter of Custody

of Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967).

The full faith and credit clause of the federal Constitution does not preclude the courts of this State from modifying the provision of a foreign divorce decree awarding custody of the minor children of the marriage for change of condition subsequent to the entry of the decree, and a case will be remanded for determination by the trial court whether there had been change in the conditions and circumstances since the entry of the decree sufficient to require the modification of the decree in the best interest of the minors. In the Matter of Custody of Marlowe, 268 N.C. 197, 150 S.E.2d 204 (1966).

§ 50-13.8. Custody and support of person incapable of self-support upon reaching majority.—For the purposes of custody and support, the rights of a person who is mentally or physically incapable of self-support upon reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support. (1967, c. 1153, s. 2.)

Cross Reference.—See note to § 50-13.1.

§§ 50-14, 50-15: Repealed by Session Laws 1967, c. 1152, s. 1, effective October 1, 1967.

§ 50-16: Repealed by Session Laws 1967, c. 1152, s. 1; c. 1153, s. 1, effective October 1, 1967.

Cross References.—
As to action or proceeding for custody of minor child, see §§ 50-13.1 to 50-13.8.

§ 50-16.1. Definitions. — As used in the statutes relating to alimony and alimony pendente lite unless the context otherwise requires, the term:

(1) "Alimony" means payment for the support and maintenance of a spouse, either in lump sum or on a continuing basis, ordered in an action for divorce, whether absolute or from bed and board, or an action for alimony without divorce.

(2) "Alimony pendente lite" means alimony ordered to be paid pending the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in an action for annulment, or on the merits in an action for alimony without divorce.

(3) "Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.

(4) "Supporting spouse" means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support. A husband is deemed to be the supporting spouse unless he is incapable of supporting his wife. (1967, c. 1152, s. 2.)

Editor's Note.—Session Laws 1967, c. 1152, s. 2, adding §§ 50-16.1 to 50-16.10, is effective Oct. 1, 1967. Section 9 of c. 1152 provides that the act shall not apply to pending litigation.

§ 50-16.2. Grounds for alimony. — A dependent spouse is entitled to an order for alimony when:

(1) The supporting spouse has committed adultery.

(2) There has been an involuntary separation of the spouses in consequence of a criminal act committed by the supporting spouse prior to the proceeding in which alimony is sought, and the spouses have lived separate and apart for one year, and the plaintiff or defendant in the proceeding has resided in this State for six months.

(3) The supporting spouse has engaged in an unnatural or abnormal sex act with a person of the same sex or of a different sex or with a beast.
(4) The supporting spouse abandons the dependent spouse.
(5) The supporting spouse maliciously turns the dependent spouse out of doors.
(6) The supporting spouse by cruel or barbarous treatment endangers the life of the dependent spouse.
(7) The supporting spouse offers such indignities to the person of the dependent spouse as to render his or her condition intolerable and life burdensome.
(8) The supporting spouse is a spendthrift.
(9) The supporting spouse is an excessive user of alcohol or drugs so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome.
(10) The supporting spouse wilfully fails to provide the dependent spouse with necessary subsistence according to his or her means and condition so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome. (1871-2, c. 193, ss. 37, 39; Code, ss. 1290, 1292; Rev., ss. 1565, 1567; 1919, c. 24; C. S., ss. 1665, 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

Providing Support Does Not Negative Abandonment.—The husband's willful failure to provide adequate support for his wife may be evidence of his abandonment of her, but the mere fact that he provides adequate support for her does not in itself negative abandonment as used in subdivision (1) of § 50-7. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966) (decided under former § 50-16).

A wife is entitled to her husband's society and the protection of his name and home in cohabitation. The permanent denial of these rights may be aggravated by leaving her destitute or mitigated by a liberal provision for her support, but if the cohabitation is brought to an end without justification and without the consent of the wife and without the intention of renewing it, the matrimonial offense of desertion is complete. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966) (decided under former § 50-16).

§ 50-16.3. Grounds for alimony pendente lite. — (a) A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when:

(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8 (f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and
(2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof.

(b) The determination of the amount and the payment of alimony pendente lite shall be in the same manner as alimony, except that the same shall be limited to the pendency of the suit in which the application is made. (1871-2, c. 193, ss. 38, 39; 1883, c. 67; Code, ss. 1291, 1292; Rev., ss. 1566, 1567; 1919, c. 24; C. S., ss. 1666, 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1961, c. 80; 1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

Editor's Note.—The cases in the following note were decided under former §§ 50-15 and 50-16, which dealt with alimony pendente lite in actions for divorce and in actions for alimony without divorce, respectively.

Purpose of Remedy.—The remedy established for the subsistence of the wife pending the trial and final determination of the issues involved and for her counsel fees is intended to enable her to maintain herself according to her station in life and to have sufficient funds to employ adequate counsel

to meet her husband at the trial upon substantially equal terms. Myers v. Myers, 270 N.C. 263, 154 S.E.2d 84 (1967).

Allowance as a Legal Right.—Generally, excluding statutory grounds for denial allowance of support to an indigent wife while prosecuting a meritorious suit against her husband is so strongly entrenched in practice as to be considered an established legal right. Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967).

No Allowance Where Plaintiff, in Law, Has No Case.—Discretion in allowance of support to a wife while suing her husband is confined to consideration of necessities of the wife on the one hand and the means of the husband on the other, but to warrant such allowance the court is expected to look into the merits of the action and would not be justified in allowing subsistence and counsel fees where the plaintiff, in law, has no case. Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967).

Subsistence and counsel fees pendente lite are within the discretion of the court, and its decision is not reviewable except for abuse of discretion or for error of law. Griffith v. Griffith, 265 N.C. 521, 144 S.E.2d 589 (1965).

The amount allowed a wife for her subsistence pendente lite and for her counsel fees is a matter for the trial judge and his discretion in this respect is not reviewable except in case of an abuse of discretion. Miller v. Miller, 270 N.C. 140, 153 S.E.2d 854 (1967).

Discretion Is Not Absolute and Unreviewable.—The allowance of support and counsel fees pendente lite in a suit by wife against husband for divorce or alimony is not an absolute discretion to be exercised at the pleasure of the court and unreviewable, but is to be exercised within certain limits and with respect to factual conditions. Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967).

§ 50-16.4. Counsel fees in actions for alimony. — At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony. (1967, c. 1152, s. 2.)

Cross Reference.—See notes to §§ 50-16.1 and 50-16.3.

Editor's Note.—The cases in the following note were decided under former §§ 50-15 and 50-16, which dealt with alimony pendente lite in divorce actions and subsistence and counsel fees pending actions for alimony without divorce, respectively.

The purpose of the allowance for attorney's fees is to put the wife on substantially even terms with the husband in the litigation. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

Subsistence and counsel fees pendente lite are within the discretion of the court, and its decision is not reviewable except for abuse of discretion or for error of law. Griffith v. Griffith, 265 N.C. 521, 144 S.E.2d 589 (1965).

Elements to Be Considered.—There are many elements to be considered in a pendente lite allowance of attorneys' fees for a wife suing for alimony without divorce. The nature and worth of the services, the magnitude of the task imposed, reasonable consideration for the defendant's condition and financial circumstances, and many other considerations are involved. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

§ 50-16.5. Determination of amount of alimony. — (a) Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case.

(b) Except as provided in G.S. 50-16.6 in case of adultery, the fact that the dependent spouse has committed an act or acts which would be grounds for alimony if such spouse were the supporting spouse shall be grounds for disallowance of alimony or reduction in the amount of alimony when pleaded in defense by the supporting spouse. (1871-2, c. 193, ss. 37, 38, 39; 1883, c. 67; Code, ss. 1290, 1291, 1292; Rev., ss. 1565, 1566, 1567; 1919, c. 24; C. S., ss. 1665, 1666, 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1961, c. 80; 1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

Editor's Note.—The cases in the following note were decided under former § 50-16, which dealt with actions for alimony without divorce.

Discretion of Judge.—The alimony which

a husband was required to pay in proceedings instituted under former § 50-16 was "a reasonable subsistence," the amount of which the judge determined in the exercise of a sound judicial discretion. His order determining that amount would not be disturbed unless there had been an abuse of discretion. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

Must Be Exercised with Respect to Controlling Facts.—An order directing the husband to make specified payments for the support of his wife until the birth of their child which expired at the birth of the child without provision for any payments thereafter, although made within the discretion of the court, was vacated and the cause remanded since the court's discretion was not exercised with respect to the controlling factual conditions. Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967).

The court must consider the estate and earnings of both husband and wife in arriving at the sum which is just and proper for the husband to pay the wife, either as temporary or permanent alimony; it is a question of fairness and justice to both. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

Wife's Property Does Not Relieve Husband of Duty to Support Her.—The fact that the wife has property or means of her own does not relieve the husband of his duty to furnish her reasonable support according to his ability. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

But the earnings and means of the wife are matters to be considered by the judge in determining the amount of alimony. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

Contributions Only Increasing Wife's Estate for Next of Kin Not Contemplated.—The legislature did not contemplate that "reasonable subsistence," as used in former § 50-16, should include contributions by a husband which tend only to increase an estate for his estranged wife to pass on to her next of kin. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

Alimony Held Excessive.—Alimony payments of $230.00 every four weeks—slightly more than three times the cost of the wife's actual subsistence in a state mental hospital at a cost of $75 a month, even including the cost of guardianship—exceeded "reasonable subsistence." Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

§ 50-16.6. When alimony not payable. — (a) Alimony or alimony pendente lite shall not be payable when adultery is pleaded in bar of demand for alimony or alimony pendente lite, made in an action or cross action, and the issue of adultery is found against the spouse seeking alimony, but this shall not be a bar to reasonable counsel fees.

(b) Alimony, alimony pendente lite, and counsel fees may be barred by an express provision of a valid separation agreement so long as the agreement is performed. (1871-2, c. 193, s. 39; Code, s. 1292; Rev., s. 1567; 1919, c. 24; C. S., s. 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

The jurisdiction of the court is not barred by a prior separation agreement between the parties. Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967) (decided under former § 50-16).

Experience of Counsel Representing Wife Bears Directly on Attempt to Set Settlement Aside.—The eminence, experience, and character of counsel who represent the plaintiff in procuring a property settlement bear directly on her subsequent attempt to set it aside as fraudulent. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965) (decided under former § 50-16).

§ 50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.—(a) Alimony or alimony pendente lite shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property, as the court may order. In every case in which either alimony or alimony pendente lite is allowed and provision is also made for support of minor children, the order shall separately state and identify each allowance.

(b) The court may require the supporting spouse to secure the payment of alimony or alimony pendente lite so ordered by means of a bond, mortgage, or

deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the supporting spouse to execute an assignment of wages, salary, or other income due or to become due.

(c) If the court requires the transfer of real or personal property or an interest therein as a part of an order for alimony or alimony pendente lite as povided in subsection (a) or for the securing thereof, the court may also enter an order which shall transfer title, as provided in G.S. 1-227 and G.S. 1-228.

(d) The remedy of arrest and bail, as provided in article 34 of chapter 1 of the General Statutes, shall be available in actions for alimony or alimony pendente lite as in other cases.

(e) The remedies of attachment and garnishment, as provided in article 35 of chapter 1 of the General Statutes, shall be available in actions for alimony or alimony pendente lite as in other cases, and for such purposes the dependent spouse shall be deemed a creditor of the supporting spouse.

(f) The remedy of injunction, as provided in article 37 of chapter 1 of the General Statutes, shall be available in actions for alimony or alimony pendente lite as in other cases.

(g) Receivers, as provided in article 38 of chapter 1 of the General Statutes, may be appointed in actions for alimony or alimony pendente lite as in other cases.

(h) A dependent spouse for whose benefit an order for the payment of alimony or alimony pendente lite has been entered shall be a creditor within the meaning of article 3 of chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(i) A judgment for alimony or alimony pendente lite obtained in an action therefor shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past-due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

(j) The wilful disobedience of an order for the payment of alimony or alimony pendente lite shall be punishable as for contempt as provided by G.S. 5-8 and G.S. 5-9.

(k) The remedies provided by chapter 1 of the General Statutes article 28, Execution; article 29B, Execution Sales; and article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for alimony and alimony pendente lite as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in article 32 of chapter 1 of the General Statutes.

(l) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available. (1967, c. 1152, s. 2.)

Local Modification. — Person: 1967, c. 848, s. 2.

Cross Reference.—See note to § 50-16.1.

Wife Has No Present Right to Disbursement of Eminent Domain Deposit for Land Owned by Entirety. — A wife separated from her husband and seeking alimony pendente lite has no present right to disbursement of money deposited by the State Highway Commission as a credit against just compensation for land owned by the wife and her husband as tenants by entirety. North Carolina State Highway Comm'n v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967) (decided under former § 50-16).

§ 50-16.8. Procedure in actions for alimony and alimony pendente lite. — (a) The procedure in actions for alimony and actions for alimony pendente lite shall be as in other civil actions except as provided in this section.

(b) Payment of alimony may be ordered:

(1) Upon application of the dependent spouse in an action by such spouse for divorce, either absolute or from bed and board; or

(2) Upon application of the dependent spouse in a separate action instituted for the purpose of securing an order for alimony without divorce; or

(3) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, or a proceeding for alimony without divorce, instituted by the other spouse.

(c) A cross action for divorce, either absolute or from bed and board, shall be allowable in an action for alimony without divorce.

(d) Payment of alimony pendente lite may be ordered:

(1) Upon application of the dependent spouse in an action by such spouse for absolute divorce, divorce from bed and board, annulment, or for alimony without divorce; or

(2) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, annulment, or for alimony without divorce, instituted by the other spouse.

(e) No order for alimony pendente lite shall be made unless the supporting spouse shall have had five days' notice thereof; but if the supporting spouse shall have abandoned the dependent spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of the dependent spouse, no notice is necessary.

(f) When an application is made for alimony pendente lite, the parties shall be heard orally, upon affidavit, verified pleading, or other proof, and the judge shall find the facts from the evidence so presented.

(g) When a district court having jurisdiction of the matter shall have been established, application for alimony pendente lite shall be made to such district court, and may be heard without a jury by a judge of said court at any time. Until a district court having jurisdiction shall have been established, application for alimony pendente lite may be made to a resident judge of superior court, a judge regularly holding the superior courts of the district in which the action is brought, any judge holding a session of superior court, either civil or criminal, in the district including the county in which the action is brought or a special judge of superior court residing in the district. Such application in the superior court may be heard in or out of session. If a court other than the superior court has jurisdiction over such application at the time of the application, such jurisdiction shall not be affected by this subsection 50-16.8 (g).

(h) In any case where a claim is made for alimony without divorce, when there is a minor child, the pleading shall set forth the name and age of each such child; and if there be no minor child, the pleading shall so state. (1871-2, c. 193, ss. 37, 38, 39; 1883, c. 67; Code, ss. 1290, 1291, 1292; Rev., ss. 1565, 1566, 1567; 1919, c. 24; C. S., ss. 1665, 1666, 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1961, c. 80; 1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

Editor's Note.—The cases in the following note were decided under former § 50-16, which dealt with actions for alimony without divorce.

Alimony without Divorce and Alimony Pendente Lite Are Separate Remedies.—Former § 50-16 provided two remedies, one for alimony without divorce, and another for subsistence and counsel fees pending trial and final disposition of the issues involved. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966); Myers v. Myers, 270 N.C. 263, 154 S.E.2d 84 (1967).

Jury Trial Required for Permanent Alimony But Not Alimony Pendente Lite.—The issuable facts raised by the pleadings in an action for alimony without divorce must be submitted to and passed upon by a jury before a judgment granting permanent alimony may be entered. However, in respect of allowances for alimony and counsel fees pendente lite, "the allowances pendente lite form no part of the ultimate relief sought, do not affect the final rights of the parties, and the power of the judge to make them is constitutionally exercised without the intervention of the jury. Davis v. Davis, 269 N.C. 120, 152 S.E.2d 306 (1967).

Discretion of Judge as to Form of Evidence as to Alimony Pendente Lite.—The words "may be heard in or out of term, orally or upon affidavit, or either or both" informer § 50-16 gave the judge hearing the motion for alimony pendente lite the discretion to decide in what form he should

receive the evidence in his efforts to ascertain the truth. Miller v. Miller, 270 N.C. 140, 153 S.E.2d 854 (1967).

The doctrine of res judicata applies to divorce actions as well as other civil cases. Garner v. Garner, 268 N.C. 664, 151 S.E.2d 553 (1966).

Action for Alimony Based on Abandonment Barred by Verdict in Divorce Action.—The fact that the wife has the alternate remedy of independent action or a cross action to secure alimony without divorce has no effect on the principles of res judicata and does not authorize her to bring an independent action based upon abandonment when the issue of abandonment has theretofore been determined adversely to her by verdict of the jury in the husband's action for divorce on the grounds of separation. Garner v. Garner, 268 N.C. 664, 151 S.E.2d 553 (1966).

§ 50-16.9. Modification of order.—(a) An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. This section shall not apply to orders entered by consent before October 1, 1967.

(b) If a dependent spouse who is receiving alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate.

(c) When an order for alimony has been entered by a court of another jurisdiction, a court of this State may, upon gaining jurisdiction over the person of both parties in a civil action instituted for that purpose, and upon a showing of changed circumstances, enter a new order for alimony which modifies or supersedes such order for alimony to the extent that it could have been so modified in the jurisdiction where granted. (1871-2, c. 193, ss. 38, 39; 1883, c. 67; Code, ss. 1291, 1292; Rev., ss. 1566, 1567; 1919, c. 24; C. S., ss. 1666, 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1961, c. 80; 1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

Editor's Note.—The case cited in the following note was decided under former § 50-16, which dealt with actions for alimony without divorce.

Power to Modify Includes Power to Terminate Award.—The power to modify includes, in a proper case, power to terminate the award absolutely. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

Any Considerable Change in Health or Financial Condition Warrants Change of Decree.—Any considerable change in the health or financial condition of the parties will warrant an application for change or modification of an alimony decree. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

But payment of alimony may not be avoided merely because it has become burdensome, or because the husband has remarried and voluntarily assumed additional obligations. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

Increase in Wife's Needs or Decrease in Estate Warrants Increase in Alimony.—An increase in the wife's needs, or a decrease in her separate estate, may warrant an increase in alimony. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

And Decrease in Needs May Be Considered on Motion to Reduce Allowance.—A decrease in the wife's needs is a change in condition which may be properly considered in passing upon a husband's motion to reduce her allowance. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

As May Acquisition of Property or Increase in Its Value.—The fact that the wife has acquired a substantial amount of property, or that her property has increased in value, after entry of a decree for alimony or maintenance, is an important consideration in determining whether and to what extent the decree should be modified. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

§ 50-16.10. Alimony without action.—Alimony without action may be allowed by confession of judgment under article 24, chapter 1, of the General Statutes. (1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

Chapter 51.

Marriage.

ARTICLE 1.

General Provisions.

§ **51-2. Capacity to marry.**—(a) All unmarried persons of 18 years, or older, may lawfully marry, except as hereinafter forbidden. In addition, persons over 16 years of age and under 18 years of age may marry, and the register of deeds may issue a license for such marriage, only after there shall have been filed with the register of deeds a written consent to such marriage, said consent having been signed by the appropriate person as follows:

(1) By the father if the male or female child applying to marry resides with his or her father, but not with his or her mother;

(2) By the mother if the male or female child applying to marry resides with his or her mother, but not with his or her father;

(3) By either the mother or father, without preference, if the male or female child applying to marry resides with his or her mother and father;

(4) By a person, agency, or institution having legal custody, standing in loco parentis, or serving as guardian of such male or female child applying to marry.

(b) When an unmarried female who is more than 12 years old, but less than 18 years old, is pregnant or has given birth to a child and such unmarried female and the putative father of the child, either born or unborn, shall agree to marry, and consent in writing to such marriage, as set out is subsection (a), subdivisions (1), (2), (3) or (4) above, or by the director of public welfare of the county of residence of either party, is given on the part of the female, the register of deeds is authorized to issue to said parties a license to marry, and it shall be lawful for them to marry in accordance with the provisions of this chapter.

(c) When a license to marry is procured by or on behalf of any person under 18 years of age by fraud or misrepresentation, a parent or person standing in loco parentis to such person under 18 years of age shall be a proper party plaintiff in an action to annul said marriage. (R. C., c. 68, s. 14; 1871-2, c. 193; Code, s. 1809; Rev., s. 2082; C. S., s. 2494; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; 1947, c. 383, s. 2; 1961, c. 186; 1967, c. 957, s. 1.)

Editor's Note.—
The 1967 amendment rewrote the section.

ARTICLE 2.

Marriage Licenses.

§ **51-6. Solemnization without license unlawful.**—No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, until there is delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place or by his lawful deputy. There must be at least two witnesses to the marriage ceremony.

Whenever a man and woman have been lawfully married in accordance with the laws of the state in which the marriage ceremony took place, and said marriage

was performed by a justice of the peace or some other civil official duly authorized to perform such ceremony, and the parties thereafter wish to confirm their marriage vows before an ordained minister or minister authorized by his church, nothing herein shall be deemed to prohibit such confirmation ceremony; provided, however, that such confirmation ceremony shall not be deemed in law to be a marriage ceremony, such confirmation ceremony shall in no way affect the validity or invalidity of the prior marriage ceremony performed by a civil official, no license for such confirmation ceremony shall be issued by a register of deeds, and no record of such confirmation ceremony may be kept by a register of deeds. (1871-2, c. 193, s. 4; Code, s. 1813; Rev., s. 2086; C. S., s. 2498; 1957, c. 1261; 1959, c. 338; 1967, c. 957, ss. 6, 9.)

Editor's Note. — The 1967 amendment added the last sentence in the first paragraph and added the second paragraph.

§ **51-7. Penalty for solemnizing without license.**—Every minister or officer who marries any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within ten days after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars to any person who sues therefor, and he shall also be guilty of a misdemeanor. (R. C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8; Code, s. 1817; Rev., ss. 2087, 3372; C. S., s. 2499; 1953, c. 638, s. 1; 1967, c. 957, s. 5.)

Editor's Note. — The 1967 amendment substituted "ten" for "thirty" preceding "days" near the middle of the section.

§ **51-8. License issued by register of deeds.**—Every register of deeds shall, upon proper application, issue a license for the marriage of any two persons if it appears that such persons are authorized to be married in accordance with the laws of this State. In making a determination as to whether or not the parties are authorized to be married under the laws of this State, the register of deeds may require the applicants for the license to marry to present certified copies of birth certificates or birth registration cards provided for in G.S. 130-73, or such other evidence as the register of deeds deems necessary to such determination. The register of deeds may administer an oath to any person presenting evidence relating to whether or not parties applying for a marriage license are eligible to be married pursuant to the laws of this State. (1871-2, c. 193, s. 5; Code, s. 1814; 1887, c. 331; Rev., s. 2088; C. S., s. 2500; 1957, c. 506, s. 1; 1967, c. 957, s. 2.)

Editor's Note. — The 1967 amendment rewrote the section.

§ **51-8.1:** Repealed by Session Laws 1967, c. 53.

§ **51-9. Health certificates required of applicants for licenses.**—No license to marry shall be issued by the register of deeds of any county to a male or female applicant therefor except upon the following conditions: The said applicant shall present to the register of deeds a certificate executed within thirty days from the date of presentation showing that, by the usual methods of examination made by a regularly licensed physician, no evidence of any venereal disease was found. Such certificate shall be accompanied by a report from a laboratory approved by the State Board of Health for making such test showing that a serologic test for syphilis currently approved by the United States Public Health Service was made, such test to have been made within 30 days of the time application for license is made. Before any laboratory shall make such tests or any serologic test required by this section, it shall apply to the North Carolina State Board of Health

for a certificate of approval; and such application shall be in writing and shall be accompanied by such reports and information as shall be required by the North Carolina State Board of Health The North Carolina State Board of Health may, in its discretion, revoke or suspend any certificate of approval issued by it for the operation of such a laboratory; and after notice of such revocation or suspension, no such laboratory shall operate as an approved laboratory under this section.

Furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, no evidence of tuberculosis in the infectious or communicable stage was found.

And, furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, the applicant was found to be mentally competent. (1939, c. 314, s. 1; 1941, c. 218, s. 1; 1945, c. 577, s. 1; 1947, c. 929; 1955, c. 484; 1967, c. 137, s. 1; c. 957, s. 11.)

Editor's Note.— The first 1967 amendment substituted "mentally competent" for "not subject to uncontrolled epileptic attacks, an idiot, an imbecile, a mental defective, or of unsound mind" in the last paragraph. The second 1967 amendment rewrote the second sentence and substituted "serologic" for "serological" in the third sentence.

§ 51-10. Exceptions to § 51-9.

(b) Exceptions to § 51-9, in case of persons who have active tuberculosis, are permissible only under the following conditions:

(1) When the female applicant is pregnant and it is necessary to protect the legitimacy of the offspring, provided that such applicant (and the proposed marital partner if he has active tuberculosis) shows evidence of being under treatment for tuberculosis and both persons are known to the local or county health department and sign agreements to take adequate treatment until cured or protected.

(2) When there is a living child of the parties and it is necessary to protect the legitimacy of said child and either or both of the parties have active tuberculosis, provided that such party or parties with active tuberculosis show evidence of being under treatment for tuberculosis and both parties are known to the local or county health department and sign agreements to take adequate treatment until cured or protected.

(3) To validate any type of marriage which took place prior to the illness of either applicant but which marriage was later found to be invalid because of some technicality and said technicality is not a bar to marriage in North Carolina, provided the marital partner or partners who have active tuberculosis show evidence of being under treatment and sign an agreement to take adequate treatment until cured or protected, and both marital partners are known to the local or county health department. (1939, c. 314, s. 2; 1945, c. 577, s. 2; 1959, c. 351; 1967, c. 957, s. 12.)

Editor's Note. — The 1967 amendment substituted "marital" for "marriageable" in the parenthetical provision in subdivision (1) of subsection (b). As subsection (a) was not affected by the amendment, it is not set out.

§ 51-11. Who may execute certificate; form.—Such certificate, upon the basis of which license to marry is granted, shall be executed by any reputable physician licensed to practice in the State of North Carolina, whose duty it shall be to examine such applicants and to issue such certificate in conformity with the requirements of §§ 51-9 to 51-14. If applicants are unable to pay for such examination, certificate without charge may be obtained from the local health director or county physician.

Such certificate form shall be designed by the State Board of Health and shall be obtained by the register of deeds from the State Board of Health upon request. (1939, c. 314, s. 3; 1957, c. 1357, s. 10; 1967, c. 957, s. 13.)

Editor's Note. — The 1967 amendment deleted the former third paragraph providing for filing a copy of the certificate with the Department of Health.

§ 51-12. Eugenic sterilization for persons adjudged of unsound mind, etc.—If either applicant has been adjudged by a court of competent jurisdiction as being an idiot, imbecile, mental defective, or of unsound mind, unless the applicant previously adjudged of unsound mind has been adjudged of sound mind by a court of competent jurisdiction, upon the recommendation of one or more practicing physicians who specialize in psychiatry, license to marry shall be granted only after eugenic sterilization has been performed on the applicant in accordance with State laws governing eugenic sterilization. (1939, c. 314, s. 3; 1943, c. 641; 1967, c. 137, s. 2.)

Editor's Note.— The 1967 amendment deleted "subject to epileptic attacks" following "mental defective" near the beginning of the section.

§ 51-14: Repealed by Session Laws 1967, c. 957, s. 3.

§ 51-15. Obtaining license by false representation misdemeanor.— If any person shall obtain a marriage license by misrepresentation or false pretenses, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days, or both, at the discretion of the court. (1885, c. 346; Rev., s. 3371; C.S., s. 2501; 1967, c. 957, s. 4.)

Editor's Note. — The 1967 amendment struck out "for the marriage of persons under the age of eighteen years" following "license."

§ 51-16. Form of license.—License shall be in the following or some equivalent form:

To any ordained minister of any religious denomination, minister authorized by his church, or to any justice of the peace for ..... county: A. B. having applied to me for a license for the marriage of C. D. (the name of the man to be written in full) of (here state his residence), aged ..... years (race, as the case may be), the son of (here state the father and mother, if known; state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state), and E. F. (write the name of the woman in full) of (here state her residence), aged ..... years (race, as the case may be), the daughter of (here state names and residences of the parents, if known, as is required above with respect to the man). (If either of the parties is under eighteen years of age, the license shall here contain the following:) And the written consent of G. H., father (or mother, etc., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to such marriage known to me, you are hereby authorized, at any time within sixty days from the date hereof, to celebrate the proposed marriage at any place within the said county. You are required, within thirty days after you shall have celebrated such marriage, to return this license to me at my office with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under penalty of forfeiting two hundred dollars to the use of any person who shall sue for the same.

Issued this ..... day of ....., 19...

..... L. M.,
Register of Deeds of ..... County

Every register of deeds shall designate in every marriage license issued the race of the persons proposing to marry by inserting in the blank after the word "race" the words "white," "colored," or "Indian," as the case may be. The certificate

shall be filled up and signed by the minister or officer celebrating the marriage, and also be signed by two witnesses present at the marriage, who shall add to their names their place of residence, as follows:

I, N. O., an ordained or authorized minister of (here state to what religious denomination, or justice of the peace, as the case may be), united in matrimony (here name the parties), the parties licensed above, on the .... day of ....., 19.., at the house of P. R., in (here name the town, if any, the township and county), according to law.

..... N. O.

Witness present at the marriage:

S. T., of (here give residence).

(1871-2, c. 193, s. 6; Code, s. 1815; 1899, c. 541, ss. 1, 2; Rev., s. 2089; 1909, c. 704, s. 3; 1917, c. 38; C. S., s. 2502; 1953, c. 638, s. 2; 1967, c. 957, s. 7.)

Editor's Note. — The 1967 amendment substituted "two" for "one or more" preceding "witnesses" in the second sentence of the paragraph following the form.

§ 51-18. Record of licenses and returns; originals filed.—Every register of deeds shall keep a book (which shall be furnished on demand by the board of county commissioners of his county) on the first page of which shall be written or printed:

Record of marriage licenses and of returns thereto, for the county of ....., from the ..... day of ....., 19.., to the ..... day of ....., 19.., both inclusive.

In said book shall be entered alphabetically, according to the names of the proposed husbands, the substance of each marriage license and the return thereupon, as follows: The book shall be divided by lines with columns which shall be properly headed, and in the first of these, beginning on the left, shall be put the date of issue of the license; in the second, the name in full of the intended husband with his residence; in the third, his age; in the fourth, his race and color; in the fifth, the name in full of the intended wife, with her residence; in the sixth, her age; in the seventh, her race and color; in the eighth, the name and title of the minister or officer who celebrated the marriage; in the ninth, the day of the celebration; in the tenth, the place of the celebration; in the eleventh, the names of two witnesses who signed the return as present at the celebration. The original license and return thereto shall be filed and preserved. (1871-2, c. 193, s. 9; Code, s. 1818; 1899, c. 541, s. 3; Rev., s. 2091; C. S., s. 2504; 1963, c. 429; 1967, c. 957, s. 8.)

Editor's Note.— The 1967 amendment substituted "two" for "all or at least two of the" preceding "witnesses" near the end of the section.

§ 51-21. Issuance of delayed marriage certificates.

(4) When proof as required by the three methods set forth in subdivisions (1), (2), and (3) above is not available with respect to any marriage alleged to have been performed prior to January 1, 1935, the register of deeds is authorized to accept the affidavit of any one of the persons named in subdivisions (1), (2), and (3) and in addition thereto such other proof in writing as he may deem sufficient to establish the marriage and any facts relating thereto; provided, however, that if the evidence offered under this paragraph is insufficient to convince the register of deeds that the marriage ceremony took place, or any of the pertinent facts relating thereto, the applicants may bring a special proceeding before the clerk of superior court of the county in which the purported marriage ceremony took place. The said clerk of the superior court is authorized to hear the evidence and make findings as to whether or not the purported ceremony took place and as to any pertinent facts relating thereto. If the clerk finds that the marriage

did take place as alleged, he is to certify such findings to the register of deeds who is to then issue a delayed marriage certificate in accordance with the provisions of this section.

(1967, c. 957, s. 10.)

Editor's Note. — The 1967 amendment added the language following the semicolon in subdivision (4).

As the rest of the section was not affected by the amendment, it is not set out.

Chapter 52.

Powers and Liabilities of Married Persons.

§ 52-2. Capacity to contract.

I. IN GENERAL.

Cited in United States v. Yazell, 382 U.S. 341, 86 Sup. Ct. 500, 15 L. Ed. 2d 404 (1966).

§ 52-4. Earnings and damages.

Spouses May Sue Each Other.— In accord with 3rd paragraph in original. See First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

§ 52-5. Torts between husband and wife.

The legislature by statute, etc.— In accord with original. See Ayers v. Ayers, 269 N.C. 443, 152 S.E.2d 468 (1967).

A wife may maintain an action against her husband for assault and battery. Ayers v. Ayers, 269 N.C. 443, 152 S.E.2d 468 (1967).

Or for Personal Injuries from His Negligence.—In this jurisdiction a wife has the right to sue her husband and recover damages for personal injuries inflicted by his actionable negligence. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

And Wrongful Death Action, etc.— In accord with original. See First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

§ 52-5.1. Tort actions between husband and wife arising out of acts occurring outside State.—A husband and wife shall have a cause of action against each other to recover damages for personal injury, property damage or wrongful death arising out of acts occurring outside of North Carolina, and such action may be brought in this State when both were domiciled in North Carolina at the time of such acts. (1967, c. 855.)

§ 52-6. Contracts of wife with husband affecting corpus or income of estate; authority, duties and qualifications of certifying officer; certain conveyances by married women of their separate property.

I. IN GENERAL.

The law requires the certifying officer to conduct an examination and to determine the contract was duly executed, and to certify that it is not unreasonable or injurious. Tripp v. Tripp, 266 N.C. 378, 146 S.E.2d 507 (1966).

A contract may be set aside if induced by fraud. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965).

If Plaintiff Alleges Facts Supporting Inference It Was Induced by Fraudulent Misrepresentations.—The plaintiff, however, must allege facts which, if found to be true, permit the legitimate inference that the defendant induced the plaintiff by fraudulent misrepresentations to enter into the contract which but for the misrepresentations she would not have done. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965).

But Efforts to Set Aside Contract Made in Good Faith Are Not Favored. — When the contract is made in good faith, is executed according to the requirements, and performed on one side, the Supreme Court

does not look with favor on efforts to set it aside except upon valid legal grounds. Tripp v. Tripp, 266 N.C. 378, 146 S.E.2d 507 (1966).

And a valid separation agreement cannot be set aside or ignored without the consent of both parties. The intent of the parties as expressed in such an agreement is controlling. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965).

Applied in Mitchell v. Mitchell, 270 N.C. 253, 154 S.E.2d 71 (1967).

Cited in Ayers v. Ayers, 269 N.C. 443, 152 S.E.2d 468 (1967); Terrell v. Terrell, 271 N.C. 95, 155 S.E.2d 511 (1967).

II. TRANSACTIONS INCLUDED.

Separation agreements, etc.—

In accord with 2nd paragraph in original. See Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

A separation agreement in which fair and reasonable provision is made for the wife will be upheld when executed by her in the manner provided by this section. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965).

Separation agreements between husbands and wives are not contrary to the public policy of this State provided they are not unreasonable or injurious to the wife, and therefore a separation agreement executed in accordance with the laws of the state of the residence of the parties will not be held invalid in this State because of the failure to observe North Carolina statutory requirements in the execution of such an agreement, but it may be attacked in this State if the wife alleges and establishes that the agreement, having due regard to the condition and circumstances of the parties at the time it was made, was unreasonable or injurious to the wife, the matter to be determined by the court as a question of fact, with the burden of proof upon the party attacking the validity of the agreement. Davis v. Davis, 269 N.C. 120, 152 S.E.2d 306 (1967).

III. THE CERTIFICATE.

The certificate is conclusive except for fraud. Tripp v. Tripp, 266 N.C. 378, 146 S.E.2d 507 (1966).

Allegation Held Insufficient to Impeach Certificate.—The allegation, "The plaintiff was advised that a paper purporting to be a property settlement did not constitute a permanent settlement because the defendant would return, resume a marriage relations, and the money received would be tantamount to a gift," is an insufficient allegation on which to impeach the clerk's certificate required by this section. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965).

IV. EFFECT OF NONCOMPLIANCE.

A separation agreement, etc.—

Under the statute then codified as § 52-12 and the decisions of the Supreme Court, a separation agreement entered into in September, 1962, was void ab initio unless it complied with these statutory requirements: That "such contract (be) in writing, and . . . duly proven as is required for the conveyances of land; and (that) such examining or certifying officer shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious" to the wife. Davis v. Davis, 269 N.C. 120, 152 S.E.2d 306 (1967).

§ 52-8. Validation of contracts between husband and wife where wife is not privately examined.—Any contract between husband and wife coming within the provisions of G.S. 52-6 executed between January 1, 1930, and June 20, 1963, which does not comply with the requirement of a private examination of the wife and which is in all other respects regular is hereby validated and confirmed to the same extent as if the examination of the wife had been separate and apart from the husband. This section shall not affect pending litigation. (1957, c. 1178; 1959, c. 1306; 1965, c. 207; c. 878, s. 1; 1967, c. 1183, s. 1.)

Editor's Note.—

The 1967 amendment substituted "January 1, 1930" for "October 1, 1954" near the beginning of the section. Section 2½ of the amendatory act provides that it shall not apply to pending litigation. The act was ratified July 6, 1967, and became effective upon ratification.

§ 52-11. Antenuptial contracts and torts.

Editor's Note.—

For case law survey on tort law, see 43 N.C.L. Rev. 906 (1965).

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

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I, Thomas Wade Bruton, Attorney General of North Carolina, do hereby certify that the foregoing 1967 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

Thomas Wade Bruton
Attorney General of North Carolina